Judicial Commission of New South Wales

Handbook for

Judicial Officers

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The Judicial Commission of New South Wales welcomes your feedback on how we could improve the *Handbook for Judicial Officers*. Please send your comments by mail, to the address above, or email to: benchbooks@judcom.nsw.gov.au

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Foreword

Public confidence in the impartial and independent administration of justice is a core element of the justice system. However, public confidence cannot be taken for granted. It must be continuously earned and replenished.[1] Whilst newly appointed judicial officers bring their legal expertise and experience to their new positions, the judicial role requires additional skills and expertise. It is the long experience of judges and of the Judicial Commission of NSW that excellence in judicial performance is best achieved when underpinned by dedicated judicial education. The Judicial Commission's judicial education programs provide continuing practical support, assisting judges to administer justice in the courts in which they preside, which in turn assists in maintaining public confidence. In this regard, the online *Handbook for Judicial Officers* is an important resource for judicial officers.

The *Handbook* contains a collection of articles curated from a broad selection of judicial speeches and recent papers published in *The Judicial Review* and the *Judicial Officers' Bulletin*, as well as articles by legal academics. Whilst principally directed to new judicial officers, the *Handbook* provides guidance to all judicial officers on all aspects of the judicial role.

The *Handbook* has been structured into three distinct areas.

Part 1 deals with the role of the judicial officer and the essential judicial qualities of independence, accountability, impartiality and fairness, reflected in the oath taken by every judicial officer to administer justice "without fear or favour, affection or ill-will". The *Handbook* then looks to the application of the judge's oath in a discussion of cultural and linguistic diversity, ethics, efficiency, competence and case management.

Part 2 explores the judicial method and gives practical guidance to presiding over the court. Topics covered include effective judicial communication, decision-making, legal reasoning and judgment-writing. The role of judicial education concludes this part.

Part 3 examines current and future challenges that judicial officers might experience during their career. These include interactions with the legal profession, issues of bullying and sexual harassment, as well as the potential challenges for judicial officers inherent in socialising and in engaging in social media. Methods to combat bias, actual and unconscious, are discussed

1 J Spigelman, "President's foreword", Judicial Commission of NSW, *Annual Report 2009–2010*, 2010, p 6. See also A M Gleeson, "A core value" (2007) 8(3) *TJR* 329.

in practical terms. Stress caused by public criticism, vicarious trauma and unrepresented or vexatious litigants is examined and practical solutions are suggested. Non-adversarial justice and therapeutic justice, including running a trauma-informed court, are also examined as aspects of the judicial toolkit. The benefits and challenges of technology are then discussed with particular reference to artificial intelligence and online justice.

The *Handbook* will be updated as required. The Judicial Commission of NSW welcomes any comments from readers of the *Handbook* as to its scope and content.

Her Excellency the Honourable Margaret Beazley AC QC
Governor of New South Wales

Handbook for Judicial Officers International Award

We are pleased to announce that the Association for Continuing Legal Education (ACLEA) has awarded the Judicial Commission of NSW one of only 10 annual awards granted to competitors representing more than 300 organisations.

An Award of Professional Excellence was given to the Commission for the *Handbook for Judicial Officers* in the Best Publication category.

ACLEA members are professionals in the fields of continuing legal education and legal publishing. Its annual ACLEA's Best Publications Awards are highly competitive and winning projects represent the highest level of achievement for the staff and volunteers involved. No Australian organisation has ever won this award previously.

ACLEA formally presented the award at the Annual Meeting of ACLEA in Vancouver, Canada on 23 July 2022.

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Who judges the judges, and how should they be judged?*

The Honourable T F Bathurst AC†

This article was a response to quantitative research by the Australian Financial Review in 2018 asking to whom are judges accountable. His Honour argues judges have "explanatory" accountability in their obligation to provide open, public justice and reasons explaining their decisions, "content" accountability in terms of the appellate process and "probity" accountability in terms of their use of public resources.

Introduction

To bastardise Shakespeare, I don't come to bury judges, nor to praise them.[1] I do however want to consider two somewhat "thorny" questions: who judges the judges, and how should they be judged?

Towards the end of last year, the AFR published a series of articles dissecting the productivity of judges of the Federal Court of Australia based on published judgments, as measured by average words written per day, average paragraphs per day, and average days to deliver judgment. Individuals were ranked in a table and the suggestion was made that the speed of justice was unjustifiably slow. The blame was placed squarely on the judges on the basis that, and I quote: "the data suggests that [they] could finish their cases more quickly by better time management".[2]

In response to criticism of their methods from legal and judicial organisations, including the court itself, the AFR hit back. They said, and I quote again, that "many professions and industries are assessed using quantitative measurements", and that "(b)ankers, stockbrokers,

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* Paper was presented at the Opening of Law Term Address, Sydney, 30 January 2019. It has subsequently been published as an extract in the *Law Society Journal* in March 2019, by LexisNexis in the *Media & Arts Law Review* cited at (2019) 23 *MALR* 117, and in *The Judicial Review* cited at (2019) 14 *TJR* 19, updated in 2021.

† Chief Justice of NSW. His Honour expresses thanks to Ms Naomi Wootton, Research Director, for her assistance in the preparation of this address.

1 W Shakespeare, *Julius Caesar*, Act III, Scene II.

2 A Patrick, "In the Federal Court, speed of justice depends on the judge", *Australian Financial Review*, 26 October 2018, at www.afr.com/business/legal/in-the-federal-court-speed-of-justice-depends-on-the-judge-20181014-h16mk9, accessed 23 February 2021.

doctors, sportspeople, entertainers and business owners know this". Even at the AFR, they noted that every reporter's performance, "measured by the popularity of their articles over any time frame, can be seen by any editorial employee". It concluded that, as compared to members of parliament and ministers, who are subject to "intense scrutiny of their performance, often on a daily basis", the "judiciary is the least accountable" of the three arms of government.[3]

A few weeks later, the leader of the opposition in Victoria made an election promise of "greater accountability and scrutiny" of judges in that State. He promised to publish "performance information" of individual judges, including their "sentencing records" — I assume meaning what sentences they gave for particular offences — and the number of their judgments overturned on appeal. He stated that the intention of these reforms was, and I quote, to "see exactly what sort of sentences individual Judges and Magistrates are imposing for what sorts of crimes" because "there is no reason for denying the public this important, basic factual information about how Judges and Magistrates are performing their roles".[4]

The impression to be gained from the proposal was the same expressed more explicitly by the AFR: that the judiciary is at present unaccountable in a manner contrary to the public interest.

Now, because I have the greatest respect for the AFR, I am going to, by and large, resist the temptation of considering what would happen if parliamentarians, doctors, bankers and perhaps even the AFR itself were judged on the metrics suggested. But, just a few examples: suppose parliamentarians were judged by the number of speeches they made, or the number of 30-second grabs per day they did. Some might say a chatty politician is a good politician. Others might say "I just wish he or she would shut up". William Mathers Jack was the federal member for North Sydney from 1949 until he retired in 1966. He was born in Dundee, and could certainly be described as a dour Scot. In his 17 years in parliament, "Silent Billy Jack", as he was known, only made five speeches, including his maiden speech and his farewell speech. His most famous speech was made in 1962, when, after seven years' silence, he said "I cannot remain silent".[5]

Let's take the AFR itself. It is common knowledge that every subscriber turns first to "Rear Window" to read about the latest corporate gossip. But that does not mean that the AFR should simply consist of a gossip column. No one would subscribe to it if it was. This really shows the difficulty with pure quantitative analysis. For a more serious example, we could take doctors. No one would want to judge the performance of doctors by the number of patients they see on a given day. That is plainly not necessarily the measure of a good doctor. And I don't think, at least these days, a good banker would be judged by the profits he or she earns, or by the salary or bonuses which he or she receives — certainly not if Mr Hayne[6] has anything to say about it.

3 A Patrick, "With respect, the Federal Court is not above scrutiny", *Australian Financial Review*, 6 November 2018, at www.afr.com/business/legal/with-respect-the-federal-court-is-not- above-scrutiny-20181102-h17fxj, accessed 23 February 2021.

4 M Guy, "Greater accountability and scrutiny for judges", 19 November 2018, media release, at www.matthewguy.com.au/media-release/guy-greater-accountability-and-scrutiny-for-judges/, accessed 23 February 2021.

5 Australia, House of Representatives, 1962, *Budget 1962–63*, 29 August 1962, p 814.

6 The Honourable Kenneth Madison Hayne AC QC was the Commissioner of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The Royal Commission was established on 14 December 2017 and the final report was tabled in Parliament on 4 February 2019.

Now, quantitative analysis certainly has its place. But, in the case of the judiciary, and I think most professions and businesses, what accountability, or a deficit of accountability, requires is a far more nuanced approach.

Accountability

It is to this proposition that I now want to turn — to whom are judges accountable, for what, and in what ways? More to the point, just how unaccountable are they?

In terms of "who", at one level, the function of the judiciary is to resolve disputes between parties by the application of the law to facts. To that extent, they are accountable to the parties in any given case.[7]

However, as has been said on many occasions, the judiciary is not simply a publicly funded provider of dispute resolution services; it is the third branch of government.[8] It performs the governmental function of enforcing legal rights and obligations to the benefit of society as a whole.[9] It must therefore be accountable to the public at large, whose interests it exists to serve, and I might add, who fund its operations.[10]

What does accountability mean? At its heart, the concept is simple: it is the obligation to give reasons or an explanation for decisions or conduct.[11] The perception that the judiciary is unaccountable is, I think, grounded in a misconception that accountability must come with a "sacrificial" element: that is, where those reasons or explanations are inadequate, a sanction, penalty, or dismissal must follow.[12]

Except in cases of proved misbehaviour or incapacity,[13] judges are shielded from "sacrificial" accountability by security of tenure, which is the ultimate guarantee of judicial independence, and in turn, the separation of powers. I will return momentarily to the importance of this, but I first want to outline why it is misleading to point to the lack of "sacrificial" accountability, as if it is sufficient to prove the claim that judges are unaccountable. In fact, the concept is far broader than that, and can involve a variety of different processes and methods.[14]

7 H Lee and E Campbell, *The Australian judiciary,* 2nd edn, Cambridge University Press, 2013, p 250.
8 J Spigelman, "Judicial accountability and performance indicators", speech delivered at the 1701 Conference: the 300th anniversary of the Act of Settlement, 10 May 2001, Vancouver, p 7, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2001.pdf, accessed 23 February 2021.
9 J Spigelman, "Magistrates' Institute of NSW Annual dinner", speech delivered 3 June 1999, p 3, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1999.pdf, accessed 23 February 2021.
10 Lee and Campbell, above n 7, p 250.
11 G Gee et al, *The politics of judicial independence in the UK's changing constitution*, Cambridge University Press, 2015, p 17.
12 ibid p 19.
13 See, eg, *Constitution Act 1902* (NSW), s 53(2). See also Australian Constitution, s 72(ii).
14 See J Doyle, "Accountability: parliament, the executive and the judiciary" in S Kneebone (ed), *Administrative law and the rule of law: still part of the same package?*, Australian Institute of Administrative Law, 1999, pp 18–19, at www.aial.org.au/resources/proceedings-nat-con, accessed 23 February 2021.

Professor Graham Gee, in the United Kingdom context, has noted that there is also "explanatory" accountability in the sense of a duty to explain or justify, "content" accountability in the sense of responsibility to an appellate court for the substance of a decision, and "probity" accountability, which includes accounting for the expenditure of money.[15] Judges, both individually and collectively, are subject to accountability in all these forms.

First, in adherence to the "open court" principle, judges conduct almost all the business of judging in public.[16] The High Court has said that the rationale of that principle "is that court proceedings should be subjected to public and professional scrutiny".[17] Bentham, many years before, said that "(p)ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity".[18] This is because exposure to public scrutiny and criticism creates an environment in which abuses are less able to flourish undetected.[19]

In exceptional circumstances, courts do act contrary to the "open court" principle.[20] Those exceptions are limited, but exist for good reason,[21] such as where the proceedings are being brought in relation to trade secrets or in matters affecting national security.[22] In general, however, courts function in public, even where it might be painful or humiliating for the parties. These things are endured because on the whole, public trials are the "best security for the pure, impartial and efficient administration of justice".[23]

Second, judges must give reasons for their decisions. This is "one of the defining features of the judicial process",[24] and as a form of accountability, "is not to be taken lightly".[25] As former Chief Justice, the Honourable Murray Gleeson AC QC, asked: "apart from judges, how many other decision-makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions?".[26] The other two arms of government have, in recent years, subjected themselves to greater transparency with the advent of legislation to compel the production of government information.[27] However, this has long been "in the nature of things" for the courts.[28]

15 Gee et al, above n 11, pp 16–21.
16 See generally J Spigelman, "Seen to be done: the principle of open justice — part 1" (2000) 74 *ALJ* 290 and "Seen to be done: the principle of open justice — part 2" (2000) 74 *ALJ* 378.
17 *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at [44] per French CJ, Hayne, Kiefel, Bell and Keane JJ.
18 J Bowring (ed), *The works of Jeremy Bentham*, Vol 4, William Tait, 1843, p 316 quoted in *R v Jackson* (1986) 20 A Crim R 95 at 98 per Carruthers J.
19 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J.
20 *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at [44] per French CJ, Hayne, Kiefel, Bell and Keane JJ.
21 See generally Lee and Campbell, above n 7, pp 254–255.
22 See, eg, *Hogan v Hinch* (2011) 243 CLR 506 at [21] per French CJ.
23 *Scott v Scott* [1913] AC 417 at 463 per Lord Atkinson.
24 Doyle, above n 14, p 23.
25 M Gleeson, "Judicial accountability"' (1995) 2(2) *TJR* 117 at 122.
26 ibid.
27 See, eg, *Government Information (Public Access) Act 2009* (NSW).
28 B Walker, "The information that democracy needs", speech delivered at the Whitlam Oration, Sydney, 7 June 2018, p 1.

It is somewhat ironic that the claim that the judiciary is the least accountable branch of government emerged from a publication which, in the next breath, was able to report the words and paragraphs per day that individual judges were apparently producing, using publicly available information.

Reasons also promote good decision-making. As a general rule, being obliged to explain a decision in a manner open to scrutiny is more likely to result in a reasonable decision which, in turn, is more likely to be acceptable to those whom it affects.[29] It is also consistent with the requirement of (and I quote from the Honourable Murray Gleeson AC QC again):[30]

> democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.

The public nature of those reasons is also significant, as they are thereby exposed to contemporaneous analysis by not only the public and the media but also the legal profession. While these mechanisms of accountability are informal, they are nevertheless powerful. Judges must publicly accept responsibility for their decisions, and it is not inconsequential to have your work subjected to intense public criticism or indeed, collegiate disapproval from other judges or lawyers.[31]

Third, most decisions can be subject to the appeal process, whereby decisions are formally reviewed. One of the points made by the AFR was that, while judges say they are, and I quote, "subject to a rigorous appeals process", "judgment by peers is, by definition, not independent".[32] This is a view that warrants strong resistance. Judges take an oath, or make an affirmation, to do right according to law, independently, "without fear or favour, affection or ill-will".[33] This applies whether it be favour towards a party, or favour towards a fellow judge, when the correctness of their decision is subject to appeal. The suggestion that they would do otherwise is not an allegation to be made lightly, and is easily refuted by the simple fact that appellate courts do frequently overturn the decisions of inferior courts. There is one further point which can be made. What is the alternative to "judgment by peers" in these circumstances? A decision on a matter of public interest can provoke a wide variety of views. Is a judge right if, as a result of an Ipsos poll, a majority find his or her decision acceptable, or is he or she right if the law is correctly applied to the facts? I want to suggest the latter.

Fourth, judges' reasons for decision are also exposed to the legislature, which can, in response, change the law.[34] Now, more so than ever, the bulk of the work of judges in this country involves applying statutes enacted by democratically elected legislatures. Where the results of that process prove unacceptable to the public, it is open to the legislature to change or clarify the law.

29 Gleeson, above n 25, at 122.
30 ibid.
31 ibid at 124.
32 Patrick, above n 3.
33 *Oaths Act 1900* (NSW) Sch 4.
34 Doyle, above n 14, p 23.

Finally — and this goes to "probity" accountability — the judiciary must account for the public resources it uses. The Supreme Court of NSW presents an annual review on its stewardship of the resources entrusted to it. It includes information on the timeliness of each division of the court, as measured against national benchmarks, as well as listing delays in each division. It also includes statistics on the number of matters filed in the court and how many cases remained pending at the end of the calendar year.[35] The Department of Justice also furnishes an annual report which includes detailed financial statements.[36] Legislation in some States imposes similar statutory reporting obligations on their courts.[37]

The point I am trying to make from all this is simply that the suggestion that the judiciary is unaccountable, or even the least accountable arm of government, is, in my opinion, misconceived.[38] Judges have "explanatory" accountability in their obligation to provide open, public justice and reasons explaining their decisions, "content" accountability in terms of the appellate process and "probity" accountability in terms of their use of public resources.

What they don't have is "sacrificial" accountability, by reason of their security of tenure. Unlike the legislature and executive, the public isn't afforded the opportunity to boot us all out every three or four years.[39] However, as former Chief Justice of SA, the Honourable John Doyle AC QC, has argued, the content of "accountability" varies according to its context. The judiciary is accountable in a way that is compatible with the precepts of judicial independence.[40]

Independence

I now want to return to this topic of independence, because it is perhaps so generally accepted as beneficial, especially by lawyers, that at times we do not articulate why this is so, and, why it is well worth the loss of "sacrificial" accountability. Independence is not a right, privilege or perk of office enjoyed by individual judges. It is, ultimately, the right of the public to have a judiciary that is free from political interference.[41]

The right to a hearing before an independent and impartial tribunal is recognised as a fundamental human right. It is a necessary feature of the rule of law. The principles were well put by the Honourable Mr Justice R E McGarvie, in a 1991 paper, where he stated:[42]

> In democratic government … (t)he law stands above and controls them all. The law is the mortar that holds the components of government together and keeps them in their proper places.

35 The Annual Reviews of the Supreme Court of NSW dating back to 2004 can be viewed at www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_annualreviews.aspx, accessed 23 February 2021.

36 The NSW Department of Justice annual reports can be viewed at www.justice.nsw.gov.au/publications-research/annual-reports, accessed 23 February 2021.

37 See, eg, *High Court of Australia Act 1979* (Cth) s 47(1), *Federal Court of Australia Act 1976* (Cth) s 18S, *Family Law Act 1975* (Cth) s 38S, *Supreme Court of Queensland Act 1991* (Qld) s 19.

38 See also Doyle, above n 14.

39 Gee et al above n 11, pp 20–21.

40 Doyle, above n 14, p 29.

41 J Faulks, "Judicial accountability and the separation of powers: judging the judges", paper presented at the Confidence in the courts conference, 9–11 February 2007, Canberra, pp 8–9.

42 R McGarvie, "The foundations of judicial independence in a modern democracy" (1991) 1 *JJA* 3 at 4.

> The judiciary of a democracy is not responsible to any governmental power. Its responsibility, owed to the whole community, is to apply the law and to apply it impartially … It is obvious that this system can only work effectively if those against whom the law is applied have confidence in the impartiality, fairness and ability of the judges in making their decisions.

Independence is important so that the community will have confidence that the judiciary will apply the law fairly and impartially, and will hold other branches of government to account where necessary. In contemporary society, judicial independence from the executive branch is particularly critical, because so many legal disputes pit citizens against the government — in criminal matters, environmental matters, challenges to administrative decision-making and tax disputes, to name just a few.

A further corollary, and one that may seem a bit circular, is that because the judiciary has neither "the might of the sword or of the purse", as the old saying goes, the institutional strength of the courts necessary for judicial independence itself largely relies on community confidence. It is, at least in part, the community's confidence and support for the judiciary that serves to protect the courts from incursions by other arms of government. In other words, community confidence in the judiciary is a goal, and an important element in maintaining the separation of powers.

Sir Frances Forbes, the first Chief Justice of NSW, emphasised this in February 1827 by stating that (and excuse the gendered language):[43]

> A judge cannot be too careful of his reputation for independence. If he loses that he loses his necessary influence over public opinion … his charges bear no weight, the juries do not respect him and his decisions carr[y] no conviction over the mind of the public.

However, I am also wary of independence being invoked inappropriately, to protect judicial self-interest rather than the public interest, or to frustrate legitimate calls for "content", "explanatory" or "probity" accountability.[44] As the Honourable M Gleeson AC QC put it in an address in 1998, and I quote:[45]

> Sometimes there is an unfortunate tendency to overstate the principle of independence and to invoke it in circumstances where it is not, in truth, under threat. There is a tendency in some people to turn every disagreement about the terms and conditions of judicial service, or the funding of the court system, into an issue of judicial independence. This creates a degree of cynicism. Such cynicism is not always unjustified. It debases the currency of principle if we overstate our case.

It is important to recognise that disputes between the legislature, executive and judiciary are not antithetical to democratic governance. Dr Henry Kissinger made the point that the original

43 Sir Frances Forbes quoted in Spigelman, above n 9, p 1.

44 G Gee, "Enemies of the people: defending the independence of the judges. A little too late and a lot too little? Does their independence matter? Is it being adequately defended? If not, what should be done?", panel discussion in *Law and Politics from St Antony's College series*, 25 April 2017, Oxford, at https://podcasts.ox.ac.uk/enemies-people-defending-independence-judges-little-too-late-and-lot-too-little-does-their, accessed 23 February 2021.

45 M Gleeson, "Performing the role of the judge" (1998) 10 *JOB* 57 at 58.

theorists of the separation of powers saw its objective as to avoid despotism, not to achieve harmonious government.[46] Harmony between the three branches "is not the natural order of things", nor is it necessarily desirable.[47]

For example, Professor Gee, in the UK context, has argued that "judicial independence is consistent with political authorities articulating the limits of proper judicial action, and those authorities standing ready to reverse judgments that exceed or defy those limits".[48] In this country, the Honourable Dyson Heydon AC QC has similarly stated that "(o)ne aspect of the responsibility borne by politicians is to identify defects in all three arms of government and seek to remedy them".[49] It is entirely legitimate for members of Parliament to disagree with judicial decisions, and for such disagreements to be articulated in the "non-lawyerly lexicon" of political discourse.[50]

My point is this: judicial independence should not be used as a shield from legitimate public or political criticism and it overstates the case to treat every instance of criticism from the executive and legislature towards the judiciary as though it is a "sledgehammer to the rule of law".[51] It is in the public interest that the shortcomings in the judicial branch be exposed "with a view to their eradication".[52]

The upshot of this, however, is that it must be done consistently with the precept that a judge cannot be punished or disciplined for making a wrong or unpopular decision. At the point where this principle is undermined, citizens can no longer trust that when they bring an action in tort against a government official, or when they are tried for a criminal offence, or when they want to challenge an administrative decision, that the judge can decide their case without "fear or favour" from the executive.

This is the fundamental reason for the security of tenure which judges have, and why any cost to the community occasioned by the lack of "sacrificial" accountability is worth bearing, for the payoff of living under the rule of law in a democratic society underpinned by the separation of powers.

Of course, as with everything, there must be a balance. The central ideal of a democratic system and an important purpose of judicial independence is that power should never go uncontrolled, so the judiciary must be trusted impartially to hold the government to account. However, "even controlling power should not be irresponsible, that is, itself uncontrolled".[53]

46 Dr Henry Kissinger cited in Gleeson, above n 25 at 136.
47 ibid.
48 Gee, above n 44.
49 D Heydon, "Judgment in the balance", *The Australian*, 21 March 2018, at www.theaustralian.com.au/news/inquirer/judgment-in-the-balance/news-story/e33071e09066fcb28aff454a82cf0408, accessed at https://westlaw.com.au, 23 February 2021.
50 Gee, above n 44.
51 ibid.
52 Heydon, above n 49.
53 Gleeson, above n 25, at 119 quoting M Cappalletti, "Who watches the watchmen?" (1983) 31 *The American Journal of Comparative Law* 1 at 61–62.

And importantly, it is not. By no means does judicial conduct in this country go uncontrolled or unchecked, even in terms of delay in delivering judgment. The first line of control is in the role of the head of jurisdiction — the Chief Justice of the Supreme Court, Chief Judge of the District Court or the Chief Magistrate of the Local Court. It is the job of the head of jurisdiction to manage delays and counsel other judicial officers when delay becomes unreasonable. I believe that this role is one that heads of jurisdictions around the country take very seriously.

Second, the parties, who are ultimately the ones affected by delay, do have rights. In NSW, there is a publicly available policy in relation to delays in reserved judgments.[54] If a party or legal representative becomes concerned that a reserved judgment has been outstanding for an unreasonably long time, a written inquiry can be directed to the relevant head of division. Each inquiry is discussed with the judicial officer concerned and a written response is provided to the party. The identity of the inquirer is not revealed to the judicial officer concerned, to avoid any concern on the part of the party that they will be disadvantaged by the making of such an inquiry.

Third, when it comes to serious delays, there are formal mechanisms for complaints. The Judicial Commission of NSW (the Judicial Commission) investigates complaints about judicial officers, and that includes complaints of incompetence or unreasonable delay.[55] Complaints can be referred to a panel of the Conduct Division for examination, and that panel can make a finding that the matter could justify parliamentary consideration of the removal of the judicial officer.[56] The Conduct Division comprises two judicial officers, although one may be a retired judicial officer, and a community representative, nominated by Parliament. The Commission must notify the minister if a complaint is referred to the Conduct Division. On the furnishing of such a report to the Governor, judicial officers can be removed from office on an address from both Houses of Parliament to the Governor, on the ground of proved misbehaviour or incapacity.[57] Since the inception of the Commission, three judicial officers have been referred to Parliament. In each case, Parliament declined to remove them.

Finally, I should make the obvious point that judicial officers are subjected to the ordinary processes of the criminal law, should there be allegations of corruption or misconduct. In particular, judicial officers in this State are subject to scrutiny by the Independent Commission Against Corruption (ICAC).[58] The *Independent Commission Against Corruption Act 1988* (ICAC Act) applies to judicial officers, whether exercising judicial or other functions.[59] The Judicial Commission is obliged under the ICAC Act to report to ICAC any matter suspected on reasonable grounds to concern corrupt conduct.[60]

54 Supreme Court of NSW, "Delays in reserved judgments" at www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/policyreserved_judgment_delays_sc_2018.pdf, accessed 23 February 2021.

55 This process is governed by the *Judicial Officers Act 1986*, Pt 6. The Judicial Commission of NSW provides a range of detailed information on the complaints process, see, eg, "Complaints about Judicial Officers" at www.judcom.nsw.gov.au/complaints/, accessed 23 February 2021.

56 *Judicial Officers Act 1986*, s 21.

57 See *Constitution Act 1902*, s 53; *Judicial Officers Act 1986*, s 41.

58 *Independent Commission Against Corruption Act 1988* (NSW), ss 2A, 3.

59 ibid.

60 ibid ss 3, 11(2).

Ultimately, judicial power is not uncontrolled; it is checked in a manner consistent with independence.

Quantity vs quality

This brings us now to my second question, which is on what basis should judges be judged? I accept that it is entirely appropriate for the judiciary to be criticised for its performance by the media and, by extension, the public. However, both catalysts focused on quantitative measures of performance: the AFR primarily being the number of days to deliver judgment, and the Victorian proposal being how harsh or lenient particular judges are and how often they are overturned, all in terms of the numbers.

One quick point I want to make in relation to the Victorian proposal is that a lot of this data is already publicly available, as it relates to sentencing. The Sentencing Advisory Council of Victoria provides a vast array of information to the public online on sentencing outcomes for particular offences. It includes graphs as to the types of sentences imposed which can be broken down further into the lengths of custodial sentences.[61] The main difference between what was proposed and what was already available was that the statistics were to be published at the level of individual judges. Given that the apparent purpose was to improve confidence in the judiciary as an institution, it is difficult to see what additional benefit would be drawn from the individualisation of the data.[62] The Judicial Commission provides similar statistics, albeit on the payment of a fee.

But more broadly, I want to mention the place of quantitative analyses. It would be disingenuous of me to say that they are entirely irrelevant. In the Supreme Court, we regularly look at the numbers in terms of the days that judgments have been outstanding or listing delays in terms of weeks or months. But it is also disingenuous to take these analyses and use them as the only, or even the most important, criterion by which to judge the judges.

As my predecessor, the Honourable James Spigelman AC QC, said on a number of occasions, and in a neat instance of symmetry, on this occasion exactly 20 years ago, the most important criteria by which the performance of courts must be judged are qualitative — fairness of the processes used and the fairness of the outcomes.[63] Measures of analysis based only on turnover or output are inappropriate for a number of reasons.

The first is that they take no account of the length and complexity of particular matters. An example of the fallacy of measuring judicial conduct by the numbers goes as follows. Hypothetically, it might be that in any given year, Judge A was able to produce 30 judgments,

61 See Sentencing Advisory Council, "Statistics for specific offences" at www.sentencingcouncil.vic.gov.au/statistics/sacstat, accessed 23 February 2021.

62 See J Doogue, C Doherty and J Simpson, "Accountability for the administration and organisation of the judiciary", paper presented to the Asia Pacific Courts Conference, Auckland, 7–9 March 2013, p 14, at https://aija.org.au/wp-content/uploads/2017/08/DoogueDoherty.pdf, accessed 3 March 2021.

63 J Spigelman, "Opening of the Law Term dinner", speech delivered in Sydney, 1 February 1999 at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1999.pdf, accessed 23 February 2021.

and Judge B, 60 judgments, and Judge A takes on average 20 days to deliver judgments, while Judge B takes 40. As a result, it may appear that Judge B is not as efficient as Judge A. However, Judge A may have produced 20 haphazard judgments which resulted in a number of successful appeals.[64] This aspect of quality is not reflected in the days to deliver judgment, nor the number of words or paragraphs per day.

If I wanted to manipulate quantitative data, I would simply direct judges to put on Caselaw all rulings on evidence, all rulings on applications for adjournments, and other similar matters on which rulings are given in the day-to-day operations of a court. I won't do this for two reasons. First, they are not useful statistics, and secondly, it would crash the system.

In another example, both Judge A and Judge B might have produced judgments of exceptional quality, but Judge A produced less because one matter ran for half the year and involved voluminous material. Without reference to the quality of the input from the parties, the difficulty of the matters, or the quality of the output, the pure figures are meaningless. The inability of quantitative analyses to reflect the quality of the work of a judge means that there are very significant limitations in such attempts to measure judicial performance.[65]

Second, the numbers take no account of the resources available to the court. Outputs are inextricably linked to inputs, and those inputs are "a matter over which judges have no control and very little influence".[66]

Third, and most importantly, courts are not simply publicly funded providers of dispute resolution services. The argument made by the AFR was that there is no reason for the performance of judges, as compared to bankers, stockbrokers, entertainers and even journalists, not to be assessed quantitatively. And this is where they are, with respect, wrong. The tendency to treat courts as if they are private corporations and judges as if they are private employees, or even as if the courts are just another government department, is the primary fallacy in the analysis and the point at which it breaks down. Courts "no more deliver a service in the form of 'judgments' than the Parliaments deliver a 'service' in the form of statutes".[67] As the Honourable James Spigelman AC QC has said:[68]

> The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a similar character to that provided by legislatures but which has no relevant parallel in many other spheres of public expenditure.

The fallacy of characterising the function of courts in this way is highlighted by reference to criminal justice. When a criminal court determines according to the strictures of due process

64 I am grateful to Faulks, above n 41, pp 43–44, for the example.
65 ibid p 44.
66 M Gleeson, "Current issues for the Australian judiciary", speech delivered at the Supreme Court of Japan, 17 January 2000, Tokyo, p 2, at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_Japanj.htm, accessed 23 February 2021.
67 J Spigelman, "Seen to be done: the principle of open justice", Keynote Address to the 31st Australian Legal Convention, 9 October 1999, Canberra, p 9, www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1999.pdf, accessed 23 February 2021.
68 Spigelman, above n 8.

whether a person is guilty or innocent, it conducts a process that "reflects, and affects, the aspirations and values of the community".[69] The Honourable Murray Gleeson AC QC has made the point that, if our only objective was the efficient determination of guilt or innocence, then the process would look very different. In fact, when we look around the world there are many places in which criminal justice does look very different, and is far more efficient. We don't regard those places as "role models".[70] We adhere to what managerialism might deem inefficient methods of criminal justice for reasons far more important than time or money.[71]

Even in the civil context, there is any number of ways we could make trials more efficient. For example, the Supreme Court could institute a system where cases had no discovery, no oral argument, a maximum of five pages of written submissions, and where judgment would be delivered with no reasons. Our performance indicators would be through the roof. It would also fundamentally undermine essential aspects of the administration of justice and rightly erode community confidence that the judiciary was fairly and impartially making decisions according to law.

Like criminal trials, civil trials also serve important public functions. At the end of such matters there is "a public affirmation that one party is right and the other party is wrong".[72] Further, civil courts have a vital role, beyond the dispute of the parties who are waiting for judgment, in clarifying legal principles that enable disputes to be avoided in the future. It would be impossible to quantify in a neat interactive table how many disputes are settled or never get to court at all because judicial decision-making enables lawyers accurately to advise their clients what the likely outcome of litigation will be.[73] This function has an important economic value to the community. It maintains the stability necessary for the regular flow of commerce, facilitating trade and investment.[74] Again, a public function whose value is impossible to quantify.

A striking example was given in 1998 by the Honourable Murray Gleeson AC QC. He referred to the decision in the *Mabo v Queensland* (No 2),[75] saying, and I quote:[76]

> it might be possible to say that what the court was doing was engaging in the resolution of a dispute between the State of Queensland and some people of the Torres Strait Islands. However, even the most committed managerialist would acknowledge that to be a ridiculously incomplete account of the functions the High Court was performing.

The judiciary does not just provide a service to litigants or accused persons as consumers.[77] To the contrary, the enforcement of legal rights and obligations is the exercise of a governmental

69 M Gleeson, "The future state of the judicature", speech delivered at the Judicial Conference of Australia Colloquium on the courts and the future, 8 November 1998, Surfers Paradise, p 2, at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_cj9.htm, accessed 23 February 2021.
70 Spigelman, above n 67, p 10.
71 ibid.
72 J Spigelman, "The qualitative dimension of judicial administration" (1999) 4(3) *TJR* 179 at p 182.
73 Gleeson, above n 69, p 3.
74 Spigelman, above n 72, p 183.
75 (1992) 175 CLR 1 (Mabo's case)
76 Gleeson, above n 69, p 2.
77 Spigelman, above n 8, p 3.

function.[78] Analyses which judge performance based primarily on financial efficiency and timeliness to the exclusion of other factors miss the fundamental point that not everything that is important to the administration of justice can be measured. Or, as the Honourable James Spigelman AC QC put it, "not everything that counts can be counted".[79]

The obvious objection to what I have said might be to question why these important values cannot continue to be served, at the same time as the courts are working more efficiently. It is a good point, and I think that courts should strive to be efficient and for justice be delivered as quickly as possible. Indeed, it is trite to say, delay lessens confidence in the judiciary. However, it must be recognised that steps to increase efficiency, as measured by quantitative analysis of output, can, in fact, adversely impact the fundamental aspects of our system.

When courts are treated as "just another government department", to be judged primarily against how efficient they are, they are judged against criteria that do not take into account the particular functions and duties of a court.[80]

The push to efficiency also fails to recognise that "(j)ustice rushed" is as much denied as justice delayed.[81] The proper reflection necessary to formulate a judgment is a time-consuming exercise.[82] The parties and the public deserve no less than properly considered judgments. In addition, as I have said, the value of a judgment is not just to the parties for whom it resolves a dispute, but the broader public as well.[83] Pressure to come to judgment more quickly or cheaply can risk compromising its quality and thoroughness, and create wider legal uncertainty and instability.

The problem is that denigration in the "quality of justice" is not something that can neatly be measured or even observed. It can happen in "small, incremental and barely perceptible steps", until finally we reach a point at which our institutions no longer reflect the values or fulfil the functions we expect of them.[84] The measures of public confidence can be deceptive; you only really know that it was there once it's gone, and once it has gone, it is not easily rebuilt.

Having said all that, I do want to make clear that I think very lengthy delays are completely unacceptable. The Honourable Dyson Heydon AC QC has set out some cogent reasons that delay is harmful. It can affect the outcome irrespective of the real merits of the case, for example, in commercial matters where circumstances change over the course of time. It may

78 ibid.

79 J Spigelman, "Measuring court performance", speech delivered at the Annual Conference of the Australian Institute of Judicial Administration, 16 September 2006, Adelaide, p 2, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2006.pdf, accessed 23 February 2021.

80 See generally T F Bathurst, "Separation of powers: reality or desirable fiction?", speech delivered at the Judicial Conference of Australia Colloquium, 11 October 2013, Sydney, p 14, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2013.10.11(2).pdf, accessed 23 February 2021.

81 Spigelman, above n 72, p 184.

82 ibid.

83 ibid.

84 J Spigelman, "The 'new public management' and the courts", address to the Family Courts of Australia 25th Anniversary Conference, 27 July 2001, Sydney, p 11, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2001.pdf, accessed 23 February 2021.

cause matters to fade in a judge's mind, weakening the capacity for justice to be done. And it is simply "cruel to the litigants", since the stress of litigation imposes an enormous strain on any individual's health, well-being and quality of life.[85]

Sometimes there are understandable matters affecting "unreasonable" delay on the part of the court, such as ill-health, personal problems or overwork.[86] But it is the parties who are primarily affected by these matters, and as I have said, the parties have options, such as contacting the court and receiving an explanation, or where the problem is chronic, making a formal complaint to the Judicial Commission.

I must emphasise again that parties are entitled to judgments without undue delays. Courts must ensure that they are as efficient as possible, in order to maximise access to justice. There is always a risk of institutional blindness — that judges sitting on a court will not be able to see flaws in process in the same way an outsider may be able to. Constructive discussions about reform should be part of a continuous process of assessment and improvement in courts' operations. Those discussions can only be enhanced by constructive comments from outside the courts, including from the media.

What is essential, however, is that, in judging the judges, the qualitative factors inherent in the administration of justice, including the quality of judgments and fairness of process, are taken into account. Critically, the role of the courts as an independent arm of government essential to our stable and democratic society must also be appropriately considered.

A side note on sentencing

There is one further matter that I want to discuss, and it is brief. It relates to the particular aspects of the Victorian proposal that purported to provide greater and further particulars about the sentences that individual judges were handing down. As the Honourable James Spigelman AC QC has said, "(s)entencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do".[87] It is the area in which judges are most often criticised for being "out of touch" with the public interest, and this was the clear impression emanating from the Victorian proposal.

I make no comment on whether that criticism is justified. However, I do want to draw some attention to the results of what I think is a very important study done into jury sentencing in Tasmania and Victoria. This study, led by her Excellency Kate Warner AC, the former Governor of Tasmania, looked at the differences between the sentences that judges gave in actual cases, and the sentences which jurors would give. The jurors were those who had in fact convicted the offender, and who were therefore in possession of almost the same information as the judge.

85 D Heydon, "Court in the crosshairs", *The Australian,* 29 September 2018, at www.theaustralian.com.au/news/inquirer/judgment-times-courts-in-the-crosshairs/news-story/b46a19cc3941f5c004afe619772c1cbf, accessed at https://www.westlaw.com.au, 23 February 2021.

86 ibid.

87 J Spigelman, "The power of twelve: a new way to sentence for serious crime" (2005) 86 *Australian Law Reform Commission Reform Journal* 51 at http://classic.austlii.edu.au/au/journals/ALRCRefJl/2005/13.html, accessed 23 February 2021. See also J Spigelman, "A new way to sentence for serious crime" (2005) 17 *JOB* 1.

In the first stage, the jurors were asked to formulate their own sentence for the offender in the case they tried. In the second stage, jurors were asked to comment on the appropriateness of the judge's actual sentence. In both states, jurors' sentences were more likely to be lenient than the sentences of judges. In the Victorian study, 62% of the 918 jurors surveyed suggested a sentence that was more lenient than that which was actually imposed. After sentence, 87% of jurors said that judge's actual sentence was appropriate, and 55% of those said that it was "very appropriate". In relation to violent offences, the researchers had expected that jurors would be harsher than the judge. In fact, 71% of jurors were more lenient.[88]

In Japan, a "mixed" jury system known as the saiban-in was introduced in 2009. Juries are comprised of both judges and lay-persons, who jointly determine both guilt and sentence in serious criminal cases. The aim was to democratise the criminal legal process.[89] Were such a system to be introduced here, with juries participating in the sentencing process, the results of the jury study suggest that, contrary to popular belief, and according to a strict quantitative analysis, criminal defendants might in fact receive lighter or shorter sentences from the public than they currently do from the judges.

Conclusion

What to make of all this? First, courts are, and should be, subject to public scrutiny, and where appropriate, criticism. To facilitate that scrutiny and to assist in ensuring that criticism is informed, courts should operate as transparently as possible. In that way, they become accountable to the other arms of government, and to the public. But the appropriate measure of accountability cannot be determined solely by some form of quantitative analysis of a court's output. What must be considered is whether the courts are performing their role of fairly and impartially administering justice according to law, a function essential to the rule of law, and to the maintenance of a just and democratic society.

Quantitative analysis does have a role to play, providing that the inherent limitations of any particular form of such analysis is recognised, and providing that it is recognised that such an analysis provides no real measure of accountability unless it assists in answering the critical question: are courts and their judges performing their function of administering justice according to law?

I would only like to add one last thing: after all that I have said, I am still a reader of the AFR.

88 K Warner, "Are courts soft on crime? Lessons from the Victorian jury sentencing study", speech delivered at the Victorian Law Foundation Oration, 21 August 2018, Melbourne, at www.victorialawfoundation.org.au/sites/default/files/attachments/victoria_law_foundation_oration_21_august_2018_0.pdf, accessed 23 February 2021.

89 See generally S Miyazawa, "Citizen participation in criminal trials in Japan" (2014) 42(2) *International Journal of Law, Crime and Justice* 71 at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2215&context=faculty_scholarship, accessed 23 February 2021.

"Something more, something less": the contemporary meaning of open justice*

The Honourable T F Bathurst AC†

What is the relevance of the principle of "open justice" in a society which has a strong, established system of courts resolving disputes by applying the law? "Open justice" means something more in that it goes beyond the mere "transparency" or "accountability" of the courts, and extends to the confidence of the public that their rights and interests will be protected by courts according to law. However, this does not require freedom of access to the courts and freedom to publish everything that occurs in them in every conceivable circumstance.

I would like to acknowledge the traditional custodians of the land, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. For many years, our legal system failed to recognise their unique culture and connection with this land, leading to a cycle of oppression and disadvantage from which escape was difficult. Change was slow in coming, and even now, is ongoing. As a result, many Indigenous Australians today will, unfortunately, still face harsh treatment at the hands of our system of justice.

The reality of the treatment of Indigenous people can be confronting. But it is not something which will improve by being ignored. While it may be uncomfortable to acknowledge, the visible presence of injustice should challenge us to do better. Indeed, it is only when we are content for injustice to remain invisible that the truly pernicious problems emerge. The invisibility of the treatment of Indigenous Australians over many years led, not only to a lack of general public knowledge of the manner in which they had been mistreated, but to a perpetuation of such mistreatment.

I do not think anyone needs to be reminded of this history. But, I think it does have something to say about the significance of "open justice" for our legal system at large and its importance.

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† Former Chief Justice of NSW. The author wishes to thank his Research Director, Damian Morris, for his assistance in the preparation of this article.

Just as a lack of transparency contributed to a significant extent to a lack of knowledge about the mistreatment of Indigenous Australians, in more recent times, publication of their ongoing mistreatment in the media has led to a better appreciation of the injustice perpetrated on them and places a real pressure on those who have the power to do so to remedy those injustices. This demonstrates that "open justice" is more than a rather technocratic notion about "transparency" and "accountability" in how the courts administer justice, concerned only with how material filed or produced in court should be made available to the media.[1] To be sure, "transparency" and "accountability" are important, but I do not think they lie at the heart of the concept.

Rather, these values depend upon the unstated assumption that those who will be responsible for the administration of justice will be courts. This may be true now. In fact, it is almost trite.[2] But it is important to retain a sense of perspective. It was not always the case in this country, and it is still not the case in many places around the world. As we see in our own history, there is a great temptation for governments to keep the administration of justice "hidden", not simply by closing the courts to the public, but by finding a way to take a dispute outside the purview of courts altogether. This "justice" may be of a more summary or arbitrary form than that dispensed by a court applying rules of law. Inevitably, in the absence of any fixed rules or outside scrutiny, it becomes perverted.

It was these circumstances which enabled the relationship between Indigenous Australians and European settlers to be governed by prejudice rather than law. No doubt encouraged by the inflammatory rhetoric of the press at the time, as well as the acquiescence of the government, the settlers were uninhibited from dispensing their own vigilante justice with senseless violence on a scale the size of which may never be known. There was a failure of "transparency" and "accountability", not just because this was done out of the public view, but because it was done without any semblance of due process or commitment to the rule of law and in circumstances where the perpetrators escaped with impunity.[3]

We are fortunate that we live in a society where we, on the whole, no longer tolerate this kind of behaviour. Where it has been found to occur, we expect that it will be punished through the courts. The alternative is not something which we often contemplate. But that does not mean that it is something which it is safe to forget. To avoid the possibility of temptation, we insist that justice will be administered by courts who are obliged to apply the law and that they will do so in public. It is only through the union of both of these ideas that we can ensure that the public can be confident that their society recognises and respects the rights of individuals and groups who are subject to its laws.

It seems to me that this is the true consideration which motivates reliance on the principle of "open justice", and the real reason why it has been described, on a number of occasions,

1 See, eg, Supreme Court of NSW, Practice Note SC Gen 2: Access to Court Files, 4 October 2019.

2 At the federal level, this is made clear by Commonwealth Constitution s 71; see also *NSW v Commonwealth* (1915) 20 CLR 54. At the state level, the position is less clear, but due to the number of matters arising in the federal jurisdiction, the same principle will often apply: see *A-G (NSW) v Gatsby* (2018) 99 NSWLR 1.

3 The "Myall Creek Massacre" was one of the few cases where there was condign punishment: see *R v Kilmeister (No 1)* [1838] NSWSupC 105; *R v Kilmeister (No 2)* [1838] NSWSupC 110.

as a "constitutional principle"[4] which goes to the heart of our conception of judicial power.[5] Now, I do not mean to say that this motivation or rationale has the status of a legal principle which ought to be directly applied in lieu of the more traditional definition of "open justice". I merely aim to point out that, when we look beyond our immediate circumstances, the idea has a wider significance than we normally appreciate. In short, I would say that it reminds us that the antithesis of "open justice" is not, as some might assume, a courtroom which closes its doors to the public in a particular case. Rather, it is a state, or any other entity with a significant degree of power or influence, which attempts to resolve disputes in secret outside the courts charged with applying the law.

I have placed some emphasis on this idea, not as a sign of eccentricity, but to help keep things in perspective. Fortunately, in Australia, we are not presently in danger of falling into a situation where the state can dispense an arbitrary and summary form of justice to its citizens in secret outside the reach of the law.[6] We have a robust and independent system of courts which has proven capable of resisting attempts by the government to place its exercises of power beyond review.[7] In this task, the courts are aided, in no small part, by the media and whistleblowers who are prepared to call out overreach, abuse of power, and maladministration when it occurs, whether by the government or others, including the courts, and bring it to the attention of the public. Together, we ensure that they can have confidence that their rights and interests will be protected from arbitrary interference.

Against this background, I think that the principle of "open justice" risks becoming something of a cliché if, as sometimes occurs, it is treated as simply guaranteeing an unbridled right of access to everything that occurs or is filed in a court.[8] A right of this kind is far removed from the motivation or rationale I have identified as underlying the principle, and has never been accepted as an accurate statement of the law in this country. Many of the appeals to "open justice" which are made before the courts often fall into the trap of assuming that the right does extend so far, and there is a real possibility that this could dilute or devalue the force of the principle. Its value is cheapened if it simply becomes seen as a means for the media to attract more viewers, or for commercial parties to gain access to documents of their competitors filed in court.

What, then, is the relevance of the principle of "open justice" in a society which has a strong, established system of courts resolving disputes by applying the law? We find the answer to this question in the language of the *Court Suppression and Non-publication Orders Act 2010* (NSW). Section 6 requires a court considering making an order under the Act to take "open justice" into account as "a primary objective" of the administration of justice. Section 8 requires

4 *R (on the application of Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41 at [40], citing *Scott v Scott* [1913] AC 417.

5 See *Russell v Russell*(1976) 134 CLR 495 at 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506 at [20]–[27], [46] (French CJ), [85]–[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

6 Cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

7 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *SA v Totani* (2010) 242 CLR 1; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

8 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [27]–[32] (Spigelman CJ).

an order to be "necessary" for the achievement of one or more overlapping purposes, all of which are related, broadly speaking, to the integrity of the justice system. In other words, the Act contemplates that there may be "objectives" of the administration of justice other than the principle of "open justice" and that achieving some of these objectives may mean that it is "necessary" to make a suppression or non-publication order.[9]

I think that this assumption is fundamental to the operation of the Act, and relates to the motivation or rationale for the principle of "open justice" which I outlined earlier. It exists to maintain the confidence of the public that their rights and interests under the law will be protected by the courts. This does not require freedom of access to the courts and freedom to publish everything that occurs in them in every conceivable circumstance. Indeed, there will be occasions where freedom of access and publication will directly undermine the confidence of the public, such as, most commonly, when it might prejudice the right of an accused to a fair trial,[10] might expose child victims to unnecessary distress,[11] or might disclose confidential commercial information.[12] To the extent freedom of access and publication will infringe such a right in a way which cannot be avoided by other means, it will become "necessary" to make an order restricting that freedom in order to preserve that right.

This much should be familiar and uncontroversial. And yet, it still seems to be treated with, at best, grudging acceptance by media organisations, particularly when the material subject to a restriction on publication has a high profile among the public.[13] However, I do not find this reluctant attitude, whether or not truly motivated by a pious concern about "open justice", to be justified. Courts do accept the intrinsic value of "open justice" as a broad principle underlying the administration of justice in our society in the manner I have outlined above. But this comes with a corollary. If "open justice" is important for its systemic value, equally applicable whenever judicial power is exercised, it is difficult to say that it should be given more weight in a particular case because its subject matter already has a high public profile.

I think that this is well-illustrated by the case involving Cardinal George Pell. For some years now, but especially since the McClelland Royal Commission,[14] allegations of child sexual abuse have attracted intense interest from the public. There could be no doubt that the fact that such allegations had been made against Cardinal Pell, who already had a high public profile as the most senior member of the Catholic Church within Australia, would attract almost universal interest and generate widespread discussion. This was certainly the opinion of most media organisations around the country, if the deluge of coverage with which the public was inundated

9 *Rinehart v Welker* (2011) 93 NSWLR 311 at [27]–[31] (Bathurst CJ and McColl JA); *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [45]–[51] (Basten JA).

10 Cf *R v Glennon* (1992) 173 CLR 592. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [124] (Hayne and Bell JJ).

11 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

12 See, eg, *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 235 (Bowen CJ).

13 See, eg, A Meade, "Up to 100 journalists accused of breaking Pell suppression order face possible jail terms", *The Guardian*, 26 February 2019 at www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breaking-pell-trial-suppression-order-face-possible-jail-terms, accessed 18 February 2021.

14 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, at www.childabuseroyalcommission.gov.au/final-report, accessed 18 February 2021.

after the non-publication orders were finally lifted is anything to judge by. But does this degree of interest, on an issue which admittedly might be described as one of "public importance", mean that the principle of "open justice" has any greater weight in making a non-publication order?

I do not think that it does. The importance of "open justice" does not vary with the desire of the public to know about the details of a particular case, at least for the purposes of the law. If it did, then the principle would pose little obstacle to the closure of the vast majority of trials and hearings in all courts around the country, which is an outcome clearly contrary to its motivation and rationale. It is for this reason that I think that statements to the effect that derogations from the principle of "open justice" should be "exceptional" or "unlikely" are apt to mislead.[15] They tend to overemphasise the importance of the principle in the circumstances of a particular case, at the expense of any countervailing right or interest said to justify a departure from the principle. It is the latter which, under both the common law and statute, ought to be the proper focus of the inquiry.[16]

Again, I think that the case of Cardinal Pell provides a good example of the correct approach to be applied by a court considering whether to make a non-publication order. In his initial judgment,[17] Chief Judge Kidd focused, with respect, entirely properly, only on the question of whether any restraint on publication was "necessary" to prevent a "real and substantial risk to the proper administration of justice" in the form of an infringement of the right of the accused to a fair trial,[18] where two trials were being held substantially "back-to-back".[19] Answering this question involved no need for an encomium on "open justice", or to balance this principle against the right of the accused.[20] The balance had already been struck by the legislature in determining that any restraint on publication must be "necessary".[21] An express consideration of the relative importance of the principle and the right in the circumstances of the particular case would have been irrelevant.[22]

The real issue which arose for determination at this initial stage was not even whether an order should be made, but what scope of order was "necessary".[23] A group of media interests contended that a non-publication order should be limited to Victoria, while the Crown and defence counsel supported an order applying throughout the Commonwealth.[24] The limitation on the scope of the order was supported by a submission that an order applying only in Victoria

15 Cf *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at [21], [59] (Spigelman CJ).
16 See *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, at 476–477 (McHugh JA); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).
17 *DPP (Vic) v Pell* [2018] VCC 905.
18 ibid at [36].
19 *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at [63] (Spigelman CJ); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384 at [35]–[36] (Bathurst CJ, Beazley P, Hoeben CJ at CL).
20 *DPP (Vic) v Pell* [2018] VCC 905 at [38]–[44].
21 *Open Courts Act 2013* (Vic) s 18(1); cf *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1). See also *Rinehart v Welker* (2011) 93 NSWLR 311 at [31] (Bathurst CJ and McColl JA), quoting *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).
22 *DPP (Vic) v Pell* [2018] VCC 905 at [52].
23 ibid at [55].
24 ibid at [56]–[57].

would be sufficient to quarantine the "vast majority" of potential jurors for the second trial from any information arising out of the first trial, and that any additional risk to the proper administration of justice arising from interstate contamination was not so significant that it could not be managed by appropriate directions.[25]

This submission was ultimately unsuccessful, but what is important to note is that it was both put and rejected, not on the basis of any abstract appeal to "open justice", but upon a close consideration of the relevant facts about the Australian media environment and how this might affect the right of the accused to a fair trial.[26] Indeed, the intense interest from the public in the case was a factor which was relevant only insofar as it tended against not making a non-publication order, rather than in favour of "open justice", by reason of the additional notoriety, and thus, likelihood of contamination, which this lent to the proceedings.[27] Thus, looking at the judgment as a whole, I do not think that there could be a clearer affirmation that, while the principle of "open justice" is the background against which it must be "necessary" for a restraint on publication to be imposed, it is not the place of the court to assess its importance in the circumstances of the particular case.

I find it difficult to disagree with either the approach adopted by the Chief Judge or, subject to one caveat, with the result itself. The circumstances were, as he put it, a "perfect storm",[28] involving a defendant who was a prominent public figure accused of a very topical offence, and hence, a very great risk to the proper administration of justice if one trial was allowed to contaminate the other. I was a member of a Court of Criminal Appeal which affirmed the making of non-publication orders in similar, but not identical, circumstances involving "back-to-back" trials in *Nationwide News Pty Ltd v Qaumi*,[29] and, I would submit, the results in these two cases are consistent. Ultimately, there is nothing in the principle of "open justice" which requires the public to have real-time updates on the progress of a trial, or knowledge of its outcome, where doing so would result in unavoidable prejudice to a trial scheduled to commence shortly after.[30]

The caveat to which I have referred is the possible futility of the non-publication orders made by Kidd CJ.[31] I was able to read all about Cardinal Pell's trial simply by going to *The Washington Post* website.[32] *The Washington Post* did not consider itself bound by the order, and could have had a good constitutional defence if its publication of the trial had been challenged in the United States.[33] Courts will increasingly have to grapple with this problem. All I will say

25 ibid at [58].
26 ibid at [58]–[59].
27 ibid at [59](a).
28 ibid at [47].
29 (2016) 93 NSWLR 384.
30 Cf *Chaarani v DPP (Cth)* [2018] VSCA 299 at [41], [46] (Maxwell P, Beach and Hargrave JJA).
31 See *DPP (Vic) v Pell* [2018] VCC 2125 at [35]ff.
32 See, eg, C Harlan, "Australian court convicts once-powerful Vatican official on sex-abuse-related charges", *The Washington Post*, 13 December 2018 at www.washingtonpost.com/world/australian-court-convicts-once-powerful-vatican-official-on-sex-abuse-related-charges/2018/12/12/da0d909c-fe20-11e8-a17e-162b712e8fc2_story.html, accessed 18 February 2021.
33 *United States Constitution* amend I. See *Sheppard v Maxwell*, 384 US 333 (1966); *Nebraska Press Association v Stuart*, 427 US 539 (1976).

at the moment is that one thing that courts should not do is to overreact and seek even more stringent restrictions on transparency such as the complete closure of a court where there is international interest.

The central purpose of my remarks has been to discuss the possibility that "open justice" perhaps means both something more and something less than we commonly appreciate. The concept means something more in that it goes beyond the mere "transparency" or "accountability" of the courts, and extends to the confidence of the public that their rights and interests will be protected by courts according to law. It means something less in that it does not itself provide the operative criterion for determining whether a restriction on publication is justified. To be sure, it is part of the background against which we apply the touchstone of "necessity", but we should be careful to ensure that we do not confuse it with a more general voyeuristic desire on the part of the public when other, more pressing rights might be at stake. As a systemic value of our legal system, "open justice" is something more certain, more fixed, and more important than that.

Judicial independence — from what and to what end?*

The Honourable S Kiefel AC†

The Chief Justice examines two questions: what are the courts and judges intended to be independent from? And what is judicial independence for? The first question looks at (1) The Australian constitutional context and separation of powers by examining the Communist Party Case;‡ (2) temporary constraints on judicial independence in times of national emergency; (3) comparisons with other constitutional systems such as China and India which demonstrate how understandings of judicial independence vary not only between jurisdictions, but over time in the same jurisdiction; (4) freedom from other influences, including the media, colleagues, ideology and prejudice, for example, judicial bias in the Weimar Republic. The answer to what purpose judicial independence serves is that it enables the public to have confidence in the courts as institutions if the courts are free from influence and pressure.

I am honoured to give this Oration, the name of which recognises the significant contribution made by the Honourable Austin Asche to the law, to the courts in which he served and to this Territory.

The theme of my paper is judicial independence. It is a matter about which, as Chief Justice of the Northern Territory, Austin Asche felt strongly, as evidenced by the stand he took when legislation was enacted by the Northern Territory Parliament in the wake of the Royal Commission into the *Chamberlain case*.[1] The legislation provided that where the prerogative of mercy had been extended to a person, the Supreme Court, after reference to it by the Attorney-General, could consider whether the finding of guilt of that person should be quashed and a verdict of acquittal entered. The powers given to the Supreme Court were greater than those ordinarily given to a Court of Criminal Appeal and allowed the court to inform itself

* Austin Asche Oration, Hilton Hotel, Darwin, 27 March 2021.

† Chief Justice of Australia.

‡ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

1 *Re Chamberlain* (1988) 38 NTLR 82.

as it saw fit and to make its own investigations. The court did quash the convictions of the Chamberlains, but not without strong statements by Chief Justice Asche about the position in which the legislation placed the court. His Honour said:[2]

> I see great difficulties in a procedure which allows the Court to become some sort of investigative tribunal gathering its own material. The proper role for a court in this country as in any country governed by the common law system is to keep above the conflict and rule only upon such material as may properly be produced by parties properly interested in a particular dispute. I acknowledge that this section could apply only in exceptional cases; but exceptional cases may become precedents for extension of powers to less exceptional cases and I would not wish this process to be later justified because the court had previously accepted it without protest; and I make that protest now.

An overview

"Judicial independence" is a subtle concept. In the Australian constitutional context, it is often spoken of as a systemic quality. For example it has been said that it is "[f]undamental to the common law system of adversarial trial" that it be "conducted by an independent and impartial tribunal", and that this principle is "fundamental to the Australian judicial system".[3] By contrast, in the context of other, rights-based constitutions and conventions, greater stress is placed on the importance of judicial independence to individuals appearing before the courts. As John Adams — who would go on to be the second President of the United States — put it in Art XXIX of the Massachusetts Constitution of 1780, "[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit".[4] While differing in emphasis, these two approaches are clearly related. On either approach, the importance of judicial independence to our societies is not to be underestimated.

In Australia, judicial independence is understood to require freedom from any external influence, other than the law itself. It is understood to reflect the separation of the powers of government and the freedom of the courts from interference by the other, arguably, more powerful, arms of government. Yet history shows that our courts have not always been vigilant in the maintenance of that independence, at least in times of national emergency.

Countries where constitutions do not reflect a strict separation of legislative, executive or judicial power are unlikely to ascribe the same meaning to judicial independence. We should not too readily assume that courts of other systems share our understanding of judicial independence. Much may depend upon the constitutional role which is assigned to those courts or the socio-political conditions in which they operate and which provide the context for their constitutional theory and interpretation.

2 ibid at 85.
3 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [3].
4 Constitution of the Commonwealth of Massachusetts, 1780, Art XXIX, as referred to in *Pennekamp v Florida* (1946) 328 US 331 at 355.

Judicial independence may also be understood as freedom from pressures which are not external. The requirement of impartiality necessarily refers to one's own cast of mind which is brought to bear in the process of decision-making. This may require distancing one's self from one's own prejudices and ideology.

But history teaches us that there have been times when judicial independence has come to mean independence from the law. The conduct of some courts in the time of the Weimar Republic serves as an example. In such a circumstance, fidelity to the rule of law — one of the ends which judicial independence is intended to serve — is abandoned.

Comparisons and reflections of these kinds might raise two questions: what are the courts and judges intended to be independent from? And what is judicial independence for? Judicial independence is a large topic. But these enquiries may help illuminate what the words mean to us.

Independence from what?

The Australian constitutional context

Our conception of judicial independence is shaped largely by the framework of the Commonwealth Constitution and the distinct role that it gives to federal courts. Separate provision is made for each of the legislature, the executive and the judiciary, the latter being contained in Ch III which vests the judicial power of the Commonwealth in courts alone. The guaranteed jurisdiction of the High Court to review actions of the executive, given by s 75(v) of the Constitution, emphasises the separation of powers and that court's special role.

Our contemporary conception of judicial independence is shaped by an acceptance that what have been referred to as the "three great powers"[5] should as far as possible be separated into three departments, relatively independent of each other — though there is some doubt as to whether the framers of the Australian constitution held such views.[6]

One reason for the need to mark the judiciary as independent was explained by Alexander Hamilton. The executive, he said: [7]

> not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either ... It may truly be said to have neither force nor will, but merely judgment.

The consequence, he said is that "the judiciary is beyond comparison the weakest of the three departments of power ... and all possible care is requisite to enable it to defend itself against their attacks".

5 *Evans v Gore* (1920) 253 US 245 at 249.

6 *State of South Australia v Totani* (2010) 242 CLR 1 at 43–44; N Aroney et al, *The Constitution of the Commonwealth of Australia: history, principle and interpretation*, CUP, 2015 at pp 555–557. But see W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, Sweet and Maxwell Ltd, 1910 at pp 96–97.

7 A Hamilton, "The Federalist no 78: the judges as guardians of the Constitution", in A Hamilton et al, *The Federalist*, Belknap Press, 2009, p 508 at pp 509–510. The passage was quoted in *Evans v Gore* (1920) 253 US 245 at 249–250.

Since Federation there have been a number of forays by the Commonwealth legislature into the judicial sphere. One of the best-known judicial corrections is of course the *Communist Party Case*[8] where there was an attempt to connect the statute outlawing the Communist Party with the defence power and the incidental power by use of the recitals to the statute. As my former colleague, Susan Crennan observes:[9]

> [t]he constitutional significance of the case now is that the Commonwealth cannot "recite itself into power" thereby circumventing a critical judicial function under the separation of powers, and that Chapter III, particularly s 75(v), has an important role in the plan of the Constitution when questions of personal liberty are at stake.

Influence and pressure from the executive can take many forms. The independence of the judiciary would be set at nought if judges did not have security of tenure and of remuneration. Former Chief Justice Gleeson once pointed out[10] that arrangements concerning the appointment and tenure of judges, terms and conditions of service and procedures for dealing with complaints against judicial officers are all relevant to independence. And as his Honour observed, there are differences in constitutional provisions with respect to judges and legislative choices which may be made concerning arrangements of the kind mentioned.

A traditional view is that State constitutions do not provide for a strict separation of powers.[11] This may lead to assumptions about the extent to which the State judiciary may be protected. Justice John Basten of the Supreme Court of NSW has cautioned against overstating that traditional view.[12] He points to the fact that in many State constitutions the legislature, the executive and the judiciary are dealt with separately. We know that State courts exercise a supervisory jurisdiction over State administration. That jurisdiction reflects a basic separation of powers doctrine. Moreover the decision in *Kirk's Case*[13] ensures that State Supreme Courts retain that jurisdiction.

It is generally accepted that some State statutes which are concerned with security of tenure and protection of judicial remuneration reflect a separation of powers,[14] though of a looser and more vulnerable kind than that mandated by Ch III at the Commonwealth level. It may be, however,

8 Above, n ‡.

9 S Crennan, "Sir Owen Dixon: The Communist Party Case, then and now", in S Crennan and W Gummow, *Jesting Pilate and Other Papers and Addresses by the Rt Hon Sir Owen Dixon*, 3rd ed, Federation Press, 2019, p 17 at p 24.

10 *North Australian Aboriginal Legal Aid Service Inc v Bradby* (2004) 218 CLR 146 at [3].

11 See, eg, Harrison Moore, ibid n 6, at p 96:

> It may be assumed ... that the separation of powers is in the States no more than a rule of expediency subject to political sanctions.

12 J Basten, "Lecture on Judicial Review", lecture delivered at the University of New South Wales, 28 March 2012 at www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_judicialspeeches/sco2_speeches_pastjudges.aspx#basten, accessed 13 June 2021.

13 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

14 See, for example: *Constitution Act 2001* (Qld) s 62 and *Supreme Court Act 1970* (NSW) s 29. Though the NSW provision does not expressly prevent judicial salaries from being reduced while a judge holds office, an equivalent provision in Queensland (now superseded) was interpreted by the High Court as having that effect in *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304.

that the jurisprudence which has developed since *Kable's Case*[15] has the consequence that the levels to which the independence of courts in our Federation are secured may not be quite as different as previously understood.

A temporary disturbance

It must be accepted that English and Australian courts have not always been immune to external influence. They have felt and responded to a need to allow wider legislative and regulation-making powers in times of war. This may be understandable but it does suggest that judicial independence is not maintained as an ideal at all times.

Robert Menzies was a law student in 1918 when he observed in an article that constitutionalists were reconciled to a "temporary disturbance of the traditional constitutional balance".[16] Justice Higgins of the High Court frankly acknowledged in 1915, that, faced with the "grave peril of national war", it has "often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority".[17]

Very few judges took a different approach. The most famous dissent is that of Lord Atkin in *Liversidge v Anderson*[18] in 1942. There a majority of the House of Lords held that a government Minister's opinion about a person's loyalty or hostile associations could not be challenged. Lord Atkin, rather impolitely, used passages from *Alice in Wonderland*[19] to ridicule the reasons of the majority. His dissent has been described by Lord Bingham as "eloquent and courageous" asserting "nobler, more enduring values" such as the rule of law.[20] But in the case which ultimately vindicated Lord Atkin, Lord Diplock was kinder to the *Liversidge* majority. He said they may have acted expediently but that, given the times, their error was understandable.[21]

Comparisons with other constitutional systems

Cases such as those just mentioned may teach us that assumptions should not be made about our own judges' adherence to orthodoxy in difficult times. There are other, wider assumptions which should not be made. One is that we should not assume what judicial independence means in other systems. The enquiry "judicial independence from what?" may yield a very different result in a different constitutional setting.

A few years ago I was part of a delegation which visited courts in Beijing and Shanghai, at the invitation of the President of the Supreme People's Court. I was rather surprised to hear some Chinese judges and officials speaking of "judicial independence" as a goal which was being actively pursued.

15 *Kable v DPP (NSW)* (1996) 189 CLR 51.
16 R Menzies, "War powers in the Constitution of the Commonwealth of Australia" (1918) 18 *Columbia Law Review* 1 at 9–10.
17 *Lloyd v Wallach* (1915) 20 CLR 299 at 310.
18 [1942] AC 206.
19 L Carroll, *Alice's Adventures in Wonderland*, Macmillan, 1865.
20 T Bingham "The case of Liversidge v Anderson: the rule of law amid the clash of arms" (2004) 43(1) *The International Lawyer* 33 at 38.
21 *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1011.

Article 131[22] of the Chinese Constitution provides that "[t]he people's courts shall ... independently exercise adjudicatory power, and shall not be subject to interference from any administrative organ, social organisation or individual". It has been observed by one commentator,[23] that there are some telling omissions from this provision. It is silent on whether the organs of the Communist Party, the national and local legislature, and the procuracy can interfere with adjudication. The same commentator suggests that it is implied that other state organs might do so.

I was therefore left to wonder what the officials and judges had in mind when they spoke of judicial independence. The response elicited from further enquiries was that judges should be independent from corruption. We tend to exclude corruption as a possible operative influence, but of course English history shows that it was not that long ago, relatively speaking, when it was an issue for the judiciary. Francis Bacon's fall from the office of Lord Chancellor is a case in point. Corruption remains a real problem in South East Asia. Some wealthier countries in the region address it by remunerating superior court judges with high salaries. But I understand the problem is greater in lower courts and in regional areas.

In some other constitutional systems the role of the courts assigned by the constitution itself, as interpreted by the courts, may give the term "judicial independence" another dimension. The first few decades of the life of the Supreme Court of India demonstrate how a court's understanding of its own role can affect judicial independence in practice.

India as we know it today — an independent republic — was established on 26 January 1950. Two days later, the Supreme Court of India held its first sittings. From the beginning, the court displayed a certain independence, exercising its powers to review legislation for validity in the first decision it handed down.[24] Though it exercised those powers confidently where necessary, in one commentator's view at least, while Prime Minister Nehru led the country, the judiciary maintained a certain respect for the representative credentials of the legislature, and eschewed radical constitutional innovation.[25]

The same commentator suggests that after Nehru's death in 1964, the court began to go beyond the text of the constitution, raising questions at the level of principle — salient amongst them being the question of what purposes underlie the written constitution, and how those purposes might affect the scope of the legislature's powers of constitutional amendment.[26] In the years leading up to 1975, several of the court's decisions are said to have impeded policy initiatives pursued by Prime Minister Indira Gandhi and her government.[27] The Emergency of 1975–1977 was to prove a challenge for the Supreme Court and a turning point in its history.

22 Formerly Art 126.
23 L Feng, "The future of judicial independence in China", in H Lee and M Pittard (eds), *Asia-Pacific judiciaries: independence, impartiality and integrity*, CUP, 2018 p 81 at p 87, DOI: https://doi.org/10.1017/9781316480946.007.
24 A Thiruvengadam, *The Constitution of India: a contextual analysis*, Bloomsbury Publishing, 2017 at pp 120–121.
25 ibid at p 122.
26 ibid at pp 123–124.
27 ibid at pp 124–125.

Following the issue of a Proclamation of Emergency, civil society activists and political opponents of the government were detained under the *Maintenance of Internal Security Act 1971*. The validity of that Act was challenged, as was the Proclamation of Emergency and a Presidential Order which purported to suspend the right to seek relief in the courts for breaches of constitutional rights and protections. On appeal, a majority of the Supreme Court (there was only one dissentient) dismissed the challenges. It has been said[28] that the court's deferential approach during the Emergency was seen as a failure to protect the rule of law and damaged its standing with the public.

Alert to these perceived failures, the court introduced measures designed to encourage access to judicial remedies, particularly by socially and economically disadvantaged segments of Indian society.[29] These measures included the relaxation of standing rules and a proactive approach to the exercise of the court's jurisdiction, whereby judges responded to grievances brought to their attention by letter, newspaper reports, or by third-parties.[30] In public interest litigation facilitated by these measures, the court made far-reaching orders and recommendations, attracting for itself the title of the most powerful court in the world.

Leaving the history there, it is instructive to note how the Emergency and the post-Emergency periods highlight, in very different ways, the relationship between judicial independence and institutional legitimacy. It is also instructive to note how understandings of judicial independence vary not only between jurisdictions, but over time in the same jurisdiction.

Freedom from other influences, including oneself

Of course the sources of threats to judicial independence as we understand it are not limited to the other arms of government. Pressure on judicial decision-making might come from the media and social media especially where a case is controversial. No more need be said about this than that a judge must not allow herself or himself to be subject to such pressures. There is also the influence or pressure which comes from strong views held by a judge themselves or, some would say, by others involved in the decision-making process.

Independence from one's colleagues

Some time ago, and on more than one occasion,[31] Kirby J suggested that one aspect of judicial independence that is often overlooked is that judges must also be independent from each other.

28 J Krishnan, "Legitimacy of courts and the dilemma of their proliferation: the significance of judicial power in India", in J Yeh and W Chang (eds), *Asian courts in context*, CUP, 2015, p 269 at p 297, DOI: https://doi.org/10.1017/CBO9781107588813.009.

29 S Divan, "Public interest litigation", in S Choudhry et al (eds), *The Oxford handbook of the Indian Constitution*, OUP, 2016, p 662 at pp 663, 666–667.

30 ibid at pp 668–672; Krishnan, ibid n 28, at pp 297–298; Thiruvengadam, ibid n 24, at pp 127–128.

31 M Kirby, "Independence of the judiciary — basic principle, new challenges", address delivered at International Bar Association Human Rights Institute Conference, Hong Kong, 12–14 June 1998 at pp 22–24; "Courts and politics: judicial independence — summing up", address at Yale Law School, The Global Constitutionalism Seminar, 16 September 2000 at p 8; "Independence of the legal profession: global and regional challenges" (2005) 26 *Australian Bar Review* 133 at 133–134.

Judicial independence includes independence from inappropriate pressure to join in, or change, opinions to accord with those of other judges. No one would doubt Kirby J's independence in that regard.

It might be inferred that his Honour's concern was that there might be some judges of a stronger personality who might prevail over less assertive colleagues. Others have expressed a similar view — that some judges might suffer from a herd-like mentality and feel compelled to go along with the others.

There can be no doubt that each judge should maintain independence of thought in the process of deciding a matter. But that cannot mean refusing to listen to one's colleagues or not allowing one's views to be challenged by others. That is surely a dialogue which it is to be hoped anyone engaged in an intellectual pursuit would engage in. And in my experience that is what occurs.

I do not believe there to be a strong basis for the concerns expressed. If there is a justice who suffers from the kind of timidity assumed, I have not met them. The reality on the High Court is that each justice closely scrutinises the reasoning of their colleagues. There is no motivation to be agreeable in everything and certainly no motivation to be spared from writing another judgment. The greater discipline for most appellate judges, it seems to me, is not writing a judgment which is not necessary; that is to say, one that adds nothing of substance to what has already been written. No real danger to independence of thought comes from one's colleagues in my view. But it may come from oneself, as history shows.

Independence from prejudice and ideology

Article 102 of the constitution of the Weimar Republic, which was created in the aftermath of the first World War, stated that "[j]udges are independent and subject only to the law". In 1923 the Association of German Judges published these words: "German judges consider it as a matter of course their duty to judge according to law and the precepts of justice alone".[32] But as many historians have observed, this is to employ the rhetoric of judicial independence to disguise decisions which were not of the law.

One might have expected judges trained in German law and judging to have a strong understanding of judicial independence. Moreover they were inculcated with an adherence to positive law. But they had also been appointed from the social elite who could afford the many years legal education, made necessary by Bismarck's plan to ensure that judges were drawn from a class which might be relied upon for their loyalty to the monarchy and who had a strong sense of nationalism.[33] Indeed, that plan succeeded: the judges proved unwilling to adapt to the new Republic and to laws made not by a Kaiser but by a legislature.[34] According to one historian,[35] "the vast majority of [judges] regarded laws promulgated by legislative assemblies rather than by a divinely ordained monarch as no longer neutral but ... [as] 'party, class and

32 Quoted in W Ott and F Buob, "Did legal positivism render German jurists defenceless during the Third Reich?" (1993) 2 *Social and Legal Studies* 91 at 93.
33 ibid at 92–93; J Bell, *Judiciaries within Europe: a comparative review*, CUP, 2006 at p 128.
34 R Evans, *The coming of the Third Reich*, Penguin, 2004 at p 135.
35 ibid.

bastard law ... a law of lies'". Ironically, those same judges were accused of administering "class justice".[36] They discriminated in their treatment of offenders by reference to their politics, acquitting right-wing murderers, even if they had confessed, and imposing much lighter sentences.[37] They were vociferous in their support of the prosecution of those on the left. They sided with those accused who claimed to be acting in the name of an ideal of the old Reich.[38] In a sentencing judgment in a case of treason, the accused were described as having "been guided in their actions by a purely patriotic spirit and the noblest of selfless intentions". The accused were Adolf Hitler and the others involved in the infamous Beer Hall Putsch in Munich in 1923. They were sentenced to the minimum term possible and Hitler was offered the prospect of parole after six months.[39]

In the worsening economic conditions of the times the courts intervened to apply their own brand of justice. As the German currency depreciated the courts used the legal concepts of "changed conditions" and "good faith" to justify rescinding or modifying contracts to produce what they consider to be a fairer result.[40] Even more radically a court held invalid legislation which made the paper mark legal tender and said that mortgages must be revalued to compensate for the depreciation of the currency.[41] The law, it was said, must yield to the paramount rule of equity and good faith in the Civil Code. This may be seen to cloak political decision-making with the neutral mask of positivism. The decision has been interpreted as a judicial rebellion against the law. In the view of one historian,[42] the judges proclaimed that the law was subordinate to the judge, not the judge to the law. The judges now invoked a higher law of their own making, one driven by the values which they held and shared.[43]

Judicial independence — to what end?

According to the eminent historian Sir Richard Evans, what mattered about the behaviour of the Weimar judges was the message which it sent to the public.[44] What this shows of course is the institutional damage wrought by judges not acting within the rule of law.

So one answer to the question as to the purpose judicial independence serves is that it enables the public to have confidence in the courts as institutions. One way of instilling confidence is for judges to put aside their own ideologies and prejudices, so far as is humanly possible. The public must have faith that judges can and will do so.

36 I Müller, *Hitler's justice: the courts of the Third Reich*, Harvard University Press, 1991 at p 8; M Stolleis, *The law under the swastika: studies on legal history in Nazi Germany*, University of Chicago Press, 1998 at p 2.
37 Ott and Buob, ibid n 32, at 94; Evans, ibid n 34, at pp 136–137. See also V Berghahn, *Modern Germany: society, economy and politics in the twentieth century*, CUP, 2nd ed, 1987 at p 76.
38 Evans, ibid n 34, at p 135.
39 Müller, ibid n 36, at pp 15–16.
40 J Dawson, "Effects of inflation on private contracts: Germany, 1914–1924" (1934) 33 *Michigan Law Review* 171 at 192–193, 198.
41 D Southern, "The revaluation question in the Weimar Republic" (1979) 51(1 – On Demand Supplement) *The Journal of Modern History* D1029 at D1035. See also, Dawson, ibid n 40 at 205–211.
42 Southern, ibid, at D1035.
43 Bell, ibid n 33, at p 128.
44 Evans, ibid n 34, at p 135.

If the public are to have confidence in the judiciary and the courts they must see the courts as free from influence and pressure. They must believe that they can rely upon the courts fairly and impartially to hear and determine their cases. Our society is intended to provide courts which are independent and impartial forums for the settlement of claims.

The attainment and maintenance of judicial independence requires judges to have a strong understanding of the role of courts in our society. It may be that that role differs according to the duties which a constitution is considered to have given the courts. What matters is public confidence in the institution.

The Weimar experience shows how the rhetoric of judicial independence can be used to legitimate decisions that undermine the very matters that independence is intended to secure. Returning to the questions posed by this paper — "Independence from what?" and "To what end?" — the Weimar judges can be taken to have answered both questions wrongly. The independence they sought was from the Republic and its laws; and they sought to ensure, not that the parties had a neutral forum where disputes might fairly be litigated, but rather that their own political ends would be met.

Further references

For further references on the topics of independence, accountability and open justice, please see the following:

- *Civil Trials Bench Book*, 2007–, Sydney, at [1-0400] "Closed court, suppression and non-publication orders"
- *Civil Trials Bench Book*, 2007–, Sydney, at [1-0800] "Unrepresented litigants and lay advisers"
- Australian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd edn (rev), 2022, chs 2, 5.

Impartiality and fairness

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Impartiality and emotion in judicial work*

Professor S Roach Anleu and Emerita Professor K Mack†

The fundamental duty of a judicial officer is to administer justice impartially. This article examines how judicial officers understand and implement impartiality, drawing on extensive empirical research the authors have conducted.

Introduction

Impartiality is a foundational value underpinning judicial work.[1] While identifying "broad indicia of impartiality" may be "easy",[2] translating it into judicial practice can be difficult.

Impartiality can seem to exclude emotion from judicial practice. Emotion is assumed to be political, unstable, personal and irrational, therefore jeopardising the impartial exercise of judicial authority.[3] A judicial decision affected by a non-legal element such as emotion may appear biased, and therefore illegitimate.

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1 The Council of Chief Justices of Australia, *Guide to judicial conduct*, 3rd edn (rev), Australasian Institute of Judicial Administration, 2022, Ch 2; C Geyh, "The dimensions of judicial impartiality" (2014) 65(2) *Florida Law Review* 493; M Gleeson, "Performing the role of the judge" (1998) 10 *JOB* 57; S Roach Anleu and K Mack, *Performing judicial authority in the lower courts*, Palgrave, 2017.

2 The Council of Chief Justices of Australia, ibid, p 3.

3 S Bandes, "Empathetic judging and the rule of law" (2009) *Cardozo Law Review De Novo* 133; S Bandes and J Blumenthal, "Emotion and the law" (2012) 8 *Annual Review of Law and Social Science* 161; T Maroney, "The persistent cultural script of judicial dispassion" (2011) 99(2) *California Law Review* 629; T Maroney, "Emotional regulation and judicial behavior" (2011) 99(6) *California Law Review* 485.

Despite this conventional disavowal of emotion, emotions and emotion management are essential (though not uncontroversial) for everyday judicial work.[4] Changes to court practice and procedure, such as increased appearances by unrepresented litigants, case management reform, emphasis on therapeutic jurisprudence and less adversarial approaches, may require judicial officers to be more emotionally engaged and expressive than conventionally expected. Recent scholarship demonstrates that conforming to the conventional model of dispassionate, detached and impersonal judging requires judicial officers to undertake considerable emotion work.

In-depth interviews enable investigation of how judicial officers understand impartiality, especially in the courtroom where emotion inevitably emerges and needs management. In this study, interviews were undertaken with 38 judicial officers from all levels of court in every State and Territory, in metropolitan and regional locations (but not Commonwealth courts).[5] Nineteen of the interviewees are men and 19 are women. Seventeen of the interviewees are magistrates (10 women; 7 men); the others are judges (9 women; 12 men). Interviews addressed key issues identified from the authors' previous research into the Australian judiciary.[6] Open-ended questions allowed interviewees to discuss issues from their own perspective and in their own words with ample scope for probing responses.[7] The interview questions directly addressing impartiality asked: "A core judicial value is impartiality — what do you understand/mean by this concept?" "Could you describe your understanding of impartiality in lay person's terms?". Follow up questions might have asked about concepts such as neutrality, objectivity, or judicial independence.

4 Bandes, ibid; Bandes and Blumenthal, ibid; S Bergman Blix and Å Wettergren, "A sociological perspective on emotions in the judiciary" (2016) 8(1) *Emotion Review* 32; Maroney (2011), ibid; Maroney (2011), ibid; T Maroney and J Gross "The ideal of the dispassionate judge: an emotion regulation perspective" (2014) 6(2) *Emotion Review* 14; S Roach Anleu and K Mack, "Magistrates' everyday work and emotional labour" (2005) 32(4) *Journal of Law and Society* 590; S Roach Anleu and K Mack, "Judicial authority and emotion work" (2013) 11(3) *TJR* 329.

5 All interviews took place between August 2012 and December 2013. Interviews ranged in length from 25 minutes to 1 hour and 33 minutes. They were undertaken in CBD (N=31) and regional/suburban locations (N=7). Most interviews were conducted in the judicial officer's chambers. In all interviews, interviewee consent was sought and granted to write down notes. After each interview, handwritten notes taken during or after the interview, or observations about the court building or location of the interview, were more fully written up. All but two interviewees consented to being audio recorded; these have been transcribed within the Judicial Research Project. This rich text-based transcript data was analysed using NVivo.

6 K Mack and S Roach Anleu, "Performing impartiality: judicial demeanor and legitimacy" (2010) 35(1) *Law & Social Inquiry* 137; K Mack and S Roach Anleu, "Opportunities for new approaches to judging in a conventional context: attitudes, skills and practices" (2011) 37(1) *Monash University Law Review* 187; K Mack and S Roach Anleu, "Skills for judicial work: comparing women judges and women magistrates" in U Schultz and G Shaw (eds) *Gender and judging*, Hart Publishing, 2013; S Roach Anleu and K Mack, "Judicial appointment and the skills for judicial office" (2005)a 15 *Journal of Judicial Administration* 37; S Roach Anleu and K Mack, "Performing authority: communicating judicial decisions in lower criminal courts" (2015) 51(4) *Journal of Sociology* 1052.

7 N Denzin and Y Lincoln, *The SAGE handbook of qualitative research*, SAGE Publications, 3rd edn, 2005; J Gubrium, J Holstein, A Marvasti and K McKinney, *The SAGE handbook of interview research: the complexity of the craft*, 2nd edn, SAGE, 2012.

Impartiality, emotion and judicial practice

Several themes emerge from the ways judicial officers characterise impartiality. Many judicial officers referred to a number of themes when elaborating on their understanding of impartiality. First, several interviewees rely on the actual words of the judicial oath. Second, many stress the core of judicial method, their duty to decide on the facts or the evidence, being open-minded, and putting aside preconceptions, biases or prejudices.[8] Third, some mention experiencing specific emotions in response to features of the substance of the case or the participants. Some understand emotion as a warning that impartiality may be under threat. Emotion management strategies such as self-awareness or self-talk are described as ways to stay focussed on the ideal of impartiality.

The judicial oath

When asked to define impartiality in lay terms, several interviewees refer to or quote the judicial oath.[9] The following judge finds it difficult to expand on an explanation beyond referring to the oath itself:

> [Long pause] I'm sure I've thought about this from time to time or I've had to *give myself a good talking to* but I, look I think we all and I certainly do strive to do it … you know *it's what our oath of office is all about* … so look I'm sure from time to time I've had to really, you know, think it through … but you know I certainly think I've always managed to come to a matter genuinely impartially *as much as I, you know, conceive that to be*. (I 33, female judge; emphases added.)[10]

This comment implies that impartiality is not necessarily a fixed state, but rather a goal, something that she "strive[s]" to achieve, and may entail some degree of self-talk.[11] She concludes that she has "managed to come to a matter genuinely impartially", in terms of how she "conceive[s] that to be", opening up the possibility that other judicial officers might conceive of impartiality somewhat differently.

8 Maroney and Gross, above n 4. The Australian Law Reform Commission is currently undertaking a review of judicial impartiality: at www.alrc.gov.au/inquiry/review-of-judicial-impartiality/, accessed 23 September 2021.

9 The full text of the oath as used for the High Court of Australia: "I, [name], do swear that I will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the Office of Chief Justice [or Justice] of the High Court of Australia and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So Help me God!", *High Court of Australia Act 1979* (Cth) s 11, Sch.

10 The interviews are labelled by the code "I ##." I indicates interview data and ## refers to an individual interviewee. Quotes are given verbatim, with identifying details deleted. Some infelicities of language such as "umm" or "ah" have been deleted to improve readability. See Roach Anleu and Mack, above n 1.

11 E Goffman, *Forms of talk*, University of Philadelphia Press, 1981.

The judicial role

Several interviewees frame their understanding of impartiality concretely in terms of adversarial legal method, emphasising the judicial obligation of keeping an open mind, hearing all the evidence and putting aside other factors, including emotion. This casts judicial decision-making as work of the mind.[12]

Keeping an open mind

A judge describes being impartial as keeping an open mind, waiting to hear both sides and all the evidence; she finds this is difficult:

> I think it would be having an *open mind*. Not making a decision until you've heard all of the material to be placed before you … and having an enquiring mind … I found it the *most difficult* part. (I 35, female judge; emphases added.)

A magistrate also identifies the importance of legal process for achieving impartiality:

> you're nobody's friend … You're there to *apply the law*. That sounds simplistic. It's hard to … It is *very difficult* … (I 26, male magistrate; emphases added.)

This magistrate stresses the core of judicial decision-making: "to apply the law." This emphasis on a limited judicial role ("nobody's friend") indicates acceptance of the conventional adversarial and unemotional model of judicial decision-making. However, the magistrate also finds this "very difficult", perhaps reflecting the challenges of emotion management needed to maintain this concept of impartiality.

In contrast, some judicial officers describe keeping an open mind as easy, normal, natural, and even intuitive:

> Interestingly it's *easier to do* than perhaps a lot of people think, you know, because in fact you don't want your mind clouded by other issues … You keep an open mind *until you've actually heard the evidence* and allowed yourself to be persuaded by … their advocates or the material. (I 33, female judge; emphases added)

Putting aside bias and emotion

Several judicial officers elaborate on their understanding of an open mind as entailing setting aside biases and emotions. Biases refer to pre-existing attitudes or prejudices about particular issues or people; these may involve cognitive shortcuts or heuristics.[13] Emotions can emerge in

12 C Guthrie, J Rachlinski and A Wistrich "Inside the judicial mind" (2001) 86 *Cornell Law Review* 777; M Scheer, "Are emotions a kind of practice (and is that what makes them have a history)? A Bourdieuan approach to understanding emotion" (2012) 51(2) *History and Theory* 193.

13 P Brest and L Hamilton Krieger, *Problem solving, decision making, and professional judgment: a guide for lawyers and policy makers*, Oxford University Press, 2010; Guthrie, Rachlinski and Wistrich, ibid; K Mason, "Unconscious judicial prejudice" (2001) 75 *Australian Law Journal* 676.

various ways: annoyance or anger at a lawyer or litigant, distress stemming from the nature or facts of a crime, or a response to the grief or sadness of others in or outside the courtroom.[14] Biases and emotion can be connected as the following judge suggests:

> but *you know you are to put out of your mind*, when dealing with the case before you, any personal prejudices or beliefs or sympathies or hostilities you may have of a preconceived nature but just to *decide the case on the factors and on the evidence as presented to you*. (I 01, female judge; emphases added.)

This judge operationalises the normative and practical requirements of impartiality as requiring putting "out of your mind" a list of elements including emotions, which are implicitly characterised as internal, individual, personal and removable.

For the next judicial officer, staying focussed on the obligation to decide cases according to law and fact is a way to put aside whatever emotion is thought to be inconsistent with this duty:

> in terms of impartiality, I think, it is picking up that case and looking at, looking at the *facts* that come before you and deciding it on *nothing but the evidence* that you have before you and not what the person looks like, is wearing, or whether their lawyer is good or bad … It's about *putting all of that to one side* as well and no matter how dreadful or unpleasant their lawyer is or they are, it's about looking at the facts you have before you and *making a decision on the facts* and as they apply to *the law*. (I 03, female magistrate; emphases added.)

Describing decision-making as driven by the facts (objective, affectively neutral) and the evidence (as legally determined), implicitly excludes emotion and feeling from the process. Though aspects of the legal process can evoke or trigger emotional responses ("dreadful", "unpleasant"), these must be put aside. This standpoint casts emotion as essentially negative. However, recent research questions this standpoint and the associated strategy, suggesting that "putting all that to one side" may not be realistic and can even be counter-productive, and that the experience and expression of emotion, even anger, can assist judicial work.[15]

Self-awareness and self-talk

Many judicial officers interviewed describe strategies to limit the impact of emotion in their everyday judicial work, including self-awareness and self-talk. These strategies can be understood as emotion work, emotion regulation or emotion management. "Emotion management refers to the cognitive, behavioural, and expressive strategies that individuals use to bring their emotional experiences and expressions in line with culturally mandated feeling rules."[16]

14 H Baillot, S Cowan and V Munro, "Second-hand emotion? Exploring the contagion and impact of trauma and distress in the asylum law context" (2013) 40(4) *Journal of Law and Society* 509; T Booth, *Accommodating justice: victim impact statements in the sentencing process*, Federation Press, 2016.

15 T Maroney, "Angry judges" (2012) 65(5) *Vanderbilt Law Review* 1207; Maroney and Gross, above n 4.

16 K Lively, "Status and emotional expression: the influence of 'others' in hierarchical work settings" in J Clay-Warner and D Robinson (eds), *Social structure and emotion*, Elsevier/Academic Press, 2008, p 288. Also see A Hochschild, "Emotion work, feeling rules and social structure" (1979) 85(3) *American Journal of Sociology* 551.

The next judge describes keeping an open mind as entailing listening, as well as management of her own emotions.

> you have to start with an *open mind*. So to start with an open mind you have to *listen* … you have to … *look at and listen to everything that can properly be put before you* … if you're finding that the way a particular person is behaving *makes you feel a little hostile or prickly* about them, you know, what is that, what's that *trigger*, is it actually them or is it something else about you. So that *self-reflection* … I think is helpful … that's the essential aspect of impartiality is that you're focussed on your, *your process of decision-making* and *being self-aware* in that of your … *any inherent bias or emotional response* or whatever it is. (I 37, female judge; emphases added.)

This judge underscores the importance of listening as part of maintaining an open mind. This could be especially important in lower courts, where sentencing decisions are often given ex tempore, as part of interacting directly with the defendant. She also refers to "being self-aware" and "self-reflection", which relate to emotion management of both the experience of emotion and the outward display.[17] In particular she identifies the need to identify "that trigger" causing her to feel "a little hostile or prickly". Such an "emotional response" might warn that a judge is not being impartial. Locating the source can facilitate regulating both the emotion experience and its expression.

Judicial officers tend to describe their practices as "thinking", implying a cognitive rather than an affective or emotional process. But thinking and feeling can be intertwined, rather than being two separate processes or practices, as illustrated in the following comment:

> you do *feel some antagonism* towards them either because of what they've done or sometimes how they conduct themselves but I think, you know, I know for myself that *if ever I begin to sort of feel that way I consciously say look just, forget it, put it out of your mind* because if, you know I'm mindful that it's just folly, just gets you into so much trouble. (I 06, male judge; emphases added.)

This internal self-talk is a conversation between the judge as ordinary person and the judge, qua judge, implementing judicial impartiality. This judge identifies feelings as in conflict with impartiality. Starting to experience certain emotions or feelings, for example anger or hostility, might be a marker that the quest for impartiality could be compromised.

Conclusion

Several key themes emerge from the interviews when judicial officers were asked to explain impartiality. These include reliance on the terms of the oath itself and the need to keep an open mind, to hear both sides, to hear the evidence, stressing their limited role, to apply law to facts. Several emphasise the need and capacity to put aside information, attitudes or emotion thought to be inconsistent with achieving impartiality. A few interviewees also reflect on the practicality or difficulty of maintaining impartiality. For some, emotion appears to serve as a warning that impartiality might be under threat and describe strategies to maintain, or regain, emotional equilibrium, and hence, impartiality. Judicial officers describe talking to themselves

17 M Holmes, "The emotionalization of reflexivity" (2010) 44(1) *Sociology* 139.

as part of the management of their own emotions: a form of emotion work.[18] This self-talk entails reminding themselves of their judicial role — what they are there for — and its requirements, deciding cases based on the law and facts, thus identifying and following the appropriate feeling rules.

While not all judicial officers explicitly mention emotions or emotion management, the consistent image of impartial judging described is one where emotion is sometimes present, but should be absent. This research demonstrates that, in the quest to be impartial, judicial officers undertake considerable emotion work. Further research demonstrates the capacity of emotion to be a positive resource for judicial officers.[19]

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18 Hochschild, above n 16.
19 Roach Anleu and Mack, above n *.

Doing right by "all manner of people": building a more inclusive legal system*

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Multicultural diversity is a defining feature of modern Australia. The Chief Justice's opening of law term speech focusses on the need to improve access to justice for Australia's diverse community and to improve how the courts include foreign parties and witnesses in international commercial disputes. The fundamental role of the legal system is to give equal access and protection to "all manner of people" regardless of race, ethnicity, status, language, political opinion, gender or sexual orientation. The speech identifies and exemplifies three specific barriers to equal access: lack of knowledge and understanding of legal rights and court processes; communication barriers; and diminished confidence in the legal system.

Introduction

In 1888, the NSW government ordered the police force to prevent Chinese passengers disembarking from a ship which had arrived in Sydney Harbour. Following an application of habeus corpus by one passenger, Lo Pak, the Supreme Court found that the detention of the passengers was illegal.[1]

* This article was the opening of law term dinner, Law Society of NSW on 1 February 2017. Published in (2017) 13 *TJR* 277, statistics updated in 2021.

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1 *Ex parte Lo Pak* (1888) 9 LR (NSWR) 221. See too, J Spigelman, "Opening of Law Term Dinner", Law Society of NSW, 29 January 2008, available at www.nswbar.asn.au/circulars/cjlawterm.pdf, accessed 3 March 2021.

Shortly following the court's decision, the then Premier, Sir Henry Parkes, dismissed the decision as "technical". He stated, in inflammatory language that we are perhaps not unfamiliar with today:

> there is one law which overrides all others, and that is the law of preserving the peace and welfare of civil society. Would you talk about a technical observance of the law if a plague was stalking in our midst — if a pestilence was sweeping off our population — if a famine was reducing the members of our households to skeletons?[2]

The government maintained this defiance of the rule of law for a considerable period of time, leading Darley CJ to admonish the government's actions as unprecedented and in flagrant disregard of the law.[3] Eventually, the government conceded and released the detainees.

As stated by my predecessor, the Honourable J Spigelman, it should give us pause that one of the most serious threats to the rule of law in Australia was grounded in xenophobia.[4] However, this story also demonstrates the role of the judiciary and the profession in promoting equality, fairness and the rule of law, in spite of popular sentiment.

Indeed, judicial officers are required by oath to "do right to all manner of people … without fear or favour, affection or ill-will".[5]

This precept reflects the fundamental goal of the legal system to give equal access and protection to "all manner of people", regardless of race, ethnicity, language, socio-economic status, political opinion, gender or sexual orientation.

I will comment about inclusivity in two senses. First, in regard to improving access to justice for Australia's diverse community, particularly culturally and linguistically diverse people and Aboriginal and Torres Strait Islander people, and second, in regard to improving the inclusivity of our courts for foreign parties and witnesses in international commercial disputes.

While these groups are not often lumped together, each faces unique cultural and linguistic barriers to fully and fairly participating in court proceedings. These barriers are required to be addressed by the judiciary and the profession at large if we are to maintain our commitment to serving "all manner of people".

In this address, I will first discuss the importance of access and inclusion for Australia's diverse community and foreign parties and witnesses. I will then turn to the barriers to access and participation in the legal system that these groups face. Finally, I will discuss a number of ways in which courts are working towards improving inclusivity and some suggestions for innovation in this area.

2 H Parkes, *Fifty Years in the Making of Australian History*, Longmans, Green and Co, 1892, p 383, available at http://adc.library.usyd.edu.au/data-2/fed0024.pdf, accessed 3 March 2021.
3 *Ex parte Woo Tim* (1888) 9 LR (NSWR) 493 at 495–496.
4 Spigelman, above n 1.
5 *Oaths Act 1900*, Sch 4.

The importance of equal access to justice for Australia's diverse community

For most of you, the importance of equal access to justice is axiomatic. Almost one third of Australia's population were born overseas, the highest proportion in 120 years.[6] While the vast majority of migrants come from the UK and NZ, in the past 10 years, the number of Australians born in non-English-speaking countries such as China, India, Italy, Vietnam and Middle Eastern countries has increased.[7]

In NSW, 23% of the population speak a language other than English at home and 19% were born in a non-main-English-speaking country.[8] Throughout Australia, 11% of Aboriginal and Torres Strait Islander peoples speak an Australian Indigenous language at home. Language plays an important role in Indigenous communities in communicating culture and tradition.[9]

These statistics should be a cause for celebration; Sydney is internationally recognised as one of the most culturally and linguistically diverse cities in the world.

The diversity of our community means that in order for us to achieve equal justice, the courts and the profession must consider the unique needs of different sections of the community. Reiterating a famous Aristotelian phrase, the High Court has stated that equality before the law "requires, so far as the law permits, that like cases be treated alike … [and], where the law permits, differential treatment of persons according to differences between them …".[10] In this sense, equal justice requires us to develop procedures and practices to accommodate particular cultural or linguistic differences that may hinder effective participation in the legal system.

Over ten years ago, in his state of the judicature address, Sir Gerard Brennan stated that in order "to maintain the rule of law in a free and confident nation", the judiciary must meet four requirements:[11]

- first, it must be and be seen to be impartial and independent;
- second, it must be competent and knowledgeable of the law and its purpose, including accepting and observing limitations on judicial power and, within those limits, "developing the law to answer the needs of society from time to time";

6 Australian Bureau of Statistics, "Overseas born Aussies highest in over a century", media release, 30 March 2016, available at www.abs.gov.au/ausstats/abs@.nsf/lookup/3412.0Media%20Release12014-15, accessed 3 March 2021. **Note:** 29.7% of Australia's population were born overseas in 30 June 2019: see www.abs.gov.au/statistics/people/population/migration-australia/latest-release, accessed 4 March 2021.

7 Australian Bureau of Statistics, "Reflecting a nation: stories from the 2011 Census, 2012–2013", 21 June 2012 at www.abs.gov.au/ausstats/abs@.nsf/mf/2071.0, accessed 3 March 2021.
Note: For 2019 figures, see "Table 1.2 Australia's population by country of birth - 2019", at www.abs.gov.au/statistics/people/population/migration-australia/latest-release, accessed 4 March 2021.

8 The Judicial Commission of NSW, *Equality before the Law Bench Book,* 2006, at www.judcom.nsw.gov.au/publications/benchbks/equality/, accessed 3 March 2021.

9 See House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land Our Languages Report*, 2012, available at www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/atsia/languages2/report.htm, accessed 3 March 2021.

10 *Green v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [28]; Aristotle, cited in P Weston, "The empty idea of equality" (1982) 95(3) *Harvard Law Review* 537 at 543.

11 G Brennan, "The state of the judicature" (1998) 72 *ALJ* 33 at 34–45.

- third, it must have "the confidence of the people"; and
- fourth, it must be "reasonably accessible to those who have a genuine need for its remedies".

These four requirements are as relevant now as they were more than a decade ago. They can all be connected to the need for an inclusive justice system. In regard to the first requirement, one aspect of impartiality is that the judiciary possess knowledge of the unique ways in which people might be disadvantaged by court processes and procedures within the existing legal framework. In regard to the second, part of developing the law to answer the needs of society includes responding to the diversity of our population by developing accommodating and inclusive procedures. Third, gaining public confidence requires "all manner of people" to have confidence that they will be able to utilise the legal system. And the final requirement speaks for itself — like all people, culturally and linguistically diverse Australians, as well as Aboriginal and Torres Strait Islander peoples, have a genuine need for the protection of the law and must be provided with reasonable access to it.

The importance of accommodating international commercial litigants in Australian courts

For different but related reasons, it is important that the Australian legal system is accommodating to foreign parties and witnesses. The last few decades have seen an exponential increase in international trade and investment, particularly in the Asia Pacific region. In 1990–1991, Australian exports to ASEAN nations were worth $8 billion and our two-way trade with China was worth $3.2 billion.[12] By 2014–2015, those figures were more than $38 billion and $155 billion, respectively, and China was Australia's largest trading partner.[13]

The exponential increase in regional trade across Asia and the Pacific has created a corresponding need for a safe and neutral seat for the resolution of international commercial disputes. While litigation is merely one means by which to resolve such disputes, it has many desirable qualities which necessitate its availability as a dispute resolution mechanism for commercial parties. These include efficiency, cost, transparency and predictability. I will not waste your time waxing lyrical about the benefits of litigation; it is indeed my prerogative as a judge to promote it. Nonetheless, it is clear that the benefits of litigation as a means for resolving transnational disputes require us, as a profession, to identify and meet its challenges.

The development of an international reputation amongst our legal institutions of accommodating international commercial parties is a worthwhile objective for our profession. This reputation can only be attained if we analyse the difficulties faced by international parties and witnesses in Australian courtrooms and work towards overcoming them.

12 Department of Foreign Affairs and Trade, "Australia's Trade Performance 1990–91 to 2010–11", available at www.dfat.gov.au/sites/default/files/australias-trade-performance-1990-91-2010-11.pdf, accessed 3 March 2021.

13 Australian Government Department of Foreign Affairs and Trade, "Australia's trade in goods and services by top 15 partners 2015–16", available at www.dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2016#partners, accessed 3 March 2021.
Note: For more recent statistics on trade, see *Trade at a Glance* at www.dfat.gov.au/about-us/publications/trade-investment/trade-at-a-glance/Pages/trade-at-a-glance, accessed 4 March 2021.

One distinct challenge that must be overcome is the fact that cultural and linguistic differences may make it difficult for parties to access and understand Australian laws and procedures. As former Supreme Court judge, the Honourable C Einstein, stated:[14]

> The means by which litigious disputes are resolved, and indeed the substantive laws from which actionable rights spring, are deeply enmeshed with cultural traditions and understandings.

Acknowledging and accommodating these different understandings is important to creating a more inclusive legal system, one that will strengthen Australia's position as a leading forum for the resolution of international commercial disputes.

Access and participation issues for Australia's diverse community and international commercial litigants

I will focus on three barriers faced by culturally and linguistically diverse people, including Aboriginal peoples and foreign parties and witnesses, in accessing and participating in our legal system.

The first two, namely, knowledge and understanding of legal rights and court processes and communication barriers, reflect a fundamental requirement of equal justice: that all people be able to understand and be understood in legal proceedings. The third barrier — confidence in the justice system and in judicial institutions — is of central importance to the rule of law.

Knowledge and understanding of legal rights and court processes

People have been having difficulty understanding court processes and procedures for many years. In *Bleak House,* Dickens described the litigation process as "such an infernal country-dance of costs and fees and nonsense and corruption as was never dreamed of in the wildest visions of a Witch's Sabbath."[15] While I don't believe that Dickens's scenes of corruption and inefficiency apply to any Australian courts today, I do acknowledge that the law can be incredibly confusing to non-lawyers, and even to many lawyers.

We can indeed be needlessly wordy at times. Arthur Symonds once said that if you wished to give another person all right and title to an orange, instead of saying "I give you that orange", you would have to say:[16]

> I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with

14 C Einstein and A Phipps, "Trends in international commercial litigation Part II — the future of foreign judgment enforcement law", IPRax, issue 4, July/August 2005, s 293, at 365.

15 C Dickens, *Bleak House*, Bradbury & Evans, 1853, p 95.

16 A Symonds, *Mechanics of Law Making*, 1835, p 75; cited in R Megarry, *A second miscellany at law: a further diversion for lawyers and others*, Stevens & Sons, 1973, p 285.

> full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, not-withstanding.

Of course, a lawyer in Sydney might ask whether the conveyor had transferred the right to make an orange-infused latte to be served in a re-purposed jam jar in Surry Hills.

It is certainly worrying that in one survey conducted by the Australia Institute, 88% of respondents agreed with the statement that "the legal system is too complicated to understand properly".[17] That being said, 79% did state that if they had a legal problem, they would know where to get help.[18]

Culturally and linguistically diverse parties and witnesses are often at a distinct disadvantage in understanding court processes and procedures, which may be very different to those in their country of origin. Further, the stress of participating in court proceedings is magnified where the justice system is unfamiliar and events occur in a non-native language.[19]

People with limited English language skills are at a distinct disadvantage when understanding forms, court paperwork, communicating with court staff, participating in court proceedings and understanding court orders.

In our legal system, where knowledge of the law is presumed and ignorance is no excuse, the impact of lack of knowledge of the law and court processes is compounded; it increases the likelihood of transgressions and reduces the capacity of "all manner of people" to participate in legal proceedings.

One study conducted by Footscray Community Legal Centre, now Western Community Legal Centre, found that many African migrants did not have adequate access to information about the legal system. It found that legal information was often exclusively communicated by family and friends and was often incorrect and unreliable.[20]

Common legal problems which arose as a result included driving-related offences, incurring debts through breaching contracts, particularly those entered with door-knockers, and breaching Centrelink obligations.

There is also substantial evidence that Indigenous people are "disproportionately disadvantaged" in accessing the civil justice system. A research project commissioned by the

17 R Denniss, J Fear and E Millane, "Justice for all: giving Australians greater access to the legal system", The Australia Institute, Paper No 8, March 2012, p 22.

18 ibid.

19 See W Martin, Judicial Council on Diversity and Inclusion, "Submission to the Productivity Commission's Inquiry into Access to Justice Arrangements", 28 November 2013, p 6, available at https://jcdi.org.au/wp-content/uploads/2021/06/04_Submission_to_Productivity_Commission_made_by_Martin_CJ_for_JCCD.pdf, accessed 19 January 2023.

20 K Fraser, Footscray Community Legal Centre, "Out of Africa and into court: the legal problems of African refugees", June 2009, available at www.communitylaw.org.au/footscray/cb_pages/images/African%20Legal%20service%20Report%20Final.pdf, accessed 3 March 2021.

NSW Legal Aid Commission found that 70% of Aboriginal participants who identified a dispute with a landlord did not seek legal advice and that only 14% with debt-related problems sought legal advice.[21] While failure to access the legal system may also be a result of lack of confidence in the system, the survey demonstrates that the civil law needs of Aboriginal peoples are unmet and that we must do more to provide accessible legal processes and procedures for Aboriginal and Torres Strait Islander peoples.

Communication barriers

In addition to understanding court processes, people from diverse backgrounds can also face barriers in being understood by courts, court staff and legal service providers.

Language is one of the largest barriers affecting the capacity of people to take advantage of the court system. Poor or improper translation, including a failure to take into account differences in dialects, can lead to erroneous factual findings or miscarriages of justice.

In international commercial litigation, challenges can arise both from the fact that witnesses may not speak English and due to documentary evidence being in a foreign language. Translations of documents may be poor and crucial information can become "lost in translation".

As stated by Dr Andrew Bell:[22]

> [m]atters of idiom, cultural dislocation, and the variable quality of translators who, in a hearing, will need to translate both questions and answers, all contribute to the possibility that a party's particular "story" and evidence will be incomplete or distorted.

This "lost in translation" problem can be a very real one for witnesses and parties. As stated by Bell:[23]

> the foreign language of the relevant transactions or events may be a powerful source of prejudice to a party including one whose exculpatory evidence, as it were, will largely fall to be given in a foreign language by a number of witnesses with all of the difficulties of translation that inevitably arise.

An Australian case illustrating such difficulties is *PCH Offshore Pty Ltd v Dunn (No 2)*,[24] heard by Siopis J in the Federal Court. While the case involved a claim by an Australian company against its former CEO, the company's operations were almost entirely conducted in Azerbaijan and Kazakhstan and most of the witnesses resided in Azerbaijan and were Azeri speakers. Problems arose as there were only two potential Azeri interpreters in Australia, neither of whom

21 C Cunneen and M Schwartz, *The family and civil law needs of Aboriginal people in New South Wales: final report*, 2008, available at www.alsnswact.org.au/media/BAhbBlsHOgZmSSI2MjAxMS8wOC8xNS8yMl81Nl8zOV85NTJfQ3VubmVlbl9SZXBvcnRfT/2N0XzA5LnBkZgY6BkVU, accessed 3 March 2021.

22 A Bell, "Getting to the forum: witnesses in transnational litigation" (2011) 85(9) *ALJ* 562 at 567.

23 ibid at 566.

24 (2010) 273 ALR 167.

were NAATI accredited, and one of whom had already been engaged by one of the parties.[25] Further, many important documents in the case were in Azeri and their translations were not easy to follow.[26]

Issues of evidence and communication being "lost in translation" can have even graver results in criminal proceedings. Even where properly trained interpreters are engaged, dialectical differences can lead to errors.

Dr Diana Eades gives a good example of this in a paper she delivered on Aboriginal English. Dr Eades describes a case in the Northern Territory where an Aboriginal witness gave evidence that on a particular night, there was a "half-moon". Cross-examining counsel sought to discredit the witness's account of the night by noting that there was no half-moon on the particular night in question. Fortunately, an interpreter was present who interjected. It soon became evident that the witness was using an Aboriginal English expression, "half-moon", to mean what standard English speakers would refer to as a "crescent moon".[27] This case provides a good example of how subtle dialectical differences can have a large impact on the courts' perceptions of a witness.

Even when translation and interpretation is provided, cultural and linguistic differences can create other communication barriers and affect the way in which evidence is received.

At a conference I attended a couple of years ago, Rares J referred to a paper by Phillip Yang, an international maritime arbitrator.[28] In the paper, Yang noted that most English arbitrators lack proper understanding of Chinese witnesses, including how they communicate and conduct business.

He referred to an arbitration in London on which he sat with two retired English judges. They were tasked with determining whether Chinese delegates and a European party had reached an agreement over the sale of six new bulk carriers. The European party claimed that the parties had reached an agreement by signing a pro-forma contract. The Chinese witness who had signed the contract stated that he felt he had "to sign something … to justify the delegation's expensive trip to Europe to [his] superior and the State authorities".[29] The documents subsequent to the trip indicated a clear record of continuous negotiations over outstanding issues.

While his fellow tribunal members would have found against the Chinese delegates, Yang explained to them the differences between Chinese business methods and European methods. The tribunal ultimately found that in this case, documentary evidence did not provide the full picture.

25 ibid at [124], [131].
26 ibid at [132].
27 D Eades, "Telling and retelling your story in court: questions, assumptions, and intercultural implications" [2008] *CICrimJust* 26, available at www.austlii.edu.au/au/journals/CICrimJust/2008/26.html, accessed 3 March 2021.
28 P Yang, "The Eastern and Western cultural influences on maritime arbitration and its recent development in Asia" (2013) *CMI Yearbook 2013*, p 396; referred to in S Rares, "Open and accessible courts: community engagement, public education and awareness", AIJA Cultural Diversity and the Law conference, Sydney, 13 March 2015 available at www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20150313, accessed 3 March 2021.
29 Yang, ibid at p 401.

This story provides just one example of how cultural differences in business practices can impact on a case. Although this example is from an arbitration, the same could equally occur in domestic legal proceedings. While it is important not to over-generalise, courts have acknowledged that cultural factors can provide context for a witness's evidence, particularly where evidence might be considered unreliable.[30]

For example, witnesses may be from a culture where direct eye contact is considered challenging or offensive, witnesses may pause before speaking as a sign of respect for court processes and it has been well documented that both Aboriginal people and other linguistically diverse people might answer yes to a question regardless of whether they understood the question or agreed with it.

It is important for both judges and legal professionals to be aware of the ways in which culture can influence communication, so as to prevent misunderstandings and erroneous findings of unreliability or evasiveness.[31]

Confidence in the legal system

The final barrier I will discuss, confidence in the legal system, is related to the first two. A lack of understanding of court processes and procedures, communication difficulties and other factors can result in diminished confidence in the legal system.

The public's confidence in the judicial system is not merely important because judges want to be liked. Indeed, we would be fighting an uphill battle in that respect. We are accustomed to criticism and disdain by disgruntled litigants, and this has a very long history. One obscure historical example that I came across was a case before Malins VC in the 19th century. After having been committed, the defendant is said to have thrown an egg at Sir Richard Malins, which broke on the wooden canopy behind his seat. Malins responded, "That must have been intended for my brother Bacon".[32] Bacon VC was sitting in another court on the same day.

But apart from disgruntled litigants, broad community confidence in the administration of justice is of central importance to the functioning of the justice system and the maintenance of the rule of law. It is critical to the willingness of victims to report crimes, to the readiness of witnesses to testify, to the peaceful acceptance of verdicts — even those which are vehemently disagreed with — and to compliance with court orders.

30 *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at 618; *Ak-Tankiz v Ak* [2014] NSWSC 1044 at [68]; *Videski v Australian Iron and Steel Pty Ltd* (unrep, NSWCA, 17 June 1993) at 6, 9. See too E Kyrou, "Judging in a multicultural society" (2015) 24 *Journal of Judicial Administration* 223.

31 See Kyrou, ibid at p 224.

32 Megarry, above n 16, p 70.

The history of dispossession and colonisation affecting Australia's Indigenous population has led to a complex relationship with Australian law. As stated by the Judicial Council on Diversity and Inclusion, which I will refer to in more detail shortly:[33]

> The imposition of colonial law and the dismantling of Indigenous "Lore" has resulted in significant mistrust of the legal system …

It found that Aboriginal and Torres Strait Islander women may have a "legacy of trauma", fear of reporting violence and history of institutional discrimination, making them fearful or distrustful of the justice system.[34]

It also found that migrant and refugee women may lack confidence in legal processes due to the adverse impacts of pre-arrival experiences, such as persecution by authorities, as well as financial dependence and concerns regarding immigration status.[35]

For international commercial litigants, confidence in the Australian justice system means that Australia is seen as an appropriate forum for the resolution of international commercial disputes.

With these access and participation barriers in mind, let me now turn to the ways in which courts are working towards improving inclusivity and some suggestions for innovation in this respect.

Measures to improve inclusivity and access

Understanding barriers through research and education

First and foremost, if courts and legal service providers wish to address issues of trust and improve inclusivity, we must focus our attention on understanding barriers faced by diverse sections of the community. One of the functions of the judiciary is to ensure that, as far as possible, court proceedings are fair and impartial. In fulfilling this function, judges may have to assess potential disadvantages suffered as a result of linguistic and cultural differences and intervene to ensure fairness. The assessment of such disadvantage requires that judges, as well as other court staff, be aware of factors productive of inequality.[36] This is where research and education come in. A judiciary which is more aware of cultural nuances and the ways in which people can be hindered in their access to justice is more likely to take steps to ensure that people are properly informed of court processes and procedures and that all communication is properly understood.

33 Judicial Council on Diversity and Inclusion, "Submission to the Productivity Commission's inquiry into access to justice arrangements", 29 November 2013, p 1, available at www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub120-access-justice.pdf, accessed 3 March 2021. See too Judicial Council on Diversity and Inclusion, "The path to justice: Aboriginal and Torres Strait Islander women's experience of the courts", 20 March 2016, p 17, available at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf, accessed 19 January 2023.

34 ibid pp 16–23.

35 Judicial Council on Diversity and Inclusion, "The path to justice: migrant and refugee women's experience of the courts", 20 March 2016, pp 18–28, available at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD_Consultation_Report_-_Migrant_and_Refugee_Women.pdf, accessed 19 January 2023.

36 See J von Doussa, "Launch of the Supreme Court Equal Treatment Benchbook", 15 February 2006, available at www.humanrights.gov.au/news/speeches/launch-supreme-court-equal-treatment-benchbook, accessed 3 March 2021.

In this State, there are currently a range of education programs on offer in this respect, most provided by the Judicial Commission of NSW. I have personally benefited from this training and so have my fellow judges, with judges in NSW spending an average of five days a year in education programs.[37]

Of particular note, the Ngara Yura program, developed in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody, seeks to raise judicial awareness of Aboriginal culture and interactions with the justice system.[38]

Ten years ago, the Commission published the *Equality before the Law Bench Book,* which has since been updated numerous times.[39] The Bench Book is a reference setting out information on the diversity of the NSW population, the importance of perception and the avoidance of bias, as well as practical considerations relating to the use of the justice system by Aboriginal peoples, people from culturally and linguistically diverse backgrounds, people with religious affiliations, people with disabilities, children and young people, women, LGBTQI people, gender diverse people, older people and self-represented parties.

Other more informal education initiatives exist in the form of seminars and conferences. The Supreme Court's Annual Conference for judicial officers has always featured lectures on the specific needs of diverse sections of the community. Other conferences, such as a conference I attended in 2015 on Cultural Diversity and the Law, seek to promote discussion between judicial officers and community members about access issues.

At the forefront of many initiatives in this area is the Judicial Council on Diversity and Inclusion. The council was established in 2014 as an independent advisory body tasked with assisting Australian courts, judicial officers and administrators with positively responding to evolving community needs arising from Australia's cultural diversity. The council reports regularly to the Council of Chief Justices and provides policy advice and recommendations to it. The council is predominantly composed of judges who represent all Australian jurisdictions and court levels, as well as other legal and community body representatives.[40]

In 2016, the council completed four significant projects. In February, it released a study on existing resources that support Australian courts to deliver services to culturally diverse clients.[41]

37 The Judicial Commission of NSW, *Annual Report 2015–16*, November 2016, p 31, at www.judcom.nsw.gov.au/annual-report-2015-2016/, accessed 3 March 2021.
Note: In 2018–2020, Judicial Officers spent an average of 3.8 days undertaking education programs: see www.judcom.nsw.gov.au/wp-content/uploads/2020/12/Judicial_Commission_Annual_Report_2019-20.pdf, accessed 30 September 2021. The number of days in education programs decreased in 2020 due in part to the COVID-19 pandemic.

38 The Judicial Commission of NSW, Ngara Yura Program, at www.judcom.nsw.gov.au/education/ngara-yura-program/, accessed 3 March 2021.

39 The Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006, at www.judcom.nsw.gov.au/equality/, accessed 9 March 2021.

40 Judicial Council on Diversity and Inclusion, "About us", at https://jcdi.org.au/, accessed 19 January 2023.

41 Judicial Council on Diversity and Inclusion, "Cultural diversity within the judicial context: existing court resources", Report, 15 February 2016, available at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD_Cultural_Diversity_Within_the_Judicial_Context_-_Existing_Court_Resources.pdf, accessed 19 January 2023.

In March, it published two reports, one on access to justice for Aboriginal and Torres Strait Islander women and one on access for migrant and refugee women.[42] These reports focus on family violence and family breakdown. In compiling these reports, the council held a national consultation process with a range of stakeholders, including community and legal representatives. The council is currently in the process of developing a national framework for enhancing access to justice for these groups. The framework consists of best practice guidelines, resources and protocols to be used by courts in Australia.

In June, the council also released a public consultation draft of Australian National Standards for working with interpreters in courts and tribunals.[43] I will speak about this in further detail shortly.

I very much look forward to continuing to work with the council and to implementing the recommendations made in its reports. The consultations engaged in by the council are to be commended and continued. Judges alone are not in a position to assess whether the justice system is serving the needs of the wider community. It is important for courts to develop links with diverse communities and to facilitate ongoing consultation and communication about their specific needs.

One of the major initiatives of the council has been to commission specialised training for judicial officers and court staff to respond to the needs of diverse court users. I welcome the partnership between the NSW Judicial Commission, the Judicial College of Victoria, the National Judicial College, the Australasian Institute for Judicial Administration and the Family Court of Australia for the development of a cultural diversity online training program for judicial officers.[44]

Similar programs should also be developed for legal service providers, including members of the profession, and court staff, in particular registry staff, who often act as a first point of contact for persons wishing to access the justice system.[45]

Overcoming communication barriers through interpreters

The second way in which courts can overcome communication barriers is through better provision of interpreter and translator services.

While courts have discretion to determine whether it is appropriate for an interpreter to be made available,[46] common practice suggests that courts generally err on the side of caution. They

42 Judicial Council on Diversity and Inclusion, above n 33 and n 35.

43 Judicial Council on Diversity and Inclusion, "Australian National Standards for Working with Interpreters in Courts and Tribunals: Public Consultation Draft", 16 June 2016.
Note: "Recommended National Standards for Working with Interpreters in Courts and Tribunals" was published in 2017, at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD-Interpreter-Standards.pdf, accessed 19 January 2023, and was updated in March 2022 at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.

44 See at https://elearning.judcom.nsw.gov.au/, accessed 4 March 2021.

45 See R French, "Equal justice and cultural diversity: the general meets the particular" (2015) 24 *Journal of Judicial Administration* 199 at 206.

46 See *Adamopoulus v Olympic Airways SA* (1991) 25 NSWLR 75 at 80, 84.

take into account the fact that while a person may be able to perform social or business tasks in English, they may not be able to present evidence in English in a courtroom. As stated by Kirby J:[47]

> [a] relationship in which the speaker is in command (as when dealing with friends or purchasing or selling goods and services) is quite different from a potentially hostile environment of a courtroom. There, questions are asked by others, sometimes at a speech and in accents not fully understood.

The Judicial Council on Diversity and Inclusion has developed national standards relating to the use of interpreters in the courtroom in the Recommended National Standards for Working with Interpreters in Courts and Tribunals.[48] The standards are intended to be flexible and to apply across a range of court settings. They provide guidelines for assessing the need for an interpreter, minimum standards to be met by interpreters and support and assistance provided to interpreters. The standards are accompanied by Model Rules, which include a Court Interpreters' Code of Conduct and a Model Practice Note.

I am confident that working towards the adoption of these standards will improve access to justice and procedural fairness for linguistically diverse court users. The standards also promote a closer relationship between the courts, the legal profession and the interpreting profession.

I echo the council's findings that the use of plain English is a vital component in effectively engaging with interpreters. The use of plain English in all proceedings also goes a long way to creating a more accessible and inclusive legal system.

There are many other possibilities that we can explore in regard to overcoming language barriers. It is interesting to look at what other jurisdictions around the world are doing in this respect. For example, in 2011, the Paris Commercial Court (*Tribunal de Commerce*) established an international division to be staffed with nine judges who speak foreign languages such as English, German and Spanish. The express aim was to make French courts more attractive to international commercial litigants. While these commercial courts virtually never hear witnesses, the judges of the new international division are able to read documents in several foreign languages and are able to better grasp the subtleties of a document and its economic meaning.[49]

Similar initiatives exist in German Courts of First Instance in Hamburg and Köln. These courts established "international chambers" in 2009 which permitted the hearing of cases in English.[50]

I am not suggesting that such an approach would necessarily be appropriate in the Australian context. However, it is useful to look to other jurisdictions to see how they overcome linguistic barriers, particularly as the world becomes more and more interconnected. Enhancing the

47 ibid at 80.
48 Judicial Council on Diversity and Inclusion, above n 43.
49 See G Cuniberti, "Paris, the jurisdiction of choice?", *Conflict of Laws.net,* 2 February 2011, available at http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/, accessed 4 March 2021.
50 ibid.

inclusivity of our court system, through the provision of better interpretation and translation services is both beneficial in ensuring that Australia's multicultural population is able to have equal access to justice and ensuring that our courts remain accommodating to international commercial litigants.

Community engagement

The third way in which courts can improve their inclusivity is by actively engaging with the wider community. While traditionally, judges have been reticent to engage in public discussion, I think that the days in which the judiciary can solely communicate to the public through judgments is gone. I regret to inform my fellow judges that very few people actually read the decisions that we spend so long considering and crafting. Courts must take an active role in explaining what we do and why. This is important for the maintenance of public confidence in our processes and procedures.

The Supreme Court has been working hard to facilitate better community understanding of our work. For example, the court now produces summaries of important judgments which provide an overview of the reasoning behind a particular decision in a simple and concise fashion. Links to these summaries and to the judgments themselves are published on the court's Twitter[51] and Facebook[52] accounts, along with a brief sentence or two stating the final result. The aim is to allow the community and media to readily access and digest judgments of interest.

I do admit that our five and a half thousand followers[53] are not much in the Twitter stakes. Apparently Lord Voldemort has over 400 times more followers and Depressed Darth Vader has 144 times more followers. Nonetheless, I still do think that the court's account plays an important role in disseminating important legal information to members of the community — far more noble than disseminating dark magic or fighting for an evil galactic empire, albeit quite sadly.

In the past few years, the court, in conjunction with the Bar Association, and with the support of the Law Society, has also hosted seminars on the process of judicial decision-making in criminal matters. The seminars include an explanation by judges of the sentencing process and also answer questions and address any concerns. I hope to have seminars on this topic and other topics in the future. Engagement such as this should serve as a sign to the community that the judiciary is ready and committed to better explaining how we function and listening to community concerns.

Another initiative, developed by the Judicial Commission, is the Community Awareness of the Judiciary Program.[54] The program provides community representatives with the opportunity to

51 At @NSWSupCt, accessed 9 March 2021.
52 At @SupremeCourtNSW, accessed 9 March 2021.
53 **Note:** As at 5 March 2021, the @NSWSupCt has 10 300 followers on Twitter.
54 See "Rising community awareness of the judiciary and the work of the courts of NSW" (2012) 24(11) *JOB* at https://jirs.judcom.nsw.gov.au/publish/job/vol24/dec/feature.html, accessed 4 March 2021.

learn more about the work of the courts. I also note the hard work of organisations such as the Legal Aid Commission,[55] which provide an extensive range of community legal education programs to diverse communities.

Global engagement

In addition to community engagement, both the courts and the profession have made substantial efforts toward enhancing our global engagement. Now, more so than ever, we operate in an internationalised legal environment. A large number of law firms provide international services, either through mergers with foreign firms or by establishing a presence in overseas markets.

Young lawyers seem eager to practice in locations around the world, including in the Asian offices of Australian firms and in London and, increasingly, New York. I myself have former tipstaves and researchers who have gone to work in New York, Haiti and Washington DC. It sometimes seems as if they will do anything so that they don't have to attend Christmas drinks and listen to me rabbit on about recent developments in corporations law.

Over 27% of legal practitioners in NSW were born overseas and of those, approximately 41% were born in Asian countries.[56] Both overseas-born lawyers and lawyers who have practised overseas increase our profession's global orientation and familiarity with diverse cultural and commercial practices. This strengthens the ability of Australian lawyers to conduct and represent foreign clients in international commercial litigation. The profession should make efforts to remain inclusive towards lawyers who bring diverse and global experiences.

Australian lawyers and judges have been instrumental in bringing together members of the profession throughout Asia, and indeed globally. For example, LAWASIA, an international organisation of lawyers' associations, lawyers, judges and legal academics, was a project of the Law Council of Australia. Since it was founded in 1966, LAWASIA has served as a platform for the cross-jurisdictional exchange of legal information and for encouraging adherence to the rule of law, the protection of human rights and high standards of legal practice.[57]

I currently serve as the chair of the judicial section of LAWASIA. In this capacity, I organised the 16th Conference of Chief Justices of Asia and the Pacific, held at the Supreme Court in 2015. This conference, held biannually, provides an invaluable opportunity for chief justices throughout Asia and the Pacific to exchange views and information and promote the rule of law.

In 2008, the Honourable J Spigelman, in a joint venture with the High Court of Hong Kong, hosted the first Judicial Seminar on Commercial Litigation at the Supreme Court. The objects of the seminar were first, "to enhance the understanding of the judiciary of one nation about the

55 **Note:** Now known as Legal Aid NSW.

56 The Law Society of NSW, "2015 Profile of the Solicitors of NSW — Final Report", May 2016, p 9, available at www.lawsociety.com.au/sites/default/files/2018-04/NSW%20PROFILE%20OF%20SOLICITORS%202016%20FINAL%20REPORT.pdf, accessed 4 March 2021.

57 The Law Association for Asia and the Pacific, "About LAWASIA", available at www.lawasia.asn.au/who_we_are.html, accessed 4 March 2021.

practices of other nations, in order to enable judges to make decisions on cases involving cross border disputes" and second, "to strengthen the prospect of cooperation between courts which is often required when cross border issues arise".[58] These seminars have continued biannually.

Since I have been Chief Justice, I have had the opportunity to witness the extensive global engagement of the Supreme Court. This includes sending and receiving judicial delegations, attending and speaking at conferences and events with a focus on international law, negotiating formal Memorandum of Understanding ("MoUs") between the Supreme Court and overseas courts and speaking at and attending international conferences.

In 2016, I attended and spoke at six international conferences and events in Singapore, Sri Lanka, Papua New Guinea, Japan, London and Hong Kong. As Chief Justice, I have had the opportunity to meet officials from Spain, the People's Republic of China, Japan, Guatemala, Bangladesh, South Africa, Hong Kong, Paris, the Czech Republic, the Philippines, the United Arab Emirates, Egypt and Jordan.

The Supreme Court has also negotiated formal MoUs with the Supreme Court of Singapore, the Chief Judge of the State of New York, the High People's Court of Shanghai, the High People's Courts of the Hubei and Guangdong Provinces in China and the Dubai International Finance Centre Courts on topics including judicial exchange, procedures for consultation with the courts of the other party and cooperation when determining questions of the law of the other party.

I by no means wish to suggest that the Supreme Court is the only court engaging globally. The High Court has been involved in the governance and work of the Asian Business Law Institute and led a judicial delegation to the Supreme People's Court of the People's Republic of China.

The Federal Court is the preferred tenderer for the new five-year Pacific Strategic Justice Initiative and has entered into a MoU with the Supreme Court of Indonesia which focuses on commercial dispute resolution, insolvency and commercial contracts. The Family Court is also commencing work with Vietnam, funded by UNICEF.

This global engagement by judges and members of the profession enhances our commitment to inclusivity and equal justice. It also plays an important role in facilitating dialogue, allowing judges and members of the profession to share experiences, discuss reform initiatives and reaffirm the basic conditions that are essential to maintaining a justice system of the highest standard. It allows us to create a common vision for judicial development that supports mutual understanding and can inform future directions for judicial systems in our region.

An additional benefit is the promotion of uniformity between laws. There have been numerous calls over the years for greater legal convergence in the Asia Pacific region, including by myself.[59]

58 J Spigelman, "Cross border issues for commercial courts: an overview", Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010.

59 See, eg T Bathurst, "The importance of developing convergent commercial law systems, procedurally and substantively", 15th Conference of Chief Justices of Asia and the Pacific, Singapore, 28–30 October 2013, available at www.austlii.edu.au/au/journals/NSWJSchol/2013/41.html, accessed 4 March 2021.

Whether this be greater convergence between domestic bodies of law or a harmonised body of international law striving for the status of a lex mercatoria, the advantages are self-evident. A better understanding between countries of their respective legal systems will assist, where possible, in the development of harmonised legal principles and practices, which can in turn lead to greater certainty for those who approach the courts. Furthermore, a consistent body of law regulating commercial disputes helps to secure legitimacy and confidence in courts in the resolution of such disputes.

Conclusion

In conclusion, multicultural diversity continues to be a defining feature of modern Australia, and one that we can be proud of. The 2016 Scanlon Foundation's "Mapping social cohesion" report found that an overwhelming majority of Australians, 83%, believe that multiculturalism is good for the country.[60] A clear majority also believed that immigration levels were either "about right" or "too low".[61] These numbers provide the best indication that Australia is a country committed to diversity and inclusivity.

However, there are also findings in the report that should give us pause. There has been an increase in people reporting discrimination, with the highest levels of discrimination reported by people from non-English speaking backgrounds.[62] As a profession, we must work together to give a voice to those who are marginalised in order to ascertain what barriers they face in fully participating in our legal system.

If the profession is to develop relationships of trust with diverse communities, we must not only engage in consultations, but we must act on recommendations.

60 A Markus, Scanlon Foundation, "Mapping social cohesion: the Scanlon Foundation surveys 2016", p 50, available at https://scanloninstitute.org.au/sites/default/files/2019-11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf, accessed 4 March 2021.
Note: In 2020 84% indicated agreement, higher than 77% in 2018 and 80% in 2019: see "Mapping social cohesion: the Scanlon Foundation surveys 2020" p 5 at https://scanloninstitute.org.au/sites/default/files/2021-02/SC2020%20Report%20Final.pdf, accessed 9 March 2021.

61 ibid pp 37–39.
Note: In 2020, 62% considered that the intake in recent years had been "about right" or "too low", while 38% considered that the intake had been "too high": see "Mapping social cohesion: the Scanlon Foundation surveys 2020" p 2, ibid.

62 ibid pp 25–28.
Note: In 2020, 18% of survey respondents indicated that they have experienced discrimination, close to the level in 2018 (19%) and 2019 (16%). There is, however, as in past years, substantial variation within the population. Data disaggregated by three groups — Australia-born, of English-speaking background and of non-English speaking background — obtains results in July 2020 within the range of the previous two surveys. Experience of discrimination was reported by:

- 14% Australia-born in 2020, 13% in 2018 and 2019
- 15% of those born overseas of English-speaking background in 2020, 23% in 2018 and 15% in 2019
- 31% of those born overseas of non-English speaking background in 2020, 35% in 2018 and 26% in 2019.

See "Mapping social cohesion: the Scanlon Foundation surveys 2020" p 6, n 60.

In regard to international commercial litigants, the globalisation of dispute resolution has placed a burden of cultural competency and inclusivity on our profession and we must adapt to meet these changes.

It should be acknowledged that courts alone cannot deal with all of the barriers I have discussed today. As stated by French CJ:

> courts have a distinctive constitutional function which is necessarily a limited one. They are not, and cannot be, holistic service providers. They deal with and decide cases brought before them as the law requires. They can nevertheless aspire to shape the ways in which they do that so as to maximise access to justice, notwithstanding diversity.[63]

It is also clear that enhancing access to legal services and addressing these barriers will have cost implications. The support of the wider legal community and the executive is crucial to ensure that we have adequate funding to adapt and remain inclusive. Legal Aid Commissions and Community Legal Centres must also be adequately funded to meet the needs of the wider community. These institutions are an essential layer in the support structure that endeavours to facilitate access to our legal system for Australia's diverse community.

It is over a quarter of a century since the High Court's decision in *Mabo*[64] — a decision which marked a turning point in the law's recognition of the unique legal rights of Aboriginal and Torres Strait Islander peoples. Since *Mabo,* the legal profession has seen a greater push toward recognising the unique issues faced by diverse groups in accessing the legal system.

In 2016, the Commonwealth Attorney-General announced that he would ask the Australian Law Reform Commission to examine the factors leading to Indigenous over-representation in our prison system.[65] I hope that this inquiry will provide an opportunity for the legal system, as well as the wider community, to reform the ways in which we cater to the needs of Indigenous Australians and produce better outcomes.

While our commitment to the core values of the legal system and the integrity of our legal institutions must not change, we must, as a profession, expand and adapt our way of doing business in order that our fundamental commitment to access to justice and equality before the law remains paramount. It is also important that the profession engage and support law reform in areas where current legislation and regulation are inappropriate in today's society. In that context I would like to note that the NSW Law Reform Commission celebrated its 50th anniversary and continues to do much work in this area.

63 R French, "Judicial Council on Diversity and Inclusion National Roundtable — access to justice for culturally and linguistically diverse women", opening remarks, 24 June 2015, p 3, available at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj24June2015.pdf, accessed 4 March 2021.

64 (1992) 175 CLR 1

65 The report, "Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples", was delivered to the Attorney-General in December 2017, and tabled on 28 March 2018. See www.alrc.gov.au/inquiry/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples/ accessed 4 March 2021.

On a slightly more gloomy note is the dismantling of the Corporations Market and Advisory Committee whose reports over the years provided much guidance and impetus to law reform in the corporations and securities area.[66]

What I think all this demonstrates is that, with one in four Australians born overseas and an increase in Australia's engagement in international commercial transactions, the legal profession and the courts in particular have the potential to become leaders in the way we ensure that "all manner of people" have equal access to our judicial institutions. We certainly have the obligation to endeavour to ensure that this occurs.

66 The Corporations and Markets Advisory Committee was abolished by Sch 7 of the *Statute Update (Smaller Government) Act 2018*, which commenced on 21 February 2018.

Attributes of a good judge*

The Honourable Justice E Kyrou†

The Honourable Justice Kyrou discusses some of the key personal attributes of a good judge, focusing on independence, impartiality, communication skills, patience, cultural awareness and tolerance, courtesy, compassion, humility, people skills, community engagement, a sense of perspective and a sense of humour.

As my perspective on the attributes of a good judge has been informed by my personal and professional experiences, I will commence by briefly outlining my background.

Personal background

I was born in a small village called Sfikia in northern Greece. The village is 103 kilometres south-west of Thessaloniki and is in a remote mountainous area. We had no running water, electricity, gas or sanitary facilities in our house.

Due to our poor living conditions and limited prospects, in 1968, my parents decided to migrate to Australia. I was then eight years old. No member of my family spoke English and we had little knowledge of Australia.

When we arrived in Australia by ship in April 1968, our first home was a Nissen Hut at the Broadmeadows Migrant Hostel.

I attended a succession of local disadvantaged government schools.

When I was growing up in Broadmeadows in the 1960s and 1970s, there was widespread racism against non-Anglo-Celtic migrants. I was the victim of racism until I was about 15. I was called "Wog", "Choc", "Greaser", "Dago" and "Spag" and was frequently told to go back to my own country.

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† Judge of the Court of Appeal, Supreme Court of Victoria

From the age of about 14, I set my sights on studying law at Melbourne University. This became my ambition because my experience in acting as my parents' interpreter from the age of nine taught me that the best way to protect yourself and your family is to know your legal rights.

In 1978, I enrolled in a combined law and commerce course at Melbourne University. I did not experience any racism at university. I did, however, initially feel out of place. Unlike me, most of the other law students came from private schools, were articulate and confident, and seemed to know each other.

I completed my course in 1982 and was awarded the Supreme Court Prize.

Professional background

In March 1983, I commenced articles of clerkship at the firm that is now known as Corrs Chambers Westgarth. I became a partner of the firm in July 1988. Two years later, in July 1990, I became a partner of the firm that is now known as King & Wood Mallesons. I remained a partner of that firm until my judicial appointment in May 2008. I was the second solicitor to be appointed directly as a judge of the Supreme Court of Victoria.

I did not experience any overt racism in the legal profession. Fortunately, in the 1980s, fierce competition forced firms to recruit and promote lawyers on the basis of merit.

Australia's legal profession today is ethnically diverse and that is one of its strengths. Ethnic diversity within the judiciary is a relatively new phenomenon. Victoria has had a number of judges with Italian backgrounds but I remain the first and only Victorian judge with a Greek background.

I will now discuss the attributes.

Independence

The first attribute of a good judge that I will consider is independence. In this context, independence means being free of any loyalties, duties or interests that might inappropriately influence the performance of a judge's functions.

Independence is of the essence in judicial office. Constitutionally, the judiciary is the third arm of government and performs the key role of ensuring that the other arms of government, the Parliament and the Executive, do not exceed or abuse their powers. The independence of judges is underpinned by their security of tenure and other constitutional guarantees. Unlike in some other countries, Australian judges cannot be removed from office simply because the government is not happy with their decisions. Independence enables judges to strike down invalid laws and to order the government to cease acting in an unlawful manner. Through a writ of habeas corpus, a judge can order that a person be released from unlawful detention. By standing between the state and its citizens, judges protect fundamental human rights and liberties. They can only do that if they are truly independent.

Upon his or her appointment, each Victorian judge takes the following oath of office:

> I ... swear by Almighty God that ... I will at all times and in all things discharge the duties of my office according to law, and to the best of my knowledge and ability without fear, favour or affection.

The words "without fear, favour or affection" mean what they say. A judge must make decisions in accordance with the law irrespective of his or her personal preferences and without having regard to whether a decision will be unpopular with the government or will generate adverse publicity. Because judges are independent, powerful institutions such as the government, the media and large corporations know that they cannot influence judges through threats, intimidation or bribes. There are no backroom deals in the judicial system. All the processes are transparent and decisions are made according to law in open court. Parties that are unhappy with a judge's decision cannot seek retribution against the judge. Their sole remedy is to appeal to a superior court which is also comprised of independent judges.

From a personal perspective, the racist abuse to which I was subjected between the ages of eight and 15 caused me to become withdrawn and to conceal my Greek identity. Once I realised that I should be proud of my heritage rather than being ashamed of it, I became much more confident and willing to stand up for myself and for what I believed in. I fought back against the bullies rather than allow them to get away with their abuse. A willingness to stand your ground and do what you believe is right in the face of threats and other pressure is an important feature of independence. It is a principle that I have followed since I was a teenager.

Impartiality

The next attribute is impartiality, which is closely aligned with independence. Impartiality lies at the heart of the judicial role and is reflected in the oath of office. Everyone who comes before the court must be treated equally regardless of whether they are wealthy and powerful or poor and marginalised. If a Minister of the Crown has infringed the law, a judge will make a finding accordingly and will not give the Minister any special treatment. If a judge were to compromise his or her decision-making so as to curry favour with the rich and powerful, or in order to receive positive media coverage, he or she would cease to be impartial and would seriously undermine the rule of law.

Communication skills

Good communication skills may not be an attribute in the strict sense but they are certainly essential for a successful judicial career. Judges are required to make rulings in the course of a trial and to give directions to witnesses and jurors. They must do so in a manner that can be quickly understood by those who must comply with the rulings and directions. In civil trials without juries and in appellate courts, judges must deliver written reasons for their decisions, often on complex factual and legal issues. The reasons must be clear and succinct so that the parties and other interested persons can understand them. If judges lacked good communication skills, the administration of justice would suffer.

Patience

It is commonly said that patience is a virtue. It is also an important attribute for judges. Judges need to be patient, particularly when listening to evidence that is implausible or to submissions which are dubious. Natural justice requires that the parties be given a fair opportunity to present

their cases before a decision is made. If a judge acts impetuously by expressing fixed views prematurely or by cutting off a party before its case is completed, an appellate court might order a new trial.

The patience of judges is often tested by self-represented litigants who are unable or unwilling to comply with normal court processes and judicial directions. The best way for judges to manage a trial with a self-represented litigant is to carefully explain the issues and each stage of the process in simple terms and to keep reminding the litigant of them every time he or she deviates.

I hold the record for presiding over the longest civil trial in Victoria that involved a self-represented litigant. The trial in the case of *Slaveski v State of Victoria*[1] ran for 115 days, the transcript comprised 16,166 pages and the length of my judgment was 655 pages. One media report of the trial described me as a "patient judge".

Cultural awareness and tolerance

Australia is a multicultural society which is made up of diverse ethnicities, languages, religions and cultures. The success of such a society depends on mutual understanding and respect. Peaceful coexistence requires the different cultural groups to understand and accept the key customs and practices of the other groups. Acceptance and inclusion of people who are different underpin multiculturalism. Conversely, negative cultural stereotypes strain harmony within the community and undermine multiculturalism.

Equality before the law and respect for other people's rights are important elements of the rule of law. As the cultural diversity in the community is reflected in the backgrounds of those who come before the courts as lawyers, parties, witnesses, jurors and members of the public, cultural awareness and tolerance are essential for judges. All court users must be treated with equal respect regardless of how different they are or how unpopular their cause may be. Judges need to be culturally aware in order to avoid the performance of any of their functions being inappropriately influenced — whether consciously or unconsciously — by assumptions that are based on cultural stereotypes. Every litigant is entitled to have his or her case decided on the evidence that has been adduced and tested in open court in the course of a trial rather than on any extraneous considerations.

My experience as a victim of racism in my youth has helped me to gain a deep appreciation of the importance of cultural awareness and tolerance. I seek to uphold these values in my work as a judge.

At times, my Greek background has assisted me to understand the evidence given by some witnesses with European backgrounds. For example, in a case involving a claim for damages for personal injuries, the plaintiff gave evidence that, as a result of the defendant's wrongful act, he locked himself in his house for three years. Counsel for the defendant then cross-examined the plaintiff at length to establish that he was lying because he was seen in the local bank

1 [2010] VSC 441

and supermarket on numerous occasions. Counsel appeared to be unaware that, in some cultures, exaggeration is considered a legitimate form of emphasis rather than as a dishonest lie. Counsel's cross-examination to establish that the plaintiff's evidence was literally untrue missed the plaintiff's point, namely, that he became withdrawn and did not socialise.

Courtesy

Courtesy is not only a basic human quality but an important attribute for judges.

Courtesy has not always been associated with the judiciary. In past eras, some judges regarded aloofness and gruffness as adding to judicial authority and to the mystique of the office. Those days are gone. Everyone who comes before the court is entitled to be treated with courtesy and respect. That includes self-represented litigants, people suffering a mental illness and those who are accused of heinous crimes.

I insist on courtesy in my court. If barristers are throwing barbs at each other in an offensive or disruptive manner, I tell them to stop. If a barrister shouts at a witness or behaves in a humiliating manner, I request that he or she desist. Courtesy is not incompatible with effective advocacy.

I try to practise what I preach. I tend to listen without interrupting except where this is necessary to clarify a point or to ensure there is order in the court. I do not make sarcastic or condescending comments. I believe that judicial courtesy bolsters the authority of the court rather than weakens it. I also believe that if judges treat people with respect, the community's respect for the judiciary will improve. Community respect is fundamental to a strong and independent judiciary.

Compassion

In my opinion, compassion has an important place on the Bench. That does not mean that a judge should find in favour of a litigant in a civil case because the judge feels sorry for him or her or should adjust the sentence in a criminal case depending on whether the judge empathises with the defendant or the victim. The law must be upheld and must be applied consistently in all cases. However, many areas of the law are unsettled or involve the exercise of a discretion. In such cases, there is legitimate scope for a judge to achieve a result that is not only legally correct but is also in accordance with the judge's view of what is fair in the circumstances of the case.

Judges are not computers that can be given particular inputs and then programmed to achieve an outcome which can be predicted with precision. Disputes involving laws that are so clear that they can be interpreted and applied precisely tend not to come before the courts. Generally speaking, civil cases come before the courts because the opposing positions are at least arguable. In clarifying ambiguities in the law there is often scope for a judge to adopt a common sense approach. Common sense and compassion often go hand-in-hand.

Humility

Humility is not out of place in the judiciary. Where judges are assisted by counsel in the course of a trial, it is appropriate to acknowledge this at that time or at the end of the trial. Likewise, where a judge is under a misapprehension in a case, it is not inappropriate to acknowledge the

error and to thank the party that clarified the position. Such respect and cooperation strengthens relations between the profession and the Bench and instills a sense of confidence in the humanity and integrity of the legal system in the eyes of court users.

People skills

Unlike lawyers, judges do not have clients and their income is not affected by the perceptions of court users about how well they perform their functions. Nevertheless, people skills are important for judges. Judges interact daily with lawyers, witnesses, jurors, members of the public and court staff. A judge with good people skills is better placed to manage trials efficiently and harmoniously than a judge without such skills.

Between 1968 and 1990 — a period of 22 years — I lived in the working-class suburb of Broadmeadows. As a student, I performed menial work in several factories in the area during the school holidays. I grew up with, and worked alongside, a diverse group of people, including many who would generally be regarded as battlers. There was no place for big words, Latin phrases or pomposity in Broadmeadows. My exposure to people from different walks of life while I was growing up in Broadmeadows has proved invaluable in my role as a judge, particularly in my interaction with parties, witnesses and jurors.

Community engagement

In my opinion, judges must remain active members of the community that they serve rather than become isolated from it. By remaining in touch with the community, judges augment the legitimacy and power of the judiciary. Examples of community involvement are hosting visits to the court by students, visiting schools, conducting moots for young lawyers and speaking at functions organised by the profession.

In some countries, judges live in official enclaves with high security walls and are driven to court in bullet-proof vehicles. Soldiers stand guard outside the courts in some countries. In Australia, judges exercise vast powers, but when they leave court, they go to their homes in the suburbs and blend into the community. In Victoria, judges are entitled to a public transport card and a government car but not a driver. I travel to and from the court by train and do not stand out in any way from other commuters. No one knows what I do for a living. When I visit the shops or attend a sporting event, I do not wear a judge's badge.

Sense of perspective

The next attribute is a sense of perspective. By this, I mean the ability to distinguish between what is important and what is not worth worrying about and to prioritise your time and energy accordingly. A sense of perspective is important for judges, particularly when presiding over a difficult trial. A trial may be difficult for a variety of reasons, such as the complexity or volume of the evidence and submissions, or misbehaviour by a party, a witness or even a legal practitioner. Self-represented litigants, in particular, pose serious challenges for judges. Where these difficulties arise in a trial, the judge must remain calm and be able to promptly make

rulings and give directions for the proper management of the trial. In assessing voluminous material and submissions, particularly where an urgent decision must be made, the judge must be able to quickly identify the material issues and put aside those that are immaterial.

Sense of humour

The administration of justice is a serious business, with important obligations and responsibilities. Court cases involve tremendous stress for court users and therefore the courtroom is not the place for judges to try their hand at being comedians. That does not mean, however, that judges must be perennially uptight and unhappy. A balanced lifestyle, interests outside the law, a down-to-earth personality and a good sense of humour can increase a judge's enjoyment of the judicial role. This can assist in ensuring that the mood in the courtroom is positive which, in turn, can ensure that the hearing is conducted in an efficient and harmonious manner.

Further references on impartiality and fairness

For further references on the topics of impartiality and fairness, please see the following:

- Australian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd edn (rev), 2022, ch 3.

Diversity

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Cultural diversity: reflections on the role of the judge in ensuring a fair trial*

The Honourable Justice H Wood†

Cultural diversity is a feature of contemporary Australian society. The author, a member of the Judicial Council on Diversity and Inclusion, identifies some barriers to justice that people from culturally diverse backgrounds experience in their interactions with the legal system and identifies practical ways that judicial officers can diminish these barriers in criminal trials. A foundational principle for trial judges accommodating such barriers is the obligation to ensure a fair trial.

Important and pressing issues confront trial judges arising from Australia's increasing cultural diversity. I reflect on some of these issues and the duty to ensure that criminal trials are conducted fairly.

My article begins with a consideration of principle that has application in the day-to-day work of trial judges. I then explore some practical issues and challenges that confront judges in trials involving culturally and linguistically diverse accused and witnesses. Some key themes that emerge are the importance of jury directions, modification of those directions to allow for cultural differences and to avoid pre-judgment and stereotypes, the essential role of counsel in identifying potential unfairness, the importance of cultural awareness, and the need for a culturally inclusive approach in fact-finding.

First, my article touches upon the increasing diversity and cultural complexity of our community and barriers to accessing the justice system.

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† Judge of the Supreme Court of Tasmania.

Australia's cultural diversity at a glance

A snapshot of contemporary Australia was provided by the Australian census in 2011:[1]

- 26% of Australia's population was born overseas[2]
- migrants who arrived in Australia in 2010–2011 came from over 200 countries
- after the UK and NZ, China and India are now the third and fourth largest contributors to Australia's overseas born population
- more than 300 different languages are spoken in Australian households
- of the most recent arrivals, Mandarin, Punjabi, Hindi and Arabic are the most commonly spoken languages, other than English,[3]
- linguistic diversity is characteristic of Australia's Indigenous communities. About 11% of Aboriginal people speak an Indigenous language at home.[4]

Barriers to justice

It is well-known that persons from culturally diverse backgrounds experience barriers in their access to and participation in the legal system. Specific barriers include lack of knowledge of the law and available services, limited or no English proficiency, and countries of origin having a different legal system or different law. The life experiences of some migrants give rise to mistrust of government agencies and/or the police, or lack of confidence in the legal system. There are also issues of multiple disadvantage, such as social isolation and limited financial resources.

The duty of fairness: cast in stone

In *Dietrich v The Queen*, there are emphatic statements on the requirement of fairness as a "central pillar of our criminal justice system".[5] Justice Gaudron stated "courts are duty bound to ensure that trials are conducted fairly".[6]

1 Judicial Council on Diversity and Inclusion, Submission No 120 to Productivity Commission, *Inquiry into Access to Justice Arrangements*, 29 November 2013, pp 1–2, at www.pc.gov.au/inquiries/completed/access-justice/submissions, accessed 10 March 2021.

2 In 2016, 33% of Australia's population was born overseas: see https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036, accessed 10 March 2021. In 2019, 30% of Australia's population was born overseas: see www.abs.gov.au/statistics/people/population/migration-australia/2018-19#state-and-territory-populations-by-country-of-birth, accessed 10 March 2021.

3 In 2016, Mandarin, Italian, Arabic, Cantonese, Greek and Vietnamese are the top 10 languages spoken: see www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Cultural%20Diversity%20Article~60, accessed 10 March 2021.

4 10% in 2016, at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20Article~12, accessed 10 March 2021.

5 *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ, McHugh J at 298. See also Gaudron J at 362, Deane J at 328.

6 ibid at 365.

Sometimes a trial may be unfair, even though conducted strictly in accordance with law. "The expression 'fair trial according to law' is not a tautology".[7] Fairness transcends the strict requirements of the law.[8]

In considering fairness, and the content of the duty, as well as remedies and solutions, *Dietrich* provides valuable guidance which resonates.

Of interest is the explicit reference in *Dietrich* to the provision of interpreters as an essential feature of a fair trial. Justice Deane expressly acknowledged the provision of interpreter services for an accused and his or her witnesses as inherent to a fair trial, so that if they "were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial ...".[9]

The inherent power to prevent an abuse of process is a useful addition to a judge's tool kit for the exceptional case. In insisting upon the need for adequate provision of interpreters, it is useful to have not only the high ground of principle, but a power which can be invoked, if necessary, to prevent an unfair trial from proceeding. If the only trial that can be had is one that involves a risk of the accused being improperly convicted, there can be no trial at all.[10]

It is impossible, in advance, to formulate exhaustively or even comprehensively what constitutes a fair trial.[11] The judgments emphasise that "the enquiry as to what is fair must be particular and individual".[12] That is not to suggest that the attributes of a fair trial involve "idiosyncratic notions of what is fair and just".[13] Importantly for our purposes, the inquiry as to what is fair enables trial judges to have regard to the circumstances of each case and the cultural background of an individual accused.

Relevantly, this case-by-case approach permits consideration of the existence of multiple disadvantage. Justice Gaudron recognised that the difficulties faced by an unrepresented person "may be exacerbated by problems such as illiteracy, language difficulties, and class or cultural differences".[14]

Another important tool is the rules governing procedure and evidence, giving trial judges the capacity to remove the source of the unfairness.[15] After all, fairness is often the purpose of these procedural rules.[16] We have rules that may require the exclusion of evidence that is unduly prejudicial, an order for separate trials or to change the venue of the trial, or special directions to the jury.

7 Gaudron J at 362.
8 Deane J at 326.
9 At 331. See also Mason CJ and McHugh J at 300.
10 Gaudron J at 365.
11 Toohey J at 353.
12 Gaudron J at 364.
13 ibid.
14 At 367, citing N Steytler, *The undefended accused on trial*, Juta & Co, 1988, p 1.
15 Brennan J at 323.
16 At 325.

Generally, these procedural rules are sufficiently flexible to enable the trial judge to address specific prejudice or unfairness that may arise in an individual case. The duty of the courts to ensure that only fair trials are had may involve "tempering" rules and practices to accommodate the case concerned.[17]

The guidance provided by *Dietrich* is invaluable, but what are some of the practical issues that trial judges are concerned with, particularly given the dimension of the jury as the decision-maker?

Practical issues concerning jury trials

Every day, in courtrooms across Australia, juries are invited to assess the credibility of witnesses and, in deciding veracity and truthfulness, they consider the demeanour of the witnesses when responding to questions. There are cases in which credibility is the deciding factor. Integral to the jury's role is that they make findings of fact about an individual's conduct and state of mind. They need to make decisions about what the accused did and why, and also make findings about victims and witnesses. They are required to stand in the shoes of accused, complainants and witnesses and apply their common sense and experiences of life and assess an account in light of their expectations. Jurors may reject evidence because it is not in line with their expectations of how the person would react if the account were true. A premise of our legal system is that juries are well-equipped for the task of judging human behaviour.

It is interesting to reflect on the jury's task in the context of culturally and linguistically diverse accused, complainants or witnesses. Some of the issues that warrant consideration are:

- our expectations of juries, given judges and magistrates attend cultural awareness education programs, while jurors walk in off the street with no education or training in cultural awareness
- the impact of different cultural norms upon the jury's assessment of a witness's credibility, namely, the risk of the jury misunderstanding demeanour because of cultural difference
- the accused or witness may belong to a culture or race which has a negative image or stereotype in some parts of the broader community. There is a risk that the jurors may have a negative bias, or that prejudice or assumptions may intrude in their fact-finding
- cultural norms may influence a witness's out-of-court conduct which is misunderstood by the jury, leading to adverse findings.

Cultural awareness

It is well accepted that judicial education and programs informing judicial officers about cultural awareness issues are invaluable. These programs provide knowledge of cultural differences and

17 Gaudron J at 363, 365. See also, Brennan J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49.

insight regarding barriers and disadvantages that impact on access to justice. They also open our eyes to the limits of our own life experiences, biases we may harbour, or assumptions that we all subconsciously make to some degree, even despite our best efforts.

At all stages of the trial process, judges must be able to identify stereotypes and false assumptions regarding racial and cultural issues. Section 41(1)(d) of the uniform evidence legislation provides a stark example of this obligation. The court has a duty to intervene to disallow improper questioning, as defined, whether or not an objection is raised (s 41(5)). Questions which have no basis other than a stereotype must be disallowed. In applying the section, the court is to take into account various factors, including ethnic and cultural background, and language background and skills.

An incidental benefit of a trial judge's vigilance about the impermissibility of this questioning is that it sends an important message to counsel and the jury. It emphasises the need for awareness of the limits of knowledge, the need for evidence-based reasoning, and that care is expected by the court.

It is interesting to consider the standard of cultural awareness that jurors should have to properly discharge their responsibilities. We can draw on benchmarking that is sometimes used in the context of court administration and public and community sectors. A "culturally competent" individual is someone who "comprehends key cultural values but recognises the limits of their knowledge and competence".[18] This individual has some knowledge of cultural differences, an awareness that they may have subconscious biases and may be making assumptions, an awareness of the limits of their experience, and an open mind to the possibility of difference. Surely, we need our juries to be culturally competent?

The trial judge's directions assume importance when it comes to the jury acquiring an awareness of the limitations of their knowledge and the existence of subconscious biases they may have. In some cases, there will be a need for the jury to be equipped with some specific knowledge of cultural differences.

Critical role of counsel

The court's capacity to produce as fair a trial as practicable in the circumstances of each case is dependent on our knowledge of the individual circumstances and background of the accused. Counsel have a critical role in identifying issues that could lead to unfairness and bringing them to the attention of the trial judge.

Defence counsel have an obvious role in relation to the accused, but so too do Crown counsel in relation to witnesses and complainants. Counsel need to be well informed about the cultural background of the individual and alert to difficulties that may emerge in the courtroom and procedures that may be invoked.

18 Family Law Council, *Improving the Family Law System for clients from culturally and linguistically diverse backgrounds*, 2012, p 91, at www.ag.gov.au/families-and-marriage/publications/improving-family-law-system-clients-culturally-and-linguistically-diverse-backgrounds, accessed 10 March 2021.

There may be measures that can be put in place with adequate notice in advance of the trial. It is preferable that counsel raise issues as early as possible to allow adequate time to effectively address them and organise any necessary resources, such as interpreters. Perhaps a special listing before the trial judge, or the involvement of the registry may be warranted. Counsel's role extends to identifying procedures to address the vulnerabilities of witnesses from different cultural backgrounds. For example, a procedure that exists in some jurisdictions is the availability of special measures for children and other witnesses, enabling evidence to be given from a remote room or permitting a support person to be present. A witness's cultural background is specifically mentioned as a relevant statutory consideration in some jurisdictions.[19] It is important for courts to promote a culture of conversation and to ensure that there are pre-trial opportunities for counsel to raise concerns.

The importance of trial directions

In *Jago v District Court of NSW*, Brennan J stated that often when an obstacle to a fair trial is encountered, it can be addressed by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.[20] The giving of "forthright" directions to the jury is an especially effective means of eliminating, or virtually eliminating, unfairness.

I agree with the importance attributed to the trial judge's directions in combatting potential prejudice to an accused. However, I must mention the powerful force of closing addresses. I have heard many fine and passionate addresses to juries, skillfully tapping into the jury's innate sense of fairness and justice, and the reality or perhaps ideal, of Australian values. I am sure some of those closing addresses have been decisive.

Having said that, trial judges' directions are potent — they carry the weight of the law.

Countering stereotypes and prejudice

Particular concerns arise in criminal trials if the accused's race or culture has a negative image in the community. The potential for prejudice is compounded if the criminal activity that is alleged "fits" the stereotype.

A trial judge's obligation to ensure a fair trial extends to countering any prejudice or stereotyping in this respect, whether subtle or extreme. It would likely require a direction to the jury to avoid making stereotyped or false assumptions. The potential for unfairness or a miscarriage of justice will mean the direction must be "forthright", and I add, compelling.

The timing of the direction may be significant. If it is a lengthy trial, the jury may have locked in a biased view of a witness and, by the end of the trial, the direction is just too late.

19 *Crimes Act 1914* (Cth), s 15YAB(1)(b)(i); *Evidence Act 1906* (WA), s 106R(3)(b); *Evidence Act 1977* (Qld), s 21A(1); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8(1)(b).

20 (1989) 168 CLR 23 at 47.

What about circumstances when the bias may operate to the forensic advantage of an accused because it attaches to a Crown witness's cultural or ethnic background? In the adversarial contest, there is a risk that defence counsel may seek to exploit negative biases. Judges have a role in identifying counsel's reasoning or addresses to the jury that are contaminated with assumptions or cultural stereotypes that the jury may be invited to adopt. Appropriate responses may include alerting counsel to the flaws in the reasoning, correcting counsel, or a direction to the jury.

Directions need to guard against jurors' subconscious prejudices that are capable of influencing jury deliberations, but which have not been endorsed or perpetuated in the courtroom. Trial judges are able to provide guidance in isolating and putting to one side these prejudices. Of course, it is not an easy task for jurors to self critically identify their own prejudices. Perhaps, it may assist to provide examples of biased thinking.

If the task facing trial judges in countering prejudices and biases seems monumental, we can find some comfort in the inbuilt safeguards in our criminal justice system. There are 12 decision-makers drawn from the community. It is likely that some jurors will have had experience with difference or disadvantage stemming from cultural or linguistic diversity, or be related to, or know someone who has had that experience.

The *Equality before the Law Bench Book* suggests that directions guiding the jury in specific ways may be necessary, such that jurors must try to avoid making stereotyped or false assumptions based on cultural norms.[21] Further, it is suggested that appropriate directions may include that the jury should treat each person as an individual and base their assessments on what they have heard or seen in court in relation to the specific person, rather than what they know, or think they know, about people from that background. It may be appropriate to direct the jury that, in assessing a witness's evidence, they need to consider what they may have learned in court about the culture or background of the individual and use this knowledge, rather than comparing how they might act in the circumstances. It is suggested that it may be helpful for the trial judge to be specific in directions about particular aspects of cultural difference.[22]

Informing the jury

The guidance from the *Equality before the Law Bench Book*, with its emphasis on the individual and evidence-based knowledge about cultural differences, is sound. However, it presupposes the jury will have acquired knowledge and some understanding of any relevant cultural differences during the trial.

A distinction can be drawn between instances where knowledge of a court user's culture or language is needed to put in place, and perhaps modify, court procedures, and where the accused or witness's cultural background should be evidence before the jury. In the former case, the

21 Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at [3.3.7]. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 1989–, Sydney, at [1-900]–[1-910].

22 ibid.

information may be provided to the court informally, such as from the bar table or at the trial judge's initiative. In the latter case, I reiterate the important role of counsel, this time in identifying evidence that is needed to ensure the jury is adequately informed.

At this time of social change, while we are still learning about cultures represented in Australia, there may be a particular need for evidence. It is interesting to reflect that in past decades, assumptions and myths abounded in the courtroom about domestic violence and child victims of sexual crimes. It was a time when defence counsel would say to the jury in closing, "the fact that the complainant did not leave her partner demonstrated her account was false" or "if that had really happened, surely the child would have told someone". A vacuum of knowledge in the community allowed false assumptions to flourish and evidence was needed to counter speculation. In some cases, expert evidence was led to explain why children may not complain, or why women may continue to live with their violent partners. Over time, juries and judges became knowledgeable and intolerant of such misconceptions and we rarely hear them in the courtroom now. Perhaps we can expect that that will eventually happen with cultural diversity. Ultimately, there may be a sufficiency of community knowledge which will protect against biases and prejudices.

Modifying well-settled directions

Another question for judicial officers is whether well-settled trial directions should be amended to take account of the cultural diversity of the accused, the complainant or other witnesses. If we consider an example from the suite of directions in relation to complaint evidence:

> … the question you should ask yourself is, did [the complainant] act in the way you would expect [him/her] to act if [he/she] had been assaulted as [he/she] said [he/ she] was? Is what [he/she] did the sort of conduct you would expect of a person who has been assaulted in that way? ... On the other hand, if [the complainant] has not acted in the way you would have expected someone to act after being assaulted as [he/she] described, then that may indicate that the allegation is false. But bear in mind when considering this issue that there may be good reasons why [the complainant] did not raise the allegation immediately following the alleged assault and that a failure to do so does not mean that the allegation must be false.[23]

This direction highlights the difficulties that may arise from cultural differences impacting upon a complainant's trust of authorities, the acceptability of speaking about matters of a sexual nature, or a complainant's familial structure. A direction which asks "what would you expect?" naturally invites a comparison with the juror's own cultural expectations. It is arguable that the basic content of these directions should shift in light of available cultural information to ensure the trial judge does not invite a comparison with the jury's (culturally dependent) expectations.

A trial judge could also reinforce to the jury that there is no text book response to the events in question, to bear in mind that we are all different and have different responses, and that there may be cultural differences that affect how a person reacts.

23 *Criminal Trial Courts Bench Book*, above n 21, at [2-570].

Demeanour

It is a legitimate part of the jury's role, in assessing a witness's credit, to take account of observations that are made of a witness's demeanour and behaviour in the witness box. However, behaviour and demeanour are influenced by culture. Demeanour that may seem evasive or uncertain to a dominant culture may, in fact, be courteous and deferential responses for individuals from other cultural backgrounds. If the jury is not aware of these differences in cultural norms and behaviour, there is a risk that they may mistakenly and unjustly make adverse findings.[24]

The *Equality before the Law Bench Book* provides a useful discussion of demeanour, behaviour and body language that is culturally-conditioned.[25] It may be the norm in some cultures to avoid direct eye contact, such as Vietnamese people and women from South-East Asian backgrounds. Some cultural groups tend to nod or shake their head for "yes" and "no" responses in the opposite way to Anglo-Celtic Australians. Silence may indicate lack of understanding, that the matter is considered too personal or intimate, or that the question should not be answered in front of someone of the opposite gender. The *Equality before the Law Bench Book*[26] and the Queensland *Equal Treatment Bench Book*[27] identify difficulties in relation to communication between Aboriginal and non-Aboriginal people. Direct questioning may be seen as offensive. Long silences are a positive and meaningful means of communicating. There are also particular linguistic and cultural impediments such as "scaffolding" and gratuitous concurrence.

In light of this discussion, is it time for a more subdued weight to be suggested regarding demeanour?[28] Is it better to inform juries that demeanour in the witness box may not be a useful marker of credibility because of cultural and other differences? This is in line with part of a suggested direction regarding assessing witnesses in the *Victorian Criminal Charge Book*:

> In making your assessment, you should appreciate that giving evidence in a trial is not common, and may be a stressful experience. So you should not jump to conclusions based on how a witness gives evidence. Looks can be deceiving. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.[29]

There may be value in a direction at the opening stages of the trial, even before the evidence commences, informing the jury that demeanour may not be a helpful guide.

24 For discussion about fallibility of demeanour and reference to culture, see Kirby J in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at 617–618. See also P McClellan, "Who is telling the truth? Psychology, common sense and the law" (2007) 19 *Judicial Officers' Bulletin* 75.

25 Above n 21, at [3.3.2.2]. See also Supreme Court of Queensland *Equal Treatment Bench Book*, 2005–, "6.5 Non-Verbal Communication" at pp 74–76, at www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf, accessed 10 March 2021.

26 Above n 21, at [2.3.3].

27 Supreme Court of Queensland, 2005–, Ch 9 at n 25.

28 See *Fox v Percy* (2003) 214 CLR 118, Gleeson CJ, Gummow and Kirby JJ at [30]–[33] for caution regarding demeanour in assessing credibility and reliability.

29 Judicial College of Victoria, *Victorian Criminal Charge Book* at [1.6.2], at www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1289.htm, accessed 10 March 2021.

A broader cultural perspective

I raise a question whether in the directions that are given, the dominant culture should be reinforced as the norm or the juries' standard for human behaviour. After all, we should expect culturally diverse juries. If we are not more inclusive, at the very least we risk alienating jurors. If we adopt a broader cultural perspective and acknowledge cultural differences, we promote confidence in our legal system and acceptance of the law.[30]

Should we be more explicit about our roles?

As a final question: if we are to have an inclusive cultural ethos within the court that acknowledges the life experiences of culturally diverse individuals who may have a mistrust of authority and acknowledges ignorance that exists about our legal system, should we all, judges, counsel and court staff, be more explicit in what we do?

Should trial judges take opportunities to inform the jury and the accused about how our system works? Some individuals from culturally and linguistically diverse backgrounds are unfamiliar with our trial process and find the adversarial system confusing and alien. Our explanation might include the impartiality of judges, our duty to deliver equal justice, to treat all people equally, to ensure that the accused's trial is fair, and the valuable role of defence counsel in challenging evidence — things we take for granted. In explaining trial processes we could refer to the rationale for the particular process such as procedural fairness. It is likely that if trial judges are more explicit about fundamental aspects of the legal system, there will be advantages to others in the broader community, such as accused who have a poor understanding of the criminal justice system.

Judicial Council on Diversity and Inclusion

There are limits to what the courts can achieve on a case-by-case basis. There is a need for research, identification of barriers experienced by Australia's culturally and linguistically diverse communities, and public consultation including feedback from key participants in the trial process. The judiciary and court administrators need independent advice on protocols and best practice guidelines for dealing with cultural diversity issues. These objectives are all part of the brief of the Judicial Council on Diversity and Inclusion.[31] The Council was formed under the auspices of the Council of Chief Justices and was chaired by Chief Justice Wayne Martin AC.[32] It comprises judicial officers from all Australian jurisdictions, as well as other members with relevant expertise, some from culturally diverse backgrounds. The Council is concerned with issues arising from cultural diversity of Aboriginal and Torres Strait Islander communities, as well as arising from migration.

30 R French, "Speaking in tongues: courts and cultures" (2008) 17 *JJA* 203 at 210–211.
31 See https://jcdi.org.au/, accessed 19 January 2023.
32 Current chair is Chief Justice Chris Kourakis.

The Council's work includes finalising a national protocol for interpreters, which responds to widespread and immediate concerns about adequate availability of interpreters, accreditation and skills, and conflicts of interest.[33] The protocols will provide guidelines and minimum standards that must be met by courts, judicial officers, the profession and interpreters. Other initiatives include judicial education to increase knowledge and understanding of cultural diversity issues. A Cultural Diversity Working Group[34] is developing an online cultural diversity training template specifically designed for judicial officers. Topics include barriers to intercultural communication and strategies, non-verbal communication, assessing the need for interpreting assistance and how to work effectively with interpreters. It is anticipated that the online training program will be available in early 2017.[35]

Conclusion

In drawing from *Dietrich*, the principles provide a foundation for trial judges in accommodating the difficulties faced by culturally diverse litigants. The principles give centre stage to the obligation to provide a fair trial. There is power to prevent a miscarriage of justice. They recognise that the court's obligation in eliminating unfairness involves more than merely following rules of procedure and trial process.

Undoubtedly, the solutions to unfairness will arise from a focus on the individual in individual cases. But that is not to suggest that we are to work in isolation. In fact, in order to ensure a fair trial for accused from culturally and linguistically diverse backgrounds and to adequately respond to the complex challenges that arise, collective knowledge and understanding is essential. I can see great benefits in sharing our insights, the awareness we will acquire, and the solutions we find.

33 "Recommended National Standards for Working with Interpreters in Courts and Tribunals" was published in 2017, at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD-Interpreter-Standards.pdf, accessed 19 January 2023; and updated in March 2022 at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.

34 Consisting of representatives from the Judicial Commission of NSW, the Judicial College of Victoria, the National Judicial College of Australia and the Family Court.

35 Judicial Council on Diversity and Inclusion published "Cultural diversity within the judicial context: existing court resources", on 15 February 2016, available at https://jcdi.org.au/wp-content/uploads/2021/06/JCCD_Cultural_Diversity_Within_the_Judicial_Context_-_Existing_Court_Resources.pdf, accessed 19 January 2023.

After R v Bayda; R v Namoa (No 8): continuing the dialogue with academics of Islam*

Mr B Rauf†

This article considers the concerns about Islam and the Qur'an expressed in R v Bayda; R v Namoa (No 8); the rise of Islamophobia in Australia; and recent initiatives to foster Muslim and judicial understanding of the experience of Australian Muslims and Islam.

Introduction

Following the decision in *R v Bayda; R v Namoa (No 8)*,[1] there has been a continuing discussion of certain observations in the judgment relating to passages of the Qur'an, the central religious text of Islam. This article considers the concerns expressed in *R v Bayda; R v Namoa (No 8)* in discussion with two senior academics, Professor Mohamad Abdalla[2] and Dr Salim Farrar,[3] who are well versed in issues associated with the administration of justice in Australia and are leading scholars in the Islamic faith.

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† Barrister, State Chambers.

1 [2019] NSWSC 24.

2 Professor Abdalla is a Professor in the School of Education at the University of South Australia and Director of the Centre of Islamic Thought and Education at that university. His recent books include *Leadership in Islam: processes and solutions in Australian organizations*, (with N Faris), Palgrave Macmillan, 2018, and *Islamic schooling in the west: pathways to renewal*, (with joint eds Dylan Chown and Muhammad Abdullah), Palgrave Macmillan, 2018. Professor Abdalla has had extensive involvement with the Australian Muslim community including acting as an Imam, advisor to government and non-government organisations and Vice-President of the Australian National Imams Council.

3 Dr Salim Farrar is an Associate Professor in Law at the University of Sydney. He specialises in Islamic Law, Muslim minorities and the law and Comparative Criminal Justice. He was called to the English Bar in 1992. He has also taught at the Universities of Coventry, Warwick, Manchester and International Islamic University Malaysia. His most recent book (with G Krayem) is *Accommodating Muslims under common law: a comparative analysis*, Routledge, 2016.

The article also considers the experiences of Islamophobia in discussion with Dr Derya Iner[4] and Rita Jabri Markwell.[5] Finally, this article considers some of the initiatives pursued to, on the one hand, assist Australian Muslims to more meaningfully participate in the judicial process and, on the other hand, assist judicial officers to better understand the experience of Australian Muslims and Islam. In Australia, there has been, according to Dr Iner, an "increasing and normalising" experience of Islamophobia. The increasing experience of such prejudicial and discriminatory conduct directed at Australian Muslims based on their religious identity or affiliation has occurred in a landscape where there is little legislative protection against such conduct.[6] This experience also needs to be considered, as one factor, in the discussion of general statements, whether by judicial officers or politicians, about Islam and Muslims.

The decision in R v Bayda; R v Namoa (No 8)

By way of background, the decision involved the sentencing of Sameh Bayda and Alo-Bridget Namoa, both of whom had been found guilty of conspiring with each other to do acts in preparation for a terrorist act. The offenders had been found to, inter alia, intend to advance the cause of Islam by violence including by conspiring together for Bayda to prepare a violent attack against non-Muslims on New Year's Eve 2015. They had been encouraged down such a path by jihadist propaganda.[7] Bayda was introduced to jihadist literature and information when he was aged 15.[8] Namoa converted to Islam aged 14 following an interaction with two female street preachers.[9] Bayda was sentenced to imprisonment for a period of 4 years and Namoa was sentenced to imprisonment for a period of 3 years and 9 months.

In the course of the judgment, reference was made to extremist material and that the two offenders understood it to be a "divine command for attacks on innocent Western civilians".[10] Reference was also made to verses of the Qur'an which, it was said, "unmistakably instruct the believers to undertake jihad in pursuit of universal Islamic dominance".[11]

Some of the materials which had been referred to were characterised as "sermons and writings" which were "serious and scholarly religious teaching".[12] In this context, it was noted that

4 Dr Derya Iner is the research coordinator and senior lecturer of the Centre for Islamic Studies and Civilisation at Charles Sturt University. She is also an Executive Board Member of the Islamophobia Register Australia and editor of *Islamophobia in Australia 2016–2017 Report* at https://cdn.csu.edu.au/__data/assets/pdf_file/0008/3338081/Islamophobia-Report-2019-Low-RES24-November.pdf, accessed 11 March 2021.

5 Ms Jabri Markwell has been a lawyer since 2003 and has worked mainly in the government sector. She is based in Brisbane, Queensland.

6 For instance, see Australian Human Rights Commission, *Freedom from discrimination: report on the 40th anniversary of the Racial Discrimination Act 2015*, p 5 and *Ekermawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29.

7 *R v Bayda; R v Namoa (No 8)* at [42]–[65].

8 ibid at [43].

9 ibid at [49]–[50].

10 ibid at [58].

11 ibid at [60].

12 ibid.

the "whole concept of inclusive tolerance would be destroyed if respect and protection were accorded to beliefs that are themselves violently intolerant and that conflict with secular laws designed to secure diverse freedom of worship for all".[13]

The decision states that if Australian Muslims make "a clear public disavowal" of certain verses as not being authoritative instructions from Allah (God), then terrorists' religious convictions might be weakened.[14] The decision further states that "(t)he incitements to violence which terrorists quote from the Qur'an cannot just be ignored by the many believers who desire harmonious coexistence" and "in the absence of express public disavowal of verses which convey Allah's command for violence", assurances that "Islam is a religion of peace" and that the faith of Muslims requires them to obey the laws of a country "are apparently contradicted".[15]

Reactions to the decision

Soon after the decision, the Australian National Imams Council issued a public statement noting its disappointment and reiterating its rejection of extremist interpretations of the Qur'an and the misuse of Islam by extremists. The Law Council of Australia, through its President, Arthur Moses SC, made the observation that "we must ensure that the criminal actions of a few are not used to unfairly judge, discriminate against or condemn a whole community and religion and that those who break our laws are the ones that pay the price and bear the punishment — not others wrongly implicated by association".[16]

The decision was also referred to, and relied upon, in a number of online publications seeking to, in part, draw a correlation between Islam and terrorism.[17]

The author spoke with Professor Abdalla and Dr Farrar to understand the Islamic theological perspective on some of the broader issues raised in *R v Bayda; R v Namoa (No 8)*.

Discussions with Professor Mohammad Abdalla and Dr Salim Farrar

What are the different approaches to textual interpretation of the Qur'an?

Professor Abdalla:

Interpretation (exegesis) of the Qur'an is the most important of sciences in Islam. Scholars distinguish between tafsir and ta'wil of the Qur'an. The former aims at explaining the "outer" or exoteric meaning of the Qur'an. The latter aims at explaining the "inner" or esoteric meaning

13 ibid at [76].
14 ibid at [78].
15 ibid at [78]–[80].
16 As reported in *The Sydney Morning Herald*: M Whitbourn,"Lawyers back Muslim community after controversial comments from bench", 8 February 2019, at www.smh.com.au/national/nsw/lawyers-back-muslim-community-after-controversial-comments-from-bench-20190207-p50wd7.html, accessed 10 March 2021.
17 For example, see www.michaelsmithnews.com/2019/01/australian-supreme-court-judge-says-islam-and-the-quran-are-to-blame-for-terrorism.html, accessed 10 March 2021.

of the Qur'an. There are multiple approaches to the textual interpretations of the Qur'an. Orthodox Muslim scholars suggest that an exegete of the Qur'an must have a number of specialisations including: expert knowledge of the principles of jurisprudence, Arabic grammar and morphology, rhetoric, literal and contextual understanding of the Qur'an, the science of abrogation, the Sunnah and must be able to contextualise the interpretation of the Qur'an to reflect contemporary realities.

Dr Farrar:

The Qur'an is not an "open book", although it is "clear" for those with comprehension and understanding. We rely on scholars' interpretations who are informed by the Prophetic example and aware of the context(s) and different applications of the Revelation. One cannot simply flip open a page, read and assume to comprehend a verse's full and proper meaning. That is not to say that there are not splinter groups or individuals, historically and presently, separate from the majority who have either denied the validity of "interpretation" or give verses of the Qur'an meanings which the majority do not accept.

Do you believe that there are parts of the Qur'an that are open to interpretations which may incite violence? To the extent that jihadist literature relies on violent interpretations of the Qur'an, what position do the orthodox and mainstream schools of thought have relating to these verses?

Professor Abdalla:

It is true that there is text contained in the Qur'an that seems very violent. When such text is not read in its proper textual and historical context, it is manipulated and distorted by Muslims and non-Muslims alike.

Muslim scholars argue that those who read the Qur'an should keep at a minimum the following principles in mind: an awareness of the inner coherence in the Qur'an; to study at the least the preceding and following verses for a sense of the immediate context; look at all of the verses that deal with the same subject in the book; the occasion of revelation; the historical context of a particular verse; a cursory knowledge of Prophet Muhammad's life; finally the way the Prophet implemented a particular directive in a verse of the Qur'an in his own life.

According to mainstream and orthodox Muslim scholars, the use of the Qur'an to justify the killing of any person, including civilians, is prohibited, completely wrong and a misguided innovation. (There is an exception where people are engaged in a field of battle, and even then, it extends to those engaged in the combat, much like the position under international law where there are designated rules of combat.) The nature of this prohibition is so specific and well-defined that there can be no legal justification, nor can there be a legitimate Sharia excuse, for circumventing this scholarly consensus.[18]

18 Shaykh Muhammad Afifi Al-Akiti, "Defending the transgressed by censuring the reckless against the killing of civilians", 2005, at http://warda.info/fatwa.pdf, accessed 11 March 2021.

Indeed, one of the highest objectives of Islamic law is the preservation of life or anything which leads to the preservation of life (for instance, training of medical staff, investment in cures and medicine, establishing and supporting hospitals and so on).

Dr Farrar:

There are verses in the Qur'an which are open to interpretations of violence, just as there are verses in the Christian Bible, but they do not incite violence. Rather, it is violent people who incite violence; they use and misinterpret religious texts for their own purposes. In an authentic saying of Prophet Muhammad (peace be upon him), narrated via the famous Companion, Abdullah ibn Omar, he warned: "What I fear greatly for my nation is a man who mis-explains the Qur'an and who takes it out of context."

There were individuals and groups in Islamic history who misinterpreted the Qur'an with devastating and violent consequences (including against mainstream and orthodox Muslims). The first of these was the Kharijites (during the time of the Companions of the Holy Prophet) who regarded it lawful to kill all those who disagreed with them. The orthodox and mainstream schools of thought regarded the Kharijites, and those like them, as misguided and even beyond the fold of Islam. They certainly did not regard their beliefs or interpretations as canonical. Unfortunately, there are those today who similarly misinterpret the Qur'an. Their interpretations are no more Islamic than those of the Kharijites.

Do you think there are parts of the Qur'an that should be repudiated?

Professor Abdalla:

There is a consensus position among Muslims, in the past and present, that the Qur'an is the speech of God, sent down upon the last Prophet Muhammad, through the Angel Gabriel, in its precise meaning and precise wording. Therefore, no parts of the Qur'an can be repudiated. However, interpretations of the Qur'an that contravene the rules of exegesis (as outlined above), scholarly consensus, or the fundamentals of Islam can and have been repudiated. For example, in his scholarly article "Defending the transgressed by censuring the reckless against the killing of civilians,"[19] Shaykh Al-Akiti repudiates the interpretations of violent extremists' understanding of jihad. Further, an open letter to Abu Bakr al-Baghdadi (the leader of ISIL/ISIS), signed by hundreds of Muslim leaders and scholars, repudiates the group's actions and ideology based on the Qur'an and other jurisprudential texts.

Dr Farrar:

There is no basis for any part of the Qur'an to be repudiated. A Muslim is a Muslim because they believe all of the Qur'an was revealed to Prophet Muhammad; every single letter and word.

19 ibid.

If a person says that Muslims should repudiate even one letter of the Qur'an, they are telling them to renounce their faith. If a Muslim were to accept that part of the Qur'an was wrong, then logically, the same might flow for other parts of the Qur'an or its entirety. All of the Qur'an is revelation from God. The issue is one of interpretation only.

Do you believe that the Islamic faith is reconcilable with a liberal democratic society such as Australia?

Professor Abdalla:

A substantial amount of scholarly literature supports the claim that the major tenets of liberal democracy are compatible with Islam and that Islamic values and norms actually encourage "democracy". I support this claim. Scholars argue that Islam and its laws have inherent values compatible with important elements of democracy, including: shura (consultation); ijma' (consensus) and ijtihad (independent legal reasoning). Furthermore, a focus on the fundamental moral values shows that the tradition of Islamic political thought contains both interpretative and practical possibilities that can be developed into a democratic model. The Sharia and its sources (Qur'an and Sunnah) did not specify a particular form of government, but advocated for principles of "good governance". The Sharia identified a set of social and political values that are central to any form of government. In fact, it can also be argued that: "In espousing the rule of law and limited government, classical Muslim scholars embraced core elements of modern democratic practice."[20] Three values are significant: "pursuing justice through social cooperation and mutual assistance (Qur'an 49:13 and 11:119); establishing a non-autocratic, consultative method of governance; and institutionalising mercy and compassion in social interactions (6:12; 21:107; 27:77; 29:51; 45:20)".[21]

In the area of Islamic jurisprudence, Muslims are obliged to comply with the laws of their country of residence as premised on the Qur'anic dicta demanding fulfilling "obligations" and "covenants". The Qur'an states, for example, that "You who believe, fulfil your obligations" and "Honour your pledges: you will be questioned about your pledges". Muslim jurists have also understood that the ultimate authority in any country belongs to the government, and so in a non-Muslim context it is counter-intuitive to assume that individual Muslims, or the religious leaders, can take the law into their own hands.[22]

Dr Farrar:

I do, but it depends what type of "liberal" society one is referring to. I also think it is reconcilable, (almost), with any democratic society, hence why Muslim communities have endured across the world.

20 Khaled Abou El Fadl, "Islam and the challenge of democracy", Boston Review, 2003, at https://bostonreview.net/archives/BR28.2/abou.html, accessed 11 March 2021.

21 ibid.

22 M Abdalla, "Sacred law in a secular land: to what extent should Sharia law be followed in Australia?"(2012) 21(3) *Griffith Law Review* 657 at https://research-repository.griffith.edu.au/handle/10072/58762, accessed 11 March 2021.

Discussions about Islamophobia with Dr Iner and Ms Jabri Markwell

What are the experiences of Islamophobia?

Dr Iner:

It is continually increasing and normalising. The upcoming Islamophobia Report reveals concerning findings.[23] Contrary to the assumptions, a majority of the incidents (60%) occurred in guarded areas, where police officers, security, trackwork personnel, surveillance cameras and other workers or officials were in force. A large proportion (64%) of incidents took place in commonly frequented places such as shops, schools, universities, on public transport, in traffic, carparks, petrol stations, official buildings, airports, hospitals, events and leisure centres.

Ms Jabri Markwell:

The Christchurch terrorist manifesto, grounded in the Great Replacement Theory, is becoming increasingly mainstream online, fuelled by the lack of deterrents in Australia's civil and criminal laws. According to this theory "even so called moderates" are a threat, as Fraser Anning famously said in one of his election campaign posters in 2019. It has now become mainstream online to dehumanise Muslims as a "disease" and demonise them as "terrorists, paedophiles and tyrants". Yet in public discourse, arguments are routinely made that such incitement to hatred should be left uncensored; that religion is different from race. This overlooks the serious endangerment and marginalisation caused by that speech as Australian Muslims are readily identifiable by their names, dress, appearance and attendance at places of worship.

According to a national survey by the Australian eSafety Commissioner, 53% of Australian youth aged 12–17 have witnessed anti-Muslim harmful content online.[24] With Australian youth representing the largest social media users in the country, one cannot underestimate the impact this has on the psychological wellbeing of Australian Muslim youth. Correspondingly, researchers based at the University of South Australia's Centre for Islamic Thought and Education are finding a high level of identity stress now experienced in this generation.[25] As a community, we are looking at how education is delivered to support this generation to critically process arguments that are made and understand their rights.

23 D Iner, above n 4.

24 eSafety Commissioner, "Online hate, bullying and violence" at www.esafety.gov.au/about-us/research/young-people-social-cohesion/online-hate-bullying-violence, accessed 11 March 2021.

25 M Abdalla, "The elephant in the room: Islamophobia and its impact on the Muslim learner", Centre for Islamic Thought and Education, 16 July 2020, www.unisa.edu.au/research/centre-for-islamic-thought-and-education/news-events/events/the-elephant-in-the-room-islamophobia-and-its-impact-on-the-muslim-learner/, accessed 16 March 2021.

In your experience, what impact can generally stated negative comments about Islam or Muslims in the public domain have on the broader Australian Muslim community?

Dr Iner:

The impact is quite profound. The lack of clear distinction between criminals and terrorism convicts and ordinary Muslim citizens in the public discourse increases anti-Muslim sentiments and Islamophobic attacks. The *Islamophobia in Australia 2014–2016* report[26] illustrated the increasing Islamophobic incident reports to the Register[27] after particular terrorist attacks, political rhetoric and legislative initiatives in Australia.

Ms Jabri Markwell:

The effect of such statements, particularly in judicial decisions and political statements, can be demoralising and frustrating. There is a real concern that such public statements are readily utilised by those who wish to advance anti-Islamic sentiment in an environment where there are few legislative protections, if any, for Australian Muslims against vilification. They can also have the effect of perpetuating a burden on Australian Muslims to constantly resist and address suggestions that they are somehow indirectly responsible for terrorist interpretations of the Qur'an and the actions of terrorists.

Some of the observations expressed in *R v Bayda; R v Namoa (No 8)* and also *R v Khaja (No 5)*[28] demonstrate that it is vital for Australian Muslim bodies to engage with the judiciary in an open and honest dialogue.

Sources of Islam and Islamic scholarship are not easy to understand, summarise, or discuss. Understanding the complexity and nuances of debate, even within the Muslim community, would enable the judiciary to make more insightful comments. We also have academic researchers like Dr Jan Ali, Dr Riyad Rahimullah and others who have studied the process of radicalisation and de-radicalisation in the Muslim context. This knowledge and insight needs to be shared and understood.

Continuing dialogue and engagement

It is important that there is a continuing dialogue and engagement to address some of the misunderstandings and concerns which have presented in, on the one hand, the perceptions of some Australian Muslims of the judicial process and, on the other hand, general views expressed in political statements and judicial decisions relating to Islam and Australian Muslims. In the legal profession, in recent times, there have been a number of positive initiatives which have sought to develop an improved understanding and engagement.

26 D Iner (ed), *Islamophobia in Australia 2014–2016*, Charles Sturt University, 2017 at https://researchoutput.csu.edu.au/en/publications/islamophobia-in-australia-2014-2016, accessed 11 March 2021.
27 Islamaphobia Register Australia at www.islamophobia.com.au/, accessed 11 March 2021.
28 [2018] NSWSC 238.

For instance, in December 2017, in discussion with the Judicial Commission of NSW, the Australian National Imams Council developed and issued an Explanatory Note on the Judicial Process and Participation of Muslims.[29] The Explanatory Note was, in part, a response to the refusal by Ms Elzahed to stand for a judge of the District Court of NSW and the ensuing media coverage. Subsequently, the Explanatory Note has been referred to by judicial officers in a number of decisions.[30]

As a further example, since 2013, at the initiative of the Law Society of NSW and the Muslim Legal Network of NSW, there has been an Open Law Term Ceremony at the Auburn Mosque in Western Sydney to mark the opening of the law term in NSW. The event has been regularly attended by judicial officers, members of the legal profession and community leaders. The event has provided a significant and important opportunity for interaction, engagement and positive discussions.

Since 2014, a Ramadan dinner has been held with the legal profession in which speeches of inclusivity and prayers for the betterment of society are offered. This event is an occasion when people from different perspectives and backgrounds come together to share an evening as members of the legal profession with shared professional values and aspirations.

Finally, the Judicial Commission of NSW has been engaging with organisations such as the Australian National Imams Council to explore opportunities for dialogue and education. These and similar collaborative efforts ought to be acknowledged and commended.

29 At www.anic.org.au/wp-content/uploads/2018/02/Explanatory-Note-on-the-Judicial-Process-and-Muslims.pdf, accessed 11 March 2021.

30 For instance, *Elzahed v State of NSW* (2018) 97 NSWLR 898; *R v Dirani (No 34)* [2019] NSWSC 1005; *Decision Restricted* [2019] NSWSC 314; *Decision Restricted* [2018] NSWSC 945; *R v Alou (No 4)* [2018] NSWSC 221; *R v Chaarani (Ruling 1)* (2018) 275 A Crim R 456; *Hawkesbury City Council v Kara-Ali (No 3)* [2019] NSWLEC 55.

Explanatory note on the judicial process and participation of Muslims

The Australian National Imams Council (ANIC)

This document is intended as an explanatory note on matters which may be raised in connection with Muslims participating in court processes. It has been prepared by the Australian National Imams Council to:

- *give practical guidance and explanation to members of the Australian Muslim community of the etiquette and behaviours expected of persons engaging in the judicial processes so that they may act consistently with these without compromising their religious beliefs; and*
- *provide information to judicial officers on Islamic concepts and practices as they relate to matters which may be raised in connection with Muslims participating in court processes.*

In developing the guidelines it is acknowledge d that in any court matter, the presiding judicial officer has duties to uphold the rules of justice and apply the established court practices and conventions, particularly as they relate to persons appearing before a court.

The meaning of justice in Islam

In Islam, justice means to put things in their rightful place and to treat others equally. Justice is also regarded as a moral virtue and an important aspiration and part of the human personality, as it is in the Western tradition. The equality of justice creates stability by ensuring that all people have equal rights and understand their duty. The Holy Quran, the sacred scripture of Islam, considers justice to be a supreme virtue. In the words of Allah:

> O My servants, I have forbidden injustice for Myself and forbade it also for you. So avoid being unjust to one another. (Saheeh Muslim)

Justice represents moral integrity and fairness, as it places things where they belong. In Islam, justice stands next in order of priority to belief in God's exclusive right to worship. This is a position affirmed in the Holy Quran; for instance, see Chapter 16 at [90]; Chapter 5 at [8].

Therefore, properly considered and understood on the basis of scriptural texts, justice is an obligation in Islam and injustice is forbidden.

Sharia law

A very common term used in the Holy Quran and in Islamic law is Sharia or Sharia law. Sharia or Sharia law is the Islamic legal system derived from the religious principles of Islam, particularly the Holy Quran and the Hadith (prophetic traditions). The term sharia comes from the Arabic language term Sharīʿah, which means a body of moral and religious law derived from religious prophecy.

Sharia to Muslims is a way of life and guides the way of worshipping God. Sharia includes crime and economics, as well as personal matters such as family affairs, hygiene, diet, prayer, everyday etiquette and fasting.

The Sharia also uses guidelines such as ijma (usually the consensus of the scholars in one particular era), Qiyas (analogy derived from the primary sources), and Urf (customs). Urf is particularly significant in an Australian context as matters of custom can become imported into religious obligations and conditions which then also apply by force of religious law.

The authority of the Judge and compliance with Australian laws

Muslims who live in Australia are considered to be living in that country under a covenant. They must, therefore, comply with the laws of that country of residence as this is considered in Islam as loyalty to the covenant which they have entered into. This is a position mandated by the Holy Quran: for instance, see Chapter 5 at [1]; Chapter 17 at [34]; and Chapter 16 at [91].

A Muslim should not break or violate oaths or promises. He or she will not be considered a faithful Muslim if he or she does so. Among the characteristics of a hypocrite that is mentioned in Islamic traditions is that he: "acts treacherously toward covenants (pledges), and when entrusted he betrays."

Scholars have stated that those who enter any country have to adhere to the respective laws and regulations even if they have entered those countries illegally, and they have no justification for breaking those laws, since they were entrusted to abide by those laws upon entry.

Court protocols

Standing up for the Magistrate or Judge

There is no prohibition or restraint on a Muslim standing up for the Magistrate or Judge as a sign of respect to the Magistrate or Judge and to the court.

Courts are very formal places. Everyone in court, including lawyers, police, witnesses, defendants and members of the public must follow the court's procedures. The Judge or Magistrate is in charge of the court. They should be shown respect by everyone in the courtroom. Standing up for the Magistrate or Judge is a sign of respect to the court.

This sign of respect is also reflected in the teaching of Islam. The Prophet (peace be upon him) commended his companion to stand up for one of the chief companions by the name of Sa'ad ibn Muath in which he said, "stand up for your chief".

In the famous Hadith collection, Al-Bukhari states that a funeral procession passed before the Prophet (peace and blessings be upon him), and when he saw it he stood up (showing respect to it). Then it was said, it is a funeral of a non believer. The Prophet replied, "Isn't it a soul!".

Bowing to the Magistrate or Judge

As is the position above, there is also no prohibition or restraint on a Muslim, when entering or leaving a courtroom, to stand and lower their head in a mark of respect. To do so is also consistent with the established custom of the courtroom.

During court proceedings, it is customary to lower one's head to the Magistrate or Judge whenever one enters or leaves a courtroom. This is a custom of respect to the court. In the Muslim faith, there are two types of lowering of the head:

1. lowering of the head, or bowing, to the creator as a form of worship, and
2. lowering of the head to the creation as a form of respect.

In this regard, examples are given in the Holy Quran when persons were directed to lower their heads to creation: for instance, see Chapter 2 at [34]; Chapter 12 at [100]. These examples relate to the angels being directed to prostrate to Prophet Adam, and the parents of Prophet Joseph bowing to him as he sat on the throne.

One can also find such customs of respect in ordinary interactions, for instance, in practices pertaining to certain martial arts.

Oaths and affirmations

Muslims can affirm their evidence; or they can make an oath on the Holy Quran; or swear by the name of God or any of the attributes of God. If the Holy Quran is used, it is not necessary to make an oath by placing one's hands on the Holy Quran. An oath can be made by reference to the Holy Quran.

A person appearing as a witness or interpreter in court may choose to take an oath or make an affirmation. The court will inform the person that he or she has this choice, unless satisfied that the person has already been informed, or knows that there is a choice. It is not necessary that a religious text be used in taking an oath.

Procedure for administering an oath upon the Holy Quran:

- The witness should be handed the Holy Quran (in its cover)
- The witness should be asked to remove the Holy Quran from its cover
- The witness should be asked if he/she recognises the book as a true copy of the Holy Quran
- The oath should then be administered,
- The witness should be asked to return the Holy Quran to its cover.

There are times when someone is not allowed to touch the Holy Quran such as not being in the state of ablution. In these instances, it is appropriate to have the person make an oath by reference to the Holy Quran.

Being deceptive or dishonest under an oath is a major sin in Islam and punishable by God.

Dress code

Standard of dress

In the Muslim faith, both men and women should maintain the Islamic dress code: Chapter 24 at [31]

Muslim women commonly wear a headscarf referred to as a hijab to cover their head and hair. On fewer occasions, women may wear a Burka or Nikab, which also covers their face.

The Hijab and Burka or Nikab are seen as a sign of modesty, and a symbol of religious faith. However, neither of these garments, should the women choose to wear them, present as an obstacle to participation in the courtroom process.

Testimony

It is not contrary to Sharia law for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is not contrary to Sharia law for the Magistrate or Judge (male or female) to look at her in order to know or identify who she is, make assessments as to credibility where this is an issue and protect the rights of all concerned.

Indeed, the position in Islamic Law is indicated by the following authoritative pronouncements. Imam al-Dardeer said:

> It is not permitted to give testimony against a woman in Nikab until she uncovers her face so that it may be known who she is and what she looks like. (Al-Sharh al-Kabeer li'l- Shaykh al-Dardeer, 4/194)

Imam Ibn Qudaamah said:

> The witness may look at the face of the woman against whom he is testifying so that his testimony will speak about her in specific terms.

Imam Ahmad said:

> He cannot testify against a woman unless he knows who she is. (Al-Mughni, 7/459; al-Sharh al-Kabeer 'ala Matan al-Muqni', 7/348, bi haamish al-Mughni; al-Hidaayah ma'a Takmilat Fath al-Qadeer, 10/26).

Court cases

If called upon to give evidence in court, it is not contrary to Sharia law for a woman to uncover her face and for it to remain uncovered when she is giving evidence so that the magistrate or judge may identify her; make assessments as to credit; and in order to protect the rights of all the parties in the proceedings.

Dealing with the opposite gender

Shaking hands with the opposite gender

According to the majority of Islamic jurists, it is not permissible for a man to shake hands with a woman who is not close kin and vice versa. Not shaking hands can be perceived as offensive in some cultures, including Australia, but it should be noted that no offence is intended by a practising and devout male or female Muslim who conforms to such a practice.

However, this should not ordinarily arise as an issue in courtrooms given that there is no requirement nor custom of parties or legal officers shaking hands in the courtroom.

Eye contact and body language

Lowering the gaze and limiting eye contact are outlined as commendable practices in the Holy Quran. It is considered to be a part of modesty and respecting the opposite gender: Chapter 24:30-31.)

A Muslim applying this principle in his or her life may make a habit of this behaviour and may do it even in front of a Magistrate or Judge, including when they give evidence. If it occurs, this should not, in itself, be construed as the witness being evasive or troubled by the testimony which is being given. Rather, it is likely to be a sign of modesty or belief or practice as to modest behaviour.

Autopsy and handling deceased persons

Muslims believe in God and the afterlife. After a Muslim has died, it is a religious requirement that the body be buried immediately. Cremation is not permitted in Islam. Mourning lasts for three days after the burial, another reason why Muslims bury the deceased as soon as possible.

It is highly recommended in Islam to proceed with the funeral procession as soon as possible. That includes, washing, shrouding, praying on and burying the dead. This is believed to be a good sign for the deceased.

Dissection or autopsy are NOT recommended practices in Islam. Most religions have an unfavourable view of autopsy, and Islam is among them. It has called for respect of the body, even after death and prohibited its disfigurement.

Therefore Islam respects the sanctity of the deceased and outlines strict instructions to respect and honour them.

However, contemporary scholars have spoken about the autopsy process and have stated it is permissible to dissect a dead body for one of the following purposes:

- examination in the case of a criminal investigation to determine the cause of death or if any crime was committed; that is when the (Coroner) is uncertain of the cause of death and thinks that dissection or autopsy is the way to find out these causes; and
- investigation of diseases in cases where dissection or autopsy is called for so that in the light of this post mortem examination, precautions may be taken or suitable treatments may be determined for those diseases or necessary legal requirements fulfilled.

Introducing the national online cultural diversity training program

The Honourable Mr W Martin AC QC*

An online training program on cultural diversity, launched in June 2017, was designed for judicial officers. Developed under the auspices of the Judicial Council on Diversity and Inclusion, the program draws on a number of resources, including the Family Court of Australia's highly regarded online cultural competency training course.† The following article outlines the program's objectives and how it assists judicial officers in dealing with cultural diversity in their courts.

Introduction

In his "State of the Australian judicature" address in 2016,[1] former Chief Justice the Honourable Robert French AC stated that equal justice as, "a necessary element of the rule of law, cannot be provided if the courts cannot appropriately respond to cultural and linguistic barriers, to access to them and engagement with them".

The Judicial Council on Diversity and Inclusion (JCDI),[2] established in 2014, provides advice to the Council of Chief Justices of Australia and New Zealand on matters arising from the interactions of migrants, refugees and Indigenous people with the court system.[3] It has undertaken a number of projects designed to achieve the objective of administering equal justice in Australian courts by responding to the evolving needs of a culturally diverse society.[4]

* Former Chief Justice of Western Australia; Chair, Judicial Council on Diversity and Inclusion. The author acknowledges the assistance of Ms Antonia Miller, Judicial Commission of NSW, in the preparation of this article.

† Special thanks to Ms Leisha Lister, Executive Officer, Family Court of Australia.

1 R French, "The state of the Australian judicature" (2017) 13 *TJR* 153 at 158.

2 Previously known as Judicial Council on Cultural Diversity.

3 ibid at 157. See also T Bathurst, "Doing right by 'all manner of people': building a more inclusive legal system" (2017) 13 *TJR* 277 and *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021.

One such project is the development of an online training program on cultural diversity for Australian judicial officers. Judicial officers can visit the JCDI website[5] and Judicial Commission of NSW public website[6] for information on how to access it.

The nine modules

Nine modules have been designed to help broaden judicial officers' knowledge of the ramifications of cultural diversity for their daily work.[7] The modules aim to go beyond a simple awareness of cultural diversity and to provide judicial officers with some practical skills to perform their duties in a culturally informed and appropriate manner. To that end, the nine modules were developed using the eFront learning management system, an online training platform, hosted by the Judicial Commission of NSW. The six primary objectives of the program for judicial officers who complete it are that they should be able to:

- encourage a high level of cultural awareness in the courtroom
- identify when intercultural misunderstandings may have occurred
- understand how to use plain English principles to aid multicultural communication
- assess the need for interpreting assistance
- work effectively with interpreters
- apply cultural awareness principles in practice.

Encourage a high level of cultural awareness in the courtroom

Being aware of what you think

The first module, entitled "Cultural awareness", provides an opportunity for participants to self-assess their current level of cultural awareness by posing 12 questions. Questions include estimating how many hours it takes a non-English speaker to learn basic English. Some may be surprised to learn how long it takes for a non-English speaker to achieve an intermediate level of proficiency. And of course, that would be far from the level where he or she can fully understand, without any assistance, what is happening around them in an often stressful courtroom situation.

Other questions in this module are designed to demonstrate the participant's understanding of substantive equality. These highlight the distinction between formal equality and an approach

4 See R French, above n 1, for details of the other projects including developing national standards relating to the use of interpreters in court and access to justice for migrant, refugee and Indigenous women.
5 See https://jcdi.org.au/, accessed 19 January 2023.
6 At https://elearning.judcom.nsw.gov.au/, accessed 21 April 2021.
7 W Martin, "Judicial Council on Cultural Diversity" (2015) 24 *JJA* 214 at 221.
The Judicial Council on Cultural Diversity is now known as the Judicial Council on Diversity and Inclusion.

which not only acknowledges cultural differences but requires that these be actively taken into consideration. The overriding aim of this program is to provide judicial officers with more tools to achieve substantive equality and develop best practices with regard to culturally diverse parties in the courtroom.

The program also emphasises that developing cultural awareness or competency is not a one-off learning experience but an on-going responsibility for judicial officers if they are to properly discharge their functions. Similarly, the online training program is regularly maintained to capture the latest changes in policy, protocols, legislation and case law.

What distinguishes a culturally aware judicial officer?

Judicial officers are obliged to treat all parties fairly regardless of gender, ethnicity, disability, literacy levels or any other personal characteristics. Taking account of cultural diversity is one aspect of administering justice fairly to achieve substantive equality. In this context, it is significant that more than 28.5% of the population of Australia were born overseas.[8] A culturally aware judicial officer understands that he or she will need to make appropriate adjustments when interacting with people from diverse backgrounds.

This requires, first and foremost, that the judicial officer identify and be aware of his or her own cultural assumptions. He or she will also take the next step and challenge those assumptions, understanding how unfair stereotyping can be and how easily misunderstandings can occur in cross-cultural communications. A degree of self-interrogation and the capacity to reflect on how a different culture might affect one's perspective are therefore important starting points. The goal of the online training modules is to help to instil an informed basis to engage across cultures.

Module 2, entitled "Australian multiculturalism", covers the challenges of learning a second language, the misconceptions about the extent of Australian multiculturalism and the specific barriers people from diverse cultures experience when accessing the courts. Australia is home to people who come from more than 250 countries, belong to more than 200 cultural groups and speak close to 400 languages and dialects. Of the prison population in Australia, 18% were born overseas.[9] Indigenous Australians make up a (regrettably) significant proportion of those appearing in Australia's criminal courts. These statistics may be somewhat daunting for judicial officers who are obliged to appropriately respond to cultural and linguistic barriers, to access them and to engage with them.

Migrants and Indigenous people may experience barriers when accessing the courts, including language and literacy, as well as cultural and religious barriers that inhibit the seeking of

8 As at 30 June 2016: ABS, 3412.0 – Migration, Australia, 2015–16, at www.abs.gov.au/statistics/people/population/migration-australia/latest-release, accessed 25 March 2021. For the year ending 30 June 2019, 29.7% of Australia's population were born overseas.

9 As at 30 June 2016: ABS, 4517.0 – Prisoners in Australia, 2016, at www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release, accessed 25 March 2021. As at 30 June 2020, prisoners born overseas accounted for 16% (6,707) of all prisoners.

help from those outside their community. A negative perception of the courts because of a misunderstanding about the workings of the law and the Australian legal system may add to a sense of alienation and distrust.

Identify when intercultural misunderstandings have occurred

Multicultural miscommunication can occur in myriad ways. One of the most insidious barriers to good cross-cultural communication is stereotyping. Module 3, entitled "Stereotyping, assumptions and prejudices", provides some insight into how stereotyping can be recognised and avoided. Under s 41(1)(d) of the uniform *Evidence Act 1995*, the law recognises that questions are, or questioning is, improper and disallowable if there is no basis other than a stereotype based on the witness's culture or ethnicity. This recognises that stereotyping can result in a poor assessment of a witness and ultimately lead to unfair treatment and/or outcomes.

The key to avoiding stereotyping is to question and challenge stereotypes and to focus on the individual rather than ignoring individual differences. The difficulty for judicial officers, of course, is that while they need to avoid stereotypes they also need to be informed by, and respond appropriately to, actual cultural differences.[10]

Module 4, entitled "Intercultural misunderstandings", examines the four main areas of misunderstanding: different communication or speaking styles, a lack of proficiency in English, hard-to-understand forms of communication such as a thick accent or silence and misunderstanding of the Australian court system.

There are two basic communication or speaking styles: the linear and the circular. Linear communication, where a person makes a point by proceeding directly from fact A to fact B is usually perceived to be the most appropriate or effective way to communicate in Australian legal contexts. However, a number of cultures consider a circular style of speaking to be a more polite or correct form of communication. To linear speakers, circular communication uses a seemingly unnecessary amount of detail to explain a point and may appear to be limited by an inability to point out when conflict has occurred; indeed it may be seen as dissembling. In non-linear speaking cultures, directness of speech may appear blunt, aggressive, impolite or even hurtful. The module identifies ways of recognising signs of unease and discomfort from a circular speaker and introduces strategies to elicit information respectfully and in a timely fashion from someone who speaks in a circular fashion.

Module 6, entitled "Hard-to-understand forms of communication", tackles the challenges of other forms of verbal communication such as accent, intonation, inflection, volume and rate

10 See for example the divergence of opinion in the case of *Moffa v The Queen* (1977) 138 CLR 601; M Kirby "The 'reasonable man' in multicultural Australia", Ethnic Communities Council of Tasmania, Cultural Awareness Seminar, Hobart, 28 July 1982 at 7, 8 and G Bird, "Power politics and the location of 'the other' in multicultural Australia", in The Criminal Justice System in a Multicultural Society, Australian Institute of Criminology Conference Proceedings, Melbourne, 4–6 May 1993, p 5.

of speech. In some cultures, it is polite to talk more quietly or submissively in a formal setting. Some Aboriginal and Torres Strait Islanders may engage in "gratuitous concurrence", a well-researched[11] trait according to which a person appears to assent to every proposition put to them even when they do not agree. For many Indigenous people, using gratuitous concurrence during a conversation is a cultural phenomenon, and is used to build or define the relationship between the people who are speaking. However it also may be employed as a strategy when confronted by alien institutions and authority figures.[12]

Not all miscommunication is verbal. The module also examines the cultural implications of sometimes problematic non-verbal communication, such as silence and lack of eye contact. Silence, or seeming to avoid answering a particular question, may not indicate dishonesty or evasiveness; it could simply mean a lack of understanding of what is going on or confusion about what is expected. Silence can also occur when cross-examining Indigenous witnesses who, when faced with a declarative form of questioning, may need time to process the question, marshal their thoughts and respond.[13] Where a question transgresses cultural norms, silence may in fact be regarded as the appropriate response for members of that culture.[14]

In Australian mainstream culture, direct eye contact can convey respect, confidence and trustworthiness. However, in other ethnic groups, avoiding eye contact may indicate respect, modesty and a wish to avoid confrontation. Being aware of such a cultural norm for a certain group of people will provide a more accurate interpretation of what is being presented in the courtroom.

Understand how to use plain English principles to aid multicultural communication

The use of plain English principles can go some way to avoid intercultural miscommunication. Module 5, entitled "Plain English principles", provides a number of useful strategies, including the avoidance of legal jargon, acronyms, idioms and slang and the occasional need to redefine legal words in plain English. There are times when the use of legal terms cannot be avoided. However, parties, witnesses and interpreters can be helped if the judicial officer, when relevant, provides a plain English explanation of a particular legal term. The core aim of plain English principles or strategies is that the judicial officer uses language that is

11 See M Cooke, "Indigenous interpreting issues for courts", at www.aija.org.au/ac01/Cooke.pdf, accessed 11 April 2017; Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006-, Ch 2 "Aboriginal people" at [2.2.2]; D Eades, Aboriginal ways of using English, Aboriginal Studies Press, Canberra, 2013, p 122; D Eades, "Telling and retelling your story in court: questions, assumptions and intercultural implications" (2008) 20(2) *CICrimJust* 209, at www.austlii.edu.au/au/journals/CICrimJust/2008/26.html, accessed 25 March 2021; D Eades, "Judicial understanding of Aboriginality and language use" (2016) 12 *TJR* 471; K Liberman, "Ambiguity and gratuitous concurrence in inter-cultural communication" (1980) 3(1) *Hum Stud* 65.

12 Legal Services Commission of South Australia, "How to assist an Aboriginal defendant — gratuitous concurrence" at www.lsc.sa.gov.au/dsh/ch03s04.php, accessed 25 March 2021.

13 D Eades, "I don't think it's an answer to the question: silencing Aboriginal witnesses in court" (2000) 29(2) *Language in Society* 161.

14 R Goldflam, "'Silence in court!' Problems and prospects in Aboriginal legal interpreting" (1997) 13 *Australian Journal of Law and Society* 17, at 43–44.

appropriate to the listener's language skills and knowledge, a courtesy that will inevitably enhance communication in the courtroom. Indeed as the Chief Justice of NSW, the Honourable Tom Bathurst AC, observed, the benefits of clarity of expression in the courts are not limited to only intercultural communications.[15]

Assess the need for interpreting assistance

One vexed question facing judicial officers in cases with multicultural parties and/or witnesses is how to assess when interpreting assistance is required. Generally, whether an interpreter will be used is a matter for the court's discretion. The basic rule is that the provision of an interpreter is essential whenever there is a possibility that a trial would be unfair because of the absence of an interpreter. Module 7, entitled "Assessing the need for interpreting assistance", canvases a number of factors that could provide assistance in deciding whether an interpreter should be provided.

The module provides two checklists garnered from the Multicultural language services guidelines for Australian Government agencies[16] and emphasises the importance of using tertiary qualified or interpreters accredited by the National Accreditation Authority for Translators and Interpreters. The issue of whether it is advisable to use the witness's family or friends in certain circumstances is also addressed. Another problematic area is identifying the language of the party or witness. A person's language may not be based on their country of birth or nationality and can also be fraught if the language is one that is "new and emerging". Strategies for dealing with unaccredited interpreters are also provided.

Work effectively with interpreters

Module 8, entitled "Working with interpreters", provides nuts and bolts style information addressing how to work effectively with an interpreter. Preparing to use an interpreter, establishing the ground rules and dealing with interpreters in the courtroom are covered.

One issue the module highlights is the complexity of the interpreting task. While languages may share basic words and concepts there are likely to also be considerable divergences. Words may not exist in another language and legal terms or phrases in particular may have no equivalent. For example, the word "private" or "privacy" in English means "lonely" in Greek. Consequently, interpreters may need to use several words or phrases to communicate not only the original word but its meaning. Further, it cannot be assumed that the witness or a party will understand legal phraseology even if it is interpreted into their language.

15 T Bathurst, "Writing judgments with the parties in mind", NJCA writing better judgments program, Keynote Address, 3 April 2017.

16 Australian Government Department of Social Services, *Multicultural language services guidelines for Australian Government agencies*, at www.dss.gov.au/sites/default/files/documents/03_2016/multicultural_language_services_guidelines.pdf, accessed 11 April 2017.

During the preparation of the online training modules, the development of the proposed Australian national standards for working with interpreters in courts and tribunals was monitored.[17] The module has gathered a range of best practices from a variety of sources, including the Judicial Commission's *Equality before the Law Bench Book*.[18]

Apply cultural awareness principles in practice

The final module comprises a set of scenarios that will help judicial officers apply best practice cultural awareness principles. A subcommittee to the working group, which includes myself, the Honourable Justice Perry of the Federal Court, the Honourable Justice Kyrou of the Victorian Court of Appeal, the Honourable Justice Blokland of the Northern Territory Supreme Court and her Honour Magistrate Boss of the ACT Magistrates Court, provided a number of scenarios based on our own experiences that were formatted into a series of questions.

One scenario focuses on explaining cultural issues to a jury. Deciding when and how to explain the interpreter's role to the jury can also be a complex issue. The circumstances chosen involve presiding over a jury trial in a regional location with a significant Aboriginal population where it appears that only one Aboriginal person has been empanelled in the jury to try the case.

The questions include: do you address the cultural issues about which you are concerned in the course of your opening remarks to the jury so that they can properly appreciate the evidence when it is given, or do you wait until the relevant evidence is given and then give directions specific to the issues which are raised? Or, do you say nothing?

Other scenarios in the initial version of the online training modules deal with assessing the need for, and working with, an interpreter. It is anticipated that more scenarios will be added to the list in due course as more cases and examples become available.

Conclusion

As was observed by former Chief Justice of Australia, the Honourable Robert French AC:

> it is entirely appropriate that those involved in the administration of justice in various ways should ensure so far as they can that people are not disadvantaged in their access to or interaction with the justice system by reason of their culture. With the very significant shift in the composition of the Australian population and the many countries of origin from which Australians now come, the potential for misunderstanding and misinterpretation, by people of different cultures, concerning the working of the justice system and the potential for misunderstanding and misinterpretation of those people by those involved in the justice system is real.
>
> ...

17 At https://jcdi.org.au/wp-content/uploads/2021/06/JCCD-Interpreter-Standards.pdf, accessed 19 January 2023; and updated in March 2022 at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.

18 Judicial Commission of NSW, above n 11.

> Judicial awareness of the significance of cultural diversity is a key area of concern. Another is the unconscious influence on a judge of underlying assumptions or attitudes based on race, religion, ideology, gender or life style which are irrelevant to the case which the judge is hearing.[19]

The online training modules are written in a concise, direct fashion. Although the modules can take up to three-and-a-half hours to complete, the training may be stopped and started at the discretion of the judicial officer. The program can be completed in stages to accommodate other commitments, as each module takes between 10 to 20 minutes to complete. For those who have more time or inclination to delve deeper into the program, there are a number of links to primary sources and articles that enhance the information provided.

How these diverse cultural strategies are used from case to case will more often than not rely heavily on "context and common sense".[20] However, it is anticipated that the online training course will add to a judicial officer's toolkit in cases that have diverse cultural dimensions.

19 R French, "Equal justice and cultural diversity — the general meets the particular" (2015) 24 *JJA* 199 at 204–205.
20 E Kyrou, "Judging in a multicultural society" (2015) 24 *JJA* 223 at 226.

Further references on diversity

For further references on the topics of diversity, please see the following:

- Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at Ch 3 "People from culturally and linguistically diverse backgrounds"
- Judicial Commission of NSW, ELearning, https://elearning.judcom.nsw.gov.au/

Ethics and conduct

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Lawyers and judges: the fifth attribute*

The Honourable Mr R Sackville AO QC†

Even within a mature democracy, lawyers and judicial officers require courage and resilience when they act to preserve fundamental values which transcend the vagaries of majoritarian opinion. In this paper, the author considers courage as a professional virtue in the context of a rapidly changing society and legal environment. He critically examines the "thin conception of democracy", and explores the fragility of the link between democracy and the rule of law. The author identifies the core concepts of the rule of law. He acknowledges that adherence to these will not ensure compliance with the rule of law, and identifies other protections which are needed. The author observes that the relationship between the courts and elected governments can be uneasy. He provides examples of occasions where the courts' power to frustrate the will of democratically elected legislatures and governments has had profound political consequences.

A changing legal environment

In an era characterised by astonishingly rapid and sometimes troubling social and technological change, it is hardly surprising that legal institutions have undergone a process of transformation. The pace of change may have been somewhat more sedate than that experienced by other social institutions, but the transformation has been no less profound.

The work of courts and tribunals, for example, has expanded in scope and become more demanding in response to developments as varied as ever more complex disputes, the globalisation of commerce, a more pervasive regulatory environment and the novelties of the digital age. The civil courts have largely abandoned their traditional role as passive arbiters of disputes between autonomous litigants and instead have become active managers of litigation and strong proponents of mediation and other forms of alternative dispute resolution. The

* Revised version of the welcome address to University of NSW students, March 2014, Sydney. Published in (2015) 12 *TJR* 187, updated 2021.

† Former Judge of Appeal, NSW Court of Appeal, currently Chair, Royal Commission into violence, abuse, neglect and exploitation of people with disability.

judiciary has not only increased substantially in size over a relatively short period, but has gradually become more representative of the community it serves. The principle of open justice has been adapted to the new technology, even to the point of judicial officers embracing social media as a means of directly communicating with the general public.[1]

The legal profession has emerged from its traditional cocoon surrounded by restrictive practices and now operates in a more open environment shaped by competition policy and the commercialisation of legal practice. These forces have produced consequences that would have been regarded by most observers as fanciful, if not bizarre, only a few decades ago.[2] Large law firms are now not merely national, but multinational. Entrepreneurial legal firms are listed on stock exchanges and are therefore answerable not only to courts and regulators but to investors seeking to maximise returns on their investments. It is commonplace for representative proceedings to be instituted in which the nominated plaintiff or applicant seeks on behalf of an aggrieved, if indeterminate, group, hundreds of millions of dollars from an alleged wrongdoer. Litigation funders share handsomely in the spoils of litigious success, but have become an accepted feature of the legal landscape following the High Court's conferral of its imprimatur on the business of litigation funding.[3]

Given these transformations, it is increasingly difficult to persuade a sceptical and frequently hostile media and wider community that lawyers and the legal system have a critical role to play in preserving and strengthening democratic institutions and the rule of law. The task is made more formidable because so much of what lawyers do — or at least ought to do — is concerned with the protection of individuals and minority groups against the exercise of power by the majority, or at least by those who claim to represent the majority. It is this aspect of the role played by lawyers and legal institutions that is often overlooked in public discussions.

The limitations of "thin" democracy

The dangers of a democracy in which a majority can impose its will upon unpopular minorities was an important theme of the debates that preceded the adoption of the US Constitution. James Madison was the fourth President of the US and is generally regarded as the principal author of the Constitution and the Bill of Rights added to the Constitution in 1791. Like many of the Founders, Madison was both a slave owner and profoundly sceptical about the virtues of democracy.

Writing for a newspaper under the name "Publius",[4] Madison lamented that a "pure democracy",[5] by which he meant a small body of citizens who administer the government in

1 For an overview of the interaction between social media and the courts, see B Fitzgerald, C Foong and M Tucker, "Webb 2.0, social networking and the courts" (2011) 35(3) *Aust Bar Rev* 281; M Krawitz, "Summoned by social media: why Australian courts should have social media accounts" (2014) 23(3) *JJA* 182.

2 See R Sackville, "Lawyers and litigation: a pathway out to wealth and fame?" in M Legg (ed), *The future of dispute resolution*, LexisNexis Butterworths, 2013, Ch 18.

3 *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

4 J Madison, "No 10: Madison" in A Hamilton, J Madison and J Jay, *The federalist papers*, Mentor Books, 1961, p 77.

5 ibid p 81.

person, admitted "no cure for the mischiefs of faction".[6] The "common passion"[7] of the majority would have no compunction about sacrificing the weaker party (that is, the minority) or an obnoxious individual. It was for this reason that Madison thought that:

> [S]uch democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[8]

Madison's answer to the defects of direct democracy ancient Greek style was the establishment of a republic under which a body of citizens would be chosen whose:

> wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.[9]

Madison recognised the dangers of inappropriate choices by the electors because of prejudice, intrigue or corruption. But he thought that these risks could be minimised if the republic were larger rather than smaller. The more numerous the electorate, the more likely the selection of "men who possess the most attractive merit",[10] presumably much like Madison himself.

The snobbery and fear of the *demos* held by some of the Founders of the American system of government are no longer acceptable. It is difficult to imagine, for example, a 21st century Australian politician questioning in public the "good sense of the Australian people" or lamenting the extension of the franchise to sections of the populace deemed to be insufficiently educated or imbued with common sense to exercise their vote wisely. The "factionalism" deplored by Madison is now regarded as inherent in the democratic system of government, as interest groups and rent seekers vie for influence and favours. Moreover, Madison's catalogue of the failures of direct democracy in ancient times was by no means historically accurate. Even so, he had a point.

As with so many concepts that play an important role in political and legal discourse, "democracy" is capable of many different meanings, reflecting the fact that democracy can take many different forms.[11] The point can be illustrated by comparing Australia and New Zealand, near neighbours and both undoubtedly democracies. They differ in political structures (one a federation, the other unitary), voting systems, the make-up of the electorate, the composition of the national Parliament (one bicameral, the other unicameral) and the powers of the national Parliament (one subject to a written Constitution interpreted by the judiciary, the other enjoying legislative sovereignty).

On one view, sometimes designated as the "thin conception of democracy", the only element essential to a functioning democracy is that the government governs with the consent of the people, determined by the votes of the majority at free elections. This definition of democracy

6 ibid.
7 ibid.
8 ibid.
9 ibid p 82.
10 ibid p 83.
11 The various forms of democracy are explored from an historical perspective by J Keane, *The life and death of democracy*, Pocket Books, 2009.

leaves many questions unanswered, such as the mechanisms for ascertaining the will of the people, and the precise nature and powers of representative institutions. But it implies that the essence of democracy is popular sovereignty, manifested by the election of the government by, and in conformity with the wishes of, a majority of the people.

In political and scholarly discourse, the rule of law is closely associated with the idea of democracy and, indeed, it is often assumed that neither can be separated from the other. Yet it is not at all difficult to conceive of a democracy in the "thin" sense that lacks basic elements of the rule of law. The government of a particular country or political entity might have the support of a majority, even an overwhelming majority, of the population manifested in free, or relatively free, elections. That same country or entity might subject minority ethnic, religious or political groups to serious discrimination, if not outright persecution. For example, minorities might be denied the freedom to preserve their religious, cultural or linguistic heritages or may be deprived of basic services that the majority takes for granted. Dissenters charged with criminal offences may be denied the protection of a fair trial before an independent and impartial judiciary. Arbitrary imprisonment may become a weapon of State control to be used against opponents of the government. Basic liberties, such as freedom of speech and of the press, may be curtailed ostensibly for the purpose of preserving social harmony.

The Russia of Vladimir Putin is a salutary illustration of a country that has relatively free national elections (at least so far as the counting of votes is concerned), but does not have the benefit of a genuinely independent judiciary that functions free from political influence. The apparently authentic election of a short-lived Muslim Brotherhood government in Egypt in 2012 was followed by autocratic rule and the repression of non-Muslim minorities. If genuinely democratic elections were to be held in Myanmar, the triumph of popular sovereignty would not necessarily guarantee that the persecution of the minority Rohingya people would cease.

The dreadful history of the 20th century serves as an antidote to the temptation to overstate the guarantees of freedom inherent in a democracy. Specifically it is well to recall that Hitler's rise to power in Germany in January 1933 was preceded by the Nazis' electoral victory in 1932. While the Nazis did not secure a majority of votes, they did obtain the highest proportion of votes among parties contesting the election: 37.4% of the popular vote, more than the combined vote of the next two parties, the Social Democrats (21.6%) and the Communist Party (14.6%).[12] Hitler came to power within the framework of a genuinely democratic electoral system.

The fragility of the link between democracy and the rule of law is not purely theoretical. Australians do not have to look very far, either in a geographic or temporal sense, to detect examples of democracies flouting the rule of law. In January 2014, for example, the President of Nauru dismissed and deported that tiny country's resident magistrate. When the Chief Justice of Nauru, an Australian national and former judge of the Supreme Court of Victoria, issued an injunction restraining the magistrate's deportation from Nauru, the Government simply

12 A chart showing election results in Germany between 1919 and 1933 is reproduced in A Bullock, *Hitler and Stalin: parallel lives*, Harper Collins, 1991, App 1. In November 1932, the Nazis secured 33.1% of valid votes and in March 1933, 43.9%.

ignored the injunction and cancelled the visa of the Chief Justice, who thereupon resigned.[13] The justification for these extraordinary actions by the Nauru Government was said to be that it had lost confidence in the magistrate by reason of unparticularised and unproven allegations of "cronyism" and other inappropriate behaviour. Notwithstanding the failure to follow due process, the President survived a no-confidence vote in the (presumably) democratically elected Parliament of Nauru. The episode demonstrates that democratic elections do not ensure that the judiciary will remain independent of the government of the day.

Many in Australian have forcefully criticised Nauru's actions as a fundamental departure from the rule of law, which it surely is. But, the events in Nauru have much greater significant than an internal dispute concerning governance of a Pacific micro-State. Nauru has a pivotal role in Australia's determined efforts to stop asylum seekers arriving by boat on the Australian mainland or on Australia's island territories. Asylum seekers whose boats are intercepted or who are interned on arrival are liable to be transferred to Nauru (among other places) for processing and repatriation or resettlement, as the case may be.[14] The effective dismissal of Nauru's judiciary, apparently because of what was seen to be judicial interference with the government policies, has direct consequences for Australia, since it has chosen to effectively outsource to Nauru its responsibilities under the *Convention Relating to the Status of Refugees*.[15] Departures from the rule of law in Nauru may therefore have a direct impact on people for whom Australia has responsibilities under both international and domestic law.

The failure of democracies to respect the rule of law is not an isolated phenomenon. Even the great Western democracies, with a professedly unshakeable commitment to the rule of law, cannot claim an exemplary record. The US's adherence to the rule of law historically has been very patchy, not simply because of the institution of slavery which perished only with the Civil War. Robert Caro's magisterial biography of Lyndon Johnson analyses in painful and anger-inducing detail how a minority of US senators, comprising racist representatives of Southern States, was able to forestall for decades the most basic federal civil rights legislation.[16] A flawed electoral system, coupled with ruthless reliance on procedural devices such as the filibuster, killed even bills that would have provided a modicum of protection to the black population of the South against lynching and some prospect of bringing perpetrators to justice. The lamentable history of Guantanamo Bay is a more recent example. Australia has not been exempt from this phenomenon. The White Australian Policy was a pillar of the Australian Federation and remained in place until the 1960s. The policy may not have led to unpunished

13 The course of events in Nauru is recounted in "Media Release No 5" issued by the Chief Justice, the Honourable GM Eames AM QC, when he resigned on 13 March 2014.

14 The arrangements are embodied in a *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia*, relating to the transfer to and assessment of persons in Nauru, and related issues signed on 3 August 2013. See *Migration Act 1958* (Cth), Pt 2, Div 8, Subdiv B, enacted in response to the *Malaysian Declaration Case: Plaintiff M70/2011 v Minister for Immigration and Citizenship*(2011) 244 CLR 144. The constitutionality of Subdiv B was upheld in *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28.

15 *Convention Relation to the Status of Refugees*, open for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

16 R Caro, *The years of Lyndon Johnson: master of the Senate*, Vintage Books, 2003.

lynching of non-whites, but it was hardly a shining example of the rule of law in action. Yet the White Australia Policy was the product of a democracy and for decades had the fervent support of a majority of voters.

The rule of law

Just as there is no universally accepted definition of democracy, there is no agreement about the essential elements of the rule of law.[17] The core notion is that the rights and obligations of citizens must be set down in laws formulated by a genuinely representative legislative body or other duly authorised organs of the state, such as the courts or administrative agencies acting pursuant to powers conferred by statute. It is also essential that legislation and other enforceable rules be enacted in accordance with recognised procedures, established and regulated by law. To the extent that these principles are adhered to, democracy and the rule of law overlap.

But adhering to these core concepts, however, does not ensure compliance with the rule of law. The reason is obvious. Oppressive regimes may scrupulously observe (or appear to observe) legal forms, yet deny fundamental freedoms to segments of their population. Apartheid South Africa did not have genuinely representative institutions, but for the most part it purported to apply laws enacted by a legitimate parliamentary process and to enforce the laws in courts nominally enjoying independence from the Executive government. Even Stalin's show trials in the Soviet Union were characterised by ostensibly full and free confessions of heinous wrongdoing by those destined to be shot within hours of their public performances. Of course, neither the old South Africa nor Stalin's Soviet Union was a democracy in any sense, notwithstanding their pretensions. Nonetheless, each laid claim to observance to the rule of law and many in the outside world chose to believe them.

For these reasons, formal adherence to legal norms cannot of itself satisfy the minimum standards required to maintain the rule of law. Other protections are necessary. These include:

- acceptance that those in authority exercise power, in the words of the political philosopher Jeremy Waldron,[18] within a constraining framework of public norms, rather than on the basis of their own ideology or their own sense of right and wrong
- the existence of an independent and impartial (and therefore incorruptible) judiciary, which applies legal rules and principles formulated in accordance with the established procedures referred to earlier
- the right of all persons involved in civil or criminal proceedings to a fair hearing before an independent court or tribunal, in accordance with principles of open justice and within a reasonable time frame

17 See T Bingham, *The rule of law*, Allen Lane, 2011.
18 J Waldron, "The concept and the rule of law" (2008) 43(1) *Georgia Law Review* 3 at 6.

- acceptance of the principle of equality before the law, meaning broadly that like cases should be treated alike so far as practicable and that unequal treatment should be justified by objective differences in the circumstances of each case
- enforceable prohibitions on arbitrary arrest detention and on cruel and unusual punishment, including torture.

Beyond these measures, there is considerable room for disagreement. Many commentators argue that adherence to the rule of law requires more demanding criteria to be satisfied. These include adequate protection of fundamental human rights, such as those embodied in the *International Covenant on Civil and Political Rights*; limits on the discretionary powers exercisable by government officials or administrative agencies, for example, by formulating rules curtailing the opportunities for arbitrary or capricious decision-making; and measures designed to overcome entrenched barriers to justice and to redress, so far as practicable, the disadvantaged experienced by the poor and vulnerable embroiled in the legal system.

These observations about democracy and the rule of law have implications both for those who are about to enter the legal profession and those who are already within it. A core function of lawyers in any legal system professing adherence to the rule of law must be to preserve and protect the values implicit in the rule of law. Since the rule of law requires the rights and freedoms of minorities to be protected against the majority, lawyers often find themselves in the business of representing the poor, the marginalised and, in Madison's phrase, the "obnoxious". Courts, which must apply the law impartially, necessarily have occasion to recognise and protect the rights of minorities against the opposition of governments and other powerful interests. Accordingly, while no lawyer or judge is obliged actively to invite community opprobrium or disdain, unpopularity frequently goes with the discharge of his or her responsibilities.

The most obvious example of lawyers risking opprobrium or unpopularity is their role in defending persons charged with particularly heinous criminal offences, especially cases that attract the attention of the mass media. Public opinion can, of course, be a very powerful force for good, but community passions can also be aroused and sometimes manipulated in an age of instant communication and short political cycles. Community revulsion at serious criminal conduct means that a lawyer responsible for defending an accused charged with such conduct can rarely expect community gratitude and may find himself or herself subjected to calumny.

The courts are often placed in an even more difficult position. Community outrage directed to those convicted of serious offences is the principal reason why sentencing decisions are so frequently attacked as grossly inadequate and judges are said to be "out of touch" with community standards. In this field, it is not at all difficult to incur the wrath of populist media commentators all too willing to advocate simplistic solutions to complex social problems and conflicting but valid policies and principles. Nor is it difficult for the commentators to impose very great pressure on politicians to "do something" about the perceived problem.

The relationship between courts and elected governments can be uneasy for many other reasons. The exercise of judicial power sometimes requires courts to decide cases adversely to governments and even to thwart the implementation of policies approved at an election by a majority of the voting population. In Australia, this is in part a consequence of the role of the High Court (and, to a lesser extent, inferior courts) in interpreting the Constitution. In Australia, as in other jurisdictions with a written Constitution such as the US and Canada, it has long been

regarded as axiomatic that the courts have the power to declare legislation or Executive acts invalid if they are deemed to be inconsistent with the Constitution.[19] Thus, the High Court has the last word on the validity of legislation challenged as unconstitutional.

The power of courts to frustrate the will of democratically elected legislatures and governments can have profound political consequences. In 1948, the *Bank Nationalisation Case*[20] invalidated the Labor Government's attempt to nationalise the banking system, a central plank in its socialist platform. On the other side of the political divide, in 1951, the High Court's decision in the *Communist Party Case*[21] invalidated the newly elected conservative Government's legislation to ban the Communist Party. The judicial decision was subsequently effectively upheld in a referendum, which rejected a proposal to amend the Constitution to give Parliament the power to dismantle the Communist Party.

In more recent times, the High Court, despite having something of a reputation for greater judicial restraint than it once enjoyed, has shown itself willing to expand the scope of judicial review of legislation and of administrative action. The rationale for this judicial intervention is often said to be the need to preserve the rule of law and democratic values. Thus, the High Court discerned an implied freedom of political communication in the Constitution and has been vigilant to strike down legislation which is inconsistent with the independence and impartiality of the courts. The implied freedom of political communication has been invoked, for example, to set aside a conviction for using insulting words in a public place because the prohibition was capable of imposing a disproportionate burden on the freedom to communicate political ideas.[22] Chapter III of the Constitution has been relied on by the High Court to invalidate legislation which requires the court to proceed in a manner that is procedurally unfair or that conforms to the wishes of the Executive government.[23]

The counter-majoritarian functions of the judiciary are not confined to constitutional adjudication. Courts in Australia are ultimately solely responsible for interpreting legislation. The exercise of this interpretive function may have the effect of preventing a government implementing a policy central to its electoral standing and thus embroil the court deciding the case in political controversy. For example, in the *Malaysian Declaration Case* in 2011,[24] the High Court held that the declaration of Malaysia as a country to which asylum seekers could be transferred had not complied with the requirements of the *Migration Act 1958* (Cth) and therefore was invalid. The decision effectively put an end to a key component of the then government's offshore processing policy.

It was, of course, open to Parliament to amend the legislation and it subsequently did so. Nonetheless, the High Court's decision proved to be pivotal and the so-called "Malaysian Solution" has not been revived, although other "solutions" have taken its place. The *Malaysian*

19 The classic statement is that of Fullagar J in the *Communist Party Case: Australian Communist Party v Cth* (1951) 83 CLR 1 at 262–263.
20 *Bank of NSW v Cth* (1948) 76 CLR 1.
21 *Australian Communist Party v Cth* (1951) 83 CLR 1.
22 *Coleman v Power*(2004) 220 CLR 1. In Australia, so it appears, incivility and free speech are inseverable.
23 See eg, *Wainohu v NSW* (2011) 243 CLR 181; *SA v Totani* (2010) 242 CLR 1.
24 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

Declaration Case demonstrates that, even outside the rarefied atmosphere of constitutional adjudication, the potentiality for conflict between the judiciary and other branches of the elected government is ever present.

Courage as a professional virtue

In 1987, Sir Gerard Brennan identified four essential requirements for a practising lawyer: legal competence of a high order; a willingness to serve the community; professional commitment going well beyond the call of strict duty; and (of course) personal integrity.[25] To Sir Gerard's list I would add a fifth attribute required of lawyers (including judicial officers) in a functioning democracy: courage and resilience in the face of public criticism and disapproval.

Since a functioning democracy does not guarantee full adherence to the rule of law, lawyers must perform a counter-majoritarian role if they are to maintain and protect the rule of law. The proper discharge of this responsibility is apt to generate conflicts with those who invoke "public expectations", "community standards", electoral mandates or other manifestations of majority opinion that can be inimical to the rule of law. Practising lawyers who represent disadvantaged, unpopular or "obnoxious" groups and individuals must therefore be prepared to receive both criticism and disapproval from commentators who see public opinion as the sole touchstone of democratic legitimacy. In Australia, critical attitudes of this kind can be seen from time to time in political responses to those who institute legal challenges to governmental policies and practices relating to asylum seekers.

Judges require an even greater measure of courage and resilience than practising lawyers in the face of hostile public opinion. To some extent lawyers are expected, albeit grudgingly, to represent the underdog.[26] Judicial officers, quite rightly, are subject to close scrutiny and can expect criticism if significant decisions are found to be erroneous or are the subject of vigorous but legitimate debate. But when judicial decisions run counter to public opinion (or the opinions of those who purport to speak on behalf of the public), criticism of judicial officers can go well beyond reasoned argument. Discussing contestable issues can descend into personal attacks and, in extreme cases, harassment of judicial officers. There is nothing especially new in this phenomenon, but public condemnation may not be comfortable for judicial officers to deal with, especially if they have not previously experienced the full glare of hostile publicity. Yet the reality is that discomfort of this kind can be an unavoidable by-product of the exercise of judicial power. It must be endured as the price for upholding the counter-majoritarian values implicit in the rule of law.

It is neither necessary nor appropriate to exaggerate. In this country, lawyers are not threatened with incarceration or torture for representing very unpopular clients or causes.[27] Judges enjoy

25 G Brennan, "Pillars of professional practice: functions and standards" (1987) 61(3) *ALJ* 112.
26 As in the quintessentially Australian film, "The Castle", 1997.
27 Although occasionally they may be subject to searches by authorities acting under warrant: see Ministerial Statement by the Attorney-General (Cth), 4 December 2013, "Execution of ASIO search warrants", relating to warrants executed by the Australian Security Intelligence Organisation at premises occupied by the lawyer representing East Timor in a dispute with Australia.

security of tenure and other guarantees of independence and so need not fear dismissal or physical retribution from official sources for applying the law or making decisions that frustrate government policies or are unpopular. Nonetheless, even within a mature democracy, lawyers and judicial officers may be called upon to show uncommon fortitude when acting to preserve fundamental values that transcend the vagaries of majoritarian opinion. Hence the necessity for the fifth attribute.

Trust in the judiciary*

The Honourable T F Bathurst AC†

The Honourable T F Bathurst examines the level of trust placed in the judiciary by the public in the context of declining institutional trust. While the Australian judiciary has historically enjoyed high levels of trust, the author submits this cannot be taken for granted nor can the judiciary afford to be complacent. The legitimacy of the judiciary, and the courts, rely upon a certain level of public trust in judicial officers. The author notes that it is essential for the judiciary to strive to build and rebuild trust in various ways, and considers active and defensive measures to foster trust in the judiciary. First, the appointment of judges who inspire trust in the judiciary by the community is considered. Second, trust in the competence of the judiciary can be promoted by improving public understanding of what judges do. Third, trust can be promoted by assuring the public of the values at the heart of the judiciary, being competence, integrity, and benevolence. Finally, trust can be built and rebuilt by demonstrating that the judiciary does, according to the judicial oath, "do right to all manner of people ... without fear or favour, affection or ill-will" by providing culturally sensitive services that recognise the ongoing impacts of colonisation on First Nations people; and improving the gender and cultural diversity of the judiciary, because diversity is symbolic of the values at the heart of the institution.

Introduction

In recent years, trust in institutions has been the subject of renewed attention. Public trust in institutions is declining not only in Australia but in many other advanced industrialised countries.[1]

* 2021 Opening of Law Term Address, 3 February 2021, published in (2021) 14(4) *TJR* 263 and by barnews at https://barnews.nswbar.asn.au/autumn-2021/84-2021-opening-of-law-term-address/, accessed 23 June 2022. Updated 2022.

† Former Chief Justice of NSW. His Honour expressly wishes to thank his Research Director, Ms Jessica Elliott, for her assistance in the preparation of this article.

1 The Australian Election Study (AES) reported that voter responses showed that trust in government in Australia reached its lowest level on record in 2019 since data was first recorded in 1969: S Cameron and I McAllister, *The 2019 Australian federal election: results from the Australian Election Study*, Australian National University, 2019, p 15 at https://australianelectionstudy.org/publications/#books-monographs, accessed 22 June 2022. See also Edelman, *Edelman Trust Barometer 2020*, Global Report, 2020 at https://cdn2.hubspot.net/hubfs/440941/Trust%20Barometer%202020/2020%20Edelman%20Trust%20Barometer%20Global%20Report-1.pdf, accessed 22 June 2022.

In Australia, public trust in institutions has been understandably shaken by a number of high-profile Royal Commissions which have exposed cause for distrust across a range of institutions from financial institutions, and aged care homes to detention facilities in the Northern Territory. This growing distrust of existing institutions is echoed abroad as evidenced by scepticism towards the World Health Organisation, the UK's exit from the European Union and the withdrawal of the US under former President Trump from various United Nations bodies.

As a result, private and public institutions are coming under greater scrutiny. The public is regularly and deeply questioning the trust they place in institutions, and rightly so. If there was ever a period where we expected the public to blindly trust institutions, it is long gone. We have learnt that public trust in institutions is fragile. Institutions can no longer simply assume the public will trust in them. Instead, all institutions, and particularly public institutions, must continually ask themselves: how we can build trust across all sectors of the community?

The judiciary must take this decline in public trust seriously. Whilst the Australian judiciary has historically enjoyed high levels of trust, we cannot afford to be complacent. We cannot assume that trust is ever-present and uniform across the community we serve. The legitimacy of the judiciary and, in turn, the courts relies upon a certain level of trust in the competency, motivations and values of its judges. The judiciary, like all institutions, must continue to build and strengthen trust by *all* groups in our society.

In this climate of rising institutional distrust, I would like to use this article to examine the level of trust placed in the judiciary by the public. I will firstly consider the appointment of judges who inspire trust by all in the community. I will then consider active and defensive measures to foster trust in the judiciary as an institution. First, I will suggest that trust in the competency of the judiciary can be strengthened by improving public understanding of what judges do and how we do it. Second, we can promote trust in the integrity of the judiciary by assuring the public of the values at the heart of the institution. We can do this at an institutional level by policies that robustly deal with judicial misbehaviour and at a micro-level in interactions with judges marked by courtesy and tolerance. Finally, we can build and rebuild trust in the judiciary by recognising that trust is not uniform across the community we serve, particularly among Australia's First Nations peoples and other minority groups and by promoting a diverse and culturally sensitive judiciary that engenders trust across *all* communities.

Trust matters

It goes without saying that the public should be able to trust public institutions, and particularly, the judiciary. The public entrusts each and every judge with significant power over their lives and liberty. The public should and must be able to trust in the individual judges and the judiciary as an institution which wields immense power on its behalf.

Whilst trust in political institutions is built and maintained through free and fair elections, this is of course not the case with the Australian judiciary. Given the judiciary lacks any electoral connection with the citizenry, trust by the public in what we do, and how we do it, is crucial.

First and foremost, this is because the legitimacy of the judiciary relies upon diffuse public trust. As Alexander Hamilton famously said, unlike the executive and legislature, the judiciary "has no influence over either sword or the purse" and "may truly be said to have neither force nor will, but merely judgment".[2]

Armed with only the power of judgment, the judiciary requires the legitimacy gained from public trust to function effectively. As the former Chief Justice of Australia, the Honourable Murray Gleeson AC QC stated, "[t]he general acceptance of judicial decisions, by citizens and by governments, which is essential for peace, welfare and good government of the community, rests, not upon coercion, but upon public confidence", and I would argue, trust.[3]

The trust necessary for the public to accept and comply with judicial decisions and court orders — even when unpopular — is fundamental to the rule of law. In the words of Honore Balzac, "[t]o distrust the judiciary marks the beginning of the end of society. Smash the present patterns, rebuild it on a different basis … but don't stop believing in it".[4]

Trust in the judiciary is also important because citizens who trust the judiciary, and the courts more broadly, are more likely to engage with the legal system to address their legal issues and to co-operate with its processes.[5]

Without trust in the judiciary, no one would bring their legal issue before the court for resolution, nor give up their time to sit on a jury, nor comply with court orders that go against their personal interests. Quite simply, trust matters.

What does it mean for the public to trust in the judiciary?

Before I continue any further, what does it mean for the public to trust in the judiciary?

Trust and confidence are often used interchangeably. Whilst they are related, I think they are separate concepts. One critical distinction is that whilst "confidence arises as a result of specific knowledge; it is built on reason and fact", trust "presumes a leap to commitment, a quality of 'faith' which is irreducible".[6]

The leap of faith inherent in trust is particularly relevant to the judiciary. Public perception of the judiciary is not and cannot be based on full knowledge.[7]

2 A Hamilton, "Federalist No 78" in A Hamilton, J Madison and J Jay, *The federalist papers*, New American Library, 1961, p 465.

3 A M Gleeson, "Public confidence in the judiciary", paper presented at the Judicial Conference of Australia, 27 April 2012, Launceston, at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_jca.htm, accessed 22 June 2022.

4 H Balzac quoted in O Kircheimer, *Political justice: the use of legal procedure for political ends*, Princeton University Press, 2015, p 175.

5 C Lelièvre, "Trust and access to justice" in OECD, *Trust and public policy: how better governance can help rebuild public trust*, OECD Publishing, 2017, pp 144–145.

6 A Giddens, *Modernity and self-identity*, Polity Press, 1991, p 19. See also, R Shaw, *Trust in the balance: building successful organisations on results, integrity and concern*, John Wiley, 1997.

7 See N Garoupa and T Ginsburg, *Judicial reputation: a comparative theory*, The University of Chicago Press, 2015, p 15.

I regret to inform my fellow judges that very few people read the judgments we spend so long agonising over. Furthermore, an even smaller portion of readers can assess the technical soundness of the decisions we make or the robustness of our legal reasoning. Even if a reader can assess the correctness of a decision, the minds of judges will always remain, to some extent, a closed book,[8] and they must still trust that the decision is made for the reason or reasons provided. For most people, they are prepared to take a leap of faith and trust that the judiciary is, by and large, making technically accurate decisions. It is this trust that means that the community generally accepts the decisions made by judges.

I have chosen to focus on trust rather than confidence because I want to consider how the perceived values, motivations and attitudes of the judiciary ensure that the public not only has confidence but *trust* in the judiciary. As a public institution comprised of men and women holding a public position, we must hold ourselves to higher standards to ensure that not only is the public confident in our abilities, but also trust in us, as an institution and as individual judges. It is not enough that there is a deep trust amongst certain sections of the community. Trust in the judiciary must be widespread and present across all sections of the community, and not merely those groups that have had a historically privileged relationship with the law.

There is extensive sociological literature on what trust is (which I won't pretend to be an expert on). However, three dimensions of trust in organisations are frequently identified: competence, integrity and benevolence.[9]

The first dimension of competence refers to the organisation acting "competently in the sense that they are able to perform the functions that are legally or constitutionally assigned to them".[10] The second dimension, integrity, pertains to the perception by the truster "that the trustee adheres to a set of principles that the truster finds acceptable".[11] The final dimension of benevolence refers to the organisation's commitment "to act in the interests of the truster because of moral values that emphasize promise keeping, caring about the truster, incentive compatibility, or some combination of all three".[12] This last dimension is what we most commonly think of when we consider trust.

Appointing judges who inspire trust in the judiciary

To maintain judicial legitimacy, it is essential that judges are chosen on their ability to inspire trust in the community they serve. In my opinion, these three dimensions of trust are useful in examining the notion of merit in judicial appointments.

8 J Soeharno, *The integrity of the judge: a philosophical inquiry*, Ashgate Publishing Company, 2009, p 71.

9 R Mayer, J Davis and F Schoorman, "An integrative model of organizational trust" (1995) 20(3) *The Academy of Management Review* 709; F Schoorman, R Mayer and J Davis, "An integrative model of organizational trust: past, present and future" 32(2) *The Academy of Management Review* 344. See generally, H Jackson, "Trust work: a strategy for building organisation-stakeholder trust?" in K Pelsmaekers, G Jacobs and C Rollo (eds), *Trust and discourse: organizational perspectives*, John Benjamins Publishing Co, 2014, p 113.

10 G Doughterty, S Lindquist and M Bradbury, "Evaluating performance in State judicial institutions: trust and confidence in the Georgia judiciary" (2006) 38(3) *State and Local Government Review* 176 at 178.

11 Mayer, Davis and Schoorman, above n 9, at 179.

12 M Levi and L Stoker, "Political trust and trustworthiness" (2000) 3(1) *Annual Review of Political Science* 475 at 476.

These dimensions of competency, integrity and benevolence overlap to a significant degree. Importantly, they are not in competition with each other. Judges not only must be technically competent, but they must first and foremost be men and women of integrity with a deep appreciation of the needs and diversity of the community they serve. We promote trust in the judiciary when we as individual judges, and as an institution are competent, uphold the highest standards of integrity and appreciate and respect difference.

What does merit mean in the context of judicial appointments? Merit is not simply technical expertise. It is not the best cross-examiner at the bar nor the most skilful solicitor. If there ever was a time where a judge was appointed merely on their technical excellence, it is long gone. It has been remarked that:[13]

> [w]hat constitutes a high quality judiciary or judge is changing and broadening. It will no longer do to juxtapose technical merit against other considerations of character, experience, and background and assume that a strong and effective judiciary requires only the former.

Judges should be appointed not merely on their technical ability, but also on their ability to inspire trust in the judiciary by the community.

Consistent with the well-known aphorism, "justice should not only be done, but should … be seen to be done",[14] mere technical competency is insufficient to earn public trust. Trust is not built simply by producing technically sound judgments. It is also built on the perceived values at the heart of the judiciary.

What constitutes a high-quality judge will depend on the role and responsibilities of the judge in question. The importance of technical expertise in engendering trust varies. It may be that at the appellate level, trust will depend to a significant extent on technical competence. Even at that level, character, experience and empathy with litigants is extremely important. All the more so with judges in trial courts who interact on a daily basis with members of the community.

Trust in those judges will be substantially based on their so-called "soft skills" and how people, particularly unrepresented litigants, who come before them are treated. These "soft skills" are crucial to whether all individuals in the courtroom, defendants, victims or witnesses, feel as if they have had a "fair go" and been treated with the respect they deserve. Take for example, a survivor of domestic violence giving evidence in criminal proceedings before a magistrate. At every stage an enormous amount of trust by the survivor is required. The survivor must first have trust in the police to report the violence. When the matter is brought before the courts, the survivor must trust that the magistrate will listen and deal with them sympathetically. The emotional intelligence and personal attributes of the judge is likely to foster trust in the judiciary more than their technical legal skills.

The importance of these attributes is heightened when one considers that if a person is going to have personal experience with the judiciary in NSW, it is overwhelmingly going to be with one

13 P Russell, "Conclusion" in K Malleson and P Russell (eds), *Appointing judges in an age of judicial power: critical perspectives from around the world*, University of Toronto Press, 2006, p 431.

14 *R v Sussex Justices; Ex p McCarthy* [1924] 1 KB 256 at 259 (Lord Hewart).

of the 139 magistrates sitting in 150 sitting locations throughout the State.[15] These magistrates deal with 96% of all criminal prosecutions and over 90% of all civil litigation in NSW.[16] The importance of the "soft skills" shown by magistrates in building trust at the coalface of the criminal justice system cannot be underestimated.

I will now turn to a closer examination of these three dimensions of trust as they apply to the judiciary: competency, integrity and benevolence.

Trust in the competency of the judiciary

The first oft-cited feature of trust in organisations is that the organisation can perform the functions legally or constitutionally assigned to them. We cannot expect the public to trust in the judiciary if we do not competently exercise our power and perform our duties.

Does the public trust in the competency of the judiciary? Of course, it is difficult to ascertain levels of trust. Nonetheless, I think the public broadly trusts that the judiciary exercises its functions competently. The level of public trust in judicial decisions means that the enforcement of judgments and orders is generally not an issue in Australia.[17]

A 2018 survey found that 55% of respondents trusted judges in Australia — higher than the level of trust in public servants, journalists, trade unionists and business people and second only to the level of trust in general practitioners.[18] Fifty-five per cent of respondents surveyed in 2020 reported that they have "a great deal" or "quite a lot" of confidence in the courts in Australia.[19] This level of confidence was similar to that in the federal government and public service.[20] Whilst this may not indicate a "crisis of trust", it certainly justifies continual efforts by the judiciary to strengthen trust.

Conventional wisdom holds that the public is largely ignorant of what we do.[21] I do not think this is necessarily the case. In my opinion, most people know we are there to resolve disputes. However, I think most people don't know how we do it. It is problematic if the public thinks decisions are made on the idiosyncrasy or personal whim of the judge. It is also concerning if the public thinks there is disparity in the decisions made by a particular judge and disparity between decisions made by different judges.

How can people trust in the competency of the judiciary without a solid understanding of the role of judges and how they make decisions? I believe improving the accessibility of the

15 Local Court of NSW, *Local Court of NSW Annual Review 2019*, Report, 2020, p 8 at https://localcourt.nsw.gov.au/documents/annual-reviews/Local_Court_Annual_Review_2019_v1_accessible.pdf, accessed 22 June 2022.

16 ibid p 2.

17 A M Gleeson, "Public confidence in the judiciary" (2002) 76 *ALJ* 558 at 560.

18 G Stoker, M Evans and M Halupka, *Trust and democracy in Australia: democratic decline and renewal*, Report No 1, Democracy 2025, 2018, p 21 at https://apo.org.au/sites/default/files/resource-files/2018-12/apo-nid208536.pdf, accessed 22 June 2022.

19 M Evans et al, *Political trust and democracy in times of coronavirus: is Australia still the lucky country?*, Report, Democracy 2025, 2020, p 4.

20 ibid. Fifty-four per cent of participants trusted the federal government and the Australian public service.

21 See J Gibson, "Public images and understanding of courts" in P Cane and H Kritzer (eds), *The Oxford handbook of empirical legal research*, OUP, 2010, p 831.

courts is a crucial way to promote trust in the competency of the judiciary. While there have been significant improvements in recent years, I think there is always scope for the courts to strengthen public understanding of what judges really do, and most importantly, how we do it.

I think it is useful at this point to consider the relationship between interpersonal and institutional trust in the judiciary. Inter-personal trust and institutional trust are closely connected.[22] In situations where it is difficult to have inter-personal trust, we rely more on institutional trust. This is particularly important given the unlikelihood of a member of the public developing inter-personal trust in an individual judge. Research shows very few Australians have any interactions with the judiciary over the course of their lives, although when they do, it is highly influential on their views of the judiciary.[23]

Even when citizens have some background knowledge or history of interactions with a judge, the ancient rituals and symbols associated with the judiciary and courts make it difficult, if not impossible, to develop interpersonal trust. The robes we cloak ourselves in, the wigs we don, and the elevated position we sit in, are designed to mask our individuality and emphasise the values of the institution we represent — fairness, impartiality and independence. These symbols encourage the public to trust in the process by which judicial decisions are made.[24] These performative rituals are designed not to promote interpersonal trust in us individually as judges, but to promote trust in the institution we personify.[25]

Most people derive their information about judges and the courts indirectly, whether that is through the media, word of mouth or ever popular courtroom dramas.[26] Professor Blackshield commented that "[t]he work of the courts … is shrouded in general public ignorance, broken only by occasional stories about sensational cases".[27]

For example, the feedback inbox of the Supreme Court of NSW was inundated by dozens of emails urging the court to address the 2020 presidential election in the US. Whilst some of these emails are clearly from US citizens, the nationality of others is unclear. One email demands the court "does our job" and address electoral fraud, whilst another describes that they are "baffled [that] the Supreme Court has not stepped in to list Trump and Pence out of office". Another states the court is the "last hope" for the US. For the first time in my judicial career, I thought

22 P Ward, "Trust: what is it and why do we need it?" in M Jacobsen (ed), *Emotions, everyday life and sociology*, Routledge, 2019, p 17.

23 K Mack, S Roach Anleu and J Tutton, "The judiciary and the public: judicial perceptions" (2018) 39 *Adelaide Law Review* 1 at 5; S Roach Anleu and K Mack, "The work of the Australian judiciary: public and judicial attitudes" (2010) 20 *Journal of Judicial Administration* 3 at 3. See generally, C Jones, D Weatherburn and K McFarlane, "Public confidence in the NSW criminal justice system" (2008) *Crime and Justice Bulletin* 118: 20.6% of respondents to a survey conducted in NSW in 2007 indicated that "personal experience" was "the most influential" source of information about the criminal justice system.

24 I Nielsen, Z Robinson and R Smyth, "Keep your (horse) hair on? Experimental evidence on the effect of exposure to legitimising symbols on diffuse support for the High Court" (2020) 48(3) *FLR* 382 at 385.

25 See generally, Soeharno, above n 8, pp 85–87.

26 Roach Anleu and Mack, above n 23, at 3.

27 A Blackshield, "The legitimacy and authority of judges" (1987) 10 *UNSWLJ* 155 at 160.

I had some real power. Jokes aside, these emails illustrate the limited understanding that many members of the public have about the varying roles and powers of judges from court to court, and country to country.

A study conducted last year suggested that the High Court "can increase diffuse support by taking steps to increase familiarity with what it does as an institution".[28] This rests on the presumption that "people who are more familiar with the courts will regard the courts as having greater legitimacy or express more diffuse support for their decisions".[29] Positivity theory suggests that "increased exposure to the symbols of judicial authority stimulates positive associations within individuals that help courts build and maintain their legitimacy".[30]

I think there is undoubtedly a link between public understanding of the judiciary and trust. This correlation is supported by the 2020 Edelman Trust Barometer, an annual global survey on institutional trust, which reported that Australia had the highest trust inequality in the world between the level of institutional trust in institutions by the "informed public" being the "wealthier, more educated, and frequent consumers of news" and the "mass population".[31]

In my opinion, improving public understanding of the role and operations of the judiciary across the community is essential to building trust. We build trust in the competency of the courts when we directly engage with members of the public, when we make court proceedings accessible and when we convey judicial reasoning in a comprehensible manner. The more the public can view court proceedings, whether in-person or from the comfort of their living room, and understand plain English explanations of legal decisions, the more likely they are to appreciate how judges make decisions and therefore trust in those decisions and the people that make them.

I think it is essential that courts continue to innovate to improve accessibility. The COVID-19 pandemic has turbocharged many of these developments, including the number of matters live-streamed. The shift to online courtrooms greatly increased the accessibility of court proceedings. The YouTube livestream of some of the challenges to the Black Lives Matter protests was a great success. Thousands of people tuned in on whatever device was handy to see the resolution of this significant piece of litigation. The popularity of such measures is further shown by the astounding 42,000 viewers who watched the live-stream of George Pell's appeal to the Victorian Court of Appeal.[32]

Putting the judicial system online, and in forums commonly used by members of the public, revolutionises the accessibility of the courts. It enables the public to see not only that justice is done but *how* it is done. When it is as simple as clicking on a YouTube link, anyone, irrespective of their familiarity with the courts, their geographical location, their confidence in entering

28 Nielsen, Robinson and Smyth, above n 24, p 399.

29 ibid at 384, citing J Gibson and G Caldeira, *Citizens, courts and confirmations: positivity theory and the judgments of the American people*, Princeton University Press, 2009.

30 J Gibson, M Lodge and B Woodson, "Losing, but accepting: legitimacy positivity theory, and the symbols of judicial authority" (2014) 48(4) *Law & Society Review* 837.

31 Edelman, above n 1.

32 Forty-two thousand viewers live-streamed the hearing in *George Pell v R* [2019] VSCA 186: Supreme Court of Victoria, *Annual Report 2017–2019*, Report, October 2019, p 17 at www.supremecourt.vic.gov.au/about-the-court/annual-reports/supreme-court-of-victoria-2017-19-annual-report, accessed 22 June 2022.

court buildings, can see justice in action. Mediums such as YouTube allow courts to engage with a new and younger audience who may never observe court proceedings in-person but armed with a device and the internet can engage in a manner accessible to them. We cannot underestimate the significance of this in increasing the public understanding of what we do, and in turn, promoting trust. This doesn't mean I am advocating for a 24-hour cable service streaming court proceedings. There is one in New York City and I can assure you that watching it is the best way to get some sleep if you are jetlagged. However, I do think such measures are a powerful tool for building trust by demystifying what judges do and how they do it.

Trust in the integrity of the judiciary

The second dimension of trust in organisations is integrity, namely, where the organisation consistently adheres to a set of principles or values that the public finds acceptable. The Rule of Law is premised on judges being of good character in order to preserve judicial legitimacy.[33] The integrity of the judiciary as an institution is dependent on the integrity of each and every judge. When trust in an individual judge is compromised, so too is trust in the institution. Trust will only be maintained if judges maintain the highest standards of integrity in their professional, public and private lives.

Citizens are more likely to trust the judiciary when they believe that the judiciary, as an institution, will "represent, enact, and even embody values they share".[34] The standards required from judges are "perhaps the highest and most rigorous … of any profession in the community".[35] This is because judicial office is "not simply a role, but a public institution."[36]

The public entrusts judges with immense power. Day after day, the decisions we make have profound implications on the lives, fortunes and liberty of those who come before the court and frequently "affect interests far beyond those formally represented in the courtroom".[37] It is not enough that judges uphold such standards on the bench; they must also demonstrate integrity off the bench. From the perspective of a member of the public, "it is difficult to dissociate the law from the judges who declare and apply it".[38]

Knowing that judges understand and reflect societal standards is a crucial element of trust. No member of the public wishes to entrust such power "to anyone whose honesty, ability or personal standards are questionable".[39] As a result, trust in the judiciary is eroded when the conduct of a judge, on or off the bench, is perceived as demonstrating a disregard and disrespect for the law or prevailing community standards.

Such transgressions significantly erode trust by those directly impacted. However, they also pollute trust more broadly. The public will never hear of the vast majority of well-behaving

33 Soeharno, above n 8, p 34.
34 B Bradford, J Jackson and M Hough, "Trust in justice" in E Uslaner (ed), *The Oxford handbook of social and political trust*, OUP, 2018, p 14 at https://eprints.bbk.ac.uk/id/eprint/16337/1/16337.pdf, accessed 22 June 2022.
35 J Thomas, *Judicial ethics in Australia*, 3rd edn, LexisNexis Australia, 2009, p 12.
36 Soeharno, above n 8, p 78.
37 C Guarnieri and P Pederzoli, *The power of judges: a comparative study of courts and democracy*, OUP, 2002, p 9.
38 Thomas, above n 35, p 11.
39 ibid p 8.

judges but will almost certainly hear of the rare judge that does not live up to community standards. It has been stated that "[b]ad Judges, however few there may be, will always be a stain on the public perception of Justice".[40]

Almost all Australian judges remain totally unknown to the public. Research shows more Australians recognise Judge Judy than any High Court judge.[41] Public awareness of judges tends to fall into one of three categories: total anonymity for almost all judges, the celebrity judge from overseas, and the odd domestic judge that has achieved notoriety.

Unlike the US, we have no culture of "celebrity judges". Often, one of the only reasons why a judge in Australia is widely known is not because they are a "celebrity", but because of their perceived deficiencies.

The Edelman Trust Barometer reported that no Australian institution was seen as both competent and ethical.[42] This included the government. Whilst this survey did not directly report on trust in the judiciary or the courts, I do think it is cause for great concern. The public should not have to choose between competency and ethics in their institutions.

The judiciary does not operate in a vacuum, separate from the people we serve. We cannot be insulated from developments in public attitudes and values. We must review and adapt policies and procedures to ensure we not only meet, but exceed, changing societal standards. The Honourable A M Gleeson AC QC stated that:[43]

> Confidence [and I would argue trust] in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.

The #MeToo movement and allegations of sexual harassment by a judge has cast a spotlight on the legal profession and the judiciary. The justified concern and disgust by the public at such allegations shows the degree of trust instilled in the judiciary and the ease in which it can be dismantled.

The legal profession has had a significant problem with sexual harassment. Legal workplaces feature many risk factors for sexual harassment including power imbalances, systems of patronage, interconnectedness, long hours and the reality that men continue to hold most senior positions.[44] Fortunately, all branches of the profession have become acutely aware of the problem and the need to endeavour to eliminate it.

40 G Williams, *A short book of bad judges*, Wildy, Simmonds & Hill Publishing, 2013, p 71.
41 I Nielsen and R Smyth, "What the Australian public knows about the High Court" (2019) 47(1) *Federal Law Review* 31.
42 Edelman, above n 1, p 13.
43 Gleeson, above n 17, p 561.
44 See generally, Australian Human Rights Commission, *Respect@Work: national inquiry into sexual harassment in Australian workplaces*, Report, 2020, at https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf, accessed 22 June 2022.

A 2019 survey revealed that 53% of female lawyers and 12% of male lawyers in Victoria had experienced sexual harassment in the legal sector.[45] Only 20% reported it.[46] Furthermore, such incidents were not a relic of the past. Fifty-seven per cent said the harassment had occurred within the past five years.[47] The figures are no less concerning in another 2019 survey conducted by the International Bar Association. Forty-seven per cent of Australian female respondents had experienced sexual harassment (compared to 37% globally) and 13% of male respondents.[48]

I am, of course, focusing on trust in the judiciary, not trust in the legal profession. This raises the fundamental question: is trust in the judiciary compromised by poor behaviour in the legal profession more broadly? The answer is undoubtedly yes. The two are inextricably linked. Judges are drawn from the senior ranks of the legal profession and are reliant upon the profession for the performance of its functions.[49] To the extent that sexual harassment within the profession erodes trust in the profession, it also erodes trust in judges who are appointed as leaders of that profession.

Sexual harassment is the current hot button issue. This is understandable. However, most complaints about judges concern bullying, not sexual harassment. Bullying, like all unacceptable behaviour, also erodes trust.

The pervasiveness of unacceptable workplace behaviour in the profession has stayed hidden for far too long due to the power imbalances inherent in many legal workplaces, the stigma associated with reporting and the importance of reputation to a career in the law. Many victims are understandably scared to come forward in fear of jeopardising their career. It takes real courage to do so.

Whilst many victims of bullying and harassment stay silent, the impacts of such behaviour are pronounced. It is an unfortunate reality that women and men leave the law because of sexual harassment and bullying. Individuals also leave because of bias and discrimination that result in unequal opportunities. Both are deeply troubling. Both behaviours disempower, exclude and silence victims from their rightful place in the law. This undoubtedly builds deep mistrust in the legal profession, and the judiciary in turn. Furthermore, apart from the impact of such behaviour on the reputation of the profession, and a result the judiciary, it also deprives the profession of great talent. This drain in turn impacts the diversity and quality of the judiciary.

Robust mechanisms are needed to prevent and respond to all unacceptable behaviour. Such policies must recognise and overcome the vast power imbalances often present and exploited in such behaviour. These policies serve a range of purposes. First, they serve the interest of complainants who have been impacted by improper behaviour. Second, it signals the standards

45 Victorian Legal Services Board and Commissioner, *Sexual harassment in the Victorian legal sector*, 2019 study of legal professionals and legal entities, 2019, p 18 at https://lsbc.vic.gov.au/sites/default/files/2020- 03/Sexual%20Harassment %20in%20the%20Victorian%20Legal%20Sector%20Report.pdf, accessed 22 June 2022.

46 ibid, p 19.

47 ibid.

48 International Bar Association, *Us too? Bullying and sexual harassment in the legal profession*, Report, 2019, p 87.

49 See further, M Gleeson, "Bench and Bar" in G Lindsay and C Webster (eds), *No mere mouthpiece: servants of all, yet of none*, LexisNexis Butterworths, 2002, pp 37, 39–40.

of behaviour expected of all judges and their staff, and therefore can prevent such behaviour in the first place. Most importantly, however, it demonstrates to the public that "the judiciary is willing to meet proper standards and that action will be taken where poor behaviour occurs".[50] In this way, the mere existence of transparent and robust policies that address improper behaviour inspires trust in the judiciary. These policies accompanied by the comprehensive resolution of any complaints and swift condemnation of any unacceptable behaviour reflects the values at the heart of the judiciary.

Furthermore, the Judicial Commission of NSW has, and continues to be, an invaluable institution in maintaining and fostering trust in the integrity and competency of the judiciary. The Judicial Commission was born out a perceived crisis in confidence and trust in the judiciary in NSW,[51] with a mission of promoting "the highest standards of judicial behaviour and decision making".[52] The Commission promotes and strengthens trust in the judiciary through its work in judicial education and training, community engagement and as an independent body to receive and respond to complaints about judicial officers. The existence of an independent complaints channel and the transparency surrounding the number of complaints and how they were handled significantly enhances trust in the competency and integrity of the judiciary.[53]

We also build trust in the judiciary when we ensure that equal opportunities are afforded to all practitioners. How do we do this? Trust is not only built at an institutional level by formal policies promoting equal opportunity. It is also built in the interactions that play out between judges and practitioners every day in every courtroom across the country. As Allsop CJ said, courts are "living institutions and workplaces".[54] Judges engender trust in the judiciary when we recognise the human side of the lawyers that come before us.

We do this when we afford everyone in our courtrooms respect and courtesy; when we recognise and accommodate the pressures many practitioners face in juggling a career in the law with family responsibilities. Whilst they may appear insignificant, these acts demonstrate the commitment of the judiciary to diversity. We must ensure that going to court isn't a Darwinian experience where only the ones with thick skin or without children on their back survive. This relates back to the idea that judges that engender trust are not necessarily the most technically competent, but the ones that demonstrate the values at the heart of the institution by their tolerance, their respect and their courtesy.

50 G Appleby and S Le Mire, "Judicial conduct: crafting a system that enhances institutional integrity" (2014) 38(1) *MULR* 1 at 5–6. See also Soeharno, above n 8, p 129.

51 See further, T F Bathurst, "Welcome address to the 30th anniversary of the Judicial Commission reception", speech presented at 30th anniversary of the Judicial Commission reception, 11 October 2017, Sydney, p 2 at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeche s/Bathurst%20CJ/Bathurst_20181011.pdf, accessed 22 June 2022.

52 Judicial Commission of NSW, "About us" at www.judcom.nsw.gov.au/about-the-commission/, accessed 22 June 2022.

53 See Judicial Commission of NSW, "Complaint statistics" at www.judcom.nsw.gov.au/complaints/complaint-statistics/, accessed 22 June 2022.

54 J Allsop, "Courts as (living) institutions and workplaces", paper presented at the 2019 Joint Federal & Supreme Court Conference, 23 January 2019, Hobart, at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190123, accessed 22 June 2022.

Trust in the benevolence of the judiciary

The final dimension of trust in organisations is that of benevolence or goodwill. The judiciary promotes trust in this manner when we demonstrate a commitment to act in the interests of the public because of moral values and incentive compatibility. This is consistent with the judicial oath taken by judges who promise to "do right to all manner of people" according to law "without fear or favour, affection or ill-will".[55] Importantly, trust in the judiciary is built not only on reality, but also on perception.[56] The perception by the public in our performance is just as important as how competently we do in fact perform our functions.

The judiciary in Australia, and particularly in NSW, serve extremely diverse communities. The diversity of the community is reflected in the people that come before the courts — whether as litigants, lawyers or jurors. It is not enough that most of the public trusts us. There is no such thing as "the" public in Australia. The public who the judiciary serves is each and every member of the community, and the community does not feel trust or assess trustworthiness homogenously.

We would be naïve to think that every member of the community trusts us to "do right" by them. The level of trust in the judiciary is not uniform across the population we serve. It is well-documented that minority groups are less trusting of courts.[57] A 2019 survey by the Bureau of Crime Statistics and Research on public confidence in the NSW criminal justice system found that "respondents who were more confident in the courts tended to be male, younger and resided in metropolitan areas".[58] This can be explained by the fact that the production, strengthening and erosion of trust is intimately connected with systems of power and control in society.[59]

The judiciary must be astute to the distrust of many First Nations communities.[60] The Judicial Commission's *Equality before the Law Bench Book* notes that First Nations peoples

55 *Oaths Act 1900* (NSW), Sch 4.

56 G Brennan, "The third branch and the Fourth Estate", paper presented at Broadcasting, Society and the Law, Faculty of Law, 22 April 1997, University College, Dublin at www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_irish.htm, accessed 22 June 2022.

57 E Berthelot, B McNeal, J Baldwin, "Relationships between agency-specific contact, victimization type, and trust and confidence in the police and courts" (2018) 43(4) *American Journal of Criminal Justice* 768 at 786; K Fernandez and J Husser, "Public attitudes toward State courts" in *Open Judicial Politics*, Oregan State University, 2020, at https://open.oregonstate.education/open-judicial-politics/chapter/fernandez/, accessed 22 June 2022; G Dougherty, S Lindquist and M Bradbury, "Evaluating performance in State judicial institutions: trust and confidence in the Georgia judiciary" (2006) 38(3) *State and Local Government Review* 176 at 187; T Tyler, D Rottman, A Tomkins, "Public trust and confidence in legal authorities: what do majority and minority members want from the law and legal institutions?" (2001) 19(2) *Behavioural Sciences & the Law* 215; I Sun and Y Wu, "Citizens' perceptions of the courts: the impact of race, gender, and recent experience" (2006) 34(5) *Journal of Criminal Justice* 457; Centre for Justice Innovation, *Building trust: how our courts can improve the criminal court experience for Black, Asian, and minority ethnic defendants*, Report, March 2017, at https://justiceinnovation.org/sites/default/files/media/documents/2019-03/building-trust.pdf, accessed 22 June 2022.

58 E Moore, "Public confidence in the NSW criminal justice system: 2019 update" (2020) 227 *Crime and Justice Bulletin* 1 at 10.

59 B Tranter and K Booth, "Geographies of trust: socio-spatial variegations of trust in insurance" (2019) 107 *Geoforum* 199 at 200.

60 I note that levels of trust are not uniform within a community, including within First Nations communities.

"frequently" distrust the police and the law and see them as "tools of oppression".[61] The Black Lives Matter movement has highlighted the distrust of many towards the ability of our justice system to, in fact, deliver justice for Australia's First Nations peoples. The tens of thousands of people, both First Nations and non-First Nations, that took to the streets across Australia demonstrates a deep concern that the police and legal system remain tools of oppression and injustice for First Nations peoples.

Even if much of the distrust highlighted by the Black Lives Matter movement resulted from the conduct of police officers and custodial officers, there is an understandable tendency for the public to amalgamate various justice entities, such as the police force, prisons and courts. We must remember that in the eyes of the public, the judiciary is inextricably linked to any injustices perpetrated by police or custodial officers.

The Law Council of Australia in their 2018 review on access to justice in Australia noted that "systemic discrimination, in addition to the law in Australia contributing to the criminalisation of First Nations communities, deaths in custody and the denial of political rights, have created a profound and ongoing distrust".[62] Similarly, the Judicial Council on Diversity and Inclusion stated that "[t]he imposition of colonial law and the dismantling of Indigenous 'Lore' has resulted in significant mistrust of the legal system by many within Indigenous communities across the country".[63]

Given the historical disenfranchisement, oppression and exclusion of First Nations peoples by our justice system, it is understandable that Australia's First Nations peoples do not view the judiciary as favourably as other groups. The ongoing impacts of colonisation and past injustices has created a "legacy of fear, suspicion and distrust" that militates against many First Nations peoples voluntarily engaging with the justice system.[64]

Personal experiences with the legal system strongly influence the level of trust in justice institutions.[65] When examining methods of building trust, we cannot overlook the very real experiences that First Nations peoples and their ancestors have had with the justice system and how this impacts levels of trust today. We must remember that perceptions of unfairness are grounded in real, lived and traumatic experiences with the justice system. As the Law

61 Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006-, "Intergenerational/transgenerational trauma" at [2.2.2], at www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html#p2.2, accessed 22 June 2022.

62 Law Council of Australia, *The justice project*, Final Report, August 2018, p 29 at https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf, accessed 22 June 2022.

63 Judicial Council on Diversity and Inclusion, Submission No 120 to Productivity Commission, *Inquiry into access to justice arrangements*, 29 November 2013, p 1 at https://jcdi.org.au/wp-content/uploads/2021/06/04_Submission_to_Productivity_Commission_made_by_Martin_CJ_for_JCCD.pdf, accessed 19 January 2023.

64 Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, Report to the Attorney-General, February 2012, p 40 at www.ag.gov.au/sites/default/files/2020-03/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf, accessed 22 June 2022.

65 See citations above n 23.

Council of Australia notes "many Aboriginal and Torres Strait Islander people have experience of intergenerational trauma linked with the justice system, and many also have personal prior experience of it working 'against them' instead of 'for them'".[66]

The ongoing legacy of past injustices profoundly impacts children who typically learn about the justice system from their families and communities. Past experiences with the police, prisons or judiciary that foster distrust are likely to be passed down from generation to generation. Research in the US shows that Caucasian children are "more likely to associate judicial institutions with fairness and justice", while children from minority backgrounds are "more likely to associate them with discipline and control".[67]

When one considers the role of the judiciary as part of the criminal justice system that has resulted in First Nations peoples being one of, if not the most, incarcerated peoples in the world,[68] it is easy to see why Australia's First Nations children would associate the judiciary with control and injustice as opposed to fairness and justice. As Leetona Dungay, whose son died in Long Bail jail in 2015 stated, "year after year, judges and police put more and more Aboriginal people in prison. Too often it isn't a prison sentence, it's a death sentence".[69]

In my opinion, it is deeply concerning when different community groups have different levels of the trust in the courts. The judiciary serves each and every member of the community. Not merely the ones living in cities or those taught from a young age that judges will protect them and their communities or those who speak English as their first language. All members of the community should feel as if they can trust in the judiciary to the highest degree.

Such variation in the levels of trust amongst the community calls into question whether the judiciary is in fact doing right to all manner of people. The mere perception (even if unfounded) that there is bias against certain groups in society severely diminishes the trust in and in turn, the legitimacy of the judiciary.[70]

Furthermore, the lack of trust by certain sectors of the community can have devastating impacts. Feelings of distrust may discourage groups from exercising their rights under the law and seeking redress in the courts. First Nations peoples are less likely to resolve their legal issue or issues.[71] The "mistrust of the legal system … because of negative interactions between Indigenous people and the law in the past" is one reason cited for this phenomenon.[72]

66 Law Council of Australia, above n 62, p 30.
67 T O'Brien, "Racing justice: mass incarceration and perceptions of courts" (2020) 90 *Social Science Research* 1 at 3.
68 See T Anthony, "FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?", *The Conversation*, 6 June 2017 at https://theconversation.com/factcheck-qanda-areindigenous-australians-the-most-incarcerated-people-on-earth-78528, accessed 22 June 2022. See also, Australian Law Reform Commission, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples*, Report No 133, March 2018.
69 @clcnsw (Community Legal Centres NSW), *Twitter*, 7 December 2019, 2:05pm AEST at https://twitter.com/clcnsw/status/1335782573562195970/photo/1, accessed 22 June 2022.
70 Fernandez and Husser, above n 57.
71 Law and Justice Foundation, "Legal needs of Indigenous people in Australia", May 2013, 25 *Updating Justice* 1 at 3.
72 Indigenous Legal Needs Project, James Cook University, Submission No 105 to Productivity Commission, *Inquiry into access to justice arrangements*, 19 November 2013, pp 4–5.

Unaddressed legal issues can quickly spiral into more complex legal problems, including criminal behaviours,[73] as "legal problems in civil, family and criminal laws interact … through a form of 'snowballing'".[74]

It is essential that the judiciary continually strives to build and rebuild trust by the public, and especially within communities that have traditionally had poor relations with the justice system. Two key mechanisms come to mind.

We must continue to build trust incrementally and consistently by demonstrating that the judiciary does in fact serve all. We do this when we provide culturally sensitive services that recognise the ongoing impacts of colonisation in Australia. There is an ongoing need for "culturally competent, community-controlled services engaging with First Nations peoples to bridge this distrust".[75] In light of the centuries of injustice inflicted by our "justice system" towards Australia's First Nations peoples, it will understandably take a long time to earn back the trust of many First Nations peoples. We must strengthen trust, bit by bit.

Secondly, improvements in the diversity of the judiciary will also strengthen trust in the judiciary by further challenging any perception that the judiciary does not serve the interests of all. When the judiciary is perceived as homogenous (irrespective of whether that is true), it is harder for the public to trust in its impartiality. People are more likely to trust in the judiciary when, and to the extent, they believe that judges "represent social groups to which they feel they belong".[76] If a community cannot not look at their judges and see men and women they identify with, their trust in the ability of the justice system to do right by them may be compromised.

It has been pointed out that it is "[s]ymbolically problematic for the judiciary to be dominated by heterosexual, white, middle-class male barristers".[77] This is undoubtedly true. I am the first to recognise that the power entrusted in the judiciary continues to be wielded predominantly by men that both look like me and have been afforded the privileges of a similar background. It has been said, "it is plainly unfair that we should have an unjustifiable representation of one group".[78]

Of course, it is not the role of the judiciary to represent any or all communities. However, a judiciary seen to be exclusively drawn from a specific ethnic and socio-economic background, in particular postcodes 2021 to 2030, 2069 to 2076 and 2088 to 2090 will, even with the best intentions and technical skill, find it difficult to convince people from other backgrounds that they are committed to doing right by all. A diverse judiciary is symbolic in representing the values at the heart of the institution. The judiciary must actively promote, and be seen to promote, diversity.

73 See, Productivity Commission, *Access to justice arrangements*, Report, 2014, vol 2, pp 782–783. See also, C Cunneen and M Schwartz, "Civil and family law needs of Indigenous people in New South Wales: the priority areas" (2009) 32(3) *UNSW Law Journal* 725 at 744.

74 Indigenous Legal Needs Project, above n 72, p 3. See also Law Council of Australia, above n 62, p 20.

75 Law Council of Australia, above n 62, p 31.

76 Bradford, Jackson and Hough, above n 34, p 14.

77 E Rackley, *Women, judging and the judiciary*, Routledge, 2013, p 23.

78 Guarnieri and Pederzoli, above n 37, p 24.

I know there are people, both in this room and the broader community, who will say we've heard this all before and nothing happens. It is true that people have been speaking about improving judicial diversity at least since the time I was a junior silk, which for those of you who can't remember, was about the time the mobile phone that more closely resembled a brick was invented. It is not true that nothing has happened. There has been improvement and more importantly, a recognition both in government and in the profession of the importance of judicial diversity and that more needs to be done to address the complex structural barriers faced by women, and people of certain backgrounds.[79] Improvements will inevitably occur because of the increasing diversity of those being admitted to the profession. However, to maximise the rich talent in the legal profession, it is important that steps are taken to ensure culturally, and gender diverse talent ultimately results in a judiciary in which all members of the community can trust.

Conclusion

To conclude, the judiciary, like all public institutions, must be alert to the decline in public trust. We cannot afford to be complacent about the levels and uniformity of trust by the public. The legitimacy of the judiciary, and in turn, the courts, rests upon diffuse trust by the public. Anything less is insufficient.

Trust by the public in the judiciary cannot be demanded. It must be earned in how we function and importantly, appear to function. For people to trust in the judiciary, every judge, and the judiciary as a whole, must be more than simply competent. For the public to trust in the judiciary, they must trust in our competency, our integrity, and our commitment to do right by "all manner of people". We must, individually and collectively, uphold the highest standards of integrity and respect the diversity of the community we serve. This will ensure that every member of the public takes the leap of faith to trust in judicial decisions.

The judiciary must continually re-evaluate how we can strengthen trust across all sections of the community. This is not just a responsibility for the judiciary as an institution. Each and every judge must strive to build trust where it is lacking and strengthen trust where it exists. Perhaps a small way to do it will be for every judge to reaffirm their commitment to try and ensure every litigant who leaves the courtroom, regardless of whether they win, lose or draw, feels that they've had a fair, independent and courteous go.

79 See further Rackley, above n 77, p 35.

Shaping legal minds — the ethical mind*

The Honourable S Kiefel AC†

The requirement that all lawyers act honourably and ethically is one of the most important requirements of the legal profession. The Chief Justice iterates that the study and expression of the values and principles which inform legal ethics must be so well understood, they may be said to have shaped the professional lawyer's mind.

I propose to address the theme of this Symposium which is about "Shaping Legal Minds" by reference to an important and enduring topic. It concerns the ethical mind. I wish to discuss how the study and expression of ethics shapes the mind of a lawyer. The journey starts from student days and continues throughout a lawyer's professional life. Ethical conduct is a critical aspect of the legal profession. It is an important part of what sets the profession apart from a business.

Sir Owen Dixon once said that "[t]o be a good lawyer is difficult. To master the law is impossible". The first rule of conduct (which he described as itself an ethical rule) is for the lawyer to "know his work", "to do his best to acquire such knowledge of the law so that he knows what he is doing" when he acts for a client in court or advises that person whether to go to court.[1] To acquire such knowledge, he said, requires "hard work for a long time".[2] He said "a law school cannot give you the necessary knowledge; it is only acquired through practising law".[3] What a law school does is to provide the lawyer with a body of fundamental principles and teach them how to use those principles to obtain a more extensive and detailed understanding of the law.

Sir Owen Dixon's view of legal formalism may not have paid much regard to the principles of legal ethics as guiding both an understanding of the law and its practise. But no one can doubt the

* Closing address to Queensland Symposium, Queensland Law Society, 19 March 2021.

† Chief Justice of Australia.

1 O Dixon, "Professional Conduct", in S Crennan and W Gummow (eds), *Jesting Pilate*, 3rd edn, Federation Press, 2019, p 274 at pp 275–276.

2 ibid at 276.

3 ibid.

importance of legal ethics. The requirement that all lawyers act ethically is one of the distinctive features of the profession. And the legal profession understands this to be the case, for it has always required it long before the regulation of professional conduct was imposed upon it. A student at law seeking admission as a lawyer must meet the "fit and proper person" standard.[4] The standard has ancient roots. As early as 1275 a statute provided for the imprisonment of and suspension from practice of lawyers who deceived the court or their client (LRO footnote 56). However for the most part in the common law tradition, regulation of fitness for practice was left to autonomous professional bodies.

Australian universities recognise the importance of legal ethics to the practice of the law. Their law faculties seek to prepare students for the possibility of joining the legal profession by courses such as "Ethics and the Legal Profession",[5] "Lawyers, Justice and Ethics"[6] and "Ethics, Social Responsibility and the Law".[7] The last-mentioned subject title captures an important aspect of the legal profession: that it has a strong public dimension. To practise as a professional lawyer is to make available skills to the state and to the community. It involves obligations which are founded on the public interest, such as that in the proper administration of justice.

Sir Owen Dixon's statements point up the fact that in reality a lawyer is educated through the actual practise of the law and what is gained by experience. So too is the necessary depth of understanding of legal ethics gained by the experience and challenges to right-thinking on the part of a practising lawyer.

Every lawyer is taught that their overriding duty is that owed to the court, although litigators are more likely to be reminded of that duty in their daily practise than commercial lawyers. Duty to the court is characterised as an "overriding" or "paramount" duty in rules of professional conduct such as the *Australian Solicitor Conduct Rules*.[8] It is understood that it transcends the duty to the client. It recognises the role of a lawyer in the administration of justice.

The duty owed by a lawyer to the court is but one, albeit an important, aspect of the requirements of ethical conduct. The work of lawyers is of course not confined to the courts. Lawyers who advise all manner of clients on many topics help the client navigate their legal relationship with others. They identify the bounds of lawful conduct and assist their clients' appreciation of the law. In their contact with clients, lawyers may be tempted to stray from what ethics requires in the clients' pursuit of their interests. But the practise of law is a profession in the true sense, not just a business. Ethics understood and applied in the practise of the law is a felt commitment to honesty and integrity.

Because the practise of the law is a true profession, it has always functioned as something of a self-regulating society. It is understood that more experienced lawyers have an obligation to oversee the conduct of fledgling lawyers, to promote in them a deeper understanding of what is

4 See, eg, *Legal Profession Act 2007* (Qld) ss 9(1)(a), 31.
5 University of Queensland.
6 Australian National University.
7 University of Tasmania.
8 Queensland Law Society, *Australian Solicitor Conduct Rules*, 2012 r 3 at www.qls.com.au/getattachment/f52dcbc2-8641-4cc0-b43f-55d865ac3f04/qls-australian-solicitors-conduct-rules.pdf, accessed 11 June 2022.

required of them and to guide them where necessary. The young lawyer must also appreciate that their conduct is being monitored by their peers. Lawyers talk a lot amongst themselves about experiences with other lawyers. A reputation for proper conduct is one of the most important assets a lawyer can have and it is one which may irredeemably be lost.

Sir Gerard Brennan has expressed the view[9] that ethics are not what a lawyer knows he or she should do; ethics are *what* they do. On this view ethics is not so much learned as lived. This view may imply that ethical conduct should be second nature to a lawyer, instinctive almost. And so it should. But I do not take it to mean that a person cannot be guided by and learn from others or that experience and the observation of the conduct of others in the profession cannot be instructive. Ethical conduct, like the rules of etiquette which are peculiar to the legal profession, is something of a construct. So while much of a person's tendency to adhere to honesty and integrity may derive from upbringing and the morals and values which have been imparted in that process, a person may also learn what is required of a professional lawyer.

What statements such as Sir Gerard's most clearly imply is that legal ethics cannot be reduced to a set of rules to be followed, although some stated rules of conduct may be indicative of the broader requirements of legal ethics. The fit and proper standard of a practitioner may be said to be one of character. But that character is shaped by a deeply-held commitment to honesty and integrity which is the basis of legal ethics.

It has often been recognised, because experience over the years shows, that for a profession to continue it requires high professional standards to be maintained. If they are not, the trust and confidence of the community which it serves may well be lost.[10] The profession will then become irrelevant. There can be no higher or stricter requirement of a lawyer than that she or he behave honourably and ethically. And that requires that the values and principles which inform legal ethics are so well understood that they may be said to have shaped the professional lawyer's mind.

9 G Brennan, "Ethics and the advocate", Speech delivered to the Bar Association of Queensland, 3 May 1992, at 1–2.
10 Dixon, above n 1, at p 279.

Further references on ethics and conduct

For further references on the topics of ethics and conduct, please see the following:

- Australian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd edn (rev), 2022, ch 6.

Efficiency, competence, delay and case management

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The Penrith District Court approach to efficiency in trial management*

His Honour Judge S Hanley SC†

This article describes the manner in which the author conducted Penrith District Court as the List Judge and outlines lessons learnt in achieving efficient trial management. A number of judges who were to be sitting judges in regional courts spent time at the Penrith District Court to observe the running of a small court. These approaches to trial efficiency formed the basis of Practice Note DC (Civil) No 1.

Prior to arraignment

The chief means of achieving efficient trial management is to get the parties to begin communicating with each other at an early stage to identify the issues, resolve what can be resolved, and determine which witnesses will be required. Communication between the parties is essential.

This process is most effectively initiated by the judge reading the prosecution file or Crown case statement before the arraignment. At this point of the criminal trial process, the trial judge can identify what he/she thinks are the issues etc and direct the parties to address these and any other identified issues before the call over.

At arraignment

At arraignment, a timetable is set for the defence to advise the Crown in writing what (if any edits) they require to Electronically Recorded Interviews of a Suspected Person (ERISPS) or child interviews if they are to be led as evidence in chief at trial; when expert evidence or Notices

* Paper presented at the District Court of NSW Annual Conference, 23–24 April 2019.

† Judge of the District Court of NSW

are to be served by; to identify any outstanding Crown requisitions; and to set a timetable for that material to be served on the defence. The parties should confirm that these are timetables they believe can be realistically met.

Lead up to the call over

Thereafter and leading up to the call over, the parties should be in communication with each other to resolve or reduce these issues, agree on "Facts" that can be tendered, and determine which witnesses are required.

The ability to talk to your opponent requires knowing who your opponent is. The manager at the Penrith DPP office allocates briefs to the Crowns and Trial Advocates up to 6 to 9 months in advance. This ensures there is no excuse for the defence being unable to speak to their opponent.

Call over

Each trial is different and effective management requires a flexible approach to call over management, the timing in respect of the prospective trial date, and the need to have more than one call over to resolve the identified issues. The completion of s 143 forms by the defence does not seem to achieve this purpose.

Call overs are effective if both parties are aware that the judge has read the file and they come prepared to answer questions posed by the judge in respect of trial management and issue resolution. I may have several call overs for a particular matter if it appears to require staged control of the matters to be addressed, and to allow time for the realisation that a plea of guilty is the more appropriate course.

Only counsel or solicitors instructing in the trial are to appear on call overs. They can appear from anywhere at 9:30 am if they want to utilise virtual meeting rooms (VMR). Agents are a waste of time.

Improved trial efficiency at the Penrith District Court

This approach at Penrith District Court has resulted in:

- pleas occurring earlier in the process after committal for trial
- both sides being prepared before the trial date
- an early resolution between the parties of prospective legal arguments
- agreement as to the editing of ERISPS and witnesses interviews
- agreement as to an "Agreed Facts" document to be tendered
- reduction in the number of witnesses required, in particular expert witnesses. Some of those required to appear do so via VMR
- a reduction in the late service of new prosecution material as requisitions by the DPP on the NSW Police Force are made at a timely and advanced stage in the process

- trials start on Monday which is crucial as the Fridays List day cannot accommodate a trial also taking place. If there are any outstanding legal issues that the parties cannot resolve before the trial date they are usually limited and resolved by the trial judge on the trial day and in time for the trial to commence on Monday morning,
- the original estimate of the trial has been significantly reduced so that most trials are completed in 4 days. This is qualified by the fact Penrith District Court does not list trials that are estimated to go on longer than 10 days.

Fact-finding made easy*

The Honourable Mr P Young AO QC†

The basic task of most courts, tribunals and arbitrators is to find the facts. There is little material on the subject as to how one goes about this task. This article seeks to list the guidelines from the author's experience of 21 years on the Bench as well as reference to the few pieces of written material on the subject.

Introduction

In M J Trow's book, *Lestrade and the Sign of Nine*,[1] p 17, Sergeant George introduces two new recruits, Constables Tyrell and Green, to Inspector Lestrade. Lestrade says to the first, "You're Green". "No, Sir" says the constable, "I'm Tyrell!" "Well" said the inspector, "that's your first lesson in detective work: you only have at least a fifty-fifty chance of being right!"

The purpose of this article is to endeavour to improve a judge's chances to well above fifty-fifty of being right in a fact-finding exercise.

Actually the title to this article is quite misleading. Fact-finding is actually a very difficult matter and there is no magic formula to apply to make the process become easier. However, by following the guidelines mapped out by experience, the chances of reaching the correct finding of fact will be enhanced.

The guidelines will be arranged under the following headings:

- General observations
- "Rules" from the cases

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* This article was first published by Thomson Reuters in the *Australian Law Journal* and should be cited as P Young, "Fact-finding made easy" (2006) 80 *ALJ* 454. For all subscription inquiries please phone, from Australia: 1300 304 195, from Overseas: +61 2 8587 7980 or online at legal.thomsonreuters.com.au/search. The official PDF version of this article can also be purchased separately from Thomson Reuters at http://sites.thomsonreuters.com.au/journals/subscribe-or-purchase.

† Former Justice of the Court of Appeal.

1 M Trow, *Lestrade and the Sign of Nine: Vol XII (Lestrade Mystery, No 12)*, Gateway Editions, 25 September 2000.

- Primary principles
- Analysis
- Secondary guidelines
- Pitfalls
- Satanic verses
- Expert evidence
- Conclusion.

General observations

Fact-finding by courts is basically the same process as fact-finding in everyday life.

The basic difference is that with fact-finding by the courts, the rules of evidence help us to exclude from our assessment process material which experience has shown has a high degree of unreliability.

In ordinary life and in court, we seek the truth. There is no need to philosophise about truth. Truth is, for this purpose, what really happened. But we cannot assume that we will always find out what really happened no matter how hard we try. This may be because of lack of evidence, perhaps because all the witnesses are dead or brain damaged, or it may be that some one or more persons are deliberately laying false trails to avoid the truth coming out.

The basic necessity in fact-finding is to have before you the fullest detailed observation of all possible witnesses. A judge has not the luxury of ensuring that this will occur. He or she is limited to the material that the parties place before the court. However, because one would expect all parties to put before the court all material which would advance their case, the absence of such material will often be significant.[2]

The basic skills required in fact-finding are listening and observation. Some subrules flow from this statement:

(1) A judge will not really be listening if he or she continually interrupts. A real listener listens with an open mind.

This is not to say that the judge should not interrupt from time to time. It is very appropriate to do so in order to steer a case back onto its proper track or to ensure, as far as possible, that people are not at cross purposes or that the witness is not misunderstood. However, fact-finders should, as much as possible, assess the witness on her or his own performance.

(2) Although the judge will not constantly stare at the witness, he or she must continually be alive to the significance of the witness's body and eye language. This will disclose not only

2 See, below, "'Rules' from the cases".

the obvious giveaway as when the witness constantly looks at his wife in the back of the court for her nod, but also less obvious signs such as the witness not making eye contact with counsel when on doubtful ground etc.

(3) Some of us think that we are wiser than our forebears and that the rules of evidence were for the old days with uneducated juries. In actual fact, those rules were developed over many years of experience to exclude from consideration material which will have the tendency to bring about a false answer. Thus, even though material that is strictly inadmissible may get into evidence through incompetence of counsel or otherwise, its use must be carefully considered.

It must always be remembered that fact-finding greatly relies on human testimony. Because of human nature, even a witness who is endeavouring to tell the truth, the whole truth and nothing but the truth, may be unreliable. There are a number of articles and other writings on this subject.[3]

"Rules" from the cases

Some leading cases provide guidance as to what inferences may be drawn in appropriate cases. The following excursus will not provide a full exegesis of those cases, but will merely touch on the crucial points.

Rule in Jones v Dunkel (1959) 101 CLR 298

A witness is not called who appears to be in a party's "camp", and there appears to be no explanation for her or his absence, then the court may draw the inference that that witness would not have assisted that party's case.

This rule often gives rise to the innocent question in cross-examination of a witness in the opposing camp, "You saw Mr X last week and, as far as you know, he is alive and well and living in Sydney?" An affirmative answer will go to establish that the witness was available to be called.

This is not the place to consider the rule in detail. This is well done in *Cross on Evidence*[4] at [1215]. All that needs to be done in this article is to draw attention to its existence as a tool in fact-finding.

The courts have now moved to what might be called, "Jones v Dunkel extended" as a result of the judgment of Handley JA in *Commercial Union Assurance Co of Aus Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418–419, that if a party fails to ask her or his own witness questions about a matter on which the witness could have testified, the court may infer that that witness would not have given evidence on the point favourable to that party.

3 See, eg J Barry, "The Problem of Human Testimony" (1938) 11 *ALJ* 314; P Young, *Civil litigation*, Butterworths, Sydney, 1986.

4 J Heydon, *Cross on Evidence*, 5th edn, LexisNexis, Australia, 1996

Note that in each case the court *may*, not must, draw the inference.

Rule in Browne v Dunn (1894) 6 R 67

This rule, originally only reported in an obscure set of reports, is now best set out in the judgment of Hunt J in *Allied Pastoral Holdings Pty Ltd v Cmr of Taxation* [1983] 1 NSWLR 1. Unless it is perfectly clear from the material to be relied on which has been notified to the opponent the position taken by a litigant on a particular point, a party must put to opposing witnesses on the subject, the case being made so that the witness has the opportunity of meeting it.

Thus, if the plaintiff's case is that X was driving the car at the time of collision and the witness says it was in fact A, usually the cross-examiner will at least have to put a question to get the witness to agree or disagree that Y was driving. Unfortunately, this often degenerates into an advocate putting, "I put it to you that everything you have said about the accident is a lie". The witness gets offended, eventually he or she answers "No" and the judge is assisted not one whit.

Rule in Connor v Blacktown District Hospital [1971] 1 NSWLR 713

This is that if there is evidence of a general practice in a business or government department and evidence that that practice was followed in the instant case, the court may infer that the usual system was followed. Thus, if X wrote a letter, but cannot remember posting it, the fact that in the ordinary course of business it would have been posted is some evidence that a letter was sent.[5]

Primary principles

The aim is to discover the truth, or, at least, to be satisfied as to what happened on the balance of probabilities. This is simple when all the witnesses are telling the same story. However, contested litigation usually involves conflicting stories.

It must always be remembered that the human memory is fallible and that, without malice, people can believe that they remember things which they have convinced themselves must have happened (self-justification) or because someone has successfully implanted the idea. Thus, when a person gives evidence of an observation, the capacity of the witness to make the observation must be assessed. Usually the cross-examiner will sufficiently deal with this point.

Justice Meares in his 1984 paper to the Australian Institute of Arbitrators[6] said that any observation is affected adversely by the following factors:

- insignificance of the event
- length of the period of observation

5 See *Trotter v Maclean* (1879) 13 Ch D 574.

6 C Meares, "Fact finding — anything but the truth", paper delivered at the National Conference — The Institute of Arbitrators Australia, 25–26 May 1984, Melbourne at p 66.

- less than ideal observation conditions
- observing under stress
- observer's physical condition,
- lack of memory inhibiting recall.

Thus, a witness's statements must be tested in the light of reliable documents and external factors. If the witness says that she saw X on 4 September 2005 as she was going to the Balgowlah cinema to see Harry Potter No 1, evidence from the cinema proprietor that the film was screening only a week later, would usually be sufficient to disregard the witness's evidence, at least as to the date.

Common sense comes into the equation. If there is a collision on a Sunday between a woman driving her elderly mother to church and a youth in a hot rod, and each alleges the other was proceeding at 150 kph, common sense tells one that the woman is more likely to be correct. However, here one must watch one's natural prejudices, and not merely quote a Satanic verse such as, "Young men are more likely to be the cause of an accident than middle-aged women".

Logic also plays its part. If A, B and C are proved and Z logically follows, then Z is proved.

Considerable emphasis is given to assessment of the demeanour of a witness. However, great care must be taken, not to make a wrong assessment. A witness may be shaking and nervous because it is her first time in a witness box, or because she has the flu or because she is lying and hopes she will not be found out.

Often the demeanour will be obvious such as the witness who constantly asks for the question to be repeated and looks at his wife who is sitting in the back of the court for inspiration.

The court is able to consider the demeanour of a witness out of the witness box, such as in the back of the court, but must inform counsel of the observations to give counsel an opportunity to explain.[7]

Analysis

In a case where there are a number of witnesses testifying to an event, it is often helpful to create a primitive spreadsheet of the evidence.

Suppose the event is whether Zoe Zemple was the person who cashed a cheque at the ANZ Bank's Burwood NSW branch at 2 pm on 2 April. There are five witnesses (Ann Anson, Brian Beatty, Carole Cush, David Denison and Edwina Evans (the bank manager)) who give evidence of having seen Zoe between 1.30 pm and 2:30 pm that day.

One makes a table, setting down the names of the witnesses on the left, giving a transcript or affidavit reference against each witness's name in the next column, then a resume of evidence on a particular incident in the third column. One might thus get a table like this:

7 See *Government Insurance Office (NSW) v Bailey* (1992) 27 NSWLR 304.

A	T419	Z wore red dress. Z entered bank with Yvonne Yeats at 1.45 pm.
B	T47	Z wore red dress. Z left bank with Fred Fisher at 2 pm.
C	T235	Z wore red dress. Saw Z at North Sydney having lunch at 1:50 pm.
D	T112	Z wore red jacket and grey trousers. Spoke to Z in bank at 2 pm.
E	T365	Can't remember what Z wore. Diary shows interview with Z at 2.30 pm.
Z	(Zoe herself)	I don't own any red dress, I do however have a wine coloured twin set which I wore that day. I was in Burwood buying a bottle of water at about 2.15 pm, but I didn't go to the ANZ Bank.

When this table is complete, one can analyse it in two ways:

- first, one sees whether there is one witness whose observation differs significantly from the others. If so, the judge should examine that witness's evidence very minutely;
- second, one looks to see if there is an hypothesis with which all the evidence, or most of the evidence is consistent.

This does not always work out. However, in the example, Zoe appears to be the odd one out. But, even if it does not work, it does give clues as to what to look for. If it is a vital matter for the plaintiff to fix the time at 2 pm exactly, why did the plaintiff not call Yvonne Yeats and Fred Fisher? Bank Manager, Edwina Evans' time is so out of kilter with the others that perhaps she wrote up her diary days later and at that stage did not remember the time exactly. Has counsel cross-examined on this? If not, perhaps it would be wise while Edwina Evans was still in the box for the judge to ask a couple of questions to give counsel the hint that Ms Evans' records might not be accurate and that she should be tested on her records generally.

Carole Cush's evidence also does not quite fit. It would also be useful to see if witnesses A, B and D had compared notes.

Secondary guidelines

There are not that many books and articles written on fact-finding. However, in Richard Eggleston's *Evidence, proof and probability*,[8] the following excellent guidance appears as to what factors a judge takes into account when deciding whether a witness is telling the truth:

- the inherent consistency of the story. (If the evidence contains internal contradictions, it cannot be accepted as a whole. The question may then be, which part to reject.)
- consistency with other witnesses
- consistency with undisputed facts
- the "credit" of the witness

8 R Eggleston, *Evidence, proof and probability*, Weidenfeld and Nicolson, London, 1978, pp 155–157.

- observations of the witness's demeanour and characteristics able to be observed in the witness box or in the court room, such as hearing and eyesight, and the ability to judge distances,
- the inherent probability or improbability of the evidence.

In his paper,[9] Lord Bingham says:

> The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breadth of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where the vehicles ended up may be crucial.[10]

Later, Lord Bingham, adopts much the same view as Eggleston. He says that the main tests as to when a witness is lying are:[11]

- the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence to have occurred
- the internal consistency of the witness's evidence
- consistency with what the witness has said or deposed on other occasions
- the credit of the witness in relation to matters not germane to the litigation, and
- the demeanour of the witness.

Lord Bingham also points out that the usual process of giving statements to and being interviewed by lawyers and being involved in preliminary proceedings may lead to the witness being exposed to misinformation. That misinformation may then cloud the recollection of the true facts. A witness may indeed be a good observer and an honest person, but may be caught out in cross-examination on part of the absorbed misinformation.

Onassis v Vergottis[12] is one of the few pages of the law reports where one may find a judicial exposition of credibility. On that page, Lord Pearce said:[13]

> "Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it,

9 T Bingham, "The judge as juror: the judicial determination of factual issues" (1985) 38 *Current Legal Problems* 1. Reprinted in T Bingham, *The business of judging*, OUP, 2000.
10 ibid p 5.
11 ibid p 6.
12 [1968] 2 Lloyd's Rep 403.
13 ibid at 431.

> did he register the intentions of the conversation correctly, and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or overmuch discussion with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point, it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability.

Not all facts can be proved by primary evidence. There is usually room for the judge to infer secondary facts. This can be a dangerous process, especially if one is egged on by enthusiastic counsel repeatedly saying, "Your Honour should infer from this that X is the fact". There is a world of difference between situations where a judge can make an inference and cases where an inference should be drawn.

Often inferences are at least semi-logical. Thus, a judge may reason, "if X were so, one would have expected A to do Y. A did not do Y; therefore X may not be so". Care must be taken with this type of reasoning as some greater pressure may have been experienced by A so that though he or she intended to do Y, there was a greater necessity to do Z.

Counsel often ask in cross-examination, "If that is so, why didn't you put that in your affidavit" (or tell the police at the scene or otherwise say it when, if it were true, it would have been expected to be said). On some occasions, the witness may give a good reason. Mostly, however, some lame reason is proffered such as, "I told my solicitor and trusted her to put everything relevant in the affidavit and did not notice it was not there".

The significance of the omission depends on the seriousness of the omitted material. As I set out in *Civil litigation*,[14] a woman who complains that her husband insulted her, but does not put in her affidavit the statement she now makes that her husband called her a prostitute and slapped her face in front of her children, is not likely to be accepted on her recent statement. If a person omits major matters from an affidavit or statement made closer to the event, there is a strong probability of recent invention.

Pitfalls

There are a number of occasions when a judge will give too great an emphasis to one of the guidelines in this article and perhaps reach a false result.

There is a view expressed in the maxim, "falsus in uno, falsus in omnibus" which holds that a witness who has proved to have lied on one matter will be willing to lie on all matters.

14 P Young, *Civil litigation: a practice guide for advocates*, Butterworths, Sydney, 1986 at pp 137–138.

This may be the case with a deliberate lie, but it is not universally true that a witness whose evidence is disbelieved on one matter should be disbelieved totally. Just because a person is giving evidence which must be wrong in one respect, does not mean that her or his evidence is generally unreliable, though credibility is weakened by the error.

Bias and motive to assist a party are relevant factors in the evaluation. However, a judge must be careful not to be carried away by counsel's cross-examination which shows that a bad motive or possible bias may exist. There will be many situations where a factor may exist from which one could find bias, but there is no bias or bad motive in fact. It is a common error to find from the proposition that a witness could be biased that he or she is in fact biased.

Thus, a police constable may possibly have a motive for lying to assist her sergeant because of solidarity in the police force. However, one cannot discount every piece of evidence the constable gives because of that factor.

One must also ensure that one does not get too negative and repeat the mantra, "There is not enough evidence".

The story goes of a lawyer who arrived home after visiting Fred Johnson's home. The lawyer's wife asked him, "Did you see Fred's new baby". The lawyer replied, "I did visit Fred Johnson's house and a woman came to the door who was carrying a baby. The woman may or may not have been Mrs Johnson and the baby may or may not have been Fred Johnson's!" While that may be a perfectly accurate statement by a witness, a judge should have no difficulties in finding on the balance of probabilities that the lawyer did see Fred's new baby, if that were the whole of the evidence on the topic.

Satanic verses

There are ways of deciding cases without thinking too deeply, and using these methods will improve one's statistics as to volume of cases decided but will reduce, quite dramatically, one's chances of being correct. A problem is that some of these maxims actually have some scientific basis, but those that are in this category still cannot just be applied in all circumstances.

So with children, one can adopt the adage, "children fantasise" or "children do not lie", or people of particular racial or ethnic background will usually agree with whatever proposition is put to them by a person in authority, again, to quote the Bible (out of context), "all Cretans are liars".

Some Satanic verses go deeper than this. Haward said in "A psychologist's contribution to legal procedure": "The discouraging fact is that even intelligent people argue in favour of common sense [over scientific proof]".[15]

Expert evidence

Expert evidence can be decisive, but it needs to be watched carefully.

15 L Haward, "A psychologist's contribution to legal procedure" (1964) 27 *Mod LR* 656.

One of the problems with expert evidence is the practice of solicitors in sounding out a number of experts and only using those favourable to their case. This is understandable, but it does not assist the court. Sometimes, the existence of expert evidence which is not called will be revealed in other reports and will come to light in cross-examination or the judge may be able to draw inferences from its non-appearance.

Another problem is the extensive use of junk experts. A person qualifies as an expert on very minimal qualifications. A person who has just graduated from medical school after a series of post-examinations is not as qualified to give expert evidence as her or his professor who has been a leader in the field for the past decade. However, the lawyers will be putting up the junk expert as equally acceptable as the experienced expert.

At the other end of the scale is the experienced expert who is not going to give the judge a chance of differing from her or him. This brand of expert knows he or she is right and considers the fact that the judge is going to decide the case, rather than herself or himself, is just a fault in the legal system. Over-confidence in one's ability often leads to error.

Expert evidence is fairly useless if there is not the evidence of the facts which the expert has assumed. The law in this regard was expounded in the NSW Court of Appeal in *Makita (Aus) Pty Ltd v Sprowles*[16] by Heydon JA, who said that the prime duty of expert witnesses in giving opinion evidence is to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions. His Honour went on to say:[17]

> The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed as "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material.

The quotes derive from *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505.

Conclusion

Fact-finding is often not easy. To a great degree the exercise involves the application of common sense and the judge's experience of life. However, care must be taken not to apply one's own prejudices and cultural conditioning. There is no magic formula to apply when finding facts. Furthermore, the quality of the result will depend as much on the quality of the material presented and the skill of the advocates as on the judge's ability.

While there is no substitute for experience as a teacher, the guidelines in this article hopefully will assist in achieving a better average than 50% correct.

16 (2001) 52 NSWLR 705 at 729.
17 ibid at [64].

Just, quick and cheap?* Civil dispute resolution and technology†

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The increasing rate of technological change over the past two decades and the predicted pace of technological change into the future have established "disruption" as a catchword. The pace of justice reform is (generally) faster, the price is (often) less expensive, and society seeks unhindered access to justice — on a cheap and quick basis. In the context of the legal landscape, this article begins by examining three levels of technological change that have impacted and will continue to impact on the operation of the civil justice system within a framework of objectives relating to expense, speed and justice. The authors argue that there appears to be a general consensus that the "quick and cheap" resolution of civil disputes will be supported through technological developments, although whether this will meet objectives in respect of "just" results and processes remains uncertain. The authors then explore the meaning of "justice" and how technological innovation can bring advantages and pose challenges in terms of access to justice. This article also addresses concerns about technological change in the context of civil dispute resolution, focusing on the relationship between disruptive technologies and "just" resolution. The readiness of the community for technological innovation is explored from the perspectives of the tech-savvy client, to the top-tier firm utilising the latest artificial intelligent machinery, through to the courts striving towards satisfying "overriding objectives" in terms of a "Just, Quick and Cheap" civil justice system.

* Referring to the overriding purpose as defined at s 56(1) of the *Civil Procedure Act 2005* (NSW) which states that "the overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings". The authors note that some authors have explored these objectives in the context of experts and other justice reforms: see, eg, G Edmond and M San Roque, "Just(,) quick and cheap? Contemporary approaches to the management of expert evidence" in M Legg (ed), *The future of dispute resolution*, LexisNexis Butterworths, 2016; See M Legg, "Reconciling the goals of minimising cost and delay with the principle of a fair trial in the Australian civil justice system" (2014) 33(2) *Civil Justice Quarterly* 157.

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Introduction

Clearly, newer technologies, mainly linked to computing developments, have impacted and will continue to impact on the way in which human society operates and people interact.[1] As a component of human society, the justice system and associated court processes have also inevitably undergone a range of changes made possible by recently developed technologies.[2] One hope is that the use of technology will promote better access to justice, partly because it may reduce cost and delay. On the other hand, whilst the concept of justice and perceptions of justice can be linked to time and cost — "justice delayed is justice denied",[3] there is a critical question as to whether some technologies may result in the system becoming less "just" and more focused on objectives related to the speed of disposition of disputes and cost reduction. In this regard, there may be a range of issues that arise where justice processes are "dehumanised" or where the speed of processing disputes impacts on the extent to which justice is perceived to have been achieved. In particular, the following three questions are relevant: how technology should influence the justice system; how "justice" should be conceptualised; and how the budgetary issue in the civil justice system with even sophisticated technology could undermine a "just" resolution of disputes.

First, at present, technology has the potential to better support the ways in which people experience and access the court system. For example, in Australia, courts such as the Supreme Court of NSW have created a social media presence to disseminate matters of public interest.[4] This type of combination of information and internet technology and legal knowledge helps laypersons understand how law works in their country and increases their possibilities to turn to law for help when they face a similar situation. The facilitation of courts in their trial work is another important advantage brought by technology to judicial processes. In some courts, these developments are more advanced than in others. For example, in 2018, the Hangzhou Internet Court became the first court in China to recognise blockchain technology as a means of storing evidence to assist in dealing with copyright infringement cases.[5]

However, views may differ in terms of how and to what extent technology should (or could) influence the justice system. Richard Susskind has suggested that technology in the justice sector can be perceived and categorised as either sustaining or disruptive.[6] He has suggested

1 As early as in 1996, Lord Woolf suggested, in the *Access to justice — final report*, that information technology should be appropriately introduced to the courts, particularly for the case management purpose: H Woolf, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales*, Final Report, 1996 at ch 21.

2 See T Sourdin, "Justice and technological innovation" (2015) 25 *Journal of Judicial Administration* 96 ("Justice and Technological Innovation").

3 See T Sourdin and N Burstyner, "Justice delayed is justice denied" (2014) 4 *Victoria University Law and Justice Journal* 46.

4 See M Douglas, "How technological change is expanding open justice", *Australian Lawyers Alliance* Blog Post, 26 April 2018 at www.lawyersalliance.com.au/opinion/how-technological-change-is-expanding-open-justice, accessed 21 April 2021.

5 J Aki, "Chinese Internet court uses blockchain to combat online plagiarism" CCN Web Page, 19 December 2018 at www.ccn.com/chinese-internet-court-to-use-blockchain-to-combat-online-plagiarism, accessed 21 April 2021.

6 See R Susskind, *Tomorrow's lawyers: an introduction to your future*, Oxford University Press, 2013, p 39.

that the former supports and enhances the way that a business or a market currently operates, while the latter fundamentally challenges and changes the functioning of a firm or a sector.[7] In this article, the authors suggest technologies influence justice in additional ways and that concerns relating to justice can also be linked to "replacement" technologies that are directed at the replacement of humans. In this regard, it is suggested that there are three levels in which technology is already reshaping the justice system.

First, and at the most basic level, technology is assisting to inform, support and advise people involved in the justice system (supportive technology, such as online legal services in the form of legal applications ("apps")). Second, technology can replace functions and activities that were previously carried out by humans (replacement technologies, such as online mediation processes). Finally, at a third level, technology can change the way that judges and legal professionals work and provide for very different forms of justice (disruptive technology, such as artificial intelligence judges), particularly where processes change significantly, and predictive analytics may reshape the adjudicative role.[8] In this regard, more concerns relating to technology may also be linked to the capacity that it has to disrupt the justice sector and the extent to which justice values may not be aligned with disruptive approaches. For example, justice concerns have been linked to issues relating to the transparency of decision making, algorithmic bias, and enforceability.[9]

In relation to the second relevant question — how "justice" should be conceptualised — the poorly defined objectives of the civil justice system complicate the assessment of technological impacts on the system. Although draft objectives have been promulgated at a federal level within Australia,[10] and include a focus on wellbeing,[11] in many courts there is little to indicate what is meant by justice. The legislation also provides limited guidance. For example, the *Civil Procedure Act 2005* (NSW) suggests that the objectives in NSW are that the system is "just, quick and cheap", but there is little guidance in terms of evaluating whether such objectives have been met (and to what extent) and how "justice" can be defined. Efforts to clarify this blurry definition of "justice" have been demonstrated by the third wave of the access to justice movement, as the concept of justice has been linked to the exploration of access to justice notions.[12] In this regard, as indicated by the former Chief Justice Murray Gleeson, access to

7 ibid.
8 See generally Sourdin, n 2 at 103.
9 See T Sourdin, "Judge v Robot? Artificial intelligence and judicial decision-making" (2018) 41(4) *UNSW Law Journal* 1114 ("Judge v Robot"), at www.unswlawjournal.unsw.edu.au/article/judge-v-robot-artificial-intelligence-and-judicial-decision-making/, accessed 22 April 2021.
10 See "Building an evidence base for the civil justice system: draft objectives", 30 May 2012 at www.ag.gov.au/legal-system/access-justice, accessed 21 April 2021.
11 ibid. The overarching objective is stated to be "The Australian civil justice system contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law".
12 See T Sourdin, "A broader view of justice?" in M Legg (ed), *The future of dispute resolution*, LexisNexis Butterworths, 2016 at p 23.

justice has a much wider meaning than access to litigation.[13] Therefore, it is suggested that justice can be achieved not only through litigation and the court system but with the facilitation of other additional approaches. Naturally, in some respects, the large volume of civil cases that have been shifted towards forms of Alternative Dispute Resolution ("ADR"), has been partly driven by cost pressures. That is, the civil court system has been unable to cope with increased litigation loads without extensive additional funding and, as a result, forms of ADR and the bodies that may administer the systems that surround such processes, have been introduced to increasingly divert disputes away from the court system. It is, however, worth mentioning some of the concerns that ADR may not contribute to access to justice, as its outcome is not based on legal rights but rather on the problem-solving approach. According to Genn:[14]

> The mediator does not make a judgement about the quality of the settlement. Success in mediation is defined in the mediation literature and by mediators themselves as a settlement that parties "can live with". The outcome of mediation, therefore, is not about *just* settlement, it is *just about settlement*.

There are of course many other reasons that support the use of ADR that include supporting relationships, reducing adversarialism and promoting more effective outcomes. However, there is no doubt that one reason for adopting ADR has been to reduce the public cost of civil justice.[15] In the context of technological change, which can be perceived as heralding a new wave in the access to justice movement, it seems probable that similar cost concerns will result in the adoption of technological changes if they are "cheap" — at least from a public cost perspective. Under such circumstances, there are dangers that such changes will be adopted without regard to the quality of justice.

The third relevant question relates to budgetary aspects. In respect of all three levels of technological change as noted above (some of which are intertwined), there is potential for the limited funding arrangements that exist with the civil justice system to drive change (or the lack of change) in ways that may result in a less just system.[16] In the context of Australia, as Morry Bailes, the past President of the Law Council of Australia, noted in May 2018, there is a "funding crisis" in respect of the civil justice sector.[17] It has also been observed that addressing the crisis requires the government to specifically deliver long-term investment in the legal

13 See M Gleeson, "National access to justice and pro bono conference", Australian Pro Bono Centre, 11 August 2006 at 1 at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_11aug06.pdf, accessed 21 April 2021.

14 H Genn, "What is civil justice for? Reform, ADR, and access to justice" (2012) 24 *Yale Journal of Law & the Humanities* 397 at 411 at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1392&context=yjlh, accessed 22 April 2021.

15 ibid at 402.

16 See N Hilborne, "Court modernisation 'undermining access to justice', lawyers tell MPs", legalfutures, 22 May 2019 at www.legalfutures.co.uk/latest-news/court-modernisation-undermining-access-to-justice-lawyers-tell-mps, accessed 22 April 2021. Another factor that may impact on the achievement of just, cheap and quick resolution of civil disputes could be less effective case management: see D Hammerschlag, "Dealing with cost and delay" in M Legg (ed), *Resolving Civil Disputes*, LexisNexis Butterworths, 2016.

17 See M Coade, J Doraisamy and E Ryan, "#Auslaw and the 2018 Budget Reveal", *Lawyers Weekly*, 9 May 2018 at www.lawyersweekly.com.au/politics/23192-auslaw-and-the-2018-budget-reveal, accessed 22 April 2021.

assistance sector, as well as a long-term investment in the courts.[18] Despite such calls for more financial resources, Australian governments appear to be relying on court system structural changes to reduce both waiting times and costs for litigants.[19] Under these circumstances, there are concerns that technological supports will only be available if they are accessible at the lowest public cost. Further, although the original intention of introducing technology to the court system may have been to facilitate the parties to settle disputes in a speedier manner, limited court funding could lead to court staff reductions as the price for adopting online pleas and remote video hearings.[20] This could cause the problem of a lack of technical support to users, leading to disputes with less "just" outcomes. Unfortunately, the experience of the UK has suggested that this outcome is likely.[21]

Centring around the theme of the "just, quick and cheap" resolution of civil disputes, this article explores the meaning of "justice" and what advantages newer technologies have brought to the civil justice system. The authors also examine the possible challenges that technology has presented to civil justice processes. Further, the authors explore the status quo of acceptance of technology by using the legal profession, judges, and consumers as examples. The article concludes that although there are various issues that technology has caused to the civil justice landscape, and therefore more work needs to be done across the sector to address those challenges, it is undeniable that technology has facilitated the resolution of civil disputes in ways that can be just, quick and cheap.

Technology and "justice"

It has been noted that justice is an "elusive concept upon which it is possible for rational and informed observers to disagree",[22] even though it is "one of the core principles of every national legal system",[23] and that "access to justice" is nebulous and "survive[s] in political and legal discourse because it is capable of meaning different things to different people".[24] These differences have meant that there is continuing disagreement amongst those who locate justice only in the court system and those who consider justice exists throughout the dispute resolution landscape.[25] It might therefore be inferred that technological impacts on justice may be assessed in the same way in terms of where technological innovations take place. For example, innovation that occurs outside the court system (or the litigation system) may not be regarded as justice-related technological innovation.

18 ibid.
19 M Pelly, "Courts merger to put more pressure on 'Workhorse', says Law Council", *Financial Review*, 23 August 2018, at www.afr.com/business/legal/courts-merger-to-put-more-pressure-on-workhorse-says-law-council-20180823-h14dfy, accessed 22 April 2021.
20 See O Bowcott, "6,500 jobs to be lost in modernisation of courts", *The Guardian*, 2 May 2018, at www.theguardian.com/law/2018/may/02/6500-jobs-to-be-lost-in-modernisation-of-uk-courts, accessed 22 April 2021.
21 See Hilborne at n 16.
22 M Kirby, "Attaining universal justice: realities beyond dreams" (2011) 1 *DICTUM — Victoria Law School Journal* 7 at http://classic.austlii.edu.au/au/journals/DICTUMVicLawSJl/2011/3.html, accessed 22 April 2021.
23 ibid.
24 R Sackville, "Access to justice: assumptions and reality checks" [2002] *FedJSchol* 12 at 19, at www.austlii.edu.au/au/journals/FedJSchol/2002/12.html, accessed 22 April 2021.
25 ibid 19–20.

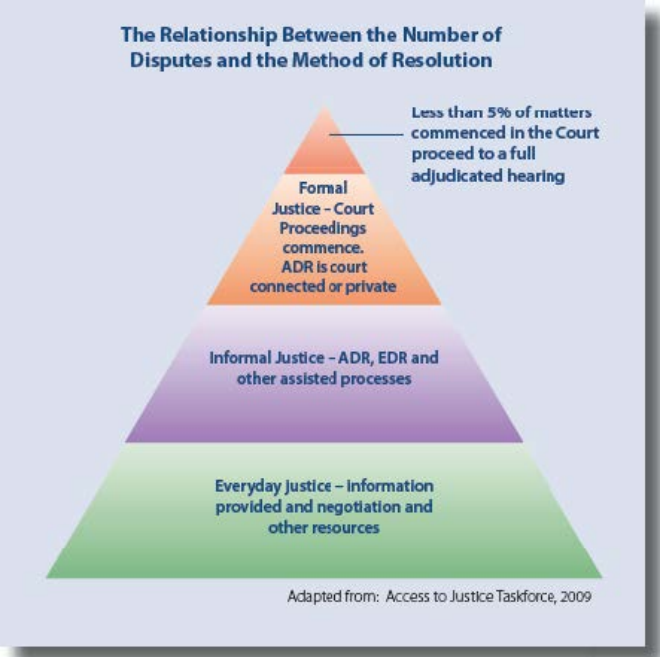
The differences in terms of the "location" of the justice system can be partly attributed to different philosophical understandings of what "justice" means. Put simply, more traditional and perhaps litigation supporters may consider that justice can only take place within courts as it is only through the articulation by a judge of understandings about the rule of law that justice can be done.[26] In contrast, those that inhabit the ADR landscape may consider that:[27]

> while there is an important, significant and essential role played by the judiciary in the public adjudication of civil disputes, justice is also present in the relationships that exist between people and in their ethical values and ADR supports this broader formulation of justice.

The "broader" view of justice that is articulated in respect of the civil justice system in Australia supports this definition as it is assumed that justice may involve invoking a corrective principle. However, a corrective principle may also be supported by forms of ADR, that is by agreement and recognition, as well as through court-based decision making. Justice in this context can, therefore, be described as incorporating a "characteristic set of principles for assigning basic rights and duties and for determining what [is] the proper distribution of the benefits and burdens of social cooperation".[28]

This view of justice is relevant in relation to how technology can support justice and the extent to which it is related to the support that technology can provide, not only in the context of defining the "corrective principle" but also in terms of how relationships and ethical understandings are supported. Considering how technology has impacted on justice in terms of a broader civil dispute resolution perspective enables a more systemic consideration of technology within the justice sector. For example, the significance of pre-action arrangements, whereby disputants seek to finalise a dispute prior to filing with the court (see diagram "The Relationship between the Number of Disputes and the Method of Resolution", below), can be considered in this context. Newer technologies have already had a significant impact in this area, and "boosted by online resources, these options are providing many disputants with accessible dispute resolution outside courts".[29] Such reforms are largely separated from courts and may function with the assistance of more advanced technologies that can be applied to processes such as internal review of disputes (eg complaints handling), and schemes that incorporate requirements to arbitrate, conciliate, mediate, or use ADR or external dispute resolution ("EDR").

26 T Sourdin, "The role of the courts in the new justice system" (2015) 7 *YB Arb & Mediation* 95 at 99, at https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1033&context=arbitrationlawreview, accessed 22 April 2021.
27 ibid.
28 J Rawls, *A Theory of Justice*, Harvard University Press, 2005, at p 5. Rawls conceives justice as fairness.
29 T Sourdin and N Burstyner, "Australia"s civil justice system: developing a multi-option response", in C Flango, et al (eds), *Trends in State Courts*, National Center for State Courts, 2013, at pp 78–84.



Other notions of justice are linked to perceptions of fairness. In this regard, perceptions of fairness can be linked to procedural fairness (ie whether procedures, participation, and the timeliness and cost of arrangements are viewed as "fair"), as well as the quality of the outcome, whether or not this is assessed by reference to objective or other standards.[30] In the context of technological innovation, there may be particular concerns relating to participation as well as procedural understandings. At the same time, there are clearly opportunities to enhance participatory justice, partly because technologies can support the exchange of, and access to, information.

In terms of justice engagement, technology is already changing the way in which disputes progress through the justice system. For example, "cloud" technology can enable all participants in a dispute to have instant access to all of the information relevant to a dispute. Disputants can provide instant links to websites where documents may be held via clusters of interested parties in secured groups on the internet. Newer technologies have the capacity to improve the time taken to deal with disputes by supporting the exchange of material, enabling prompt exchanges to take place, ensuring that data is relevant and produced in a way that encourages sophisticated planning responses, and by creating more innovative processes that enable people to access justice processes with greater ease.

However, a related fairness concept may be more relevant in some jurisdictions than in others and can be linked to the extent that the outcomes are perceived to be the result of an "even-handed" process. This has been discussed in a number of reports[31] in the context

30 T Sourdin, *Exploring civil pre-action requirements resolving disputes outside courts*, Australasian Institute of Judicial Administration, 2012 at p 88.

31 See R Kaspiew et al, "Evaluation of the 2006 Family Law Reforms: a summary" Australian Institute of Family Studies, at https://aifs.gov.au/publications/evaluation-2006-family-law-reforms, accessed 22 April 2021.

of pre-action requirements,[32] and restricting access to justice,[33] and in more detail in the literature particularly when considering ADR processes.[34] In this regard, "even-handedness" and related notions of transparency and natural justice may raise particular issues in online dispute resolution (ODR) processes where technological innovations may reduce face to face contact and where the processes used to reach an outcome may be less visible.

This pursuit of justice utilising new technologies has been examined in the context of self-represented litigants (SRLs), being parties that are susceptible to not achieving a fair/just result, and intelligent negotiation support systems.[35] Zeleznikow has noted:[36]

> [W]e have examined the issue as to whether potential litigants can receive useful support from intelligent online dispute resolutions. We have seen that such systems can be particularly useful for self-represented litigants. The SRLs benefit not only from obtaining useful advice, but also becoming better educated about the procedures and potential outcomes for issues in dispute. We note that most ODR systems provide exactly one of either BATNA[37] [Best Alternative to Negotiated Advice] advice, support for trade-offs and facilitated communication. A truly useful Online Dispute Resolution system should be a hybrid of all three approaches.

In addition to the possibilities provided by a technology-assisted ADR system, British Columbia in 2016 established its Civil Resolution Tribunal — being the first full integration of ODR into a formal tribunal system. With numerous other jurisdictions (such as the European Union)

32 National Alternative Dispute Resolution Advisory Council, *Maintaining and enhancing the integrity of ADR processes: from principles to practice through people*, February 2011, at pp 13–14, at https://apo.org.au/sites/default/files/resource-files/2011-02/apo-nid66677.pdf, accessed 22 April 2021. One salient feature of this recommendation is that it is proposed in relation to "mandatory" ADR, which is an increasing feature of the Australian dispute resolution landscape (both within courts and tribunals and as a precondition to commencing litigation). It is possible that disputants who are required to attend an ADR process (rather than choosing to attend) may be less likely to attend and participate in good faith: at p 34.

33 See Australian Law Reform Commission, "Discovery in Federal Courts", *Consultation Paper No 2*, November 2010, at p 286, at www.alrc.gov.au/wp-content/uploads/2019/08/Whole-Discovery-CP.pdf, accessed 22 April 2021 ("Discovery in Federal Courts"). The ALRC referred to the Victorian Law Reform Commission, *Civil Justice Review*, Report No 14, 2008 at pp 109–110, and noted:

> The VLRC Report identified that the implementation of pre-action protocols may be challenged on the basis that such protocols are a barrier to accessing the courts, and therefore incompatible with the right to "have the charge heard or proceeding decided ... after a fair trial" pursuant to s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, this concern was dismissed by the VLRC on the grounds that pre-action protocols: would not bar the commencement of proceedings; are triggered before the commencement of proceedings; and support the facilitation of a fair hearing.

34 See, for example, T Sourdin, *Alternative dispute resolution*, Thomson Reuters, 4th edn, 2012, at p 20. Sourdin, at Appendix G and referring to R MacCoun, E Lind and T Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, RAND, Santa Monica, 1992, at p 100 for reference to the extensive Thibaut and Walker research.

35 J Zeleznikow, "Can artificial intelligence and online dispute resolution enhance efficiency and effectiveness in courts" (2017) 8(2) *International Journal for Court Administration* 30 at 36, at https://vuir.vu.edu.au/36146/1/223-789-1-PB.pdf, accessed 22 April 2021.

36 Zeleznikow, n 35 at 43.

37 R Fisher and W Ury, *Getting to YES: negotiating an agreement without giving in*, Houghton Mifflin Harcourt, 1981, at p 104. Fisher and Ury introduced the idea of a BATNA as one's best alternative to a negotiated agreement. The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting; or rejecting an agreement you would be better off entering into.

incorporating ODR as a fundamental component of their dispute resolution processes, ODR may indeed be the most visible face of new technology in the civil justice sector: "Online dispute resolution could, therefore, be the future of ADR. As time goes on, the public will increasingly discover the benefits of alternative methods of dispute resolution when they encounter dispute resolution, for the first time, in online venues".[38]

In relation to satisfying the overriding purpose of just, cheap and quick justice, many commentators suggest that ODR has the potential to reduce delay and broaden the range and reach of existing dispute resolution services: "Compared to the costs of litigation or even prolonged alternative dispute resolution, the investment in online technologies is potentially both value adding and cost saving".[39]

In Australia, the area of family law has seen widespread growth in the application of ODR in the telephone and internet-based conferencing technologies. In discussing the statistical trends of this growth, Bilinsky notes that:[40]

> most family/divorce/access/support issues take place in families where the age of the parties are often under 35. This demographic group is familiar with technology as well as having access to technology. Given the large geographic challenges faced in Australia, this factor alone is driving the use of this system.

In the family area, many disputes are now dealt with through very simple technologically supported processes such as the Family Relationship Advisory Line, Telephone and Online Dispute Resolution Service and, increasingly across Australia, through video conferencing (Zoom, Skype or purpose-built). These options are particularly suited to disputants who may be geographically isolated from services or one another and also in circumstances where family violence may be an issue. Some issues about the increased use of technology include concerns about factors that may impact on the "just" result, such as privacy and confidentiality. In this regard, the Relationships Australia report actually found that there were very high rates of satisfaction with the Online Family Dispute Resolution (OFDR) services that were set up as part of the project in Queensland. Their research, therefore, suggests that online family dispute resolution processes meet objectives in terms of justice in addition to objectives relating to "quick" and "cheap" processes. Many factors support the continuing use of effective OFDR. The factors include:

- the type of technology — ease of use, reliability, accessibility and staff assistance (help desk and like supports)
- the skills and experience of staff

38 N Ebner and J Zeleznikow, "No sheriff in town: governance for online dispute resolution" (2016) 32(4) *Negotiation Journal* 297 at 319.

39 E Bellucci, D Macfarlane and J Zeleznikow, "How information technology can support family law and mediation" in W Abramowicz, R Tolksdorf and K Węcel (eds), *Business Information Systems Workshops*, Springer International Publishing, 2010, p 243 at p 252.

40 D Bilinsky, "Report from the ODR Conference in Buenos Aires", *Slaw*, 3 June 2010 at www.slaw.ca/2010/06/03/report-from-the-odr-conference-in-buenos-aires/, accessed 22 April 2021.

- the training given to staff.[41]

Other technology that supports disputants in this area includes "supportive service technology", such as that offered by Anglicare in Tasmania where e-counselling is provided to clients in the remote north-west of that state.[42] Real-time counselling is provided online using software developed by that organisation. Partnerships have been developed with local community organisations that allow clients to use their computer facilities for counselling sessions.[43]

In consideration of the above, it is pertinent to recognise that both the location of technological innovations in the justice sector and the type of innovations may impact upon considerations relating to whether they meet justice objectives. For example, supportive technologies may not raise concerns across the justice sector. Replacement technologies may also be supported in the ADR sector and in respect of the management of disputes as discussed above in relation to OFDR. However, more disruptive technologies that may involve developed artificial intelligence (AI) may raise quite different and additional issues in terms of "justice", particularly if they impact on perceptions relating to procedural justice as well as substantive justice, in part because both participation and transparency in terms of decision making may be reduced, which may be more relevant where evaluative and judicial adjudication processes are involved. In addition, it is also worth mentioning that no matter what types of technologies are discussed, there could be work across the justice sector that is not appropriate for technology to play a part, such as the work of the oral advocate.[44]

Concerns about technological change

As noted above, technological innovations have resulted in a number of positive changes to the landscape of justice system. For example, in terms of supportive technologies, access to justice can be made much easier with the application of online free legal services such as apps, including Penda[45] and AskLOIS,[46] which have been developed to empower victims of family violence with access to legal, financial and safety information, and to provide online training and resources to assist community support workers assisting women experiencing family and domestic violence.[47]

As to replacement technologies, as noted above, online dispute resolution (which includes video conferencing) has at least saved travel times and disbursements whilst contributing to a faster finalisation of disputes compared with both traditional litigation processes and traditional

41 Relationships Australia, *Development and evaluation of online family dispute resolution capabilities*, Report, 2011 at pp 14–15.
42 See H Brookes and T Smith, "Servicing rural and remote communities through e-counselling" (2010) 16 *Family Relationships Quarterly* 14.
43 ibid at 15.
44 T Bathurst, "The role of the commercial bar in the mid-21st century", presented at Australian Bar Associate Conference, 16 November 2018, at 7, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20181116.pdf, accessed 22 April 2021.
45 See Penda at https://penda-app.com, accessed 22 April 2021.
46 See Women's Legal Service NSW at www.wlsnsw.org.au/training/ask-lois-website/, accessed 22 April 2021.
47 LAWCPD, "Apps and access to justice: how technology can make a difference", Blog Post, 9 May 2018 at https://lawcpd.com.au/blog/apps-and-access-justice-how-technology-can-make-difference/, accessed 22 April 2021.

forms of ADR that require face to face contact. Similarly, case management has been aided by replacement technologies that enable the easier exchange of material, timetabling and the insertion of advisory apps.[48]

In terms of the more disruptive technologies, the benefits are less clear although it has been suggested that where computerised sentencing has been introduced into some criminal determinations, computers can make sentencing determinations more effectively and fairly than judges, and that there could be considerable fiscal savings flowing from reductions in the amount of time currently spent by judges in determining appropriate sentences.[49] There are, of course, strong arguments to the contrary[50] where the use of AI has generated concerns that arise from algorithmic bias issues to a lack of transparency, and even the encroachment by the executive upon the judicial function.[51]

As noted above, there are, however, an additional range of concerns about technological change in the judicial sector. These may include scepticism about the extent to which technology can assist in dealing with the "current" problems of the justice system.[52] There are also responses to the possible "new" problems caused by the use of technology in the sector, including how courts can preserve open justice in a technological era.[53] Another issue relates to how newer technologies may be "taken up" in the sector and the unevenness of any take-up. The challenge of ensuring that legal technical systems are kept up to date as technology develops quickly means that technological improvements are unlikely to occur in an "even" manner. For example, "private" parts of the system, which includes large law firms and funded ADR organisations (such as the Australian Financial Complaints Authority) are more likely to be able to afford investment than some parts of the court's sector.[54] In this regard, current developments already suggest that there is a lack of evenness in terms of developments. Through mining litigation data and applying big data analytical tools, Lex Machina, a company owned by legal publisher LexisNexis, is able to provide law firms and corporate clients with quantified insights into judicial behaviour, venues, opposing parties and opposing counsel to assist them to make better decisions about claim construction and case strategy.[55] Thus, instead of seeking advice from a law firm regarding the costs and benefits of initiating or defending litigation, businesses can

48 See Sourdin, n 2 at 99.

49 M Bagaric and G Wolf, "Sentencing by computer: enhancing sentencing transparency and predictability, and (possibly) bridging the gap between sentencing knowledge and practice" (2018) 25(4) *George Mason Law Review* 653. Although looking at the criminal jurisdiction, the principles stated in this article would apply equally to judgments in the civil jurisdiction: Sourdin, n 9 at 1132–1133.

50 Bagaric and Wolf, ibid.

51 Sourdin, n 9 at 1126.

52 See T Bathurst, "ADR, ODR and AI-DR, or do we even need courts anymore?", presented at Australian Disputes Centre, Supreme Court of New South Wales, 20 September 2018, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180920.pdf, accessed 22 April 2021 ("ADR, ODR and AI-DR").

53 See M Warren, "Open justice in the technological age" (2014) 40(1) *Monash University Law Review* 45 at www.austlii.edu.au/au/journals/MonashULawRw/2014/5.html, accessed 22 April 2021.

54 R Thomas and J Tomlinson, "The digitalisation of tribunals: what we know and what we need to know", *Public Law Project*, 5 April 2018, at https://publiclawproject.org.uk/resources/the-digitalisation-of-tribunals-what-we-know-and-what-we-need-to-know/, accessed 22 April 2021.

55 V Waye, M-L Verreynne and J Knowler, "Innovation in the Australian legal profession" (2018) 25(2) *International Journal of the Legal Profession* 213 at 223.

obtain that advice more quickly, inexpensively and, in some cases, more accurately from legal analytics firms like Lex Machina. However, access to such systems can be costly and therefore uneven, which raises questions about fairness (in terms of smaller law firms, legal aid, and courts) as well as whether an investment in technology could, to some extent, undermine the potential for the "cheap" resolution of disputes. In this context, the question arises: is it possible that the legal landscape is on the cusp of a technology-driven paradigm shift of a quantum nature whereby "just, cheap and quick" are capable of truly coexisting?

In this regard, it seems likely that many technological changes will promote the just resolution of civil disputes, particularly in terms of diverse online free legal services supported by the relevant "supportive" technologies, since the "weaker" party with disadvantaged status in a dispute may now be able to receive appropriate legal information and advice, and power imbalances can be, at least, somehow addressed — thus increasing the possibility of obtaining a "just" settlement (see further discussion below). There are, however, some additional challenges to the use of disruptive technologies in justice that may impact on the "just" resolution of civil disputes, although some commentators suggest that such challenges can be dealt with appropriately and "justice" can be achieved.[56]

Another potential benefit concerns the extent to which technology can assist with the long-term operation of the justice system. Innovation in the use of technology across society and to a limited extent in the justice system has recently focused on finding ways of accessing what is known as "big data". The inferential techniques being used on big data can offer great insight into many complicated issues, in many instances with remarkable accuracy and timeliness. The quality of business decision-making, government administration, scientific research and much else can potentially be improved by analysing data in better ways. These developments, in turn, have the potential to improve the quality of justice.[57]

Researchers at the Hague Institute for the Internationalisation of Law, studying big data's impact on the justice environment, have noted that these benefits are generally not being realised:[58]

> For most justice systems, the goal of court information systems is to get accurate statistics about workloads, disposition times, sentence rates, appeal and reversal rates, etc. However, our research indicates that existing court IT and organisational tools and mechanisms have limited capacity to extract valuable knowledge and insights from massive data sets.

Ingo Keilitz, an expert consulting with justice institutions throughout the world on measuring and improving their performance, offers the following example of how big data could affect court administration issues such as court consolidation:[59]

> For example, court location data could be compared against a number of public databases with information from inside and outside the justice system including Zip codes, populations,

56 Sourdin, n 9 at 1126–1130.
57 D Bollier, *The promise and peril of big data*, The Aspen Institute, 2010 at p 2.
58 G Lim, "Courts and Big Data" HIIL, webpage, 3 September 2013 cited in N Burstyner et al, "Using technology to discover more about the justice system" (2018) 44 *Rutgers Computer and Technology Law Journal* 1 at 14.
59 I Keilitz, "The courts' big data: what if only?", *Made2Measure*, Blog Post, 2013, at https://made2measure.blogspot.com/2012/07/the-courts-big-data-what-if-only.html, accessed 22 April 2021 cited in Burstyner n 58.

> demographics of the population (race, age, disability), travel times between locations, numbers and types of cases heard by different courts, levels of courts, and availability of public transportation.

The result of this analysis would allow advocates and opponents of various court consolidation models to consider the effect on distance and timeliness:[60]

> Results may allow advocates and opponents to compare various court consolidation models and say, for example, that the consolidation of courts from ten locations to three would increase the average distance and driving time to the nearest court from 3.1 miles and a ten minute commute to 4.5 miles and a fourteen minutes, where the overall average can be disaggregated by age of citizens, income levels, case type and so forth.

However, whilst big data may assist in terms of making the "system" work more effectively partly because it may enable better data to be gathered about the system, there are also concerns that the capacity to collect and explore data may have unforeseeable risks and issues. For example, in an effort to promote quick and cheap justice by way an alternative "naming and shaming" strategy, a Chinese court has mandated the use of a mini-program nicknamed "Deadbeat Map" which allows users to pinpoint the location of those who have failed to pay their debts within a 500-metre radius.[61]

There are other concerns about the capacity to meet justice objectives that are linked to the potential for a large-scale job loss that may occur across the legal sector partly because similar systems that involve predictive and related technologies to work effectively will lead to significant job sector changes. For example, according to a 2018 report from British accounting firm PricewaterhouseCoopers ("PwC"), the most affected employment segment by automation over the next 5 to 8 years will be administrative and white-collar office jobs.[62] However, a study into the impact of AI on daily commoditised legal tasks recently conducted by American academics showed that AI can already work not only faster than lawyers on certain non-core legal tasks such as reviewing legal contracts, but also in a more accurate way.[63] Despite this finding, one of the academics involved in the study insisted that automation was not synonymous with job losses, but rather AI could end up being a "lawyer's best friend".[64] In this

60 I Keilitz, "Big data, data analytics, and the access to justice 'card'", *Made2Measure*, Blog Post, 2012, at http://made2measure.blogspot.nl/2012/11/big-data-data-analytics-and-access-to.html, accessed 22 April 2021.

61 E Handley and B Xiao, "China tests opening up social credit scores to social media platform WeChat with debt map" *ABC News* online, 24 January 2019 at www.abc.net.au/news/2019-01-24/new-wechat-app-maps-deadbeat-debtors-in-china/10739016, accessed 22 April 2021.

62 PwC UK, "How will automation impact jobs?", 6 February 2018 at www.pwc.co.uk/services/economics-policy/insights/the-impact-of-automation-on-jobs.html, accessed 22 April 2021.

63 N Abermann, "AI vs lawyers: the ultimate showdown", *Wall Street Pit* Web Page, 7 March 2018 at https://wallstreetpit.com/114557-ai-lawyers-ultimate-showdown/, accessed 22 April 2021.

64 ibid.

regard, a number of reports and commentators have stressed that technological innovation can provide more opportunities for lawyers,[65] including completing some of the groundwork and then improving lawyers' work efficiency.[66]

At the same time, despite cost-saving benefits, technological developments have also led to new issues and increased costs in respect of some parts of the justice sector. For example, according to the Report of Discovery in Federal Courts released by Australian Law Reform Commission, many commentators, including Acting Justice Ronald Sackville of the NSW Supreme Court, have noted the distorting effect that technology has had on discovery costs associated with court proceedings. It was observed that it was here that extraordinary and disproportionate costs were frequently incurred by parties to the litigation.[67] Again, this echoes the question above as to whether such new costs on discovery will still be in line with the "cheap" resolution of disputes for parties.

Concerns about the judicial role in the context of more disruptive technological innovation have so far been the subject of limited commentary; however, there are also justice concerns in this arena.[68] Some have suggested that in the judicial decision-making process, artificial intelligence cannot take over entirely because of the biases possessed by the automation systems, particularly when it comes to the sentencing outcome in a criminal case.[69] Others have noted that in the civil justice arena there is potential, in the longer term, for Judge AI to replace lower-level tribunal and lower-tier judicial decision-making, and it seems likely that Judge AI will develop in a range of other ways.[70] In some jurisdictions, such as China, Judge AI may play a more prominent role.[71] In relation to the civil system, however, and as noted previously, in the absence of a clear focus on "justice" and related objectives (including well-being), there is a risk that a focus on cost and delay will mean that there is a temptation to automate more

65 See, eg, R Smith, "Ten ways in which technology can expand access to justice", *Law, Technology and Access to Justice*, 12 February 2018 at https://law-tech-a2j.org/digital-information/ten-ways-in-which-technology-can-expand-access-to-justice/, accessed 22 April 2021; J Zeleznikow, "Don't fear robo-justice. Algorithms could help more people access legal advice", *The Conversation*, 23 October 2017 at http://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395, accessed 22 April 2021; M Leering, "Enhancing the legal profession's capacity for innovation: the promise of reflective practice and action research for increasing access to justice" (2017) 34(1) *Windsor Yearbook of Access Justice* 189 at https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5012, accessed 22 April 2021.

66 See S Palmer-Derrien, "New technologies are throwing out the book on law procedures, and Aussie legaltech startups are helping them do it", *smartcompany*, 16 January 2019 at www.smartcompany.com.au/startupsmart/news/legaltech-startups-ai-blockchain/, accessed 22 April 2021.

67 Discovery in Federal Courts, n 33 at 160.

68 Sourdin, n 9 at 1133.

69 See B Head, "Law is falling far behind the tech", *InnovationAus.com*, 27 November 2017 at www.innovationaus.com/law-is-falling-far-behind-the-tech/, accessed 22 April 2021.

70 Sourdin, n 9 at 1118. Other developments could include the creation of template decisions to assist judges in civil matters.

71 See, eg, C Yin, "Courts embrace AI to improve efficiency", *China Daily* online, 16 November 2017 at www.chinadaily.com.cn/china/2017-11/16/content_34595221.htm, accessed 22 April 2021. By the end of 2017, over 100 courts in China had used robots to improve efficiency, although at this stage those robots seem to be only helpful in terms of answering disputing parties' questions regarding the legal procedure and the simple substantive legal inquiries, rather than making decisions in place of human judges.

decision making particularly at lower levels of the court system. In terms of the ADR system, a focus on "quick and cheap" at the expense of a justice objective may result in automated non-human decision making which may not be perceived to be "just".

Given the issues noted above, it is not surprising that the introduction of technology in the justice system has generated much discussion within the many different interest groups involved in the system about the capacity of technological reforms to meet justice objectives. An additional issue in this area relates to technological readiness which partly explains the variation in views above but also partly explains why there may be an "uneven" capacity to meet justice objectives. Prior to considering whether effective measures can sustain the advantages while curbing the disadvantages of technological innovation, it is useful to consider how technological innovation may be received by end-users in the justice sector.

Innovation readiness

Historically, the justice system has been slow to adjust to change. As the new millennium approached, the then Justice Kirby wrote about the slow rate of change within the sector:[72]

> A lawyer from Dickens' time, walking out of *Bleak House* into a modern Australian court on an ordinary day, would see relatively few changes. Same wigs and robes. Same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion. Contrast, if you will, the astonishment of a physician from Guy's Hospital in London, from the middle of the last century, wandering into the electronic world of bleepers and monitors, of CAT scans, genomic tests and automated diagnosis of a modern Australian hospital. We have made progress in the law and in the courts, including the past twenty-five years. But not as much as other professions. Will it stay this way?

Chief Justice James Allsop upheld the courts' role in the adoption of technology in the law and in legal practice:[73]

> As core public institutions, courts need to take a leading role in the responsible implementation of technology in the law and in legal practice, with a specific emphasis on problem solving and the facilitation of the just resolution of disputes in a quick and inexpensive manner, while still maintaining the fundamentally human character of the courts.

This observation raises a question about whether the justice sector is "ready" for technological innovation. The concept of readiness can be in itself a self-delusionary enthusiastic willingness to participate. Many parents will attest that childhood races commencing with words of "ready, set, go" generally have the attention of most of the participants at "ready", though at that critical "go" moment, many more find themselves still on the back foot. The level of readiness is perhaps something that can only truly be measured post the event — failure at "go" suggests (irrespective of the efforts to be "ready") that the readiness factor has shortcomings.

72 M Kirby, "The future of courts — do they have one?" (1998) 9(2) *Journal of Law, Information and Science* 141 at 143–144, at www.austlii.edu.au/au/journals/JlLawInfoSci/1998/12.html, accessed 22 April 2021.

73 J Allsop, "Technology and the future of the courts" [2019] UQLawJl 1 at http://classic.austlii.edu.au/au/journals/UQLawJl/2019/1.html, accessed 22 April 2021.

Accordingly, legal innovation readiness is difficult to achieve and measure, particularly when the task is to prepare and adapt to technological innovations that are developing more rapidly than at any other time. The timeframe whereby the music marketplace prepared and adopted CDs in place of vinyl records, only to itself be replaced by online music, was for most involved an extremely fast transition — a disruption to the generally accepted rate of change accommodated by the market.

Much has been made of the concept of "disruption" since its critique in "The innovator's dilemma",[74] and recently Richard Susskind provided a succinct summation:[75]

> What Christensen highlights is that by the time market leaders react to the change, it's often too late. A popular example of such a phenomenon is Kodak. They invented much of digital camera technology. Yet they didn't themselves embrace it and by the time they recognized the market had shifted, other players had rapidly come to dominate. The point is that because the market can move quickly, leaders can find it very hard to adapt in time.

Newer technology is sweeping forward with a groundswell of new opportunities towards improving legal efficiencies — new processes whereby the "quick" and "cheap" resolution of civil disputes could indeed become the norm as opposed to the exception. However, there is also a risk that a lack of readiness will mean that technological reform will be led by tech giants and major commercial interests who may be less concerned with meeting "justice" objectives (from a societal perspective). Readiness for disruption is perhaps a contradiction, however the "cart before the horse" analogy would appear to apply for civil dispute resolution. The clients (and potential clients) are increasingly tech-savvy — their readiness to adapt to online legal services, the latest phone app, and online video communication is unquestionable — particularly in the desire to obtain quick and cheap justice. Arguably, the cart is full and eager for the horse to come to the fore.

The profession

Considering the readiness of the legal profession in relation to technological advances is difficult (in accordance with the above critique of readiness), particularly given the significant differences that apply across the sector (for example, Judge v Tribunal Member, large firm v small, government lawyer v in-house). It appears clear, however, that technological advances have spawned a somewhat reluctant acceptance that the pyramid business model sustained by significant billable hours, which served to provide healthy remuneration packages for a select number of partners, is on its last legs. This, of course, applies mostly to the larger firm which, while being in the minority as to the number of firms, provide significant influence

74 See C Christensen, *The innovator's dilemma: when new technologies cause great firms to fail*, Harvard Business School Press, 1997.

75 O Duchesne, "Threats to traditional legal practice: an interview with Richard Susskind — Part 2", *Priori* Blog Post, 31 October 2018 at www.priorilegal.com/blog/threats-to-traditional-legal-practice-an-interview-with-richard-susskind-part-2, accessed 22 April 2021.

that trickles down through the mid and small law firms.[76] Adopting new strategies and models so as to survive/accommodate the significant changes that the new technologies will bring is perhaps the only option towards a state of readiness.

The 2016 profile of solicitors in NSW highlights the significance of the sole practitioner, accounting for the second highest percentage of practising lawyers at 18.6% — second only to single principal firms (employing on average 2.2 Solicitors) at 26%. In light of the above, the readiness of the legal profession in relation to innovation (at least in NSW) would appear to have three discrete and markedly different journeys. Top tier and large firms with enviable budgetary resources are able to invest into incorporating and developing the latest technologies;[77] small to mediums firms are attempting to keep up as best they can but generally with only administrative preparedness;[78] while the new breed of sole practitioner is using technology towards what has been described as Uberisation within the legal profession.[79]

Fortunately, it would seem reasonable to infer that "quicker and cheaper" legal services will be the by-product of innovation as adopted by all levels of the legal profession. Large firms are already making significant cost and time improvements by way of implementation of new technologies[80] (although passing on cost savings will be potentially dictated by market forces), while sole practitioners are now providing "partner-level expertise at almost half the hourly rate" with the additional benefit of a direct line of contact between solicitor and client ensuring time efficiencies in relation to correspondence.[81]

76 Law Society of NSW, *NSW profile of solicitors*, Final Report, 2016 at pp 20–21, at www.lawsociety.com.au/sites/default/files/2018-04/NSW%20PROFILE%20OF%20SOLICITORS%202016%20FINAL%20REPORT.pdf, accessed 22 April 2021.

77 A Collyer and I McGill, "Allens hub for technology, law and innovation launches to confront the future of law", Allens Linklaters, 24 November 2017 at www.allens.com.au/med/pressreleases/pr24nov17.htm, accessed 22 April 2021. According to the Allens media release: "The Allens Hub will see 22 UNSW academics work closely with staff from Allens to explore disruptions to the law, lawyers and the legal system such as reliance on data-driven decision-making and new kinds of biological, artificial and legal 'persons'".

78 "An industry in transition 2017: legal benchmarking results", Macquarie Bank Web Page, 2017 at www.macquarie.com.au/assets/bfs/documents/business-banking/bb-legal-industry/macquarie-2017-legal-benchmarking-full-results.pdf ("An industry in transition"). The Macquarie Bank benchmarking report stated:

> A survey of legal practitioners in Australia conducted by Macquarie Bank and released earlier this month uncovered a digital divide already existing in law firms; smaller firms invested in back office efficiency tools such as accounts automation, and only the larger firms spent up on data mining, predictive analytics and artificial intelligence. Almost a quarter of small law firms have no technology beyond the very basic administrative tools.

79 C Kane, "Law Council of Australia raises concerns about Uberisation of profession by technology", *ABC News* online, 28 September 2018 at www.abc.net.au/news/2018-09-28/law-council-of-australia-raises-concerns-about-uberisation/10306298, accessed 22 April 2021. In 2018, Law Council of Australia raised concerns about Uberisation of profession by technology. Professor Margaret Thornton from the Australian National University (ANU) described the growing practice of lawyers doing piece work for firms or individual clients as the "Uberisation" of law.

80 See n 78 at 31. See the case study "Transforming legal practice with artificial intelligence (AI) — we've got happier real estate lawyers, the work product is much more consistent … [and] we've achieved time and cost savings of around 30%".

81 A Patty, "Digital disruption expected to make legal services cheaper", *Sydney Morning Herald* online, 29 March 2017 at www.smh.com.au/business/workplace/digital-disruption-expected-to-make-legal-services-cheaper-20170327-gv7fhd.html, accessed 22 April 2021.

The judges

Exploring the topic of technological readiness and judges (including magistrates and tribunal members/commissioners) is an area of perhaps unparalleled complexity and uncertainty. The overriding purpose to deliver a just outcome quickly and cheaply promotes a stressful work setting for the judiciary, and recent commentary about judicial mistakes,[82] procrastination,[83] and the notion that judges are existing in a bubble highlights the current problematic environment.[84]

Furthermore, perhaps no other area of the legal profession is more susceptible to the concept of inertia, as referenced earlier by Michael Kirby. In relation to the UK and internationally in general, it has been noted:

> Although it is sine qua non that courts ought to reflect advances in society, historically in the United Kingdom and elsewhere, the courts and to a lesser extent, the legal profession, have been amongst the most conservative professional domains in terms of technology adoption and in harnessing advances in technology to improve practice.[85]

Offering further judicial commentary in the area, Bathurst CJ provided the following:[86]

> Nevertheless, the influence of technology on dispute resolution has already been significant. Those disappointed with the slow uptake, particularly in the Courts, should take heed of Amara's law — that we tend to overestimate the effect of technology in the short run and underestimate its effect in the long run. In any event, supportive technology is used in the Courts as a matter of course — we now have e-filing, e-discovery, real time transcription services, electronic courtrooms, the use of video links and "safe rooms" for vulnerable witnesses and the use of devices on the bench and at the bar table. In NCAT, some hearings are conducted via telephone where it is the most timely and effective way to hear the matter.

Noteworthy in the above extract is the reference to numerous supportive technologies, yet replacement and disruptive technologies remain elusive in terms of judicial input, as perhaps does the "readiness" quotient.

Independent of perceptions of inherent reluctance on the part of (some) judges to disrupt "their" well-established procedures for the facilitation of quick and cheap justice, even the most innovation-ready judge remains reliant on the Executive to provide the funding package sufficient for the implementation of the latest technologies.[87] As legal minds (on the shop floor) within the legal profession are supplemented with "big data AI sourced answers" to intricate

82 G Mitchell, "'I knew I must be making mistakes': magistrate's tears in court", *Sydney Morning Herald* online, 22 November 2018 at www.smh.com.au/national/nsw/i-knew-i-must-be-making-mistakes-magistrate-s-tears-in-court-20181122-p50hkt.html, accessed 22 April 2021.

83 J Doraisamy, "Are judges succumbing to the "seductive power of procrastination" with writing judgments?", *Lawyers Weekly*, 26 November 2018 at www.lawyersweekly.com.au/wig-chamber/24523-are-judges-succumbing-to-the-seductive-power-of-procrastination-with-writing-judgments, accessed 22 April 2021.

84 ibid.

85 J Donoghue, "The rise of digital justice: courtroom technology, public participation and access to justice" (2017) 80(6) *The Modern Law Review* 995 at 997.

86 Bathurst, n 52 at 4.

87 See *NSW Budget Estimates 2018–19*, Budget Paper No 3, 2018, ch 6, at www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_3-Budget%20Estimates-Budget_201819.pdf, accessed 22 April 2021.

legal questions, the position whereby "your Honour" is considered the brightest legal mind in the court may turn on not only the innovative readiness of the judge, but access (by way of sufficient funding) to the latest technologies.

There are also other issues about how technology can be integrated and used effectively in courts and tribunals, which often operate "legacy" systems with content management features that make it difficult to add and support more sophisticated systems. Court filing systems remain paper based in many areas, and there are cultures operating within the litigation system that may find it difficult to adapt to newer technologies.

Conceivably no other area of the legal profession has a greater need to strive towards a sophisticated understanding that will in turn support readiness to embrace many of the new technologies available. Considerations of Judge AI, whereby there will be "an increasing emphasis on artificial intelligence to deal with smaller civil disputes and the more routine use of related technologies in more complex disputes", highlight that the process of change is indeed underway[88] — so far, however, with little judicial input as changes take place in the External Dispute Resolution ("EDR") and tribunal area. The ethical issues that emerge in terms of the judicial role and Judge AI, and developments in this area so far, assume that the "human touch" will remain central to the judicial role. Incorporating technology will not remove "the importance of responsive judging and a need to better understand and explore the impact that people experience when a human judge deals with their concerns".[89]

The consumers

The consumers (the clients and the litigants) are arguably more ready to adopt new technologies in the interests of just, quick and cheap dispute finalisation. However, again there is an "uneven" readiness that can be linked to geographical location, age, economic circumstances as well as other factors that can be linked to vulnerability. The challenge likely to emerge will be "how consumers will be able to discriminate effectively between the plethora of different service providers that are likely to emerge".[90] This has prompted the development of websites such as Law Choice Australia,[91] and the inference may be that modes of advertising (and strategies to receive high priorities in the Google searches) will be key determiners as to the services being used.

In addition, consumers are always ready (with perhaps some sceptical caution) for "free" services. Apart from the introduction of free online legal consultation by many law firms,[92] the Legal Services Commission of South Australia[93] as well as some apps supported by the public sector that provide free legal services to clients, there is little available to those with complex problems. In this regard some issues that people face may even be linked to confusion or even

88 Sourdin, n 9 at 1114.
89 ibid at 1133.
90 Waye, n 55 at 222.
91 See Law Choice Australia website at www.lawchoice.com.au, accessed 22 April 2021.
92 Waye, n 55 at 230.
93 See Legal Services Commission of South Australia at https://lsc.sa.gov.au, accessed 22 April 2021.

technological uncertainty (eg Robo debt).[94] However, such services may enable people with legal problems to have access to a legal chat line and obtain information and/or links to relevant sources of law without having to wait on a telephone line to talk with a lawyer. Not only is such a process quicker and more effective, but it may promote greater accessibility and confidentiality.

The "tech-savvy" consumer (as referred to previously) is already armed (and proficient) with the latest smartphone capable of providing "24 hours a day, 7 days a week" access to whatever can be downloaded or linked to. In conjunction with the widespread community rhetoric (and general reality) that dispute resolution by way of the legal process is currently too expensive and too slow, this innovative readiness of the consumer is perhaps the latent driving force that will catalyse the legal disruption. Many clients will no longer tolerate expensive slowness — particularly where aspects such as the "billable hour" has hindered the motivation of legal representatives towards a timely resolution. To this end, those companies, including the UK's Robot LISA[95] — whereby costs are upfront and the matter is essentially conducted (as far as possible) utilising Chatbot technology without the intervention of a legal practitioner, could become the legal service provider model of an innovative ready consumer. The scope to which this unbundling of legal services may become available in the Australian jurisdiction may (at least in the short term) be more limited than the UK on account of legal regulatory differences. However, as recently highlighted by Michael Legg: "The confluence of concerns about the affordability of legal services and the greater use of technology to provide legal information and related services means that more potential clients are likely to seek limited scope services".[96]

Conclusion

This article has focused on the relationship between civil dispute resolution and technology, and the ever-increasing complexities that are being realised by way of supportive, replacement and disruptive technologies. In this regard, no matter how technology has impacted on justice, it is undeniable that there are many tangible advantages that technology has brought and will bring to the justice system. The authors argue that in the context of Australian civil justice, technology will often assist to achieve the objectives of the civil justice sector in terms of the quick and cheap resolution of civil issues.[97]

In terms of objectives relating to justice, there are many considerable advantages that the technological revolution can provide. Given the geographical limitations and remote access

94 H Pett and C Cosier, "We're all talking about the Centrelink debt controversy, but what is 'robodebt' anyway?", *ABC News* online, 3 March 2017 at www.abc.net.au/news/2017-03-03/centrelink-debt-controversy-what-is-robodebt/8317764, accessed 22 April 2021.

95 See Robot Lawyer LISA Website at www.youtube.com/channel/UCSRbwk_0FllqETf_g67WtvA, accessed 22 April 2021. LISA is an acronym for Legal Intelligence Support Assistant. The company's website provides the following as their mission: focus on making access to legal services cost effective, time saving, insightful and transparent for consumers and businesses to acquire their legal needs by using technology wherever possible in the first instance before moving on to garner human lawyer support, if at all necessary or desired.

96 M Legg, "Recognising a new form of legal practice: limited scope services" (2018) 50 *Law Society of NSW Journal* 74, at https://lsj.com.au/articles/recognising-a-new-form-of-legal-practice-limited-scope-services/, accessed 22 April 2021.

97 *Civil Procedure Act 2005* (NSW) s 56.

issues that can arise in a vast and relatively sparsely populated country such as Australia, and the reality that disputes can include international, national and local interaction, supported technological solutions are likely to exert a significant influence on the justice system into the future. In addition, the "digital divide" issues that existed in the past are decreasing because simpler technologies have evolved and internet access has increased across communities. Each of these factors, coupled with growing technological competencies and preferences, means that technological approaches are likely to be extended into the future.

Those within the litigation system have noted that technology changes have the potential to dramatically transform the way in which dispute resolution is carried out.[98] Within the court system, e-callovers,[99] e-filing,[100] video conferencing and applications[101] are now commonplace in many jurisdictions. Technology courts, virtual courts or cyber courts now exist in many jurisdictions,[102] and the presence of such initiatives may produce more participatory court processes, and enhance "participatory" justice as well as better communication and document management. Other changes have occurred in the handling, collation, and storage of information and in the way that research occurs. The information available online increases access to court systems and can assist parties to better observe and understand what takes place within the court system.

Newer communication approaches have the potential to overtake the limitations of e-mail and offer new collaborative styles and processes. Together with online meeting facilities, the interactions that have traditionally slowed down capacity to respond "on time" can now be instantaneous. In addition, parties constantly communicating in groups can develop more sophisticated and timely solutions to process issues as well as the final outcome of the case. Creating rules around these interactions to ensure that due process is followed will be the new challenge for justice agencies. Many Australian ADR environments now use Facebook, Twitter and YouTube to engage with business, consumers, and stakeholders about dispute resolution and to support dispute avoidance and self-managed negotiation strategies.[103]

Newer technologies present a range of challenges for court legislators and are giving rise to new litigation industries that provide forensic oversight of data analysis processes, encryption and "cloud" collaborative processes between litigation participants. All of these technologies might support timeliness. In light of this, there may be a challenge posed by this new technology and industry — that of ensuring that courts and tribunals adapt in order to remain relevant and that courts and tribunals have additional input in respect of justice objectives.

The potential for technological innovations to pave a supportive, replacement and disruptive path to facilitate a tripartite union of the overriding principles as defined under the *Civil*

98 See n 52.
99 For example, NSW Land and Environment Court.
100 For example, Federal Court of Australia.
101 Bail applications are commonly carried out by video in the Supreme Court of NSW.
102 See "Technology court", *Judiciary* at www.judiciary.gov.hk/en/crt_services/tech_crt.htm, accessed 21 April 2021.
103 "The Victorian Department of Justice and web 2.0", 31 December 2009 cited in T Sourdin and C Liyanage, "The promise and reality of online dispute resolution in Australia", p 483 at www.mediate.com/pdf/sourdin_liyanage.pdf, accessed 22 April 2021.

Procedure Act 2005 (NSW) and similar legislation is unquestionable.[104] And yet the difficulty of certainty arises on account of the complex diversity of the legal landscape which requires consideration of almost polar opposite extremes, such as:

- bush courts (run over two days incorporating 44 matters and utilising two lawyers) to Supreme Court matters that may involve teams of lawyers and a senior counsel[105]
- top-tier firms with multi-million-dollar budgets to office-less sole practitioners
- litigants represented by teams of lawyers and senior counsel, through to self-represented litigants.

All sectors will be impacted by the latest technologies. To the extent that "cheaper" and "quicker" justice will be obtained (albeit with challenges) appears likely, perhaps certain. And yet the illusiveness of truly satisfying the "just" component remains the most significant challenge. Greater awareness and access to information of the consumer is significant in this disruptive environment, and while measurements of speed and expense may be noteworthy, it will perhaps be the consumer's critique of a process to deliver a "just" outcome that may be of ultimate importance. As established at a time not conflicted by today's complex technological challenges — "Not only must justice be done; it must also be seen to be done".[106] Justice may also require some component of human creativity that cannot, for example, be readily replicated by AI which may, in any event, fail to provide litigants with "human" experience.[107] In addition, the clear articulation of what is meant by "justice" is critical in ensuring that future developments are measured and considered in terms of clear benchmarks.

There is, however, undeniably a strong relationship between "quick" and cheap" objectives and the attainment of justice. Although the complexities that have been outlined in this article cannot be condensed to a single sentence, NSW Barrister Philippe Doyle Gray provided a brief summation (albeit in relation to costs, but applicable to the three overriding purpose elements of just, quick and cheap justice):[108]

> You can repeat slogans, like just, quick and cheap, which is s 56 of the *Civil Procedure Act 2005*, but the only way that $11,000 became $990 [for my client] is because somebody embraced technology.

104 See, eg, *Civil Procedure Act 2010* (Vic).

105 D Lewis and A Clarke, "Two lawyers, three days, and 44 cases: is bush court in the NT the fast food of justice?", *ABC News* online, 16 February 2019 at www.abc.net.au/news/2019-02-16/background-briefing-northern-territory-bush-court/10817642, accessed 22 April 2021.

106 *R v Sussex Justices; Ex p McCarthy* [1924] 1 KB 256.

107 Sourdin, n 9 at 1124.

108 Law Society of New South Wales, *FLIP — The future of law and innovation in the profession: commission of inquiry*, 28 March 2017 at p 37, at www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf, accessed 22 April 2021.

Delay too often defeats justice*

The Right Honourable Lord Dyson†

This paper focuses on the right to timely justice, a principle articulated in cl 40 (prohibition on sale, denial or delay of justice), and underpinning cl 17 (provision for the court to sit and hear claims at a fixed place), of Magna Carta. According to the author, systemic delay has been as significant a barrier to the effective operation of the justice system as excessive costs and procedural complexity. Together they undermine the individual litigant's interest in having effective access to justice. In extreme cases, they may lead to a denial of justice altogether. They are also damaging to the wider public interest in the rule of law. However, these private and public interests do not always run together. In any system where there are limited resources and demand outstrips supply, a degree of rationing is necessary. To improve efficiency without compromising the effectiveness of the justice system the author advocates the proper use of technology and effective procedural reform and case management. The author cautions against litigation being conducted at breakneck speed, as that carries a risk that parties will be unable to present their cases effectively and judges will not have enough time to produce decisions that are sufficiently researched and carefully considered.

Introduction

I was formerly chairman of the Magna Carta Trust,[1] a position held by all Masters of the Rolls since the Trust was established in 1956. As you can imagine, my term of office was a little busier than that of my illustrious predecessors.

One of the aims of the Trust is to "perpetuate the principles of Magna Carta".[2] Magna Carta is a curious hotch-potch of a document. Many of its provisions cannot by any stretch of the imagination be described as principles. They include detailed measures of an intensely practical

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1 From 2012 to 2016.

2 See http://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/, accessed 27 April 2021.

nature which reflect the economic and social conditions of the early 13th century. Some of them were aimed at resolving grievances that King John's barons had at the time; grievances that were not only directed at him, but were a reaction to the rule of the Angevins more generally.

But it is undeniable that Magna Carta does contain a number of chapters which we would recognise as setting out important principles and which have real relevance today. They are the reason why it has been grandiloquently claimed that Magna Carta is the inspiration for democracy; and why thousands of people from all over the world congregated on a field at Runnymede on 15th June 2015 to commemorate the 800th anniversary of the sealing of the Charter. I have in mind in particular the famous cl 40: "To none will we sell, to none will we deny, or delay, the right of justice" — inspiring words. There is also cl 20: "A freeman shall not be amerced for a small fault but after the manner of the fault; and for a great crime according to the heinousness of it" (an early assertion of the principle of proportionality). I also have in mind other provisions concerning access to justice and due process of law and the right to fair trial as well as the requirement that justice should be dispensed from a fixed place,[3] that it should be local,[4] and that judges should know the law, which often meant local law[5] — an early instance of subsidiarity, perhaps. Another is that only judges should sit in judgment.[6] The Charter was not, however, the source of trial by jury or the great writ of habeas corpus.

There are those who seek to debunk Magna Carta, at least to the extent of insisting that it be examined in its true historical context. I am sure that King John and the barons would have been astonished if they had been told that the sealing of Magna Carta would be commemorated 800 years later in an explosion of events both in England and abroad; that thousands of people would come to Runnymede from all over the world on 15 June 2015 to mark the 800th anniversary; and that it would be regarded as one of the most important constitutional documents of all time. It is remarkable that a treaty extracted from a feudal king by the barons "at the point of the sword" would have such a powerful and enduring influence on constitutional development in England, the US, and the common law world and beyond. It is true that Magna Carta had a somewhat bumpy ride during the medieval period. It was annulled only two months after it was sealed. In the next two centuries, it was issued, withdrawn, reissued and confirmed. It expresses an idea that retains its vitality and relevance in the 21st century. This idea, as described by Sir Winston Churchill, is the "sovereignty of the law"[7] as protection against attempts by governments "to ride roughshod over the rights or liberties"[8] of the governed.

3 Magna Carta 1215, cl 17.
4 Magna Carta 1215, cl 19.
5 J Holt, *Magna Carta*, Cambridge University Press, 1992, p 63.
6 Magna Carta 1215, cl(s) 24 and 45.
7 W Churchill, *A history of the English-speaking peoples: the birth of Britian*, Vol 1, Cassell and Company, 1956, pp 201–202.
8 ibid p 202.

Magna Carta — to no-one will we deny or delay right or justice

In the discussion below I want to focus on one particular principle of justice which is articulated in Magna Carta: the right to timely justice. The principle finds expression in two places in the Charter. It underpins the provision in cl 17 that "Common pleas shall not follow our court, but shall be holden in some place certain."[9] The consequence of this was the re-establishment of the court sessions at Westminster. I need to explain how this impacted on the time taken to resolve disputes.

Prior to 1209 an informal arrangement had existed by which common pleas sat in two divisions. One followed the King. The other held its sessions in Westminster Hall. In 1209 John stopped the Westminster sessions, although from 1212 a limited number of sessions continued to be held there.[10] The elimination in practice of the fixed court in Westminster placed an increased cost burden on litigants because they had to travel round the country with the King's court in order to prosecute their claims. This caused delay. Westminster sessions tended to be longer and occurred more frequently than those in the King's court. The aim of cl 17 was to reduce delay and cost, by requiring John to turn the clock back to the start of his reign and provide for common pleas to sit once more in Westminster on a permanent basis.

Clause 17 simply called for the court to sit in a "place certain". It is easy to assume that this was a reference to what was to become the Court of Common Pleas. But its meaning in 1215 was not so clear. The reference to "our court" was a reference to the King's court, that is, "the whole body of counsellors, ministers, knights, clerks and domestic servants who [accompanied the King].[11] "Where was the "fixed place"? There is nothing to indicate that it had to be in Westminster Hall, still less, as Sir Orlando Bridgman, Chief Justice of the Court of Common Pleas in the 17th century is said to have believed, that the court was to be held in a specific part of Westminster Hall. Bridgman is said to have refused to move the court a few metres away from where it habitually sat in the Hall — in front of a door that let in a nasty draught of air. The reason he gave was that to move the court in that way was prohibited by Magna Carta. In fact, it did no such thing.[12] Clarification of the meaning of cl 17 was to come in the 1217 re-issue of the Charter. This made it clear that common pleas were to be heard by "Justices of the Bench". What was implicit in 1215 was now made explicit: the court meant the judges, and particularly the judges who sat in Westminster Hall.

Securing a fixed place for the court to sit and hear claims is not, however, the most famous of the chapters that deal with delay and administrative inefficiency. That honour goes to cl 40 which, as I have said, proclaims in ringing terms: "To none will we sell, to none will we deny, or delay, the right of justice."[13]

9 Magna Carta 1215, cl 17.
10 Holt, above n 5, pp 323–324.
11 D Carpenter, *Magna Carta*, Penguin Classics, 2015, p 157.
12 J Baker, *An introduction to English legal history*, Butterworths Lexis Nexis, 2002, p 37.
13 Magna Carta 1215, cl 40.

What mischief did this provision seek to address? McKechnie, in his magisterial account of Magna Carta, gives a flavour of the answer. In the years leading up to 1215, John used the machinery of justice as "ministers to his lust and greed".[14] What for others would be instruments of government and justice were, for John, "instruments of extortion and outrage".[15] To fill the coffers of the exchequer, litigants were expected to pay sums of money to ease their path to a favourable decision. Judgments went to the highest bidder.

For example, Gilbert de Gant paid 100 marks for judgment. William de Mowbray paid 2,000 marks in respect of an action brought against him. His opponent had already paid a similar amount. Speculative investment in claims was also commonplace. Barons provided the funds for others to pursue claims in the expectation of profiting from a favourable decision. Champerty and maintenance was a thriving business. Money was not only paid to secure favourable decisions, it was also paid to halt justice in its tracks. Gerard de Furnivall paid 1,000 marks to ensure that an action brought against him was simply stopped. And, in order to secure support for war efforts, in 1206 John offered an incentive to his knights. If they joined the army, claims against them would be stayed.[16]

The aim of cl 40 was therefore to ensure that the King did not use the justice system as an instrument of financial policy. To a large degree it succeeded. While some future kings did sell and delay justice for their own ends, none did so in the same way or to the same extent as John.[17] But it did not, and was not intended to, bring about an end to delays in the administration of justice generally.

Delay — a means to defeat justice

The real focus of cl 40 was on the need to stop abuses of the justice system by the monarch. It was aimed at ensuring that improper interference with due process of law came to an end. The nurturing and sustaining of this aspiration is a central aspect of what we now refer to as "the rule of law" and which we take for granted as a fundamental tenet of a liberal democratic society. It underpins a commitment to judicial independence, which John sought to undermine by requiring the court to attend on him rather than sit at a distance from him in Westminster Hall. It underpins the rules against bias. Most fundamentally, it underpins the court's constitutional role as the means by which rights are determined, vindicated and — importantly in our common law jurisdiction — developed. The latter role of developing the law is, of course, subject to Parliament's legislative sovereignty. None of these ideas would have been apparent to the barons or to John at the time. The former no doubt were firmly focused on ensuring that John did not use the justice system to exploit them to his advantage. But it is still possible to see these wider principles of justice being illuminated by the barons' immediate concerns, albeit that these concerns were actuated by self-interest and not high-minded ideals.

14 Cited in Holt, above n 5, p 179.
15 ibid.
16 ibid p 84.
17 ibid p 327.

The main focus of attention on cl 40 has tended to be on the prohibition of the sale of justice. That is understandable. The idea that a judge will decide a case in favour of the highest bidder is deeply shocking to us, although corruption of this kind is still endemic in many parts of the world. Confidence in the independence of the judiciary is essential to the maintaining of the rule of law. Less attention has been paid to the prohibition on delayed justice. That may be because delayed justice is rarely as clear-cut, stark and shocking as the sale of justice. Cases of delayed justice as extreme as *Jarndyce v Jarndyce* in Dickens's *Bleak House*[18] were unusual even in 19th century England. But delay can unquestionably frustrate the achievement of justice. Sir Edward Coke CJ's commentaries on Magna Carta (or should I say reinterpretation of Magna Carta) drew this out. He said that justice has three qualities:

> Justice ... must be Libera, Free; for nothing is more odious than justice let for sale; Plena, Full, for justice ought not to limp, or be granted piece-meal; and Celeris, Speedy ... Because delay is a kind of denial.[19]

Chief Justice Coke was not the first person to equate delayed justice with the denial of justice, nor would he be the last. Complaints about the delays of justice have echoed through the centuries, culminating in the great complaints in the 19th century about the courts' delays. These problems no doubt inspired the famous phrase (attributed to Gladstone) that "justice delayed is justice denied."[20] They clearly inspired Bentham in his detailed attacks upon the justice system and his claim that unnecessary delay and unnecessary expense were inimical to the achievement of justice.

He said that the justice system should produce correct decisions with minimal delay and at minimal expense. For Bentham "every moment beyond what was necessary [to achieve a correct decision] was detrimental [to its achievement]".[21] The reason for this was that delay could cause justice to be delivered too late to benefit the claimant. An example given by Bentham was that the claimant might die before judgment was given.[22] But a claimant does not have to die to be denied the fruits of successful litigation by delay. The effect of a delayed judgment may be that effective execution or enforcement becomes impossible. The defendant may have become insolvent or have spirited away his assets so that they are beyond the reach of the successful claimant. Even a freezing injunction is of no use if it is granted after the defendant has removed his money from the jurisdiction. Bentham's other examples are perhaps less stark. He pointed out that delay could lead to the destruction of evidence and the fading of memories. It not only tended to reduce, if not altogether eliminate, the practical value of a judgment, but it also reduced the likelihood that the judge would reach the right decision.[23]

18 C Dickens, *Bleak House*, Bradbury & Evans, 1853

19 Cited in W Martin, "Because delay is a kind of denial", keynote address, Timeliness in the Justice System: Ideas and Innovations Forum, Australian Centre for Justice Innovation, Monash University, 17 May 2014, Melbourne, p 3, at www.civiljustice.info/cgi/viewcontent.cgi?article=1015&context=timeliness, [web page under construction], accessed 27 April 2021.

20 See in *Gohman v City of St Bernard* 111 Ohio St 726 (1924) at 737.

21 J Bentham, "Principles of judicial procedure", in J Bowring ed, *The works of Jeremy Bentham*, William Tait, 1843, Vol 2, pp 29–30.

22 ibid at 31.

23 ibid pp 17ff

Systemic delay has been as significant a barrier to the effective operation of the justice system as excessive costs and procedural complexity. Complexity, expense and delay are three interrelated problems which Professor Andrews has described as the "unholy trinity" of civil procedure.[24] Complexity breeds both unnecessary expense and delay. Delay in turn leads to complexity. There are many examples of this, such as applications to strike out claims for want of prosecution, applications for extensions of time, and applications for relief from sanction. Over the years, a large body of case law has been built up in which the courts have developed the principles by which applications of this kind are determined. They are not clear-cut and have proved to be a fruitful source of litigation. Complex procedural battles of this kind are a delight to the lawyers, but they add to the delay and cost of litigation. On that account they cause dismay to litigants and do not serve the interests of justice.

Complexity, excessive cost and delay undermine the individual litigant's interest in having effective access to justice. They are also damaging to the wider public interest. They undermine the rule of law. Protection of the rule of law is vitally important to the health of a fair liberal democratic society. Excessive cost, delay and complexity tend to impair the ability of litigants to use the justice system effectively. In extreme cases, they may lead to a denial of justice altogether. An essential aspect of the rule of law is that citizens should be able to vindicate their rights and to have their claims determined by independent judges in accordance with the law. If they cannot do this, there is a danger that, in some cases, they will resort to self-help. This may pose a real threat to law and order. Thus it is that the private interests of litigants march hand in hand with the wider public interest. Both interests require that complexity, excessive cost and delay are reduced so as to ensure effective access to justice.

But the two interests do not always run together. In any system where there are limited resources and demand outstrips supply, a degree of rationing is necessary. Any fair and efficient justice system should be managed for the benefit of all litigants. We cannot afford a system which serves the interests of each individual litigant at the expense of the interests of the litigant population as a whole. A litigant's private interest in having effective access to justice must be looked at in the wider context of the public interest in an effective and affordable administration of justice in the interests of all litigants.

So what steps should we be taking in the 21st century to promote the private and the public interest in reducing delay? It is unthinkable that we, unlike King John, would use delay as a deliberate policy tool to deny litigants access to justice. We may not sell, delay or deny justice. But how do we ensure, as far as possible, that delay does not defeat justice?

Dealing with delay today

If we are to deal with delay effectively, we must bear two things in mind. The first rests on fundamental principle. The second is financial.

24 N Andrews, "A new civil procedural code for England: party-control 'going, going, gone'" (2000) 19 *Civil Justice Quarterly* 19 at 20.

The issue of principle was examined in a paper given by the Honourable Wayne Martin AC, former Chief Justice of Western Australia,[25] in which he discusses the issue of delay in litigation and the consequent denial of justice. As regards the aim of reducing delays, he says:[26]

> reforms undertaken in order to improve timeliness should not view expedition as an end in itself, but must view timeliness in the context of the broader objectives of the civil justice system including most particularly of all, the provision of qualitatively just outcomes … The challenge … is improving timeliness without detracting from the achievement of the fundamental objectives of the civil justice system …

These objectives are, as I have already mentioned, the promotion of the rule of law by satisfying the private and public interests in the fair and effective determination of disputes by independent judges and the vindication of rights of individuals.

The point Martin makes is in my view one of fundamental importance. Just as excessive delay can reduce the quality of evidence and the quality of a judicial adjudication, so too can excessive speed. In our pursuit of efficiency, there is a danger that we overlook this. If litigants are not given reasonable time to obtain evidence and prepare for trial, the court may not be able to determine their claims effectively and correctly. The ability of the court to reach the right result may be severely compromised. A rush to justice can be just as dangerous as a leisurely amble. Tortoises and hares come to mind, although I would certainly not wish to be understood as espousing a tortoise-like approach to litigation. Reforms that purport to promote administrative efficiency should only be adopted in so far as they are consistent with and promote the private and public interests in the delivery of good quality justice in accordance with the law. Speed for speed's sake is not desirable in a fair and effective justice system. Speed that sacrifices justice undermines the public interest in the rule of law. Martin put the point very well:[27]

> when one is endeavouring to construct a system for the administration of justice which strikes the right balance between the fairness and justice of the process and the time which it takes, it must always be remembered that the interests served by the courts extend beyond the interests of the parties to any particular dispute and include the broader public interest which includes the affirmation of the rule of law and the delivery of outcomes which can be qualitatively assessed as just, as compared to dispositions quantitatively assessed as timely.

As with so much in the law, ultimately the issue is one of balance. On the one hand, if the litigation process is conducted at breakneck speed, there is a real risk that parties will be unable to present their cases effectively and judges may not have sufficient time to produce decisions which are sufficiently researched and carefully considered. Where this occurs, there may be a denial of justice. The losing party may have a real cause for a sense of grievance. In the real world of democratic societies, problems of this kind are unlikely to happen at least in an extreme form. The court resources to enable a dash for justice of this kind to take place are unlikely to be available. It is not unknown in this country, however, for parties to say that they will not be ready to meet a trial date that is offered to them by the court. On the other hand, if the litigation

25 Chief Justice of Western Australia from 2006 until 2018.
26 Martin, above n 19, p 20.
27 ibid.

process is conducted at a snail's pace, there is a real risk that there will be a denial of justice for the kinds of reason given by Jeremy Bentham and others to which I have earlier referred. In 21st century England, a sensible balance is usually struck by courts between the two extremes of breakneck speed and the pace of a snail. In practice, therefore, the injustice generated by the extremes is usually avoided.

There is also a financial consideration to be borne in mind. Efficiency should be pursued in order to reduce the financial burden of litigation on individuals. Cost reduction is an effective way of promoting access to justice, thereby enhancing the ability of the courts to perform their constitutional role. Efficiency can also reduce the waste of scarce public resources. At a time of austerity when the financial pressure on the court system is so acute, this is a particularly important consideration. Unnecessary court hearings should be eliminated and the length of those court hearings that are necessary should be reduced so far as is possible, consistently with the courts continuing to perform their essential constitutional role. Precious public resources should be used to serve the private and public interests to which I have referred. We cannot afford to waste these resources. The reduction of delay in litigation has a part to play in this.

It should be apparent, therefore, that the pursuit of efficiency serves the valuable purpose of enabling the justice system to act as an effective branch of the State. What more should we do to further this objective? I want to focus on three things: proper use of technology; effective procedural reform; and effective case management.

The proper use of technology

A constant feature of procedural reforms since at least the time of Lord Woolf's access to justice reforms[28] has been the call for proper investment in, and use of, technology. In the 19th and 20th centuries, civil procedure was based on paper processes. The arrival of the photocopier added hugely to the volume of paper that was generated. In the late 20th century, telephone conferences were introduced. This was regarded as a revolutionary step which many predicted would not work. The use of the internet and communication by email is now almost universal as between parties to litigation. The courts have been very slow to catch up. This is not because there is reluctance on the part of the judges to come into the 21st century. It is because there has not been the funding necessary to make the requisite information technology investment.

I expect that many of you are aware of the Civil Justice Council working party online dispute resolution (ODR) report on the development of an online court.[29] I believe that it convincingly demonstrates one of the ways in which we should develop the justice system to make it more accessible and more efficient, speedy and affordable than it now is. I am confident that this will pave the way for a major shift in the way in which we conduct civil litigation in this country. Quite apart from the advent of an online court, I have little doubt that it will not be long before

28 H Woolf, *Access to justice*, Final Report, Her Majesty's Stationery Office, 1996.

29 Civil Justice Council (England and Wales), Online Dispute Resolution Advisory Group, *Online dispute resolution*, Report, February 2015, at www.judiciary.uk/reviews/online-dispute-resolution/odr-report-february-2015/, accessed 27 April 2021.

all claims are filed online, when paper bundles and authorities are past history; and when the court file is an online file. I can see no reason, in principle, why case and costs management should not be facilitated through the proper use of technology. The potential savings in terms of costs and time to all involved are obvious.

The system in France encourages more than simply greater efficiency. It allows innovation. One form of innovation has been the creation of a website that provides an e-filing service for litigants-in-person.[30] Individuals are able to attempt to resolve their disputes through an ODR mechanism. If that does not succeed, the website enables the creation of, and files electronically, the necessary court documents to commence a claim. It is primarily aimed at small — as the website puts it "everyday" — claims.

Such services open up justice. That the starting point for the French website is an informal means of alternate dispute resolution (ADR) cannot but be a good thing. It is right that it is backed up with access to the court if ADR does not lead to a resolution of the dispute. I hope that something similar will emerge from our own ODR project. We should be looking at similar innovations, to both secure more efficient and cost-effective ADR and formal adjudication.

In developing such ideas, however, we need to keep in mind the public interest in open justice. Open justice is rightly prized as an essential element of our system of justice. Justice must not only be done, but must be seen to be done. There is an obvious tension between the preservation of this fundamental principle and the promotion of virtual, internet-based, systems and processes that enhance efficiency and cost savings. It is one thing to conduct mediations out of the public gaze. This is already done and there can be no objection to it. But we should not allow advances in technology to lead to secret court determination of disputes. It will be a technical challenge to find a solution to this problem. Technology must be the servant of justice, not its master.

Effective procedural reform and case management

Finally, I want to turn to effective procedural reform and case management. If we are to achieve fair and efficient justice, we must ensure that both the pre-trial process and the trial itself are conducted effectively. There are two aspects to this: first, the rules themselves should not be too complicated; and secondly, they should be applied in a fair and efficient manner.

The quest for simple rules has been going on for a very long time. One of the declared aims of the major procedural reforms that have taken place has been the simplification of the rules. "Simplify the rules" is a cry commonly heard. And yet it does not happen. Instead, the number of pages of the White Book increases inexorably edition by edition. The publishers attempt to keep the size and weight of the volumes down by making the paper thinner and thinner. But this fools nobody. It is a common complaint that the Civil Procedure Rules (CPR) have grown like topsy, with its collation of rules, practice directions, protocols, guides and practice statements. There must be room for rationalisation. To give one example, there is a considerable

30 See www.demanderjustice.com, accessed 27 April 2021.

amount of overlap between rr 76, 79 and 80, which deal with three types of terrorism-related procedures. There is a good case for consolidating these rules. But there is scope for much more. In Scotland such a process has begun. The Scottish Civil Justice Council, which performs the role of our Civil Justice Council and our Civil Procedure Rule Committee, has embarked on a project of rule simplification. With proper resources there seems to me no reason why a joint subcommittee of our Civil Justice Council and Civil Procedure Rule Committee could not embark on a similar exercise. If we are genuinely concerned to reduce the complexity of our rules and the cost and delay which are its inevitable consequence, we must do something about it. The cost and effort of doing this is surely a price worth paying. I know that there are those who say that, if the rules are made too simple, there will be interstices which the court will have to fill and this will simply encourage a great deal of procedural litigation. There may be some force in this argument. It is a striking fact that the number of procedural appeals to the Court of Appeal is relatively small these days. But I am not persuaded that we should not be trying to simplify the rules. We should not overlook the fact that a high proportion of litigants who use our civil courts are self-represented. To say that for the majority of them the CPR are daunting must be an understatement.

Procedural reform should not be limited to making the rules as simple as possible. We should also be prepared to change our way of conducting litigation in other ways so as to make it more effective and reduce cost and delay. Much has already been achieved. We can learn from what goes on in other jurisdictions. For example, a Brazilian Code of Civil Procedure came into force on 18 March 2016.[31]

Article 191 of the code introduces a provision which allows parties to agree to modify the procedure as it applies to their claim. It is worth thinking about whether we should adopt such a provision here so as to permit parties, with the court's consent, to agree to opt out of certain aspects of procedure to enable their claim to be dealt with more speedily. The requirement of court consent is essential if we are to avoid surrendering control of litigation to the parties and going back to the chaos which Woolf and Jackson[32] did so much to eliminate. But provided that agreements between parties are, generally speaking, subject to court consent, I see no objection to allowing the parties some freedom to manage litigation.

That is for the future. The issue of costs management is one for here and now. There are complaints in some quarters that costs management hearings are taking up a considerable amount of court time and that they are not taking place until months after the issue of proceedings. Any new procedure carries with it the potential for delay while the users and judges learn how to apply it. I have little doubt that the teething problems will subside in time as everybody becomes more familiar with costs management. It is easy to forget that there were delays and difficulties in the early days of case management hearings. But gradually, we all adapted to them. Routine case management hearings take less time now than they did in the pioneering days of the immediate post-Woolf era. There is no reason in principle why the same should not happen in relation to costs management hearings.

31 See www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm, accessed 27 April 2021.
32 R Jackson, *Review of civil litigation costs*, Final Report, The Stationery Office (UK), December 2009.

It is undeniable that the preparation for and conduct of costs management hearings are additional steps in litigation which entail the expenditure of additional time and money. But the benefits that accrue from costs management will usually outweigh the costs. The responsibility of the costs management judge is, with the assistance of the parties, to plan and budget a claim; prescribe an efficient process so as to ensure that the proceedings are conducted in a manner and at a cost which is proportionate to what is at stake; and generally take steps to control the litigation in such a way as will eliminate unnecessary work (work that would generate unnecessary costs and delay). The value of effective costs management and budgeting should be noticed over the entire course of the proceedings. It is obviously of benefit to the immediate parties. It is also of benefit to other court users. This is because it furthers the aim of ensuring that there is allocated to each claim no more than a proportionate amount of the courts' entire resources. This facilitates the wider public interest in promoting access to justice for all court users.

The final point I want to make on the subject of efficient case management relates to *Mitchell v News Group Newspapers Ltd*[33] and *Denton v TH White Ltd*.[34] These two authorities sought to enhance procedural efficiency. Their aim was to eliminate, as far as possible, a laissez-faire approach by the courts and litigants to rule-compliance. It was not to punish recalcitrant litigants. Nor was it to trap ignorant or lazy litigants. The aim was simply to ensure that claims are efficiently prosecuted at a cost which is proportionate to the parties and the court system. This is an aim which focuses both on the private and public interest I identified earlier.

This approach may appear to produce unfair results in some individual cases. For example, if a claim is struck out for non-compliance it might be said that this is the very epitome of a denial of justice, particularly if the innocent party is not prejudiced by the non-compliance. But an effective justice system is not only concerned with delivering justice in the individual case. Justice requires the court to be able to promote the public interest in the rule of law. The courts can only do that if they are able to ensure that no more than a proportionate amount of court time and resources is expended on single claims. Judges must look beyond the individual cases that they are managing and consider the effect of their case management decisions on the system as a whole. Only by means of proportionate case management can the courts hope to meet the aspiration that all claims that require court adjudication are determined efficiently and proportionately. As Carr J put it in *Su-Ling v Goldman Sachs International*[35] when setting out the principles to be derived from, amongst others, *Mitchell*:[36]

> The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

33 [2014] 1 WLR 795.
34 [2014] 1 WLR 3926.
35 [2015] EWHC 759 (Comm).
36 ibid at [38].

Conclusion

I started this address by noting that one of the aims of the Magna Carta Trust is to perpetuate the principles of Magna Carta. Eight hundred years ago the barons were concerned about the King's deliberate abuse of the justice system. John pursued delay as a matter of policy. One of the aims of Magna Carta was to put a stop to that and ensure that the courts were properly able to fulfil their role.

Our concern today is different. Delay is not now a product for sale. But the principle enshrined in cl 40 is as important today as it was in 1215. We must do our best to ensure that the justice system delivers timely justice for all who need to call upon the State to fulfil its constitutional duty of resolving disputes in accordance with the law. The justice system must operate in the public interest. Reforms aimed at reducing delay and litigation cost must be carried out consistently with that public interest. Delay may defeat justice. Like the barons, we can and must defeat delay and its causes.

Some legal scenery*

The Honourable A M Gleeson AC†

The former Chief Justice identifies significant changes that have occurred in the legal landscape during his tenure, particularly in the areas of cost and delay; and examines the issues of case management, expert evidence, the increasing reliance on written material, information overload and the role of the judge in managing these areas of change.

It used to be said of some elderly judges that they owed much of their legal knowledge to the fact that anyone who regularly makes the same journey for a sufficient time will become acquainted with some of the scenery along the way. Having been a Chief Justice for 19 years, I have become acquainted with some of the features on the legal landscape. I will take advantage of this opportunity to record, with the directness that is a prerogative of age, how they appear to me, before I forget what they are. Two of the most prominent are cost and delay. I will begin with delay.

The law's delay

Almost always and almost everywhere, the administration of justice has been associated with complaints of delay. Delay can be both a form, and a cause, of injustice. It may involve a denial of rights, or remedies, when they are most needed. It may make it more difficult, at the time of judgment, for a court to make a fair decision, especially if establishing a legal entitlement, or imposing a legal sanction, depends upon an accurate assessment of disputed facts. Delay often increases the difficulty of making such an assessment.

No one expects instantaneous justice, and there are few circumstances in which peremptory decision-making is valued. Lapse of time is not the same thing as delay. Depending upon the nature of the jurisdiction, the orderly progress of pre-trial procedures will involve some time, and should contribute to a fair outcome. What I mean by delay is the difference between the time required for such procedures and the time that is actually taken.

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Standards of tolerable delay change. Everyone agrees that criminal justice should be administered with reasonable speed. Yet modern criminal justice moves at a pace very different from that of earlier, or even fairly recent, times.

One of the best known 20th century criminal cases is *Woolmington v DPP*,[1] concerning the onus of proof in homicide. The law reports show that the appellant shot and killed his wife on 10 December 1934. He was indicted for murder, and tried before a jury on 23 January 1935. He was convicted, and applied unsuccessfully to the Court of Criminal Appeal for leave to appeal. The case then went to the House of Lords, where it was argued on 4 April 1935. On 23 May 1935, the House of Lords allowed the appeal and quashed the conviction. The period from the alleged homicide to the decision of the court of final resort was six months.

In Australia, a leading case on murder and the law of insanity is *Stapleton v The Queen*.[2] The appellant killed a police officer on 9 June 1952. He was tried in the Supreme Court of the Northern Territory, and convicted of murder. He applied direct to the High Court for special leave to appeal. The court granted special leave, allowed the appeal, and quashed the conviction on 19 September 1952. It delivered its reasons on 29 October 1952, less than five months after the killing. The pace of criminal justice altered radically during the last quarter of the 20th century; time standards now accepted as reasonable would have been regarded as intolerable as recently as 30 years ago.

As to the length of criminal and civil trials, no one needs reminding of the changes that have taken place during our professional lives. Forty years ago, a long trial was one that lasted more than two days. Now, at the end of a second day, counsel are just getting warmed up. Why has this happened? To what extent is it within the capacity of judges to reverse these changes? Is it their responsibility to try? An entire conference could be devoted to those questions; and perhaps it should. Delay is like inflation; it feeds on itself. Just as in financial markets, inflationary expectations, when factored into planning, themselves contribute to further inflation, so courts and lawyers build upon expectations of delay. Delay, like inflation, is sometimes convenient for those who are part of the system; altering expectations and reversing trends may cause pain. Yet there comes a time when that is necessary. It is easy to become desensitised to this issue. Comparison of our current standards with those of earlier times is a useful corrective.

Some delays in the system, although acute, may be temporary. When I was appointed Chief Justice of NSW — more accurately, soon after I accepted the position — I was told that, unless urgent remedies were adopted, the already serious delays in the Common Law Division of the Supreme Court could blow out to something of the order of 10 years. This information was given to me to solicit my support for a Common Law Delay Reduction Programme. The solicitation was effective. The features of the vigorous delay reduction exercise that was undertaken are well known to some of you.

I would make three comments based on that experience. First, almost all of the cases involved in the common law backlog were actions for damages for personal injury resulting from motor

1 [1935] AC 462.
2 (1952) 86 CLR 358.

vehicle or work-related accidents. Generations of lawyers and judges regarded such cases as the staple diet of the common law system. Yet now, as a result of various legislative measures, there is little of that kind of litigation in NSW. The second point is related to the first. Governments have a responsibility to provide courts with adequate resources, including a sufficient number of permanent judges to dispose of the workload of the courts within a reasonable time. However, not all increases in judicial workload are permanent, and there are ways of reducing a backlog apart from increasing the number of judges. Thirdly, the problem of shifting a backlog gives a useful insight into the concept of judicial productivity.

In the example I mentioned, it was impossible that more than a small fraction of the cases in the backlog could have been resolved by judicial decision. Almost all of them were dealt with by settlement, although the availability of sufficient judges to pose a credible threat of judicial decision in the absence of compromise was often necessary, in addition to techniques of case management and alternative dispute resolution. In such a situation, a productive judge was one who ran his or her list so as to facilitate settlement, not one who forced litigants to run their cases to finality.

Managerial experts will tell you that if something cannot be measured, it cannot be improved. I will not stay to debate that, but it is important to measure the right thing. A judge who allows lawyers to negotiate for settlement, even if he or she sits in chambers while that is going on, may be more productive than a judge who forces them on, and ends up producing, after an extended trial, a decision and an appeal. Even in normal times, this was most apparent when judges of the Supreme Court went on circuit. I used to go on circuit myself, to see how the system worked in different places and to experience sitting at first instance. The results of circuit sittings were, of course, influenced by the approaches of particular lawyers, and the attitudes of the insurers. What was clear, however, was that the judges who reported the largest turnover of cases were those whose methods promoted settlements, not those who spent the greatest number of hours in court. Time spent in court is easily measured, but for a system seeking to cope with delays, it may be a poor indicator of productivity.

The object is to resolve disputes, not to keep judges active. Busy judges are useful, but, to be productive, their energies need to be well directed. In a programme of delay reduction, an obsession with keeping judges in court is counter-productive. The same is often true even in normal times. Chief justices and heads of jurisdiction know who are their most productive judges, and they do not base their conclusions solely, or even mainly, on sitting hours.

The cost of justice

Cost and delay are connected. The practice of time-charging by lawyers reinforces that connection. Cost bears two aspects: the public cost of the justice system, and the cost of court proceedings to litigants. Legal aid, although a cost to governments, may be put into the second category.

Compared to the amounts that governments spend on other activities, the cost of maintaining the justice system appears to me to be modest. There are, it is said, no votes in courts. That is certainly true when the system is working smoothly. Unacceptable inefficiency and delay, or patent inadequacy of facilities, however, might have political consequences. In Australia, as in the United States, there is a contrast between the court facilities funded by the federal government and those funded by State governments.

In most Australian States (other than NSW, where some facilities are shared) the buildings housing federal courts are generally superior to those housing State courts. No doubt, the explanation for this is availability of funds. It also may be that the federal judiciary is relatively new. Until the 1970s, apart from the High Court and a small number of specialist judges, there were relatively few federal judges. The creation of the Federal Court, the Family Court and the Federal Magistrates Court, and their rapid expansion, created a need for new court buildings and other facilities. The construction of the High Court in Canberra, completed in 1980, also represented a substantial commitment of federal funds. To one who travels regularly to most parts of the Commonwealth, the difference between the facilities provided to the federal and State courts is hard to overlook. In some States there are plans for new or renovated courts; in some there are not. Court buildings are primarily designed to provide facilities for the public, including litigants and witnesses, not accommodation for judges. Improving the standard of court buildings should not be trivialised as expenditure on the personal comfort of judges.

The cost of litigation is commonly described as an issue of access to justice. The expense of civil litigation is the greatest blot on the common law system. In my estimation, the common law system of criminal justice compares more than favourably with the civilian law system. Indeed, there are moves in a number of civilian jurisdictions to adopt features of the common law system, including an institutional separation of the judiciary from the prosecution, and a more adversarial procedure. Yet civilian jurisdictions have shown little inclination to copy the common law model of civil justice, primarily because of its expense. Legal aid is widely available in criminal cases, and this is an important contribution to the fairness of criminal justice. The availability of legal aid for civil cases is limited. Pro bono work by lawyers ameliorates the problem, and is encouraged actively by the judiciary. In certain types of litigation, plaintiffs' lawyers commonly work on a no-win no-fee basis. This means that the accessibility of civil justice varies with the kind of dispute involved.

It is often said that only the very rich or the (legally assisted) very poor can afford to go to court. That is true of some kinds of litigation and untrue of others. I have already mentioned the flood of common law litigation that threatened to submerge the NSW courts in the 1980s and early 1990s. At the time, I wondered why, if only the very rich or the very poor could bring legal action, the common law courts were unable to cope with their workload. Most plaintiffs in such actions were required to give particulars which indicated their means. I asked for a survey to be done. It showed that the average income of plaintiffs in the Common Law Division of the Supreme Court was roughly the same as the community average. The explanation of their capacity to sue was that plaintiffs' lawyers historically acted on a speculative basis. This was good business, because the great majority of the cases were settled on terms that included payment by the defendant (usually insured) of the plaintiff's legal costs. However, as I mentioned, much of this work has largely disappeared. Litigation funding is now with us. Entrepreneurial activity in this respect raises issues that have come before the courts. It is not in all respects attractive, but subject to certain controls it may be a necessity. There is a need for some pragmatism about this, because the cost of access to justice is essentially a practical matter. Yet, a basic problem of access to civil justice is the remorseless mercantalisation of legal practice. This reflects the dominance of the culture of the market, with its tendency to reduce society to the single dimension of producers and consumers.

Case management by judges is now an accepted feature of litigation. Because of the basis upon which most lawyers charge for their services, repeated interlocutory hearings add substantially to the cost of litigation. Interlocutory procedures, such as discovery and interrogatories, sometimes involve astonishing expense. Such is their cost, they may even be used as instruments of oppression. Summary procedures, where reasonably available, are often the only means of providing realistic access to civil justice. Modern judges and magistrates ought to be more, not less, favourably disposed to summary justice. Courts of primary and intermediate jurisdiction should not aspire to imitate the procedures of higher courts; on the contrary, they should recognise their own, less expensive, process as a strength which often provides the only prospect of reasonable availability of civil litigation to ordinary people.

The mega-trial is not a complete novelty. When I came to the Bar in 1963, the case of *American Flange v Rheem*[3] was just getting started. As I recall, it was as at least as long as the *C7* case,[4] although there were only two parties. What is new and more alarming is the length of the ordinary case. For well-resourced litigants, the time of judges is cheap. The government pays for judges; and it pays them much less than many litigants pay their lawyers. It is understandable that some parties and their lawyers adopt a habit of thought which discounts the economic value of judicial services and court time. Judges should be conscious of this, and should be ready to assert their authority where that is necessary to secure reasonable expedition.

The administration of civil justice is not merely one of a number of alternative forms of dispute resolution. It is part of government. There are, therefore, major issues involved in requiring litigants to pay for court services. The courts are not merely service providers, and governments have a responsibility to make justice available to the public. Attempts to introduce user-pays justice suffer from both practical and theoretical difficulties. Yet litigants are using valuable and scarce resources, and modern judicial control of litigation should aim to reflect that fact.

Efficiency

Much attention has been given to streamlining and rationalising court process, within the general constraints of what is sometimes called the adversarial system. The essence of that system is that, in both criminal and civil cases, the parties, through their lawyers, define the issues to be tried, present the evidence upon which they intend to rely, and argue their respective positions as they choose. The judge undertakes the role, not of an investigator or a participant in the forensic contest, but of an independent adjudicator.

A criminal trial normally takes the form of a contest between the government and a citizen. The theory that a just outcome is most likely to be achieved in this manner is not universally accepted, and even in common law systems the full adversarial rigour of the process has been modified in significant respects. The system reflects a societal respect for individual autonomy. One of its strengths is the institutional protection it gives to the independence and impartiality

3 [1963] NSWR 116.
4 *Taxation Case C7* (1971) 71 ATC 27

of the judge, who plays no part in a decision to prosecute or commence proceedings, or in formulating the issues for trial, or in preparing the evidence, or in selecting the witnesses, or in framing the arguments. One of its weaknesses is that it assumes a reasonable balance of power (sometimes called equality of arms) between the opposing parties. A gross imbalance can defeat the system, and there are circumstances (of which the most obvious is a criminal trial of an unrepresented accused) where the judge is obliged to play an active role in order to redress the imbalance. Comparisons between the adversarial and inquisitorial systems are often over-simplified. In adversarial systems, modern judges are becoming more interventionist, and inquisitorial systems are beginning to adopt some of the features of the adversarial process, especially in the administration of criminal justice.

Case management, involving a level of judicial involvement in matters previously left to the parties and their lawyers, is now practised widely. The orality of the common law court process is diminishing. At both trial and appellate levels there is much greater emphasis on written material; developments in information technology have contributed to this. Electronic filing of originating process and supplementary material is used in some courts. International developments in court technology are well known in Australia, which has been one of the leaders in implementing these changes. There is no occasion for me to elaborate on this. It is worth noting, however, that in some ways these changes, beneficial as they may be, have the capacity to be counter-productive.

No judge or magistrate needs to be reminded of the problem of information overload. The facility with which lawyers can produce documentary material, including evidence and arguments in written or electronic form, increases the cost of litigation, and places an additional burden on judges. Judges often find themselves, at the end of a case and with little oral argument, presented with a volume of documentary material on the assumption that they will use it in the preparation of a reserved judgment. Conducting a completely oral procedure is now a luxury that most courts cannot afford, but there is a need to make allowance for the pressure on judges that can come from increasing reliance on written material. There is also, on occasion, a question whether such material has been properly tested and evaluated.

The imposition of time limits on evidence and argument, consistently with the basic requirements of fair process, is now more common. It is easier to do in appeal courts than at trial, where there is maybe an element of unpredictability that needs to be accommodated. In appeals in the High Court, we rarely impose formal time limits for oral argument, but counsel are told how long we are prepared to allot to a case (rarely more than a day) and they are expected to agree between themselves on a division of time. I have never found it necessary to be heavy-handed. Counsel understand what is required of them, and there is a high level of compliance. On the other hand, in special leave applications when the court decides to hear oral argument, time limits (20 minutes for each side) are strictly applied. Litigation is a prime example of work that expands to fill the available time. Some advocates, if given 20 minutes, will take 20 minutes; and if given a day, will take a day.

An issue that affects both the economy and fairness in the trial process is the use of expert witnesses. Of course, there is some litigation where technical issues require expert information. There seems, however, to have been a marked increase in the use of experts in cases where the true technical or specialist expertise involved is limited, and the experts are used mainly for the purposes of advocacy. When experts are used, their relevant expertise should be in

something other than giving evidence. Confining opinion evidence within proper legal limits may require more attention to the rules of evidence than is often given by lawyers, especially in the preparation of written statements of evidence. Laxity in this matter complicates the task of trial judges and appeal courts.

I do not mean to suggest that judges should be encouraged to become their own experts. The extremes are to be avoided. The judge who requires proof of matters of common knowledge may be annoying. A greater, although I hope rare, menace, is the judge who is anxious to bring to his or her task information and wisdom extraneous to both evidence and arguments. When I was a barrister, a very experienced American trial lawyer said to me: "It isn't what judges don't know that you have to worry about; it is what they think they know that is wrong."

Legal argument

Two major changes have affected the presentation of legal argument in trial and appeal courts. One is beyond the control or influence of the judiciary; the other is not.

The first change concerns the greatly increased level of legislative activity on topics that previously were left largely to the common law. Modern parliaments enact legislation, which is to be interpreted and applied by judges, on a scale that would have astonished our predecessors. Partly as a consequence of the work of law reform agencies, partly as a consequence of expanding public and political interest in legal rights and obligations of many kinds, and partly as a consequence of an increased disposition to question and challenge all forms of authority, citizens now look to legislators to intervene in many areas that in former times were the exclusive province of judges and lawyers. Many examples could be given. Two will suffice.

Legislation affecting sentencing now regulates extensively decisions that were formerly left largely to judicial discretion. Fortunately, although there are notable aberrations, parliaments in Australia continue to accept, as a general principle, the value of discretionary and individualised sentencing. This acceptance, I believe, reflects public opinion. We have been spared the excesses of legislative intrusiveness that have affected the work of some of our American counterparts. I have heard it said that American legislation to remove or severely curtail judicial discretion in sentencing was originally motivated by a politically liberal desire to overcome what was seen as discrimination against minorities in certain places. In Australia, moves to restrict judicial discretion are usually associated with the opposite political tendency. Another example of the same trend is legislation to effect what is sometimes described as tort law reform, or, at least, tort law change. In most Australian jurisdictions, the assessment of damages in negligence actions is heavily constrained by statute. Such examples could be multiplied.

Curiously, this development has not, or has not yet, been fully reflected in legal education. Few Australian law schools provide courses in statutory interpretation, although I am aware of some moves in that direction. The routine business of modern courts is largely taken up with interpreting and applying Acts of Parliament. Legal interpretation, including statutory interpretation, proceeds according to established principles, and imparting those principles ought to be regarded as an essential element in legal instruction. Those who arrange Bar practice courses also should keep this in view.

The second major change I have in mind concerns the approach to common law authority. Judicial precedent underpins the common law system. The doctrine of stare decisis is fundamental. Although I speak of relatively recent developments, and habits, the seeds of the problem have always existed in the common law.

According to *Boswell's Life of Johnson*,[5] on Saturday 27 March 1772, the great man and Sir Alexander Macdonald discussed judges, barristers and the law. Sir Alexander said: "Barristers, I believe, are not so abusive now as they were formerly. I fancy they had less law long ago, and so were obliged to take up abuse, to fill up the time. Now they have such a number of precedents, they have no occasion for abuse." Dr Johnson replied: "Nay, Sir, they had more law long ago than they have now. As to precedents, to be sure they will increase in course of time; but the more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles."

What Dr Johnson asserted more than 200 years ago has a resonance for modern judges. The growth of precedents, he said, diminishes the law because it gives advocates, and in consequence judges, less occasion for investigating principles. Modern courts are affected, not only by the proliferation of judicial decisions that are reported or otherwise accessible, either in hard copy or electronically, but also by the use, or abuse, that is made of those decisions.

I referred earlier to information overload. This takes an especially acute form when, instead of authorised law reports edited with the conscious object of selectivity, advocates have available to them, and are therefore practically compelled to refer to, records of decided cases compiled with the object of universality. A barrister who specialises in revenue law, for example, now has access to every decision on every revenue case made by every judge in the Commonwealth. Consulting those decisions to guard against error or surprise is one thing. Feeling obliged to cite them in argument, perhaps in written submissions which a judge is expected to make the subject of private reading, is another.

There is, however, a deeper issue. Excess of information may be burdensome, or annoying, but it is not fatal, and comprehensiveness has benefits. I would hesitate to make a judgment about whether practitioners these days, with ready access to the wisdom of the entire judiciary, are better or worse off than we were. Circumstances are different, and provided a barrister does not expect me to do the same, why should I complain if he or she consults everything that all judges have said on some topic? It is the way in which precedent is used that has the capacity to subvert principle.

The doctrine of stare decisis depends upon identifying the binding rule for which a decision stands. It is the ratio decidendi of a case that gives it authority, and that will involve a re-assertion, or clarification, or development of the law. The legally binding precedential effect of judicial decisions is a distinguishing feature of the common law. It would be an over-simplification to say that decisions of appellate courts in civil law jurisdictions have no precedential quality, but the defining characteristic of the common law is that it is judge-made, and is made by the systematic creation and adoption of judicial precedent.

5 Vol 1, pp 443–444.

The legal rule established by a decision of an appellate court, to be applied by courts bound by that decision and for most practical purposes by the appellate court itself in the future, is identified by relating the orders of the court, and the reasons for those orders, to the issues in the case. I stress "the reasons for those orders". In a collegiate court, the orders will be unanimous, or by majority. What is said by members of the court, or of the majority, may go beyond (sometimes well beyond) the reasons for the orders. What is said by a minority is not part of the reasons for the orders. Where the members of a majority write multiple reasons for judgment, it may be difficult to identify the essential reasons for the orders. However that may be, the search is for the binding rule. Yet there is a strong tendency, which in some cases amounts to a compulsion, to treat judicial reasons as a smorgasbord of obiter dicta from which the reader is invited to select according to taste. This may be a useful method of exposing law students to different ideas and approaches. It may be a source of ideas for legal change. It may provide a basis for informed commentary on the law judges are making. But is has little to do with the task that confronts practitioners, and judges, in the discernment and application of binding legal principle.

Practitioners need to advise their clients as to the law; an advocate needs to persuade a judge that legal principle supports the advocate's case; and a trial judge or intermediate appellate court needs to know the binding rule to be applied. The law is neither completely certain, nor static. Sometimes it is distinctly unstable, or in need of refinement or modernisation. Even so, the primary reason for consulting judicial precedent is to establish the principle for which a case stands as authority. For practitioners and judges, reasons for judgment are not like speeches made in the course of a parliamentary debate. What is sometimes said to be the increasing complexity of the law may be a modern manifestation of the tendency referred to by Dr Johnson: the displacement of legal principle by misused precedent.

The place of judges in government

What I have just said leads me to the topic of the role of the modern judiciary. Who do judges think they are? What do people in the other branches of government think judges are supposed to be? Is there such a thing as public opinion of judges and, if so, what is it? Of those questions, that of immediate importance is the first. There is probably no clear or simple answer to the second or the third. People in government, and members of the public, probably have a range of opinions about judges, to the extent to which they think about them at all.

As an institution in the public life of the nation, a feature of the judicial branch of government is that it is so small. There are only about 1000 judicial officers in Australia. For the leaders of the judiciary, this is a good thing. There are, I understand, more than 200,000 judges in the People's Republic of China. What is called "judicial reform" is an important topic in that country. When I meet China's judicial leaders, I marvel at what must be involved in achieving discipline in a judiciary of that size.

Plainly, a relatively small judiciary, such as that in Australia, can more easily achieve a sense of cohesion and common purpose, and an institutional acceptance of standards of professional behaviour. In some Australian States, the Chief Justice of the State knows every judge and magistrate personally. The members of our final court of appeal do not operate exclusively in

the seat of government, but regularly visit major capital cities. We have, for practical purposes, a national legal profession. We have an integrated system of justice, with movement of personnel between State and Territory, and federal, judiciaries. We have a National Judicial College and, of course, this Judicial Conference. All this supports our professional unity and discipline. For that, I am very thankful. Inevitably, the size of the judiciary will increase. That will make it all the more important to foster unifying forces of the kind I have mentioned. That is why the Judicial Conference of Australia is so important to the future of the judiciary.

There is, I believe, an encouraging level of understanding, by people in public life, by the media, and by the community, of the importance of the rule of law, and of the inseparability of that from judicial independence. Independence always causes friction and resentment. Judicial independence is sometimes seen as interfering with a government's capacity to govern; and so in a sense it does. The error lies in failing to recognise that the judiciary itself is part of government; that judicial authority is governmental authority; and that justice and executive power are both attributes of sovereignty. Our constitutional arrangements reflect a political philosophy which values a separation of legislative, executive and judicial power as a safeguard of freedom. The separation is not absolute, and the political philosophy is not incontestable.

It is the legislative branch of government that is elected. This encourages an assumption that judicial power in some sense lacks legitimacy. The phrase "unelected judges" is often deployed, not to make the point that judges are free from the pressures of political contest, but to suggest that their authority is in some way illegitimate. The freedom of judges from political constraints, which ought to be welcomed because it sustains their impartiality, is sometimes a source of frustration. Impartiality is not a matter of degree. Words like "accountability" come trippingly off the tongue, but the conditions which must exist for judges to be, and to appear to be, free to administer justice according to law are inconsistent with certain forms of external control appropriate to other forms of authority.

People who speak of "unelected judges" rarely intend to suggest that Australian judges should be popularly elected. A good test of such a proposal would be to compose a policy speech for a candidate for judicial office. People who put themselves forward as candidates for election to an office usually need to do at least two things: first, they need to make representations as to what they will do if elected, and they are rarely able to confine themselves to anodyne generalities; secondly, they need to show why they should be preferred to the alternative candidates. Both of those courses are inconsistent with the comportment Australians expect of potential judges, and have the capacity to compromise their impartiality. I sense no serious community support for replacing our unelected judges with elected judges.

The fact that judges do not subject themselves to popular elections is related to what, in our society, is seen as the proper and legitimate function of judges. In particular, they do not engage in the political process in their decision-making. Judicial decisions sometimes have large political consequences, but, unlike political decisions, we expect them to be made impartially. We expect judicial authority to be exercised for judicial purposes, and people in general, and politicians in particular, are quick to sense when the bounds of judicial legitimacy are exceeded.

Pascal said: "Justice without power is ineffective; power without justice is tyranny."[6] A nation's justice civilises its power. The separation of judicial authority from executive authority creates a tension that serves a positive and constructive purpose.

In the nature of things, from time to time those who have executive responsibilities will call for an increase in their power in order to enable them to discharge their responsibilities. From time to time, justice requires that those with judicial responsibilities exercise judicial power in a way that diminishes or restrains executive power. All forms of governmental power are exercised by fallible humans. One of the reasons why the law constrains executive power is that, even with the best of intentions, the people who carry out executive acts sometimes make mistakes. Matching the power given to officials with the calibre of the people who are called upon in practice to exercise such power is important and often difficult. At least in theory, where a mismatch results in error and harm then political responsibility follows. But when excess or abuse, or human error, in the exercise of executive power results in injustice, then citizens will look to the judicial arm of government for redress. It is through an independent judiciary that the nation protects its justice from its power.

This, I have come to realise, is a message that needs constant reinforcement. I have no taste for repetition, but this is an unending story. The work of the Judicial Conference of Australia in explaining the role of an independent judiciary in the scheme of the Australian constitutional system will never be completed. I am sure that whoever takes my place will support that work, and I am sure that you will never give up on it.

6 Pensées, 1670, Ch iii, p 298.

Further references on efficiency and case management

For further references on the topics of efficiency and case management, please see the following:

- Law Council of Australia, *Case Management Handbook*, 2014 at www.lawcouncil.asn.au/publicassets/9eaa26f1-b330-e711-80d2-005056be66b1/Case_Management_Handbook_Mar17-2.pdf, accessed 27 April 2021.

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How to develop effective judgment writing*

The Honourable Mr D Lloyd QC†

Good legal writing is an art, not a science. And, while it is an art that one can spend a lifetime learning, the following article helpfully summarises courses on judgment writing held at the Judicial Commission. This article should be read in conjunction with the following articles by J Raymond, "The architecture of argument" and "Five ways to improve your judgment writing".

Why do we have courses on judgment writing skills? The answer should be obvious. As judges we all spend more time sitting down, writing, than doing anything else. In my case, I kept for my own information an accurate record of how much time it took me to write a reserved judgment. I did this over 39 consecutive judgments. I found, to my surprise, that it took me, on average, about four times the hearing time to produce a reserved judgment. In discussing my findings with other trial judges I discovered that my experience is not unusual. The Honourable Dennis Mahoney AO, former President of the Court of Appeal, estimated that it took him about one-and-a-half times the hearing time, on average, to produce a reserved judgment.

Another reason why we have courses on judgment writing skills is that, no matter how long we have been in this job, or how experienced we are, we all fall into bad habits. Nobody is perfect.

Anything, therefore, which makes the task of judgment writing easier, shorter, more efficient and more effective, is to be embraced with enthusiasm. Writing is, of course, an exercise of communication skills. Better writing improves our competency, efficiency and effectiveness. Effective communication skills lead in turn to community confidence in the judiciary.

As the Court of Appeal reminded us in *Beale v Government Insurance Office of NSW*:[1]

> there is a broader interest in maintaining public acceptance of judicial decisions and the judicial system.

* Previously published in (2007) 19(5) *JOB*, updated 2021.

† The Honourable Mr Lloyd QC was a judge of the Land and Environment Court of NSW from 1997–2010. He has also served as an Acting Judge of the Supreme Court of NSW, assigned to the Equity Division (2005–2006).

1 (1997) 48 NSWLR 430 per Meagher JA at 442.

And as Spigelman CJ said in *R v Thomson*:[2]

> The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties: see F Kitto, "Why Write Judgments" (1992) 66 *ALJ* 787.

A former Chief Justice of Canada, Dickson J, said in an address in 1981:[3]

> Our judgments touch the lives of all Canadians. They should convey meaning to all who read them.

He was using the words "our judgments" as meaning the judiciary as a whole. So too do our judgments touch the lives of all Australian citizens and should convey meaning to all who read them.

Judgments are not written just for the parties, although they are clearly the most interested readers. Judgments are also precedents. As such, they are written for other judges and lawyers, appellate courts, legal academics, law students and court users as well as the media, business sector, government, and the community at large. Similar views have been expressed by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*,[4] by Meagher JA in *Beale*,[5] followed and adopted by a differently constituted Court of Appeal in *Athens v Randwick City Council*[6] and by Spigelman CJ in *R v Thomson*.[7]

The right Honourable Sir Vincent Flossiac, of the Eastern Caribbean Court of Appeal, said:[8]

> A written judgment is a public document. As such, it should be available to the whole world. For this reason, it is sometimes published in the Gazette or in the Law Reports or even on the Internet where it is universally accessible.
>
> Since a written judgment is a public document, it should be intelligible to the general public. It is not sufficient that the judgment can be interpreted or appreciated by judges and other jurists. It must also be comprehensible to the average literate laymen [sic] and in particular to the litigants who are affected by the judgment.

Since the people for whom we are writing include those who may be unfamiliar with the case or unfamiliar with the applicable legal principle, the essential quality of a judgment is clarity of expression.

In applying Professor Raymond's approach to judgment writing,[9] one must first look at the fundamental purpose of a judgment, namely, to record, analyse, persuade and decide. Secondly, the structure of the judgment must be considered. A judgment should contain:

1. Introduction ("who did what to whom", or "who is arguing about what");
2. A statement of the issue or issues ("what is the question that the court has to decide");

2 (2000) 49 NSWLR 383 at 394.
3 An address to the Canadian Institute for the Administration of Justice, Seminar on Judgment Writing, 2 July 1981.
4 (1987) 10 NSWLR 247 at 279.
5 (1997) 48 NSWLR 430.
6 [2002] NSWCA 83 per Handley, Beazley and Giles JJA.
7 (2000) 49 NSWLR 383 at 394.
8 V Flossiac, Eastern Caribbean Supreme Court Orientation Programme for New Judges, 2002.
9 J Raymond, "The architecture of argument" (2004) 7(1) *TJR* 39.

3. Then follow five easy steps:
   (i) write a case-specific heading for each issue
   (ii) the issues in a sequence that makes sense
   (iii) briefly tell the story that gives rise to each issue
   (iv) analyse each issue, and
   (v) write a conclusion.

In analysing and disposing of each issue, the writer need only set out the losing party's position and then set out the flaw in the losing party's position. Professor Raymond also advocates the principle of proximity — the facts and law which relate to each issue should be set out in the analysis section of each issue.[10]

Professor Raymond advocates the writing of minimalist judgments. Common mistakes that he identifies in judgments include the following:

- things that do not need to be recorded
- deciding things that do not need to be decided
- obscuring the analysis with poor organisation and irrelevant details
- neglecting the "aesthetic" component of persuasion
- making the analysis more complex than it really is. Everything that is unrelated to the issues should be cut out — "every word must earn its right to be on the page".

Oliver Wendell Holmes, Jr, Justice of the Supreme Court of the United States, famous for the brilliant legal reasoning in his written opinions, wrote:[11]

> I abhor, loathe and despise these long discourses, and agree with Carducci the Italian poet who died some years ago that a man who takes half a page to say what can be said in a sentence will be damned.

According to Professor Raymond, good legal writing is an art, not a science. It begins with imagining your readers as friends and neighbours and writing in a way that they can understand: "It is an art you can spend a lifetime learning." The acid test for a well-written judgment is to ask: "How long will it take a reader unfamiliar with the case to determine who did what to whom or who is arguing about what before anyone set foot in court; the issues to be decided and the losing party's position and flaw in the losing party's position for each issue; and the remedy or judgment".

Professor Raymond also looks at writing style. He offers the following checklist:

- break up any monster sentences
- get rid of legalisms

10 ibid at 44–46.
11 M DeWolfe Howe (ed), *Holmes-Pollock Letters: The correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874-1932*, 1941, Harvard University Press, Cambridge MA, p 245.

- replace passive voice with active when active voice works better
- replace the verb "to be" when a better verb is available
- cut out every word that will not be missed
- cut out every detail that has no bearing on the issues
- make sure every word earns its right to be on the page
- give yourself permission to write like a writer.

Most judicial officers who have done Professor Raymond's course end up writing shorter judgments — which contain only the essential material — and which are better expressed, clearer, easier to write and take less time to write.

Five ways to improve your judgment writing*

Professor J Raymond†

The following article, by internationally renowned legal writing consultant James Raymond, sets out five clear principles to hone judgments.

Identify the issues before you start writing

Issues don't blossom out of facts: lawyers and judges have to fashion them. The best time to do that is before the trial even begins. Meet with solicitors and counsel if possible, and have them agree on the questions that need to be determined in trial. Obviously, these questions change as the trial progresses, and you will need to change your plan accordingly. It is far better to start with a tentative plan at the beginning of the trial, rather than wait to the end, when the true issues may be obscured by lots of subsidiary issues that may turn out to be irrelevant.

Arrange the issues in a sequence that makes sense

Sometimes the issues are so independent of one another that you can arrange them in almost any sequence whatsoever. In other cases, however, there is a threshold issue, or a dispositive issue, and it must be dealt with first. In all cases with more than one issue, it is important to foreshadow them, preferably in a bullet-pointed list before the end of the first page, or as close to that point as possible. Once you have made this list, use headings that track these issues. This will enable your readers to find a way to the part of the judgment that might concern them as precedent, or in constructing an appeal.

* Originally published in the *Commonwealth Judicial Education Institute Report*, June 2006, Halifax, Nova Scotia, and reprinted with permission. Published in (2007) 19(5) *JOB*, updated 2021.

† Professor Emeritus, the University of Alabama, former editor of College English; President, The International Institute for Legal Writing + Reasoning.

Analyse the issues by using an appropriate pattern of analysis

In questions of law, it is usually preferable to express the losing party's position first, and then to explain the flaw that you have determined in the losing party's position. For questions of fact, it is often preferable to begin with the evidence of the party who has the burden of proof, followed by the evidence from the opposing party. Once you have laid out this evidence, indicate which side you prefer, and why. Try to give objective factors for making this determination, such as evidence from cheque, credit card, or telephone records, or evidence that undermines one party's credibility, such as prior inconsistent statements or evasiveness in answering questions.

Write a beginning that provides the context for understanding the issues

A good beginning indicates who did what to whom, or who was arguing about what, before anyone set foot in court. Give an overview, not a detailed narration of the facts. Avoid cluttering this overview with parenthetical aliases (for example, "hereinafter called"), or with citations that serve no purpose at this point. The beginning may suggest where the judgment is heading, or it may conceal the result entirely — this is a choice that the judge must make with each individual case. Don't waste your first paragraph on uncontested matters or procedural history that is no longer relevant.

Write a conclusion that recapitulates your analysis

The last part of a judgment is a good place to recapitulate your reasons for the benefit of those readers likely to skip the body of the judgment. It is also a good place to bolster your findings with arguments from consequence — that is, by mentioning all the bad effects that would flow from a contrary judgment. If the result is unlikely to be a popular one, the last paragraph is a good place to assure readers that remanding a case does not result in freeing an unsavoury character, but simply in a new trial that follows long-established rules of due process.

From beginning to end, a judgment is best written in language that ordinary people can understand. Each judgment contributes to the credibility and authority of the judiciary as a whole. No judgment is unimportant.

Judgment writing in final and intermediate courts of appeal: "a dalliance on a curiosity"*

Her Excellency the Honourable Margaret Beazley AC QC†

An essential aspect of the judicial function is the giving of reasons.‡ Much has been written about the topic. Questions are asked about the audience to whom the judgment is directed, about style, clarity, efficiency, judgment citation and length. While the author touches upon these matters, she explores the different approach to judgment writing of the High Court in recent years.

There has, I would suggest, been a discernible shift in the judgment-writing process of the High Court. The 5–7 separate judgments of 100 plus pages of the Mason era[1] and of the early years of the court under Gleeson CJ[2] have been replaced, at least in a sufficient number of cases to make comment, by a minimalist, largely propositional style of reasons, often with a plurality judgment.

Because a court speaks through its judgments, this trend, assuming it is a trend, has led me to ask whether this reflects a statement by the High Court of its role at the apex of the appellate hierarchy and whether this, in turn, has implications for the role of intermediate appellate courts, where the reasons have remained more discursive and detailed, particularly, but not only, where social issues are raised.

* Presentation given at a public seminar "What are Courts of Appeal good for?", Banco Court of the Supreme Court of Victoria, Melbourne, on the occasion of the 20th Anniversary of the Victorian Court of Appeal, 20 August 2015. Published in (2015) 27(9) *JOB*, updated 2021.

† Governor of New South Wales and former President of the NSW Court of Appeal 2013–2019.

‡ See, for instance, *Wainohu v New South Wales* (2011) 243 CLR 181 in which it was held that an Act conferring the power to declare certain organisations as being criminal for the purposes of the *Crime (Criminal Organisations Control) Act 2009* (NSW) was incompatible with judicial power, principally because it exempted judges from any requirement to give reasons for the making of a declaration.

1 For example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 whose jurisprudential value has survived by virtue of Brennan J's judgment esp at 493; *Cunliffe v The Commonwealth of Australia* (1994) 182 CLR 272.

2 For example see, *Brodie v Singleton Shire Council*(2001) 206 CLR 512 and *Perre v Apand* (1999) 36 198 CLR 180.

An exploration of this question can only be made through the decided cases. Space permits a consideration of only a few, and then with a generality that does not purport to be a definitive statement of the full import of the decisions to which reference is made.

Let me start with *Norrie v NSW Registrar of Births Deaths and Marriages*[3] which concerned a challenge to a decision of the Registrar of Births, Deaths and Marriages to refuse to register Norrie's sex as "non-specific". Norrie's contention was that the ordinary usage of the word "sex" had developed to encompass more than a binary meaning.

The question in issue was whether the power to register a person's "change of sex" after sex affirmation surgery, pursuant to s 32DC of the *Births, Deaths and Marriages Registration Act 1995* (NSW), extended to the power to register a change that was neither specifically male nor female. The Court of Appeal held that it did.

The case as argued on the appeal raised questions of changing community values and understandings of gender and the extent to which those matters were relevant to the question of statutory construction with which the case was concerned. The judges of the Court of Appeal, (including in my own judgment), dealt with those questions in detailed judgments totalling 306 paragraphs.

The High Court[4] in 48 brief paragraphs dismissed the appeal, differing slightly in its formulation of the outer boundaries of the issues raised by the case. The judgment was technical and narrowly framed. Its focus was on the terms of the statute and not on the indicia of changing community standards, advances in medical and other relevant knowledge, the extent to which the court was entitled to rely on common knowledge,[5] or how the legislation was to be read cohesively with other legislation in which the sex of a person was relevant,[6] all being matters that had engaged the NSW Court of Appeal.

The High Court's approach was to be welcomed — it had turned, what to the Court of Appeal was a difficult and contentious case, into a simple case of unambiguous statutory construction. However, there is no social learning or dissertation in the court's reasons. That may be explicable on at least two bases. First, the legislation itself recognised sex change, but had not in express words recognised as non-specific. Secondly, the court had dealt with gender characteristics in *AB v Western Australia*[7] — although in that case, the legislation was framed in binary gender terms. It may therefore have been considered unnecessary to revisit that territory (other than by way of footnote to *AB*).

The recent case of *Lindsay v The Queen*[8] is another example. The appellant, an Aboriginal man, had been convicted of murder following a trial before a jury, in circumstances in which he had

3 (2013) 84 NSWLR 697 (Beazley JA, Sackville AJA and Preston CJ of LEC).
4 *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.
5 *Evidence Act 1995* (NSW), s 144.
6 See, for instance, *Crimes Act 1900*, s 61H; *Court Security Act 2005*, s 10; *Crimes (Administration of Sentences) Regulation 2008* cll 12, 13; *Industrial Relations Act 1996*, s 55(4); *Landlord and Tenant (Amendment) Act 1948*, s 62(5)(t); and *Conveyancing Act 1919*, s 76.
7 (2011) 244 CLR 390.
8 (2015) 255 CLR 272.

stabbed and killed the victim after being the subject of a homosexual advance. The appellant was offered money for sex, in his house and in front of his family. The appeals to the Court of Criminal Appeal of SA and subsequently the High Court primarily concerned the adequacy of the trial judge's directions relating to the partial defence of provocation.

The principal judgment in the Court of Criminal Appeal, that of Peek J (with whom Kourakis CJ agreed), comprised 186 paragraphs, and very comprehensively outlined the relevant evidence and authorities.[9] Justice Peek found that, although the jury was misdirected as to provocation, the proviso should apply and the appeal be dismissed. This was primarily because provocation should not have been left to the jury. As in *Norrie*, one important strand of reasoning related to community values. His Honour considered, on the basis, inter alia, of academic literature, that although provocation may well have arisen in times when homosexual acts were criminalised and men were accustomed to resort to violence to defend their honour, "times [had] very much changed".[10]

The High Court allowed the appeal in two judgments, comprising a total of 89 paragraphs. The central finding was that Peek J erred in placing weight on contemporary attitudes to homosexuality given that there were circumstances of the advance, other than its homosexual nature, that might give rise to provocation.[11] However, the circumstances of the killing were outlined in only a few sparse paragraphs.[12]

There are other examples. *Clark v Macourt*[13] was a case concerning a fundamental question about the calculation of damages in contract awarded to the purchaser of a fertility clinic sold by deed after the vendor provided defective donor sperm as part of the assets of that business. The High Court allowed an appeal from a judgment of Tobias AJA of 164 paragraphs (with which Barrett JA and I agreed in short concurring reasons)[14] by a majority decision comprising 71 paragraphs. The case was by no means simple and its outcome in the High Court has excited some academic controversy.[15] The focused, somewhat sparse approach of the court was, perhaps, surprising in the context of Tobias AJA's very extensive review of authority.

Subject matter aside, the case involved the application of the principles of damages in contract law to unusual factual circumstances. However, the court, with a minimalist approach, stated the relevant principles in what I have already characterised as a propositional style. In short, it was making a statement as to what the law is as opposed to engaging in any detailed way, in either a search for the correct principle of law or an explanation of why the law is as it stated it to be.

In *Magaming v The Queen*,[16] the appellant was an Indonesian fisherman who had been convicted of people smuggling offences which the trial judge held fell "right at the bottom end of the

9 *R v Lindsay* (2014) 119 SASR 320.
10 ibid at [235].
11 *R v Lindsay*, n 8, at [35]–[37] per French CJ, Kiefel, Bell and Keane JJ and [81] per Nettle J.
12 ibid at [8]–[10] per French CJ, Kiefel, Bell and Keane JJ and [57]–[58] per Nettle J.
13 (2013) 253 CLR 1.
14 *Macourt v Clark* [2012] NSWCA 367.
15 D Winterton, "Clark v Macourt: defective sperm and performance substitutes in the High Court of Australia" (2014) 38 *Melbourne University Law Review* 755.
16 (2013) 252 CLR 381.

scale" of seriousness.[17] Magaming challenged the constitutionality of mandatory minimum sentencing laws which had resulted in his conviction of a term of imprisonment of five years. The constitutional challenge was rejected in the NSW Court of Criminal Appeal in a lead judgment of Allsop P comprising 126 paragraphs, with which the other members of a five-judge bench agreed.[18] A majority of the High Court dismissed the appeal in 54 paragraphs. Fewer applicants were involved before the High Court than before the Court of Criminal Appeal; however, largely, the same questions arose. The circumstances of the offences and the offenders were outlined in only two introductory paragraphs of the High Court decision.[19] Unlike the Court of Appeal decision which explored in depth the purpose of the legislation, the High Court made crisp statements of the law with only short exploratory reasons. *Magaming* therefore provides a clear example not only of the High Court's condensed approach to factual context, but also its propositional approach to authority and argument.

The ACT same-sex marriage case, *Commonwealth v Australian Capital Territory*,[20] is another notably condensed High Court judgment touching on a very live social issue. The unanimous judgment opened with the sentence, "[t]he only issue which this Court can decide is a legal issue". The judgment comprised 62 paragraphs, about half of which addressed the core constitutional question, namely, the meaning of "marriage" in s 51(xxi). Perhaps the most legally vexed question that arose, being the jurisprudential approach to take to the shifting boundaries of "marriage", was dealt with in 10 paragraphs,[21] notwithstanding the existence of substantial commentary on the issue.[22]

The case was decided against the Territory, on conventional principles of statutory interpretation, although the constitutional finding could be seen as a silver lining for same-sex marriage advocates. At no point did the court acknowledge a role in the larger public dialogue surrounding same-sex marriage and relationships. Indeed, the court's short, propositional approach, particularly on the constitutional question, seems almost to deny the existence of any substantial legal controversy, let alone the social dynamic that underpinned the attempted legislative reform.

What does this tell us, if anything, about the present role and function of the High Court? There are a number of immutable aspects of its function, the most fundamental of which is its constitutional role in determining the law of Australia as is "appropriate to the times".[23]

17 Quoted ibid at [7].
18 *Karim v R* (2013) 83 NSWLR 268 (Bathurst CJ, Allsop P, McClellan CJ at CL and Hall and Bellew JJ).
19 See ibid at [5] and [7]. For a critique of this approach, see A Dziedzic and S Walker, "The High Court on Mandatory Sentencing in Magaming v The Queen: Only Part of the Story" in "Opinions on High", posted 13 November 2013 at blogs.unimelb.edu.au/opinionsonhigh/2013/11/13/dziedzic-walker-magaming/, accessed 28 April 2021.
20 (2013) 250 CLR 441.
21 ibid at [14]–[24].
22 See, for instance, J McLean, "The Constitutionality of Same-Sex Marriage" (2013) 15 *The University of Notre Dame Australia Law Review* 1; G Lindell, "Constitutional issues regarding same-sex marriage: a comparative survey — North America and Australasia" (2008) 30(1) *Sydney Law Review* 27; A Zanghellini, "Marriage and civil unions: legal and moral questions" (2007) 35(2) *Federal Law Review* 263.
23 *Queensland v The Commonwealth* (1977) 139 CLR 585 per Barwick CJ at 593.

It is, in its appellate role, a court of error.[24] In addition, the High Court has in recent years emphasised the centrality of the institutional integrity of courts in the separation of powers doctrine enshrined in the Constitution. The increase in statutory governance of large aspects of hitherto common law rights and of new rights[25] has also had its impact.

The court may consider that the social and/or value-laden underpinning of many of the cases that come before it has already been laid out by the intermediate appellate court. Another possibility is that the court's current approach to its judgment writing is responsive, at least in part, to the criticisms made in the past as to its lengthy judgment writing. There is substantial commentary decrying extended recitations of undisputed facts, dense citation, the marshaling of long lists of factors of minimal relevance, and other forms of jurisprudential padding.[26]

Australian courts have been identified as particular offenders. One analysis of High Court judgments up to 2007 found that, in comparison with the final courts of appeal of Canada and the United States, the High Court has consistently (and increasingly) produced the longest judgments by average word length.[27] If we are in the early days of a trend towards more focused and succinct High Court judgments, it may be, in part, in response to these critiques.

It may also be that into its second century, aspects of the court's jurisprudence are settled and therefore do not require long dissertation. In short, there is simply less to argue about. The High Court's focus may, therefore, be on ensuring that lower courts "get it right" and that the court has determined this should be done in judgments that are short and unadorned.

What, then, is the position in intermediate courts of appeal? The starting point in the consideration of judgment writing, as in all forms of writing, is audience and purpose. Judgment writing poses its own challenges because of the multiple functions judgments serve and the multiple audiences for whom they are important. This is nowhere more true than in the context of the intermediate appeal.

The first audience for which any judgment is written is the parties to the dispute — indeed, one piece of advice often given to judges is to write for the losing litigant.[28] Confidence in the legal system, and therefore in the rule of law, demands that litigants understand the reasons for their loss and, in particular, that it was by operation of law and not judicial whimsy or eccentricity. This is best achieved if the basis of the reasoning that leads to the outcome is revealed. This may be seen as part of the intermediate appellate court's significant rule of law function.

There is a second audience, those who have an interest in the legal issues raised in the judgment of the intermediate appellate court. Regardless whether it is correct to say that intermediate

24 See for instance *AJS v The Queen* (2007) 235 CLR 505 at [39] per Kirby J.

25 For example in the area of biodiversity legislation and patent rights.

26 See, for instance, R Posner, "Judges' writing styles (and do they matter?)" (1995) 62 *The University of Chicago Law Review* 1421 at 1442; D Neuberger, "Sausages and the judicial process: the limits of transparency" (2015) 12 *The Judicial Review* 131 at 138; V Waye, "Who are judges writing for?" (2009) 34 *University of Western Australia Law Review* 274 at 278; J Allsop, "Appellate judgments — the need for clarity" (2012) 1 *Journal of Civil Litigation and Practice* 181.

27 Waye, above, at 283–4; see also M Groves and R Smyth, "A century of judicial style: changing patterns in judgment writing on the High Court 1903–2001" (2004) 32 *Federal Law Review* 255.

28 Waye, above n 26, at 276.

courts of appeal have a declaratory function, these judgments are of fundamental importance for this audience — it is the revelation of the way the law is administered in the particular jurisdiction.

For intermediate courts of appeal there is of course a third audience — the High Court and the requirements of *Kuru v NSW*,[29] although it is not the point of this paper to consider the implications of that decision.[30] Nor do I seek to touch upon questions of writing for the higher appellate court.[31]

As is apparent, therefore, I have not discerned a similar, propositional approach in judgments of intermediate appellate courts as I have in the High Court. There are reasons why this is likely to be so, relating to the function and practice of intermediate courts of appeal. In particular, intermediate appellate courts do not have the same constitutional function as the High Court, and there remains debate as to their declaratory role in the development of the law.[32] Further, appeals in intermediate courts are by way of rehearing, which is likely to require a fuller consideration of factual as well as legal issues. In courts such as the NSW Court of Appeal, the practice of assignment of a lead judgment to a particular judge may require the setting out of facts and arguments for the other judges on the bench. Finally, intermediate appellate courts are bound to apply the common law of Australia, which necessitates the consideration of judgments of other intermediate courts on the issue in question and, should there be a challenge to the correctness of those judgments, of whether they are "plainly wrong".[33]

More pertinently to the point I seek to make in this paper, there is value in presenting a case in its context — factual, legal and, in some circumstances, social and political — so that the basis of the reasoning and therefore the outcome is transparent. This necessitates a more comprehensive but not verbose judgment writing process which, in the result, will not only be dispositive of the case but may also valuably record the legal, social and political history of the times.

29 (2008) 236 CLR 1 at [12].

30 See similarly, in the criminal context, *Cornwell v The Queen* (2007) 231 CLR 260 at [105].

31 Posner contends that the potential for appeal in the use of a highly formal, characteristically legal approach to language and structure, is designed to appeal to the expectations or perceived expectations of other judges, at the cost of clarity. I do not share that view of Australian intermediate appellate court decisions. See Posner, "Judges' writing styles (and do they matter?)", above n 26, at 1431.

32 See J Allsop "Appellate Judgments — the need for clarity" (2012) 1 *Journal of Civil Litigation and Practice* 181 at 182.

33 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

The architecture of argument*

Professor J Raymond†

The question of how best to structure judgments is an ongoing one. This article is based on the premise that judges should convey their reasoning in a form that reflects the simple and repetitive logic of the law. It provides a seven-step recipe for writing clearly structured judgments that convey logical reasoning and contain context before details, clearly partitioned issues and succinct arguments.

I once had the following exchange with a gracious judge who allowed me to review his work in a tutorial session.

> "I had trouble figuring out what's going on in this case until I got to page 15," I said. "This is where you get around to mentioning the issues."
>
> "Yes, professor, I can see that."
>
> "And now that I know what the issues are, it seems to me that probably twelve of the first fifteen pages could be omitted, since they have nothing to do with any of the issues."
>
> "Yes, professor, I agree."
>
> "Just out of curiosity, why did you wait until page 15 to enunciate the issues?"
>
> "Well professor, to tell the truth, I didn't know what the issues were myself until I got to page 15."

It was an instructive admission. Writing is often a means of discovering what we think. It is not unusual for judges and lawyers to discover the case as they write it.

They make a mistake, however, when they require their readers to wander through the same process of discovery — to follow them down blind alleys, wrong turns, false starts and irrelevant facts until the issues finally pop up like mushrooms after rain.

The universal logic of the law

Every legal argument can be distilled to the same simple structure, a variation of the classic categorical syllogism:

> These facts (narrate facts) ...

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> viewed in the context of this law/contract/regulation/precedent/section of the Constitution/principle of equity (choose one) ...
>
> lead to this conclusion (relief sought).

The logic never varies. At trial the judge's job is to discover this pattern of thought in the morass of facts, distortions, outright lies, genuine issues and spurious arguments that the contending parties allege. The attorney's job is to assist the judge in reducing the facts and evidence to this pattern.

In jurisprudence, only four arguments can occur:

1. the litigants may contest factual allegations; or
2. they may claim that the other side has cited the wrong law; or
3. they may argue that although the other side has cited the right law, they have misinterpreted it; or
4. they can agree about the facts and the law, but disagree about how one applies to the other.

Every case boils down to some combination of these four basic disputes. There are no others. Litigants may argue about things outside the law: technicalities in accounting procedures, similarities among patented products, or the reliability of laboratory tests. But these arguments involve other disciplines. They are not legal arguments.

Even when some procedural issue is argued (venue, for example, or timeliness), the argument will always be the same. One side will allege certain facts in the context of a controlling law, principle or standard; and the other side will either dispute the facts, or argue that the wrong law has been cited, or that the right law has been misinterpreted or misapplied.

When several issues are involved, each must be resolved with the same logic: certain facts, considered in the context of a particular law, lead to an ineluctable conclusion.

The logic of jurisprudence is the same in trial courts and courts of appeal. The only difference is that at trial, litigants are likely to argue about both facts and law, whereas in courts of appeal arguments tend to focus on the law — the appellant arguing that the court below has applied the wrong law, or misinterpreted or misapplied the right one. Appellate courts are not equipped to examine the evidence itself. They cannot call witnesses, examine exhibits or indulge litigants in the sort of lengthy, unpredictable, and often disorderly proceedings that characterise a trial. Courts of appeal may hear arguments about the admissibility or sufficiency of certain evidence, but except in rare circumstances they will not second-guess trial courts on the inferences of fact drawn from whatever evidence they deem admissible.

Because the pattern of legal logic is always the same, the structure of an effective judgment at any level is identical to the structure of a good brief. These genres have different audiences, but the same purpose: to persuade. There is one important difference. A judgment has the advantage of authority. A judge can issue an order instead of merely asking for one.

A universal outline for judgments

If the logic of the law is so simple and repetitive, why do judges and lawyers have so much trouble organising what they write?

Because despite the appearance of logic, litigation is always messy and uncertain. It relies on "facts" inferred from observations that cannot be replicated, reported by witnesses who

may or may not be telling the truth or by experts who are generally contradicted by opposing experts. Inferences made from events described by witnesses rarely achieve the reliability of science. Even evidence that claims to be "scientific" can be contested by other data or other interpretations of the same data or by arguing that the data has been contaminated.

Nor do issues arise from the facts with a logical inevitability. Good lawyers can find many issues in any set of allegations, some more likely than others to benefit their clients. Unanticipated issues and surprising facts may arise during the trial, and sometimes on appeal.

In addition, the logic of the law often melts like a pocket watch in a surreal painting. Analogies, which are the basis of common law (the claim that the case at bar is essentially like a precedent), always limp. Precedents are always distinguishable.

Furthermore, the language of the law is rotten with ambiguity. Despite the best efforts of legal drafters, a motivated reader can find more than one meaning in any text. A word like "murder" may seem plain enough — until we have to decide how it applies in cases of abortion or assisted suicide. A term like "marriage" may seem plain enough — until we have to decide when cohabitation becomes marriage, or whether one member of a same-sex union can claim spousal benefits on the other's insurance policy. Absolutely no word in the law is immune from the ambiguity it might contract, like a contagious disease, in the context of a novel set of facts. What seems like "plain meaning" when a legal text is drafted disappears in a swirl of indeterminacy when the text is applied to facts the drafters did not anticipate.

Jurisprudence requires lawyers and judges to control the chaos by conveying their reasoning in a form that seems logical. Instead of controlling the chaos, however, they often reproduce it — failing to identify or to partition the issues; rambling through facts and allegations without distinguishing the credible from the implausible; switching from one party's version to the other's as if judges were court reporters; reproducing the testimony instead of analysing it. Their arguments meander, just as their thoughts must have meandered. They produce a stream of consciousness instead of an orderly sequence, a diary of dawning awareness instead of an engine of logic in which a result emerges from an application of law to fact. They forget that the goal of jurisprudence is to pluck the essential issues, the relevant facts and controlling laws from the maelstrom of arguments, allegations, precedents, principles and pretensions that rage about during a trial. It is not an easy task. But it would be easier if judges would remember the simple logical structure that they must identify in the resolution of every issue in every case.

Many jurisdictions publish rules to assist lawyers in organising their submissions. These rules generally make excellent sense. "First, tell us what the issues are," they seem to say, reflecting an awareness that facts have no significance until they are placed in the context of issues. "Then tell us what the case is about" — reflecting the frustration of judges who have to read dozens of pages before discovering the basic fact situation from which the case arises. And finally, "Organise the rest of the judgment in a logical and predictable order" — a plea from readers who are continually surprised by what turns up next in an argument.

Paradoxically, judges sometimes forget that their readers want precisely the same things: context before details, clearly partitioned issues and succinct arguments. Rules for appellate procedure generally work just as well on both sides of the bench, and at every level, all the way to Supreme Court.

A seven-step recipe for organisation

Here is a recipe for organising a judgment in even the most complex case:

- identify and partition the issues
- prepare an LOPP/FLOPP analysis for each issue
- arrange the analysis of issues like rooms in a shotgun house
- prepare an outline with case-specific headings
- write a beginning
- write an ending,
- review your draft with a checklist and a friend.

Identify and partition the issues

Plan the body of the judgment before settling on an introduction.

Use a stack of note cards, or half sheets of paper, or the equivalent space on a computer screen. On each card write the word "Issue", followed by a brief statement of any question you will have to decide.

At trial, the issues may be either questions of fact or questions of law. At the end of the trial you will have to present your findings and support them with reasons enough to satisfy the court of appeal, if not the losing party. During the trial you may have to provide written responses to preliminary or interlocutory motions — again, with reasons that will survive on appeal.

At trial, the issues are any reasonable and relevant question raised by either party. To these, some judges add questions that either they or the court of appeal might think ought to have been raised, even if only to mention them as a way of anticipating what might be raised at a different level.

When judges are responsible for finding facts, they have to support their findings with credible reasons. (Paradoxically, juries do not have this obligation: they find facts without revealing their reasons.) When a jury is responsible for finding facts, you are relieved of your responsibility to provide reasons for these findings; but at the same time you become responsible to guide the jury's deliberations by composing directions that they can understand and that will also satisfy a court of appeal's demand for legal accuracy. Either task alone would be difficult enough; achieving both at once is just short of miraculous.

On appeal, you should have the assistance of counsel in identifying and articulating the issues. At either level, judges in some jurisdictions use case-management procedures to have counsel clarify the issues among themselves before addressing the court.

Determining the issues early is essential to efficiency in writing and economy in the result. You cannot distinguish relevant facts and arguments from pointless digressions until you have determined precisely what questions the court is being asked to settle. If the issues change as the case proceeds, prepare cards for the new ones and discard those that become irrelevant.

Partitioning the issues is essential to the structure of your judgment. Unless each issue is clearly separated from the others, your judgment will seem like a vast swamp — shapeless and devoid of direction. Dividing your judgment into discrete issues enables you and your readers to focus on the analysis of each one individually.

Prepare an LOPP/FLOPP analysis for each issue

The easiest way to organise the analysis of each issue is to follow this pattern:

- LOPP (Losing Party's Position)
- FLOPP (Flaw in Losing Party's Position)
- CONCLUSION.

> For example:
>
> LOPP: Respondent contends that he had not been informed of the penalty clause in the contract.
>
> FLOPP: The evidence shows that both the respondent and his attorney received the contract thirty days before signing it.
>
> CONCLUSION: Therefore respondent's contention that he was unaware of the penalty clause has no merit.

When the conclusion is obvious, it may be effective to leave it unstated, allowing your readers to make the inevitable inference on their own. These inferences will, of course, become explicit in the form of findings or orders at the end of the ruling as a whole. Sometimes it is effective to refer to an unstated conclusion as if it were so obvious that it can be safely tucked away in a subordinate clause (for example, "Because the respondent had ample time to examine the contract before signing it ..."). Understatement of this sort can be more powerful than rhetorical excess. It implies that any reasonable reader would agree.

Be careful about using highly charged language to characterise the losing party's position. Charged language is a rhetorical weapon that often backfires. It pleases readers who agree with you in advance, but it alienates impartial readers, and infuriates the losing party and anyone who may be sympathetic to the losing party's point of view. There are, of course, exceptions, when judicial indignation is perfectly appropriate and effective. But charged language is often a sign that an argument is based on passion rather than law. Normally, a civil society wants judges to rise above emotion and blatant political preferences. People who pay attention to the courts want reasons, not feelings nor even ideals — reasons that seem firmly grounded in law. Express the losing party's position as effectively as you can — as if you were representing that party yourself — and then identify the flaw in that position with surgical detachment. If you cannot find the flaw in your best statement of the losing party's position, you may need to reconsider your conclusion.

Although the final logic in a judgment always resembles a categorical syllogism (controlling law/relevant facts/conclusion), actual courtroom argument is dialectical: one party argues X, the other argues Y. Lawyers are always responding to the opposing party's position. This dialectic should be easy to find in the analysis of each issue:

> One party says X.

> The other party says Y.
>
> The court says X (or Y, or possibly Z).

The LOPP/FLOPP pattern suggested earlier captures this dialectic. But because the court's position is essentially identical with the prevailing party's position, it is often possible to skip one of these steps.

> LOPP: One party says X.
>
> FLOPP: But the court says Y because ...

There is no reason to say what the winning party has argued, since the court has adopted that position as its own.

Although the LOPP/FLOPP pattern generally works, there are a few exceptions.

One exception occurs when the controlling law is a principle of equity or a matter of judicial discretion that must be exercised without clear and definitive standards. In determining custody, for example, or visitation rights, family court judges can help calm raging emotions by downplaying the notion of a "losing" party. Divide the judgment into factors (for example, "proximity to schools", "access to extended family" or "the child's safety"). Under each heading, simply compare and contrast conditions at mum's house with conditions at dad's house. A simple objective description will suffice; often the inferences will be obvious.

An adverse ruling in family court is never easy to accept; but disappointed parents will find it easier to respect a decision that focuses on the child's best interest rather than on a finding that either party has been found a less competent parent. Even when the decision is actually based on the unsuitability of one parent, it does no harm for the record to acknowledge whatever parental strengths can be attributed to that parent along with the weaknesses that are critical to the decision.

Another exception to the LOPP/FLOPP pattern occurs when judges are finding facts. It generally makes sense to begin with the position of the party with the burden of proof, whether that party loses or wins.

> Plaintiff argues that the respondent's equity in the condominium at the time of the divorce was $250,000.
>
> Respondent, however, presented evidence that the equity was roughly half that amount.
>
> After carefully weighing the evidence presented by each side, I find that ... because ...

In an actual judgment each of the first two sentences would be followed by a summary of the evidence presented, and the third sentence would be followed by an indication of why the judge found one party's evidence more persuasive than the other's.

This is trickier than it seems. Many trial judges believe that by expressing reasons for findings, particularly for findings based on credibility of witnesses, they invite the court of appeal to second guess them and to reach different conclusions. On the other hand, failure to give reasons can tempt the court of appeal to remand on grounds that the findings were not supported by sufficient evidence. Balance is the key. Trial judges should support their findings with sufficient

reasons to show that they are not arbitrary and capricious. Whenever possible, they should cite specifics — for example, evidence from documents, consistencies or inconsistencies in testimony, conformity to or deviation from normal human behaviour, awareness of motives for telling the truth or for concealing it, etc. In other words, judges can and should reveal exactly the sort of thought processes that they tell jurors to follow in reaching a verdict.

In general, the LOPP/FLOPP pattern will help you think clearly about the application of fact to law. It can also protect you from your own biases. Nothing is more frustrating to the bar and to the public than a decision that is not supported by a clear and logical application of law to facts. And nothing can be more damaging to public trust in the integrity of the judiciary.

Arrange the analysis of issues like rooms in a shotgun house

The most frequent cause of obscurity in jurisprudence on both sides of the bench is not technical language or complex issues or arcane subjects. It is haphazard organisation.

The easiest way to organise a judgment is to imitate the structure of what in some parts of the United States is called a shotgun house — a house in which each room follows the other in a straight line leading from a front porch to a back porch. The front porch is the introduction, the back porch the conclusion. Each room between contains the analysis of a particular issue.

Once you have determined the issues, arrange them in a sequence that makes sense. If you have written each issue on a separate card, you can spread the cards across a table and select the sequence that works best.

Sometimes there will be threshold issues (standing, for example, or jurisdiction or timeliness); normally these are dealt with first. Sometimes issues can be grouped in categories (for example, three dealing with the admissibility of evidence, two dealing with jury instructions, five dealing with sentencing). Sometimes the issues can be arranged in a logical chain, each issue dependent on the other for its viability. Sometimes each issue is completely independent of the others. In this situation, consider arranging the issues chronologically, if the material allows it.

After reaching a decision on a dispositive issue, the others generally become moot. On occasion, however, judges will analyse these moot issues anyway, on the theory that if they are reversed on the dispositive issue, ruling on the others will save the litigants the trouble and expense of further litigation. If you do this, be sure to announce your intention in advance. Do not surprise your readers by having them read your analysis of a dozen issues only to discover at the end that the moving party had no standing in court.

The analysis of each issue should be self-contained, like a stanza in a poem or a room in a shotgun house (stanza actually means “room”). You should have as many rooms as you have issues.

In some cases, a section equivalent to a foyer needs to be added: an antechamber just after the introduction and before the analysis of the first issue. This section is necessary in cases that cannot be understood without a detailed narration of facts or a review of procedural history.

Although a “foyer” for an extended facts, background or procedural history may be necessary at times, more often than not it can be avoided by writing a beginning that provides an essential

overview (see **Write a beginning**, below), saving necessary details for the analysis of the issue to which they are most relevant. Narrating the detailed facts twice — in the beginning and in the analysis of the issues — creates unnecessary work for yourself and your readers.

Prepare an outline with generic and case-specific headings

If a judgment is very short — two or three pages — it may need no headings. In longer texts, headings are extremely helpful, particularly to readers who want to read your argument as quickly as possible.

In judgments that include a table of contents, headings provide a roadmap, foreshadowing the journey you want your reader to take. Within the document, headings serve as signposts marking the boundaries between various stages of the journey. They show where the analysis of each issue ends and another begins. To serve these functions effectively, headings must be as brief as possible. They should not be entire arguments (though it is often effective to put a brief summary of an argument immediately after a heading).

There are two kinds of headings: generic and case specific. Words and phrases like "Introduction", "Background", "Order", "Cases cited", "Issues" and "Findings of fact" are generic headings. Generic headings can be transferred from case to case, regardless of the facts and issues.

Although generic headings are useful, even more useful are case-specific headings — headings like "Was the warrant valid?" or "What is the meaning of obscenity in s 905?". These headings differ from generic headings in that they are tied to the facts of a specific case. They mark boundaries between the analysis of separate issues. Case-specific headings enable future readers (such as lawyers and law students) to go directly to those sections they suspect might be helpful to other cases.

There are three ways to phrase a case-specific heading. You can phrase it as an argument:

> The University of Montevallo is not an Agency of the State.

You can phrase it as a question:

> Is the University of Montevallo an Agency of the State?

Or you can phrase it as a topic:

> State Agency.

Some judges prefer argumentative headings, never wanting to pass up an opportunity to press their point of view. Others think topics or questions are more effective as headings because they convey a sense of detached objectivity, which is in itself a persuasive stratagem. It is a matter of personal preference, based upon the authorial persona you want to create and on the way you think a particular reader or set of readers is likely to react.

Even though you should write every judgment as if you expect your readers to follow it from beginning to end, chances are they will not. Effective headings will aid those readers who raid your text like marauding pirates, looking for what interests them and ignoring the rest. Make it easy for them to find whatever they are looking for.

No matter how you phrase them, however, headings should be clearly foreshadowed by the end of the introductory section (see **Write a beginning**, below). And they should be phrased in such a way that they are intelligible to an educated non-lawyer who knows nothing about the case in advance.

Here, for example, is a heading that requires far too much knowledge of local law:

> **Issue One**
>
> The holder of a perfected security interest is not entitled to negate the State's rights under the statutory "warrant hold" provision of the VIP Government Code, s 403.055(a).

The same issue could have been stated much more clearly in plain English:

> **Issue One**
>
> Can the State withhold Medicare funds from creditors of a bankrupt nursing home that has failed to pay its taxes?

Write a beginning

It may seem odd to suggest writing an introduction at this stage, after you have already developed the heart of your argument. But you are not in a position to write an introduction until you know what you are going to introduce. Sometimes you have no idea what the issues are, or how many, or how they should be resolved, until you have drafted an LOPP/FLOPP analysis for each issue.

Avoid beginning with technical, dry or uncontested assertions. Imagine, for example, the reaction of weary readers with busy schedules when they see an opening paragraph like this:

> Pursuant to Local Patent Rule 4-5(b), Defendant National Compuchip Corporation ("Compuchip") challenges the Claim Construction Brief filed on February 27, 2003 by Plaintiff Laserop, Inc ("Laserop"), on issues of claim construction for US Patent Nos 5,944,807 ("the '807 patent") and 6,098,141 ("the '141 patent"). Exhs A and B, The Laserop patents. Compuchip's proposed interpretation of the terms and phrases in the claims of the '807 and '141 patents are set forth in Compuchip's Interpretation Chart for the Claim Terms/ Phrase Recited in the Asserted Claims of US Patent No 5,944,807 ("the '807 patent") and US Patent No 6,098,141, which is attached hereto as Exh C.

If you are a typical reader, you probably did not read this example in its entirety. You skipped over it as soon as your eyes glazed over. Yet some judges are convinced that they are bound by tradition, rules or logic to begin their judgments with a reference to the rule that gets one party or the other into court. There is something logical about this convention; after all, how can we decide a case if the litigants have not established standing and jurisdiction? But then again, if there is no contest about standing or jurisdiction, why waste the opening lines establishing something that can be safely presumed?

Then, too, once they have mastered the numerical references in a particular case or a particular statute or a particular set of rules, some judges forget that shorthand references are meaningless to readers who are not already intimately familiar with the same material. References like "Local Patent Rule 4-S(b)" and "the '807 patent" do not actually communicate information;

they merely remind a small set of readers in the know. Granted, this beginning would make sense to the parties involved in the case, but it wouldn't tell them anything new. So to whom is it useful?

When jurisdiction and standing are uncontested, starting with "Pursuant to" is like putting a hotdog stand on prime real estate. The first paragraph and the last are possibly the only places where you can count on the reader's attention. Why waste this space by filling it with uncontested assertions or with information the reader can be presumed to know?

Similarly, imagine the reaction of their readers who encounter opening lines like these:

> **Declaratory judgment (article 453 cpc)**
>
> This Court, having examined the proceedings and the exhibits, considered the arguments of counsel, and duly deliberated, doth now render the following Declaratory judgrnent:

This self-congratulatory gambit serves no purpose. It is a sort of judicial throat clearing. It enables you to put something on paper before getting around to the case at hand. Why not just get around to it? Skip the throat clearing.

An effective introduction provides two things: a synopsis of the facts and a brief statement of the issues. Begin with what you would tell your next door neighbours if they were curious about the case. Use ordinary, neighbourly language. Avoid jargon. Tell a brief story indicating the human conflict, "who did what to whom" or "who's arguing about what". Then state the issues — the questions of fact or law that you need to settle.

In cases destined for the highest courts, often the fate of the particular litigants is less important than what the decision will mean for other litigants in similar situations. If the issues have far-reaching implications — if, for example the suit is intended to establish or to challenge an important public policy — you might start with the issues and then summarise the facts.

The combination of facts and issues provides the context that gives meaning to everything that follows. In addition, by delineating the issues in a few lines, you can foreshadow the structure of the argument to follow. Here is an example:

> Harry Saunders was convicted of assault, battery, rape and murder, each in the first degree. According to the evidence, Saunders wore gloves and a mask when he committed these crimes, concealing his identity from his victim and from witnesses on the scene.
>
> In this appeal, Saunders argues that the lineup in which he was identified was suggestive, that articles of clothing used in his identification were illegally seized from his apartment, and that he had no access to counsel at key points during the investigation.

This beginning is exceptional not only for what it does, but perhaps more importantly for what it does not do. It does not establish standing or jurisdiction with the ubiquitous phrase, "Pursuant to Rule 123 appellant asks ... ". It has no legal jargon or long, tangled sentences. In fact, there is nothing in this opening that would seem odd or technical in a good newspaper. And that, despite whatever misgivings you might have about the media, is an excellent standard for legal writing.

The writer (a judge in Idaho) also avoided citing specific sections of the code and specific references to precedent. He did not feel obliged to tell us that assault, battery, rape and murder are illegal activities (for example, "contrary to sections w, x, y and z of the Criminal Code"). Nor

did he feel obliged, at this stage, to tell us what statutes, precedents or standards the appellant had invoked in support of his claims. This may be essential information at some point — the precedents will have to be cited and distinguished, the statutes and standards may have to be quoted if there is any dispute about their meaning or the application to this particular set of facts. But details of this sort should be saved for the sections in which issues are analysed. No need cluttering the opening paragraph with more information than the reader needs at this point.

This beginning provides the necessary context for understanding the analysis that follows. You can even predict the headings: "Lineup identification"; "Search and seizure"; "Access to counsel". And in predicting the headings, you are predicting the structure of the rest of the document. You are, in effect, promised an easy and interesting read. Although judges are not obliged to make their writing interesting, doing so does have the effect of helping the reader pay attention to the argument.

In this case, the writer felt the need to interpolate a detailed narration (foyer) between the opening paragraphs (the front porch) and the analysis of the first issue (the first in a series of rooms). He did this by telling the story of the lineup in which Mr Saunders was identified, beginning with "There were three lineups. The first occurred ... The second occurred ... The third occurred ... ".

In most cases a simple story-plus-issue is the best way to gain the reader's interest and attention. But the temptation to write abstractly is hard to resist. Here is the opening paragraph in a case about unlawful detention:

> [1] This is an application supported by an affidavit in which the applicant is seeking to be admitted to bail pending her trial. The affidavit discloses that the applicant who has been in custody since October, 1985 was on 3rd December, 1985 committed to the High Court for trial for the offence of Infanticide. On 18th December, 1985 she applied to the High Court at Kitwe to be admitted to bail pending her trial.

This is an adequate beginning, but it reads like an abstract problem in the law instead of what it really is, a case about a young woman who has been improperly held in jail without bail. Starting with the story would have given the case the sense of urgency and human significance it deserved:

> [1] Rosemary Chilufya has been in jail for nearly five months, awaiting trial on a charge of infanticide. The High Court has refused to set bail, on the ground that infanticide is a form of murder, and murder is not a bailable offense. A threshold issue in this case, however, is whether the Supreme Court has the authority to ...

Stating the issues effectively requires steering a course midway between too much detail and too little. The example below provides too much detail — too much because it overwhelms the reader and predicts what follows in bewildering specificity:

> (1) The issues in this appeal in respect of the Appellant's 1994 taxation year are:
>
> (a) Whether the Appellant, in determining LCT liability under Pt 1.3 of the Act, is entitled to deduct the amounts of the Estimates from its "capital", or whether such amounts are to be included in its "capital":
>
> (i) as "reserves" pursuant to ss 181(1) and 181.2(3)(b), or
>
> (ii) as "other surpluses" pursuant to s 181.2(3)(a);

(b) Alternatively, if the Estimates are "reserves" or "other surpluses", whether the Appellant, in computing its income under Pt I of the Act, is entitled to deduct the amounts of the Estimates from its revenue;

(c) Whether the Appellant, in determining LCT liability under Pt 1.3 of the Act, is entitled to deduct the $37,481,776 amount as a "deferred tax debit balance" within the meaning of s 181.2(3)(h).

The other extreme is to provide too little detail:

> The issue is whether the tax returns filed by the appellant in 1994 were accurate.

This version does not predict the structure of what follows, nor does it give the reader a glimpse of the grounds on which each side bases its argument.

It is also possible to provide too much and too little detail at the same time — too much by including information the reader does not need at the outset; too little by not explaining what is at stake and by presuming a reader who knows the code by heart:

> The issue is whether the appellant is entitled to deductions pursuant to ss 181(1), 181.2(3)(a), 181.2(3)(b) and 181.2(3)(h) of Pt 1.3 of the *Income Tax Act*.

A good statement of issues foreshadows the structure of what follows and provides the reader with a glimpse of the grounds of the argument.

It does not cite laws, precedents or records that can be more usefully cited in the analysis section. In this particular case, after a brief description of what the appellant claimed in his tax returns, the issues might have been effectively stated like this:

> The issues are:
>
> - Whether the appellant is entitled to deduct the amounts of the estimates from its "capital".
> - Whether the appellant is entitled to deduct the amounts of the estimates from its revenue.
> - Whether the appellant is entitled to deduct the $37,481,776 as a "deferred tax debit balance".

A good beginning makes the reader want to read more. A notable example is this introduction in a per curiam by the Ontario Court of Appeal:[1]

(1) Professor Starson is an exceptionally intelligent man. His field of expertise is physics. Although he has no formal qualifications in that field, he is in regular contact with some of the leading physicists in the world. In 1991 he co-authored an article entitled "Discrete Anti-Gravity" with Professor H Pierre Noyes, who teaches physics at Stanford University and is the Director of the Stanford Linear Accelerator Center. Professor Noyes has described Professor Starson's thinking in the field of physics as being ten years ahead of its time.

(2) Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. He has been diagnosed as suffering from a bipolar affective disorder. On several occasions during the last 15 years he has spent time in mental institutions. In November 1998 Professor Starson

1 *Starson v Swayze* (unrep, 14 June 2001, Ontario CA).

> was found not criminally responsible on account of mental disorder on two counts of uttering death threats. In January 1999 the Ontario Review Board ordered that he be detained at the Centre of Addiction and Mental Health (the Centre).

Notice that this passage does not call attention to itself as *writing*. The words are transparent, invisible, like lenses through which we see characters and events. The writer does not seem to *be trying* to write. The art conceals the artifice. It is *as if* the story wrote itself. But of course it did not. A beginning like this is carefully crafted, a combination of talent and craft.

In this case, the plot thickens when we find out that the unusual Professor Starson "has a history of mental illness". And it thickens further when we discover a few sentences later that he does not want the medication the Ontario Review Board wants to give him, because it would cloud his mind and hinder his ability to conduct his theoretical research.

A beginning like this entices the reader to continue reading. Who would not be curious to know how the case was resolved?

Write an ending

Your concluding section may include only an order. However, if you think the court above yours, or the press, or the losing party might miss the essence of your analysis, use your conclusion as a summation. Repeat your analysis, but in different words, and succinctly. Brevity is essential.

The concluding section also provides an opportunity for obiter dicta — instructions to the Bar on related matters that are not logically essential to the case you are deciding. And when your decision is based on common sense or pure equity, the concluding section can include what I like to call the "to-rule-otherwise" trope. Judges rely on this device when they have little or no law to justify their decisions. "To rule otherwise would be to invite ..." they say, and then list the horrible, unjust and illogical things that would follow from a different decision.

In a very short judgment, where repeating the reasons would be tedious, a conclusion that includes an order without repeating the reasons may be adequate:

> (1) For the reasons above, plaintiff's Motion to Remand is granted. This action is remanded to the Circuit Court for Barbour County, Alabama, Clayton Division. In addition, defendants will pay all just costs and expenses, including attorney's fees, incurred as a result of the improper and groundless removal of this case.

In a judgment of any complexity, however, an ending of this sort misses an opportunity to revisit the argument. A brief review of the analysis, like the one below, can assist the reader.

> **Conclusion**
>
> Defendant, Tarwater Tobacco Co, has succeeded in having this case removed from state to federal court on the ground that Tarwater's local agents were named as co-defendants by the plaintiff as a ruse ("fraudulent joinder") to obtain a favourable local venue.
>
> The standards for removal on the basis fraudulent of joinder are quite high. In this case, Tarwater would have had to prove either that there is no possibility of a verdict against the local defendants, or that the complaint against them was based on false information.
>
> Tarwater has met neither standard. There is no evidence of fraudulent information in the joinder. Nor is there any question that a jury would find against Tarwater's local agents if the facts alleged are proved at trial.

> For these reasons, we respectfully request the court to remand the case to the Circuit Court for Barbour County, Alabama, Clayton Division, from which it was removed.
>
> We also request the court to order that costs and attorney's fees be assigned to Tarwater. Their failure to provide credible evidence for their claim amounts to a frivolous delaying tactic, taxing the plaintiff with unnecessary costs and taxing the resources of this court.

It may seem paradoxical that a good ending resembles a good beginning (which, in turn, often resembles a good head note). The resemblance is not accidental. Your audience does not necessarily read from top to bottom. If they get lost in an argument, they may flip to the end, hoping to find a synopsis there. They will not be helped by a conclusion that says merely "For the foregoing reasons ...", sending them right back to the thicket they had just abandoned. An effective conclusion summarises those foregoing reasons in a nutshell, in plain English, without repeating citations and references that are already included in the body. Here is how the Ontario court concluded the case about Professor Starson:

> [14] Putting aside any paternalistic instincts — and we think that neither the Board nor the appellants have done so — we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore it is a decision that the statute and s 7 of the Canadian Charter of Rights and Freedoms permit him to make.
>
> [15] The appeal is dismissed.

Enough said.

Review your draft with a checklist and a friend

Persuade a friend, preferably a non-lawyer with no knowledge of the case, to help you review your draft with the following checklist:

- Ask your friend to tell you, after reading only the first page, who did what to whom and what issues need to be settled.
- Test the overall structure by asking your friend, after reading only the introduction, to guess what headings will follow. If there is a good match between the introduction and the structure that follows, your friend should be able to guess, in substance, the case-specific headings that separate the analysis of each issue from the others.
- Ask your friend to tell you, after reading the last full page, what you decided and what grounds you give for the decision.
- Ask your friend to locate the beginning and the end of the analysis of each issue, and to tell you the losing party's argument and the flaw you found in it.
- Check for economy and consistency. If you announced five issues at the outset, be sure that you have analysed five issues. Delete any information that is irrelevant to the issues. Look for repeated information; see if it can be mentioned in one place and omitted in the other.

If your friend doesn't answer any of these questions to your satisfaction, don't explain. Revise.

A well-written judgment is as smooth as a grape. There is nothing extra. Once you reduce it to essentials and organise it coherently, you are ready to revise and polish for style.

Recommended reading

- B Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Court*, OUP, New York, 1999.
- J Raymond, "Legal Writing: An Obstruction to Justice" (1978) 30 *Alabama Law Review* 1.
- J Raymond, "Writing to Be Read: or, Why Can't Lawyers Write Like Katherine Mansfield?", New Zealand Law Conference: The Law and Politics, Conference Papers, 1993, vol 2, pp 210-216. Reprinted in (1997) 3 *TJR* 153.
- J Raymond and R Goldfarb, *Clear Understandings: A Guide to Legal Writing*, Random House, New York, 1983.
- S Stark, *Writing to Win*, Doubleday, New York, 1995.

Why write judgments*

The Honourable Justice S Gageler AC†

Forty years ago Sir Frank Kitto asked and answered a question: "Why write judgments?" Asked of individual members of multi-member appellate courts, that question has become the subject of contemporary controversy. This article reassesses the answer given by Kitto in light of modern choice theory and behavioural science. It restates, in quantitative terms, the qualitative answer given by Kitto. The answer so restated is: to maximise the probability that the court as an institution will give the best of possible judgments.

Introduction

Sir Frank Kitto was a Justice of the High Court of Australia from 1950 to 1970 when he left to become Chancellor of the University of New England. In 1973, he presented a paper to a convention of judges of the High Court and of the Supreme Courts of the States and Territories. The Family Court and the Federal Court did not then exist. The paper was published some years later.[1] It has become staple reading for newly appointed superior court judges in Australia.

The title of Kitto's paper was in the form of a question: "Why write judgments?" Forty years on, I return to that question in the context of a contemporary controversy.

Sir Frank Kitto's Answer

Kitto's answer to the question was multifaceted and nuanced. He noted at the outset that an obvious purpose of a judge delivering reasons for judgment was "to satisfy a desire, which the

* This is a revised version of the Sir Frank Kitto Lecture delivered at the University of New England Law School on 11 November 2013. A version was also delivered at the 11th Annual University of South Australia Competition and Consumer Workshop in Adelaide on 15 November 2013.
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† Justice of the High Court of Australia. The author wishes to thank Brendan Lim for the maths, and to Henry Ergas and Jason Ockerby for the further conceptual comments.

1 F Kitto, "Why write judgments?" (1992) 66 *ALJ* 787.

parties to the case may be assumed to possess, that they may be told not only whether to rejoice or to be sad, but also how it was that the judge reached his ultimate conclusion".[2] He went on to make the "cardinal point"[3] that "the delivery of reasons is part and parcel of the open administration of justice".[4]

But the core of Kitto's answer derived from the understanding that a judgment is the result of reasons that are justified in law and that it is the duty of a judge not only to decide a controversy between parties fairly and transparently, but "to decide correctly if he can".[5] Kitto identified the greatest advantage of writing a judgment as lying in the discipline that the process of writing imposes on a judge doing his or her honest best to decide correctly. That is because experience teaches that:[6]

> only in the throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered its freshness, even tearing it up and starting again, can most of us hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought ...

Towards the end of the article, Kitto turned to what he described as "the really difficult question whether and when a member of a multiple court is justified in simply concurring in a judgment written by a colleague".[7] He expressed the conviction that "on balance, the writing of individual judgments tends to produce the better work".[8] Acknowledging that opinions differ, eschewing any "intention of being dogmatic",[9] not thinking that "a categorical answer ought to be attempted",[10] and accepting that "the advantage of certainty in the law"[11] could on occasions be aided by one judge concurring or joining in reasons for judgment written by another, he said that he:[12]

> would urge no more than that the course of individually, exactingly, intensely, putting in writing what the judge believes ought to be said has such immense advantages that it should be followed in every case unless the reasons for departing from it, when doubtingly considered, are felt to preponderate convincingly.

Contemporary controversy

Kitto gave his answer at a time when it was the norm for the individual members of appellate courts in Australia to give separate reasons for judgment. The course he urged on the judges to whom he gave his paper was the course then generally followed in practice.

2 ibid at 788.
3 ibid at 789.
4 ibid at 790.
5 ibid at 793.
6 ibid at 796.
7 ibid.
8 ibid at 797.
9 ibid at 796.
10 ibid.
11 ibid at 797.
12 ibid at 798.

Times have changed. Now it is much more common for members of appellate courts in Australia either to join in delivering a single set of reasons for the judgment of the court or to express individual concurrence with reasons for judgment delivered by just one of them.

That contemporary practice is in the process of reappraisal. It was trenchantly criticised by Dyson Heydon, who had been a judge of the NSW Court of Appeal from 2000 to 2003 and a Justice of the High Court from 2003 to 2013, in a lecture published after his retirement.[13] The published form of the lecture makes plain in an introductory note that its author was not to be taken to be referring to the behaviour of any particular court of which he had been a member, but "to tendencies and possibilities in courts in general".[14] The theme of the lecture was captured in its title: "Threats to judicial independence: the enemy within". The theme was that, properly to perform the judicial function, judges must be willing and able "to work out and say what they think is right",[15] not only independently of external influences but also independently of each other:[16]

> Composite judgments raise questions. Who did the work? Did every judge understand the judgment? Did every judge closely examine it? Did a confident "specialist" assume dominance over nervous "generalists"? What, if any, compromises were made? … The same difficulty exists where a judge delivers a full judgment and the remaining judges say "I agree". No doubt the judges do sincerely agree on something, but on what?

The contemporary practice, argued Heydon, carries risks, which include that each member of the appellate court might fail to give close personal attention to each issue in the case and that some members of the court might assent to the reasons of others either through the influence of dominant judicial personalities or through the natural tendency of persons in small groups to "flow along with what they perceive to be majority opinion".[17] He provocatively raised the prospect of the "judicial herd"[18] careening blindly into the legal abyss.

Publication of the lecture resulted in publication of responses. One was that of Sir Anthony Mason,[19] who had been a judge of the NSW Court of Appeal from 1969 to 1972, a Justice of the High Court from 1972 to 1987, Chief Justice from 1987 to 1995, and who has been a non-permanent judge of the Court of Final Appeal of Hong Kong since 1995. Agreeing that the risks identified by Heydon exist, Mason recorded that in his judicial career spanning 45 years he had encountered neither a judge who had been dominant in practice (as distinct from in aspiration) nor a compliant judge who was inclined merely to conform.[20] He gave two justifications for the practice of delivering joint reasons for judgment. The first was that it best reflects the collective or institutional responsibility of the court for the decision made in a case. The second was that, by consolidating and clarifying the reasons of the court, it provides greater

13 J D Heydon "Threats to judicial independence: the enemy within" (2013) 129 *Law Quarterly Review* 205.
14 ibid at 205.
15 ibid at 209.
16 ibid at 212.
17 ibid at 216.
18 ibid at 217.
19 A Mason, "Reflections on the High Court: its judges and judgments" (2013) 37 *Australian Bar Review* 102.
20 ibid at 109.

certainty.[21] He also stated two provisos that he said must be "clearly understood".[22] The first proviso was that each judge should be under no pressure to participate in joint reasons for judgment and should be free to write his or her own reasons for judgment. The second was:[23]

> that under no circumstances should a judge fail to give expression to his true view of the law for the sake of creating a false sense of unanimity or collective solidarity; in other words, compromise must not be allowed to triumph at the expense of judicial independence.

Another response was that of Peter Heerey,[24] who was a judge of the Federal Court from 1990 to 2009. "Most human decision-making is improved by frank discussion between persons with knowledge of the subject" he said, and "[i]t is hard to see why the decisions required of appellate judges should be any different".[25] He stated:[26]

> The problem with Heydon's approach is that it sets up a paradigm of appellate judging, said to have its basis in psychological theory which, notwithstanding the lack of any support by way of empirical evidence, is necessarily applicable for all judges for all cases, however straightforward.

Joint reasons for judgment, he argued, contribute to clarity and certainty in the law. No "one modus operandi" should be imposed "on all judges on all appellate courts for all cases".[27] An appellate judicial system that dispensed with joint reasons for judgment, and with attendant judicial discussion, "would mean longer and more delayed and more expensive cases with no demonstrable improvement in the quality of justice delivered".[28]

Mason's approach aligns with that of Heydon in emphasising as absolute the duty of each individual member of an appellate court to form and to act on his or her own true view of each case before the court. Their approaches also align in accepting that a practice of concurrence or participation in joint reasons for judgment poses some risks to the performance of that duty. The difference between them lies in their assessment of the magnitude of those risks. Without questioning the duty, Heerey's approach is more pragmatic. It questions the empirical basis for the tendencies argued by Heydon to give rise to the risks. It questions the systemic costs and the benefits of seeking to avoid them.

What might empirical evidence suggest about risks to the performance of the duty that Mason and Heydon both accept to be an absolute duty? What might it suggest about the costs and benefits of seeking to avoid those risks? What might a broader appreciation of what Heerey described as "human decision-making"[29] tell us about the importance of the duty itself?

21 ibid at 110.
22 ibid
23 ibid. To similar effect, see W Douglas, "The dissent: a safeguard of democracy" (1948) 32 *Journal of the American Judicature Society* 104 at 106 quoting Hughes CJ.
24 P Heerey, "The judicial herd: seduced by suave glittering phrases?" (2013) 87 *ALJ* 460.
25 ibid at 461.
26 ibid at 463.
27 ibid.
28 ibid.
29 ibid at 461.

Condorcet's jury theorem

Consideration of these questions is assisted by awareness of the work and legacy of the French mathematician and social scientist Nicolas de Condorcet. In 1785, he wrote an "Essay on the application of analysis to the probability of majority decisions". The essay had some early influence amongst statisticians and political theorists, but was largely forgotten until it was rediscovered in the second half of the 20th century in the development of modern choice theory.[30]

The central question with which Condorcet was concerned was how likely a group is to arrive at a correct judgment given three variables. The first is the judgmental competence of the individual group members. The second is the decision-making rule or deliberation process used to aggregate individual judgments into a group decision. The third is the size of the group.

What has become known as "Condorcet's jury theorem" amounts to this: for a group tasked with adjudicating a controversy that has two possible outcomes, where the judgmental competence of each of the individual group members is the same and exceeds 0.5 (that is to say, where each group member judging individually would be more likely to be right than wrong), and where the decision-making rule is that of a majority vote, the probability that the judgment of the group will be correct increases as the size of the group increases.[31] Condorcet himself explained it this way:[32]

> One finds further that if the probable truth of the vote of each voter is greater than [0.5], that is to say if it is more probable than not that he will decide in conformity with the truth, the more the number of voters increases, the greater the probability of the truth of the decision. The limit of this probability will be certainty, from which it follows that multiplying the number of votes yields as great a probability of having a decision as desired.

What one finds from Condorcet's jury theorem, more significantly for present purposes, is that where the judgmental competence of each individual group member is uniform, the probability of the judgment of the majority being correct will always exceed the probability of the judgment of an individual member being correct. Even where the judgmental competence of individual group members varies, the probability of the judgment of the majority being correct will, in all but cases of extreme variation, still exceed the probability of the judgment of the most competent member being correct.

The theorem can be illustrated by some simple worked examples. Assume a group, each member of which, judging individually, has an 80% probability of arriving at a correct judgment. The probability that the group, voting by majority rule, will make a correct decision

30 H Landemore, *Democratic reason: politics, collective intelligence and the rule of the many*, Princeton University Press, 2013 at pp 70–75; I McLean and F Hewitt (eds), *Condorcet: foundations of social choice and political theory*, Edward Elgar, 1994 at pp 49–54, 73–78.

31 S Nitzan and J Paroush, "A general theorem and eight corollaries in search of correct decision" (1994) 17 *Theory and Decision* 211.

32 N de Condorcet, "Essay on the application of mathematics to the theory of decision-making", 1785, translated in K Baker (ed), *Condorcet: selected writings*, Macmillan, 1976, at pp 48–49.

(as distinct from the probability that any given decision is in fact correct):[33] for a group of three will be 90%; for a group of five will be 94%; for a group of seven will be 97%; and for a group of nine will be 98%. If each member of the group, judging individually, has instead a 90% probability of arriving at a correct judgment, the probability that the group, voting by majority rule, will make a correct decision: for a group of three will be 97%; for a group of five will be 99%; and for a group of either seven or nine will exceed 99.7%. Now change the assumption so that each member of the group judging individually has an 80% probability of arriving at a correct judgment except for one — the guru or the specialist — who alone has a 90% probability of arriving at a correct judgment. The probability that the group, now including the guru or specialist and again voting by majority rule, will make a correct decision: for a group of three will be 93%; for a group of five will be 96%; for a group of seven will be 97%; and for a group of nine will be 99%. Despite the average competence of the members becoming increasingly lower as the size of the group increases, the majority of the group that includes the guru or the specialist will judge increasingly better than the guru or the specialist would judge alone. The inclusion of the guru or specialist in the group would result in some increase in the probability of correctness of the judgment of the group of three, less for the group of five and less again for the group of seven. It would make virtually no difference to the probability of correctness of the judgment of the group of nine.

The theorem does not depend on the adoption of any naïve or absolute notion of what it means for a judgment to be "correct": relative or evaluative terms such as "preferable" or "better" can be substituted. The most that the quality of correctness implies is that there be some external standard by reference to which judgments are made and against which they can be measured. The theorem can be applied, for example to a group choice between two possible outcomes evaluated by reference to "the common good" or "the interests of justice", provided that the common good or the interests of justice is exogenous, in the sense that the common good or the interests of justice is conceived of independently of the decision-making procedure adopted by the group.[34]

The implications of the theorem for institutional design have, of late, been explored well beyond the boundaries of formal adjudication, although the normative conclusions to be drawn from the theorem for real-world decision-making have generally been approached with caution.[35]

33 The probability that a given decision is in fact correct is a conditional probability. It is conditional in the sense that it takes as given that particular members of the group have already in fact voted one way or another, thereby ruling out all of the other voting scenarios that were possible but that did not, in fact, occur.

34 Landemore, above n 30, pp 208–210.

35 ibid, p 148; H Landemore, "Collective wisdom: old and new" in H Landemore and J Elster (eds), *Collective wisdom: principles and mechanisms*, Cambridge University Press, 2012, p 1. See also A Vermeule, *Law and the limits of reason*, Oxford University Press, 2009; D Estlund, *Democratic authority: a philosophical framework*, Princeton University Press, 2009; R Goodin, *Reflective democracy*, Oxford University Press, 2003, pp 91–108; J Waldron, *The dignity of legislation*, Cambridge University Press, 1999, pp 124–166.

Acknowledging the need for caution, and accepting that any abstraction involves simplification, it remains that the theorem can readily be applied to the design of an institutional structure for formal adjudication.[36]

The classic functional definition of judicial power, formulated by Kitto himself in the course of giving separate reasons for judgment as a member of the High Court, is that it "involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation".[37] It involves, ordinarily, the adjudication of a controversy that, in broad terms, has two possible outcomes. The exercise of judicial power, as Kitto was later at pains to point out in explaining why reasons for judgment should be written, of its nature requires that a court as an institution comprising a group of members who are judges should always try to get the decision right. Trying to get a decision right does not necessitate belief that a single right answer to every legal problem exists in the abstract just waiting to be discovered; merely belief that one outcome of adjudication will ordinarily be able to be shown to be preferable to another. Making a correct judgment, for present purposes, means nothing more or less than making the better judgment.

Condorcet's jury theorem can be seen to explain and to justify as rational the institutional structure for formal adjudication that has now long existed in many countries in which provision is made for an appeal from a court generally comprised of a single judge, to an intermediate court of appeal generally comprised of either three or five judges (deciding by majority), with the possibility of a further appeal to a court of final appeal generally comprised of either seven or nine judges (again deciding by majority). Even if there were no increase in the relative competence of the judges, the probability of arriving at a correct result would necessarily increase at each of the two stages of the appellate hierarchy. It also explains the traditional practice of common law courts, before appeals were permitted by statute, of deciding difficult questions of law by taking the majority view of all available judges sitting en banc.

Applied to individual decision-making within an institutional structure of appellate courts, Condorcet's jury theorem also explains and justifies treating as absolute the duty of each individual member of an appellate court to form and to act on his or her own true view of each case before the court. That is because it is a necessary condition for the theorem to hold that each member decides independently. Independence in the necessary sense is statistical or decisional independence (which rules out members being influenced in their own decisions by the decisions of other members), as distinct from causal or deliberative independence (which would rule out members being influenced in reasoning to their own decisions by information they have gained or realisations to which they have come in the course of deliberating with other members).[38]

36 P Edelman, "On legal interpretations of the Condorcet jury theorem" (2002) 31 *Journal of Legal Studies* 327. See also L Kornhauser and L Sager, "Unpacking the court" (1986) 96 *Yale Law Journal* 82.

37 *The Queen v Trade Practices Tribunal; ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

38 Landemore, above n 30, pp 73, 153–154; Vermeule, above n 35, pp 30, 73–4; Estlund, above n 35, p 225; D Estlund, "Opinion leaders, independence and Condorcet's jury theorem" (1994) 36 *Theory and Decision* 131 at 138.

The significance of independence lies in the de-correlation of error. If you and I decide independently, we might each reach a correct decision, or we might each reach a wrong decision, but the fact that one of us reaches a wrong decision, does not mean that the other of us will also reach a wrong decision. If we form part of a large enough group, our individual errors will be diluted. On the other hand, if I simply agree with your decision, any error you make, I will make too. Whatever the size of our group, my simple agreement with your decision will effectively decrease the size of the group by one. The majority decision of the group would be no better than if I was not there at all.

Accordingly, if two generalist members of a three member court simply agree with a third because he or she is properly acknowledged to have greater competence in judging a case within that field of speciality, then the size of the three person court would in practical terms be reduced to one. The result would not be bad. The result would be better than could be achieved by either of the two concurring judges deciding individually and as good as the decision of the most competent judge. But it would be likely to be sub-optimal: other than in extreme cases of variations in individual competence, the court as a whole would be likely to do better if each judge (taking into account information gained or realisations arrived at in the course of deliberating with the judge acknowledged to have greater competence) reasoned independently to his or her own decision, and the decision of the court was by majority in the event of disagreement.

Risks to independence

Enter behavioural science. The 40 years since Kitto's lecture have seen an explosion of research into the cognitive processes of individuals and into the behaviour of groups.

More recent research has complemented Condorcet's jury theorem's statistical analysis of group decision-making to the extent that it highlights the significance of "cognitive diversity" among group members. The term denotes differences in the way individual group members approach problem-solving. The term denotes, more specifically:[39]

> a diversity of perspectives (the way of representing situations and problems), diversity of interpretations (the way of categorizing or partitioning perspectives), diversity of heuristics (the way of generating solutions to problems), and diversity of predictive models (the way of inferring cause and effect).

Cognitive diversity provides an explanation, beyond mere random variation, as to why equally competent group members apprised of the same information might arrive at different answers to the same questions.

The most significant contribution of behavioural science, however, has been to highlight behavioural risks to the de-correlation of individual error that are inherent in small-group

39 Landemore, above n 30, p 102. See generally S Page, *The difference — how the power of diversity creates better groups, firms, schools and societies*, Princeton University Press, 2008; L Hong and S Page, "Some microfoundations of collective wisdom" in H Landemore and J Elster (eds), *Collective wisdom: principles and mechanisms*, Cambridge University Press, 2012 at p 56.

decision-making. The critical findings can be stated without need for much elaboration.[40] The fact is that humans are influenced in making their own judgments by their perceptions of other humans. They are influenced, in part, because their perception of what is objectively true is influenced by their perception of what others believe to be true; they shortcut the need to think and to experiment for themselves by tapping into the cumulative experience stored in the minds and observed in the behaviour of others. They are also influenced, in part, by the desire to avoid the disapproval of others; in their personal relations they ordinarily prefer friendship and solidarity to conflict, and they adjust their own behaviour accordingly. Within a small group, those two basic influences have a tendency through deliberation to produce: intellectual conformity (by which the range of views within the group tends to be decreased as members self-censor views of their own that they think other members of the group would disapprove); cascades (by which members of the group tend to adopt and to reinforce the views of others who speak first or with greatest authority); and group polarisation (by which members of the group who were like-minded before deliberation tend to end up adhering after deliberation to a more extreme position in line with their tendencies before deliberation).

Deliberation can help group decision-making, especially through the sharing of information and the testing of ideas. But the constant risk of deliberation to the quality of group decision-making is the risk of loss of independence of individual judgments within the group, and with it the loss of the benefit of the de-correlation of individual error. The risk is one to be managed. According to psychologist Daniel Kahneman, winner of a Nobel Prize for his pioneering work in behavioural economics:[41]

> A simple rule can help: before an issue is discussed, all members of the [group] should be asked to write a very brief summary of their position. This procedure makes good use of the value of the diversity of knowledge and opinion in the group. The standard practice of open discussion gives too much weight to the opinions of those who speak early and assertively, causing others to line up behind them.

According to lawyer and behavioural theorist Cass Sunstein:[42]

> The basic goal should be to increase the likelihood that deliberation will do what it is supposed to do: elicit information, promote creativity, improve decisions …
>
> Frequently, a team player is thought to be someone who does not upset the group's consensus. But it would be possible, and a lot better, to understand team players as those who increase the likelihood that the team will be right — if necessary, by disrupting the conventional wisdom.

40 See eg R Thaler and C Sunstein, *Nudge: improving decisions about health, wealth and happiness*, Penguin Books, 2nd edn, 2009 at pp 53–59; Vermeule, above n 35, pp 74, 146–149; C Sunstein, *Why societies need dissent*, Harvard University Press, 2005, pp 9–11; C Sunstein, *Infotopia: how many minds produce knowledge*, Oxford University Press, 2006, pp 75–102; J Surowiecki, *The wisdom of crowds*, Anchor Books, 2nd edn, 2005, pp 23–65.

41 D Kahneman, *Thinking, fast and slow*, Penguin Group, 2011 at p 85.

42 Sunstein, *Infotopia*, above n 40, pp 200–201.

Judges, as anecdotal evidence suggests[43] and empirical research tends to confirm,[44] are humans. The reality is that the risks to independent reasoning created by the "tendencies and possibilities" to which Heydon alluded, and that Mason accepted to exist, are risks and possibilities inherent in any human decision-making. It would be wholly reasonable to expect disciplined judges to be well-equipped to manage those risks, but it would be folly to suggest that judges as a class are wholly immune from them. Management of risks begins with their recognition.

Costs and benefits

The High Court was established in 1903 with three justices: Chief Justice Sir Samuel Griffith and Justices Sir Edmund Barton and Richard O'Connor. The early practice was for the judgment of the court to be reserved after the hearing of a case, for the justices to prepare their individual reasons for judgment separately, and for those separate reasons for judgment to be read out by their authors in order of seniority in open court on the day of delivery of the judgment. The practice meant that, at least in theory, it could happen that the first time one justice came to know of the reasons of another was when he heard them read out on the day he was to deliver his own. In a foreword, written in 1947, to a biography of Sir Edmund Barton, Sir Robert Menzies said, "[m]any times, I have reason to believe, Barton wrote separate reasons for judgment and then, on the Bench, having heard Griffith read his, put his own away, and said, "I concur"."[45]

Sir Robert continued:[46]

> The modern passion ... for the writing of long independent judgments, even though they concur in the result, had no appeal for Barton. He knew that a multiplicity of reasons sometimes obscures the result and makes it exceedingly difficult to discover the real point of decision. There is among many members of the legal profession a strong feeling, which I share, that the final court of appeal would add to the certainty and clarity of the law by reducing the present duplication and re-duplication of reasons. It may not, perhaps, be desirable to go the whole distance and have one judgment only ... But it is certainly true that Barton in his day contributed in many cases to the intelligibility of the result arrived at by the High Court by pocketing his own reasons for judgment and subscribing to others which followed substantially the same lines.

Whether Menzies accurately recounted the practice of Barton can be put to one side.[47] Relevant, for present purposes, are the suggestion and the commendation of the practice by Menzies,

43 See eg K Llewellyn, *The common law tradition: deciding appeals*, W S Hein, 1996, at pp 30–31; Sunstein, *Why societies need dissent*, above n 40, pp 166–182.

44 See eg C Sunstein, D Schkade and L Ellman, "Ideological voting on Federal Courts of Appeals: a preliminary investigation" (2004) 90 *Virginia Law Review* 301; C Sunstein et al, *Are judges political? An empirical analysis of the federal judiciary*, Brookings Institution Press, 2006, pp 63–78; L Epstein, W Landes and R Posner, *The behavior of federal judges: a theoretical and empirical study of rational choice*, Harvard University Press, 2013 especially ch 5; C Guthrie, J Rachlinski and A Wistrich, "Blinking on the bench: how judges decide cases" (2007) 93 *Cornell Law Review* 1.

45 J Reynolds, *Edmund Barton*, 3rd edn, Angus & Robertson, 1948 at p viii.

46 ibid.

47 Cf G Bolton, *Edmund Barton: the one man for the job*, Allen & Unwin, 2000 at pp 304–305.

which reflect the systemic benefits that flow from the members of an appellate court, who have arrived at a conclusion independently of each other, agreeing on the expression of common reasons for judgment where they are able to satisfy themselves that there is no substantial difference between their individual reasons for judgment. Reasons for judgment become precedents that form part of the law and it is better, where possible without materially compromising their quality, that they be short and clear. Barton's suggested practice of concurring with Griffith at a time after he had completed writing his own separate reasons for judgment is sufficient to demonstrate that a practice of agreement is not inherently incompatible with the maintenance of complete decisional independence. It is also sufficient to demonstrate that a practice that promotes decisional independence can come at a cost. If he adopted the practice recounted by Menzies, the cost of Barton's independence was the time he spent writing his own separate reasons for judgment to a standard where they were ready for delivery, only to throw them away.

Once it is accepted that a practice of agreement is not inherently incompatible with the maintenance of decisional independence necessary to ensure the quality of collective decision-making, the question becomes one of whether decisional independence can be maintained at a lower cost.

It is here important to recognise that the conscientious performance of what Kitto described as the duty of a judge to decide "correctly if he can"[48] can give rise to a range of outcomes depending on the difficulty of the question and on the time the judge has in which to make up his mind. When asked, as an experienced legal practitioner, to give my opinion on a difficult legal question, I would sometimes give a client a choice. I would say:

> You can pay me to think about this question for a day and I will give you an answer with 90 per cent confidence. You can pay me to think about this question for a week and I will give you an answer with 95 per cent confidence. I cannot do better than 95 per cent. You choose.

The client — even the most sophisticated and well-resourced client — would invariably choose to pay me for a day. I would reason my way through the problem to the best of my ability for a day. I would then give a qualified answer.

Having read Kahneman's *Thinking, Fast and Slow*,[49] I now recognise two things about my former practice. One is that, like most humans and almost all professionals, I equated my subjective confidence in my ability to arrive at a correct decision with the objective probability of me arriving at a correct answer. Almost certainly, I over-estimated my own ability. The percentages I gave should have been lower. To make it easy to tie into the worked examples of Condorcet's jury theorem I gave earlier, let's say that the objective probability of me arriving at a correct answer after thinking for a day should, realistically, have been 80%, and that the objective probability of me arriving at a correct answer after thinking for a week should have been 90%. The other is that I was implicitly recognising the essential difference in

48 Kitto, above n 1, 793.
49 Kahneman, above n 41.

reliability between "fast thinking" (which experience often allows to be undertaken rather quickly), carrying a higher risk of error, and "slow thinking" (which can only ever be undertaken laboriously), carrying a lower risk of error. Why fast thinking is possible with experience is because we are able to recognise standard patterns in problems we habitually encounter. Those standard patterns trigger information, stored in our memories, about standard solutions.[50] Further reflection may well reveal the standard pattern and standard solution to be inadequate to provide a particular solution to a particular problem. Bringing the same honest, earnest and independent analysis to the same problem, we can often give an answer that is likely to be correct after we have thought about the problem for a short time, or give an answer that is more likely to be correct after we have thought about the problem for a much longer time.

The critical point, for present purposes, is that, taking the need for each member of a multi-member court to reason independently to a judgment as given, a judgment that has the requisite independence can be formed relatively quickly, or it can be formed relatively slowly. A quicker judgment can still have a probability of correctness that is, for many purposes, acceptable. A slower judgment brings a higher probability of correctness, but at a higher cost. Given that the time each member has to engage in independent reasoning must be finite, there is an inevitable trade-off between the number of cases the court can decide and the probability that the court will decide those cases correctly.

The point can be illustrated with reference to worked examples of Condorcet's jury theorem set out earlier. Assume that I bring to my work as an appellate judge the same industry and acuity that I brought to my work as a legal practitioner. Assume other appellate judges do the same. Assume, for the sake of simplicity, that the problems we adjudicate are no more or less difficult than the problems on which I formerly opined. Assume also for the sake of simplicity that we each take four weeks annual leave a year, do not work weekends, and do nothing on work days except think and write about our judgments. Reasoning independently, and doing our very best in every case to get it right in the time available, we could each judge 48 cases a year, each with 90% individual probability of being correct, or we could each judge in 240 cases a year, each with 80% individual probability of being correct. Sitting in courts of, say, three members, we could therefore each participate in judging 48 cases a year, each with 97% probability of reaching a correct decision, or we could participate in judging 240 cases a year, each with 89% probability of reaching a correct decision. Alternatively, sitting in courts of, say, seven, we could each participate in judging 48 cases a year each with 99.9% probability of reaching a correct decision, or we could each participate in judging 240 cases a year each with 96% probability of reaching a correct decision. Those are the outer parameters. There are endless permutations and gradations in between. You choose.

Your choice might well vary with where a particular court sits within the appellate hierarchy. It was said some time ago in England that the function of a trial judge was to be quick, courteous and wrong. It was immediately added that this did not mean that the function of the Court of Appeal was to be slow, rude and right, for the Court of Appeal would then be usurping the

50 See Kahneman, above n 41, pp 236–237.

function of the House of Lords.[51] It was a joke. But like many jokes, it contained an insight. A two-tier system of appellate review can tolerate a greater margin of error at the level of an intermediate appellate court than it can at the level of the court of final appeal.

An intermediate court of appeal typically has very little control over its case load. In meeting that case load, the court needs, inevitably, to balance the risk of error against the time each member can realistically spend independently reasoning to a conclusion. A typical approach in three-member intermediate courts of appeal, in Australia and elsewhere, is for one member to be allocated to spend longer considering and preparing reasons for judgment in a case, in the expectation of the other two members each independently spending shorter periods, unless in those shorter periods they find themselves provisionally inclined to disagree, in which case they will likewise spend longer considering and preparing their own separate reasons for judgment. There is no reason to think that adherence to the typical approach fails to achieve an appropriate balance in typical cases. Using the assumption made earlier for the purpose of illustrating the relativities, allocating one member always to reason slowly gives the court, voting by majority, 93% probability of reaching a correct decision — better than the probability of 89% if all judges reasoned quickly, and not greatly below the probability of 97% if all judges reasoned slowly.

A court of final appeal, on the other hand, typically has a very high level of control over its case load, and typically chooses to hear and determine those cases in which it is able to conclude that its judgment will be likely to contribute systemically to the interests of justice. A court of final appeal will therefore rarely, if ever, be justified in compromising the probability of its judgments being correct. What is the point of a court of final appeal choosing to hear appeals so as to give its own answer to legal questions already answered by intermediate courts of appeal, unless the court of final appeal can ensure that the answers it gives by majority will be the best answers the court can give? A court of final appeal cannot ensure that the answers given by a majority of its members will be the best answers the court can give, except by ensuring that its members consider, and have sufficient time each to consider, those questions each to the best of his or her individual ability. If, having reasoned independently to the same conclusion, they are able to put immaterial differences aside and agree on a common form of expression of those reasons, then the systemic benefits can be expected ordinarily to outweigh the costs of doing so.

Some raw statistics perhaps provide tentative support for a broad observation that final courts of appeal do tend, in practice, to allow their individual members time to get it right. The High Court (which has seven members) now typically gives judgment in about 60 appeals each year, against the background of about 500 applications for special leave to appeal from the judgments of intermediate appellate courts.[52] In 2012, the Supreme Court of the United Kingdom (which has 12 members) gave judgment in 85 appeals, against the background of about 250 broadly

51 See Lord Justice Asquith, "Some aspects of the work of the Court of Appeal" (1950) 1 *Journal of the Society of Public Teachers of Law* 350.

52 High Court of Australia, *Annual Report 2011–2012*, 2012, at p 13.
Note: In 2019–2020, the High Court heard 55 appeals and 455 special leave applications were filed: High Court of Australia, *Annual Report 2019–2020*, 2020, at p 20 at https://cdn.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2019-20.pdf, accessed 5 May 2021.

equivalent applications.[53] In the same year, the Supreme Court of Canada (which has nine members) gave judgment in 75 reserved appeals against the background of about 560 broadly equivalent applications,[54] and the Supreme Court of the United States (which also has nine members) gave signed opinions in 73 appeals against the background of over 7,500 broadly equivalent applications.[55] There are marked differences in the numbers of applications to appeal. There are, in contrast, marked similarities in the numbers of judgments. The contrast suggests that the number of appeals determined by courts of final appeal correlates less with demand for authoritative answers to legal questions already answered by intermediate courts of appeal than with the time needed for members of courts of final appeal each to reason their way to giving their best answers.

Conclusion

The High Court, having been established in 1903 with three Justices, had its membership increased to five in 1906, with the appointment of Sir Isaac Isaacs and Henry Bournes Higgins, and from five to seven in 1913. Justice Higgins died in office in 1929. His contribution to the work of the High Court was celebrated in a ceremonial sitting held just a few weeks after he died. Justice Isaacs said of him then:[56]

> His was a thoroughly independent mind. He sought his own solution of every problem that was brought before him, and, having reached his conclusion and considered it right, it mattered not to him whether it found favour or failed to find favour in the eyes of others. If it could be supported, well and good; but, if not, he always had the supreme consciousness of doing his duty as he saw it. He always seemed to me to illustrate in a marked manner what was once said by a great Chief Justice of Victoria (Chief Justice Higinbotham), that the responsibility of a Judge is not do what is right, but to do what he believes to be right.

Chief Justice Higinbotham spoke of judicial independence. Justice Higgins exemplified it. Condorcet's jury theorem suggests that if each member of a multi-member appellate court follows the example of Higgins J so as to do what he or she independently believes, on adequate reflection, to be right, the court as a whole will be more likely to do what is right.

Kitto emphasised the importance of the writing of reasons for judgment to the individual reflective process. Writing reasons for judgment involves very slow thinking. It has costs. It also has great systemic benefits.

53 Supreme Court of the United Kingdom, *The Supreme Court Annual Report and Accounts 2011–2012*, 2012, at pp 22–24.
Note: The Supreme Court heard 81 appeals and delivered 54 judgments between 1 April 2019 and 31 March 2020. The number of applications for permission to appeal determined by the justices was 238: at www.supremecourt.uk/news/uk-supreme-courts-2019-20-annual-report-and-accounts-published.html, accessed 5 May 2021.

54 Supreme Court of Canada, *Statistics 2002–2012*, 2013, at p 4.
Note: For a statistical summary from 2010 to 2020, see www.scc-csc.ca/case-dossier/stat/sum-som-2020-eng.aspx, accessed 5 May 2021.

55 Chief Justice Roberts, *Chief Justice's Year-End Report on the Federal Judiciary*, 2013, p 12.
Note: For the 2020 Year-End Report on the Federal Judiciary, see www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf, accessed 5 May 2021.

56 Justice Isaacs, "The late Mr Justice Higgins" (1928) 41 CLR.

Why write judgments? Focusing on the position of an individual member of a multi-member appellate court and restating in quantitative terms the qualitative answer Kitto gave 40 years ago: to maximise the probability that the court as an institution will give the best of possible judgments.

Adequate, sufficient and excessive reasons*

The Honourable Justice M Weinberg AO†

There is an ongoing debate whether a failure on the part of a decision-maker to provide reasons should be regarded as establishing a breach of procedural fairness, or some other ground of judicial review. The author examines the justification for giving reasons in judgments and defines "adequate" or "sufficient" reasons. The duty to give reasons varies, and while magistrates are obliged to give reasons for what they do, they are not expected to go into matters in anything like the detail that would be expected from judges in the higher courts when delivering reasons for judgment; whereas in appellate judgments the failure to give sufficient reasons has been considered as a ground of appeal.

It is said that Lord Mansfield once advised a businessman, who had recently been appointed as one of the King's Justices, that he should only ever give judgments (which would probably be right) and never give reasons (which would almost certainly be wrong).

Judges give reasons in almost every case. The giving of reasons is a normal incident of the judicial process.[1] The obligation to explain how, and why, a particular decision has been reached stems from the common law. It has been suggested that this duty has a constitutional dimension as well.[2]

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* Extensive references to this article have been included in *The Guide for the Magistrate in the Commonwealth: Fundamental Values and Recommended Practices*, 4th edn, Commonwealth Magistrates' and Judges' Association, August 2021, Ch 9. Published with the kind permission of the author Justice Weinberg. The Guide can be accessed at www.cmja.org/wp/wp-content/uploads/A-Guide-For-the-Magistrate-Final-August-2021.pdf.

† Former Judge, Court of Appeal, Supreme Court of Victoria. The author acknowledges the assistance of his Associate, Emily Brott, in the preparation of this paper. The author's opinions expressed in this paper are his own. They are not to be taken as reflecting the views of any other member of the Court of Appeal.

1 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 ("*Osmond*").

2 *Wainohu v NSW* (2011) 243 CLR 181. In *Wainohu*, legislation which empowered Supreme Court judges to make specific declarations and decisions, but included a provision stating that any judge making such an order was not required to provide reasons, was held to be invalid. The exemption from the duty to give reasons was repugnant to institutional integrity and incompatible with the exercise of judicial power. At the same time it was recognised that not every judicial order need be accompanied by reasons.

As a matter of sound practice, administrators usually give reasons. However, unlike judges, they are only obliged to do so when statute so demands.[3]

Complaints about the failure to give any, or any adequate, reasons have become more common in recent years. As I hope to demonstrate, the law in this area has grown rapidly. There is also a significant body of legal writing on this topic.

The justification for giving reasons

Plainly, there are a number of justifications for requiring the provision of reasons.

In the case of judicial review, reasons enable a reviewing court to be satisfied that the decision-maker took into account all matters that he or she was required to consider, and did not have regard to extraneous material. Reasons also enable the reviewing court to determine whether any other form of jurisdictional error has been demonstrated.

There is an ongoing debate, amongst administrative lawyers, as to whether a failure on the part of a decision-maker to provide reasons when asked to do so, should of itself be regarded as establishing a breach of procedural fairness, or some other ground of judicial review.

In *Osmond v Public Service Board of NSW*,[4] Kirby P, in the NSW Court of Appeal, held that there was a general common law duty to give reasons. That duty existed irrespective of whether the decision was judicial or administrative in character. His Honour emphasised that the duty existed whether or not the legislature had chosen to impose such an obligation.

President Kirby explained the benefits of a duty to provide reasons.[5] First, it enabled the recipient to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. Second, it answered the frequently voiced complaint that good and effective government could not win support or legitimacy unless it was accountable to those whose rights it affected. Third, the prospect of public scrutiny would provide officials with a disincentive to act arbitrarily. Fourth, the discipline of giving reasons could make decision-makers more careful, and rational. Finally, the provision of reasons could provide guidance for future cases.

It is fair to say that the merits of giving reasons have never seriously been doubted. That is so even when one factors in the additional burden that this task imposes on decision-makers. Obviously, the need to give reasons can result in significant additional cost and delay.

Of course, statutory obligations to give reasons have been imposed upon administrators for many years.[6] At the same time, it must be recognised that Kirby P's approach to the duty to give reasons was specifically rejected, on appeal, by the High Court.[7] There it was held that

3 *Osmond* (1986) 159 CLR 656.
4 (1984) 3 NSWLR 447.
5 ibid at 467–70.
6 See for example, at the Commonwealth level, s 28(1) of the *Administrative Appeals Tribunal Act 1975* (Cth); s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In Victoria, the same general duty is cast upon decision-makers by s 8 of the *Administrative Law Act 1978*. In NSW, see s 52 *Administrative Decisions Review Act 1997*.
7 *Osmond* (1986) 159 CLR 656.

the introduction of such a duty was a matter for the legislature, balancing all competing policy considerations, and not to be effected by the "blunt undiscriminating" approach of judicial innovation.[8]

Why do judges give reasons? In my opinion, there is no better explanation than that given by McHugh JA (as his Honour then was) in *Soulemezis v Dudley Holdings*:[9]

> The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice": "The Writing of Judgments" (1948) 26 *Can Bar Rev* at 491. Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said ("In Defence of Judicial Candor" (1987) 100 *Harv L Rev* 731 at 737):
>
>> "A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."
>
> Thirdly, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases: Taggart "Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases" (1983) 33 *University of Toronto Law Journal* 1 at 3–4. Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.

There is a difference, it seems to me, between what the law expects by way of reasons from administrative decision-makers, and the obligation imposed upon judicial officers.

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[10] the High Court cited with approval a passage from a judgment of the Full Court of the Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[11] to the effect that, when dealing with the reasons of an administrative decision-maker, these were "not to be construed minutely and finely with an eye keenly attuned to the perception of error".[12]

I have not seen the *Wu Shan Liang* admonition applied to judicial reasoning. There is no reason in principle why, in some cases, that should not be done.

The balance of this paper will focus primarily upon the obligations that rest upon courts, in relation to the provision of reasons, rather than any lesser obligations that rest upon tribunals exercising quasi-judicial functions. However, some of what I have to say may be applicable entirely across the board.

8 ibid at 669–70 (Gibbs CJ).
9 (1987) 10 NSWLR 247 at 279 ("*Soulemezis*"). Quoted by A Goldberg, "When are reasons for decision considered inadequate?" (2000) 24 *Australian Institute of Administrative Law Forum* 1 at http://classic.austlii.edu.au/au/journals/AIAdminLawF/2000/2.pdf, accessed 13 May 2021.
10 (1996) 185 CLR 259.
11 (1993) 43 FCR 280.
12 ibid at 287. See also *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707 at 708 (Lockhart J).

What are adequate or sufficient reasons?

Regrettably, this question does not admit of a simple answer. It is always a matter of degree. Judges, acting reasonably, may have quite different views on this subject.[13]

In *Soulemezis*, two members of the NSW Court of Appeal expressed quite different views as to how much detail had to be provided if a judge's reasons were to be regarded as adequate. Kirby P, who dissented, held that both the grounds which led the judge to a conclusion on disputed factual questions, and the findings on the principal contested issues had to be set out, in full. Mahoney JA took a more flexible approach. His Honour observed that the law did not require a judge to make an express finding in respect of every fact leading to, or relevant to, that judge's final conclusion of fact. Nor did a judge have to reason, and be seen to reason, from one fact to the next, along the chain of inference leading to the ultimate conclusion.

What seems to be clear is that the bald statement of an ultimate conclusion, even by reference to the evidence said to support it, is unlikely, in many cases, to be sufficient. There must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed.

Reasons may be lengthy, and even prolix, without being adequate.[14] A global, or general pronouncement, on the part of a judge that he or she has considered all the relevant evidence and reached a conclusion based thereon is not an adequate statement of reasons. Nor is it normally sufficient to set out the arguments of both sides and state simply that the contentions of one party are to be preferred to those of the other.

A judge, though obliged to give reasons, is not required to address every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

Plainly, judges are not expected to deal specifically with every consideration that passes through their minds as they proceed to their conclusion. However, any submission that is worthy of serious consideration should, ordinarily, receive some attention in the reasons provided.

One area that often gives rise to difficulty, when it comes to preparing reasons for judgment, is the manner in which findings as to credibility should be expressed. How much detail is required? To what extent should the judge explain precisely why he or she prefers the evidence of one witness to that given by another? This problem can be exacerbated when it comes to dealing with conflicting expert evidence, as often occurs. It will usually be necessary, in such cases, to state not merely whose evidence the judge accepts, but also to explain, in appropriate detail, why the judge reached that conclusion.

In that regard, judges should endeavour to recognise and give effect to the importance to the parties, to the public, and to appellate courts of providing adequate reasons. As I have previously

13 See for example *Ta v Thompson*(2013) 46 VR 10 where the court was divided on the question of whether adequate reasons had been provided by a magistrate who recorded a conviction for possession of heroin.

14 See *Dornan v Riordan* (1990) 24 FCR 564 where a report of 178 pages was held not to disclose the relevant Tribunal's reasoning process sufficiently to avoid an error of law.

suggested, administrative decisions are generally afforded greater latitude. However, even those decisions should meet the basic requirements of procedural fairness associated with the need to explain why a particular result has been reached.

In *Telstra Corporation Ltd v Arden*,[15] Burchett J referred with approval to *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* in which it was said that "the extent to which a court must go in giving reasons is incapable of precise definition".[16] His Honour reiterated a view that he had previously expressed to the effect that reasons given by administrative decision-makers should not be read pedantically, but sensibly.[17] He added that provided the reasons expose "the logic" of the decision, and contain findings on those matters of fact essential to that logic, they would normally be adequate.[18]

If it is not possible to understand from the reasons given how the conclusion was reached then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion.

If certain evidence presented was relied upon, that fact, and the reasons why it was so relied upon, should be stated. Merely summarising the evidence will not be sufficient.

If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which the decision below can be upheld.

"Horses for courses"

The duty to give reasons is, of course, an integral part of any judge's task in deciding a case. I would add that it is also an important part of any judge's task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point.[19]

The content of that duty will, of course, vary. The obligation that rests upon a busy magistrate, hearing perhaps dozens of summary matters in a day, will obviously be less onerous than that which rests upon a judge in one of the higher courts.

Summary justice — Magistrates' Courts and VCAT

Magistrates' Courts and the Victorian Civil and Administrative Tribunal (VCAT) deal, between them, with the overwhelming bulk of all disputes that are institutionally resolved in Victoria.

15 (1994) 20 AAR 285.
16 (1983) 3 NSWLR 378 at 381 (Hutley JA).
17 *Dodds v Comcare Australia* (1993) 31 ALD 690 at 691.
18 ibid.
19 Rulings given upon points of evidence, in the course of a trial, are normally accompanied by the briefest of reasons. Sometimes, common sense dictates that nothing need be said when the objection taken is obviously frivolous, or, it is plain that the evidence is not admissible. However, in any case in which there is a contestable issue as to whether a particular piece of evidence should be received, the judge should state, albeit succinctly, the basis of the ruling.

VCAT is not a court,[20] but it exercises powers that are, in many respects, judicial in nature. Its members are subject to specific statutory duties, regarding the provision of reasons, under the Victorian *Civil and Administrative Tribunal Act 1998*.[21]

Magistrates generally give only the most cursory of reasons, particularly in summary criminal matters.[22] This is perhaps, in part, because appeals to the County Court from their decisions in such matters are by way of re-hearing de novo. It is obvious that reasons are likely to be of less importance in such circumstances. An appeal lies to the Supreme Court from a magistrate's decision, but only on a point or points of law. While the prerogative writs are available, the conditions under which they will be granted are so narrowly circumscribed as to make their use a rare occurrence.

A useful illustration of the extent of the duty to provide reasons, at the Magistrates' Court level (and, it might be said, at the level of the County Court hearing an appeal de novo), may be found in the decision of the Court of Appeal in *Ta v Thompson*.[23]

In that case the appellant was convicted of possession of heroin in the Magistrates' Court. His conviction was upheld on appeal to the County Court. The facts were as follows. The police located 0.1g of heroin in the bedroom of a house that was solely occupied by the appellant. The heroin was found in a wardrobe. There was evidence that some days earlier, he had hosted a New Year's party. The appellant claimed that he knew nothing about the heroin, and that it must have been left there by someone else.

The County Court judge, who heard the appeal, gave her decision immediately after the close of submissions. She said that she had heard the evidence about a party at the appellant's house, and other matters surrounding the state of the premises. She added that, with regard to that matter, she had no other evidence upon which to rely apart from that given by the appellant. She said that she did not accept his evidence and, accordingly, found the charge proved.

The appellant brought proceedings by way of judicial review seeking orders in the nature of certiorari. He submitted, inter alia, that the judge had failed to provide adequate reasons to explain her decision, and, in particular, why she had rejected his account. The application for review was dismissed by Whelan J (as his Honour then was).

The appellant then appealed. Justice Osborn (with whom Beach JA agreed) analysed the County Court judge's treatment of the appellant's evidence in some detail. His Honour noted that the judge had observed that there was no evidence corroborating his assertion that there had been a party, on New Year's Eve, "at which people were sleeping all over the place". The appellant, being the occupier of premises in which drugs were found, bore the onus of proving that he

20 *Director of Housing v Sudi* (2011) 33 VR 559.
21 s 46(2).
22 They are not to be criticised for doing so. Where, for example, a magistrate is asked to impose the minimum period of disqualification and fine for a 0.05 offence, and is willing to accede to that request, it is hardly necessary to say anything further.
23 (2013) 46 VR 10 ("*Ta*").

had no knowledge of their presence. The case therefore depended upon the judge accepting his evidence. The judge had found him to be a witness whose evidence was not credible. Little more needed to be said.

Justice Osborn pointed out that there were major hurdles to be overcome if the appeal were to succeed. In the first place, it would have to be shown that the County Court judge's reasons were so inadequate as to give rise to an error of law. Even that would not be sufficient. Error of law on its own, falling short of jurisdictional error, would not justify the grant of certiorari.

His Honour noted that there was some uncertainty in the authorities as to whether, in the absence of a right of appeal, the duty to give reasons was as extensive as it might otherwise be.[24] However, he was in no doubt that even though no appeal lay from the County Court judge's determination, it was a final decision of the kind for which reasons had to be given.

In Osborn JA's opinion, the reasons did not have to be particularly extensive. All that was required was that the judge state the grounds for her decision. That was essential in order to satisfy the various purposes for which reasons were to be provided, as laid down in *Fletcher Constructions Aus Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)*.[25]

His Honour found that there were good reasons for concluding:[26]

> that the obligation to give reasons did not go as far as that which is imposed where a decision is subject to an appeal by way of rehearing but was limited to that ordinarily imposed when a decision is subject to an appeal on questions of law only.

Justice Osborn referred to *Soulemezis*, and to *Huntsman Chemical Co Aus Ltd v International Pools Aus Pty Ltd*,[27] in which the NSW Court of Appeal re-affirmed the principles expounded in the former case. He said that if the approach taken in *Soulemezis* was to be followed, then the County Court judge's reasons had to explain the grounds for her conclusion in sufficient detail to enable the Court of Appeal "to see the grounds upon which it was based but did not require detailed reasoning as to the evidence".[28]

Justice Osborn concluded that Whelan J had been correct in holding that:[29]

> Where there is no right of appeal in relation to factual findings, the requirement for the provision of reasons as to factual findings is less rigorous. This is such a case.

His Honour said that he did not accept that:[30]

> it must be inferred that her Honour's decision rested upon further grounds which she did not identify. A conclusion that a decision maker is not satisfied to the relevant standard may not bear any or any material elaboration.

24 *Perkins v County Court of Victoria* (2000) 2 VR 246 at [55]–[56].
25 (2002) 6 VR 1 at [101].
26 *Ta*(2013) 46 VR 10 at [34].
27 (1995) 36 NSWLR 242.
28 *Ta*at [42].
29 *Ta v Thompson* [2012] VSC 446 at [30].
30 *Ta*at [51].

Justice Osborn referred, with apparent approval, to Mahoney JA's comment in *Soulemezis* that:[31]

> The weight which a judge will give to the evidence of a witness will often be not capable of rationalisation beyond the statement: having heard him, I am not satisfied that I should accept what he says.

Justice Osborn's judgment in *Ta*seems to have been influenced to some degree by the fact that the appellant bore the onus of satisfying the court that the heroin found in his wardrobe was not his, and that he knew nothing about it.

In other words, Osborn JA may have come to a different conclusion regarding the adequacy of the reasons given in *Ta*but for the two factors that stood out in that case. First, the absence of any appeal from the County Court on a hearing de novo, and second, the fact that the appellant bore the onus of establishing his innocence. Put simply, Osborn JA found that the County Court judge had not been persuaded by the appellant's evidence and it was sufficient that "her reasons made clear that she was not so persuaded".[32]

Justice Priest delivered a strongly worded dissent.[33] His Honour noted that it had been recognised, specifically with respect to the County Court exercising its appellate jurisdiction, that a judge is not relieved of the obligation to give reasons simply because of the absence of a further right of appeal. As Priest JA noted, this very question had arisen for consideration in *R v Arnold*[34] where Phillips JA observed:[35]

> One would hope that such a failure on the part of an appellate judge to give any reasons whatever when announcing his determination is an occurrence which, if not unique, is very uncommon. It has frequently been emphasised how important is the giving of reasons to the process of judicial decision-making: see, for example, *De Iacovo v Lacanale* [1957] VR 553 at 557–9 (where the earlier cases are recounted); *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 380–2 (where again earlier authorities are recounted); *Palmer v Clarke* (1989) 19 NSWLR 158 (where the nature of "the common law duty" imposed upon a judge was emphasised); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, especially at 278–81 per McHugh JA, and *Sun Alliance Insurance Ltd. v Massoud* [1989] VR 8 at 19–20 per Gray J. In stating the relevant principles, it is always accepted that there is no universal obligation on the decision-maker, even though it be a court, to give reasons (for which proposition *Brittingham v Williams* [1932] VLR 237 at 239 is commonly cited) and what is sufficient by way of reasons in a given case will always depend upon the circumstances (of which *Wightman v Johnston* [1995] 2 VR 637 is a recent example). In *Soulemezis* at 280, McHugh JA (as he then was) said that "the extent of the duty to give reasons is related 'to the function to be served by the giving of reasons'" (quoting Mahoney JA in *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386). McHugh JA also pointed out (as did Gray J in *Massoud*) that the obligation to give reasons could no longer be seen as dependent upon the existence of a right of appeal: as to which see *Tatmar Pastoral* at 386 and *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666–7 per

31 (1987) 10 NSWLR 247 at 273.
32 *Ta*at [62].
33 ibid [64]–[81].
34 [1999] 1 VR 179. See also *Munro v Brack* (2000) 112 A Crim R 398 at [31]–[34] (Beach J).
35 [1999] 1 VR 179 at [8].

> Gibbs CJ (although of course the hearing of an appeal has often provided the occasion for pointing out the difficulties created by the absence of reasons below). The duty to give reasons, qualified though it is, can be recognised now as "an incident of the judicial process".

In explaining why he regarded the County Court judge's reasons as inadequate, even to the point of justifying the grant of certiorari, Priest JA went on to say:[36]

> If the judge's rejection of the appellant's evidence turned on credit, she did not say so explicitly. There is nothing in her reasons to suggest that she based her failure to accept the appellant's word on an assessment of demeanour. And save to say that she probably rejected his evidence based on one or other (or a combination) of the possibilities set out above, the judge's reasons are enigmatic. The appellant was entitled to know "explicitly" the path of reasoning which led to the order dismissing his appeal. He did not get that.

A case which bears some similarity to *Ta*is the well-known decision of the Court of Appeal in *Perkins v County Court of Victoria*.[37] There the appellant had been convicted in the Magistrates' Court of various summary offences. His appeal to the County Court was only partly successful. He then sought judicial review. He failed before Harper J, and appealed from that decision.

In dismissing the appeal, Buchanan JA said:[38]

> Want of reasons may amount to an error of law where the absence of reasons would frustrate a right of appeal, although even where a right of appeal exists, the nature of the decision and the circumstances of the case may require no more than a brief ruling, and, where an appeal is de novo, an absence of reasons for the decision below can have no effect. Moreover, the provision of reasons for decisions affecting persons' rights and liabilities is usually desirable, serving objectives such as candour in decision-making, the accountability of decision-makers, the reconciliation of parties to the results of litigation and promoting the drawing of conclusions which are rational and soundly based on legal principles. Nevertheless, the general desirability of reasons, and in certain cases their necessity, in my view are not sufficient considerations to found an all-embracing principle that failure to state reasons or adequate reasons for a judicial decision constitutes an error of law vitiating the decision.

His Honour continued:[39]

> The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.

Justice Buchanan found that the County Court judge had made clear the grounds for his decision. Therefore, while reasonable minds might differ as to whether that finding was correct, the judge had expressed adequately the basis of his finding.

36 *Ta*(2013) 46 VR 10 at [78] (citations omitted).
37 (2000) 2 VR 246 ("*Perkins*").
38 ibid at [56].
39 ibid at [64].

The reasoning of the Court of Appeal in both *Ta*and *Perkins* speaks for itself. Although magistrates (and County Court judges hearing appeals de novo) are obliged to give reasons for what they do, they are not expected to go into matters in anything like the detail that would be expected from judges in the higher courts when delivering reasons for judgment.

Trial judges

Nothing like the same latitude will be extended by appellate courts to trial judges who hear and determine civil cases.

The extent of the obligation to give reasons at trial level is largely to be gauged from an analysis of appellate judgments where the failure to give sufficient reasons has been considered as a ground of appeal.

There is now a significant and growing body of case law dealing with adequacy of reasons. A number of these cases turn upon the serious injury provisions of the *Accident Compensation Act 1985* and its interstate equivalents.

Before dealing with the case law, a brief excursus into history may be of interest. In *Swinburne v David Syme & Co*, an early libel case initiated by the Victorian Minister in charge of the Department of Water Supply, Madden CJ said that although a judge should give his reasons "he is not bound to do so".[40] That view would not command support today.

In 1932, Sir Leo Cussen, in delivering the judgment of the Full Court in *Brittingham v Williams*,[41] put the matter more in accord with current thinking:[42]

> We must not be taken as laying down a universal rule that a judge is bound upon request to give reasons for his decision. A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable.

NSW judges have traditionally been somewhat more inclined to insist upon the provision of adequate reasons in every case. Sir Frederick Jordan, in particular, emphasised the need for all courts, even those exercising summary jurisdiction, to provide reasons. He accepted, of course, that the reasons need not be elaborately stated.

In *Carlson v The King*,[43] Sir Frederick observed that reasons should contain not merely a summary of the evidence and a statement of the decision reached but should also disclose the actual process of reasoning adopted in arriving at the decision.

40 [1909] VLR 550, quoted in *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 19.
41 [1932] VLR 237.
42 ibid at 239.
43 (1947) 64 WN (NSW) 65.

The decision of the NSW Court of Appeal in *Pettitt v Dunkley*[44] provides a useful illustration of the development of principle in this area. In an action for negligence, where the plaintiff had been struck by a motor vehicle, a District Court Judge found for the defendant, saying only this:

> It would not help in view of this lady's condition of health, psychomatic [sic] or otherwise, for me to give any other reasons. I simply enter my verdict. I return a verdict for the defendant.

The plaintiff appealed under s 142 of the *District Courts Act 1912* (NSW) (repealed) which gave a right of appeal where the appellant was aggrieved "on a point of law".

Justice Asprey, after referring to previous authority, said:[45]

> for a magistrate to content himself saying "I have reached my decision after having considered all of the matters which the statute requires me to consider" is not a proper fulfilment of the obligation which rests upon him as a judicial officer to see that his reasons are "explicitly stated", to use the language of Sir Frederick Jordan...

His Honour continued:[46]

> where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.

Returning to the position in Victoria, in *Llewellyn v Reynolds*[47] the Full Court made it clear that where a judge rejected evidence which had not been challenged, and was not itself inherently improbable, without giving any reasons for having done so, that finding might be set aside.[48]

In *Sun Alliance Insurance v Massoud*,[49] the Full Court adopted much of Asprey JA's reasoning in *Pettit v Dunkley*. There, Gray J, expressed the opinion that "the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision".[50] While his Honour noted that the sufficiency of reasons would always

44 [1971] 1 NSWLR 376 at 380.
45 ibid at 381. See also *Lock v Gordon* [1966] VR 185 (O'Bryan J).
46 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382.
47 [1952] VLR 171.
48 See also *De Iacovo v Lacanale* [1957] VR 553 at 557–559.
49 [1989] VR 8.
50 ibid at 18.

depend on the particular circumstances of the case, he articulated two criteria where reasons would be inadequate: (1) where an appellate court is unable to ascertain the reasoning upon which the decision is based, and (2) where justice is not seen to have been done.[51]

Soulemezis remains the seminal case on the adequacy of reasons. An injured worker succeeded in gaining compensation in the District Court. However, the judge awarded her only limited benefits, terminating on a particular date. Thereafter she was deemed "fit for work". The date chosen was the date of a CAT scan report that was tendered in evidence. The plaintiff appealed that finding, arguing that she was still incapacitated after that date. She argued that there was no basis for the judge's finding, and that his Honour had failed to give adequate reasons for the decision reached.

The judgment of Mahoney JA, on appeal, is particularly instructive. In considering what reasons must be given, and what a judge does in writing a judgment, it is relevant to distinguish between the "essentials and the peripherals".[52] For example, where there is an appeal from his order, it is proper that the judge make apparent those matters which should be apparent if the right of appeal is to be exercised by the unsuccessful party and if the appellate court is to be able to do what, in the particular appeal, it should do.

Justice Mahoney was at pains to observe that a formulaic approach to judging was impossible. To require a judge to detail the various steps by which he reasoned to his conclusion was to mistake the nature of the reasoning process. In his Honour's opinion, the objection to what the judge had done, at first instance, was that he had not explained with sufficient clarity how the CAT scan could (and did) lead to the conclusion that, after that particular date, the worker's condition had changed.

Nonetheless, and despite the inadequacy of the reasons given, Mahoney JA dismissed the appeal. He concluded that any error on the part of the judge in that respect did not, in the particular circumstances of that case, give rise to a point of law.

Justice McHugh agreed with Mahoney JA that the appeal should be dismissed. His Honour considered that the adequacy of a judge's reasons will depend "on the importance of the point involved and its likely effect on the outcome of the case".[53] While the finding that the appellant was fit for work from the date of the CAT scan did involve a crucial fact, McHugh JA suggested that "great care need[ed] to be taken that dissatisfaction with the finding of fact d[id] not mislead the court into holding that the learned judge ha[d] failed to give his reasons for his finding".[54] Although the judge had not given any specific reasons for his finding, it could be inferred that he considered the plaintiff to be fit for work because the CAT scan did not reveal any abnormality. It was not to the point that that finding may itself have been incorrect.

51 ibid.
52 *Soulemezis* (1987) 10 NSWLR 247 at 272.
53 ibid at 279.
54 ibid at 281.

According to his Honour:[55]

> An erroneous or perverse finding of fact raises no question of law and cannot be challenged by way of appeal. What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in support of, his finding of fact. But that is enough in a case where no appeal lies against the finding of fact.

In further authority dealing with the adequacy of reasons, particularly in the context of serious injury cases in Victoria, it is worth considering first the decision of the Court of Appeal in *Franklin v Ubaldi Foods Pty Ltd*.[56] There the appellant had sustained a lower back injury during his employment as a chef. He had been lifting crates, and other items weighing between 10–25 kilograms. A County Court judge dismissed his application for compensation under the *Accident Compensation Act 1985*.

Justice Ashley considered the adequacy of the reasons given by the judge as then required by the relevant section of the Act. At that time, s 134AE provided that the reasons given by the court in deciding a serious injury application should not be "summary reasons but shall be detailed reasons which are as extensive and complete as the court would give on the trial of an action".[57]

His Honour referred to *Hunter v Transport Accident Commission*[58] where Nettle JA had said, in relation to an application under s 93(4)(d) of the *Transport Accident Act 1986*, that although the extent of the reasons required would depend upon the circumstances of the case, they should deal with the substantial points raised by the parties, include findings on material questions of fact, refer to the evidence or other material upon which those findings were based, and provide an intelligible explanation of the process of reasoning that had led the judge from the evidence to the findings, and from the findings to the ultimate conclusion.

Justice Ashley went on, in *Franklin*, to say that insofar as the judge may have rejected evidence or other material upon which a party relied, the judge should refer to that evidence or material and explain why it was rejected. While it was not incumbent upon the judge to deal with every argument and issue that may have arisen, where an argument was substantial or an issue significant, it should be addressed. Put simply, failure to expose the path of reasoning was itself an error of law.

Justice Ashley made clear that the mere recitation of evidence, followed by a statement of findings, without any explanation as to why the evidence was said to lead to the findings was "about as good as useless".[59]

55 ibid 282.
56 [2005] VSCA 317 ("*Franklin*").
57 Section 134AE was repealed by the *Justice Legislation Amendment (Miscellaneous) Act 2012*, but continued to have effect in relation to certain cases initiated prior to 1 January 2013 and not decided by that date.
58 [2005] VSCA 1 ("*Hunter*").
59 *Franklin* [2005] VSCA 317 at [37], quoting Nettle JA in *Hunter*, ibid, at [28].

To illustrate the requirements that had to be met in a case of the kind that confronted the court in *Franklin*, it should be noted that Ashley JA discussed seven shortfalls in the trial judge's reasons for rejecting the appellant's claim in that case. In brief, they were as follows:[60]

- the starting point of the appellant's case was that after hard work on 29 October 1999, his pre-existing symptoms got much worse. The judge never addressed whether he accepted or rejected the appellant's evidence as to the events on 29 October 1999;
- if the judge rejected the appellant's account, he did not provide any objective circumstances which gave it some support;
- simply to recount various medical histories and the appellant's response when faced with them in cross-examination, left their significance, as the judge perceived it, unexplained;
- if he rejected the appellant's account of events concerning 29 October 1999 for the reason that the appellant was not creditworthy, the judge made no finding on that;
- the judge wrongly concluded that the appellant had been made aware that unless he could demonstrate an injury after 20 October 1999, then his present application would fail. The evidence did not necessarily show this;
- the judge's statement that the plaintiff "chose to press on with employment and only after giving notice of resignation by letter dated 14 October, for the first time he consulted a doctor in respect of what he now describes as severe pain in his lower back" left very uncertain what the judge meant to convey. If he meant to convey that the appellant had made up an injury only after giving notice, then this would stand in opposition to the judge's conclusion that the appellant had indeed suffered a compensable lower back injury. If he meant something else, he did not say so; and
- if the judge thought that the appellant was un-creditworthy, certain objective evidence tending to the contrary required consideration.

The Court of Appeal has applied the principles laid down by Ashley JA in *Franklin* on a number of occasions.

For example, in *Alsco Pty Ltd v Mircevic*,[61] the trial judge dealt with a conflict between medical experts by placing greater weight on the evidence given by those witnesses whose opinion was tested in court. She rejected the evidence of two neurologists, and another acknowledged expert who had arrived at a different conclusion. The Court of Appeal concluded that the judge had provided sufficient justification, in her reasons for judgment, for having done so.

In *Meadows v Lichmore Pty Ltd*,[62] the plaintiff, whose work duties included repetitive and quick packing and unpacking, developed a pain syndrome or "functional overlay". The resultant pain and disability had both physical and psychological aspects. The trial judge accepted that the

60 *Franklin* [2005] VSCA 317 at [40]–[52].
61 [2013] VSCA 229.
62 [2013] VSCA 201.

pain and suffering consequences relied on did reach the "very considerable" level required, but was not satisfied that those consequences had an organic basis. The judge therefore dismissed the application for compensation.

The plaintiff appealed on a number of grounds, including that the judge had failed to provide adequate reasons for his decision. Acting Chief Justice Maxwell (with whom Robson and Dixon AJJA agreed) dismissed the appeal, finding that:[63]

- the trial judge had applied the correct legal test and his decision was well open on the evidence;
- it was not possible on the evidence to separate the physical from the psychological causes of the pain and disability from which the plaintiff was suffering (or at least it was open to the judge to conclude that they could not be separated); and
- the reasons given by the judge were entirely adequate.

In considering the adequacy of the reasons given, Maxwell ACJ held that the judge's reasons:[64]

> dealt with both the substance of the evidence of the medical practitioners relied on, and the strength and weaknesses of that evidence, in quite sufficient detail to enable [the plaintiff] to appreciate why the application had failed.

According to Maxwell ACJ, the conclusion arrived at by the trial judge was essentially quite straightforward. It was that the evidence did not allow the judge to be satisfied that the pain and suffering consequences which the plaintiff described were the result of the physical injury, rather than having been brought about by the functional overlay (or chronic pain syndrome) described in the medical reports. In the circumstances, and having regard to the body of evidence that suggested that the pain and disability was primarily due to psychological causes, that conclusion was open to the trial judge.

In *Wingfoot Australia Partners Pty Ltd v Kocak*,[65] the High Court turned its attention to the question of adequacy of reasons in cases of this kind. In 1996, the first respondent suffered an injury to his neck while at work. In 2009 he commenced two proceedings in the County Court. The first sought leave to bring proceedings for common law damages in respect of the injury and was, in effect, a serious injury application. The second sought a declaration of entitlement in respect of injury under the *Accident Compensation Act 1985*. This was in the nature of a statutory compensation application.

The statutory compensation application was sent to the Magistrates' Court. Three medical questions were referred to the medical panel for determination. The medical panel gave a certificate of opinion to the Magistrates' Court, along with a written statement of reasons for its opinion. After receiving the certificate, the Magistrates' Court made orders, by consent, which were expressed to "adopt" and "apply" the opinion, and to dismiss the statutory compensation application.

63 ibid at [5].
64 ibid at [39].
65 (2013) 252 CLR 480.

The serious injury application came on for hearing in the County Court. The employer foreshadowed a contention that the County Court was bound by the opinion of the medical panel. The worker applied to the Supreme Court for an order in the nature of certiorari, quashing the opinion of the medical panel on the ground that it had failed to give adequate reasons for its opinion. The application was dismissed by the primary judge. The Court of Appeal allowed an appeal and made the order sought.

On appeal to the High Court, one of the issues to be determined was whether the reasons given by the medical panel were, in fact, inadequate.

The High Court reversed the decision of the Court of Appeal. It said:[66]

> The Court of Appeal considered that a higher standard was required of a written statement of reasons given by a medical panel under s 68(2) of the Act. On the premise that Brown held that the opinion of a medical panel must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act, the Court of Appeal analogised the function of a medical panel forming its opinion on a medical question to the function of a judge deciding the same medical question. Accordingly, it then equated the standard of reasons required of a medical panel with the standard of reasons that would be required of a judge giving reasons for a final judgment after a trial of an action in a court. The application of that judicial standard in circumstances where an affected party had provided to the medical panel opinions of other medical practitioners and had sought in submissions to rely on those opinions, and where the opinion formed by the medical panel itself did not accord with those opinions, meant that "it was incumbent on the [P]anel to provide a comprehensible explanation for rejecting those expert medical opinions or, if it be the case, for preferring one or more other expert medical opinions over them". Rejection of the premise and the analogy, for reasons already stated, entails rejection of the conclusion that the higher standard is required. *A medical panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.*

It may be said that the task that confronts County Court judges faced with resolving serious injury applications is a daunting one. Appellate courts insist that adequate reasons be given for any decision reached, in circumstances where there is often a paucity of material upon which those reasons can be properly based. Usually, in such cases, it is the applicant alone who gives viva voce evidence and is cross-examined. It is rare for any of the medical experts to be called. In such circumstances, the reasons for decision will necessarily suffer from an inability on the part of the judge to see and hear the witnesses give their evidence, and be cross-examined. There will also be little time for reflection.[67] However, one thing is clear. The reasons must be such as to reveal (although in a particular case it may be by necessary inference) the path of reasoning which leads to the ultimate conclusion. If reasons fail in that regard, the losing party will not know why the case was lost, rights of appeal will be frustrated, and the consequence will be that the inadequacy gives rise to an error of law.

66 ibid at [56] (citations omitted) (emphasis added).
67 This very point was made by Ashley JA in *Franklin* [2005] VSCA 317 at [38].

When it comes to criminal cases, the requirement that judges give reasons takes on a completely different aspect. At least in Victoria, juries decide questions of guilt or innocence. Their reasons are, of course, inscrutable. Judges give reasons only in relation to rulings in the course of trials, and, importantly, in sentencing remarks.

With regard to reasons for sentence (and it might be said, sentencing judgments on appeal), it should be remembered that in *R v Lim*, Brooking JA lamented:[68]

> Nowadays, no appeal against sentence is complete without the citation of authority, and Mrs Hampel and Mr Tehan both rose to the occasion by referring us to a number of reported cases. I have not found it necessary to discuss any of them, although I venture to record with respectful concern the melancholy fact that in one of the cases relied on, *R v Downie & Dandy* (1998) 2 VR 517, it was found to be desirable, as an interim measure, to lay down nine large bundles of propositions as part of "the law on prevalence", which was said at 520 to await its Labeo. I note with apprehension that Labeo is the Roman jurist reputed to have written 400 books. Most appeals against sentence can and should be disposed of without the citation of authority. We must do what we can to strive for simplicity. The present case is no exception so far as authority is concerned.

If at all possible, rulings should be kept brief. Regrettably, in an age of ever-increasing complexity, particularly in trials involving sexual offences, there is often a great deal that must be said. Some evidentiary rulings, particularly in the field of tendency and coincidence evidence, require detailed analysis. Nonetheless, the judge who presides over a criminal trial is usually a great deal better off, in terms of the obligation to provide reasons, than his or her counterpart sitting as a judge alone in civil matters.

Intermediate appellate courts

The first thing to say is that these courts are principally concerned with the correction of error.[69] Unlike the High Court, which has broader responsibilities, they are not primarily tasked with the development of the common law, or even the exposition of high points of principle.

That is not to say that courts at this level do not, from time to time, contribute significantly to the development of legal doctrine. They are, of course, concerned to ensure that judgments of the lower courts correctly state the law as part of what might be termed "quality control". Their reasons may therefore need to explain the law for the benefit and guidance of lower courts.

68 [1998] VSCA 54 at [10]–[11] ("*Lim*").

69 *Crampton v The Queen* (2000) 206 CLR 161 at 217 (Hayne J). Even his Honour's statement that appeals are for the "correction of error" is not quite accurate. In sentence appeals for example, we often allow "error" to be perpetuated since we will not interfere with a sentence that we regard as inappropriate unless we are satisfied that it is "manifestly" excessive or inadequate. In other words, it must be "wholly" outside the range. The fact that we would have chosen a different sentence, and by implication, view the sentence imposed as too high or too low, is of no legal consequence. In that sense, the Court of Appeal does not correct error, in this area, unless the mistake made is egregious.

However, intermediate appellate courts have neither the time, nor the resources, to give every case that comes before them the treatment that, in a perfect world, it might merit.[70] Courts of appeal throughout this country are literally swamped with heavy case-loads. The line must be drawn somewhere.

In truth, most of the work done by intermediate appellate courts is carried out in areas where the law is relatively well-settled, and the issues to be determined on appeal concern its application in the particular circumstances of the case. Some of this work, it must be said, is quite mundane. A good deal of it, particularly in civil appeals from judge-alone trials, is purely fact based. Of course, that does not mean that the issues raised are easy to determine.

Criminal cases make up a substantial proportion of the work of the Court of Appeal. Many of the matters that come before the court are sentence appeals. Although it has been said many times that the submission that a sentence is manifestly excessive (or manifestly inadequate) does not admit of great elaboration, my experience over the years has been that counsel are not dissuaded from putting forward lengthy and even prolix arguments in support of their particular case.

The Court of Appeal almost always provides detailed reasons for its decisions. It differs, in that regard, from its predecessor, the Full Court, whose judgments on sentencing matters were almost always delivered ex tempore, and were usually brief in the extreme.

These days, a typical sentencing judgment begins by setting out, in the form of a table, the actual sentence or sentences imposed below. The judgment then sets out the grounds of appeal which are occasionally elaborately stated. It then usually proceeds to a detailed summary of the circumstances surrounding the offending. Sometimes lengthy extracts from the written summary tendered by the prosecution on the plea are included.

There is often then an outline of each side's written case. When I speak of an "outline" it may, of course, be far more than that. Written cases tend not to be brief. This is then followed by a conclusion which, as Brooking JA observed in *Lim*,[71] all too often contains copious, and sometimes quite unnecessary, reference to authority. There is, on occasion, reference to what are said to be comparable cases, generally "cherry picked" by the party relying upon that material.

In my opinion, many of the sentencing judgments delivered by the Court of Appeal could be shortened considerably without any harm being done to the quality of the reasoning. I can say this because I am myself an habitual offender in this regard. To paraphrase the great French mathematician, Blaise Pascal, I often write long judgments because I simply do not have the time to write short ones.

I was interested to discover that my colleagues in NSW have sought answers to the problem of the excessively long judgment, and have experimented with possible solutions.

70 The former President of the NSW Court of Appeal described intermediate appellate courts as "sweatshops". See K Mason, "The distinctiveness and independence of intermediate Courts of Appeal" (2012) 86 *ALJ* 308 at 312.

71 [1998] VSCA 54.

In NSW, s 45(4) of the *Supreme Court Act 1970* provides:

> If, in dismissing an appeal, the Court of Appeal is of the unanimous opinion that the appeal does not raise any question of general principle, it may, in accordance with the rules, give reasons for its decision in short form.

This section has been used on a number of occasions. The results are readily apparent.[72] Judgments that might have been expected to run for perhaps 20 or 30 pages, without really saying anything of great consequence, are reduced to two or three pages at most. It seems to me that nothing is lost by this, and a good deal of judicial time and effort is spared.

Section 45(4) is, of course, narrow in scope. It applies only to civil appeals, and indeed, only to those cases where the appeal is dismissed. It seems to me that there is no reason why a similar provision, perhaps more broadly drafted, could not be adopted in Victoria.

In one sense, we seek to achieve something similar, at least in criminal cases, by the use of the leave procedure. Often, however, reasons for either granting or refusing leave are given at considerable length, with much attention to detail. This can result in a good deal of wasted effort, as there is a high rate of election in cases where leave has been refused.

The High Court has, on a number of occasions, considered the adequacy of reasons given by intermediate appellate courts, in criminal matters. For example, in *BCM v The Queen*[73] the appellant appealed against his conviction for indecent dealings with a child under 10 years. There were inconsistencies in the complainant's evidence (who was aged six at the time of the alleged offending). The jury at trial convicted the appellant on two counts of indecent dealings but could not come to a decision on the third count (which the complainant brought to the attention of authorities more than a year after she complained of the first two instances).

In dealing with the appellant's challenge to the reasonableness of the verdicts on appeal, De Jersey CJ said that there was a rational explanation for the jury's inability to reach unanimity on the third count. The fact that the complainant delayed for a year before raising the third allegation concerning events that she alleged had occurred within the same short interval may have been viewed by one or more jurors as adversely affecting the reliability of that allegation. Therefore some jurors may have doubted the reliability of the complainant's account "without doubting her overall credibility".[74]

The appellant appealed to the High Court arguing that the Queensland Court of Appeal gave insufficient reasons for its decision. The High Court referred to its decision in *SKA v The Queen*[75] outlining the principles to be applied in determining a challenge to the sufficiency of

72 See for example *W & P Reedy Pty Ltd v Macadams Baking Systems (Pty) Ltd* [2007] NSWCA 146; *Independent Print Media Group Publishing Pty Ltd v Estate Agents Co-operative Pty Ltd* [2007] NSWCA 352; *Animax Films Pty Ltd v Simlogic Pty Ltd* [2011] NSWCA 73; *Millis v Valpak (Aust) Pty Ltd* [2013] NSWCA 249.

73 (2013) 88 ALJR 101 ("*BCM*").

74 ibid at [29].

75 (2011) 243 CLR 400 ("*SKA*"). See also *M v The Queen* (1994) 181 CLR 487.

the evidence to support a conviction. The majority in *SKA* had highlighted the requirement that the appellate court's reasons disclose its assessment of the capacity of the evidence to support the verdict.[76]

In *SKA*, French CJ, Gummow and Kiefel JJ were not satisfied that the NSW Court of Appeal had come to its conclusion (that it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the applicant) after having weighed the competing evidence. Therefore, as was said in *BCM*, the court's "obligation [will not be] discharged by observing that the jury was entitled to accept [the complainant's] evidence and act upon it".[77] The court must assess the evidence for itself.

In *BCM* the High Court did not believe it to be "in the interest of justice to remit the proceeding to the Court of Appeal for it to determine afresh the challenge to the reasonableness of the verdicts".[78] Instead, it analysed the inconsistencies that the appellant relied on to call into question the complainant's reliability before discussing the rest of the evidence presented at trial.

The court concluded that "[n]one of the criticisms of [the complainant]"s evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict".[79]

It should also be noted that the High Court has imposed upon intermediate appellate courts the very considerable burden of having to deal, in many cases, with each and every ground of appeal that is pursued.[80] That obligation arises even if the matter can be disposed of on the basis of one single, and simple, point. This has long been a bone of contention, so far as these courts are concerned. One can understand the logic of the High Court's position, since a failure to address all grounds that are pressed may lead to unnecessary cost and delay if the decision on the short point is overturned by the High Court. Such cases are likely to be rare. The question must be asked whether, from a policy perspective, the "requirement" that all grounds be addressed really makes good sense.

The High Court

The High Court is this country's ultimate appellate and constitutional court. Its role is to state and develop the law, and not to correct error in individual cases. It normally hears only those cases that are of general importance in the administration of justice. Many of these cases present difficult issues for decision and require detailed analysis of highly technical legal principles or complex legislation.

76 *SKA*, ibid, at 409.
77 *BCM* (2013) 88 ALJR 101 at [31].
78 ibid at [32].
79 ibid at [47]. In civil appeals, a similar burden is placed upon intermediate appellate courts, since they are required, as part of the process of rehearing, to review the whole of the evidence led below. See generally *Allesch v Maunz* (2000) 203 CLR 172 at 180.
80 *Cornwell v The Queen* (2007) 231 CLR 260 at 300; *Kuru v NSW* (2008) 236 CLR 1 at 6.

At the same time, as has been observed,[81] the contrast between the style of judgment writing in the High Court, and that of other courts of ultimate jurisdiction (including the Supreme Court of the United Kingdom and the Supreme Court of the United States) is stark. That contrast cannot be explained solely by reference to the difference in the types of cases heard and determined by each court.

The abolition of appeals as of right to the High Court, and the substitution of the special leave to appeal regime in 1984, were designed to enable that court to control the flow of appeals, and to give priority to those cases raising questions of the ultimate importance.

The creation of the Federal Court in 1976 was also, in part, designed to alleviate the burden placed upon the High Court in the discharge of its heavy responsibilities.

Nonetheless, the burden presently borne by the seven members of the High Court is obviously crushing. They are required to sift through literally hundreds of applications for special leave to appeal each year.[82] Many of these are dealt with on the papers alone, but each of them must be read and considered. Reasons are given in every case. It is scarcely surprising that in the vast majority of cases that come before the court, the reasons are extremely brief. Unfortunately, they are also often uninformative.

What does it mean to say that a particular case does not provide "a suitable vehicle" for the grant of special leave? Normally one will have to go back to the transcript of the oral argument to try to work out why the court has arrived at that conclusion. What is one to make of the statement that the decision below is not "attended with sufficient doubt" to warrant the grant of special leave? How much doubt is sufficient? And what particular aspects of the decision below are attended with any doubt?

Sometimes the court refuses special leave because the decision below is said to have been correct. That, at least, provides an explanation that is both comprehensible, and meets any conceivable requirement that adequate reasons be given.

The same cannot be said for the template reasons given when special leave is refused. Yet, as a practical matter, the sheer volume of work that confronts the court requires that reasons be given in a wholly abbreviated form.

The paucity of reasons given on special leave applications is more than amply compensated for by the detail, and attention, that the court gives to its reasons for judgment in those cases which it hears as appeals.

That is not to say that the decisions of the court are always written in a helpful manner. Some judgments are written in a style that is unduly dogmatic and even abrasive.[83]

81 See R Sackville, "Appellate judging: onwards and outwards towards mid-century" (2012) 86 *ALJ* 249.

82 In *Collins (Alias Hass) v The Queen* (1975) 133 CLR 120 at 122 it was noted that special leave applications are really only applications to commence proceedings. Until the grant of leave there are no proceedings inter partes before the High Court.

83 An example of this is *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, where some of the language used by the court was intemperate and, I would respectfully suggest, quite inappropriate.

In some cases, the court provides reasons that are so difficult to follow as to render them almost incomprehensible.[84] Occasionally, the court produces a judgment that has no discernible ratio, and results in nothing but confusion.[85]

How should judgments be written?

This paper is about the adequacy of reasons, and not how they should be expressed. Questions of style or form are an entirely separate matter. Style is very personal. Some judges write expressively, and even flamboyantly, while others are so "judicial" and measured in what they say that their readers find the end product turgid and uninviting.

Lord Denning MR was a master at presenting attractive opening lines. Two of his classics were: "It happened on April 19, 1964. It was bluebell time in Kent,"[86] and "In summertime, village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch".[87]

One of my personal favourites, is the opening sentence, and the following lines delivered by Edmund Davies LJ in his judgment in the celebrated case of *R v Collins*.[88] The issue was whether the defendant had committed burglary when he climbed up the ladder to a bedroom of a house on the second floor, looked in through an open window, and saw a young lady sleeping naked in her bed. Mistakenly assuming that he was her boyfriend, she beckoned him in, and had sexual intercourse with him. It was only thereafter that she realised her mistake.

The question to be resolved on the appeal was whether the defendant had entered the house "as a trespasser". His Lordship commenced his judgment by saying:[89]

> This is about as extraordinary a case as my brethren and I have ever heard either on the bench or while at the bar …
>
> Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce.

Not everyone has the ability to use language so effectively. Nor should they necessarily endeavour to do so. Murray Gleeson, former Chief Justice of the High Court, did not write in this vein. Yet his judgments were always clear, and succinct. They were a pleasure to read.

One aspect of his writing that stood out was his ability to formulate, concisely, with precision, and right at the outset, the issue to be determined. Any judge wishing to write well, and particularly at an appellate level, would do well to follow that approach.

84 See *Viro v The Queen*(1978) 141 CLR 88.
85 *HML v The Queen* (2008) 235 CLR 334.
86 *Hinz v Berry* [1970] 2 QB 40 at 42.
87 *Miller v Jackson* [1977] 1 QB 966 at 976.
88 [1973] 1 QB 100.
89 ibid at 101.

Other judges whose written work I have greatly admired include former Justices Michael Kirby and Dyson Heydon. Both wrote extraordinarily well, with an attention to detail, and rigour, that stood out.

Michael Kirby has also written, extra-judicially, on the subject of judgment writing.[90] He speaks, in his paper, of the "blessed trinity" of good judgment style.[91] By this he means brevity, simplicity and clarity. It is instructive to note that he puts brevity first among the list of "blessed" attributes.

I have on occasion revisited several of Dyson Heydon's quite remarkable judgments on various evidentiary subjects. He is, of course, a complete master in that field.

In *Australian Crime Commission v Stoddart*,[92] Heydon J delivered a judgment unlike any other that I have ever read. It is, if you like, a mini-treatise on one small aspect of the law of evidence, but covered in such depth as to evoke nothing but admiration. It was a dissenting judgment. It proves the value of occasional dissents. If you have not had the opportunity to read his Honour's analysis of the history of spousal privilege, may I suggest that you do yourself a favour, and see how a superbly well written judgment is crafted.

Of course, the rest of us are mere mortals. The pressure under which we work, whether it be as trial judges, or in intermediate appellate courts, means that we do not have the time to write, and re-write, as we would wish.

One thing is critical. We must know our audience. If we are writing, in essence, for the losing party, as is often suggested, we must focus upon why he or she has met that fate. The winning party will seldom care.

If we are writing for the legal profession, present and perhaps future, we will structure what we say quite differently. Even then, we should always aim for the "blessed trinity".

There is one thing I would caution against. Judgments should not be written with an eye to what an appellate court might do. Say what you think, and explain as clearly as possible, how you came to your decision. If someone else, further down the track, takes a different view, then so be it.

Judge Richard Posner is, in my opinion, one of the greatest living American jurists. He is a stern critic of writing that is prolix and unduly complex.[93] Unlike most judges in the United States, he writes his own judgments. He largely avoids footnotes. He despises the "Blue Book" method of citation. His judgments are all the better for that.

A lengthy judgment, littered with copious footnotes, may at first glance seem impressive. All too often, however, one is left with the feeling that there is an element of self-indulgence in writing in that vein.

90 M Kirby, "On the writing of judgments" (1990) 64 *ALJ* 691.
91 ibid.
92 (2011) 244 CLR 554 at 571–620.
93 R Posner, *Reflections on judging*, Harvard University Press, 2013.

I have a strong aversion to lengthy judgments. The fact that I am myself a repeat offender in that regard merely means that you should do as I say, and not as I do.

Over the past 16 years I have delivered probably thousands of judgments. Some of these were written as a trial judge, and others as a member of an appellate court. I have been exposed to just about every style of judicial writing. I have also endeavoured, as best I can, to keep up with trends in modern legal scholarship.

I once sat interstate on a criminal appeal from a judge-alone trial. The trial judge found the accused not guilty of murder, and set out in almost 400 pages, his reasons for acquittal. I am ashamed to say that our own judgment on the appeal came to almost 200 pages. On reflection, I consider that both the trial judge's reasons and our own judgment were about twice as long as they ought to have been.

When I sat on the Federal Court, I was put on an appellate bench in a case where the primary judgment ran for 1565 paragraphs and took up almost 500 pages in a single volume of the law reports. It took literally weeks to read and digest. We managed to confine the judgment on appeal to a mere 123 pages. Sadly, this case was not unique.

Difficult as it may be to believe, I have seen sentencing remarks that run for more than 100 pages. I have also seen sentencing remarks that are extensively footnoted. I have no idea why that was done. I doubt that the prisoner being sentenced was concerned to know precisely what the various legal authorities cited had to say about arcane aspects of sentencing law.

Judicial writing courses are valuable. I have participated in such courses and benefited greatly from them.[94] I would encourage all judicial officers to expose themselves to the comments and criticisms of people like Professor James Raymond, who are truly expert communicators.[95]

That is really all I have to say. I would stress that writing does not come easily to me. Every judgment that I prepare goes through at least several drafts. I wish it were not so. I have seen, at first hand, the work of judges who can produce wonderfully clear reasons, overnight, and in a single draft. Indeed, I have seen judges who can routinely produce ex tempore reasons that are word perfect. They are few and far between. There are not many of them sitting today.

I believe it was Professor Raymond who said that every word in a judgment must earn its place. Too many judgments, unthinkingly, follow a pattern that is unhelpful to the reader. Is it really necessary to set out, in painstaking detail, the procedural history of the matter? Sometimes that may be required, but I would think only rarely so. Is it essential, to set out verbatim, massively long quotes that have been extracted from previous judgments when what is said could have been summarised in a few short sentences? Is cutting and pasting really to be regarded as good writing? Is it absolutely necessary to recount the entire history of a particular legal doctrine in order to expound the law on some point in issue?

It seems to me that in our reasons for judgment we write far too much. I am not suggesting that those reasons should be "dumbed down". However, even the most complex of legal and

94 I refer, in particular, to the contribution made to better judgment writing by Professor James Raymond, and the courses he has run in this country.

95 See R Goldfarb and J Raymond, *Clear understandings: a guide to legal writing*, Random House, 1988.

factual issues can be dealt with using plain language. If we include unnecessary material in our reasons, then plainly, they are in that sense, “excessive”. The giving of excessive reasons may be less of a vice than the failure to provide adequate reasons. It is a vice nonetheless, and one that we would do well to try to overcome.

The idea of the professional judge: multiple versus single appellate judgments*

The Honourable Justice P Keane AC†

The author considers the vexed question of multiple versus single appellate judgments in the context of the institutional role of the judiciary.

Multiple judgments or joint judgments

We as judges need to be mindful of how we discharge our institutional role. The administration of justice is not the work of individual judges. Our work is the work of an institution, and we have responsibilities to that institution. Those responsibilities are discharged most directly in the writing of judgments.

In this context, I make some brief remarks about the vexed question of multiple or single judgments of appellate courts.[1]

We have to start with the basic proposition that it is the undeniable right of a judge to give a reasoned judgment in the terms which he or she wants.

Multiple judgments by an appeal court have been described as "one of the glories of the system".[2] For all that gloriousness though, multiple judgments may also lead to uncertainty and unpredictability, and give rise to "extra work for lawyers and, in some cases, [are] responsible for the cost of avoidable litigation".[3]

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1 J D Heydon, "Threats to judicial independence: the enemy within" (2013) 129 *Law Quarterly Review* 205.

2 R Fox, *Justice in the twenty-first century*, Cavendish Publishing Ltd, 2000, p 107.

Many will have read the Honourable J D Heydon's essay "Threats to judicial independence: the enemy within"[4] in which he attacks joint judgments, pre- and post-hearing conferences and other forms of judicial cooperation and collegiate behaviour generally. His thesis is that the avoidance of conferences about cases and adherence to the practice of individual judgments are essential to the maintenance of judicial integrity of appellate courts. Otherwise, individual judges may be overborne by stronger personalities so that there is a failure of the institution.

Heydon also expressed the view that it is through diverse reasoning, obiter dicta and concurring and dissenting judgments that the incremental development of the common law is promoted. In this respect, he is in eminent company.

Lord Reid, in *Cassell & Co Ltd v Broome*,[5] even thought that multiple judgments conduce to clarity:

> When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.

In 2008, Dame Mary Arden described multiple judgments as an expression of judicial independence, in the sense of decisional independence, and accountability.[6]

Lord Neuburger recently said that a single judgment of an appeal court:[7]

> often looks as if it is a work of profound compromise: drafting by committee is rarely a happy or, from the law's perspective, a helpful experience. All too often reasoning can be jettisoned on the road to agreement; thus producing a judgment gnomic in brevity and founded on the lowest common denominator. Such judgments impede rather than develop the law, and reduce its clarity and predictability.

It has to be said that there can be a real tension between the proper concern not to go beyond a statement of what is strictly necessary to decide a particular case and giving a clear, coherent and forthright statement of why one thinks that a given case should be decided in a particular way. It is a fair criticism of some joint judgments that it can be difficult to understand why the case has been decided in a particular way.

All this having been said, the right of each appellate judge to write his or her own judgment, like all rights, carries with it institutional responsibilities, one of which is to provide clear, practical guidance to the community and the legal profession. We cannot pretend that we work in isolation: we have institutional responsibilities which those writing academic treatises do not.

In response to "Threats to judicial independence: the enemy within", Peter Heerey wrote:[8]

> In common law systems judgments are part of the law. One of the functions of law is to provide a guide for conduct. Most citizens want to obey the law, to know what are their rights and obligations

3 ibid p 108.
4 Above, n 1.
5 [1972] AC 1027 at 1085.
6 M Arden, "A matter of style? The form of judgments in common law jurisdictions: a comparison", paper presented at the Conference in Honour of Lord Bingham, Oxford, 20 June 2008, p 6.
7 D Neuberger, "Developing equity: a view from the Court of Appeal", paper presented at the Chancery Bar Association Conference, London, 20 January 2012, at [22].
8 P Heerey, "The judicial herd: seduced by suave glittering phrases?" (2013) 87 *ALJ* 460 at 463.

> in particular circumstances. So there is need, one might almost say a constitutional need, for as much clarity and certainty as possible in judgments. Often it is difficult for lawyers, let alone lay citizens, to wade through multiple judgments, pondering the subtle nuances which emerge and how they impact on the ratio decidendi, if there is one. This is quite apart from the time taken merely in reading multiple accounts of non-contentious factual narrative and procedural history.

Timeliness

One point which can be made here is that a judge who insists upon always writing separately is likely to cause delay in the completion of the work of the court. Only rarely would it be consistent with the irreducible level of professional commitment to the success of our institution for any judge to delay the giving of a decision in any case by insisting that his or her voice be heard. Especially is that so when that voice will not affect the outcome of the case.

A failure by the courts to resolve the controversies which come before them as expeditiously as possible means that the courts, as institutions, are letting the community down. They are also risking irrelevance.

If one looks at *Commonwealth Law Reports* for the last two years of each of the Mason, Brennan and Gleeson courts and the most recent two years of the French court, one sees some interesting figures. In the last two years of the Mason court, there were 78 reported cases; and there was a single majority judgment in 36 of them. The average time between argument and judgment was 241 days.

In the Brennan court, there were 65 reported cases, but only 12 were decided by a single majority judgment. The average time between hearing and judgment was 224 days.

In the Gleeson court, there were 96 reported decisions, of which 30 involved a single majority judgment. The average time between hearing and judgment was 138 days.

During 2013–2014 in the French court, there were 96 reported decisions, of which 38 involved a single majority judgment. The average time between hearing and judgment was 87 days.

Now obviously one cannot make too much of these figures. For example, the Mason and Brennan courts found themselves deciding more of what we regard as landmark cases than has been the case more recently when it might fairly be said that we are in a period of consolidation.

But the figures are not entirely without significance. They do tell us some things: first, it is evident that there has been a trend towards more joint judgments; and second, that trend is associated with a substantial reduction in the delay between hearing and judgment. And that is not a bad thing.

Coherence and clarity

Lack of clarity and predictability in the law creates "more litigation".[9] More litigation means greater cost in terms of money and time, and is wasteful of the resources of the community. It is essential therefore that, as far as it can reasonably and properly be, the law is clear, certain and predictable.

A single judgment may sometimes be the best way to afford authoritative decisive guidance. Sometimes, not always, it may be the only effective way. And where they are possible, judgments of the court are desirable because they are inherently more authoritative, and have the potential, at least, to be more conducive to clarity.

Anything that can be done to help lawyers give confident advice and so lessen litigation is a good thing. By providing a clear and authoritative ratio in a single majority judgment, we can try to reduce the legal costs, lost opportunities and inefficiencies which are consequential on uncertainty — and in this the courts fulfil their duty to the development of the law, and their duty to society.

Coherence and authority

Even Sir Frank Kitto, who was not generally in favour of joint judgments, acknowledged that "one great benefit of a joint judgment" is the certainty of the statement of the legal rule because "with several judgments reaching the same ultimate conclusion there is often uncertainty as to whether differences of expression or emphasis indicate differences of substance".[10]

Anyone who doubts the desirability of a single judgment as a means of providing clear authoritative guidance to lower courts, and to the legal profession, and through it, to the community, should read the High Court's decision in *HML v The Queen*[11] where there were six separate and disparate judgments concerning the admissibility of evidence of uncharged acts in cases of alleged sexual assaults and the appropriate directions to be given by trial judges to jurors.

In the area of admissibility of evidence and directions to juries, clarity, above all else, is a necessary attribute of authority; and if guidance is to be worthwhile it must be authoritative.

And there is a larger implication here for the institution which makes the common law. If judges can't get within cooee of agreement on the articulation of a rule of law, then perhaps there is either something wrong with the rule, or with the functioning of the institution whose function it is to articulate it.

In addition to *HML*, can I add some examples of civil cases where multiple judgments have led to an embarrassing lack of coherence: for example,*Northern Sandblasting Pty Ltd v Harris*[12] and *Commonwealth v Verwayen*.[13]

9 P Atiyah, "Justice and predictability in the common law" (1992) 15(2) *UNSWLJ* 448 at 451.
10 F Kitto, "Why write judgments?" (1992) 66(12) *ALJ* 787 at 797.
11 (2008) 235 CLR 334.
12 (1997) 188 CLR 313.
13 (1990) 170 CLR 394.

In tort law there is *Perre v Apand Pty Ltd*,[14] where the seven separate judgments on the recovery of negligently inflicted economic loss did little to clarify the learned muddle of the five separate judgments (out of five) delivered in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*.[15]

In *Crimmins v Stevedoring Industry Finance Committee*,[16] six different points of view were developed in relation to the circumstances when the common law duty of care will oblige a statutory authority to exercise its statutory powers. A significant measure of clarity and coherence was restored by the agreement of Gaudron J with Gummow and Hayne JJ as members of the four to three majority in *Graham Barclay Oysters Pty Ltd v Ryan*.[17]

In the fields of constitutional and defamation law, the muddles which were *Theophanous v Herald & Weekly Times Ltd*[18] and *Stephens v West Australian Newspapers Ltd*[19] were an embarrassment until the unanimous judgment in *Lange v Australian Broadcasting Corporation*.[20]

Lange is a great example of the value of a joint judgment in settling the law. It may not be too much to say that the idea of an implied constitutional guarantee of free political communication may not have survived if it had continued to fray at the edges as individual attempts to articulate the content of the freedom failed to provide sufficient common ground to allay scepticism as to whether the discovery of the implied freedom was an unprincipled overreach.

By way of another and even more venerable example, the immediate authority of the *Engineers' Case*[21] was due in no small part to the power of the single voice in which the majority view was expressed. It resolved great constitutional questions, but its decisive power could not be attributed to the felicity of its expression — Sir Isaac Isaac's rather orotund prose is not a pleasurable read, and the logical force of his argument is elusive. The abiding influence of the decision rests upon the authority of its unified statement of the position, rather than upon the quality of the reasoning and expression of the judgment itself, which Professor Sawer described, not unfairly, as "one of the worst written and organized in Australian judicial history".[22]

Similarly, it was the authority of the single voice of the joint majority judgment in *R v Kirby; ex p Boilermakers' Society of Australia*,[23] which gave the quietus to the heresy which had prevailed between 1926 and 1953 in the line of cases cited by Williams J in dissent,[24] that the Arbitration Court was a body properly constituted as a federal court created under Ch III of the Constitution.

14 (1999) 198 CLR 180.
15 (1976) 136 CLR 529.
16 (1999) 200 CLR 1.
17 (2002) 211 CLR 540 at [58], [145]–[147].
18 (1994) 182 CLR 104.
19 (1994) 182 CLR 211.
20 (1997) 189 CLR 520.
21 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
22 G Sawer, *Australian federalism in the courts*, Melbourne University Press, 1967, p 130, cited by Callinan J in *New South Wales v Commonwealth of Australia (The Work Choices Case)* (2006) 229 CLR 1 at [747].
23 (1956) 94 CLR 254.
24 ibid at 316.

The joint judgment in *Cole v Whitfield*[25] afforded an authoritative statement of the scope and effect of s 92 of the Constitution. It may be said, as it usually is, that the High Court, having established the settled test in *Cole v Whitfield*, then fractured it in the very next case, *Bath v Alston Holdings Pty Ltd*,[26] as to the application of that test to the facts of the case. But to focus on that circumstance is to fail to recognise the historic success of *Cole v Whitfield* in removing the uncertainty surrounding s 92, its success being reflected in the vast reduction in litigation concerning s 92. Section 92 cases have become, over the last 20 years, a rarity. And that, too, is a good thing.

And the same point may be made of the plurality decision in relation to s 90 of the Constitution and excise duties in *Ha v NSW*[27] after decades of uncertainty generated by multiple judgments in which a "ratio decidendi" could not be discerned.

The High Court

Clarity of statement is important for all appellate courts, but it is especially important for the High Court, as a court of ultimate appeal. It is to be remembered that the legislature was persuaded 30 years ago to allow the High Court to determine which appeals it should take up, in order to allow the court better to perform its function of settling controversies involving questions of legal principle. Given the history of the adoption of the special leave filter, it is particularly incumbent on judges of the High Court as an institution to strive to achieve that end.

Chief Justice Gleeson, writing extra-judicially in 2000, referred to the criticism of the length and diversity of the reasons for judgment given by the High Court. He attributed the phenomena which gave rise to this criticism to "the individualistic spirit" of the judges who constitute the court.[28] Significantly, however, he did not seek to suggest that the criticism was devoid of justification.

No doubt it is of the first importance that every judge should decide each case conscientiously, and to do that it may be necessary to go a long way towards completing one's own draft. But that does not mean that one must publish a separate judgment.

As our colleague Kiefel J noted in last year's Sir Richard Blackburn Lecture, Sir Robert Menzies believed that at the earliest days of the High Court, Barton J wrote separate reasons for judgment, but hearing Griffith CJ read his reasons in court (as they did in those days), would put his draft away and simply concur with the Chief Justice on the basis that to seek to add to the principal judgment was to risk compromising its clarity.[29]

The practices of collaboration which are developing within most of the appellate courts in Australia are not out of line with modern practice in the UK. In Professor Alan Paterson's

25 (1988) 165 CLR 360.
26 (1988) 165 CLR 411.
27 (1997) 189 CLR 465.
28 A Gleeson, *2000 Boyer lectures: the rule of law and the Constitution*, ABC Books, 2000, p 89.
29 S Kiefel, "The individual judge (2014) 88(8) *ALJ* 554 at 559, citing A Mason, "Reflections on the High Court: its judges and judgments" (2013) 37 *Aust Bar Rev* 102 at 103.

book, *Final judgment: the last Law Lords and the Supreme Court*,[30] there is an account of his interviews with the judges of the House of Lords in its last few years before October 2009 and the Supreme Court of the UK thereafter. It is apparent from these accounts that some of the Law Lords lobby others, some are willing to consider changes to their draft judgments, and some are not.

What is particularly interesting for us is Professor Paterson's observation that since the creation of the Supreme Court, there has been a "notable increase in collaborative team-working and interactive dialogue".[31] They have adopted the practice of short pre-hearing meetings, more debate after the hearing, and working together to produce joint judgments.

Lord Neuberger "emphatically disagreed" with the view that discussions between appellate judges about their judgments are wrong in principle. Lord Neuberger's view was that the collegiate character of a court which consists of more than one judge obliges each individual judge to do his or her best to ensure that the court "produces as clear and coherent a judgment or set of judgments as is consistent with each member's opinion".[32]

It has been my experience that collaboration sharpens up a joint judgment and actually contributes to the rigour and richness of the reasoning. To the extent that this removes unnecessary or hazy or self-indulgent commentary or observations, that too is a good thing.

I should say that it has also been my experience that there are real advantages to judicial cooperation in terms of doing my job as an individual judge. I find the insights of colleagues very valuable. There are often angles to the case or details of the evidence which I have missed while reading the parties' written submissions before the hearings and which are supplied at the pre-hearing conference. I do not think that there is any harm in being open to this kind of assistance.

Indeed, it seems to me that there is something distinctly quixotic in the notion that one should make a deliberate effort to avoid assistance from people who are quite likely to be the best lawyers to have considered the problem at hand.

In summary on this point, I would respectfully adopt what was said by our colleague, Kiefel J, in this year's Blackburn Lecture:[33]

> While joint judgments are not always possible, for the most part reasonable attempts should be made to reduce the number of judgments in any matter. It is the institutional responsibility of the members of a court to do so, in the pursuit of clarity, certainty and timeliness. A court may be comprised of individual judges, yet the expression of their individualism should on occasions be tempered. I do not suggest that judges should not write separately from their colleagues. I merely suggest that we should ask ourselves: for what reason am I doing so?

30 A Paterson, *Final judgment: the last Law Lords and the Supreme Court*, Hart Publishing, 2013.
31 ibid p 313.
32 D Neuberger, "Sausages and the judicial process: the limits of transparency" (2015) 12(2) *TJR* 131 at 141.
33 S Kiefel, "The individual judge (2014) 88(8) *ALJ* 554 at at 560.

Conclusion

While a judge must ultimately decide cases in the loneliness of his or her conscience, the ideal of fairness to which we seek to give effect is not the product of individual virtue or wisdom or intuition; it is an institutional achievement. It depends on the understanding and disciplined observance of rules deriving from the practice of a distinctive professional ethos developed over a millennium.

It was the professional association of barristers and judges which originated in the Inns of Court, aided no doubt by the Reformation, which fixed the character of the common law and its processes as something quite different from the civil law system rooted in the academic treatment of Roman law and canon law.

That professional association and the ethos which binds its members has been one of the major dynamics in the development of the common law in Australia. It has been, and remains, crucially important.

Sometimes, in our enthusiasm to maintain our independence, including our independence from each other, we lose sight of these institutional connections without which we could not even begin to face the challenges of doing justice to our rights-conscious and self-confident fellow citizens.

I conclude by saying that the institutional ethos which enlivens that institution is a practical expression of the best of us. We cannot hope to be wiser or better than the institution of which we are a part. We, as members of our ancient profession, must address the implications of this truth for the way in which we discharge our judicial functions.

Further references on delivery of judgments

For further references on the topic of delivery of judgments, please see the following:

- Judicial Commission of NSW, *A matter of judgment: judicial decision-making and judgment writing*, Education Monograph 2, Sydney, 2003.

Communication

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The national certification system for the translating and interpreting profession in Australia*

Mr M Painting†

The National Accreditation Authority for Translators and Interpreters (NAATI) introduced a certification system in 2018 (updated in 2022) to improve the professional standards of interpreters and translators. The following article outlines the work of NAATI and the certification process.

Introduction

Judicial officers have an overriding duty to ensure a fair trial. Improving access to justice and ensuring procedural fairness require that a witness or party to court proceedings understands and can communicate effectively. Justice can be undermined where a communication problem limits the ability of a person to participate effectively in legal and court processes. A non-English speaking person, or a person with limited English, may be disadvantaged in police interviews, when instructing counsel, in giving evidence or understanding trial proceedings. Arguably, strategies to improve communication can only go so far to address unfairness; resolution ultimately requires that courts insist that miscommunication issues are addressed before proceeding with trials.[1] While there is no specific "right" to an interpreter, procedural fairness requires that the language needs of court users be accommodated. Various statutory provisions facilitate the use of an interpreter, for example, s 30 of the *Evidence Act 1995* (NSW).

* Previously published (2019) 31 *JOB* 63, updated 2022.

† CEO, NAATI; Chair of Australia's national Mirror Committee to the International Organization for Standardization (ISO) committee on Interpreting, translating and related technology; member of the Judicial Council on Diversity and Inclusion (previously known as Judicial Council on Cultural Diversity).

1 M Cooke, "Anglo/Aboriginal communication in the criminal justice process: a collective responsibility" (2009) 19 *JJA* 26 at pp 26, 34.

The JCDI Standards

In 2017, the Judicial Council on Diversity and Inclusion (JCDI) developed the *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Standards) to establish recommended and optimal practices for, amongst others, judicial officers to assess the need for an interpreter, conduct proceedings with an interpreter and undertake training for working with interpreters.[2] The Standards provide a practical four-part test to determine the need for an interpreter.[3]

Background to NAATI

NAATI is the national standards and certifying body for translators and interpreters working in Australia.

NAATI was established in 1977 primarily to support the wave of post-World War II non-English speaking migrants. Having a body to accredit practitioners was considered important to ensure non-English speaking people could get equal access to critical public services with the support of interpreters who met an appropriate standard. Forty years on, access to social justice and public services remain central to NAATI's mission, although in recent times more emphasis has been placed on improving quality and standards of a developing profession.

The credentialing system in Australia is unique in many ways and largely stems from NAATI's origins being rooted in the policy of nation building and the migration program rather than a language-related policy.[4] NAATI's origins have had positive and negative consequences: the credentialing system is broader than any comparable international body's, but has somewhat limited the industry's development as a recognised profession.

The linguistic profile of Australia presents another interesting challenge. Australia is among the most monolingual nation where English is the dominant language but there is also a wide range of languages that a relatively small number of people use. This diversity continues to expand due to Australia's humanitarian refugee program.[5]

This conflict between the dominance of English and the expanding number of migrant languages represents a significant challenge to maintaining a comprehensive, high quality and consistent certification system for translating and interpreting services. The practical implications of this are experienced nowhere more obvious than the judicial system.

2 Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, 2nd edn, 2022, Annexure 4, at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.

3 ibid.

4 A Gentile, *A policy focused examination of the establishment of the National Accreditation Authority for Translators and Interpreters in Australia*, PhD thesis, Monash University, 2017, at https://doi.org/10.4225/03/5a9c736bd0d65, accessed 6 May 2021.

5 Federation of Ethnic Communities' Councils of Australia, "Australia's growing linguistic diversity: an opportunity for a strategic approach to language services, policy and practice", 2016, pp 6–7 at http://fecca.org.au/wp-content/uploads/2016/09/feccalanguagesreport.pdf, accessed 6 May 2021.

The challenges are further compounded by the absence of underpinning legislation. Unlike other professions where formal regulation governs registration, the credentialing system for translating and interpreting is limited to the policies of the jurisdiction where practitioners operate and is largely limited to the public sector. When combined with other historical industry issues such as workforce casualisation, fragmentation, and poor remuneration, these challenges pose a significant risk to quality and consistency, and in the context of the justice system, a risk to the effective administration of justice itself.

While this lack of regulatory or legislative power adds to the challenge, it should not be used as an excuse not to pursue positive progress. NAATI has engaged collaboratively with its stakeholders both within the translating and interpreting sector and externally with academics, government and consumer organisations, to address several key issues affecting the overall quality and integrity and therefore the reputation of the sector.

Improving NAATI's processes

The first major review of NAATI was in 2012 with Professor Sandra Hale's report.[6] This identified a number of concerns with the reliability and consistency of the NAATI testing regime that had not been comprehensively reviewed for almost three decades. This report became the catalyst for NAATI to begin a more comprehensive process, with the support of key stakeholders, to professionalise the translating and interpreting sector. A significant step in this journey was the introduction of the NAATI certification system[7] to replace the previous accreditation system.

The new certification system was introduced in 2018. As well as providing a more robust and comprehensive testing and assessment regime, changes included the introduction of mandatory minimum training requirements and more emphasis on formal training as the primary pathway to certification. In order to maintain their certification, practitioners are required to attend a minimum level of ongoing professional development and demonstrate currency of practice through the maintenance of an activity log of work assignments to submit with their application for recertification.

Significantly, the certification system also introduced a specialisation for interpreting in the legal context. To be eligible to sit for the certified specialist interpreter (legal) test, which became available in 2021, candidates must already be a certified interpreter, complete specific training and have demonstrated experience in legal interpreting work complemented by relevant professional development.

6 S Hale et al, *Improvements to NAATI Testing: development of a conceptual overview for a new model for NAATI standards, testing and assessment*, 2012, at www.naati.com.au/wp-content/uploads/2020/01/Improvements-to-NAATI-Testing.pdf, accessed 6 May 2021.

7 NAATI, "The certification system" at www.naati.com.au/become-certified/, accessed 6 May 2021.

The certification model includes credentials that recognise practitioners for which there are no reliable or effective means of testing through to specialist interpreters and advanced translators for which formal education will be the primary pathway. The certification types for interpreters are as follows:

- Certified Conference Interpreter
- Certified Specialist Health Interpreter
- Certified Specialist Legal Interpreter
- Certified Interpreter
- Certified Provisional Interpreter, and
- Recognised Practising Interpreter (not tested).

In March 2021, NAATI launched a continuous improvement program with the aim to refine some of the certification system's key areas. Since the launch of the certification system in 2018, NAATI has delivered certification testing in more than 50 languages, and has accumulated a broad range of data relevant to continuing improvement of the system. The first phase of the program has identified 20 recommendations to refine the current certification tests.

Minimum standards to ensure properly qualified interpreters are engaged

Throughout 2016 and 2017, NAATI participated on the JCDI Working Group to develop the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*.[8] These Standards establish recommended and optimal practices for Australian courts, with the aim of improving access to justice and procedural fairness. Importantly, the Model Rules recognise and affirm the important role of interpreters by confirming their status as officers of the court, which is a significant step for the recognition of the profession. In April 2019, an addendum was published in the Standards outlining NAATI's certification model.[9]

A post-implementation review was undertaken which recommended, among other things, an update to the Standards. The work to review and update the Standards, which was funded by NAATI, continued throughout 2021 and an updated version has been developed and approved. The new *Recommended National Standards* were launched in April 2022.[10] The key changes include:

- *NAATI Certification System*: the Standards were updated to reflect the new system and the different terminology employed
- *tribunals*: the language of the Standards was changed to be more inclusive of tribunals

8 For the first edition of the Standards, see https://jcdi.org.au/wp-content/uploads/2021/06/JCCD-Interpreter-Standards.pdf; second edition, above n 2.

9 JCDI, "Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals" at https://jcdi.org.au/wp-content/uploads/2021/06/Addendum-to-the-Standards-Final.pdf, accessed 19 January 2023.

10 JCDI, second edition, above n 2.

- *engaging an interpreter*: amended to emphasise that in all circumstances and for all languages, the most highly certified or qualified interpreter should always be the first preference,
- *equipment*: revised to include more practical guidance on the preferred technology to assist interpreters.

The JCDI has also published resources, including factsheets and informative videos, that provide guidance on how to understand and implement the Standards.[11]

NAATI recommends that wherever possible in legal and court proceedings, a Certified Interpreter, or a Certified Specialist Legal Interpreter (when available) is engaged. The interpreter's certification can be verified by checking their practitioner identification on NAATI's on-line verification tool at www.naati.com.au.

It is acknowledged that a NAATI credential, even under the new certification system, does not guarantee relevant expertise in all legal cases, especially as there are languages where only a lower level of certification is available. As Fraser also highlights, NAATI certification does not in itself ensure that interpreters are appropriately independent of the investigation, a key factor in avoiding unconscious bias.[12] While not eliminating such a risk completely, NAATI considers that the certification system, whereby compliance with the Professional Code of Ethics is required to maintain certification, is a significant mitigation of the risk of an interpreter acting where a conflict of interest is possible.

Conclusion

There is clearly no magic solution to all the issues and challenges for quality interpreting service in courts. NAATI considers that a collaborative approach and shared responsibility is essential in addressing them. The *Recommended National Standards for Working with Interpreters and Tribunals* are an excellent example of such collaboration and NAATI strongly supports these Standards. Similarly, the introduction of the new certification system alone will not change the profession overnight, however it does mean that anyone who relies on the services of an interpreter can feel much more confident knowing that the certified practitioner they engage:

- has met minimum training requirements
- has had their skills independently assessed
- has demonstrated intercultural and ethical competence
- is current in his or her practice through maintaining a reasonable level of work activity, and
- participates in continuing professional development.

11 See Judicial Council on Diversity and Inclusion, "Resources" at https://jcdi.org.au/resources/, accessed 19 January 2023.

12 H Fraser, "Thirty years is long enough. It is time to create a process that ensures covert recordings used as evidence in court are interpreted reliably" (2018) 27 *JJA* 95; see also H Fraser, "Covert recordings used as evidence in criminal trials: concerns of Australian linguists" (2018) 30 *JOB* 53.

Recommended national standards for working with interpreters in courts and tribunals*

Stephanie Olbrich†

The Judicial Council on Diversity and Inclusion (JCDI) produced the Recommended National Standards for Working with Interpreters in Courts and Tribunals‡ in 2017, which was reviewed and updated in 2022, to establish recommended and optimal practices for working with interpreters. The following article surveys this resource and summarises how it can assist judicial officers and the courts to work effectively with interpreters.

Australia is a culturally diverse nation. Aboriginal and Torres Strait Islander people number around 3% of the total population while 26% of Australians are born overseas.[1]

With over 300 languages spoken in Australian households,[2] it's not uncommon for people coming before the courts to need an interpreter. The work of interpreters is essential to ensuring access to justice and procedural fairness for people with limited or no English proficiency in Australia's courts.

The Council of Chief Justices has recommended this resource as a way of improving access to justice and promoting procedural fairness.

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* Previously published (2018) 30(4) *JOB* 36, updated 2022 and 2023.

† Senior Policy Adviser, Migration Council Australia and Judicial Council on Diversity and Inclusion (previously known as Judicial Council on Cultural Diversity).

‡ The 2nd edition of *Recommended National Standards for Working with Interpreters in Courts and Tribunals* published in 2022 is at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.

1 ABS, 2071.0 — Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016 at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Snapshot%20of%20Australia,%202016~2, accessed 6 May 2021.

2 At https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, at Introduction, accessed 19 January 2023.

Overview of the recommended standards

Effective communication in courts is a responsibility shared between judicial officers, courts, interpreters and legal practitioners. As such the recommended standards are directed to each of these key stakeholders.

Recommended standards for judicial officers

The recommended standards for judicial officers concentrate on those aspects that are within the scope of the judicial officer to implement, including:

- assessing the need for an interpreter
- conducting proceedings with an interpreter, and
- undertaking training for working with interpreters.

Assessing the need for an interpreter

It is important that judicial officers raise the topic of working with an interpreter in a sensitive manner. There are a number of reasons a party might say they do not want to work with an interpreter, including ignorance of an interpreter's role, past negative experiences with interpreters, shame that their English is "not good enough", or not wanting others to know about their business.[3]

Annexure 4 of the recommended standards outlines a useful four-part test to assess a person's ability to understand and speak in English, with the aim of determining the need for an interpreter.[4]

If the party or witness has difficulties understanding or speaking in English at any point, or if the person asks for an interpreter, the judicial officer should stop the discussion and arrange for an interpreter to be present.

Conducting proceedings with an interpreter

After it has been determined that an interpreter is required, a judicial officer can assist the interpreter in several ways. Annexure 5 of the recommended standards summarises how a judicial officers can assist,[5] including:

- **Briefing interpreters:** In making directions as to the conduct of proceedings, the judicial officer should consider whether and to what extent interpreters should be briefed by the parties on the nature of the matter prior to the commencement of proceedings. Briefing may include provision of materials that may otherwise require sight translation in court.[6]
- **Logistics:** Where circumstances permit, judicial officers should ensure that the court has provided the interpreter with somewhere to wait, leave their belongings, prepare materials

3 *Recommended Standards for Working with Interpreters in Courts and Tribunals*, above n ‡.
4 ibid, Annexure 4. The test has been adopted from the Northern Territory Aboriginal Interpreter Service.
5 ibid, Annexure 5.
6 ibid, Standard 24.

and be briefed and debriefed. In the courtroom, interpreters need to be able to see and hear all parties in the court, and have as a minimum a chair and table and sufficient room to work, and access to a jug of water and a glass.[7]

- **Introducing the interpreter:** Before an interpreter commences interpreting, the judicial officer should ask the interpreter to introduce themselves and state their level of National Accreditation Authority for Translators and Interpreters Ltd (NAATI) accreditation or certification, interpreting qualifications, membership of a professional interpreting association, court experience, and understanding of their ethical obligations.[8]
- **Interrupting proceedings:** At the start of proceedings, the judicial officer should also ask the interpreter to alert the court, and if necessary to interrupt, if the interpreter:

  (i) did not accurately hear what was said

  (ii) cannot interpret a question or answer for any reason

  (iii) needs to consult a dictionary or reference material

  (iv) needs a concept or term explained

  (v) needs to correct an error

  (vi) is unable to keep up with evidence, or

  (vii) needs a break.[9]
- **Speaking style:** A judicial officer should use plain English to communicate clearly and articulately during court proceedings.[10] It is the judicial officer's role to explain all legal concepts, jargon, acronyms and technical terms, not the interpreter's. Annexure 3 of the recommended standards provides some useful plain English strategies.[11] Judicial officers should also speak slowly and clearly, and with appropriate pauses, to help facilitate the interpreter to discharge his or her duty to interpret.[12]
- **Breaks for interpreters:** Interpreting is demanding work; therefore, interpreters need to have regular breaks during proceedings, eg every 45 minutes for spoken language interpreters and every 20 minutes for signed language interpreters.[13]
- **Conflict of interest:** If a judicial officer becomes aware that an interpreter has a conflict of interest in the proceedings, he or she should permit the interpreter to withdraw from the proceedings if necessary and adjourn the proceedings until another interpreter can be found or to consider another appropriate way to address the conflict.[14]

7 ibid, Standard 9.
8 ibid, Standard 17.
9 ibid, Standard 17.
10 ibid, Standard 14.
11 ibid, Annexure 3.
12 ibid, Standard 25.
13 ibid, Standard 9.
14 ibid, Standard 20.

- **Debriefing interpreters:** Ideally an interpreter should have access to counselling or debriefing following proceedings, as interpreters may be vulnerable to vicarious trauma and secondary stress when interpreting sensitive or distressing material.[15]

Training for working with interpreters

It is recommended that judicial officers undertake training on assessing the need for an interpreter and working with interpreters in accordance with the recommended standards, as and when this training is available.[16]

Recommended standards for courts

The recommended standards for courts[17] centre on steps than can be taken from an institutional perspective, to ensure better working with interpreters, including:

- provision of information to the public about the availability of interpreters
- facilitation of training for judicial officers and court staff on the recommended standards and working with interpreters
- assessing the need for an interpreter
- coordination and engagement of interpreters by the court
- court budget for interpreters
- appropriate support for interpreters
- provision of professional development to interpreters on the recommended standards, and
- adoption of the model rules to give effect to the proposed standards.

The optimal standards for courts[18] are intended to provide aspirational targets or longer-term strategies or objectives to be implemented as and when resources become available, relating to simultaneous interpreting equipment; provision of tandem or team interpreting; provision of professional mentors; and establishment of an interpreter portal.

Recommended standards for interpreters

The recommended standards for interpreters[19] outline what is expected of interpreters during court proceedings, including adherence to the Court Interpreters' Code of Conduct (in Sch 1 of the model rules),[20] and practical aspects related to interpreting in court.

15 ibid, Standard 9.
16 ibid, Standard 5, Standard 15.
17 ibid, Standard 1.
18 ibid, Optimal Standards 1–4.
19 ibid, Standards 18–20.

Recommended standards for legal practitioners

The recommended standards for legal practitioners[21] relate to their particular responsibilities, including:

- assessing the need for an interpreter
- booking interpreters
- engaging appropriate interpreters
- briefing interpreters
- using plain English, and
- appropriate management of documents.

Model rules and model practice note

The recommended standards are accompanied by model rules[22] and a model practice note.[23] Courts and tribunals are encouraged to adopt these to give effect to the proposed standards. The model rules recognise and affirm the important role of interpreters and their paramount duties of accuracy and impartiality in the office of interpreter.

Legal appendix

The legal appendix[24] is intended as a summary for judicial officers and practitioners regarding the current law on interpreters in the legal system.

Annexures

Six annexures[25] cover practical strategies and information to facilitate better working with interpreters in courts and tribunals.

A note about implementation

As former Chair of the JCDI, the Honourable Wayne Martin AC, former Chief Justice of Western Australia, stated in the foreword, the recommended standards "have been specifically designed to recognise and respond to the practical limitations which may preclude achievement of optimal practices in all cases and circumstances",[26] and are intended to be implemented progressively, in line with resource capacity.

20 ibid, Sch 1.
21 ibid, Standards 21–26.
22 ibid, Model rules.
23 ibid, Model practice note.
24 ibid, Legal appendix.
25 ibid, Annexures 1–6.
26 ibid, Foreword.

Who produced the resource

The recommended standards were prepared by a specialist committee appointed by the JCDI, which included representatives of the judiciary and tribunals and senior members of key interpreting bodies.

The JCDI is an advisory body formed to support procedural fairness and equality of treatment for all court users, and to promote public trust and confidence in Australian courts and the judiciary.

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Managing courtroom communication: reflections of an observer*

Joanna Kalowski†

In the highly structured courtroom environment, communication is a strange hybrid with unique features. The following article identifies these and suggests practical interventions for judicial officers to manage effective and courteous communication.

To understand what tips the balance in a courtroom (or an individual) from courteous and receptive to unreceptive or hostile is to consider many factors:

- litigants' expectations of courts, judicial officers and the hearing process
- the quality of understanding they have of their case, of the hearing process, and their role in it
- their level of language competence and confidence
- previous experience of courts in particular, and authority figures in general
- their attitude to winning and losing, whether in or outside court
- the quality of their representation in court.

A litigant's state of mind is also a factor, and while a degree of tension and nervousness is predictable and normal, tension is dramatically higher in litigants without legal representation.

The people central to the purpose of the court (the litigants) are required to speak in a limited and formalised way, and often speak least of all. Those who speak on their behalf are in far more direct communication with the judicial officer than they are, a situation many find frustrating, even when prepared for it — and many are ill-prepared. While legal representatives know the

* Edited version of an address presented to the National Judicial College of Australia Communication in the Courtroom Conference, 10 November 2007, and the Local Court of NSW Annual Conference, 2 July 2008. Published in (2008) 20(10) *JOB*.

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applicable law, parties feel they know the fact situation better than anyone else, having lived it, and can be puzzled and irritated by the omission of details they regard as essential features of their case. This type of mediated communication is unusual in itself, and is usually reserved for people needing the services of an interpreter. In social settings, nothing is quite so irritating as having someone speak for you when you are present and perfectly able to speak for yourself.

The reverse, however, is worse. Unrepresented litigants do speak for themselves, but find themselves saying things inappropriately, either at the wrong moment or in the wrong way; they soon discover that underlying communication in court are some assumptions about process without which they quickly appear bumbling and incompetent.

Bumbling, incompetent, puzzled, frustrated, irritated: these are hardly descriptive of the state in which people do their best, and adults can be reduced to feeling like children. Add to this the shame adults feel when they are out of their depth, and it becomes obvious why comprehension declines in direct proportion to the rise of feelings of inadequacy.

Judicial officers, too, are in the unusual situation — from the communication point of view — of having to gauge levels of understanding without being able to rely on the usual tools: eye contact, direct interaction, mutual questioning. At best, judicial officers can ask if all is clear; but which adult is going to admit, aloud, in the presence of others who seem at ease with what is happening that they don't understand a process which is ostensibly about them?

It is this reality which provides the backdrop to the reflections contained in this paper, and the basis of suggested approaches, interventions and skills deployment.

Some safe assumptions judicial officers can make about litigants

- People believe legal representation largely evens out power imbalances between parties, and unrepresented parties are keenly aware of the unevenness of power relations, and of their level of disadvantage.
- This sense of being disadvantaged often makes them defensive or aggressive.
- It can also have the opposite effect, silencing them, making them passive in the face of much they do not follow. A feeling of helplessness frequently results, further impairing the capacity to understand and participate.
- Litigants will be anxious, even when represented, but far more so if they are not.
- Anxious people are more likely to seem hostile, even if they don't feel particularly hostile.
- People's capacity to understand and respond is reduced in direct proportion to their level of anxiety, yet litigants not unreasonably expect to understand everything that will happen around them. ("After all, it's my case.") As the case proceeds, and their understanding remains limited or declines, their resentment grows, further fuelling their inability to focus, follow and respond.
- Most litigants are poorly prepared for the court event, whether represented or not. Where lawyers are involved, litigants rely on them and behave quite passively. However, unrepresented litigants' more active participation can be equally unhelpful to the process unless they are among a tiny group of highly skilled and well-informed people who know how to conduct their matter in court.

- Litigants generally have high expectations that the process will be fair, and have preconceived, often unrealistic notions of what fairness entails.
- Their unrealistic expectations include the idea that the outcome will vindicate them, and resentment can grow as they realise it is unlikely to happen. Not knowing how rare it is for a litigant to leave court feeling vindicated, they leave feeling cheated.
- This is the cycle that predisposes such a litigant to be even more difficult to deal with in future court hearings, whether related to the first event or not.

Judicial interventions aimed at reducing anxiety will lower the level of litigants' defensiveness and helplessness and raise their capacity to participate. Among the most effective are introducing the court event with a description of what is to happen on this occasion, and a summary of what happened previously.

What people know before they are familiar with a subject or a setting ("entry knowledge") deeply influences the way they act once they are in the setting or dealing with the subject ("entry behaviour"). Judicial officers and lawyers know the subject and the setting so well that they can easily overlook how strange it can be for litigants: how formal, how artificial, how unusual, how constrained and rule-bound.

Attempts to deal with this sense of strangeness by altering the physical setting have been partly successful, especially where litigants can sit next to their representatives instead of behind them. Doing away with all ceremony, however, may defeat the purpose, since parties to litigation have twin goals, sometimes seen as inconsistent, but in fact quite compatible. They want input into their matter, to be heard and taken seriously, but they want someone else, someone in a position of authority, to take responsibility for resolving their problem.

How does the ordinary litigant know what to expect?

Judicial officers' use of language is crucial to ensuring litigants' understanding of stages in the hearing, and may also lower tension in the courtroom. The capacity to speak simply and clearly, using accessible yet not simplistic language is a daunting task where technical language is regularly used and widely accepted as the norm. It requires judicial officers to be able to paraphrase and explain common legal expressions, or to suggest others do so for the benefit of litigants.

Communication improves if judicial officers use active rather than passive voice, and avoid talking over parties or lawyers, double negatives and multi-layered questions. Judicial officers report they also propose these techniques as a solution when litigants fail to understand questions from counsel (listening for the "how" as well as the "what").

It is apparent that one aspect of judicial leadership lies in the ability to model the kind of communication that assists both the court and its users.

It really matters for those whose business is language clarity to stop and consider how, when and why they use particular forms of expression, and to choose consciously how they will communicate, and with whom.

English has a rich heritage, influenced by many other languages, but its primary influences are Germanic and Latinate. In workshops I offer judicial officers either a "hearty welcome" or a "cordial reception", and ask which they would prefer. Someone always (correctly) observes

that they mean the same thing; and someone else always adds that they feel different — and that is the point. The "hearty welcome" sounds immediate and comfortable, while the "cordial reception" sounds cooler, and more formal. The former is the Germanic, the language of the many, and creates a tone which the latter, in the language of the few, cannot. Only the clergy and the judiciary knew Latin, and used it in ways that reserved meaning and high purpose for a select group.

Those who study and love the language enjoy the by-play English permits, but rarely recognise that it is possible to retreat into unnecessary formality under pressure, because almost everything in English can be said in two "languages". That is not to say there is no place for the use of formal language, but it is unhelpful if the goal is to increase litigants' sense of participation and understanding. When judicial officers reproach parties who are having difficulty understanding an issue that "this is a simple proposition", the outcome can be quite difficult.

Under pressure from high case loads and increasing numbers of unrepresented litigants in complex matters, judicial officers are now faced with reformulating what they say to ensure the ordinary listener — quite literally the average person in the street — can follow and answer, query and respond. For judicial officers, this can be about simply reframing Latinate phrases into everyday English, or persistence in explaining a point to a litigant without feeling that this reflects poorly on themselves. On the contrary, litigants' respect for judicial officers grows in circumstances where judicial officers have gone to some lengths to ensure they understand and can follow the process.

As a stress management tool, it is of unparalleled benefit to judicial officers, too.

Expectations of courts in general and the judicial officer in particular

- The buck stops here — this is the person who will sort it all out.
- The judicial officer is in control, and won't let me be overborne.
- The judicial officer will protect my rights.
- The climate here is serious, and I will be taken seriously.

The adversarial nature of most proceedings ensures that litigants will at times feel discomfort. If they perceive this, rightly or wrongly, as an assault on their rights, anxiety and tension result. At high levels, this can lead to hostile and unproductive behaviour on the part of litigants and tension in the courtroom. Paradoxically, it is sometimes when judicial officers are following due process scrupulously that litigants with unrealistic expectations of what protection of their rights looks and feels like may become aggressive.

It is of great value therefore, if judicial officers can explain procedural steps in simple terms along the way.

Realistic expectations of judicial authority

- direction
- stability

- conflict management,
- maintenance of norms.

Authority, defined as the ascribed power to achieve an end or carry out a responsibility through others, is distinguished from influence, the ability to work with others towards a common goal by recruiting their commitment, energy and purpose.

Recruiting the energy of others depends upon the conscious use of active listening skills, and being prepared to attend to a litigant's expression of emotion (obviously without overstepping boundaries) in order to ensure emotion does not swamp reason.

The purpose of an intervention aimed at managing emotion is to return the individual to the state in which he or she can best participate — a rational state rather than an emotional one.

It seems counter-intuitive that attending to a party's emotional state when it is impairing their capacity to participate will actually lower emotion and raise the level of cognition; many professionals ignore emotion in the hope that it will go away. Judicial officers themselves report that a range of interventions, from offering or calling a short adjournment to asking parties whether they feel able to proceed, assists parties to "pull themselves together" and function more appropriately from that point on.

Saving face is not only a cross-cultural phenomenon, but a human one, and is particularly important for adults, whose fear is that they will look foolish (childlike) if they are unable to conduct themselves appropriately in a given setting (like an inexperienced child). Feedback and interviews with litigants reveal that the judicial officer's status is actually enhanced by subtle interventions that restore dignity and confidence. A phenomenon known as "locating people in their expertise" emerges from the understanding that no one knows more about a situation than those who have lived it. Judicial officers who adopt this view find parties are more likely to accept and follow instructions designed to assist them also to understand procedural or legal issues. It is the "also" which is the key here. ("You may understand the facts of the case; now let me help you understand how it will run and why so that you can participate more fully." This may not be stated, but litigants will "hear" it as an enabling message, since it will underpin much of what they experience in court).

A quick self-assessment using the four factors (direction, stability, conflict management, maintenance of norms) after a tense session in court can help judicial officers to identify whether today's difficult litigants were and possibly remained confused, and to reconsider the techniques used to manage them. More often than warranted, people jump to the conclusion that litigants behaving aggressively are querulants in the sense used by Lester et al.[1] More often than not, they were merely being difficult.

Considering what was done to create a sense of direction and stability, and what kind of interventions were used to manage conflict and maintain norms can reveal interesting gaps.

1 G Lester et al, "Unusually persistent litigants" (2004) 184 *British Journal of Psychiatry* 352; G Lester, "The vexatious litigant" (2005) 17 *JOB* 17.

Remembering that litigants, especially unrepresented litigants, are unfamiliar with the norms of conduct and procedure in court presents a raft of possibilities for intervention by the judicial officer. However, it goes without saying that not all judicial officers will feel comfortable with all possible interventions, and will probably deploy mostly those with which they are most comfortable themselves. The trick is to expand judicial officers' own comfort in order to acknowledge and manage the discomfort of litigants. This is best achieved by discussion and exchange of views among judicial officers themselves, not just skills training or practice.

A judicial educator, herself a judicial officer, identifies four factors which assist in maintaining the tone of communication in court:

Preparation + Knowledge lead to Politeness + Control

Preparation, she asserts, goes a long way to protecting judicial officers from being taken by surprise and assists judicial officers to remain in their comfort zone. It is fear of loss of status which may cause some to respond aggressively to a surprise issue, although undoubtedly such issues will arise, regardless of the level of preparation. If civility is a by-product of preparation, it will enhance both the function and the tone of the court, and prevent that downward spiral so difficult to reverse. (Here again, the same judicial officer says that if she feels herself losing her temper, she takes a short adjournment and on return apologises for speaking sharply — a good way of reframing the outburst and restoring calm.)

At the heart of effectiveness in this area are some self-evident skills:

- awareness of the importance of managing people in all situations
- ability to define and describe a task and set limits up front
- ability to build confidence and manage risk
- capacity to stay with ambiguity for a time — easier for the judicial officer than for the litigant, who wants and expects everything to be clear from the outset, and can become agitated if this does not happen.

Anxious litigants can't manage themselves, are unfamiliar with the process and the judicial officer and his or her role, and they usually don't know the nature of the task or its limits. Building litigants' confidence in the process as it runs its course is one role the judicial officer plays: it is all but imperceptible to everyone in the courtroom, including many judicial officers who, upon hearing favourable observations, regularly express surprise that they achieved them, and in what ways they did so.

Key communication skills revisited

- communicate clearly and simply
- use accessible yet not simplistic language
- involve litigants in the process — eyes and words
- create a climate conducive to "participation"
- maintaining a focus on the issues

- ensuring there is clarity about process
- maintaining courtesy in the courtroom
- listening, summarising, paraphrasing if necessary
- asking questions, not statements disguised as questions
- avoiding talking over litigants or lawyers
- avoiding double negatives and multi-level questions
- using active rather than passive voice.

Interventions to settle litigants down

- make opening remarks which indicate how the case will proceed today
- acknowledge litigants as well as their representatives
- tell unrepresented litigants what is expected of them, what they can and can't do
- assure them they will be heard
- let them know they will have a chance to speak, and indicate when and in what ways at the outset and as the case proceeds
- use as wide a range of interventions as you comfortably can.

Six interventions defined by their purpose

1. **Prescriptive:** purpose — to be directive, eg, "You must answer yes or no to the question."
2. **Informative:** purpose — to instruct, make an observation, eg, "You look uncertain about that."
3. **Confrontative:** purpose — to challenge, give direct feedback, eg, "Please remain silent while X is giving evidence."
4. **Cathartic:** purpose — to acknowledge and normalise tension, eg, "The question may be unpleasant, but you have to answer it as best you can."
5. **Catalytic:** purpose — to encourage analysis, eg, "Where does this line of argument take us?"
6. **Supportive:** purpose — to express empathy, eg, "I know you have left your patients waiting to be with us today, Doctor."

Manage tension

- give yourself a break if you need one, and the timing permits it
- give litigants a break if emotion is getting in their way, or offer a break or ask if they feel able to go on
- mutualise comments on emotion in order to neutralise them, for example, "There are moments everyone feels ..."

- work on your own comfort with conflict and emotion — both are to be expected, especially in the court setting
- saving face is valued by all, and does not diminish your standing
- talk with your peers — exchange insights and ideas.

Further references on communication

For further references on the topic of communication, please see the following:

- Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, 2nd edn, 2022 at https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf, accessed 19 January 2023.
- Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at Chs 5 "People with disabilities", 10 "Self-represented parties" and 11 "Older people".

Legal reasoning

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Alternative facts in the courts*

The Honourable Justice S Gageler AC†

This article reflects on how our legal system deals with the phenomenon of the assertion of alternative versions of a fact. When a party in litigation asserts the existence of a fact which another party disputes, the question for the tribunal of fact is not the abstract question of whether the fact exists. The question for the tribunal is whether it is satisfied that the fact has been proved to the requisite standard. The tribunal's judgment is made inevitably under conditions of uncertainty and involves the formation of a subjective belief. That subjective belief is an "actual persuasion" that the asserted fact exists. And it is the subjectivity of fact-finding that allows us to understand why a different, probabilistic approach to fact-finding cannot be the measure or the goal of what our courts do.

> [J]ustice is but truth in action … We must have not only a knowledge of facts, as a basis for doing justice; but we must have conditions under which truth may properly function … We cannot expect to have justice done unless we have a mind that is free to act on such facts as may be presented.[1]

"Alternative facts"

On Sunday 22 January 2017, a new and evocative term entered mainstream English usage. How that occurred was as follows. On Friday 20 January 2017, the 45th President of the US was inaugurated in a public ceremony on the West Front of the Capitol Building at the end of the National Mall in Washington, DC. The US National Park Service, which controls the National

* This is an edited version of a talk given at Harvard Law School on 28 March 2018. An earlier version was presented at the Australian Bar Association Conference in Dublin on 5 July 2017. The themes were inspired by Jim Spigelman and David Hodgson: J Spigelman, "Truth and the law" in N Perram and R Pepper (eds), *The Byers Lectures: 2000–2012*, Federation Press, 2012, p 232; D Hodgson, "The scales of justice: probability and proof in legal fact-finding" (1995) 69 *ALJ* 731.

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† Justice of the High Court of Australia. Thanks to Glyn Ayres and Monica Aguinaldo for their assistance and to Jim Thomson and Philip Pettit for their comments. Errors and misconceptions are entirely my own.

1 L Brandeis, "Interlocking directorates" (1915) 57 *Annals of the American Academy of Political and Social Science* 45 at 45, 48. The opening words are inscribed above the entrance to the John Joseph Moakley US Courthouse in Boston, Massachusetts.

Mall, does not publish statistics on the sizes of the crowds that gather there. The Washington Metropolitan Area Transit Authority does publish statistics on the numbers of people who ride the Washington Metro so as to be able to get to the National Mall.

On Saturday 21 January 2017, the White House Press Secretary, Sean Spicer, held his first press conference. Mr Spicer criticised mainstream media reporting of the estimated number of people who had gathered in the National Mall for the President's inauguration the previous day. Mr Spicer then said, "we know that 420,000 people used the DC Metro public transit yesterday, which actually compares to 317,000 that used it for President Obama's last inaugural". The Washington Metropolitan Area Transit Authority's published statistics on the number of people who rode the Washington Metro on the morning of President Obama's inauguration on 21 January 2013 was indeed 317,000. The Authority's published statistics on the number of people who rode the Washington Metro on the morning of Friday 20 January 2017 was not 420,000, but 193,000.

That formed the background to an interview which aired live on NBC's "Meet the Press" program on the morning of Sunday 22 January 2017. Moderator Chuck Todd interviewed publicist Kellyanne Conway, who by then held the new position of Counsellor to the President. Mr Todd asked Ms Conway why the President, when putting his press secretary in front of the podium for the first time, had chosen to cause him to utter a "provable falsehood". Ms Conway's answer, when it eventually came, was as follows: "Don't be so overly dramatic about it, Chuck. … You're saying it's a falsehood. … Sean Spicer, our press secretary, gave alternative facts to that." She went on to say: "I don't think you can prove those numbers one way or the other. There's no way to really quantify crowds."

Those watching the interview on that Sunday morning had just witnessed the creation of a meme. The term "alternative facts" went viral and global. Many, especially in the mainstream media, derided Ms Conway's use of the term. Some, particularly in the blogosphere, defended it.

Ms Conway subsequently explained what she meant. She said: "Two plus two is four. Three plus one is four. Partly cloudy, partly sunny. Glass half full, glass half empty. Those are alternative facts." What Ms Conway seemed to be saying, in context, was that the ultimate question of whether the crowd in the National Mall at the time of the inauguration was big or small was an inherently evaluative question. Because the ultimate question was evaluative, she seemed to be saying, it was acceptable to marshal tendentious material to support one answer over another.

One of Ms Conway's defenders was journalist Joel Pollak. The day after the "Meet the Press" interview, on Monday 23 January 2017, he published an article in *Breitbart*, in which he explained "alternative facts" to be a "harmless, and accurate, term in a legal setting, where each side of a dispute will lay out its own version of the facts for the court to decide".[2] Some short time later, on 2 February 2017, blogger David Allison published an article in *American Thinker* entitled "'Alternative facts': a common legal term".[3] The term "alternative facts", Mr Allison

2 J Pollak, "'Alternative facts' the media finds a meme for the 'resistance'", *Breitbart*, 23 January 2017 at www.breitbart.com/the-media/2017/01/23/alternative-facts-left-finds-meme-resistance/, accessed 12 October 2021.

3 D Allison, "'Alternative facts': a common legal term", *American Thinker*, 2 February 2017, at www.americanthinker.com/blog/2017/02/alternative_facts_a_common_legal_term.html, accessed 12 October 2021.

wrote, "is known to most lawyers". Mr Allison wrote that the category of "most lawyers" presumably included Ms Conway, who had a degree from George Washington University Law School and who could therefore be presumed to have known exactly what she was saying. Mr Allison went on to write that when the non-legally-trained Mr Todd had described an alternative fact as a "falsehood" in his interview with Ms Conway, Mr Todd was "not only wrong, but propagating an ignorance born out of lazy and shallow thinking".

The online version of Mr Allison's article provided a link to a *Wikipedia* entry entitled "Alternative facts (law)".[4] The "history" of that *Wikipedia* entry recorded that the entry was created on 25 January 2017. The entry defined "alternative facts" as "a term in law to describe inconsistent sets of facts put forth by the same party in a court given that there is plausible evidence to support both alternatives" and as a term "also used to describe competing facts for the two sides of the case". The entry went on to refer to a number of English and American cases on pleadings in which, lo-and-behold, the term "alternative facts" has been used.

Despite being legally trained in Australia and the US, I confess to having been one of those lazy and shallow thinkers who had previously been ignorant of the term "alternative facts". Through *Wikipedia*, I became better informed. But I have not come to shed newfound enlightenment by delivering a lecture on pleading.

What I want to do is to reflect, in a post-truth era, on how our legal system deals with the phenomenon of the assertion of alternative versions of a fact. My topic is legal epistemology from the perspective of a lawyer rather than a philosopher. What do we, as lawyers, mean by truth? How does our conception of truth relate to our conception of justice?

The Dixonian perspective

A fundamental similarity between the US and Australia is that both are inheritors of the common law system of justice. The central feature of the common law system is that there is committed to a distinct judicial branch of government the unique and essential role of conclusively determining disputed questions of law and of fact in the context of an adversarial trial. For present purposes, I do not draw any distinction between civil and criminal trials and I do not draw any distinction between the US legal system and the Australian legal system as each has developed over the past two centuries. To the extent that there is a relevant difference, it is that Australia has abandoned trial by jury in almost all civil cases.

As someone who has studied and practised law mainly in Australia, however, I naturally approach the topic from the perspective of an Australian. And as an Australian lawyer I cannot help but to be influenced in my thinking by Sir Owen Dixon, who was a dominant figure within the Australian legal hierarchy for a substantial part of the 20th century and whose intellectual influence is still felt within it. Much of what I have to say will be drawn from his insight into what it means for a tribunal of fact to make a finding on a disputed question of fact. To the extent that I add anything, it will be limited to some contemporary observations about probability and heuristics.

4 See https://en.wikipedia.org/wiki/Alternative_facts, accessed 12 October 2021.

First, I should tell you who Sir Owen Dixon was. He was a Justice of the High Court of Australia from 1929 to 1952 and Chief Justice from 1952 to 1964. Between 1942 and 1944, he took time off the Bench to become Australian Ambassador to the US. In Washington, he became a friend of Justice Felix Frankfurter.[5] In the library of the High Court in Canberra, where I now sit, there is a first edition of Judge Learned Hand's book on the Bill of Rights published by Harvard University Press in 1958. Inside the front cover is a handwritten inscription which gives an indication of the relationship between Dixon and Frankfurter. It reads:

> For Dixon CJ who is not burdened with applying the Bill of Rights, but [who] has a great judge's true instinct about it all, With esteem and in friendship, Felix Frankfurter.

Dixon was the principal exponent and exemplar of a judicial method which he famously described at the time he was sworn in as Chief Justice as "strict and complete legalism".[6] In a later address at Yale Law School, he explained that judicial method in the words of Professor Maitland as cleaving to that strand of the common law tradition which emphasised "strict logic and high technique".[7] Legalism has often been associated with formalism, including by me,[8] but to brand it as mere formalism would be wrong to the extent that the description would suggest that it was mechanical or Austinian. Dixonian legalism, as practiced by Dixon himself as distinct from some of his lesser imitators, was sophisticated, intellectually inquiring and subtly innovative. Dixon's legalism was not markedly different from the judicial method of Frankfurter. It might fairly be described as an understated, scholarly and sceptical version of the "grand style" admired by Professor Llewellyn.[9]

Not long before he retired, Dixon delivered what was in retrospect his capstone speech. He delivered it not to a group of lawyers, but to a gathering of surgeons. The speech was about different forms of decision-making under conditions of uncertainty. Speaking of the role of a judge in contrast to that of a surgeon or a general, he said this:[10]

> Unlike men responsible for immediate action we have all the advantages which dialectical discussion can give; by the ordinary legal process relevant facts and circumstances can be made to appear, and we have time, if not leisure, in which to reach our decisions and prepare our reasons. If truth is an attribute which can be ascribed to a purely legal conclusion, it should be within our reach.

Whether truth was an attribute which could properly be ascribed to a legal conclusion, was the question which Dixon deliberately left hanging.

5 O Dixon, "Mr Justice Frankfurter: a tribute from Australia" (1957) 67 *Yale Law Journal* 179, reprinted as O Dixon, "The Honourable Mr Justice Felix Frankfurter — a tribute from Australia" in Judge Woinarski (ed), *Jesting Pilate: and other papers and addresses*, Law Book Co, 1965, p 180.

6 "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi, xiv.

7 O Dixon, "Concerning judicial method" in Judge Woinarski (ed), *Jesting Pilate: and other papers and addresses*, Law Book Co, 1965, pp 152, 153, quoting *Selden Society year book series*, vol 1, Introduction, xviii.

8 S Gageler, "Legalism" in T Blackshield, M Coper and G Williams (eds), *The Oxford companion to the High Court of Australia*, Oxford University Press, 2001, p 429.

9 K Llewellyn, *The common law tradition: deciding appeals*, Little, Brown and Co, 1960, pp 36–38.

10 O Dixon, "Jesting Pilate" in Judge Woinarski (ed), *Jesting Pilate: and other papers and addresses*, Law Book Co, 1965, pp 1, 10.

Dixon chose to entitle that speech "Jesting Pilate".[11] He took that title from a line in Francis Bacon's essay entitled "Of truth".[12] Bacon's inspiration came from the biblical encounter between Jesus and Pontius Pilate as told in the Gospel of John. Bacon penned as the first line of his philosophical dissertation: "What is truth? said jesting Pilate; and would not stay for an answer." Dixon quoted those words as the penultimate line of the last significant speech he was to give in his long career as a judge. Dixon's last line was, "I have not forgotten that when Pilate said this he was about to leave the judgment hall".[13]

The same weary scepticism is evident in a story, recounted by his biographer, about Dixon seated at a dinner party next to a woman who was enthusing about how splendid it must be to dispense justice. Dixon's reply: "I do not have anything to do with justice, Madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence."[14]

What I find interesting about the story is that a man who has been a senior appellate judge for a very long time gets asked about justice and responds by talking about facts. He responds by expressing in the negative what Justice Brandeis expressed affirmatively in the quotation with which I opened. He says, in effect, that there can be no justice without knowledge of the facts.

Of the three impediments to an appellate court having knowledge of facts which Dixon identified, the first two might together be described in terms more general and more generous than those used by Dixon as "human imperfection". The third — what Dixon described as "archaic laws of evidence" — is, I think, inextricably linked with the other two. I will try to explain why.

Truth and the adversarial process

Historically, rules of procedure and rules of substantive law were very much more blurred than they are now. By the time of Chief Justice Dixon's retirement in 1964, many rules that a century before would have been considered rules of evidence had been transmogrified into rules of substantive law. Conventional estoppel and the parol evidence rule are examples. Other rules like client legal privilege have since gone the same way.

That still leaves many truly procedural rules of evidence derived from the tradition of the common law that persist within our contemporary legal system. They include rules which regulate the form and method by which evidence is adduced in a court. They include rules which regulate when evidence adduced is admissible to prove or disprove a fact in issue.

The basic rule of admissibility, to use the language of its modern statutory restatement in Australia, is that evidence is admissible if, but only if, it is relevant and that evidence that

11 ibid, p 1.
12 F Bacon, "Of truth" in *The works of Francis Bacon*, printed for FC and J Rivington et al, 1819, vol 2, p 253.
13 Dixon, above n 10.
14 P Ayres, "Owen Dixon's causation lecture: radical scepticism" in "High Court centenary: Sir Owen Dixon" (2003) 77 *ALJ* 682 at 693.

is relevant is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[15] From that basic rule of admissibility, there are exceptions. Except under strict conditions, by way of example, we exclude hearsay, we exclude opinion, and we exclude evidence of a person's predisposition.

Were the question of the size of the crowd at the Presidential inauguration ever to arise for determination in a court, the question would be seen as a question of fact to be decided by reference to inferences drawn from evidence. Evidence of the number of people who rode the Washington Metro on the morning of the inauguration would be relevant. But evidence of that number, although relevant, would be excluded as hearsay or as opinion except under strict conditions.

Worth pondering is how exclusionary rules of that nature should have come to exist and persist. How is it that our system of justice should have come to accept that less relevant evidence should be preferable to more relevant evidence? Apart from evidence of such low probative value that its admission would be a waste of time or lead to undue expense, why is evidence that could rationally affect the assessment of the probability of the existence of a fact excluded from the assessment of the probability of the existence of that fact? Why have we not opted for what Jeremy Bentham suggested at the beginning of the 19th century was the "natural system" of adjudication: "Be the dispute what it may, — see everything that is to be seen: hear everybody who is likely to know anything about the matter"?[16]

Scholars who began to ponder those sorts of questions in the 19th century tended to see the answer as lying in the traditional distinction in common law courts between the role of the legally trained judge to orchestrate the proceeding and to state the law and the role of the randomly chosen jury of laymen to find the facts. The exclusionary rules had evolved, as they saw it, to limit the scope for the jury to be swayed by prejudice.[17]

The problem with that explanation is that not many exclusionary rules in their overt formulation differentiate between fact-finding undertaken by a jury and fact-finding undertaken by a judge. More recent historical research has tended to link the emergence of exclusionary rules of evidence less to the emergence of the jury as the finder of facts than to the somewhat later emergence of the adversarial system under which a trial of fact, whether in a civil proceeding or a criminal proceeding, came to be treated as a contest between parties.[18]

The essential feature of fact-finding within an adversarial system is that the tribunal of fact — whether it be a jury or a judge — is tasked not with the independent pursuit of some ultimate truth but with arbitration of a contest between parties who assert different versions of the truth. Within an adversarial system, the party who asserts the existence of a fact which another party

15 *Evidence Act 1995* (Cth) ss 55, 56.

16 J Bentham, *The works of Jeremy Bentham*, William Tait, 1843, vol 7, p 599.

17 For example, J Thayer, "The present and future of the law of evidence" (1898) 12 *Harvard Law Review* 71. For a history of scholarly writing on evidence, see W Twining, *Rethinking evidence: exploratory essays*, 2nd edn, Cambridge University Press, 2006, ch 3.

18 J Langbein, *The origins of adversary criminal trial*, Oxford University Press, 2005, ch 4; T Gallanis, "The rise of modern evidence law" (1999) 84 *Iowa Law Review* 499; S Landsman, "The rise of the contentious spirit: adversary procedure in eighteenth century England" (1990) 75 *Cornell Law Review* 497.

disputes ordinarily bears the burden of its proof. The question for the tribunal of fact is not the abstract question of whether the fact exists but the more concrete question of whether the tribunal is satisfied at the conclusion of the contest that the fact has been proved to the requisite standard. The requisite standard of proof in a civil proceeding is traditionally expressed as proof "by the preponderance of the evidence" or more commonly, at least in Australia, as proof "on the balance of probabilities".

Truth and uncertainty

Expression of the standard of proof in a civil proceeding as satisfaction on the balance of probabilities is an acknowledgment that the judgment to be made by the tribunal of fact is inevitably to be made under conditions of uncertainty. Unless we were present, and perhaps even if we were, we can never have absolute certainty that an historical event occurred. Our memories are at best impressions of fragments of the past.

Satisfaction on the balance of probabilities, however, has not been equated with mere satisfaction as to the balance of probabilities. There are many examples in the decided cases, but an example from the academic literature perhaps illustrates that point best. There are many variations of the example. The earliest, I think, was given by Professor Tribe.[19] The example is of a town in which there are just two bus companies. The Blue Bus Co has 95% of the buses. The Red Bus Co has the other 5%. The evidence shows only that the plaintiff was knocked down by a speeding bus in the dead of the night and nobody saw the colour. The question is whether the plaintiff recovers damages in negligence from the Blue Bus Co on the basis that there is a 95% chance that the bus was blue. The answer our legal system gives is "no".

Theoretically, our legal system could have taken a different approach to fact-finding and a correspondingly different approach to the imposition of liability. We could have accepted an entirely probabilistic approach to finding facts in issue and we could have adjusted liability to reflect the probabilities. On the basis that the split reflects the probability of each company being responsible for the speeding bus, we could have held the Blue Bus Co liable for 95% of the damage sustained by the plaintiff knocked down by a bus and held the Red Bus Co liable for the other 5%.[20]

The reason we do not impose liability in that probabilistic way, as Professor Nesson to my mind convincingly demonstrated, is deeply rooted in our conception of justice according to the rule of law.[21] The rule that a bus shall not be driven at more than 60 miles an hour is a rule that the driver of a bus is expected to obey, and either obeys or does not. Only its breach gives rise to civil or criminal liability. If liability was to be imposed in proportion to the probabilities without need to prove an actual breach of the rule, the Blue Bus Co could stay within the speed limit and still be liable for 95% of the damage sustained by the plaintiff being knocked down by a red bus,

19 See L Tribe, "Trial by mathematics: precision and ritual in the legal process" (1971) 84 *Harvard Law Review* 1329, at 1340–1341, 1346–1350. The example was based on *Smith v Rapid Transit, Inc* , 317 Mass 469; 58 NE 2d 754 (1945).

20 Compare *Sindell v Abbott Laboratories*, 26 Cal 3d 588 (1980). But see C Nesson, "The evidence or the event? On judicial proof and the acceptability of verdicts" (1985) 98 *Harvard Law Review* 1357 at 1384.

21 ibid at 1391.

and the Red Bus Co could exceed the speed limit and still only be liable for 5% of the damage sustained by the plaintiff knocked down by one of its own buses. Neither bus company would have an incentive to obey the rule. The normative force of the rule itself would be destroyed.

To preserve the integrity of the rules we enforce, the approach we have therefore taken to fact-finding is all or nothing. We treat past events the occurrence of which is uncertain as either proved to have happened or not proved to have happened. We force a tribunal of fact to decide one way or the other, and we impose or decline to impose liability according to the outcome of that binary decision. Whatever its underlying probability, a disputed fact once found is a fact which is taken to exist for the purpose of resolving the legal rights or liabilities that are in contest. The fact once found is treated for that purpose as certain even though the fact might be found only on the balance of probabilities and even though the existence of the fact remains uncertain outside the scope of the controversy that is concluded by the judgment of the court. Sir Owen Dixon, to whom I have already referred, and to whom I will refer again, wrote of that phenomenon that: "[C]ourts have an advantage over other seekers after truth. For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given."[22]

Truth and subjectivity

The process of fact-finding, however, is not entirely linear. The certainty attributed to a found fact loops back to affect in practice the way evidence is evaluated to find that fact.

Quite what is involved in the notion of satisfaction on the balance of probabilities was spelt out by Dixon J in 1938 in a case called *Briginshaw v Briginshaw*.[23] According to a recent survey, *Briginshaw* comes in at number seven of the 200 most frequently cited cases in Australia.[24] Like many frequently cited cases in many jurisdictions, it is one of the most persistently misunderstood. It is often treated as standing for the exact opposite of what it held.

What Dixon J was immediately concerned to do in *Briginshaw* was to reject the notion, since taken up in the Supreme Court of the US,[25] that some categories of facts in civil cases — of which fraud is the prime example — demand a higher standard of proof than proof on the balance of probabilities: a standard which might be expressed in contradistinction to proof "by the preponderance of the evidence" as proof "by clear and convincing evidence". His explanation provided an analysis of the nature of fact-finding more generally. What he said was as follows:[26]

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt

22 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 340. See also *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at [6], [70]; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642–643.
23 (1938) 60 CLR 336.
24 D Reynolds and L Goddard, *Leading cases in Australian law: a guide to the 200 most frequently cited judgments*, Federation Press, 2016, xi.
25 *Addington v Texas*, 44 US 418, 423–424 (1979).
26 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–363. See also *Murray v Murray* (1960) 33 ALJR 521 at 524–525.

> an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal … Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency … This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

The main thing Justice Dixon was saying, consistently with mainstream judicial[27] and academic[28] opinion in the US, is that satisfaction on the balance of probabilities involves the formation under conditions of acknowledged uncertainty of a subjective belief. The requisite belief is an "actual persuasion" that the fact in issue actually exists — that a past event the occurrence of which is uncertain and is disputed did indeed occur. What he was emphasising is that belief, as Bentham put it, "is susceptible of different degrees of strength, or intensity".[29] The belief involved in having a state of satisfaction "beyond reasonable doubt", the universally accepted expression of the requisite standard of proof for a fact asserted by the prosecution in a criminal proceeding, is similar to the belief involved in having a state of satisfaction "on the balance of probabilities" in that it is subjective belief and different only in that it is belief that must be held with a greater degree of intensity.[30] We have refused in Australia to define what we mean by "beyond reasonable doubt",[31] but in England and NZ, where a judge is permitted to translate the meaning of "beyond reasonable doubt", the standard instruction to a criminal jury is that it means "you must be sure".[32] In the US, in some States, juries are instructed that proof beyond reasonable doubt is proof "that leaves you with an abiding conviction that the charge is true".[33]

27 For example, *Anderson v Chicago Brass Co*, 106 NW 1077, 1079–1080 (1906); *Sargent v Massachusetts Accident Co*, 29 NE 2d 825, 827 (1940).

28 For example, Nesson, above n 17; V Walker, "Preponderance, probability and warranted factfinding"(1996) 62 *Brooklyn Law Review* 1075; M Pardo and R Allen, "Juridical proof and the best explanation" (2008) 27 *Law and Philosophy* 223.

29 J Bentham, *A treatise on judicial evidence*, Baldwin, Cradock, and Joy, 1825, p 40.

30 See *Luxton v Vines* (1952) 85 CLR 352 at 358, quoting *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

31 *The Queen v Dookheea* (2017) 262 CLR 402 at [23]–[28].

32 See *R v Bracewell* (1979) 68 Cr App R 44, 49; *R v Wanhalla* [2007] 2 NZLR 573, 588 [49].

33 Judicial Council of California Advisory Committee on Criminal Jury Instructions, *Judicial council of California criminal jury instructions*, LexisNexis, 2019, 43 (CALCRIM No 22).

Advances in biological and social sciences mean that recognition of the inherent subjectivity of belief in or satisfaction of a fact has the potential in a contemporary context to give rise to a number of avenues of inquiry. The suggestion has been made that what Dixon J referred to as "actual persuasion" of the existence of a fact in issue has a somatic component in that the feeling of persuasion can be related to activity in the region of the pre-frontal cortex associated with emotion and not simply with activity in the region that is more classically associated with reason, deliberation and judgment.[34] Expansion of the frontiers of neuroscience might well produce a more profound neurobiological understanding of the process of fact-finding.

In the meantime, our understanding of the cognitive processes involved in evaluating evidence and subjectively finding facts has been increasing through advances in behavioural science, particularly those building on the work on judgment under uncertainty pioneered by Daniel Kahneman and Amos Tversky in the 1970s.[35] The take-out point for present purposes is that humans, whether judges or jurors, are not particularly good at estimating probabilities. Tasked with forming a judgment as to the likelihood of the existence of a fact on the basis of incomplete information of uncertain veracity, most of us have an innate tendency to adopt rules of thumb or "heuristics" which work well enough in most situations, but which can lead in other situations to systematic and predictable errors or "biases".

The subjective explanation of the process of fact-finding provides a bridge between those developing fields of biological and behavioural science and orthodox legal theory. When acknowledgment of the inherent uncertainty of the existence of a fact in issue is combined with acknowledgment of the inherent subjectivity of the process of finding that fact, scope emerges within the confines of mainstream legal analysis for conceiving of at least some exclusionary rules of evidence as measures serving a function of compensating for or mitigating difficulties faced by a tribunal of fact attempting to weigh some types of logically probative evidence. What emerges is the potential for conceiving of the existence and application of at least some of those rules as methods for correcting and improving the making of judgments of fact under conditions of uncertainty within the context of an adversarial system — for conceiving of rules which Dixon sardonically described as archaic rules impeding a court's knowledge of the facts as measures which, to the contrary, might serve to mitigate unconscious biases so as to align the fact-finding tribunal's perception of what is likely to have occurred more closely with a statistically objective assessment of what probably occurred.[36]

But the subjectivity of fact-finding also allows us to understand why a statistically objective assessment of what probably occurred based on the evidence cannot be the measure of the veracity of curial fact-finding and should not be its goal. Recognising that the process of forming a state of mind cannot be divorced from the consequences that flow from such a state of mind being formed assists in understanding why we do not aspire to what Professor Tribe

34 H Bennett and G Broe, "The civil standard of proof and the 'test' in *Briginshaw*: is there a neurobiological basis to being 'comfortably satisfied'" (2012) 86 *ALJ* 258. See also L Capraro, "The juridical role of emotions in the decisional process of popular juries" in M Freeman (ed), *Law and neuroscience*, Oxford University Press, 2011, p 407.

35 A Tversky and D Kahneman, "Judgment under uncertainty: heuristics and biases" (1974) 185 *Science* 1124.

36 See M Saks and B Spellman, *The psychological foundations of evidence law*, New York University Press, 2016.

famously derided as "Trial by Mathematics".[37] Improbable things, by definition, sometimes happen. Experience teaches that it is the happening or asserted happening of an improbable thing which in the majority of civil cases gives rise to the underlying dispute about liability. The risk of error inherent in finding an improbable thing to have happened on the balance of probabilities, like the risk of error inherent in finding a probable thing to have happened beyond reasonable doubt, has a human cost and a social cost.[38] The necessity for the tribunal of fact to feel actual persuasion of the existence of a fact in issue accommodates those realities by requiring the tribunal of fact, in effect, to factor in the cost of error.

Truth and integrity

There is a final aspect of Dixon J's *Briginshaw* explanation that is of overriding importance. Frank acknowledgment of the inherent subjectivity of the fact-finding process highlights the ultimate dependence of our legal system's discernment of the existence of a fact on the honesty and integrity of the person or persons who constitute the tribunal of fact. The notion of a judge or a jury needing to feel an actual persuasion of the occurrence or existence of a fact before that fact can be found is meaningful and workable only if the judge or each member of the jury brings to the fact-finding function a mind genuinely open to persuasion.

I referred earlier to Francis Bacon, who among his many other achievements held the office of Lord Chancellor in the early 17th century. I will conclude with reference to Matthew Hale, who among his many other achievements held the office of Lord Chief Justice around the middle of the same century, during a particularly turbulent period of English history in comparison with which Brexit might fairly be portrayed as a minor blip. In 1660, Hale produced a set of rules for judges. Two centuries later, the then Lord Chief Justice, Lord Campbell, would say that Hale's rules "ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those entrusted with the administration of justice". In his popular yet profound little book entitled "The rule of law", the Senior English Law Lord, Thomas Bingham, said as recently as 2010 that Hale's rules "would still today be regarded as sound rules for the conduct of judicial office".[39]

Of the 18 rules Hale laid down, four of them amount to different ways of saying the same thing. The first is "That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked". The second is "That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions". The third is "That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard". The fourth is "That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard". The four rules are important, because together they capture the personal intellectual and moral discipline of decision-making on which the integrity of the system depends.

37 Tribe, above n 19.
38 Compare *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 at 1.
39 T Bingham, *The rule of law*, Penguin, 2010, p 21.

We have an adversarial system of justice. Our system has never adopted the illusion that it is involved in an ultimate quest for truth. But nor has it descended to the relativism of countenancing the dispensation of justice as nothing more than the making of an unconstrained choice between so-called alternative facts. Our best answer to Pilate's eternal question lies in our system's deeply rooted commitment to the ideal of an honest and impartial tribunal, mindful of the gravity of the decision to be made, finding disputed facts by assessing evidence that has been filtered to correct for cognitive bias, so as to arrive at an actual state of satisfaction or lack of satisfaction as to the existence of those facts. Polarisation is the antithesis of impartiality; and impartiality is the hallmark of justice.

The craft of judging and legal reasoning*

The Honourable Mr Justice Mostyn†

This paper explores the process of judicial fact finding in civil proceedings and considers how the facts as found give rise to a result. The author first considers the importance of credibility in the fact-finding process and questions the wisdom of the profession that the trial judge has superior ability to judge credibility than the appellate judge. He warns that triers of fact must be cognisant of the issues surrounding the reliability of testimony based on memory, and the very plausible yet dishonest witness. The author refers to the view of some that it is better for triers of fact to look first, where possible, at contemporaneous documents and undisputed facts and to draw conclusions primarily from those sources. He observes, however, that the more reliable the technique of fact finding, the more it is susceptible to appellate review. The role of the expert witness in the fact-finding process is briefly touched on. The author then refers to the "discretion" that is often vested in courts once the facts have been found. He observes that sometimes it is a true discretion and sometimes the use of the word is a misnomer. This categorisation debate highlights that, once the facts are found, then, in some cases, the so-called discretion is virtually extinguished and is replaced by an evaluative function. It is of pivotal importance for judges to be aware of this difference.

The subject of my paper is "the craft of judging and legal reasoning". In the discussion below I will not consider the constitutional role of the judge, or the boundary between legitimate, perhaps even adventurous, interpretation and illegitimate judicial activism. Nor will I consider the increasingly rancorous division in the US between loose constructionists and textual originalists. Reams have been written about this. For those interested, I recommend, *The business of judging*[1] by the late Lord Bingham of Cornhill, and *Reflections on judging*[2] by Judge

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1 T Bingham, *The business of judging: selected essays and speeches*, Oxford University Press, 2011.

2 R Posner, *Reflections on judging*, Harvard University Press, 2013.

Richard Posner of the US Court of Appeals for the Seventh Circuit. I have spoken about this in the context of the interpretation of, and the exercise of, the powers in the *Matrimonial Causes Act 1973*.[3]

Instead, as a puisne judge, who particularly enjoys first instance judging, I will discuss the process of judicial fact finding in civil proceedings and how, particularly in the field of family law, the facts as found give rise to the actual result.

Let there be no doubt, in the field of family law we are asked to find facts of the utmost seriousness. In child protection proceedings under s 31 of the *Children Act 1989* (UK), I have tried cases where the issue is whether a parent has deliberately killed a child. In effect, in such cases, I have sat as a Diplock court trying a charge of murder. In the light of such findings I have been asked to order, and have ordered, forced adoption severing the parental bond. In the Court of Protection (UK) I try issues of mental capacity, and in the light of such findings, I have been asked to order, and have ordered, forcible caesareans or amputations. I have been asked to make findings as to the life expectancy and quality of life of seriously ill or injured babies and adults in support of applications that medical care be palliative only and persons be allowed to die. In financial cases I am asked routinely to make serious findings of fraud with the most far-reaching consequences.

If I were to ask you what the key factor in finding facts in a trial is you might reply "credibility". Who does the judge believe? The primacy of the factor of credibility has an iconic, almost canonical, status. Thus Posner wrote:[4]

> No legal catchphrase is more often repeated than that determinations by a trial judge (or jury) whether to believe or disbelieve a witness can be overturned on appeal only in extraordinary circumstances. The reason is said to be the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony, since the transcript eliminates clues to veracity that are supplied by tone of voice, hesitation, body language, and other nonverbal expressions.

Just such a line was taken in *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd*,[5] a decision of the Privy Council on an appeal from Trinidad and Tobago. Lord Hodge cited[6] the following passage from the Canadian Supreme Court decision in *Housen v Nikolaisen*:[7]

> The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

3 N Mostyn, "¡Viva El Loro!", paper presented at the Family Law Conference 2014, Jordan Publishing, London, 8 October 2014, at www.judiciary.gov.uk/wp-content/uploads/2014/10/viva_el_loro.pdf, accessed 20 May 2021.
4 Posner, above n 2, p 123.
5 [2014] 4 All ER 418 ("*Beacon Insurance*").
6 ibid at [15].
7 [2002] 2 SCR 235 at [14].

His Lordship cited[8] the famous dictum of Lord Hoffmann in *Biogen Inc v Medeva plc*:[9]

> The need for appellate caution in reversing the [trial] judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

He also cited[10] Lord Neuberger of Abbotsbury in *Re B (A Child) (Care Proceedings: Threshold Criteria)*:[11]

> This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).

So you can see why this feature, credibility, has gained such high importance. It has a long and heavily-backed pedigree. But is it justified? Posner has his doubts. He wrote:[12]

> This is one of those commonsense propositions that may well be false. Nonverbal clues to veracity are unreliable and distract a trier of fact (or other observer) from the cognitive content of the witness's testimony. Yet it would occur to few judges to question the proposition that the trial judge has superior ability to judge credibility than the appellate judge, because nothing in the culture of the law encourages its insiders to be sceptical of oft-repeated propositions accepted as the old-age wisdom of the profession, and because appellate judges (indeed all judges) usually are happy to hand off responsibility for deciding to another adjudicator. [Citations omitted.]

He then makes this very obvious point:[13]

> No longer, however, are they technologically constrained to do so. Witnesses' testimony could be video-taped and the videotapes of their testimony made available to an appellate judge who thought demeanor important in assessing the truthfulness of testimony.

This convincingly undermines, to my mind, the argument that first instance judges somehow have some numinous exclusive power to assess credibility perfectly.

8 *Beacon Insurance* at [16].
9 [1997] RPC 1 at 45.
10 *Beacon Insurance* at [13].
11 [2013] 1 WLR 1911 at [53].
12 Posner, above n 2, pp 123–125.
13 ibid p 125.

Reliance on a witness's "demeanour" or on non-verbal clues is surely a most unsafe judging technique, as Posner rightly points out, even if it has an ancient and deep-rooted pedigree. A skilled actor will likely fool a judge, who is not a trained psychologist. Further, demeanour depends on who is asking the questions. In *Yuill v Yuill*, Lord Greene MR famously observed:[14]

> A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.

But is oral testimony about an event the best source of evidence about that event? Invariably the testimony depends on the memory of the witness. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J had some very potent things to say about testimony based on memory:[15]

> An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description "flashbulb" memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown

14 [1945] P 15, CA at 20.
15 [2013] EWHC 3560 (Comm) at [15]–[21].

> that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

In one of Lord Bingham's essays in *The business of judging* he quoted an extra-curial speech by Lord Justice Browne, who made the same argument as Leggatt J, but more laconically: "[T]he human capacity for honestly believing something which bears no relation to what actually happened is unlimited."[16]

16 T Bingham, "The judge as juror: the judicial determination of factual issues", in Bingham, above n 1, p 15.

I have read a review of the latest work by the masterful storyteller Aleksandar Hemon, *The book of my lives*.[17] In an interview Hemon said this:[18]

> If I try to tell you what happened to me in '91, I'll have to guess about certain things, I'll have to make up certain things, because I can't remember everything. And certain memories are not datable. You and I might remember our lunch, but some years from now we won't remember it was on a Friday. I will not connect it with what happened this morning because they are discontinuous events. To tell a story, you have to — not falsify — but you have to assemble and disassemble. Memories are creative. To treat memory as a fact is nonsense. It's inescapably fiction.

In my opinion, a trier of facts should bear this firmly in mind when weighing a witness's memory.

Lord Bingham also pointed to a further obvious pitfall in the path of the assessment of credibility, namely the very plausible but dishonest witness:[19]

> [T]he ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages.

Not infrequently it is shown that lies have been told out of court. That is by no means determinative. It has been said that in the assessment of core credibility in a fact-finding inquiry it would be as well for the court to give itself the famous direction in *R v Lucas*, where it was stated by Lord Lane CJ:[20]

> To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family.

Again, in my opinion this is a highly important observation for a trier of facts to have in mind.

Therefore, Lord Bingham argues that the better approach is, when finding facts, to look first, where possible, at contemporaneous documents and undisputed facts and to draw conclusions primarily from those sources. He cited[21] the dissenting speech, now almost forgotten, of Lord Pearce in *Onassis v Vergottis*:[22]

> "Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as

17 C Simic, "A masterful storyteller between worlds" (2014) 61(19) *The New York Review of Books* 42.
18 K Bolonik, "Toxic assets and English syntax: Aleksandar Hemon talks with Bookforum", June/July/August 2009 at www.bookforum.com/inprint/016_02/3828, accessed 20 May 2021.
19 Bingham, above n 16, p 10.
20 [1981] 1 QB 720 at 724.
21 Bingham, above n 16, pp 5–6.
22 [1968] 2 Lloyd's Rep 403, HL at 431.

> he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

In similar vein in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J stated:[23]

> In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose — though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

If this is the more reliable approach to fact finding then this gives rise to a paradox, or at least an irony. I refer again to Lord Hodge's opinion in *Beacon Insurance*. He cited[24] Lord Bridge of *Harwich in Whitehouse v Jordan*:[25]

> [T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.

And Lord Hodge concluded:[26]

> Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability

23 [2013] EWHC 3560 (Comm) at [22].
24 *Beacon Insurance* at [17].
25 [1981] 1 WLR 246 at 269–270.
26 *Beacon Insurance* at [17].

> of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum.

Thus, the more reliable the technique of fact finding, the more it is susceptible to appellate review!

Time does not permit me to explore the role of the expert witness in helping the judge to find the relevant facts. In the field of family law the movement now is inexorably in the direction of the single joint expert (SJE) rather than allowing the parties to use their own experts. In *J v J*, I said:[27]

> One reason why so much forensic acrimony was generated, with the consequential burgeoning of costs, was that the Deputy District Judge at the first appointment on 9 November 2012 permitted each party to have their own expert to value the husband's business interests, notwithstanding the terms of Part 25 FPR [Family Procedure Rules 2010 (UK)] which clearly stated then (and even more strongly states now — see PD 25D para 2.1) that a SJE should be used "wherever possible". Not "ideally" or "generally" but "wherever possible". In this case the forensic accountants have filed a total of no fewer than six expert reports and have prepared a joint statement setting out their extensive disagreements. They have charged a total of £154,000 in fees. The husband has been permitted during the course of the case to ditch his expert and to instruct a new one.

And later:[28]

> It can be seen how the failure to appoint a SJE resulted in extremely partial and partisan positions being adopted by the experts who seem to have forgotten that their first duty is to the court and that, notwithstanding the large fees they are paid, their role is not to act as a gladiator on behalf of their client.

Posner put it rather better where he said:[29]

> A lawyer is not allowed to pay a lay witness to testify; the potential for corruption is obvious. But he may pay an expert witness — and the potential for corruption is obvious.

And later:[30]

> Lawyers resist a judge's [sic] appointing an expert even if both sides are satisfied that the expert is neutral and competent and can communicate with a jury, as academics (and not only academics) usually can. For the lawyers aren't interested whether the judge or jury understands their case; they're interested in winning, and so they hire experts (and pay them very well) whom they think a judge or jury will find persuasive.

And earlier:[31]

> A further problem with expert witnesses is that for many of them litigation *is* their ordinary, even their only, work. Their technical skills may be minimal, their real skill being theatrical — the ability to charm or dazzle a jury. [Emphasis in original.]

27 [2014] EWHC 3654 (Fam) at [8].
28 ibid at [24].
29 Posner, above n 2, p 294.
30 ibid at p 298.
31 ibid at p 296.

Family law is now less about sex and more about money. But laws about sex remain on the statute book. A ground for nullity of a marriage (opposite sex couple) is incapacity or wilful refusal to consummate the marriage: see ss 12(a) and (b) of the *Matrimonial Causes Act 1973*. In theory, expert medical evidence may be needed to determine this issue.

Rule 7.26(1) of the Family Procedure Rules 2010 is entitled "Medical examinations in proceedings for nullity of marriage" and provides that:

> Where the application is for a decree of nullity of a marriage of an opposite sex couple on the ground of incapacity to consummate or wilful refusal to do so, the court must determine whether medical examiners should be appointed to examine the parties or either of them.

I have never heard, in over 30 years, of the court appointing medical examiners, although it certainly did in bygone days (see, for example, *Russell v Russell*,[32] where Lord Dunedin with barely concealed revulsion stated that "Fecundation ab extra is admittedly, by the medical testimony … a rare, but not impossible, occurrence; but its accomplishment will depend, not only or exclusively on the proximity of the organs, but on certain other potential qualities of the particular man"). I had assumed it was a bizarre and barbarous relic that somehow found itself reiterated in the 2010 rules. But it would seem that expert evidence to this effect is alive and well in India. I draw your attention to the not very well-known case of *Kalsie v Kalsie*,[33] decided on appeal by Avadh Behari J in the Delhi High Court on 23 August 1974. The petitioner wife alleged that the husband was impotent at the time of marriage and continued to be so until the institution of the proceedings. She prayed for a decree of nullity. The petition was dismissed, the Additional District Judge finding that:[34]

> All this shows that it was a made up affairs [sic] and the respondent does not suffer from impotency organic or psychological qua the petitioner … I am of the considered view that the petition has been filed by the petitioner in collusion with the respondent.

On the appeal, there is this startling statement by Avadh Behari J:[35]

> It may be stated here that the husband was examined by a board of doctors on two occasions. Their reports are on the record. In one of the reports the doctors found that the husband was unable to produce erection when asked to masturbate. On the second occasion they found that there was nothing which could prove that he was impotent. These reports were not tendered in evidence on behalf of either side and, therefore, they do not constitute proof in the case.

Had the reports been adduced and the doctors produced for questioning, it is easy to guess what lines the cross-examination would have taken.

However, Avadh Behari J was doubtful whether this would have been useful expert evidence anyway:[36]

> [T]here may be cases where a person may have invincible repugnance to the act with a particular individual, though generally capable of having sexual union with others. Where owing to

32 [1924] AC 687 at 722.
33 (1975) DLT 92.
34 ibid at [11].
35 ibid at [9].
36 ibid at [28]–[29].

> psychological or mental reasons a person is impotent quoad hanc it is not necessary to show universal impotency. In these types of cases the impotency arising from that fact would be within the exclusive knowledge of these spouses and it would be difficult to test it by medical evidence.
>
> I do not think that the learned Additional District Judge was right … drawing an adverse inference because of the non-examination of the doctors by the wife. In view of the admission of the husband himself I think no further evidence was called for. It is not possible for the doctors, I think, in all cases to find out whether a certain person has a sexual aversion to a particular woman or the wife. The doctors can find out whether there is malformation or structural defect in the genitals of a man.

The appeal was allowed and the wife was granted a decree of nullity.[37]

So, the facts are eventually found. What happens next? In many fields, the law then vests the court with what is described as a "discretion". Sometimes it is a true discretion; sometimes the use of the word is a misnomer. In the field of crime, for example, the verdict of the jury gives the judge a true discretion as to sentence: his or her powers are bounded only by sentencing guidelines and statutory maxima.

A true discretion exists in most financial proceedings, particularly where the award is being made by reference to the principle of need rather than the principle of sharing. It is obvious that the decision whether to award GBP 15,000 per annum in spousal maintenance, or GBP 20,000 or GBP 25,000, is quintessentially one of discretion. So too if the dispute is about the quantum of contact to a child: it is a pure exercise of discretion whether to allow the father to have contact on two, three or four days a fortnight.

But even where the decision is fundamentally discretionary it must be exercised consistently and predictably. As Deane J stated in the High Court of Australia in *Mallett v Mallett*:[38]

> It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" of "a codeless myriad of precedent" and "a wilderness of single instances" of which Lord Tennyson wrote in his poem "Aylmer's Field".

Or as Lord Bingham put it:[39]

> The job of judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged.

There is obviously a tension between consistency and flexibility. The judicial dilemma was well illustrated by Ribeiro PJ sitting in the Hong Kong Court of Final Appeal in *LKW v DD*. He stated:[40]

> However, as Ormrod LJ observed, [*Martin v Martin* [1978] Fam 12] the courts' pronouncements on a provision like section 7 "can never be better than guidelines". This is because, as Gibbs CJ

37 ibid at [31].
38 (1984) 156 CLR 605 at 641.
39 T Bingham, *The rule of law*, Allen Lane, 2010, p 51.
40 (2010) 13 HKCFAR 537 at [50]–[51].

> explained, [*Mallett v Mallett*(1984) 156 CLR 605 at 609] the courts "cannot put fetters on the discretionary power which the Parliament has left largely unfettered". Dealing with the natural tension existing between the need for flexibility on the one hand and the desire for consistency on the other, Brennan J stated:
>
> > The only compromise between idiosyncracy [sic] in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so — guidelines which are not rules of universal application, but which are generally productive of just and equitable orders. [*Norbis v Norbis* (1986) 161 CLR 513 at 538]
>
> As his Honour pointed out, Lord Denning MR addressed the problem of guiding the exercise of an unfettered judicial discretion in *Ward v James* [1966] 1 QB 273 at [295] in the following terms:
>
> > The cases all show that, when a statute gives discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion, and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised, and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process.

Sometimes the nature of the dispute and the facts that are found will, to all intents and purposes, determine the exercise of the supposed discretion. In such a case, the court is not really exercising a discretion at all, but is forming a value judgment about the outcome. This will be so in public law proceedings under s 31 of the *Children Act 1989* where the fact finding will have determined whether the threshold of significant harm has been crossed. If so, the findings will effectively determine whether a care order, a supervision order or no order should be made. In private law proceedings the process will be the same where the dispute is as to which parent should be the primary caregiver. It is so in the stark and difficult case which is a relocation application. It is certainly the case in abduction proceedings where a ground of defence is successfully mounted under Art 12 or Art 13 of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. Proof of the ground of defence of, for example, the child's objections to a return order only opens the door to the exercise of discretion, but that exercise will almost invariably be in favour of a non-return.

In *Re LC (Children) (International Abduction: Child's Objections to Return)*,[41] one of the issues was whether a child should have been joined to the proceedings under the Family Procedure Rules 2010, r 16.2(1), which provides that: "[t]he court may make a child a party to proceedings if it considers it is in the best interests of the child to do so". Lord Wilson stated:[42]

> If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens on a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion.

41 [2014] AC 1038.
42 ibid at [45].

The fallacy that an actual discretion is being exercised in such a case had been conclusively demonstrated (to my mind) by the Supreme Court of New Zealand in *Kacem v Bashir*,[43] a relocation case. In the judgment of the majority (Blanchard, Tipping and McGrath JJ) it was stated:[44]

> But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.

And later:[45]

> These and other concerns … are inherent in the exercise in which judges administering ss 4 and 5 of the [*Care of Children*] Act [2004] are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme.

In *Re B (A Child) (Care Proceedings: Threshold Criteria)*, an appeal in a care case, this analysis was described by Lord Wilson as "interesting". He stated:[46]

> *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 was a dispute between parents as to which of them should have residence of the children. Lord Fraser of Tullybelton gave the classic exposition of the role of the appellate court in reviewing a trial judge's order in a dispute between members of a family about arrangements for a child. He described the order, at p 649, as having been made in the exercise of the judge's discretion. This classification, which was not controversial, is hard-wired into the mind-set of family lawyers in England and Wales; and, although in *Kacem v Bashir* [2011] 2 NZLR 1, the Supreme Court of New Zealand made an interesting suggestion, at para 32, that the decision in such a case was evaluative as opposed to discretionary, this is not the moment to consider whether — subject to para 45 below — to depart from the conventional classification or the consequences, if any, of doing so.

To my mind, the reasoning of the Supreme Court of New Zealand is irreproachable. The consequences of the classification in New Zealand are very significant — a discretionary

43 [2011] 2 NZLR 1.
44 ibid at [32].
45 ibid at [35].
46 [2013] 1 WLR 1911 at [38].

judgment requires permission to appeal; other judgments entitle an appeal as of right. Here the only consequence is whether the appellate test is "wrong" or "plainly wrong", which to my mind is hardly of any consequence for as Lord Wilson points out:[47]

> What does "plainly" add to "wrong"? Either the word adds nothing or it serves to treat the determination under challenge with some slight extra level of generosity apt to one which is discretionary but not to one which is evaluative.

What the categorisation debate does point up is that, once the facts are found, then for certain types of cases the so-called discretion is virtually extinguished and is replaced by the function of evaluation, and that it is of pivotal importance for the judge to be aware of the difference. Evaluation is a very different exercise to making a choice between a number of different outcomes, none of which can be said to be wrong. In fact, in the evaluation category there is not much further judging to be done at all, for as Lord Wilson said: "the threshold conclusion will almost always drive the exercise of the resultant discretion".[48]

When I was first appointed a wise old hand said cryptically to me "find your facts carefully". It has taken me nearly five years but I now think I know what he meant!

47 ibid at [44].

48 *Re LC (Children) (International Abduction: Child's Objections to Return)* [2014] AC 1038 at [45]. The author delivered a further lecture on the exercise of discretion in the family law sphere on 25 April 2019, at www.judiciary.uk/announcements/address-by-mr-justice-mostyn-to-the-hong-kong-family-law-association/, accessed 21 September 2021.

Basic categories of argumentation in legal reasoning*

Professor Douglas Lind†

While many factors such as public policy, science, psychology, moral values, ideals of justice, etc, permeate the deliberations and decision-making of lawyers and judges, such considerations are intertwined inextricably with reason and logic. This article provides an introduction to the principles of logic and methods of argumentation most common to law and legal discourse. By way of introduction, the author provides a useful overview of the basic terms and concepts used in the study of logic. He then focuses his discussion on the two broad categories of logical reasoning: inductive reasoning (analogy and inductive generalisation) and deductive reasoning (especially deductive syllogisms in their various forms), and explains how these categories differ. The author contends that although the latter form of reasoning has not been prominent in legal thinking since early in the 20th century, an understanding of it will give judicial officers an invaluable tool for assessing whether arguments found in submissions or judicial opinion are sound and warrant acceptance. The author explains the various forms of reasoning, exposes the fallacies in reasoning of each form of argument and, considers the criteria against which inductive reasoning is assessed. He provides useful illustrations of the forms of argument discussed, including some case law examples.

> The essence of the rule of law is that the logic of private force be replaced by the public force of logic.[1]

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1 *Nuutinen v Finland* (Application No 32842/96) (European Court of Human Rights, 27 June 2000) (Zupancic J dissenting).

The significance of logic for law

Around the turn of the 20th century, those at the forefront of the Legal Realist movement decried over-reliance on logic in law and judicial decision. Ever since, judges and lawyers in common law jurisdictions have minimised the importance of formal logic for understanding law and legal reasoning.

Many legal practitioners have feared that to acknowledge logic as central to law would risk a return to the rationalistic excesses of the formalistic jurisprudences that proliferated in 19th century legal thought. For it was against that formalist tradition that the Legal Realist jurists, along with their Free Law counterparts on the European continent, directed much of their critical energies early in the 20th century. It was in spirited opposition to that tradition that Oliver Wendell Holmes, Jr, penned his most famous aphorism: "[t]he life of the law has not been logic: it has been experience".[2]

There is good reason to retain a sceptical attitude towards overly rationalistic accounts of law and judicial practice. The weave of historical doctrine, legal principle, and factual circumstances that comprises judicial decision-making is far too intricate to allow critical appraisal under any single evaluative method, including the principles of logic. So we are rightfully uneasy when we are reminded of the formalistic visions of the 19th century jurists — visions that perceived the essence of adjudication as reducible to simply the logical derivation of conclusions required necessarily by predetermined legal principles.

Somewhere between the extremes of strict formalistic jurisprudence and an outright disregard for logic and argumentative form, however, lies the mid-range of practice where law and judicial decision-making do their work. The pithy remark quoted above is all that is typically given to represent Holmes J's view towards the role logic plays in judicial decision. Yet a broader look at his jurisprudential writings together with his judicial opinions reveals that he fully considered logic to be a central aspect of law and judicial decision-making.[3] In this regard Holmes was not alone. For a number of other major 20th century writers on jurisprudence, such as Benjamin Cardozo,[4] John Dewey,[5] Julius Stone,[6] and HLA Hart,[7] agreed that evaluating and creating arguments sits at the core of the crafts of judging and lawyering. Edwin Patterson stated it well when he suggested that the rules of logic "are so ingrained in the pattern of legal reasoning that … [p]erhaps formal logic has as much to do with (articulated) legal reasoning as Euclidean geometry has with building houses".[8]

2 O Holmes, *The common law*, Little, Brown and Company, Boston, 1881, p 1.
3 See, for example, O Holmes, "The path of the law" (1897) 10(8) *Harvard Law Review* 457 at 465.
4 See B Cardozo, *The nature of the judicial process*, Yale University Press, New Haven, 1921, p 31.
5 For example, J Dewey, "Logical method and law" (1924) 10(1) *Cornell Law Quarterly* 17.
6 See J Stone, *The province and function of law: law as logic, justice, and social control: a study in jurisprudence*, Stevens and Sons, London, 1947.
7 For example, H Hart, *The concept of law*, Oxford University Press, Oxford, 1961, pp 132; "Positivism and the separation of law and morals" in H Hart, *Essays in jurisprudence and philosophy*, Clarendon Press, Oxford, 1983, pp 63, first published in (1958) 71(4) *Harvard Law Review* 593.
8 E Patterson, *Jurisprudence: men and ideas of the law*, The Foundation Press, Brooklyn, 1953, p 21.

Practitioners of the law thus can well benefit from possessing an understanding of the principles of logic that regularly are used in legal reasoning and judicial decision-making. Such an understanding requires, in important part, skill in working with the processes of inductive reasoning — the logical methods of analogy and inductive generalisation — by which inferences are drawn on the basis of experience and empirical observation. The common law method of doctrinal development through case law, as well as the general norm known as "the Rule of Law" — that like cases should be decided alike — are grounded logically in inductive reasoning.

Equally important for legal reasoning is a second general category of argumentation — deductive logic, especially the forms of argument known as "syllogisms". These are the familiar forms of deductive argument consisting of two premises and a conclusion. This is the aspect of logic that early in the 20th century stirred such spirited opposition to formalism. It is also the aspect of logic that has been so minimised in legal thought ever since. That is unfortunate. For even a modest understanding of deductive logic gives those engaged in legal practice — especially judicial officers — an invaluable tool for assessing whether an argument found in a set of submissions or a judicial opinion is sound and warrants rational acceptance or suffers from a logical fallacy that makes it unworthy of further consideration.

The purpose of this article is to provide an overview of the principles of logic and methods of argumentation that are most common to law and judicial practice. The article concentrates on the two general categories of logical reasoning: inductive reasoning (analogy and generalisation) and deductive reasoning (especially deductive syllogisms). In his Rhetoric, Aristotle wrote that "every one who proves anything at all is bound to use either syllogisms or inductions".[9] Modern logic has moved in directions more complex and symbolic than those two general categories. Still, deductive syllogisms and inductive reasoning remain remarkably useful for understanding the basic structures and forms of reasoning used in law and legal discourse. For that reason, this article focuses on setting forth a number of key considerations for developing a good working knowledge of those two categories of argumentation.

Basic logic terms and concepts

A number of terms and concepts central and craft-bound to the study of logic appear in this article. Among the most basic are the following:

- **Proposition or statement:** A proposition or statement is an assertion or claim which is either true or false, and which can be either asserted or denied. Propositions differ in these respects from questions, exclamations, and commands.
- **Argument:** An argument is a group of propositions wherein one proposition is claimed to follow logically from the others. The others are treated as providing grounds or support for the truth of that one. An argument is not just a collection of propositions, but a group with a particular structure.

9 W Ross (ed), *The works of Aristotle*, Vol XI, "Rhetoric", W Rhys Roberts trans, Oxford University Press, Oxford, 1924, Book 1, at [1356b].

- **Conclusion:** The conclusion of an argument is the one proposition that is arrived at and said to follow from the other propositions of the argument.
- **Premises:** The premises of an argument are the propositions which are assumed or otherwise accepted as providing reasons or support for accepting, as true, the one proposition which is the conclusion.
- **Premise and conclusion are "relative" terms:** A proposition can serve as the conclusion of one argument while it is a premise in another argument. Moreover, premises and conclusions require each other. A proposition standing alone is neither a premise nor a conclusion. Only when it serves as an assumption in an argument is a proposition a premise. A proposition is a conclusion only when it is said to logically follow from other propositions with which it is joined to form an argument.
- **Inference:** The term "inference" refers to the logical process that takes place in an argument. The premises of the argument are said to "infer" the truth of the conclusion. That is to say the premises provide reasons, grounds, support, or justification for accepting the conclusion's truth.
- **Valid/validity:** Validity is an evaluative concept that expresses approval of the form or structure of an argument. A valid argument is one with a form that allows for the drawing of a necessarily true conclusion. The concept of validity applies only to deductive arguments.
- **Truth:** Truth is an evaluative concept that expresses approval of the content or subject matter stated in the individual propositions in an argument. The concept of truth applies to propositions or statements found in both inductive and deductive arguments. However, its application is limited to the individual propositions themselves. An argument, taken as a whole, does not have truth value.
- **Sound/soundness:** Soundness is an evaluative concept that expresses full approval of a deductive argument. A sound deductive argument has both valid form and true premises. Its conclusion is necessarily true.
- **Fallacy:** A fallacy is a logical error in reasoning. All fallacious reasoning produces conclusions that are not logically justified. Fallacies can be either "formal" or "informal". A formal fallacy is a logical error found in the form or structure of a deductive argument. A deductive argument that commits a formal fallacy is both invalid and unsound. Informal or material fallacies are logical errors in reasoning that do not go to the form of an argument but to its content or subject matter. Arguments that commit informal fallacies are often valid in form and may be intuitively or psychologically compelling. They are fallacious in that they attempt to draw unjustified inferences from premises that do not provide sufficient, reliable grounds for their conclusions. Informal fallacies can be divided into the categories of fallacies of relevance and fallacies of language or rhetoric.
- **Premise indicators:** Certain words and phrases frequently signal the premises of an argument. These terms, sometimes called "premise indicators", typically indicate that what follows is a premise. Not uncommonly, the conclusion of an argument is stated immediately preceding a premise indicator. Common premise indicators include:

because	follows from	insofar as
given that	for	in virtue of
since	for the reason that	may be inferred from
as	in view of the fact	may be deduced from
as shown by	inasmuch as	may be derived from

- **Conclusion indicators:** There are also several words and phrases that commonly mark the conclusion of an argument. These "conclusion indicators" typically indicate that what follows is the argument's conclusion. Common conclusion indicators include:

therefore	as a result	finally
thus	so	follows that
hence	in conclusion	implies that
accordingly	in consequence	entails that
consequently	may infer	shows that

- **Arguments without indicators:** While indicator terms are present in many arguments and tend to be very helpful in identifying premises and conclusions, not every argument contains these versatile logical expressions. It is common, especially in oral communication, for arguments to proceed without indicator terms. The nature and immediacy of verbal exchange, particularly face-to-face dialogue, together with the interpretive aids that come from gestures and inflections make indicator terms often unnecessary. Consider the following verbal exchange between three patients in an asylum:[10]

  NEWTON: But damn it all, we're not mad.

  MÖBIUS: But we are murderers.

  They stare at him in perplexity.

  NEWTON: I resent that!

  EINSTEIN: You shouldn't have said that, Möbius!

  MÖBIUS: Anyone who takes life is a murderer, and we have taken life …

  No indicator terms are needed here for Dr Möbius to clearly make his point: that from the premises — "Anyone who takes life is a murderer", and "We have taken life" — it logically follows that, "We are murderers". The context makes indicator terms unnecessary.

10 F Dürrenmatt, *The physicists*, J Kirkup trans, Grove Press, New York, 1964, p 82.

Basic categories of argumentation

Stated most generally, there are two basic categories of argumentation — deductive arguments and inductive arguments. It can be helpful to think of these two categories as differing from one another in the following ways:

- **Inferential strength of the relation between premises and conclusion:** Every argument involves a claim that its premises provide some support or justification for accepting the truth of the conclusion. Deductive and inductive arguments differ in terms of the inferential strength the premises provide for the conclusion.

  (i) In deductive arguments, the premises, if true, are treated as providing *conclusive* grounds for the truth of the conclusion, that is, that the conclusion *must* be true or is *necessarily* true. The inferential strength of the relation between premises and conclusion is one of *necessity*.

  (ii) In inductive arguments, the premises, if true, are treated as providing *some* grounds or support for the truth of the conclusion, that is, that the conclusion is *probably* true, or *more likely* true than not. The inferential strength of the relation between premises and conclusion is one of *probability*.

- **Containment of the conclusion within the premises:** Another way of looking at the different premises-conclusion relationships involved in deductive and inductive reasoning is to consider whether the conclusion asserts something to be true that "goes beyond" what is implicitly stated or "contained within" the premises.

  (i) The premises of a valid deductive argument, if true, entail the necessary truth of the conclusion. This makes deductive reasoning a powerful logical tool, for it provides a basis for accepting the truth of a conclusion where there is no room left for rational doubt. Yet this inferential relationship of necessity also stands as a limitation. For the certainty of the conclusion is possible only because its truth is already "contained within" the premises. Deductive reasoning accordingly does not take us beyond what we by implication already know.

  (ii) Inductive reasoning is very different. Induction involves rational processes whereby we infer conclusions that go beyond what is by logical implication contained within the premises. The conclusions of inductive arguments assert new claims of knowledge that are not already present in the premises. The limitation in inductive reasoning is one of risk of error. Since the truth of the conclusion is not "contained within" the premises, it is not proven to be true necessarily. The truth of the conclusion in inductive reasoning thus is always clothed in an element of doubt. For when our inference goes beyond what is present already in the premises, we do not entail the necessary truth of the conclusion, but only its truth to a greater or lesser degree of probability.

- **Evaluation:** Finally, deductive and inductive arguments differ in terms of evaluative descriptors. The evaluative concepts of validity and soundness apply to deductive arguments, but not inductive.

  (i) A deductive argument is valid when its formal structure is such that its premises, if true, provide conclusive grounds for the truth of the conclusion. When a deductive argument has both valid form and true premises, it is said to be a sound argument.

(ii) Inductive arguments cannot appropriately be evaluated as valid or invalid; nor can they be said to be sound or unsound. This is because the concepts of validity and soundness are attached to arguments whose form permits the drawing of a necessarily true conclusion, a degree of inferential strength unattainable by inductive reasoning. Inductive arguments lead to conclusions that are true to greater or lesser degrees of probability. They are better or worse, given the degree or strength of support the premises provide for the conclusion. A persuasively strong inductive argument with true premises is sometimes called a cogent argument.

Inductive reasoning

Reasoning by analogy

Arguments by analogy are inductive arguments which assert that since some percentage of one or more things (the sample) possesses a property, it can be inferred that some similar thing or things (the target) is more likely than not to have that property as well. The target of an argument by analogy is usually, though not always, an individual thing. It can be helpful to think of reasoning by analogy as reasoning by comparison, or as Aristotle put it, reasoning by "example".[11] Reasoning by analogy (or example) involves comparing two things (sample and target) and then inferring, based on similarities and resemblances, that what is known to be true about the members of the sample is probably true as to the target. The logical structure of an argument by analogy can be understood as taking the following form:

(1) One or more things (sample **S**) is known to have property **P**.
(2) Sample **S** *resembles* or is *relevantly similar* to some other thing (target **T**).
(3) Therefore, it is *probable* that target **T** also has property **P**.

In assessing the strength of an argument by analogy, several criteria are relevant:

- **Size of the sample:** In general, the larger the sample population, the stronger the argument for inferring that the target probably has the property too.
- **Percentage of the sample that has the property:** The greater the percentage of the sample population that is known to have the property, the stronger the argument. If 100% of the members of the sample are known to have the property, the inference that can be drawn about the likelihood of the target possessing the property is stronger than if, say, only 75% of the sample have the property.
- **Similarities or resemblances:** The greater the number of similarities, likenesses, and resemblances between the target and the members of the sample, and the fewer the number of dissimilarities or differences, the stronger the argument.

11 See Aristotle, *Nicomachean ethics*, M Ostwald trans, The Bobbs-Merrill Company Inc, Indianapolis, 1962, Book 6; *The works of Aristotle*, Vol XI, "Rhetoric", above n 9.

- **Relevance of the similarities or dissimilarities:** In most situations where comparisons are drawn, some similarities and dissimilarities will be more important than others. The importance of a similarity or dissimilarity, a resemblance or difference, is a product of how relevant or material it is toward establishing the truth of the analogical argument's conclusion.
- **Diversity within the sample:** With regard to a characteristic or feature that as far as is known the target may or may not have, the greater the diversity within the sample, the stronger the argument.

While reasoning by analogy is commonplace in law (as in daily life), it is critical to employ this form of reasoning with care, for "analysis by analogy is problematic and the issues are never exactly the same".[12] The comparison called for in analogical reasoning requires thoughtful attention to the specifics and nuances of resemblance and difference that hold between the sample and target things. Given that not only issues but facts and circumstances are never precisely the same, it is essential that judicial officers exercise caution in drawing inferences on the basis of analogy.

Fallacies in reasoning by analogy

There are no formal fallacies associated with reasoning by analogy. Reasoning by analogy is fallacious when the content or material of the argument leads to inferences that are "strained", "false", "weak", "overbroad", or "questionable". That is, reasoning by analogy is unreliable (fallacious) if the analogy or comparison drawn between the sample and target populations seems on balance, as a matter of fact or evidence, unreasonable or otherwise unconvincing. An analogy is "strained" when the similarities and resemblances between the sample and target lack relevance or appear too distant. An analogy is "false" when the sample and target are truly more dissimilar than similar. An analogy is "weak" when there is some minimal level of resemblance between the sample and target, but it is not enough to support the logical inference proposed. An analogy is "overbroad" when there is some degree of similarity and resemblance between the sample and target, but the analogy is being pushed too far. Finally, drawing an inference by analogy is "questionable", even when the sample and target are relevantly similar, if the nature of their resemblance does not provide a reasonable basis for the conclusion the argument aims to establish, or if the argument appears to gloss over relevant differences.

References to these fallacies associated with reasoning by analogy are quite common in judicial decision-making. Courts often reject arguments by analogy that are proposed by litigants, and not uncommonly the rejection is couched in the terms mentioned. For example, the US federal district court in *Ralston v Capper*[13] refused to draw an analogy between federal antitrust law and the *Racketeer Influenced and Corrupt Organizations Act 1970* (*RICO*). The court reasoned that the proposed argument appeared "to be based on a strained analogy to antitrust law, … [even

12 *Cantwell v Sinclair* [2011] NSWSC 1244 at [115] (Rothman J).
13 569 F Supp 1575 (1983).

though] analogies to limitations on standing in the antitrust context are entirely inappropriate here".[14] Though the court rejected the analogy as "strained", it could equally well have called it a "false" analogy, as the following passage from the opinion shows that the court reasoned that the two statutory schemes were, in relevant part, more dissimilar than similar:[15]

> The antitrust laws are designed to promote competition in the marketplace
>
> ...
>
> RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have no applicability here." [Emphasis in original.]

Innumerable judgments have rejected proffered arguments by analogy on the basis of their setting forth a false analogy.[16] Likewise, judicial opinions not uncommonly find analogical arguments unconvincing (and hence fallacious) because they attempt to draw an inference as to how a target thing has a certain property based on a weak, overbroad, or otherwise questionable analogy between the target and the sample population.[17]

Inductive generalisation

Arguments by inductive generalisation infer general conclusions from what is known about a number of particular instances. A generalised inductive inference asserts that since some percentage of a subgroup (the sample) drawn from a class of things (the target) is known to possess a property, it is more likely than not that the entire target class possesses that property to the same extent. The target of an argument by inductive generalisation is always an entire class, and the sample of the generalisation is drawn from that target population. The basic logical structure of an argument by inductive generalisation is as follows:

(1) All (or some percentage of) similar things (sample **S**) are known to have property **P**.
(2) Sample **S** is a *representative* subgroup of the general class or category target **T**.
(3) Therefore, it is *probable* that all (or a given percentage) of target **T** has property **P**.

14 ibid at 1580.
15 ibid.
16 For example, *John Harris & Associates (Aust) Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 254 at [17] ("Neither of these is a true analogy"); *Power v Hamond* [2006] VSCA 25 at [32] (Ormiston JA) (refusing "a false analogy which cannot bear close examination"); *Conyers v State* 115 Md App 114 at 122 (1997) ("false analogy").
17 See, for example, *Hope v Brisbane City Council* [2013] QCA 198 at [18] (Jackson J) ("It serves no great purpose to draw broad analogies."); *Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340 at [23] (Fraser JA) ("no relevant analogy"); *Crusader Resources NL v Santos Ltd* (1991) 58 SASR 74 at 99 (Olsson J) (analogy rejected as "neither appropriate nor accurate"); *Heck v Humphrey* 512 US 477 at 496 (1994) (Souter J concurring) ("weak analogy").

As with arguments by analogy, a number of criteria determine the strength of an argument by inductive generalisation:

- **Size of the sample relative to the size of the target:** In general, the greater the size of the sample population relative to the known or believed size of the target population, the stronger the generalisation.
- **Percentage of the sample that has the property:** The greater the percentage of the sample that is known to have the property, the stronger the claim as to what can be known about the distribution of the property across the entire population of the target class.
- **Representativeness of the sample:** The more representative the sample is believed to be across the entire target population, the stronger the generalisation. A sample is representative of a general target population to the extent it possesses all relevant features of the target and to possess them to the same degree or proportion as the general target population, and does not possess any idiosyncratic features.

Fallacies in reasoning by inductive generalisation

Again, as with arguments by analogy, there are no formal fallacies associated with reasoning by inductive generalisation. There are, however, three named fallacies commonly identified with reasoning in the pattern of a generalised inductive inference:

- **Fallacy of hasty generalisation:** The fallacy of hasty generalisation is committed when a generalisation rests on an inadequate number of instances — that is, the sample is too small or not representative of the entire target population. Since the strength of an inductive generalisation depends primarily on the number of representative instances, it is fallacious to move too quickly (or hastily) to a generalised conclusion.
- **Fallacy of anecdotal evidence:** The fallacy of anecdotal evidence is somewhat the opposite of the fallacy of hasty generalisation. This fallacy occurs when a small number of disconfirming instances is treated as a sufficient reason to reject a generalisation for which there is otherwise a sufficiently large and representative sample.
- **Accident fallacy:** The accident fallacy is very different than the fallacies of hasty generalisation and anecdotal evidence. Those fallacies are committed in the process of drawing a generalised inference. The fallacy of accident, by contrast, takes place in the context of applying to an individual case a generalisation that has already been drawn. The accident fallacy occurs when a generalised proposition (or general rule) is applied in a too rigid or careless manner. In law, the fallacy is committed when a judicial officer or lawyer moves too quickly from a general rule to a particular case, without giving due consideration to whether the case presents special ("accidental") circumstances which place it outside the general rule.

Deductive reasoning

The most common forms of deductive argument found in legal reasoning are those known as "syllogisms". The term comes from Aristotle: "A syllogism is discourse in which, certain things

being stated, something other than what is stated follows of necessity from their being so".[18] Structurally, a syllogism is any deductive argument that strives to draw a necessary inference on the basis of three propositions or statements: two premises and a conclusion. The four most common deductive syllogisms are categorical syllogisms, hypothetical syllogisms, disjunctive syllogisms and conjunctive syllogisms.

Categorical syllogisms

A categorical syllogism is a deductive argument wherein all three of the argument's statements are "categorical propositions". Categorical propositions are statements that assert or deny relationships. Every categorical proposition has two "terms" — that is, two things, classes, or categories about which something is said in the proposition. The two terms are called the subject term and the predicate term. The nature of a categorical proposition is to assert or deny that a relationship exists between the subject term of the proposition and the predicate term. For example, the claim, "All kangaroos are marsupials", is a categorical proposition asserting that each and every member of the category or class represented by the subject term "kangaroos" falls within the predicate class, "marsupials". The statement, "Aristotle is not a bandicoot", is also a categorical proposition, though of a different kind. This statement denies that a relationship exists between the particular thing referenced by the subject term ("Aristotle") and the entire membership of the predicate class ("bandicoots").

There are four ways that categorical propositions relate classes or categories, one to another. These are often referred to as the four standard forms of categorical propositions. Each standard-form categorical proposition has a name: universal affirmative, universal negative, particular affirmative, and particular negative. By convention, each also goes by a letter, respectively, A, E, I, O. The nature of the claim made by each standard-form categorical proposition also can be represented by a formal logical statement using the letters S and P as place-holders for the proposition's subject and predicate terms. The claims made by each form of categorical proposition are — universal affirmative: All S is P; universal negative: No S is P; particular affirmative: Some S is P; particular negative: Some S is not P. The four standard forms can be summarised as follows:

- **[A] Universal affirmative categorical proposition — All S is P:** This form of categorical proposition asserts a relationship of containment, such that each and every member of the first-stated class (the subject class) is said to be a member of (included or contained within) the second class (the predicate class).
- **[E] Universal negative categorical proposition — No S is P:** This form of categorical proposition states that *no relationship* exists between the memberships of the two classes — that is, that no member of the subject class is also a member of the predicate class.

18 W Ross (ed), *The works of Aristotle*, "Prior analytics", A Jenkinson trans, Oxford University Press, London, 2006, Book 1, Ch I, at [24b18–20].

- **[I] Particular affirmative categorical proposition — Some S is P:** This form of categorical proposition expresses a *relationship of partial containment*, in that some (at least one) but perhaps not every member of the subject class are said also to be members of (included or contained within) the predicate class.
- **[O] Particular negative categorical proposition — Some S is Not P:** This form of categorical proposition asserts a *relationship of partial non-containment*, such that some (at least one) but perhaps not every member of the subject class are said not to be members of (included or contained within) the predicate class.

Categorical syllogisms: standard-form

The basic requirements for an argument to be a categorical syllogism with the possibility of being valid in form are the following:

- both of the argument's premises and its conclusion must be categorical propositions
- collectively, those three categorical propositions must contain exactly three different terms (that is, three different things, classes, or categories about which something is asserted), and
- each of the three terms must occur twice in the argument (that is, be present in two different propositions).

Deductive arguments that satisfy these three requirements and are arranged in a certain order are said to be *standard-form categorical syllogisms*.

Of the three categorical propositions in a standard-form categorical syllogism, one is designated the *conclusion*, the other two are *premises*. The identity of each proposition as a premise or conclusion is determined by the terms it contains. The three terms are known as the major term, the minor term, and the middle term. Their identities are determined by their positions within the categorical syllogism, as follows:

Major term: the term that occurs as the *predicate of the conclusion*.

Minor term: the term that occurs as the *subject of the conclusion*.

Middle term: the term that *does not occur in the conclusion, but appears in both premises*.

Every categorical syllogism states in its conclusion that a relationship exists or does not exist between its minor term and its major term. The two premises assert that each of those terms, minor term and major term, stand in a certain relationship to a common third term, the middle term. While it does not figure in the conclusion, the middle term provides the critical link that makes reasoning by categorical syllogism possible.

When in standard form, a categorical syllogism presents what is called its major premise first, followed by its so-called minor premise, and then the conclusion. The determining feature that makes one premise the major premise is that it contains the major term (that is, the predicate term of the conclusion). The minor premise is the premise that contains the minor term (the subject term of the conclusion). A standard-form categorical syllogism is thus stated as follows:

Major premise: contains *major term* and *middle term*

Minor premise: contains *minor term* and *middle term*

Conclusion: contains *minor term* and *major term* as, respectively, its subject term and its predicate term.

The classic example of a categorical syllogism is found in the claim, "Since Socrates is human and all humans are mortal, Socrates is mortal". This argument can be stated as a standard-form categorical syllogism in the following way:

Major premise: All humans are mortal.

Minor premise: Socrates is a human.

Conclusion: Therefore, Socrates is mortal.

This form of categorical syllogism represents a very common form of argument in law and judicial decision-making. Consider the following passage from Marshall CJ in the US Supreme Court's decision in *United States v Bevans*:[19]

> [T]he jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.
>
> The place described [Boston Harbor] is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts.

This passage precisely mirrors the Socrates argument. Chief Justice Marshall's reasoning can be stated in the form of a standard-form categorical syllogism:

Major premise: All places within the territory of a State are places within the jurisdiction of the State.

Minor premise: Boston Harbor is a place within the territory of the State of Massachusetts.

Conclusion: Therefore, Boston Harbor is a place within the jurisdiction of the State of Massachusetts.

As an argument identical in form to the Socrates argument, the *Bevans* argument from Marshall CJ carries the same logical force in terms of validity. This is because the validity of a categorical syllogism is entirely a product of the argument's *form* — ie, its formal structure as determined by the types of categorical propositions it contains and the positioning of its terms. A valid categorical syllogism is thus valid solely by virtue of its form. Content, subject matter, and the truth or falsehood of its propositions have no bearing on the argument's validity. Since validity is entirely a matter of formal structure, categorical syllogisms that take the same form are the same in terms of validity, regardless of content. If we know that a certain form of categorical syllogism is valid (for example, the Socrates argument), then another argument in that same form (*Bevans*) is valid too. This holds even if one or more of the categorical propositions in the argument are false. Consider this argument:

Major premise: All night parrots are dead.

19 16 US 336 (1818) at 386–387 (Marshall CJ).

Minor premise: A certain bird photographed (much alive) and captured on video in early July 2013 in western Queensland was a night parrot.

Conclusion: Therefore, that certain bird photographed (much alive) and captured on video in early July 2013 in western Queensland was dead.

This argument is valid. But it is not sound. The logical form of the argument matches exactly the form of the Socrates and *Bevans* arguments. All three arguments begin with a universal affirmative categorical proposition followed by two particular affirmative categorical propositions follow (AII sequence of categorical propositions). The terms in the arguments also occupy the same positions. While the three arguments follow the same form (which happens to be valid), the night parrot argument is obviously troublesome. Its trouble lies in falsehood; either its major premise or minor premise is not true. And the conclusion is nonsensical. The lack of truth, however, does not affect the validity of the argument. It is valid, but due to the fact that its major premise is false, the argument is unsound.

Determining the validity of categorical syllogisms

Every categorical syllogism in standard form can be tested for validity by enquiring whether it violates one or more rules which must all be satisfied for a categorical syllogism to be valid. If a form of categorical syllogism fails to satisfy any one (or more) of the rules, that form is invalid; and every argument that takes that form is invalid, regardless of the truth of its content. Each rule has associated with it a particular formal fallacy. The five standard rules of validity, along with their associated fallacies, are set out below:

- **Rule 1: Three terms rule** Every valid categorical syllogism contains precisely three terms, each of which is used in the same sense throughout the argument.

  Fallacy: *Fallacy of four terms or fallacy of equivocation*
- **Rule 2: Middle term distribution rule** In every valid categorical syllogism, the middle term is distributed in at least one premise.

  Fallacy: *Fallacy of the undistributed middle term*
- **Rule 3: Conclusion distribution rule** In every valid categorical syllogism, any term distributed in the conclusion is also distributed in the premise where it appears.

  Fallacy: *Fallacy of the illicit process of the major term or minor term*
- **Rule 4: Negative premise rule** No valid categorical syllogism has two negative premises.

  Fallacy: *Fallacy of exclusive premises*
- **Rule 5: Negative conclusion rule** Every valid categorical syllogism with one negative premise has a negative conclusion.

  Fallacy: *Fallacy of an affirmative conclusion from a negative premise*

With these rules in hand it is possible to confirm the validity or prove the invalidity of any categorical syllogism. The form represented by the Socrates/*Bevans*/night parrot arguments is valid for it satisfies all the rules. It is, as a matter of fact, the most common form of categorical syllogism used in law and ordinary life. Yet just one slight modification from that argument form yields an invalid argument. In the familiar valid form, the middle term (the term that

appears in each premise) is positioned as the subject term in the major premise and the predicate term in the minor premise. If instead of that placement, the middle term serves as the predicate term in each premise, the argument is invalid. Consider:

(1) All Hulme Supercars are orange.
(2) Betty's car is orange.
(3) Therefore, Betty's car is a Hulme Supercar.

The fallacy this form of categorical syllogism commits is that of the undistributed middle term. This is the most vexing fallacy in reasoning by way of categorical syllogisms. It vexes because it can be difficult to detect and is committed in arguments that are extremely close in formal structure to the most common form of categorical syllogism.

Another invalid categorical syllogism that is close in form to the Socrates/*Bevans*/night parrot form results from beginning an argument with a particular affirmative major premise instead of the universal affirmative categorical proposition found in the major premise of that most familiar form. This would be to argue like:

(1) Some controversial historical figures from the 19th century were scientists.
(2) Ned Kelly is a controversial historical figure from the 19th century.
(3) Therefore, Ned Kelly was a scientist.

Again, the error of reasoning here is the fallacy of the undistributed middle term. For a categorical syllogism to be valid, the middle term must be distributed in at least one of the premises. Each term in a categorical proposition is either distributed or not. For a term to be distributed means that what is said about it in a categorical proposition involves a claim of knowing something to be true about each and every individual in the entire class or category to which the term refers. Thus, the universal affirmative statement, "All kangaroos are marsupials", asserts a claim of knowing that each and every member of the category represented by the subject term "kangaroos" falls within the predicate class "marsupials". The subject term "kangaroos" is thus distributed. The statement does not, however, imply knowing anything to be true about every member of the class "marsupials"; hence, that predicate term is not distributed. A universal affirmative categorical proposition accordingly distributes its subject term but not its predicate term. By contrast, in the particular affirmative categorical proposition form (for example, "Ned Kelly was a scientist"), neither subject nor predicate term is distributed.

Failure to distribute the middle term renders a categorical syllogism invalid regardless of the argument's content. Were Charles Darwin substituted for Ned Kelly in the argument above, it would read:

(1) Some controversial historical figures from the 19th century were scientists.
(2) Charles Darwin is a controversial historical figure from the 19th century.
(3) Therefore, Charles Darwin was a scientist.

All three propositions in this syllogism are true. Still the argument remains invalid. The fallacy remains the undistributed middle, as it will for every argument that takes this form, no matter the content. For the middle term (here "controversial historical figures from the 19th century") must be distributed for a categorical syllogism to be valid. This is because the middle term is the argument's yeoman. While the purpose in arguing by way of a categorical syllogism is to draw a necessary inference about how the minor term relates to the major term, it is the middle term that does the inferential work. The two premises assert relationships between the major and minor terms and the middle term. That middle term is the class or category that they share in common. If the middle term is not distributed in at least one premise, it cannot do its work of bringing the minor and major terms together by necessary inference.

Unfortunately, categorical syllogisms that commit the fallacy of the undistributed middle term are all too common in legal reasoning. Many cases discuss the fallacy. One is the US Court of Customs and Patent Appeals' judgment in *Atlantic Aluminum & Metal Distributors, Inc v United States*.[20] This case concerned a dispute over the appropriate classification of an importer's merchandise for the purpose of assessing import duties under the federal *Tariff Act* of 1930. The merchandise consisted of aluminum tubes. The importer sought to have the tubes classified with bars and rods, which would significantly lower the import duty from the assessment resulting from the classification used by the government. The principal evidence submitted by the importer were definitions from various dictionaries meant to establish the common meaning of the terms "bars" and "rods". Finding the definitions inconclusive, the court reasoned:[21]

> These definitions establish that a bar or a rod is "long in proportion to its breadth and thickness". The evidence establishes that the imported tubes are also "long in proportion to [their] breadth[s] and thickness[es]". From these premises the importer asks us to find that tubes are bars and rods. This constitutes an invalid syllogism. The undistributed middle term prevents reliance upon the premises to support the importer's conclusion. If we were to agree with this argument, we would then be required logically to hold that every item having length would be a rod or bar, since every item having length is, by definition, long in proportion to its breadth and thickness.

Essentially, the argument the court here rejects is the following:

(1) Some items long in proportion to breadth and thickness are bars/rods.
(2) <u>The importer's aluminum tubes are long in proportion to breadth and thickness</u>.
(3) Therefore, the importer's aluminum tubes are bars/rods.

Just as the court rules, this argument commits the fallacy of the undistributed middle term. The explanation Smith J gives for rejecting the argument nicely illustrates how the fallacy is here implicated.

20 47 CCPA 88 (Customs and Patent Appeals 1960).
21 ibid at 90 (Smith J).

Another noteworthy judicial discussion of the fallacy of the undistributed middle is found in the judgment of the NSW Court of Appeal in *Bishop v Electricity Commission of NSW*.[22] The plaintiff in Bishop suffered from substantial tinnitus allegedly caused by two decades' exposure to industrial noise while employed by the defendant. The evidence showed that in addition to his time in the defendant's employ, the plaintiff had been exposed to industrial noise in previous workplaces. Further, the plaintiff also had a history of exposure to noise through his hobbies of rifle shooting and pistol shooting. The trial judge found the evidence insufficient to establish that the plaintiff's tinnitus could be causally attributed to his employment with the defendant. In dismissing the appeal, Handley JA reasoned:[23]

> In my judgment [plaintiff's] submission should not be accepted. The evidence earlier referred to indicates that tinnitus has other causes, apart from exposure to industrial noise. One common cause is the exposure to noise made by firearms, but some persons suffer from tinnitus without having any history of exposure to industrial noise, or the noise made by firearms. In these circumstances, the fact that a significant proportion of persons suffering from industrial deafness also suffer from tinnitus does not permit the Court to draw the conclusion that in this, or any case, the inference is available that proved tinnitus must have been, more probably than not, caused by exposure to industrial noise.
>
> There is, of course, a well-established logical fallacy in that proposition known as the undistributed middle.

Handley JA's argument can be formally stated as:

(1) Some tinnitus is caused by exposure to industrial noise.
(2) <u>Bishop's injury is tinnitus</u>.
(3) Therefore, Bishop's injury is caused by exposure to industrial noise.

This argument precisely matches the form of the Ned Kelly argument. All three propositions (major premise, minor premise, conclusion) in both arguments are particular affirmative categorical propositions. That type of categorical proposition does not distribute either its subject or predicate term. The middle term accordingly is left undistributed. The excerpt here from the judgment of Handley JA admirably describes the logical problem that attends trying to draw an inference without distributing the middle term.

Hypothetical syllogisms

There are three valid types of hypothetical syllogisms: the pure hypothetical syllogism and two forms of "mixed" hypothetical syllogisms: *modus ponens* and *modus tollens*. The distinguishing feature of hypothetical syllogisms is that they rely on "hypothetical propositions" — that is, *conditional* or "*if/then*" statements.

22 [1996] NSWCA 50 (Sheller and Powell JJA agreeing).
23 ibid.

Using the letters A and C as placeholders for any two simple propositions, it is possible to represent the basic form of a hypothetical proposition as:

> *If* A is true, *then* C is true.

In the hypothetical proposition, the assertion that follows "if" is called the antecedent. The assertion that follows "then" is the consequent. So every hypothetical proposition states that:

> *If* antecedent A is true, *then* consequent C is true.

- **Pure hypothetical syllogism:** A pure hypothetical syllogism is a deductive argument containing hypothetical propositions exclusively. Every valid pure hypothetical syllogism takes the following form:

  (1) *If* A is true, *then* C is true.
  (2) <u>*If* C is true, *then* E is true</u>.
  (3) Therefore, *if* A is true, *then* E is true.

- **Modus ponens:** The deductive argument form known as *modus ponens* is one of two valid forms of "mixed" hypothetical syllogism. A mixed hypothetical syllogism is a deductive argument wherein one premise (the "conditional premise") takes the form of a hypothetical proposition, while the other premise and the conclusion are simple or categorical propositions. Arguments that take the form of *modus ponens* claim:

  (1) *If* A is true, *then* C is true.
  (2) <u>A is true</u>.
  (3) Therefore, C is true.

- **Modus tollens:** The other valid form of mixed hypothetical syllogism is known as *modus tollens*. As a mixed hypothetical syllogism, *modus tollens*, like *modus ponens*, is an argument that contains one conditional premise (that is, one hypothetical proposition), while the other premise and the conclusion take the form of simple or categorical propositions. Arguments in the form of *modus tollens* assert:

  (1) *If* A is true, *then* C is true.
  (2) <u>C is not true</u>.
  (3) Therefore, A is not true.

Fallacies in reasoning by hypothetical syllogism

There are three fallacies that are committed all too frequently when reasoning by way of hypothetical syllogisms:

- **Fallacy of the illicit conditional:** The fallacy of the illicit conditional is associated with the pure hypothetical syllogism form. This fallacy occurs whenever an argument contains

three hypothetical propositions but takes a form different from the valid form set out above. As noted, a valid pure hypothetical syllogism contains three propositions, A, C, and E, each of which appears twice in the argument. Those propositions must be positioned in the argument precisely as stated. If they are positioned differently the argument is invalid. This can be by adding a fourth proposition, by positioning the three propositions differently, or by negating one or more of the propositions the second time it occurs in the argument. If any of these errors occur, we have the fallacy of the illicit conditional.

- **Fallacy of affirming the consequent:** The fallacy of affirming the consequent is a mixed hypothetical syllogism fallacy. It begins with a standard-form conditional proposition — *If* antecedent A is true, *then* consequent C is true. The second premise then affirms the truth of the consequent, leading to an attempt to establish the truth of the antecedent. That is, an argument that commits the fallacy of affirming the consequent reads:

  (1) *If* A is true, *then* C is true.
  (2) <u>C is true</u>.
  (3) Therefore, A is true.

  Note that this fallacious form of mixed hypothetical syllogism contains only affirmative propositions. In that respect, the fallacy of affirming the consequent resembles *modus ponens*. Essentially it modifies *modus ponens* by inverting the propositions asserted in the minor premise and the conclusion. While *modus ponens* affirms the truth of the antecedent in the second premise so as to necessarily prove the truth of the consequent in the conclusion, the fallacy of affirming the consequent inverts the ordering of those propositions.

- **Fallacy of denying the antecedent:** The final hypothetical syllogism fallacy, that of denying the antecedent, is another mixed hypothetical syllogism fallacy. Like the fallacy of affirming the consequent, the fallacy of denying the antecedent begins with a conditional proposition — If antecedent A is true, then consequent C is true. Then in this fallacious form, the argument, in its second premise, denies the truth of the antecedent in an effort to prove, in the conclusion, that the consequent cannot be true. Accordingly:

  (1) *If* A is true, *then*C is true.
  (2) <u>A is not true</u>.
  (3) Therefore, C is not true.

  Given that the fallacy of denying the antecedent asserts negative propositions in its second premise and conclusion, this fallacious form of mixed hypothetical syllogism quite closely resembles *modus tollens*. It essentially modifies *modus tollens* by inverting the propositions asserted in the minor premise and the conclusion. While *modus tollens* denies the truth of the consequent in the second premise in order to necessarily deny the truth of the antecedent in the conclusion, the fallacy of denying the antecedent reorders those propositions, producing an invalid syllogistic form.

The judgment of the US Court of Appeals for the Second Circuit in *Crouse-Hinds Co v InterNorth Inc*,[24] provides an excellent study of hypothetical syllogisms in the law. InterNorth, desiring to complete a hostile takeover of Crouse-Hinds, filed suit to block a proposed merger between Crouse-Hinds and another company. At trial, InterNorth claimed that the Crouse-Hinds directors, who would remain in control after the merger, were pursuing it out of self-interest and bad faith. InterNorth succeeded in temporarily enjoining the merger by fashioning a hypothetical syllogism on the basis of an earlier Second Circuit judgment. In *Treadway Companies v Care Corp*,[25] the Second Circuit had declined a request to block a merger on the basis of self-interest or bad faith on the part of the directors. Under the facts in *Treadway*, the directors were not going to remain in control after the merger. The reasoning of the Second Circuit in *Treadway* thus took the form of *modus ponens*:

(1) If the directors of a company are not going to remain in control after a merger, then perpetuating their control cannot be their motive in pursuing the merger.
(2) <u>The Treadway directors were not to remain in control after the merger</u>.
(3) Therefore, perpetuating their control could not be the Treadway directors' motive in pursuing the merger.

Before the trial court in *Crouse-Hinds*, InterNorth successfully argued, following *Treadway*:

(1) If the directors of a company are not going to remain in control after a merger, then perpetuating their control cannot be their motive in pursuing the merger.
(2) <u>The Crouse-Hinds directors were to remain in control after the merger</u>.
(3) Therefore, perpetuating their control must be the Crouse-Hinds directors' motive in pursuing the merger.

Though the starting-point of this argument is the same as *Treadway*'s, the Second Circuit correctly observed that the syllogism was very different. Instead of *modus ponens*, the form of the InterNorth argument was that of the fallacy of denying the antecedent. Reversing the trial court that had accepted the fallacious inference crafted by InterNorth, the Second Circuit in *Crouse-Hinds* astutely ruled that, "This inference has no basis in either law or logic".[26]

Disjunctive syllogisms

Disjunctive syllogisms are deductive arguments wherein one premise takes the form of a disjunctive proposition, while the other premise and the conclusion are simple propositions that

24 634 F 2d 690 (1980).
25 638 2 Fd 357 (1980).
26 634 F 2d 690 at 702 (1980).

either deny or affirm part of the disjunctive proposition. Disjunctive propositions are "*or*" or "*either/or*" statements. They are compound propositions in that every disjunctive proposition, or disjunction, contains two component propositions called "disjuncts". One disjunct comes before the "or"; the other appears after it.

Two disjunctive syllogism "moods"

It is often said there are two forms or "moods" that disjunctive syllogisms can take. The two moods differ from one another in two important respects:

- **Exclusivity of the disjuncts:** The first mood does not assume that the disjuncts are mutually exclusive; the second mood requires that the disjuncts be fully exclusive of one another — that is, that it not be possible for both disjuncts to be true.
- **Conclusions they draw:** The first mood denies the truth of one disjunct in its second premise and then affirms, in its conclusion, the truth of the other; the second mood affirms the truth of one disjunct in the second premise and then concludes that the other disjunct must be false. Only the first mood is, in a pure logical sense, a disjunctive syllogism. The second mood presumes, in its disjunctive premise, a proposition that is more complex than a simple disjunctive proposition. Nevertheless, arguments in the second mood do occur in certain situations in legal reasoning. When they do, they are typically presented as simple disjunctive syllogisms.

The two moods can be stated symbolically as follows:

Mood which by denying affirms:

(1) A is true *or* B is true.
(2) A *is not* true.
(3) Therefore, B *is* true.

Mood which by affirming denies:

(1) A is true *or* B is true.
(2) A *is* true.
(3) Therefore, B *is not* true.

While the second mood represents a fairly common argument form, it must be used with care. It is a valid argument form only when the assumption holds that the disjuncts, A and B, are mutually exclusive. The California Court of Appeal addressed this point well and expertly compared the logical validity of the two disjunctive syllogism moods in the case *Danzig v Superior Court*.[27] The court was asked to consider, in a class action suit, whether unnamed class members are, under the applicable State statutory scheme, "parties" to whom interrogatories

27 87 Cal App 3d 604 (1978).

may be propounded. An earlier California Supreme Court judgment had held that, under the same statutory scheme, unnamed members of a class are "persons for whose immediate benefit an action or proceeding is prosecuted".[28] The petitioners in *Danzig* argued that in ruling that unnamed class members are "persons", the Supreme Court had impliedly held that they were not "parties". Justice Feinberg for the Court of Appeal in *Danzig* rebuffed this argument as unsound:[29]

> The argument suffers from a logical fallacy. When a proposition is in the form of two alternatives, if one alternative is false, then the other alternative must be true. But, if one of the alternatives is true, nothing can be said about the truth or falsity of the other alternative except in the situation when the two alternatives are mutually exclusive.
>
> In *Southern California Edison*, the Supreme Court holding that unnamed members of a class … were persons for whose benefit the action was being prosecuted tells us nothing as to whether unnamed members of a class in a class action are "parties" within the meaning of [the applicable] section … unless a "party" and "a person …" are mutually exclusive concepts. Since it appears obvious that the two concepts are not mutually exclusive, we conclude that Southern California Edison is not authority for the resolution of the issue at bar.

Fallacies associated with disjunctive syllogisms

There are three fallacies associated with reasoning by way of a disjunctive syllogism:

- **Fallacy of non-exclusivity:** The fallacy of non-exclusivity applies only to the second disjunctive syllogism mood — the mood which by affirming denies. The logic behind this fallacy is that if the disjuncts in a disjunctive proposition are not contradictory or mutually exclusive, then it is possible for both disjuncts to be true. Hence, to affirm one disjunct in a non-exclusive disjunctive proposition provides no basis for denying the truth of the other. Arguments which employ the second disjunctive syllogism mood when it is possible for both their disjuncts to be true commit this fallacy of non-exclusivity. This is the fallacy committed by the petitioners in *Danzig*.
- **Fallacy of missing disjuncts:** While the fallacy of non-exclusivity can be committed only when an argument takes the second disjunctive syllogism mood, there are two other fallacies associated with disjunctive syllogisms that can occur in either mood. Both of these fallacies go to the truth of the disjunctive proposition, not to the form or structure of the disjunctive syllogism. The first, the fallacy of missing disjuncts, goes to the *incompleteness* of a disjunctive proposition. This fallacy is committed whenever a disjunctive proposition asserts the truth of one disjunct taken from a pair or set of disjuncts when in fact other disjuncts not enumerated are possible.
- **Fallacy of false disjunction:** The other disjunctive syllogism fallacy that can arise in either mood is the fallacy of false disjunction. This fallacy is committed whenever an argument rests on a disjunctive proposition that sets in opposition two disjuncts that are not in truth alternatives to one another.

28 *Southern California Edison Co v Supreme Court* 7 Cal 3d 832 (1972).
29 87 Cal App 3d 604 at 609 (1978).

Conjunctive syllogisms

Conjunctive syllogisms are deductive arguments wherein one premise is stated in the form of the negation of a conjunctive proposition. Conjunctive propositions are compound propositions that pull together, usually with the word "and", two or more component propositions known as "conjuncts". In a simple two-part conjunctive proposition, one conjunct comes before the "and", while the other appears after it (for example, "The auto dealership sells BMWs and it sells Holdens"; "The plaintiff filed the complaint and the defendant counterclaimed").

In a conjunctive syllogism, one premise (the conjunctive premise) negates the truth of a conjunctive proposition — that is, it denies the possibility that both conjuncts could be true. The other premise then affirms the truth of one of the conjunctive premise's conjuncts, while the conclusion denies the truth of the other conjunct. That is, a valid conjunctive syllogism takes the logical form:

> **Premise 1:** The *negation* of a conjunctive proposition. (the conjunctive premise)
>
> **Premise 2:** A simple or categorical proposition *affirming* the truth of one of the conjunctive premise's two conjuncts.
>
> **Conclusion:** A simple or categorical proposition *denying* that the conjunctive premise's other conjunct could be true.

Symbolically, the standard claim made by a valid conjunctive syllogism can be expressed as follows:

(1) A *and* B are not both true.
(2) <u>A *is* true</u>.
(3) Therefore, B *is not* true.

Note that the conjunctive syllogism form can be used interchangeably with the second disjunctive syllogism mood. Consider the argument:

(1) Ernest Hemingway could not have been born both in Idaho and in Illinois.
(2) <u>Hemingway was born in Illinois</u>.
(3) Therefore, Hemingway was not born in Idaho.

As stated, this argument is a conjunctive syllogism. The same reasoning can be presented as a disjunctive syllogism in the second mood if the first premise is changed to read: "Ernest Hemingway was born either in Idaho or in Illinois". The resulting disjunctive syllogism would be valid since the disjuncts are mutually exclusive.

Conclusion

The language of logic used herein to describe the basic categories of inductive and deductive reasoning is not everyday language in the law. However, the patterns of reasoning found in the

forms of argument presented are the everyday patterns of legal reasoning. For the domain of law, and most significantly within that domain, the practice of judicial decision-making is a realm governed by practical reasoning and deliberative judgment. As a practical matter, humans tend to deliberate, reason, and reflect according to a relatively small set of logical argument forms.

Law, to be sure, concerns more than logic. Yet the abundance of factors that conduce to good lawyering and fair judging disclose that the life of the law, while not logic alone, is a complex manifold of activities that use and depend upon reason in a mosaic of specialised ways. The precision of semantic detail required of solicitors in the drafting of legal documents — contracts, trusts, wills, etc — is a rational precision. The care demanded of barristers in planning, strategising, and deciding how to present their cases is a rational care. The skill in oral and written argumentation necessitated by appellate practice is, quite evidently, a rational skill. The talent commanded of judicial officers to craft understandable findings of fact and conclusions of law is a rational talent. The aptitude the law demands of appellate judges to separate, dispassionately and without bias, the kernel of an argument from the emotive and rhetorical chaff of adversarial presentation, so as to render judgments justified under law is fundamentally a rational aptitude.

While many other factors — self-interest, public policy, science, psychology, moral values, ideals of justice, etc — permeate the deliberations and decision-making of lawyers and judges, all such considerations are intertwined inextricably with reason and logic. Barristers may appeal to the sentiments and psychology of jurors, but only to the extent they reasonably think they can influence the jury to draw rational inferences favorable to their client. Self-interest commonly is the primary if not the only motive for each party in the drafting of a contract, yet the prudential recognition, grounded in practical reason, that to insist on onerous provisions would likely undermine the whole process of contractual negotiation has the tendency to restrain everyone's self-interest. Though adjudicative practice may well call for judgments of value and policy in choosing, interpreting, and applying legal principles, such judgments do not stand free of the constraints of reason. For fundamentally, as stated by one appellate court: "every legal analysis should begin at the point of reason, continue along a path of logic and arrive at a fundamentally fair result".[30]

30 *Sunrise Lumber v Johnson*, Appeal No 165 (Fort Peck Tribal Court of Appeals, 30 June 1999) (Sullivan CJ).

The role of judicial education

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Continuing judicial education: the Australian experience*

The Honourable Justice J Allsop AO†

In this paper, the author begins by providing an overview of the Australian judicial system before comparing the processes for the appointment and removal of judicial officers in a common law, adversarial system such as Australia with the processes in civil law systems in which judging is preceded by specialised training. He then articulates the broad purpose of continuing judicial education within the constitutional requirements for the appointment and removal of judicial officers and gives a brief history of judicial education in Australia. The author outlines the various judicial education bodies and the educational opportunities available to judicial officers in Australia, and explains the national standard for judicial education. Finally, the author examines the education programs offered by the various judicial education bodies and how they are developed with a view to ensuring that sessions are both educationally sound and stimulating for judicial officers.

Introduction

> Judicial education is now an accepted part of judicial life in many countries. It is an enhancement of the … qualities necessary to the preservation of judicial independence … Judicial independence requires that the judicial branch is accountable for its competency and that proposition is now accepted as beyond debate.[1]

As with the need for continuing education in other professions, the need for continuing judicial education is now widely accepted in Australia. Judicial education bodies have provided programs for Australian judicial officers since the late 1980s. Unlike other professional education however, the purpose of continuing judicial education extends beyond the need to improve professional competence and performance. The ultimate purpose of judicial education

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† Chief Justice of the Federal Court of Australia.

1 R Nicholson, "Judicial independence and accountability: can they co-exist?" (1993) 67 *ALJ* 404 at 425.

is to improve the quality of justice within the paradigm of reconciling the "divergent and to some extent inconsistent requirements of public accountability, judicial independence, and efficiency in the administration of justice".[2] Unless these requirements are balanced by excellent judicial performance, which is fostered by dedicated judicial education, public confidence in the justice system may be diminished. The preservation of public confidence in the impartial and independent administration of justice is a core element of the justice system and public confidence must be continually earned and replenished.[3]

The Australian judicial system

The Australian system of government has devolved from a mixture of the Westminster system and the political structure of the United States. In 1901, Australia became a federation or Commonwealth of six States, formerly British colonies. Today, power is divided between the Commonwealth, the six States and two self-governing mainland Territories. The Australian court system operates at the Commonwealth, State and Territory level. Within these jurisdictions, the judicial system is one of three branches of government comprising the executive, the legislature and the judiciary. There is a separation of the judicial branch from the other branches of government to provide a structural mechanism for supervision of the lawfulness of the exercise of power by the executive and the constitutionality of legislation by Parliament. This ensures that no branch of government exercises unfettered power or abrogates power to itself. Judicial independence is an inherent requirement of this system and is a central value of the rule of law. The safety, stability and economic prosperity of all Australians depends upon the maintenance of the rule of law by the judicial branch of government.[4] Within this system, the duty of a judge is "to administer justice according to the law, without fear or favour, and without regard to the wishes or policy of the executive government".[5] Judicial officers, through judicial review of executive and legislative action, are often required to declare the limits of the powers of the other branches of government in order to give practical expression to the rule of law.[6] An essential attribute of judicial independence is judicial skill and knowledge.

Appointment and removal of judicial officers

Australia is a common law system in which judicial officers are appointed by the executive branch of government. A successful and lengthy legal career, usually as a barrister or solicitor or, sometimes, as a legal academic, is almost always a precondition for judicial appointment. Most judges are appointed aged above 50, some below the age of 50. It is very rare for anyone below 40 years of age to be appointed. Judicial appointments are based on merit.[7] The Australian system moves experienced legal professionals within an adversarial system to a

2 Lord Hailsham, "Democracy and judicial independence" (1979) 28 *University of New Brunswick Law Journal* 7 at 8.
3 J Spigelman, "President's foreword", Judicial Commission of NSW, *Annual Report 2009–10*, 2010, p 6. See M Gleeson, "A core value" (2007) 8(3) *TJR* 329.
4 W Martin, "Future directions in judicial education" (2011) 10(3) *TJR* 277.
5 M Gleeson, "Performing the role of the judge" (1998) 10(8) *JOB* 57.
6 Gleeson, "A core value", above n 3, p 341.
7 J Spigelman AC, "Judicial appointments and judicial independence" (2008) 17(3) *JJA* 139.

judicial position. It is expected that the new judge has that stock of knowledge built up in his or her career so that he or she can commence work immediately. The place of judicial education at this point is to assist in the transition from advocate to impartial adjudicator.

This process is different from the civil law systems in countries such as France and Germany where judging is a career choice preceded by specialised training. In France for example, specialised judicial training is administered by the Ecole Nationale de la Magistrature (ENM) at Bordeaux for judicial candidates who have finished four years of law school.[8] In Germany, legal trainees may be ready for a judicial career around the age of 28 years after specialised academic and practical training. The paramount aim of German legal training is to produce qualified judicial officers, rather than counsel.[9] In civil law countries, there is a formalised structure of promotion for career judges and opportunities for promotion are of high interest.[10] Promotion to higher judicial office in Germany and France is based on the same principle of merit used for initial appointments. A German judge seeking promotion will be reviewed by higher judges on his or her aptitude, qualifications and professional ability and these are of great importance in the promotion process.[11] In Australia, there are no performance measures for a judicial officer for the purposes of promotion. Assessment of judicial performance comes through the perception of peers, the appeal process and by public scrutiny through the media and, where it exists, through a public complaints process as exists with the Judicial Commission of NSW.

In Australia there has been public discussion about whether the appointment of judges should rest solely with the executive.[12] Some have urged independent advisory bodies to recommend appointments.

Judicial appointments to Commonwealth courts

In 2008, the federal Attorney-General introduced new processes for appointing judges and magistrates to federal courts, including:

- broad consultation to identify suitable persons
- notification of appointment criteria
- notices in the media seeking expressions of interest and nominations
- the appointment of advisory panels to assess expressions of interest and nominations and to develop a shortlist of suitable candidates.

8 See B McKillop, "The judiciary in France — reconstructing lost independence", in H Cunningham (ed), *A fragile bastion: judicial independence in the nineties and beyond*, Education Monograph 1, Judicial Commission of NSW, Sydney, 1997, p 113.

9 S Nehlep, "A glance at the far side: a comparative analysis of the role and powers of judges in German and English criminal trials" (2005) 7(2) *TJR* 181 at 182.

10 ibid at 188.

11 ibid.

12 The parameters of this debate are noted in R Sackville, "The judicial appointments process in Australia: towards independence and accountability" (2007) 16 *JJA* 125. For a critique of the traditional appointments process, see R McColl, "Women in the law" (2006 Winter) *Bar News* 38.

In 2009, a Senate Legal and Constitutional Affairs Committee of the national legislature inquired into Australia's judicial system and the role of federal judges. The inquiry examined:

- procedures for the appointment and method of termination of judges
- the term of appointment, including the desirability of a compulsory retirement age
- the merit of full-time, part-time or other arrangements.

The Committee recommended limited reform to the judicial selection and appointment process, including the adoption of a protocol for appointments to the High Court, greater transparency by publicising the number of nominations and applications received for each federal vacancy, and the wide advertising of vacancies.[13] The Federal Government announced in October 2010 that it would adopt each recommendation in part, but would preserve the appointment of judicial officers by the executive government.[14]

Judicial appointments in NSW

Vacancies for positions as a District Court judge, magistrate or specialist tribunal member are advertised in the media and a selection panel comprising the head of jurisdiction or authority, a retired judicial officer, a prominent community member and a leading member of the profession is convened to assess candidates. The selection panel makes recommendations to the Attorney General who advises the Governor about judicial appointments. The Governor, with the advice of the Executive Council, formally appoints a judicial officer under s 47 of the *Constitution Act 1902* (NSW).

Removal of judicial officers for proved misbehaviour or incapacity

A judicial officer in Australia holds office during good behaviour. Since the *Act of Settlement* 1701 (UK), a judge enjoys security of tenure as a necessary protection against the undue influence of other branches of government and can only be removed from office following an address from both Houses of Parliament for proven misbehaviour or incapacity. Federally, this is reflected in s 72(ii) of the *Australian Constitution* 1901 whereby Parliament can only remove a judge on the ground of "proved misbehaviour or incapacity". In NSW, s 53(2) of the *Constitution Act 1902* provides that:

> The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

In NSW, a judicial officer can only be removed following the tabling in both Houses of Parliament of a report by the Conduct Division of the Judicial Commission of NSW. The Conduct Division is constituted when a complaint made to the Judicial Commission about a judicial officer's behaviour or ability is not summarily dismissed and is referred to the Conduct

13 Australia, Parliament, Senate, Legal and Constitutional Affairs References Committee, *Australia's Judicial System and the Role of Judges,* Report, 7 December 2009, pp 14, 25, Recommendations 3 and 4.

14 The government's response was tabled in the Federal Parliament on 25 October 2010.

Division in accordance with s 21(1) of the *Judicial Officers Act 1986*. In December 2009, the federal Senate Legal and Constitutional Affairs Committee recommended the establishment of a federal judicial commission modelled on the Judicial Commission of NSW.[15]

Continuing judicial education

Purposes and aims of education in the context of the judicial method

Given that the grounds for removal of a judicial officer are for proved misbehaviour or incapacity, the necessary aims of judicial education must be to promote the highest standards of behaviour befitting judicial office and to foster judicial capacity. Because a successful legal career is a precondition for judicial appointment, judicial education is directed at already experienced legal professionals. The need is better expressed not as a need for judicial training, but rather for judicial education, which focuses on induction, orientation and transition to the Bench, and then on a continuous renewal of professional education and a sharpening of judicial skills. It is beyond doubt that the judicial function requires professional skills of a very high order.[16] A judicial officer is expected to gain competence in judicial skills, and judicial technique ranging from:

- investigating facts and circumstances and applying correct legal principles to these
- resolving evidentiary and procedural issues
- determining the rights and liabilities of the parties
- exercising fairness and where necessary, substantive equality, to parties
- exercising impartiality in adjudication in an adversarial system
- crafting comprehensible jury directions in criminal cases
- providing oral or written reasons for decisions,
- being subject to public and appellate scrutiny.

It is also necessary for judicial officers to have appropriate knowledge in the subject matters of the disputes to be heard. Appellate court judges are required to formulate, elucidate and elaborate general principles of law and where relevant, policy, and identify possible error and correct possible injustice.[17]

The overarching purposes of judicial education are to facilitate just and efficient dispute resolution, and to preserve judicial independence and accountability. Judicial education provides a mechanism to achieve this by equipping judges to serve their courts, which in turn,

15 *Australia's Judicial System and the Role of Judges*, above n 13, p 95, Recommendation 10.
16 A Mason, "The appointment and removal of judges" in Cunningham (ed), above, n 8, p 1 at p 5.
17 ibid p 6; M Gleeson, "The role of a judge in a representative democracy" (2008) 9(1) *TJR* 19 at 23; "The judicial method: essentials and inessentials" (2010) 9(4) *TJR* 377 at 384; R French, "The judiciary in an age of global interdependence", paper presented at the International Association for Court Administration Conference, 15 March 2011, Bogor, Indonesia, at https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj15mar11.pdf, accessed 24 May 2021.

serve the community. Both the individual accountability of judicial officers and the institutional accountability of courts enhance the quality of the administration of justice.[18] To preserve judicial independence, it is essential that the continuing education of judicial officers is in the hands of those who will safeguard that independence.[19] In Australia, judicial education is generally judge-driven and judge-led. By providing an effective program of judicial education, judicial independence and accountability are not opposed, but work towards the same end.[20]

History of continuing judicial education in Australia

Formal judicial education commenced in common law countries in 1963 when the American National Judicial College was established and then Chief Justice Warren Burger called for judges nationally to participate in continuing judicial education.[21]

Australia followed the North American lead some 20 years later with the formation by judges of the Australian Institute of Judicial Administration (AIJA) in 1975.[22] In his 1983 Boyer lectures broadcast on ABC radio, then Federal Court Justice Michael Kirby called for formalised judicial education to assist newly appointed judicial officers in their transition to the Bench. It took another decade before any permanent funding and infrastructure was dedicated to judicial education with the formation of the Judicial Commission of NSW in 1986 and the AIJA Secretariat in 1987. Arguably, judicial education was slow to take off in Australia because, as judicial officers were appointed late in their professional careers, they were already seen as experienced lawyers who specialised in court work. Calls to impose any formal mechanism were also initially perceived by the judiciary as a threat to their independence. In 1986, legislation was enacted in NSW to establish the Judicial Commission of NSW as both a judicial complaints and judicial education body run by the executive government. The legislation was enacted in response to a perceived crisis in public confidence in the justice system in the wake of criminal charges against a High Court judge, the conviction of a former Chief Magistrate, and allegations of inconsistent sentencing in the District Court.[23] Judicial pressure on the government led to substantial amendments to the legislation and the Judicial Commission was ultimately established as an independent statutory corporation with its staff wholly independent of the Public Service. The vitally important features of the Judicial Commission are that it is independent from the executive and it deals with both complaints about judicial officers and the education of judicial officers.

During the next decade, Australian judges at the most senior level began to publicly acknowledge the need for formalised judicial education resulting in the disappearance of any

18 Martin, above n 4, p 279.
19 M Gleeson, "The future of judicial education" (1999) 11(1) *JOB* 1 at 2.
20 M Gleeson, "Judicial accountability" (1995) 2(2) *TJR* 117.
21 L Armytage, *Educating judges: towards a new model of continuing judicial learning*, Kluwer Law International, The Hague, 1996, p 13.
22 Now the Australasian Institute of Judicial Administration.
23 A Riches, "Continuing judicial education in NSW" (1988) 6(2) *The Journal of Professional Legal Education* 150; K Lumley "From controversy to credibility: 20 years of the Judicial Commission of New South Wales" (2007) 19(9) *JOB* 73 at 74.

debate about the Commission's justification or controversy about its establishment.[24] In 1991, Victoria enacted legislation to establish a Judicial Studies Board, but this body did not eventuate due to lack of funding. The Judicial College of Victoria began operating in November 2002 to provide judicial education, professional development, publications and resources for judicial officers. It is funded by the State government as is the Judicial Commission of NSW. No other Australian State has a similar dedicated organisation.

At the national level, the Judicial Conference of Australia was formed in 1993. Its governing council is drawn from judges and magistrates from all Australian jurisdictions. The Judicial Conference organises annual colloquiums and produces resources and publications in relation to the "public interest in maintaining a strong and independent judiciary within a democratic society that adheres to the rule of law".[25] The National Judicial College of Australia (NJCA) was established in May 2002 following an inquiry and recommendations of the Australian Law Reform Commission.[26] This organisation is controlled by a governing council, the majority of whose members are judicial officers and is funded by contributions from the Commonwealth and some State and Territory governments. The College provides professional development for Commonwealth judicial officers and other participating States and Territories and plans and coordinates judicial education at the national level for federal and State judicial officers. The AIJA continues to provide research, educational resources and publications in relation to court administration and the judicial system. The AIJA has developed courses in relation to gender awareness, cultural awareness, court technology and case management. It is funded by the Standing Committee of Attorneys-General and by subscription income from its membership.

Along with formal judicial education bodies, most courts in each federal and State jurisdictions, with the exception of NSW, have had for many years their own education committee, and many courts run annual conferences and professional development seminars.

Interaction of Australian judicial education bodies and the National Standard for judicial education

Because Australia's justice system operates at both the federal and State levels, and there are different court structures at each State, Territory and Commonwealth level, formalised judicial education has developed incrementally in federal and State jurisdictions over the past two

24 See for example, Gleeson, above n 19; Mason, above n 16; J Spigelman, "Dealing with judicial misconduct" (2003) 6(3) *TJR* 241 at 248.

25 See Judicial Conference of Australia website at www.ajoa.asn.au, accessed 24 May 2021. [**Note**: The Judicial Conference of Australia changed its name to the Australian Judicial Officers Association in 2020, see www.ajoa.asn.au/judiciarys-association-elects-new-president-and-changes-its-name-2-december-2020/, accessed 3 June 2021.]

26 Australian Law Reform Commission, Managing justice: a review of the federal civil justice system, *ALRC Report 89*, 2000, pp 201–203, Recommendation 8.

decades. Until the formation of the NJCA in 2002, there had been no attempt to plan and coordinate judicial education at a national level unlike the position in Britain, Canada, America and New Zealand.[27]

This is not to say that there has been no cooperation between the State and national bodies. In 1994, the first national Judicial Orientation Program was jointly conducted by the AIJA and the Judicial Commission of NSW. This continues to be held annually (sometimes twice a year) and is now a joint presentation of the NJCA, the Judicial Commission of NSW and the AIJA.

The diffuse structure of judicial education in Australasia became the focus of a review undertaken by the NJCA in 2009. Mr George Thomson of the National Judicial Institute of Canada conducted a wide review into the NJCA's work and he recommended a more collegiate approach to judicial education by the various State and national bodies, referred to above, together with the New Zealand Institute of Judicial Studies. The Australian Council of Chief Justices has endorsed this approach. To achieve this objective, Mr Thomson recommended that curriculum development be made a priority and the various bodies agree as to which organisation would develop particular modules of education. The intention would then be for the organisations to share the programs they have developed with other organisations and trainers would be encouraged to assist in the delivery of these programs to all jurisdictions. The aim of this approach is to encourage maximum return from limited funding and resources.[28]

The Thomson review also led to two faculty development workshops being held in Australia in 2010. The focus of the workshops was to develop course design skills for judicial officers with the aim to establish a group of judicial officers with ongoing responsibility for course design. Judicial officers participating in the workshops were involved in designing a portion of a module using sound adult education design principles. The modules, once completed, may then be used in future by the participating judicial education bodies as part of their curriculum. Some of the topics included: oral decisions, decision-making, assessing witness credibility and reliability, solution-focussed judging, and leadership. It is expected that the groups will carry on with the development of their respective modules.

National and State judicial education bodies in Australia have different mandates but are now increasingly cooperating with joint programming and the regular exchange of information and ideas with each other and overseas education providers.

27 Martin, above, n 4; S Kenny, "Judicial education in Australia", paper presented at the First Australasian Judicial Educators Forum, 11–14 February 2003, Philippine Judicial Academy, Manila. The United States has the National Judicial College, founded in 1963, and the Federal Judicial Center, founded in 1967, as the education and research agency for the federal courts. Since 1979, the United Kingdom has had the Judicial Studies Board (JSB), which in April 2011 was subsumed into the Judicial College. The Judicial College is directly responsible for the development and delivery of judicial education in the Crown, county and higher courts in England and Wales and to tribunal judges and members who come under the leadership of the Senior President of Tribunals. Canada has the National Judicial Institute, founded in 1988, which is both the primary provider of education programs and has overall responsibility for the coordination of judicial education in Canada. New Zealand has the New Zealand Institute of Judicial Studies, established in July 1998, as the professional development arm of the New Zealand judiciary which provides education programs and resources.

28 Martin, above n 4, p 283.

In October 2009, a meeting of Australian and New Zealand judicial education bodies agreed to contribute to an electronic clearinghouse/judicial library of past programs and other relevant materials which would be accessible by all judicial education bodies and by all judicial officers.[29]

The national standard

The NJCA initiated a process in 2004 to prepare and promote a national standard or benchmark for the amount of time and funding that should be available for each member of the Australian judiciary for professional development. This led to the development of the standard which has been endorsed by the Council of Chief Justices of Australia, Chief Judges, Chief Magistrates, the Judicial Conference of Australia, the Association of Australian Magistrates, the AIJA and judicial education bodies.[30] The standard was reviewed in late 2010, and following this review, the standard continues to be:

> Each judicial officer should be able to spend at least five days each calendar year participating in professional development activities relating to the judicial officer's responsibilities.
>
> This standard need not be met in each year but can be met on the basis of professional development activities engaged in over a period of three years.
>
> This standard can be met, in part, by self-directed professional development.
>
> Judicial officers should be released from court duties to enable them to meet this standard. However, judicial officers should commit some private time to meet the standard.

The Judicial Commission of NSW

As noted above, the oldest judicial education body in Australia is the Judicial Commission of NSW. This had its origins in controversial circumstances with the State government's announcement in 1986 to establish a body to examine complaints against judicial officers. Today, the Commission remains the only organisation in Australia to formally examine complaints against judicial officers. Any controversy about the Commission quickly disappeared with the wide acceptance of the Commission's education program by the NSW judiciary.

The Commission's major functions under the *Judicial Officers Act 1986* are to:

- assist the courts of NSW to achieve consistency in imposing sentences
- organise and supervise an appropriate scheme for the continuing education and training of judicial officers,
- examine complaints against judicial officers.

29 ibid; NJCA, *Annual Report 2009–10*, 2010, p 13.

30 NJCA (prepared by Dr C Roper AM), *A national standard for professional development for Australian judicial officers*, 28 April 2006, at https://njca.com.au/resources/national-curriculum-standards/, accessed 24 May 2021.

How the Judicial Commission designs and delivers judicial education

The Judicial Commission works closely with the education committees of each court in NSW to promote judge-led judicial education. This is in keeping with the Commission's obligation to consult, and takes into account the benefit of participant involvement at various stages, including program design. These committees regularly meet to discuss the proposed judicial education programs for their particular court. The Judicial Commission's professional staff attend education committee meetings and provide educational input and support. Additionally, a Standing Advisory Committee on Judicial Education (SAC) was established with a representative from each of the court committees. The SAC provides general guidelines and informs each jurisdiction of the activities in the various courts.

As well as working with the court education committees, the Judicial Commission consults widely, and shares information and ideas, with other Australian and international education providers. For example, the Commission actively participated in the October 2009 International Organization for Judicial Training (IOJT) conference. This conference attracted over 200 delegates from 48 countries. There were almost 60 speakers in plenary and smaller group discussion sessions. As most of the Australasian judicial education bodies were represented at the conference, it was an excellent opportunity to share approaches to the design and delivery of judicial education and build a network of judicial and other leaders in the field.

Program design

The Judicial Commission recognises that effective judicial education has to be based on sound adult education design principles and focus on experiential and interactive learning, that is, learning based on experience and enhancing judicial skills. The Commission has been influenced by the work of David Kolb and the National Judicial Institute of Canada.[31]

The content of these interactive sessions includes:

- communication skills
- courtroom management skills
- efficiency skills
- judgment writing skills,
- social and cultural awareness training.

The Commission continues to provide some traditional "black letter" style law sessions and material to update judicial officers on current legal developments and emerging trends.

Although not universally agreed in Australia, the Judicial Commission's view is that examining complaints about judicial officers allows the Commission to monitor patterns in the nature and scope of complaints that may be addressed in specific judicial education sessions. Information

31 See for example D Kolb, *Experiential learning: experience as the source of learning and development*, Prentice Hall, New Jersey, 1984; T Dawson, "Lessons learned for experiential, skills-based judicial education" (2008) 20(6) *JOB* 47.

gathered from complaints is used to develop specific education sessions on topics such as effective courtroom communication, domestic violence, sexual assault issues and cultural awareness training.

To achieve its statutory objectives, the Commission provides, or assists the courts in the provision of, conferences, seminars, field trips, interactive educational sessions, an Aboriginal cultural awareness program, a 360 degree feedback program for judicial officers, a voluntary mutual observation program for magistrates, publications, computer training and online and printed resources to promote a consistent approach to sentencing and to meet the specific research requirements of individual courts.

Conferences, seminars, field trips, skills-based sessions

The Commission offers an extensive conference and seminar program for judicial officers, ranging from induction courses for new appointees to specialist conferences on specific aspects of law, procedure and judicial skills and techniques. The conferences and seminars organised by the Commission also frequently cover matters of wider community interest, including social concerns.

The scheme of education presently covers 39 different programs for the five courts of NSW, which include pre-Bench training for newly appointed magistrates and computer training sessions.

Some educational sessions are held during court time; many others are conducted after court hours and on weekends in judicial officers' own time. Approximately 1550 days of continuing judicial education were attended by judges and magistrates between July 2009 and June 2010. Attendance by judicial officers at the Commission's programs is voluntary.

The Judicial Commission, along with other judicial education bodies in Australia, has conducted successful judgment writing and oral decisions workshops for judicial officers in recent years. These interactive workshops help participants develop and refine their ability to write and deliver clear, concise, well-structured judgments.

The Commission has also offered judicial officers the opportunity to participate in field trips, visits to gaols and correctional centres, and weekend visits to Aboriginal communities with the aim of increasing awareness among judicial officers about contemporary Aboriginal society, customs and traditions, and their effect on Aboriginal people in the justice system. Other Australian judicial education providers run similar programs.

Published material

The Commission's conference program is supplemented by an active publishing program. The Judicial Commission provides to each NSW judicial officer a full range of publications on appointment, including:

- a bench book relating to their court's practice and procedure (*Local Court Bench Book* or *Criminal Trial Courts Bench Book*)
- *Sentencing Bench Book*
- *Equality before the Law Bench Book*

- *Civil Trials Bench Book*
- *Sexual Assault Handbook*
- *Judicial Officers' Bulletin*
- *The Judicial Review*
- *Sentencing Trends and Issues* papers
- education monographs
- research monographs
- conference paper database.

All of the bench books and some of the monographs and journals are also available online on the Commission's intranet for judges (see JIRS below) and on the Judicial Commission's website. These are produced or updated and distributed periodically.

JIRS

The Judicial Information Research System (JIRS) is an online decision support system available for all NSW judicial officers. It contains information on all aspects of sentencing law, including case law, legislation and sentencing statistics. It is designed to provide judicial officers with timely information to assist in decision-making and is updated regularly. JIRS is the most effective and direct way to communicate information about the latest legal developments. The system operates as an intranet.

Effective presentation

The Judicial Commission has designed a checklist to assist presenters in designing their presentations to make them educationally sound and more likely to be interesting and useful to the audience. It is provided to presenters in a number of the State's courts and has been a useful resource.

Evaluation of education sessions

All educational sessions conducted by the Judicial Commission are evaluated for their effectiveness in order to:

- ensure that the sessions provide useful assistance and benefits to judicial officers in the performance of their professional duties,
- provide feedback to presenters to ensure their sessions meet the needs of judicial officers.

All judicial officers are encouraged to provide feedback based on specified learning objectives for each educational activity by completing evaluation forms. The evaluation forms seek feedback on:

- the extent to which the learning objectives were met
- the program's usefulness and relevance

- the appropriateness of the content of sessions and materials
- the mode of program delivery,
- any improvements which may be made for future programs.

The evaluation form also asks for suggestions for themes or topics for future activities relevant to judicial officers. Comments made by participants are confidential, although feedback based on participants' comments may be made available to the presenters, but not the verbatim comments.

An evaluation report is prepared for the confidential review of each court's Education Committee, and is based on a summary of the formal evaluation instrument completed by the participants and further observations provided from presenters and the Judicial Commission's Education Director.

The future of judicial education in Australia

The aims of judicial education will continue to be the promotion of the highest standards of behaviour befitting judicial office and to foster judicial capacity and skills. The purposes of judicial education will continue to be the development of judicial skills, the preservation of judicial independence and to provide individual and institutional accountability. Australian judicial education providers are now slowly but surely working towards a more collegiate and national approach to the design and delivery of education programs which will meet the diverse needs of judicial officers.

The future of judicial education*

The Honourable A M Gleeson AC QC†

In this article the former Chief Justice and former President of the Judicial Commission of NSW considers the importance of an impartial and independent Judicial Commission and judge-led education.

For almost ten years I had the privilege of serving as President of the Judicial Commission of NSW,[1] which was described by Professor Sallmann in an article published in 1993 as "[the] Rolls Royce of judicial education bodies in Australia".[2] As a glance at the published accounts of the Commission will show, the reference must have been to the quality of its work, not its cost.

The educational role of the Commission has received both national and international recognition. It provides orientation and training programmes for newly-appointed judges and magistrates, and continuing education for serving judicial officers. In co-operation with the Australian Institute of Judicial Administration, it conducts National Judicial Orientation Programmes. There is no national judicial college in Australia of the kind that exists in England,[3] Canada,[4] and New Zealand.[5] However, such a body may emerge. Whatever form it takes, those responsible for its establishment will have a good deal to learn from the history and experience of the Judicial Commission of NSW.

* Published in (1999) 11(1) *JOB* 1, updated 2021.

† Former Chief Justice of Australia.

1 1988–1998.

2 P Sallmann, "Comparative judicial education in a nutshell: a cursory exposition" (1993) 2 *JJA* 246 at 253.

3 The Judicial Studies Board.

4 The National Judicial Institute.

5 The Institute of Judicial Studies.

The need for education

Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly-appointed judges and magistrates, and for their continuing education. Of course there should.

There were approximately 880 judicial officers in Australia (at the time of writing).[6] The idea that all, or most, of them would have had sufficient practical experience before appointment to slip comfortably into their judicial roles, without need of further assistance, and that thereafter throughout their judicial careers they would keep abreast of developments in the law and in judicial technique on their own initiative, is unacceptable. It is also unfair to the litigating public, and to the judicial officers themselves.

Being thrown in at the deep end might be fun for an experienced swimmer, but nowadays the number of newly-appointed judges who have had extensive practical experience as advocates in the jurisdictions in which they will sit is diminishing. Most magistrates never did fall into that category; in NSW most magistrates have in the past come from within the Public Service, although in recent years more have been recruited from elsewhere, including the practising profession. As to judges, it is no longer true that they almost all come from the ranks of experienced advocates. Furthermore, those that are from that background tend to have increasingly specialised, and therefore narrower, practices before appointment.

There are relatively few newly-appointed judges now who would claim to be familiar with all aspects of the work they are assigned on the bench. Moreover, it is now accepted that competent judging requires skills and techniques that are not learned or acquired as an advocate. Judicial education is an aspect of professionalism. Continuing education is as important for judges and magistrates as it is for practitioners.

Judge-led education

During my time as Chief Justice of NSW,[7] and President of the Commission, I saw a major change in the attitude of the judiciary towards this subject. Initial hesitancy and scepticism was overtaken by widespread enthusiasm. I have no doubt about one of the principal reasons for the Commission's success. Its skilled staff have performed splendidly, but their achievements have been possible largely because the Commission is controlled by the judiciary: it is independent of the executive; and its educational activities have been controlled and assisted by judges

6 The Judicial Commission's figures record that on 26 October 1998 there were 877, of whom 266 were appointed by the NSW Government. In March 2019, there were 1084 judges and magistrates in Australia, see Judicial Commission of NSW, "Number of judges and magistrates in Australia, March 2019" at www.judcom.nsw.gov.au/number-of-judges-and-magistrates-in-australia-march-2018-2/, accessed 15 September 2021.

7 1988–1998.

and magistrates. That accounts for its acceptance. It enjoys, amongst the judiciary, what is sometimes referred to as "credibility". This is the usual experience in common law countries where judicial officers are appointed in the manner with which we are familiar.[8]

There are two reasons why judicial control of formal judicial training and continuing education is essential. The first is a matter of principle. The second is a matter of practicality.

A matter of principle

The first reason concerns the constitutional principle of judicial independence. The purpose of the independence of the judiciary is to ensure both the reality and the appearance of impartiality in judicial decision-making. That purpose would be undermined if the training and continuing education of judicial officers were in the hands of people who do not share the judiciary's independence.

There are those, both inside and outside government, who would welcome any opportunity to influence the opinions and attitudes of judges and magistrates, and who, given the chance, would not hesitate to use educational programmes for that purpose. According to their own reasoning, this would be a useful thing to do. To such people, judicial independence is often a source of frustration. Some of them regard impartiality as a myth. They would be anxious to assist in developing what they would regard as a sound and proper approach to decision-making on a variety of issues.

The dividing line between appropriate education, and inappropriate propaganda, is sometimes indistinct. Some well-meaning enthusiasts have difficulty in accepting the idea that, in adversarial litigation, the presiding judicial officer is required to be, and to appear to be, even-handed; notwithstanding the indignation which the conduct of one of the parties may arouse in some quarters. Many groups, in government and in the community, would like to "inform" judicial officers of matters which might not be proved in evidence, but which they believe should have a bearing on the manner in which powers and discretions should be exercised.

A desire to proselytise the judiciary is harboured by a large number of people, some of whom have conflicting objectives. The Attorney General is regularly exhorted to direct the Commission to instruct judicial officers in various forms of "right thinking", as though he or she has power to direct the Commission and as though the Commission has power to direct judges and magistrates.

If judges and magistrates are to maintain their independence, and the appearance of strict impartiality, then their judicial training and education cannot be controlled by those who do not share their independence. It certainly cannot be controlled by those of whom they are meant to be independent.

8 Some care needs to be exercised in considering the United States experience, especially in relation to those State jurisdictions where judges are elected.

A practical requirement

The second reason is related to the first, but is essentially pragmatic. For judicial training to be effective, it must be provided by an organisation with such standing amongst judges and magistrates that they will give it their full co-operation and support. An organisation controlled by the executive government would simply be ignored by a substantial section of the judiciary. People cannot be effectively compelled to be educated.

Furthermore, the Judicial Commission of NSW has always depended heavily upon the input of serving and retired judicial officers in formulating and providing its programmes. They are well-placed to identify the practical needs of those to whom the programmes are directed, and they have been generous in giving their time and services. Their support is not sufficient for success; the input of trained educators is also of vital importance. However, although their support is not sufficient, it is necessary.

Judicial independence

Those who pay the piper are accustomed to calling the tune. However, the executive government in NSW has respected the statutory independence of the Judicial Commission, even though it provides the funds for its operations. This is not surprising; the same applies to the entire NSW judicial system. The money which the government spends on the judicial system comes from taxpayers. In Australia, taxpayers are entitled to expect that so much of their money as is applied towards the operations of the judiciary will be applied in a manner which respects the independence of the judiciary, and not in a manner which undermines it.

If, at some time in the future, there is to be a National Judicial College, as there ought to be, then a lesson to be learned from the first 12 years of operation of the Judicial Commission of NSW is that it should be established as part of the judicial branch of government, and it should participate fully in the independence of the judiciary.

Another lesson to be learned from the experience of the Judicial Commission is as follows. The judicial members of the Commission are the heads of the various NSW courts. The Chief Justice of the Supreme Court is the President, and all other heads of jurisdiction are members of the Commission. This is a matter of considerable practical importance. Judicial education programmes are tailored to the needs of each particular court. Their success depends upon the support of the head of the court. It is difficult to imagine how a programme could work successfully in relation to a court against the opposition of the head of jurisdiction. At a national level, the counterparts of the heads of jurisdiction are the members of the Council of Chief Justices. As a matter of practicality, their support for any particular model of a National Judicial College would be essential.

There has already been some consideration by the Council of Chief Justices, the Australian Institute of Judicial Administration and the Judicial Conference of Australia, of this subject. Such consideration is still at an early stage, but it may be assumed that the Council of Chief Justices would not support any proposal that was regarded as compromising judicial independence.

One of the principal difficulties to be addressed if such a body is to be established is the matter of funding, and the related question of the role of the various jurisdictions concerned. Until recently, the federal government has been a fairly minor player in the field of judicial appointment and activity.

Until the establishment of the Federal Court and the Family Court, the federal judiciary was very small in number. This is now changing, although the number of federal judicial officers is still much smaller than the corresponding numbers in NSW, and is somewhat smaller than the numbers in Victoria and Queensland. This may explain why, so far, there has not been much pressure for the setting up of a national body, and why NSW, acting sometimes in co-operation with the Australian Institute of Judicial Administration, has taken the lead in judicial education. It is the jurisdiction with most at stake. A National Judicial College will require a considerable exercise in co-operative federalism.

International guiding principles for judicial education*

Mr E Schmatt AM, PSM†

Members of the International Organization for Judicial Training (IOJT), which the Judicial Commission of NSW has been a member of since 2004, unanimously resolved at the 8th International Conference on the Training of the Judiciary to adopt the Declaration of Judicial Training Principles in November 2017. The Judicial Commission of NSW has incorporated many of these principles in its continuing judicial education policy.

The Judicial Commission is part of a global network of judicial education and training organisations that have been established in civil and common law jurisdictions since the 1960s. The International Organization for Judicial Training (IOJT) currently has 129 institutions from 79 developed and developing countries as members. Established in 2002, the IOJT aims to promote the rule of law through international cooperation. This mission is realised by providing opportunities for members to network and exchange professional strategies, and by assisting members to develop curricula and the capacity of their training faculty.

The Judicial Commission has been a member of the IOJT since 2004 when the second international conference was held in Ottawa, Canada under the auspices of the Canadian National Judicial Institute. Being an IOJT member means the Commission is engaged with best practice in judicial education trends globally and can share its considerable accumulated experience with other members. The IOJT's General Assembly is convened once every two years. Between these meetings, the Board of Executives and Board of Governors direct and operate the organisation.[1]

The need for an international umbrella group was recognised in 1997 at a judicial training conference in Sao Paulo, Brazil. The "Sao Paulo Declaration" ensued, leading to the first international forum held in Jerusalem in 2002. Conferences are now held every two years. The

* Published in (2018) 30 *JOB* 17 and updated 2021. The author wishes to thank Kate Lumley, Manager, Publications and Communications, Judicial Commission for her assistance in the preparation of this article.

† Chief Executive, Judicial Commission of NSW.

1 The author was elected to the IOJT Board of Governors in 2009 and the Board of Executives in 2011 and re-elected to both in 2013, 2015, 2017 and 2019.

IOJT publishes an international journal, *Judicial Education and Training*,[2] and provides access to resources and online courses on its website at www.iojt.org. One of the benefits of the IOJT is the assistance that better-resourced members such as Australia, Canada, France, Germany, Israel, the United Kingdom and the United States, can provide to judicial education bodies in developing countries to support the consolidation of an independent judiciary.

In November 2017, the author and the Commission's Director, Education, Ms Una Doyle, attended the IOJT's 8th International Conference on the Training of the Judiciary, Judicial Education 2025: Core Values and Future Innovations in Manila, the Philippines. Members of the IOJT unanimously resolved at the conference to adopt the Declaration of Judicial Training Principles, set out below.[3] The principles apply to all 129 diverse member judicial training institutions. The Judicial Commission of NSW has long incorporated many of these principles in its continuing judicial education policy, originally settled in 1991. For example, the Commission has, since its inception, embraced the innovative use of technology in the delivery of its judicial education program, reflecting principle 10, directed towards the optimal use of new technologies, distance/online learning, and electronic media.

Principles

1. Judicial training is essential to ensure high standards of competence and performance. Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.

Institutional framework

2. To preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training.
3. Judicial leaders and the senior judiciary should support judicial training.
4. All states should:
   (i) provide their institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives; and
   (ii) establish systems to ensure that all members of the judiciary are enabled to undertake training.
5. Any support provided to judicial training should be utilised in accordance with these principles, and in coordination with institutions responsible for judicial training.

Training as part of the judicial role

6. It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.

2 The author was appointed joint Editor-in-Chief (with Dr Rainer Hornung-Jost) of Judicial Education and Training in 2015. The Journal may be accessed at www.iojt.org.

3 The development of the principles was proposed at the biennial conference in Recife, Brazil in November 2015.

7. All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.

Training content and methodology

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.
9. Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.
10. Judicial training should reflect best practices in professional and adult training program design. It should employ a wide range of up-to-date methodologies.

Demystifying judicial commissions*

The Honourable T F Bathurst AC†

Without taking a position in the debate about the merits of a federal judicial commission, the article raises questions to consider in the process of determining whether such a body is necessary by looking closely at the functions and history of the Judicial Commission of NSW ("the Commission"), of which the author is President. The Commission's three primary functions under the Judicial Officers' Act 1986 are described: monitoring and disseminating information about sentences imposed by NSW courts; delivering continuing education and training of judicial officers; and conducting preliminary examinations of complaints about judicial officers received from the public. The success of the Commission's work in all its functions is explained by the trust and support of the judiciary, and the professionalism of its staff, rather than its particular powers or institutional structure as a body independent of the court. That trust and support includes the recognition by the judiciary at the time of the establishment of the Commission that it would address the crisis in public confidence in the administration of justice occurring in NSW in the early 1980s. The characterisation of the Commission as a "police officer" of whom judicial officers should be afraid is rejected as mistaken. The most important, if subtle, benefit of the engagement between the Commission and the judiciary is identified as a general increase in awareness among judicial officers that their performance in their role will be judged by members of the public who appear before them.

The topic of judicial commissions has been the subject of more than the usual amount of attention over the past year or two, at least at the Commonwealth level. Many have their own opinions on the variety of different proposals which have been made, and I am not going to pretend that this article takes place in a vacuum. However, for obvious reasons, it would be inappropriate for me to venture to give my own opinion about whether a judicial commission or an equivalent body is necessary or desirable for the federal judiciary.

Instead, what I intend to do is to describe the workings of the Judicial Commission of NSW ("the Commission") and some of its history. It is, perhaps, not as dry as it might sound. I think

* Federal Circuit Court of Australia Plenary 2019, 8 August 2019. Published in (2020) 14 *TJR* 215, and updated in 2021.

† Chief Justice of NSW. The Chief Justice expressly wishes to thank his Research Director, Damian Morris, for his assistance in the preparation of this article.

that the clear lesson to be learned is that our Commission has succeeded in its work because it has had the trust and support of the NSW judiciary, and not because it has, as some like to believe, struck fear into the hearts of our judicial officers. Those on both sides of the debate would do well to think about the example set by the Commission in NSW. Too often, I have seen the Commission presented as a police officer, and, as I will seek to show, I do not think that this characterisation is accurate at all.

For this reason, I will start, as one always should, by turning to look at the terms of the statute which establishes the Commission.[1] We can see that it confers three broad functions conferred on the Commission. First, the Commission is empowered to "monitor" the sentences imposed by NSW courts and "disseminate" information about those sentences.[2] Second, the Commission is empowered to "organise and supervise" the "continuing education and training of judicial officers".[3] Finally, the Commission is required to conduct preliminary examinations of complaints about judicial officers received from members of the public.[4] These complaints can then be referred to the relevant head of jurisdiction or a separately constituted panel of the "Conduct Division" of the Commission.[5]

Now, even from this brief glance at the statute, we can see that the duties of the Commission are somewhat different from those which receive attention from the media or the rather vocal proponents of a "federal judicial commission". If you only listened to their commentary, you might be forgiven for not being aware that the preliminary examination of complaints forms only one part of the work of the Commission. Unfortunately, this has the effect of distorting an understanding of how the Commission operates and the benefits which it has undoubtedly brought to the judiciary of NSW. Rather, it is necessary to look at the working of the Commission holistically, and this can best be done by taking a closer look at the sentencing information and judicial education functions of the Commission, the importance of which can be seen from their prominence in the Commission's 2018–2019 annual report.[6]

The first function of the Commission which I mentioned, the monitoring and dissemination of sentencing information, is possibly the most significant for lawyers in criminal practice in NSW courts. Through the Judicial Information Research System ("JIRS"), the Commission provides a comprehensive database on information relating to all aspects of sentencing, with the assistance of data on Commonwealth offences from the National Judicial College of Australia. JIRS collates and presents statistical data on the range and frequency of penalties imposed in particular types of case, which aids sentencing judges and counsel in understanding the direction

1 *Judicial Officers Act 1986* (NSW).
2 ibid s 8.
3 ibid s 9.
4 ibid s 18.
5 ibid s 21.
6 Judicial Commission of NSW, *Annual Report 2018–19*, 2019, at www.judcom.nsw.gov.au/annual-report-2018-2019/, accessed 26 May 2021 ("*Judicial Commission Annual Report*").

of sentencing practice for any given offence. It also maintains an extensive commentary on sentencing principles in the form of the *Sentencing Bench Book*,[7] for quick reference for magistrates and judges while on the bench.

These resources are almost indispensable for the magistrates or District Court judges, who are frequently required to sentence a large number of offenders over the course of a single day, with few spare minutes to engage in the abstract philosophising and pontificating which we like to indulge in from time to time in the Court of Criminal Appeal. The work which the officers of the Commission do in preparing these resources is not a mere adjunct to the administration of criminal justice in NSW; it forms an integral part of it. Even in the ivory tower of an appellate court, these resources make it much easier to assess current trends in sentencing practice, which is a relevant consideration in appeals against sentence, even though its use is often fraught.[8]

It may be surprising to learn that the sentencing information functions of the Commission were not merely an afterthought tacked on to what was really intended to be a complaints-management body, but rather, were one of the primary reasons why the Commission was formed in 1986. While there had been some concerning cases about judicial misconduct around that time, there was equally, if not more, widespread concern about leniency and consistency in the sentencing practices of NSW courts.[9] I think the same pattern remains true today. From time to time, there will be stories in the media about judicial misconduct,[10] but by far the more serious and consistent preoccupation of the public is with the severity of the sentences being imposed by the courts on offenders. In that respect, the work of the Commission in facilitating the consistency and integrity of the sentencing process is its most valuable.

Now, it should be obvious that these concerns have much less significance in relation to the federal courts, with their very limited criminal jurisdiction. At the very least, then, it can be said that there is no need for a body to collate and publish similar types of sentencing information at the federal level, particularly because the National Judicial Conference of Australia already performs a similar function for Commonwealth offences. Is there a part of federal jurisdiction which is perhaps analogous to sentencing in State courts, and which could benefit from having an independent body preparing similar kinds of legal resources? I am not going to pretend to be familiar enough with the current caseload of the federal courts to be able to give a good answer to this question, but it is certainly something that is worth asking. I would only note that, at least in comparison to the attention devoted to sentencing, the matters over which the federal courts have jurisdiction tend to attract less media attention.

7 Judicial Commission of NSW, *Sentencing Bench Book*, 2008–, at www.judcom.nsw.gov.au/sentencing/, accessed 26 May 2021.

8 *Hili v The Queen* (2010) 242 CLR 520 at [53]–[54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

9 Judicial Commission of NSW, *From controversy to credibility: 20 years of the Judicial Commission of NSW*, 2008, pp 1–2 at www.judcom.nsw.gov.au/wp-content/uploads/2014/07/judcom-20years-web.pdf.

10 See, eg, G Mitchell, "Magistrate's misconduct: Dominique Burns latest judicial officer referred to Parliament", *Sydney Morning Herald*, 13 January 2019 at www.smh.com.au/national/nsw/magistrate-s-misconduct-dominique-burns-latest-judicial-officer-referred-to-parliament-20190111-p50qve.html, accessed 26 May 2021; S Stewart, "Magistrate Dominique Burns resigns before trial-by-Parliament", *ABC News*, 30 May 2019, at www.abc.net.au/news/2019-05-30/nsw-magistrate-resigns-before-parliamentary-inquiry/11162380, accessed 26 May 2021.

However, this is by no means a precondition for such resources to be useful. While sentencing information for the judiciary might have been its original focus, the Commission has expanded its activities to also include general updates on developments in the criminal law, both common law and statutory, and it also maintains other bench books which provide an overview of legal principles applicable to a wide range of the matters which come before State courts.[11] No less than for their work in relation to sentencing, the concise statements of the law which these publications provide are essential for busy magistrates and judges who need to identify and ascertain the applicable law within a very short space of time. I know that the effort which goes into their preparation is greatly appreciated by many judicial officers around NSW.

I should also note that these resources are available outside the judiciary to the profession and members of the public. While JIRS in its entirety is only available by subscription,[12] a significant portion of the information published by the Commission on JIRS is freely available. Importantly, this includes the series of bench books and the updates on developments in the criminal law, which are accessible both online and via an app, if you are someone who is technologically savvy.[13] Thus, not only does the Commission provide an excellent service to the judiciary, but it also helps provide high-quality educational resources to the profession and the public, which, judging from the statistics provided in the annual report, are well used.[14]

So, even if the work of the federal courts might not attract quite the same public attention which attends sentencing, could an argument be made for a body to assume responsibility for publishing similar resources for matters in federal jurisdiction? Again, that is a question which I will leave open. It may be that you feel that you, or the members of the profession who appear before you, would be assisted by these resources. Or, it may be that you feel that the resources which are already available are adequate. But, given the importance of this function to the present work of the Commission in NSW, I do not think that you can sensibly have a discussion about a "federal judicial commission" without considering whether the proposed commission will assume the same responsibility.

Now, the sentencing information function which I have been discussing so far is not the only function of the Commission which is rarely mentioned in the media. In fact, some of the matters which I have been talking about have already started to bleed into a discussion of another important function of the Commission: judicial education, which of course, includes the publication of the bench books and newsletter updates which I have already spoken about. However, the judicial education services provided by the Commission also extend much wider. They include an annual conference for the members of each of the courts of NSW as well as workshops on individual issues, including orientation programs for new judicial officers. The feedback suggests that all of these events are roundly well received and useful to judicial officers in their court work.[15]

11 *Judicial Commission Annual Report 2018–19*, above n 6, at p 39.
12 Judicial Commission of NSW, Judicial Information Research System (JIRS), at www.judcom.nsw.gov.au/judicial-information-research-system-jirs, accessed 26 May 2021.
13 The JIRS resources app is available for free download from Google play.
14 *Judicial Commission Annual Report 2018–19*, above n 6, at pp 40, 43–4.
15 ibid pp 25–8.

Several of these events also offer the opportunity for the judiciary to engage more broadly with the community. A particular example is the "Ngura Yura" Program, which "aims to raise judicial awareness about Aboriginal history and culture, Aboriginal interactions with the justice system, and to provide an opportunity for judicial officers to meet and exchange ideas with Aboriginal people".[16] These kinds of events can go a long way towards addressing the difficulties which Aboriginal people have faced and still face in the justice system today by providing judicial officers with the training necessary to overcome cultural communication barriers in their everyday work in court, supplemented by resources such as the *Equality before the Law Bench Book*.[17]

I will again point out that, while the Commission does an excellent job in organising these events and resources for the judiciary, there is nothing out of the ordinary about the fact that these functions have been invested in an independent body rather than remaining with the court. If the current educational events organised by the court fulfil your needs as a judge, then there would be no need to change for the sake of change. On the other hand, if you feel that the court could benefit from a better or just a different judicial education program, then maybe there is an argument for change. Take the present conference as a case in point, since it is this type of event which would have been organised by the Commission if this were a State court. Do you feel that it has been a useful experience, or do you think it could have been improved in some way? Now, I won't ask you to put up your hands — I don't think the Chief Judge would like it very much if I subjected him to a random opinion poll.

But, whatever your opinion on the present conference may be, it must be recognised that entrusting the planning and preparation of a judicial education program to a body like the Commission is not a radical step, and this is a theme which is worth emphasising, since it has lain in the background of my discussion of both the sentencing information and judicial education functions of the Commission. I think it can best be summarised by saying that I do not think that there is "magic" in the work of the Commission. It has been a success because it is staffed by highly talented, highly experienced and highly intelligent people, and not because the Commission has stumbled upon some hitherto unknown institutional arrangement which makes it especially well suited to the tasks that it performs.

Unfortunately, it is often assumed that it has succeeded because of the latter rather than the former. I do not think there is much basis for this assumption. It seems perfectly conceivable to me that the sentencing information and judicial education functions of the Commission could have been performed by staff operating within each court. Of course, it is generally more efficient and easier to approach problems from a holistic viewpoint when there is only a single body external to each of the Supreme, District and Local Courts and shared by them all. But, when considering the possibility of a body like the Commission at the federal level,

16 ibid p 30.

17 See Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006, at www.judcom.nsw.gov.au/publications/benchbks/equality/index.html, accessed 26 May 2021.

it is important to bear in mind that the same arguments may no longer apply. Again, this is a point which is too far outside my understanding of the present workings of the federal courts to be able to consider.

In any case, regardless of who performs, and perhaps, who ought to perform, the sentencing information and judicial education functions of the Commission, it cannot be denied that they are important. Both have the common goal of strengthening the competence and knowledge of the judicial officers in carrying out the administration of justice in NSW and thus building public confidence in the judiciary. They should be regarded as lying at the heart of the task which the legislature has set the Commission. In my opinion, this justifies the view that the primary and most significant role of the Commission is not to be a judicial police officer, but rather, to provide information and educational resources to the judiciary to allow them to effectively discharge their duties fairly and in accordance with the law.

At the same time, it cannot be denied that the Commission has a responsibility to receive complaints from members of the public about judicial officers when they fail to discharge these duties. This function tends to be the focus of media commentary on judicial commissions. But this coverage gives something of a misleading impression, since much of this commentary suggests that, absent the existence of an independent Commission, there would be no means for addressing complaints made by the public about judicial officers. However, it is clear that, as has been done in the case of the federal courts, there are alternatives to having complaints managed by an external body. If we are to properly understand the nature of the Commission and its functions under statute, we need to look more closely at what task the legislation confers on the Commission in relation to complaints.

First, it may be noted that the relevant legislation creates a close link between the judiciary and the Commission. Indeed, as is sometimes unappreciated, the Commission itself, strictly speaking, consists only of the six head judicial officers of each major jurisdiction in NSW, along with four members of the community appointed by the Governor on the advice of the Minister, who generally have some connection with and understanding of the legal profession.[18] The staff of the Commission,[19] do not form part of the Commission, and cannot exercise any of its decision-making functions in relation to complaints,[20] but nevertheless do much of the valuable front-line work in making initial contact with complainants, processing, collating and summarising the relevant information, including taking statements from the parties concerned where appropriate, and in some cases providing recommendations on how a complaint should be handled. Their work is critical to the functioning of the Commission, but ultimately, it is only in aid of the powers to deal with complaints vested in the six judicial officers and four appointed members comprising the Commission itself.

However, even the powers of the Commission are themselves somewhat limited. When a complaint comes before the Commission, it may conduct a further preliminary investigation, summarily dismiss the complaint, or, depending upon the seriousness of the complaint, refer

18 *Judicial Officers Act 1986* (NSW) s 5(3).
19 ibid s 6.
20 ibid s 7(2)(a).

it on to another body.[21] Less significant complaints are referred to the head of jurisdiction,[22] who may take any action which they might otherwise have taken under their existing powers to manage their respective courts. Other complaints are referred to a separately constituted "Conduct Division" of the Commission,[23] which conducts an independent investigation of the complaint.[24] Thus, the Commission itself really has quite a limited, although important, role to play in responding to complaints.

It is for this reason that I think coverage of judicial commissions by the media can often be misleading. Viewed in the way I have described, the legislation under which the Commission operates does not confer any radical powers upon it to discipline, censure, or otherwise punish judicial officers as a result of a complaint, and nor was it intended to.[25] Indeed, one could almost say that the powers of the Commission in relation to complaints are a triage process, determining whether a complaint should be summarily dismissed, referred to the head of jurisdiction or sent to a separately constituted Conduct Division. It has no compulsory powers apart from the power to require a judicial officer to undergo a medical examination if there is reason to suspect impairment in the performance of their duties.[26]

I am emphasising these aspects of the nature of the Commission's powers in relation to complaints not because I wish to downplay the importance of having an effective procedure for handling complaints. On the contrary, I believe that it is essential to the maintenance of confidence in the public administration of justice. Rather, as I have done in relation to the sentencing information and judicial education functions of the Commission, I wish to point out that the powers of the Commission fall far short of being extraordinary, exceptional, or unique, when at least some media commentary would suggest otherwise. I would think that most such references to the Commission are probably intended to refer to the distinct and different ad hoc "Conduct Division" formed when the Commission refers a more serious complaint.[27]

However, even so, a panel of the Conduct Division cannot make any findings which would ultimately affect any decision about whether to remove the judicial officer by the legislature. Its role is ultimately advisory. In particular, the role of the panel is to produce a report after a hearing concerning the complaint which sets out its decision on whether it is "wholly or partly substantiated".[28] Even if it is of the view that there are grounds which "could justify parliamentary consideration of the removal of the judicial officer", its role is limited to forwarding its report on the matters which were the subject of complaint to the Governor and the legislature.[29]

21 ibid ss 18, 20.
22 ibid s 21(2).
23 ibid s 21(1).
24 ibid Pt 6 Div 3.
25 See Judicial Commission of NSW, Conduct Division of the Judicial Commission (NSW), *Report of inquiry in relation to Magistrate Dominique Burns*, 21 December 2018, pp 2–3, [3]–[4], at www.judcom.nsw.gov.au/wp-content/uploads/2019/03/Judicial-Commission-of-NSW-Conduct-Division-Magistrate-Dominique-Burns.pdf, accessed 26 May 2021.
26 *Judicial Officers Act 1986*, s 39D.
27 ibid s 22.
28 ibid s 28.
29 ibid s 29.

It is true that a panel of the Conduct Division can exercise more extensive compulsory powers during an investigation into a complaint about a judicial officer, although these are largely based on the powers which could be exercised by a royal commission.[30] However, the vast majority of complaints with which the Commission deals are either summarily dismissed or simply referred to the relevant head of jurisdiction for further action without being brought before a panel of the "Conduct Division".[31] No doubt the matters brought before the Conduct Division tend to be those which are more likely to catch the attention of the media and the public, but I do not think that this means they should be the focus of the debate about whether a "federal judicial commission" should be established. It is hardly appropriate to assess the utility of a body like the Commission solely by looking at the narrow and infrequently exercised functions of a panel of the Conduct Division.

I do not point these matters out to diminish the excellent work which has been done by the Commission and its staff over its three decades of existence. In particular, the work of its staff is professional and always of the highest quality. Rather, I seek only to say that the reason for its utility does not lie in the particular powers or roles with which it has been conferred, but elsewhere. In other words, there is no "magic" in the work of the Commission. Its powers to deal with complaints are, on the whole, not extraordinary, and there is nothing particularly unique about the institutional structure which it has adopted. At most, I think that it could be an efficient and convenient way of providing sentencing information and educational programs to judicial officers while also managing complaints. None of these functions are new or particularly innovative, and each would have to be undertaken regardless of the existence of a body like the Commission.

Now, it might seem strange for me to describe the functions of the Commission in this way. After all, the Commission is often held up as an example of best practice in relation to the difficult task of managing the judiciary. However, I do not see any difficulty. The success of the Commission in NSW *has not* been due to the particular powers with which it has been conferred, or with the particular institutional arrangements within which it operates. Rather, its success should be attributed to the broad-based support which it receives from the judicial officers who participate in its work, who co-operate with it, and who constitute its directing mind and will alongside other prominent and respected members of the community.[32] The Commission has not succeeded because it is able to exercise extraordinary powers to "keep the judiciary honest". It has succeeded because it operates with the consensus and co-operation of all the relevant stakeholders.

I think that this fact is essential to understand in the current debate about the merits of a "federal judicial commission". Without the full support and involvement of the federal judiciary, I find it difficult to understand how such a body would add any benefit to the internal complaint-handling procedures which have been adopted by each of the major federal

30 ibid s 25.
31 *Judicial Commission Annual Report 2018–19*, above n 6, at p 50.
32 *Judicial Officers Act 1986* (NSW) s 5. For the selection of the "appointed members" from the community, see Sch 1.

courts,[33] most of which, I note, already bear some similarity to the procedures which are already followed by our Commission in NSW. If a complaint is not summarily dismissed, the procedures provide for it to be either referred for assessment to an independent "Conduct Committee", which then prepares a report, or referred to the Commonwealth Parliament through the Attorney-General, which may then establish a separate independent commission under statute with powers of compulsion,[34] and which then prepares a report. The principal difference is that the determination of whether a complaint should be summarily dismissed or sent to a "Conduct Committee" of Parliament is done internally, generally at the direction of the head of the relevant jurisdiction.

The dangers of establishing an external complaint-handling procedure without the support of the judiciary are well illustrated by the history of our Commission.[35] As originally proposed by Attorney General Sheahan, the initial plan for the Commission would have placed it under the control of the executive government with powers to discipline judges or remove them from office.[36] This proposal quickly generated a hostile reaction from the judiciary, and the Bill as it was eventually introduced retained the traditional role of the Parliament in removing judicial officers.[37] However, while the Bill was ultimately passed, controversy continued to rage around questions about the independence of the Commission from the Attorney General's Department until provisions were introduced which made the Commission an independent statutory body with the power to employ its own staff.[38]

The NSW judiciary ultimately accepted the need for the Commission as a result of several issues of public concern about the administration of justice which had developed over the course of the early 1980s, and in particular, the concerns about consistency and leniency in sentencing to which I have already referred. Despite their reservations about the initial model which was adopted, there could have been little doubt at the time that some action was needed to maintain public confidence in the ability of judicial officers to discharge their duties. I suspect that things would have turned out quite differently if the judiciary had not acknowledged a need for reform in the way in which complaints about judicial officers were being managed. The broad support which the final model for the Commission received means that there is no need to speculate about what might have occurred otherwise.

33 Federal Court of Australia, "Judicial Complaints Procedure", at www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints, accessed 26 May 2021; Federal Circuit Court of Australia, "Judicial Complaints Procedures", at www.federalcircuitcourt.gov.au/wps/wcm/connect/08ab5d84-7c47-4fdc-8f41-83709b9649ef/BR+-+Judical+complaints+policy+FCCv2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-08ab5d84-7c47-4fdc-8f41-83709b9649ef-miRaOeK, accessed 26 May 2021; Family Court of Australia, "Judicial Complaints Procedure", at www.familycourt.gov.au/wps/wcm/connect/bc5d3da1-6495-4810-82e4-408b1d29d64e/FCOA+-+Judicial+Complaints+Procedure.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-bc5d3da1-6495-4810-82e4-408b1d29d64e-lMZGwQq, accessed 26 May 2021.

34 *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

35 For more detail about the Commission's history, see n 9.

36 ibid p 2.

37 ibid.

38 *Judicial Officers (Amendment) Act 1987* (NSW), Sch 1.

I think that this history shows that any outside observer who wishes to introduce a "federal judicial commission" needs to be able to secure the co-operation of the federal judiciary to these changes. This may be difficult if there is no perceived problem with the procedures currently in place to perform the same functions as those performed by the Commission in NSW. And, while I know that I have stated that I do not have the knowledge necessary to comment in detail on the functioning of the federal judiciary, I think that I can at least say that there is nothing like the public crisis of confidence in the work of the NSW judiciary in the 1980s which led to the formation of our own Commission.

Further, while it was the debate about the function of the Commission in relation to complaints about judicial officers which highlighted the need for the support of the judiciary, I think that the support of the judiciary equally underlies its successes in performing each of its functions which I have mentioned in this article. It has provided excellent legal resources and training which are available to judges in every court because it works closely with the judiciary to develop material which is relevant to their key areas of work, just as it has become accepted as the appropriate means by which complaints should be assessed because it retains a role for the judiciary in that process. But, in the end, the most important benefit of the engagement between the judiciary and the Commission is perhaps one of the most subtle. In large part, it was responsible for making the judiciary conscious of the fact that their performance in their role will be judged by the members of the public who appear before them in court.

There can be no doubt that this has had a civilising effect on the judiciary. It has not resulted from the threat of any disciplinary sanction, but from an acceptance that, since how they carry out their work can affect the lives of members of the public who appear before them in significant ways, they must do so fairly, politely and, it almost goes without saying, in accordance with law. This is where the value of a body such as the Commission lies. There have been few complaints which have required meaningful action to be taken over its lifetime, and no cases where there has been any finding of corruption of any sort. It is perhaps doubtful whether the situation prior to the establishment of the Commission was that much different. However, there has been a general increase in awareness among the members of the NSW judiciary about the importance of proper conduct attributable to the their engagement with the Commission and its work, which is to the benefit of the members of the public who come before the courts.

As I have been doing throughout this article, I would again ask the rhetorical question: is this an area in which the federal judiciary needs to improve? And, once again, your view on whether having a "federal judicial commission" would be beneficial might change depending upon your answer to this question. If you believe that there is a need for a separate body to be created to increase awareness among the federal judiciary about the importance of proper conduct in dealing with litigants, then you will take a favourable view. If you think otherwise, then you will not. I can only speak to the circumstances in NSW, but in my experience, it is perhaps this improvement in the attitude of the judiciary which is the most tangible, though subtle, consequences of the existence of the Commission.

However, the importance of the willingness to engage with and support the Commission by the judiciary to achieving this result should never be forgotten, and I would reiterate that I think it should be regarded as indispensable to the functioning of any body like the Commission. Isolated calls for reform are unlikely to gain much traction unless they proceed by engaging respectfully with the judiciary and building consensus over time based on a genuine and

identified need for reform. The Commission in NSW has succeeded because its relationship with the judiciary is constructive and the product of many years of respectful dialogue. This approach is, I think, one which should be commended and followed. As to whether it is something which is necessary or desirable for the federal judiciary and federal courts, I will leave it for you to consider.

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Judges, cyberspace and social media*

Her Honour Judge J Gibson†

Social media has become an integral part of electronic legal research, as well as influencing court communication and judicial courtroom control. This paper provides a background to this vast topic. The author first describes the types of social media now available, and focuses on those that are most likely to be encountered by judicial officers. She considers how courts reconcile the principles of open justice with social media use; the impact of using (or not using) social media on the role and standing of judges, and on legal research, reports and judgment writing; and how social media will affect the law.

Introduction

How did we obtain information and keep in touch before the internet and social media? Nearly all of the traditional methods — the address book, postcard, phone book, encyclopedia — have been replaced by social media networking and electronic publishing.

That's the easy part. The problem is that social media methods have now become an integral part of electronic legal research, as well as influencing court communication and courtroom control by the judge.

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* Revised version of a paper prepared for the District Court of NSW Seminar, Social Media, 4 June 2014, Sydney. This paper is based in part on two earlier papers by the author: "Should judges use social media", Australasian Institute of Judicial Administration Public Information Officers' Conference, Social Media and the Courts, 14 June 2013, Sydney; and "Judicial style and reasoning", for the 2009 China Law Society Legal and Judgment Writing Conference, September 2009, Shanghai. This article has been updated in 2021.
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† Judge of the District Court of NSW.

The discussion below provides some general background to this vast topic.[1] It then covers three areas:

1. How should courts reconcile the principles of open justice with social media use? How should judges respond to requests by journalists (including so-called "citizen journalists") to "tweet" from the courtroom, or to jurors who have been "friending" each other on Facebook? Are existing legislative provisions sufficient to prevent a trial miscarrying when publication on social media can occur not only instantaneously, but internationally?
2. How does social media impact on judicial dignity? Will the public remain respectful if they can find out what judges "like" on Facebook, or Tweet, or post on Tumblr? Will they be critical of judges who don't understand how this "newfangled" technology works?[2]
3. How can social media help courts communicate with the public? Is social media useful for legal research? How does it impact on courtroom procedure? Most importantly, how is it changing the law?

Defining the internet and social media

In 1995 Bill Gates described the internet as a "tidal wave",[3] a useful analogy, as controlling it is "like Canute bidding an electronic tide".[4] The internet's impact on long-established principles of law has been more temperately described as "unsettling",[5] principally because it connects individuals and institutions cheaply, and without sensitivity to distance. Additionally, its international nature challenges traditional notions of jurisdiction; the potential to share and alter images introduces novel ideas of ownership and control; and its potential for misuse (for example, trolling or bullying through social media) challenges how we deal with freedom of expression.

What, exactly, is the internet? The "internet" has been defined by the US Supreme Court as "an international network of interconnected computers"[6] situated in "a unique medium — known

1 The February 2013 survey of 62 judges and court workers by Professor Keyzer and others, referred to in detail in this paper, and summarised in Keyzer et al, "The courts and social media: what do judges and court workers think?" (2013) 25(6) *JOB* 47 is an invaluable resource. The speech given by the Honourable T Bathurst, Chief Justice of NSW, "Social media: the end of civilisation?", Warrane Lecture, University of NSW, 21 November 2012, Sydney, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst211112.pdf, accessed 26 May 2021, is also particularly helpful.

2 The answer to this question is yes: L Hurley, "The Supreme Court is clueless when it comes to tech — and that's a problem", *Business Insider Australia*, 9 May 2014, at www.businessinsider.com.au/r-in-us-when-high-tech-meets-high-court-high-jinks-ensue-2014-09, accessed 26 May 2021. However, judges familiar with technology have expressed similar exasperation with lawyers who are "clueless about the latest in technology": J Dysart, "Catch up with tech or lose your career, judges warn lawyers", *ABA Journal* (online), 1 April 2014, at www.abajournal.com/magazine/article/catch_up_with_tech_or_lose_your_career_judges_warn_lawyers/, accessed 26 May 2021.

3 See http://bildt.blogspot.com.au/2005/11/coming-web-20-tsunami.html, accessed 26 May 2021.

4 "Editorial" (2011) 29(4) *Salisbury Review* 3.

5 R Calo, "Robotics and the lessons of cyber law" (2015) 103 *California Law Review* 102. A draft of this paper, "Robotics and the new cyberlaw", was presented at the We Robot 2014 Conference on Legal and Policy Issues relating to Robotics, 5 April 2014, Miami. Professor Calo has workshopped this paper through a series of conferences in 2013–2014, including the University of Washington and Yale, and it contains helpful definitions of many basic internet terms as well as a short history of internet law.

6 *Reno v American Civil Liberties Union* 521 US 844 at 849 (1997).

to its users as 'cyberspace' — located in no particular geographical location but available to everyone, anywhere in the world".[7] "Cyberlaw" is defined in *Black's law dictionary*[8] as the field of law "dealing with the internet, encompassing cases, statutes, regulations, and disputes that affect people and businesses interacting through computers".

The internet's history is very recent. The world wide web was created in 1989 by Sir Tim Berners-Lee, and was made available to the public by the European Organization for Nuclear Research (his employer) in 1993. The first international conference on the world wide web, 25 May 1994, is generally regarded as the internet's starting date. Its initial use was for trade and commerce by AuctionWeb (later rebranded as eBay) and stores such as Amazon. Netscape Navigator permitted wider access through its search functions, and use grew exponentially in most countries. For example, by 2012–2013, 7.3 million (83%) of Australian households had home access to the internet, and more than 77% via a broadband connection.[9]

"Internet" is one of the many new words and phrases coined to describe electronic communication. Some of these words, such as "spam" and "cloud computing", are now in common usage, but others (such as the "internet of Things",[10] referring to the connectivity of devices in cyberspace) are not. Internet dictionaries such as Urban Dictionary[11] are a helpful resource.

Types of social media

"Social media" is an umbrella term for virtual networks or communities created by internet-based applications which share many similarities with traditional website publications, but generally offer more secure, instantaneous and interactive information or data sharing. These include:

- Social networking sites, such as Facebook, currently the most readily recognisable form of social media. In 2004, Mark Zuckerberg launched "thefacebook" as a social networking site for students at his university. Renamed "Facebook", it opened its site to outside users in 2006, the same year that the smartphone came onto the market.[12] In 2021, Facebook had 2.853 billion users worldwide,[13] with users accessing their accounts using smartphones, iPads and computers. Suddenly, social media could be accessed anywhere, at any time (except in

7 ibid at 851.
8 B Garner (ed), *Black's law dictionary*, 9th edn, West Publishing, 2009.
9 F Sheppard, "A brief history of the internet over the past 20 years and the role of the world wide web", ABC News, 25 May 2014 (updated 27 May 2014), at www.abc.net.au/news/2014-05-25/internet-changes-over-20-years/5470442, accessed 26 May 2021. There were precursors to the web, such as the French Minitel, released in 1978, but destined to be "an evolutionary cul-de-sac": J Lichfield, "How France fell out of love with Minitel", *The Independent* (online), 9 June 2012, at www.independent.co.uk/news/world/europe/how-france-fell-out-of-love-with-minitel-7831816.html, accessed 26 May 2021.
10 A term coined by Kevin Ashton in 1999 at the World Economic Forum, Davos.
11 www.urbandictionary.com, accessed 26 May 2021. Net dictionaries provide not only definitions, but origins. For example, "spam" comes from the Monty Python sketch; "Google" comes from the misspelling of "googol" (a large number); "yahoo" is an acronym; "Hotmail" was originally "HoTMaiL" (referring to HTML).
12 www.facebook.com/facebook/info?tab=milestone and http://en.wikipedia.org/wiki/History_of_Facebook, accessed 27 May 2021.
13 www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/, accessed 27 May 2021.

certain countries such as China, where outside sites such as Facebook are banned and internal social media sites restricted[14] — nevertheless, over 1,000 Chinese courts have microblog accounts[15] and social media is widely used by lawyers[16]).

- Blogs and Microblogs, such as Twitter, set up in 2006.[17] This includes ratings blogs, such as TripAdvisor.[18]
- Shared video and other visual material, such as YouTube. "Tube" is French for "video clip". Many of the first YouTube posts were musical, and Psy's "Gangnam Style" clip (viewed more than 2 billion times) was the most watched in YouTube history.[19] YouTube also contains televised lectures, legal resources such as court information videos[20] and adult education courses.
- Email and networking sites. Hotmail (set up in 1996)[21] and Yahoo were pure email sites, but networking social media is now also available. Social media networking sites such as LinkedIn require users to have an email address and promote professional information exchange. Gmail dominates this market.
- Although not strictly speaking a social media site, eBay and other online auction or sale websites provide opportunities for information forums, blogs, emails and other means of communication through anonymised user names. This includes the ability to use Paypal, the world's first cyber bank.
- Chat-based or information sites like Reddit, photograph and image exchanges such as Instagram, Pinterest, Tumblr and other sites, most of which are iPhone- or iPad-based, as is Skype, a visual telephone link.
- Group chat programs and mainstream instant messaging services. One of the first was ICQ (launched in 1996).[22] Facebook Messenger is the best known. Others include Whatsapp or Line. While some merely use the internet to chat, others use it for live streaming from

14 J Chin, "China tightens grip on social media", *Wall Street Journal* (online), 9 September 2013, at http://online.wsj.com/news/articles/SB10001424127887324549004579065113098846226, accessed 27 May 2021.

15 D Tang, "China courts lift veils but keep courtroom closed", *The Big Story*, Associated Press, 1 October 2013, at https://omaha.com/news/china-courts-lift-veils-but-keep-courtroom-closed/article_5555e75d-a1d1-58e4-aa92-2442f96dd104.html, accessed 27 May 2021.

16 However, see B Feldman, "How Chinese courts try their cases on social media", *The Atlantic*, 31 August 2013 at www.theatlantic.com/technology/archive/2013/08/how-chinese-courts-try-their-cases-social-media/311596/, accessed 26 July 2021.

17 http://en.wikipedia.org/wiki/Twitter, accessed 27 May 2021.

18 There are now entire websites dedicated to reputation protection for restaurants, hotels or other businesses, which receive bad reviews. Critical reviews are a fertile source of defamation actions: see L Kinstler, "How TripAdvisor changed travel", *The Guardian*, 17 August 2018, at www.theguardian.com/news/2018/aug/17/how-tripadvisor-changed-travel, accessed 26 July 2021.

19 N Galvin, "Psy's Gangnam Style 'breaks' the internet", *Sydney Morning Herald* (online), 4 December 2014, at www.smh.com.au/entertainment/music/psys-gangnam-style-breaks-the-internet-20141204-11zusj.html, accessed 27 May 2021. In June 2015, Baby Shark became to most watched video with 8.44bn views.

20 For example, the SA Supreme Court has a presence on YouTube, see www.youtube.com/results?search_query=south+australia+supreme+court, as does the Judicial Commission of NSW, see www.youtube.com/user/JudComNSW, accessed 27 May 2021.

21 http://en.wikipedia.org/wiki/Outlook.com, accessed 27 May 2021.

22 http://en.wikipedia.org/wiki/ICQ, accessed 6 January 2015.

concerts, radio podcasts and music downloads. Music downloads are now dominated by Apple's iTunes, launched on April 28, 2003 with just 200,000 songs; by 2011, it was offering 20 million. By 2013 it had sold 25 billion songs, in April 2020, iTunes offered 60 million songs.[23]

- Collaborative research projects such as Wikipedia, established in 2001 and effectively replacing *Encyclopedia Britannica*.[24] WikiLeaks, the name given to the site containing leaked documents set up by Julian Assange, is unrelated.
- Virtual game worlds, social worlds and games.[25]

The social media platforms principally referred to in this paper are the first two items in this list, as they are the forms of social media most likely to be encountered by judges in the course of legal argument, court control and communication, and legal research. The shift away from reliance on authorised law reports and newspaper summaries (such as the *Times Law Reports*) to the use of electronically searchable online judgment databases, and the use of social media for legal research, have changed both the preparation and conduct of court proceedings.

Social media and the judicial process

Social media at first seemed to be just another way to contact family and friends through Facebook, or for sharing holiday and cat photographs.[26] However, methods of personal communication available through social media, particularly Twitter, have increasingly become research and information sharing tools. For example, the Supreme Court of NSW, following the lead of overseas courts and the Supreme Court of Victoria, set up its own Twitter site in 2013.[27]

When social media was still a novelty, concerns were raised about judges expressing opinions and providing personal information in a way that could become public and thus threaten the impartiality of the trial process.[28] What impression would it convey if a prosecutor or a witness was a judge's Facebook friend? Was a Facebook friend like a real friend, or was it something different? In some cases, the danger was obvious. For example, in North Carolina,[29] a presiding

23 C Jones, "iTunes hits 25 billion songs sold", *Forbes*, 2 June 2013, at www.forbes.com/sites/chuckjones/2013/02/06/itunes-hits-25-billion-songs-sold/, accessed 27 May 2021.

24 D Gillmor, "Encyclopedia Britannica in the age of Wikipedia", *The Guardian* (online), 15 March 2012, at www.theguardian.com/commentisfree/cifamerica/2012/mar/14/encyclopedia-britannica-wikipedia, accessed 27 May 2021.

25 Geocities, created in 1994 and closed in 2009, was one of the first social media-style sites: www.oocities.org/, accessed 27 May 2021. More recent examples are Minecraft, Second Life and IMVU.

26 www.bbc.com/future/story/20120222-cats-memes-and-internet-schemes, accessed 27 May 2021.

27 https://twitter.com/NSWSupCt, accessed 27 May 2021.

28 D Smith, "When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard" (2012) 3(1) *Journal of Law, Technology and the Internet* 1 at 2, at https://scholarlycommons.law.case.edu/jolti/vol3/iss1/8/, accessed 27 May 2021. See eg, *Youkers v The State of Texas* 400 SW 3d 200 (2013); *Onnen v Sioux Falls Independent School District* 801 NW 2d 752 (2011); and *Quigley Corporation v Karkus* 2009 WL 1383280 (ED Pa).

29 Public Reprimand, Inquiry No 08–234 before the Judicial Standards Commission, State of North Carolina, 1 April 2009. The judge also conducted personal research into the alleged conduct of the mother by visiting the website of the mother's photography business and later quoted poems she had published there in open court. The orders made by the judge were later vacated on the grounds of the ex parte communication between the judge and father's lawyer, and for bias or influence gained from the independent research conducted by the trial judge. The judge disqualified himself and a new trial for the custody dispute entered.

judge (District Court Judge, B Carlton Terry Jr) was reprimanded after he heard a child custody dispute and befriended the father's lawyer on Facebook, and they discussed the case on their respective Facebook accounts. Nevertheless, social media is now such a fundamental part of daily communication that its use by judges cannot simply be prohibited, as was the early response from courts.[30]

Electronic searching on online judgment databases is a quicker and more accurate way to access judgments, and the availability of judgments online also allows access to judgments on social media sites, particularly Twitter. Prior to 2006, when District Court judgments were first placed online, judgments were generally only available to the parties.[31] With the advent of social media, however, any judgment can be scanned and reproduced, or linked to, in a law blog, academic e-journal, law firm e-newsletter or Twitter feed.

The days when trial judges were writing privately for the parties (or perhaps for the Court of Appeal) are vanishing. Social media is replacing traditional research and analysis methods, such as law reports and academic analysis of judicial decisions, by instantaneous and potentially worldwide communication, which can bypass not only authorised reports,[32] but even electronically-based sites like Caselaw. Law blogs such as the *Gazette of Law & Journalism* in *Inforrm*[33] regularly publish not only their discussions of these decisions, but the online copies of the judgments as well. Similarly, the actual words spoken by a sentencing judge may be accessed via a court Twitter feed,[34] or the key points in a lengthy trial or inquiry tweeted in live feeds to an electronic (or print) newspaper by the journalist sitting in the courtroom. The result is that traditional methods of publication of a judgment — only the most important judgments, in authorised reports, with headnotes, months later — have been replaced by a system which can publish a judgment internationally, instantaneously, and for free. Judges no longer have an option about not publishing a judgment, because anyone who obtains a copy can make it public. The public can, in some circumstances, watch part or all of a trial on television; for example, the UK Supreme Court has its own Twitter account and telecasts proceedings on its own website.[35]

The speed of these changing methods of communication can be demonstrated by comparing them to the date for electronic publication of judgments on Caselaw. The internet celebrated its 20th birthday, and the Supreme Court commenced publishing judgments online in 1999. However, Twitter was only set up in 2006, the same year the District Court of NSW commenced

30 See eg, the response of the UK courts as late as 2012: M Beckford, "Judges banned from blogging or tweeting about cases", *The Telegraph* (online), 15 August 2012, www.telegraph.co.uk/news/uknews/law-and-order/9477275/Judges-banned-from-blogging-or-Tweeting-about-cases.html, accessed 27 May 2021.

31 In *Valentine v Eid* (1992) 27 NSWLR 615 at 621, Grove J, lamenting the "potential for disorder" caused by the almost total unavailability of NSW District Court judgments, even for other judges and magistrates, stated: "A Local Court learning of a decision in the District Court would seem to depend largely upon chance".

32 See the discussion of the ramifications of electronic judgment publishing on authorised reports by the Honourable Justice G Lindsay in "The future of authorised law reporting in Australia", paper presented to the Australian Law Librarians Association, 11 June 2013, Sydney, published in (2013) 25(9) *JOB* 73, and discussed in more detail later in this paper.

33 See https://inforrm.org/tag/gazette-of-law-and-journalism/, accessed 21 July 2021.

34 See for example, https://twitter.com/highcourtofaus?lang=en for the latest tweets from the High Court of Australia; and https://twitter.com/fedcctcourtau?lang=en for tweets from the Federal Circuit Court of Australia.

35 See www.supremecourt.uk/live/court-01.html, accessed 26 July 2021.

publishing a limited number of its judgments online.[36] The Victorian Supreme Court and NSW Supreme Court Twitter accounts now regularly publish not only their judgments, but also (in the Victorian Supreme Court) links to sentences handed down orally, open days at the court and other topics of legal interest.

The immediacy of Twitter makes it an important tool for journalists seeking to cover long and complex trials or inquiries. Twitter changed journalism,[37] and media court reporting has been enhanced as a result. Two examples demonstrate this: the coverage of Independent Commission against Corruption (ICAC) inquiries by Kate McClymont in Sydney,[38] and daily reporting of the lengthy "phone hacking trial" in the UK both by mainstream journalists and by "citizen journalists" writing for private blog sites.[39] Ms McClymont, whose coverage of the ICAC inquiry resulted in a Walkley Award in 2013, provided a daily Twitter feed while sitting in court. It was probably the most widely read piece of journalism in Australia for some time. Ms McClymont is well aware of the potential for problems arising from Twitter use in the courtroom:[40]

> There are witness [sic] who are sitting outside who aren't meant to know what evidence is being given. Is this going to have an impact on the course of justice by tweeting the minutiae of what is happening in [sic] within the courtroom? It's an interesting consideration.

How such issues should be addressed was the subject of changing judicial views during the Assange hearings.[41]

Unlike more traditional news methods, where there is a delay in preparing the full story and a degree of filtering or "spin" both by the media and the persons involved, the raw story of ICAC inquiry developments, such as the evidence leading to the resignation of the NSW Premier, became immediately known because this information was immediately spread by social media. When traditional news sources delayed in reporting the finding of 800 children's bodies at

36 R Schoon, "Social media Saturday: Twitter celebrates 8th birthday, gets banned in Turkey, and US government tells Facebook about privacy", *Latin Post* (online), 22 March 2014, at www.latinpost.com/articles/9327/20140322/social-media-saturday-twitter-celebrates-8th-birthday-gets-banned-in-turkey-and-u-s-gov-tells-facebook-about-privacy.htm, accessed 27 May 2021; Twitter celebrated by allowing its users to access their first Tweet, an indication of the eternal nature of publication in the blogosphere.

37 B Kerschberg, "The new way twitter will dominate online journalism", *Forbes*, 13 January 2012, at www.forbes.com/sites/benkerschberg/2012/01/13/the-new-way-twitter-will-dominate-online-journalism/?sh=7658e3bf6128, accessed 27 May 2021. For a more recent article on Twitter's influence, see "Twitter's influence on news judgment: an experiment among journalists" at https://journals.sagepub.com/doi/abs/10.1177/1464884918802975, accessed 21 July 2021. When asked what medium she could not live without, the 7.30 Report's Leigh Sales told *Encore*: "Probably Twitter. It collates all the different sources of information — newspapers, magazines, blogs, TV and radio — and puts them in one place for me to sift through. It saves me a huge amount of time and delivers me a lot of information I wouldn't otherwise find": at http://mumbrella.com.au/leigh-sales-157476, accessed 27 May 2021. See also *Kumova v Davison* [2021] FCA 753.

38 https://twitter.com/Kate_McClymont.

39 See the coverage of the phone hacking trial by Peter Jukes: https://twitter.com/peterjukes, accessed 27 May 2021, and his book, *Beyond contempt: the inside story of the phone hacking trial*, Canbury Press, 2015.

40 http://mumbrella.com.au/journalist-use-of-social-media-in-court-an-issue-155942, accessed 27 May 2021.

41 District Judge Howard Riddle permitted journalists to send tweets from the courtroom while hearing the Assange case: see CBS News, 15 December 2010, www.cbsnews.com/news/uk-judge-allows-tweeting-at-assange-hearing/, accessed 26 July 2021. However, *Swedish Judicial Authority v Assange* [2010] EWHC 3473 (Admin), Ouseley J refused permission for this practice to continue.

a former children's home in Ireland, the story appeared on social media.[42] These changes to the dynamics of the news cycle, and to journalists' use of social media in court, impact upon traditional concepts of "open justice".

How can "open justice" accommodate social media?

"Open justice" is justice being seen to be done.[43] In *John Fairfax v District Court of NSW*,[44] Spigelman CJ described open justice as "one of the most fundamental aspects of the system of justice in Australia".[45] During the 19th century, interest in all trials was so great that courtrooms were larger and the seats for members of the public frequently filled, as court illustrations from newspapers of the day demonstrate. From the early 20th century, as court architecture demonstrates, the number of public visitors to courts has dropped significantly.[46] These days, the "presence" of the public means the presence of the media[47] (and what Leslie J Moran calls the "citizen journalist").[48]

The traditional image of the court literally being "open", in the form of a gallery of members of the public listening to the trial, has long vanished, other than for the occasional sensational murder or corruption inquiry.

Instead of gaining information about our legal system by sitting in the back row of the court, most people now learn about the legal system from the mass media. A 2003 survey showed that "personal experience" came below television, newspapers and tabloids as a source of knowledge about the criminal justice system.[49] The fact that they are not in court does not mean, however, that the public has lost interest in the legal system; if anything, they want more information. The real change lies in the increasing use of blogs and electronic law journals to obtain this information; some blogs now highly respected as a source of information, not only for lawyers, but for judges writing their judgments. Justice Applegarth[50] recently paid tribute to the trial reports and research resources of the *Gazette of Law and Journalism*, set up by Richard Ackland nearly 30 years ago, and the most reliable and respected site for defamation trial reports, interviews and information about new litigation.

Long before social media was invented, the High Court of Australia emphasised the interdependent nature of the media and the judicial system. In *R v Tait and Bartley*,[51] Brennan,

42 http://freethoughtblogs.com/butterfliesandwheels/2014/06/catherine-corless-synopsis-of-her-research-on-tuam-motherbaby-home/, accessed 27 May 2021.
43 The Honourable J J Spigelman, then Chief Justice of NSW, "Seen to be done: the principle of open justice", paper presented at the 31st Australian Legal Convention, 9 October 1999, Canberra.
44 (2004) 61 NSWLR 344.
45 ibid at [18].
46 L Mulcahy, *Legal architecture: justice, due process and the place of law*, Routledge, 2011, Ch 5.
47 The Honourable Justice I Judge, then Lord Chief of England and Wales, keynote address to the Society of Editors Annual Conference, 16 November 2009, London.
48 L Moran, "Mass-mediated 'open justice': court and judicial reports in the press in England and Wales" (2014) 34(1) *Legal Studies* 143.
49 B Page, R Wake and A Ames, *Public confidence in the criminal justice system*, Home Office Research Findings 221, Home Office (UK), London, 2004.
50 *Cerutti v Crestside Pty Ltd* [2014] QCA 33 at [49], n 45.
51 (1979) 24 ALR 473 at 492.

Deane and Gallop JJ stressed the importance of the media, not only in informing members of the public of the result of cases, but also of the logic and principles that judicial officers use in their decisions. What the media does is to provide the legal system with the means by which justice is not only done but seen to be done.[52]

An important part of the open justice principle is the entitlement of journalists to attend, and report upon, court proceedings.[53] The use of social media in the courtroom has been a vital reason why the otherwise declining role of the newspaper as a source for information has been arrested. Journalistic training and research skills are necessary for the journalist to be able to record accurately what is said and to understand the important developments in a case. A journalist who misunderstood an important link in the evidence of, for example, the inquiry currently before the ICAC Commissioner, would quickly be exposed as being incompetent or ill-informed. The key to the success of Kate McClymont's court reporting is her remarkable journalistic skills, just as much as the immediacy of the tweets. The roundsman's two-minute summary on the evening news broadcast cannot compete. It is understandable, in those circumstances, why skilled journalists continue the use of social media, and especially Twitter, to report from the courtroom, as no other media platform can compete with this kind of instantaneous skilled reporting.

The imposition of a sentence designed to deter others from committing a similar crime really only works if the public is aware of the reasoning behind the sentence.[54] Information about sentencing patterns, actual sentences and remarks on sentence, if accessible to the general public, can make this form of information not only more widely available, but more accurately known. Judges have complained about the inaccurate news commentary about sentencing in the past.[55] More public information about the sentencing process, such as the Victorian Supreme Court's release of audio criminal sentences on Twitter, may contribute to accurate reporting and greater understanding.

Social media in the courtroom

The second area in which there is interaction between journalists and the courts arises from the role of court officials in providing information (such as summaries of cases, press releases or actual judgments) to journalists. This is generally unexceptionable; most Australian courts now have a media or public information officer.[56] However, occasionally journalists want more

52 C McLeod, "Wrestling with access: journalists covering courts" (2004–2005) 85 *Reform* 15 at 15; M Krawitz "Stop the presses but not the tweets: why Australian judicial officials should permit journalists to use social media in the courtroom" (2013) 15(1) *FLJ* 1 at 5.

53 *McJannett v Daley (No 2)* [2012] WASC 386 at [4] (Le Miere J).

54 P de Jersey, "Courts and the media in the digital era: a judicial perspective" in P Keyzer, J Johnston and M Pearson (eds), *The courts and the media: challenges in the era of digital and social media*, Halstead Press, 2012, pp 35–36.

55 See eg, M Kirby, "Improving the discourse between courts and the media" (2008) 35(6) *Brief* 20.

56 I Lueckenhausen, "Facebook vs a fair trial? Court reporting restrictions and the internet" (2009) 92 *Precedent* 15; Krawitz, above n 52, at 6.

and rulings are sought from the judge as to whether additional material such as the pleadings, counsels' submissions, exhibits or affidavits should be provided, and an application is made to the court for such material.

Whether the request to the judge is for permission to tweet from the courtroom, or an application for documents, the first step is to consider the amendments to the *Court Security Act 2005* (NSW), which is the State Government's first real attempt to regulate social media in relation to the administration of justice.

Section 9A of the Act contains a prohibition of unauthorised transmission from the courtroom as follows:

> (1) A person must not use any device to transmit sounds or images (or both) from a room or other place where a court is sitting, or to transmit information that forms part of the proceedings of a court from a room or other place where that court is sitting, in any of the following ways:
>
> (a) by transmitting the sounds, images or information to any person or place outside that room or other place,
>
> (b) by posting entries containing the sounds, images or information on social media sites or any other website,
>
> (c) by otherwise broadcasting or publishing the sounds, images or information by means of the Internet,
>
> (d) by otherwise making the sounds, images or information accessible to any person outside that room or other place,
>
> whether that transmission, posting, broadcasting, publishing or other conduct occurs simultaneously with the proceedings or at a later time (or both).
>
> Maximum penalty: 200 penalty units or imprisonment for 12 months (or both).
>
> (2) Subsection (1) does not apply to any of the following:
>
> (a) a device being used for a purpose other than a purpose referred to in subsection (1),
>
> (b) the transmission of sounds, images or information by an audio link, audio visual link, closed-circuit link or other technology that enables communication between the room or other place where the court is sitting and another place and that has been expressly permitted by a judicial officer,
>
> (c) any other transmission of sounds, images or information that has been expressly approved by a judicial officer,
>
> (d) the transmission of sounds, images or information for the purpose of transcribing court proceedings for the court at a place outside the room or other place where the court is sitting,
>
> (e) the use by a prosecutor of a tablet computer or other similar device to transmit sounds, images or information only to another prosecutor who either is not a witness in the relevant court proceedings or, if he or she is such a witness, who has already given evidence in those proceedings,
>
> (f) the transmission of sounds, images or information in any circumstances that may be prescribed by the regulations.

"Journalist" is defined in s 4 as follows:

> a person engaged in the profession or practice of reporting, photographing, editing or recording for a media report of a news, current affairs, information or documentary character.

A "media report" is also defined as follows:

> an article, program or other report for publication in or broadcast on any of the following:
>
> (a) a newspaper, magazine, journal or other periodical,
>
> (b) a radio or television broadcasting service,
>
> (c) an electronic service (including a service provided by the Internet) that is similar to a newspaper, magazine, radio broadcast or television broadcast.

These amendments, which primarily resulted from informal or non-professional postings on social media, are helpfully discussed by Joan Evatt in her article, "Bloggers beware: law uneasy about citizen journalists and court reporting".[57]

The first step that the judge will have to take is to determine the status of the person seeking authorisation. Is that person, in fact, a journalist? This is not an easy question to determine. For example, Joan Evatt would be more qualified than most professional journalists to report on court proceedings, and it seems unfair that a person of her considerable abilities should be relegated to the role of "citizen journalist".

The second question is what judges should do when confronted with a request for more than just a judgment, namely a request for pleadings, counsel's submissions, exhibits or affidavits.

Exceptions to the "open justice" principle

Justice Kirby explained the exceptions to the rule in *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW*,[58] adding:

> The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.

These observations were made before the internet came into common use. Additional problems arise in relation to the provisions of documentation to journalists, particularly if social media publication is involved.

57 J Evatt, "Bloggers beware: law uneasy about citizen journalists and court reporting", *No Fibs*, 7 August 2013, at https://nofibs.com.au/bloggers-beware-social-media-and-the-courts/, accessed 27 May 2021.

58 (1991) 26 NSWLR 131 at 141.

Open justice and the request for documents by journalists

Journalists who ask for court documents, submissions, pleadings or other material may be intending to disseminate them on social media. The current procedures for access by the media to court-related documents in Australian jurisdictions differ, but all have one thing in common: they do not provide for use of documents on social media sites.[59]

In NSW these procedures are set out in the following practice notes and court rules:

- Supreme Court (Practice Note SC Gen 2, "Access to Court Files", effective 4 October 2019)
- District Court (Practice Note DC Civil 11, "Access to Court Files by Non-Parties", effective 9 August 2005 and District Court Rules 1973, Pt 52, r 3)
- Local Court (Local Court Rules 2009, Pt 8, r 8.10(3)).

Different approaches may be taken in different courts, because of differences in these rules.[60] Applications in the Federal Court are generally brought under the Federal Court Rules 2011 (Cth), r 2.32, and different rules again apply in other States and Territories. These rules may require review, in part because judges need to exercise caution to ensure that these documents do not end up being available on social media, and in part because of the inconsistency between jurisdictions.[61] The growing importance of confidentiality and/or privacy issues is another relevant factor.

Judicial reputation and social media

Judges and courts should not underestimate the challenges to the administration of justice due to the increasing power of public opinion, in which social media plays such a vital role. The cost, efficiency and transparency of the justice system are under challenge. Social media has lowered the barriers to entry in the marketplace of ideas, as now anyone can be a publisher (or, as the saying goes, "everyone's a critic").

Judges in the common law system face challenges from two main sources. The first is the increasingly powerful pressure on the common law system from others within the legal profession, as well as governments and proponents of the less expensive continental/civil law system.[62] There can be no better illustration of the degree to which the common law system is under attack than the recent speech of the Lord Chief Justice of England and Wales, Lord Thomas, acknowledging that the failures of the common law system mean that the advent of the

59 See *Ex p West Australian Newspapers Ltd & Channel Seven Perth Pty Ltd* [2014] WADC 12.

60 *Llewellyn v Nine Network Australia Pty Ltd* [2006] FCA 836 at [22] (Rares J).

61 See P Keyzer, "Media access to transcripts and pleadings and 'open justice': a case study" (2002) 2(3) *The Drawing Board* 209, at www.australianreview.net/journal/v2/n3/keyzer.pdf, accessed 27 May 2021, which reviews Australian courts' rules for provision of documents to the media.

62 For a comprehensive bibliography, see the articles discussed by N Garoupa and C Liguerre, "The syndrome of the efficiency of the common law" (2011) 29(2) *Boston University International Law Journal* 287, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674170, accessed 27 May 2021.

continental law system seems inevitable.[63] These views are able to achieve wider dissemination through the informality of social media. The impact upon the doctrine of precedent caused by the immediate availability of all judgments (as opposed to slow-release of only leading judgments at appellate level, published in authorised reports) is another potential area for change.[64]

The second source of complaint, once restricted to the occasional letter to the editor, but now one of the mainstays of social media and blogsites, is the claim (to quote a 26 March 2014 article by Louise Hall in the *Sydney Morning Herald*)[65] that judges are "out of touch" with the modern world. Concern about this perception led the Supreme Court of NSW and the former NSW Attorney-General, the Honourable Greg Smith MLA, to set in place a series of proposals to ensure judges are communicating effectively with the public, such as the introduction of televised proceedings in certain circumstances, juror surveys and a public forum. The lack of familiarity judges have with social media and electronic publishing is seen as one of the proofs of this, as one columnist in *The Telegraph* pointed out.[66] Academics[67] and judges[68] have contributed to discussion of the need for judges to be in touch with the community, and as one of the main purposes of social media is community interaction, judges need to consider what their role in social media should be.

What impact will these negative perceptions, and the courts' response to them, have upon the role of the judge?

- Judges may have to respond to criticisms that judges are out of touch in the kind of public debate foreshadowed by Bathurst CJ in Louise Hall's article.
- Judges will be expected not only to know about, but also to be able to use, social media. Personal use is the main area of difficulty, in terms of the potential for attracting criticism of what a judge says or does in his or her personal capacity. The American Bar Association Formal Opinion 462[69] and the guidelines issued by Lord Justice Neuberger and the Australasian Institute of Judicial Administration (AIJA)[70] accept the use of social media by judges for private purposes, although with strong warnings about expressing views on current litigation. Social media preserves in aspic those informal, transient, off-colour

63 O Bowcott, "Inquisitorial system may be better for family and civil cases, says top judge", *The Guardian* (online), 5 March 2014, at www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas, accessed 27 May 2021.

64 For example, the Victorian Reports are now published electronically and free of charge: https://victorianreports.com.au/, accessed 26 July 2021.

65 L Hall, "Judges fight 'out of touch' tag with courtroom broadcasts, jurors' surveys", *Sydney Morning Herald* (online), 26 March 2014, at www.smh.com.au/nsw/judges-fight-out-of-touch-tag-with-courtroom-broadcasts-jurors-surveys-20140325-35ghn.html, accessed 27 May 2021.

66 N Farndale, "Google has eroded a judge's right to be heroically out of touch", *The Telegraph* (online), 16 June 2012, at www.telegraph.co.uk/comment/columnists/nigelfarndale/9335414/Google-has-eroded-a-judges-right-to-be-heroically-out-of-touch.html, accessed 27 May 2021.

67 D Blitsa et al, "Judges and social media: managing the risks", *Researchgate*, at www.researchgate.net/publication/315450646_Judges_Social_Media_Managing_the_Risks, accessed 26 July 2021.

68 A M Gleeson, "Out of touch or out of reach?" (2005) 7(3) *TJR* 241.

69 www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf , accessed 27 May 2021.

70 See AIJA, *Guide to Judicial Conduct*, 3rd ed (rev), 2022. See also Beckford, above n 30.

remarks that are part of daily life for everyone. The current very low barrier for bringing an apprehended bias application[71] means that the courts are at risk of an increasing number of applications for recusal, a tendency already noticeable in the increasing number of applications for recusal (on unrelated bases) around Australian courts, as a search of Barnet Jade[72] for "recuse" will demonstrate.

- Judges will have to use social media and technology as part of their work (for example, call witnesses to give evidence by audio visual link (AVL), or deal with e-discovery).[73] They will need to understand enough of the workings of social media to deal with submissions about this, whether it is the issue of the tender of Facebook entries to show that a plaintiff is not as badly injured as alleged, or a submission as to the nature of publication on the internet and the liability of internet service providers for social media publications. For example, a man who had posted nude photographs of his former girlfriend to her Facebook page and had locked the account so that she was unable to delete them was charged with publishing indecent images under s 578C of the *Crimes Act 1900*. Understanding the technology would be important for determining the seriousness of the offence (in this case, the defendant pleaded guilty and was sentenced to a suspended six-month jail term).[74]
- Social media has lowered the barriers to entry for publishers — a blogged or scanned judgment can now become as publicly available as the most widely read authorised report.

The courtroom of the future may well consist of iPad-waving barristers, e-discovery on closed-circuit television, witnesses on Skype, solicitors electronically in touch with their offices and journalists tweeting a live feed to electronic blogs and newspapers. Although judges ask parties to turn off their mobile phones and warn jurors not to use the internet, courts are still in the process of developing an overarching policy about cyberlaw issues generally. A consistent Australia-wide approach and consideration of judicial education issues would be helpful — as would appropriate technology resources to enable their use.[75] Changes to research and judgment writing, however, may go even further. I will briefly summarise what some of these changes may be.

Impact of social media on legal research, reports and judgment writing

Legal publishers are struggling to keep up with the influx of freely available academic comment which is competing with the expensive loose-leaf practices and authorised reports series that

71 *Goritsas v Barakat* [2012] NSWCA 36 at [64] (Basten JA).
72 https://jade.barnet.com.au/Jade.html, accessed 27 May 2021.
73 See for example, Local Court Practice Note Crim 1 *Case management of criminal proceedings in the Local Court*; Judicial Commission of NSW, *Local Court Bench Book* at [28-120] case conferences may be held by AVL.
74 H Aston, "Man jailed over nude Facebook photos", *Sydney Morning Herald* (online), 22 April 2012, at www.smh.com.au/technology/man-jailed-over-nude-facebook-photos-20120421-1xe2c.html, accessed 27 May 2021.
75 For technological changes in the courtroom since COVID-19 pandemic, please see: A Levin and T Kashyap, "Law enforcement and police powers in NSW during COVID-19" (2020) 32 *JOB* 29; A Miller, "Lawcodes report: new criminal penalties for COVID-19 related offences" (2020) 32 *JOB* 33; NSW Public Defenders, COVID-19 resource for practitioners; Judicial College of Victoria, Coronavirus and the courts — summary of court arrangements around Australia during COVID-19 pandemic.

have dominated the legal research market over the past century. Some echoes of this battle can be seen in Lindsay J's paper for the 2013 Australian Law Libraries Association Annual Conference on the future of authorised reports.[76] Justice Lindsay states that the concept of authorised reports has been "radically challenged",[77] that practitioners and the public alike have been swamped by unreported judgments, and that the answer is to set up a national website for "authoritative"[78] statements of the law, as opposed to statements of the law by inferior courts or tribunals which may contain errors. His Honour considers some form of authorised reports ought to exist alongside the court websites, presumably so that there is some method of supervision of the accuracy of case law.

Bailii was revolutionary in the UK because for many years unreported judgments could only be obtained by paying the private court reporting services (such as Smith Bernal) that provided them. These unreported judgments included appeal judgments in both criminal and civil courts. Austlii's provision of unreported judgments has long put Australia in the lead internationally for court reporting.

One of the proposals is that cases of lesser importance would not appear on the website, but simply be summarised, as occurred for many years in the *Times Law Reports*. The *Times Law Reports* certainly filled an important gap in court reporting at the time, but this gap is now no longer in existence, thanks to e-journals and blogs which not only comment upon, but also provide a link to, the actual judgment.

These proposals to restrict publication of judgments have been made too late. The principal argument for restriction, namely the flood of legal information requiring a controlling hand, does not take into account the manner in which judgments are now read, namely by use of the search function rather than by reading a judgment headnote. Restricting access to judgments is the kind of response that members of the public might misread as evidence that judges are out of touch with community concerns about transparency and open justice.

A more fruitful area for consideration by the courts could be the impact upon the doctrine of stare decisis of the loss of position of authorised reports resulting from free electronic publishing. The shrinking pool of precedent law (the "vanishing trial"[79] phenomenon), the impact of interstate appellate judgments and the increasing reliance of legislation could be additional relevant factors.

The difficulties in which legal publishers now find themselves function as a reminder to courts and to judges that changes to the law caused by electronic publication and social media should be dealt with sooner rather than later.

76 G Lindsay, "The unfolding future or authorised law reporting in Australia", 25 September 2013, Sydney, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Lindsay/lindsay_2013.09.25.pdf, accessed 27 May 2021. See also S Rares, "Remarks to welcome to Australia the Incorporated Council for Law Reporting for England and Wales" at www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20180509, accessed 26 July 2021.

77 Lindsay, ibid at [17].

78 ibid at [14].

79 K Hayne, "The vanishing trial" (2008) 9(1) *TJR* 33.

What changes will social media make to the law?

What are some of the areas of the law most likely to require knowledge of social media-related issues? In their February 2013 survey of judges (the survey) (a summary of which was published in the *Judicial Officers' Bulletin*),[80] Professor Keyzer and his colleagues identified the challenges posed by social media to the law, courtroom procedure and judicial status which were of most concern to participants. The participants included judges and court media liaison officers from around Australia. Some of their concerns are considered below, along with others which were not reported in the survey findings.

Increase in apprehended bias applications

The bar for determining apprehended bias is very low.[81] If judges' social or professional activities can be accessed through social media, as has occurred in the US, this seems fertile ground for such applications. Surprisingly, this issue was not on the list of concerns of the judges who participated in the survey.[82] Such applications are on the increase; a search of the word "recuse" on Barnet Jade showed that one quarter of all judgments referring to this word had been handed down in the last 12 months.[83]

Contempt of court

Aborted trials, publication in breach of court orders and pre-trial publicity issues were a major concern for the judicial officers participating in the survey. For a recent case of contempt which involved comments posted on Twitter, see *R v Hinch*.[84] The ease with which alleged pedophiles can be named on social media is to be contrasted with other types of media which have censoring facilities. For example, radio's "dump button" or the editorial discretion which can be exercised when a television program is pre-recorded.

Criminal procedure issues

Where members of the media seek access to material such as a record of interview, or photographs of the crime scene, applications may include requests for such items to be made available on social media. In *Ex p Western Australian Newspapers Ltd & Channel 7 Perth Pty Ltd*,[85] Staude DCJ (refusing the application) warned:[86]

> If the order sought were made in this and similar cases, lawyers would be bound to advise their clients that as a possible consequence of participation in an interview the recording of it

80 Keyzer et al, above n 1.
81 *Newcastle City Council v Lindsay* [2004] NSWCA 198 at [29]–[32] (Giles and Tobias JJA; McClellan AJA); *Goritsas v Barakat* [2012] NSWCA 36 at [64].
82 See also Australian Law Reform Commission, "Who judges whether a judge is biased?", 24 May 2021 at www.alrc.gov.au/inquiry/review-of-judicial-impartiality/spotlight-on/who-judges/, accessed 26 July 2021.
83 See M Groves, "Public statements by judges and the bias rule", 40(1) *Monash University Law Review* 115 at www.monash.edu/__data/assets/pdf_file/0004/139837/groves.pdf, accessed 26 July 2021.
84 [2013] VSC 554.
85 [2014] WADC 12.
86 ibid at [68]–[70].

> may be broadcast and posted on an internet site. Police officers acting properly in their role as investigators would also feel an obligation to warn of this particular risk, lest they be accused of misleading a suspect as to the use to which an audiovisual recording of interview may be put.
>
> The submission made on behalf of the applicants is that s 122 [Criminal Investigation Act 2006 (WA)] applications are so rare that suspects are not likely to be deterred from participating in interviews by the risk of eventual publication. Yet it is also the applicants' submission that as a matter of principle they should have access to this type of evidence in every case for the purpose of fair and accurate reporting. The applicants do not contend that this case is special or unusual. The logical consequence of the applicants' submission is that media release of police interviews should be routine. The authorities to which I have referred do not support that proposition.
>
> The court is also of the view, having regard to the subject matter, scope and purpose of pt 11 [Criminal Investigation Act] as a whole, that the privacy of the participants is a relevant and pertinent consideration. While it is proposed that publication on social media be prohibited, it is unreasonable in my view to expect that that order would guarantee any protection to Mr Newman, or the interviewing officers for that matter, from potential abuse of the recording. This is yet another countervailing consideration.

What happens when a person is identified because of their Facebook picture? Identification and social media are discussed at length in *Strauss v Police*.[87] (The conviction based on Facebook evidence was quashed, but for a number of reasons unrelated to the use of social media). See also *Peterson v R*,[88] where it was held that the trial judge's ruling refusing to exclude Facebook identification evidence was not attended by doubt,[89] and the reliability of the identification was "pre-eminently a jury question".[90]

Defamation, misleading and deceptive conduct, intellectual property issues

The risk of defamatory publications going "viral" was a particular concern expressed by those participating in the survey, but the extent of publication is only one of many new issues for determination by courts. The sheer scope of the changes can best be addressed by referring to the many issues raised in Dr Matt Collins QC's weighty tome, *The law of defamation and the internet*.[91]

Defamation is only one cause of action which may arise from statements made on social media or in electronic publications such as emails. Publications on Facebook may be made in trade or commerce[92] and also be defamatory.[93] They may constitute grounds for an apprehended violence order.[94]

87 (2013) 115 SASR 90.
88 [2014] VSCA 111.
89 ibid at [57].
90 ibid at [56].
91 M Collins, *The law of defamation and the internet*, 3rd edn, Oxford University Press, 2011.
92 *Madden v Seafolly Pty Ltd* [2014] FCAFC 30.
93 *McAlpine v Bercow* [2013] EWHC 1342 (QB).
94 *Ives v WA (No 8)* [2013] WASC 277, which reports Mr Ives' subsequent, and unsuccessful, attempt to sue the person seeking the order for defamation.

Changes to intellectual property law arising from sharing social media sources will be profound. To cite only one example, in one of a series of articles in the ABA Journal on the paradigm shift in the way law is being practised, the author asks "Who owns the law?".[95]

E-discovery

Electronically stored information will vastly increase the number of discoverable documents, and special equipment may be required to view them. This is an acknowledged problem in the US.[96] The obligation to discover material on Facebook, the contents of mobile phones and other social media-related documents is now a common issue in litigation proceedings.

Employment law

The sorry story of the senior bureaucrat who lost her job because her tweets were less than flattering to her employer[97] should be a warning to employees both in and out of the court system. The courts have also been asked to rule on what constitutes reasonable access to social media by employees. The United Firefighters Union of Australia brought a complaint to the Fair Work Commission about a 60-minute restriction upon social media use.[98] Fortunately (or unfortunately) the matter was resolved by mediation. Insurers and brokers may need to consider these issues when drafting policies.

Illegally or improperly obtained evidence

Illegally obtained evidence is adequately dealt with under existing legislation. The principal problem in the future, in my opinion, will be claims brought on the basis of revelation of private information, such as health records or sexual activity. The fastest-growing area of tort law relates to invasions of privacy through illegally or improperly obtained photographs, films of private sexual activities, voicemails, or other private material which can be accessed and republished online.

Part of the problem is that different kinds of private or confidential information give rise to different kinds of problems. A good example is the practice of animal liberation groups releasing illegally obtained material demonstrating cruelty to animals. The High Court could neither identify nor describe the tort in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[99] and the problem now is that material of this sort is not just distributed to the mainstream media, but is put directly onto social media websites. A number of US States have attempted "ag gag" ("agricultural gag") laws to criminalise the provision of illegally obtained material about

95 V Li, "Who owns the law? Technology reignites the war over just how public documents should be", *ABA Journal* (online), June 2014, at www.abajournal.com/magazine/article/who_owns_the_law_technology_reignites_the_war_over_just_how_public_document/, accessed 27 May 2021.
96 Dysart, above n 2.
97 *Banerji v Bowles* [2013] FCCA 1052. See also, *Comcare v Banerji* (2019) 267 CLR 373.
98 *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2013) FWC 4758.
99 (2001) 208 CLR 199.

animal cruelty, with mixed success. However, the issues of law arising from animal cruelty, such as live baiting greyhounds, are generally disclosures of business practices rather than personal information.

Jury use of social media during the trial

A realistic approach to jury use of social media during the trial is essential. A good example of common judicial sense prevailing can be seen in *R v Wills*.[100] The Director of Public Prosecutions (NSW) (DPP) complained to the trial judge that information about a fraud trial was "all over Facebook"[101] after a juror not only joined other jurors as Facebook friends, but had a photoshopped photo on his site (posted by a personal friend) of the juror's face superimposed onto a picture of another person in a wig and gown.[102] The DPP wanted the trial judge to question the jurors under ss 55D and 55DA of the *Jury Act 1977*.[103] Relying on information from the sheriff and an examination of the Facebook pages in question, Haesler SC DCJ concluded that the material was "no more than one would expect a juror in a long trial to engage in",[104] and the application was refused.

Jury Skaf directions[105] — and the jury's continued existence

It is not just potential jurors who have access to the internet on their phones or iPads; almost invariably so do their families, and everyone they know. The days when a simple warning to the jury not to look up material on the internet would be listened to are certain to be drawing to a close. Members of the public routinely look up everything from the ending of a movie to archived news stories. Courts are still struggling with what directions jurors should be given. It is still not settled law whether civil juries should be given any directions at all.

What the courts do about proper directions to juries, pre-trial publicity, trial publicity, and indeed, in relation to the future role of the jury is a vast topic, to which this short paper can only briefly refer.[106] Directions about pre-trial publicity, pixelated photographs,[107] use of suppression orders and reporting restrictions,[108] to list only a few of the major areas of concern, need reconsideration. In the UK, a jury was dismissed and a juror (Joanna Fraill) sentenced to

100 [2012] NSWDC 285.
101 ibid at [1].
102 ibid at [4].
103 ibid at [3].
104 ibid at [5].
105 *R v Skaf* (2004) 60 NSWLR 86 at [280]–[284]; *Jury Act 1977*, s 68C.
106 See Judicial Commission of NSW, *Criminal Trial Courts Bench Book* at [1-450]; C Smith and J Wheeler, "Dealing with prejudicial and adverse publicity", March 2018 at www.publicdefenders.nsw.gov.au/Documents/Prejudicial and Adverse Publicity.pdf, accessed 26 July 2021.
107 These problems principally occur in reports of criminal trials and cases involving minors. For the truly determined, Google can be used to get around pixelated photographs: see A Kidman, "Use Google to identify pixelated pictures", *Lifehacker Australia*, at www.lifehacker.com.au/2012/07/use-google-to-identify-pixelated-pictures/, accessed 27 May 2021.
108 For a helpful review of proposed reporting restrictions in the UK, see J Townend, "Law Commission: a sensible proposal for online recording of reporting restrictions", *Inforrm's Blog*, 18 April 2014, at http://inforrm.wordpress.com/2014/04/18/law-commission-a-sensible-proposal-for-online-recording-of-reporting-restrictions-judith-townend/, accessed 27 May 2021.

imprisonment after she used social media to befriend the defendant.[109] Also *R v The Herald & Weekly Times Pty Ltd* [2021] VSC 253, where 12 news media organisations, who pleaded guilty to 21 charges of contempt of court for reporting information derived from the trial of Cardinal George Pell in December 2018, contrary to a proceeding suppression order, were convicted and sentenced.[110]

Product liability, health and safety

The interconnectivity of devices, remote access and surveillance may affect traditional concepts of negligence.[111]

Privacy

The issue of whether a statutory cause of action should be introduced for a serious invasion of privacy, or such a cause of action should be left to the courts to create and define, has been reviewed in a series of reports from the Australian Law Reform Commission from 1979 onwards.[112] All that seems certain is that, sooner or later, such a cause of action will exist. How courts deal with publication on social media which contravenes the right to privacy will form part of that discussion.[113] Understanding the technology involved will be essential.[114]

Service of documents

Applications for substituted service traditionally sought orders that publication in a newspaper's legal notices column be considered sufficient, although the likelihood that these pages were ever consulted by the defendants in question was improbable. As was noted by the participants in the survey, magistrates in Family Court proceedings, spurred by the desire to make actual contact with the missing party in proceedings, began making orders which included service by Facebook[115] or LinkedIn,[116] a procedure which has spread to other courts.[117] Courts acknowledge

109 *A G v Fraill* [2011] EWCH 1629 (Admin).

110 See also, A Cooper, "Media companies apologise to court for breaching Pell suppression order", *Sydney Morning Herald*, 10 February 2021 at www.smh.com.au/national/media-companies-apologise-to-court-for-breaching-pell-suppression-order-20210210-p57189.html, accessed 26 July 2021.

111 G Millman, "Cyber cavalry rides to the rescue of internet of things", *The Wall Street Journal* (online), 5 May 2014, at http://blogs.wsj.com/riskandcompliance/2014/05/05/cyber-cavalry-rides-to-the-rescue-of-internet-of-things/, accessed 27 May 2021.

112 See eg, Australian Law Reform Commission (ALRC), *Privacy*, ALRC Report 22, 1983, at www.alrc.gov.au/report-22, accessed 27 May 2021; and ALRC, *Serious invasions of privacy in the digital era*, ALRC Report 123, 2014, at www.alrc.gov.au//publications/serious-invasions-privacy-digital-era-report-123, accessed 27 May 2021.

113 Office of the Privacy Commissioner, *The adequacy of protections for the privacy of Australians online*, Submission to the Senate Standing Committee on Environment, Communications and the Arts, August 2010.

114 ALRC, *For your information: Australian privacy law and practice*, ALRC Report 108 (Final Report), 2008, Pt 1, Ch 9, "Overview: impact of developing technology on privacy", at www.alrc.gov.au/publications/9.%20Overview%3A%20Impact%20of%20Developing%20Technology%20on%20Privacy/internet, accessed 27 May 2021.

115 For example, *Penna v Lanza* [2014] FCCA 278.

116 For example, *Hilton v Longhurst* [2013] FamCA 511.

117 *Graves v West* [2013] NSWSC 641 (service by LinkedIn).

that "many corporations now use [Facebook] Fan pages to promote their business".[118] Facebook use to promote business by music performers such as Lady Gaga (who had the most followers in the world at the time of writing) is a well-known example.

However, the NSW Court of Appeal decisively rejected the use of social media in *Flo Rida v Mothership Music Pty Ltd*.[119] Flo Rida, a singer, was paid $50,000 to sing at a concert but, minutes before he was due to perform, refused to do so. The promoter commenced proceedings against both Flo Rida and the Australian company representing him, and sought an order for substituted service by Facebook, as well as service by email on the Australian company (which continued to represent Flo Rida during his visit to Australia), as there was evidence his departure from Australia was imminent. Justice Macfarlan warned that anyone could set up a Facebook page in the name of Flo Rida, and service (including service on Flo Rida's co-defendant by email) and the default judgment were set aside. These statements suggest a lack of curial familiarity with the widespread commercial use of Facebook,[120] particularly by the music industry, and with the now universal use of emails by businesses generally.

The decision is also inconsistent with the increasingly common use of social media in the Family Court and more recently summonses, such as the use of USTREAM for service on a young girl publishing information about sporting figures.[121] (USTREAM was a program which enables its users to upload videos, not only to the USTREAM site, but to various sites including Facebook and Twitter, it is no longer available as a streaming option as of 1 August 2016).[122] Such orders are increasingly common in *Family Law Act 1975*(Cth) proceedings,[123] orders for corrective advertising,[124] notification of criminal proceedings and applications for injunctions. The likelihood is that this will continue, regardless of the Court of Appeal's disapproval.

Superinjunctions

The form of suppression order relevant to social media which has caused the most difficulty in the UK is the superinjunction — so called because even the fact that an injunction has been sought cannot be revealed. This was a popular method of media suppression where social media, especially Twitter or Facebook, was used to name persons contrary to court orders made to prevent sensational "red top" tabloid publications from publishing scandals (usually of a

118 *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34 at [16]. See also, "Facebook Marketing for Musicians 2021" at www.octiive.com/blog/facebook-marketing-for-musicians-2021, accessed 22 July 2021.

119 [2013] NSWCA 268.

120 See *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34.

121 P Millar and J Lynch, "Better get a lawyer: St Kilda schoolgirl warned to appear in court today", *Sydney Morning Herald* (online), 23 December 2010, at www.smh.com.au/afl/afl-news/better-get-a-lawyer-st-kilda-schoolgirl-warned-to-appear-in-court- today-20101222-195lw.html, accessed 6 January 2015.

122 See also P Tabibi, "Facebook notification — you've been served: why social media service of process may soon be a virtual reality" (2014) 7 *Phoenix Law Review* 37.

123 The Family Court Rules allow for substituted service (with court approval) of service via Facebook messenger, but not on someone's Facebook page/wall.

124 Such as occurred in the proceedings in *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34.

sexual nature). Some of these orders were made contra mundum. The Neuberger Committee[125] produced a comprehensive report on superinjunctions in the UK 10 years ago and the problem appears to have died down. There appears little likelihood that such problems will arise in Australia, although the practice of naming and shaming convicted pedophiles continues to be an issue.

Surveillance footage, procedural fairness and other issues

In *Frost v Kourouche*,[126] a review panel confronted an applicant with evidence that, according to her Twitter and Facebook accounts at least, she was a lot less injured than she had been asserting. Independently of the issues of procedural fairness raised in this case, social media is a fertile (and cheap) source of information about the daily activities of injured plaintiffs (see also *Munday v Court*,[127] where excerpts from the plaintiff's Facebook pages were tendered, to similar effect). The rules for showing surveillance film are straightforward, but would social media posts, such as photographs be caught by Pt 31, r 31.10 of the Uniform Civil Procedure Rules 2005 if they are the plaintiff's own entries?

Conclusions

While preparing this paper, I asked some of my colleagues if they used social media. One response was that judges should not use social media because its contents could be harmful to the standing of judges. Whether judges (as opposed to doctors, religious leaders or police officers) should refrain from use of social media is an issue best left to the guidance of the courts, but the exclusion of judges from, for example, academic discussions on law reform issues, runs the risk of judges being seen as out of touch with the community.

Another response was to the effect that there were many undesirable aspects of social media, such as the "trolling" attack on Charlotte Dawson. Social media certainly is open to misuse, but so is mainstream journalism, as evidence in the Leveson Inquiry[128] and subsequent criminal proceedings has made clear.

A further area for concern, whether judges participate in social media or not, is how social media will impact upon how judges do their work. While it would be fanciful to fear that judgments will feature a "like" button, or end up being as short as those seen on television series, the style and content of judgments (and headnotes) will undoubtedly change in the course of interaction with the public through the courts' Twitter sites.

However, it is relevant to note that judgment-writing style has changed profoundly over time, and no doubt this will be a continuing process. A mere 400 or 500 years ago, judges did not

125 "Report of the Neuberger Committee: thorough, thoughtful but not the last word", Inforrm's Blog, 22 May 2011, at http://inforrm.wordpress.com/2011/05/22/report-of-the-neuberger-committee-thorough-thoughtful-but-not-the-last-word/, accessed 27 May 2021.

126 (2014) 86 NSWLR 214.

127 (2013) 65 MVR 251.

128 See http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/, accessed 27 May 2021.

have to worry about writing judgments at all. They would argue the cases with the lawyers or, if there was a collegiate Bench, with each other, but did not necessarily hand down a formal judgment. Sometimes counsel would ask for an explanation; for example, barrister Edmund Plowden is recorded in *Sharington v Stratton*[129] as asking: "may it please you, my lord, for the sake of our learning, to show us the causes of your judgment?",[130] following which Catlyn CJ delivered short reasons. By the end of the 18th century, judgments were still being delivered orally; opinions of individual judges (as opposed to the facts) were often not recorded or only summarised. In fact, when the first steps were taken to have judgments recorded, some judges complained.[131] By the 1970s, when Lord Denning MR was revolutionising judicial style by referring to bluebell time in Kent,[132] the role of the judge in the common law system was increasingly expected to reflect current social values and ideas. The precepts of simplicity and clarity currently being imparted to judges by Professor James Raymond and his colleagues will no doubt come to have increasing relevance.

This brings me to the most difficult issue in this discussion paper, namely how to reconcile the preservation of judicial independence with the need to communicate effectively, including use of social media to do so. The public perception that judges are out of touch is in part reinforced by perceived judicial unfamiliarity with cyberlaw and social media generally. Each time the current (and limited) Skaf warning is delivered to a jury who may need more compelling reasons to turn off mobile devices they consult on a daily or hourly basis, or a judge has to determine whether a journalist can send tweets from the court, or courts express unfounded fears of social media, the public will be the judges of whether the legal system is keeping up with modern technology. The US Supreme Court's lack of familiarity with technological terms and absence from social media has already led to "bemused derision"[133] of these justices as "black-robed techno-fogeys"[134] and Luddites.[135]

Judicial education, law reform and changes to courtroom procedure to accommodate social media and electronic publication are issues with which the courts, and judges, must deal now.

129 (1564) 1 *Plowden* 298.
130 ibid at 309.
131 H Cockburn, *Memorials of his time*, TN Foulis, 1909, p 158. These early reports sometimes mixed judicial reasoning with opinions and the accuracy of the reports was uneven; see eg, *Wills' Trustees v Cairngorm Canoeing & Sailing School Ltd* 1976 SC (HL) 30, which notes reporting errors of this kind.
132 *Hinz v Berry* [1970] 2 QB 40 at 42.
133 L Hurley, "The Supreme Court is clueless when it comes to tech — and that's a problem", *Business Insider* (online), 9 May 2014, at www.businessinsider.com.au/r-in-us-when-high-tech-meets-high-court-high-jinks-ensue-2014-09, accessed 27 May 2021.
134 ibid.
135 ibid.

Hastening slowly: what the hare and the tortoise might teach the judiciary about social media*

Associate Professor J Johnston† and Professor A Wallace‡

The authors suggest two strategies for judicial officers and the courts to engage with the opportunities social media present to promote public trust and confidence in the justice system. They recommend that courts strategically adopt social media and foster its institutional use in a measured way, and that judicial officers be supported to develop digital media literacies to assist them in their work.

Introduction

Where social media is concerned — especially as it applies to judicial officers and the courts — Aesop's "slow and steady" cautionary approach is best. This old fable provides sage advice for this media phenomenon. "Hastening slowly"[1] in the uptake of social media calls for a combination of digital media literacy, including an understanding of its fragmented and complex

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1 Many interpretations and critiques of the fable use the oxymoron "hastening slowly" to describe the pace adopted by the tortoise to achieve the desired outcome, ie to move slowly to win the race. We apply this to the need for a strategic and measured engagement in the often frenetic uptake of social media.

parts, and a strategic approach to its use. For judicial officers navigating this space, social media also presents a unique range of professional, cultural and political challenges. As the Honourable Justice Steven Rares of the Federal Court noted:[2]

> in evolving to adapt to the new communication norms of our age, judges will need to develop careful insights and behaviours to protect not only themselves and their family's safety, but also the integrity of their office and the court.

There is nothing simple about social media. While the tapping out of a few words and posting, sharing or liking might seem like child's play — and often is — this unpredictable field of communication networks is permeated with risks and complexities. A central paradox exists within social media's two key elements of youth and power. On the one hand, in 2018, Facebook is only 14 years old, YouTube 13, Twitter 12, Instagram 8 and Snapchat 6. Yet, they hold monumental power that seems out of step with their youth, with social media collectively positioned at the epicentre of the media and communications environment in which we live, learn, work and connect.[3]

Social media presents a range of possible scenarios that may intersect with judicial life. These include judicial personal use; courts' institutional use; others' use to report or comment on the work of the courts, including its use to make personal commentary or attacks on judges; and its use to post material that could potentially prejudice the outcome of a criminal trial. This article deals with the first two scenarios and associated issues: those generated from the courts' and judicial officers' use or potential use of social media.

Getting on board

Social media usage is ubiquitous and pervasive.[4] Nearly 80% of Australian adults who access the internet use it in some form. Usage is almost universal among 18–29 year olds (99%), with 96% of those aged 30–39 and 86% of those aged 40–49 also using it.[5] In business, figures are less dramatic; just under 50% of small to medium companies, and 60% of large companies, use social media.[6] A recent report captures the urgency with which business is being pressured to get on board the social media juggernaut:[7]

> The longer a company waits to begin the transformation to social media, the harder it is to catch up.

2 S Rares, "Social Media — challenges for lawyers and the courts", speech delivered to the Australian Young Lawyers Conference, 20 Oct 2017 at [26], at www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171020, accessed 2 June 2021.

3 J Johnston and K Rowney, *Media strategies: managing content, platforms and relationships*, Allen & Unwin, Sydney 2018.

4 Among the most popular forms of social media are Facebook, Twitter, Snapchat and YouTube.

5 Sensis Social Media Report 2017, "Chapter 1 — Australians and social media", 2017, at www.sensis.com.au/asset/PDFdirectory/Sensis-Social-Media-Report-2017.pdf, accessed 2 June 2021.

6 Sensis Social Media Report 2017, ibid, "Chapter 2 — Australian businesses and social media".

7 M Fidelman, "The rise of enterprise social networks", 2013, p 2 at www.sharepointeurope.com/media/200905/the-rise-of-enterprise-social.pdf, accessed 2 June 2021.

At a personal, rather than an institutional level, judicial officers are subject to the same factors that have resulted in increasing numbers of Australians making use of various forms of social media. As Rares J points out:[8]

> Australian judicial officers ... can choose to post, tweet, connect or, indeed, share a photo of their Sunday brunch or family occasion, in their private capacities. Often they will have social media accounts to connect with family and friends. The judicial role, like other traditional roles in our society, cannot stay static.

In 2014, the former Chief Justice of Victoria, the Honourable Marilyn Warren AC, warned that the judiciary should not be "left behind and trapped in [its] own traditions",[9] noting the potential for court use of social media to enhance community engagement.[10] She pointed out that social media's capacity to enable public access to court proceedings, and the contribution this can bring to enhancing public trust and confidence in the work of the courts, are central to the relationship that a court has with any form of media.[11] This demanded a strategic approach. Chief Justice Warren called for "constructive strategies" to deal with the changed media environment and how it aligns with open justice.[12]

This article takes up this challenge, proposing an informed, strategic and "slow and steady" approach to the often frenetic world of social media, led by two key strategies: first, the use of institutionalised social media supported by professional qualified staff; and second, support of the judiciary to achieve digital media competencies in order to confidently manage the complex world of social media.

Social media use: institutional v individual

We know that increasingly members of the executive and legislature are taking to social media as a primary means of communication with the public. World leaders are famous, or notorious, for its use in activity that is described as "mediatisation" or "processes whereby the logic and institutionalised norms of the media affect the behaviour of actors and institutions belonging to other societal subsystems".[13] As political science scholar Kent Asp notes:[14]

> political actors have, to a great extent, adapted to the requirements which the mass media place on their coverage of the political world.

It is argued that politicians cannot risk ignoring the media and its operating logics because mediatised language and thinking becomes part of the accepted way for how politicians engage with the voting public.[15]

8 Rares, above n 2 at [26].
9 M Warren, "Open justice in the technological age" (2014) 40(1) *Monash Law Review* 45 at 58.
10 ibid at 45.
11 ibid at 46–47.
12 ibid at 56.
13 B Laursen and C Valetini, "Mediatization and government communication: press work in the European Parliament" (2015) 20(1) *The International Journal of Press/Politics* 26 at 28.
14 K Asp, *Mäktiga massmedier. Studier i Politisk Opinionsbildning [Powerful media. Studies in Political Advocacy]*, Akademilitteratur, 1986, p 380.
15 F Esser and J Strömbäck (eds), *Mediatization of politics: understanding the transformation of western democracies*, Palgrave Macmillan, Basingstoke, 2014, pp 3–28.

The same imperative might be seen to apply in some courts' jurisdictions, for example in US State Courts where elected judges rely on the popular vote. There are examples of US judges with active social media profiles who, while not commenting on specific cases, sometimes appear to blur the boundaries between the personal and the professional, for example, by commenting (albeit obliquely) on political issues or, from an educational perspective, in relation to legal issues.[16]

Blackham and Williams note how US courts have a more external focus than courts in the UK or Australia, a position that is encouraged by the public election of judicial officers. In comparing the use of social media by judges across these three countries, Blackham and Williams observed that courts in jurisdictions where judges do not face the same pressures in relation to re-election have tended to take a collective, rather than an individual, approach to communication. They suggest:[17]

> in the UK and Australia, where judges are appointed and have security of tenure, judges and courts have traditionally focused their communications towards internal or legal audiences and building a collective public reputation. In contrast, in the US system of judicial elections, judges may seek to build their individual public reputation (and electability) instead of, or at the expense of, the judiciary's collective reputation, making court communication more outward-facing.

Social media use by the judiciary, in Australia and internationally, has attracted a good deal of attention from legal scholars and the judiciary itself, including the publication of a 2016 issues paper for the Australasian Institute of Judicial Administration (AIJA).[18] While some analysis has merged personal (in the sense of private) judicial use of social media with that of the institutional use by courts, in our view, it is important to separate them. We suggest that they should be considered as two distinct approaches, that is: courts' use of social media at the institutional level, generally undertaken by communication professionals or court Public Information Officers (PIOs); and judges adopting social media for their own personal use.

At an institutional level, Australian courts have moved to adopt social media at a slow and measured pace. Twitter — arguably the most popular court social media platform — was first used in the Supreme Court of Victoria in 2011, followed by the Family Court of Australia.[19]

16 See, for example, the Twitter account of Justice Don Willett of the Texas Supreme Court who Tweets @JusticeWillett; or Chief Judge Dillard, Chief Judge of the Atlanta Appeals Court at @judgedillard, both of whom have sizeable Twitter followings; A Blackham and G Williams, "Social media and court communication" [2015] 3 *Public Law* 403, report that 81 US judges openly acknowledged their judicial affiliation on their social media accounts; 52 on Twitter and 31 on Facebook (and two on both). They also found many judges used their judicial title in their social media user name or Twitter handle (eg @JudgeToddRoss and @JudgeDillard).

17 Blackham and Williams, ibid, at 404–5.

18 M Bromberg-Krawitz,"Challenges of social media for courts & tribunals", May 2016, at https://aija.org.au/wp-content/uploads/2017/07/Krawitz.pdf, accessed 2 June 2021. See also M Krawitz, "Can Australian judges keep their 'friends' close and their ethical obligations closer? An analysis of the issues regarding Australian judges' use of social media" (2013) 23 *JJA* 14; B McLachlin, "The relationship between the courts and the news media" in P Keyzer, J Johnston and M Pearson (eds), *The courts and the media: challenges in the era of digital and social media*, Halstead Press, 2012, p 24; J Gibson, "Judges, cyberspace and social media" (2015) 12 *TJR* 237; Blackham and Wiliams, above n 16; Warren, above n 9.

19 J Johnston, "Courts use of social media: a community of practice model" (2017) 11 *International Journal of Communication* 669 at 674.

Shortly after this, an AIJA conference for public information officers in Brisbane during February 2012, featuring the theme "Social Media and Courts", saw the beginning of a "real migration to social networks" by the courts.[20] An earlier review of those developments observed that courts had both "sought out visibility and had visibility imposed on them ... first via the Web 1.0 (predominantly websites) ... and more recently, by Web 2.0 (predominantly social media)".[21]

Compared to other institutions, such as the police, the courts were relatively cautious in adopting social media. A comparative study of Australian courts and police services found that the more tentative approach, and the limited nature of courts' use of social media, may have been attributed to:

- a focus on "information-out" communication with an emphasis on access and accuracy
- a historically late entry into institutional communication
- limited resourcing
- legal limitations to using social media
- socio-cultural restrictions, including language, professional cultures, and internal understandings of the job.[22]

These factors are inter-related. Courts generally, as institutions, have not had a focus on external communication, and have only relatively recently appointed communication professionals to assist them in engaging with the media or the public.[23] Historically, external court communication had focussed on the issuing of the court's decision or judgment, its accuracy, and ensuring its accessibility. The court environment has also historically privileged the use of formal language, and a professional culture focussed on individual cases, rather than institutional performance, which were also contributing factors to a slow uptake of social media. The courts' cautious adoption of social media has also been attributed to the very different environments of media and courts. A report by the US Conference of Court Public Information Officers (CCPIO) found that:

- new media are decentralised and multidirectional, while the courts are institutional and largely uni-directional
- new media are personal and intimate, while the courts are separate, even cloistered, and independent

20 J Johnston, "A history of public information officers in Australian courts: 25 years of assisting public perceptions and understanding of the administration of justice (1993-2018)", *AIJA*, 41 at https://aija.org.au/wp-content/uploads/2019/04/Johnston-History-of-Public-Information-Officers-in-Australian-Courts-April-2019-Final.pdf, accessed 2 June 2021.

21 J Johnston, "Courts' new visibility 2.0" in Keyzer, Johnston, Pearson, above n 18, p 41.

22 J Johnston and A McGovern, "Communicating justice: a comparison of courts and police use of contemporary media" (2013) 7 *International Journal of Communication*, at http://ijoc.org/index.php/ijoc/article/view/2029, accessed 2 June 2021.

23 Johnston, above n 20.

- new media are multimedia, incorporating video and still images, audio and text, while the courts are highly textual.[24]

Nevertheless, there has been a shift in recent years with many Australian and US courts incorporating social media into their overall communication strategies.[25] In a 2017 study of 16 public information officers (PIOs) from within Australian courts and statutory bodies about their use of social media, almost all reported using social media of some sort in the course of their work, in addition to an organisational website.[26] The spread of social media outlets they used is outlined in the following table:

Media channels	Number reported
Website	14
Twitter	12
A/V streaming	7
Facebook	6
YouTube	4
LinkedIn	2
Pinterest	1
Vimeo	1

Response to question: *"Of the following, what court controlled media channels do you use in the regular course of your work? Please circle or highlight – Website, video/audio streaming, Twitter, Facebook, YouTube, Pinterest, other"*

Why are courts turning to social media? One scholar notes how the internet, and its social media functions, provide courts with the means of "delivering a fuller and truer picture of their work to the public than the traditional media provide".[27] Research has found that courts use social media for various purposes, including to support the news media in their coverage of cases, to counter inaccuracies in media coverage, and to reach a broader audience-base.[28]

A study of Victorian courts' uptake of social media found that social media significantly expanded the reach of the courts' communication, with one high-profile trial, for example,

24 Conference of Court Public Information Officers, "New media and the courts: the current status and a look at the future", 2010, p 8, at http://ccpio.org/wp-content/uploads/2012/02/2010-ccpio-report-summary.pdf, accessed 2 June 2021.

25 Johnston, above n 19; see also CJ Davey et al, "CCPIO new media survey: a report of the conference of court public information officers", paper presented at the Conference of Court Public Information Officers 23rd annual meeting, Las Vegas, Nevada, 2014, at http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report_2014.pdf, accessed 2 June 2021.

26 Unpublished research undertaken by J Johnston with PIOs across 16 courts, statutory authorities and government departments in Australia, August 2017. In the study, 11 PIOs were employed by courts, three by a statutory authority or other legal body, and two by the government.

27 S Rodrick, "Achieving the aims of open justice? The relationship between the courts, the media and the public" (2014) 19 *Deakin Law Review* 123 at 162.

28 Johnston, above n 21.

resulting in a court Twitter account picking up 500 followers in one week.[29] On a broader level, other social media accounts have been linked to AustLII in order to provide access to a wide range of legal literature and court decisions.[30]

One PIO who was an early adopter of social media stressed that the shift to social media was a necessary progression in professional communication practice:[31]

> Social media is not as scary as people have you believe, it is no different to talking on the telephone or to answering an email, in terms of work responsibilities; it is just another medium.

This highlights the ease with which professional communicators are able to adapt to social media use.

Indeed, the development, over several decades, of the role of court PIOs[32] has been a key factor in Australian courts increasingly adopting social media strategies. The use of communication professionals, trained and increasingly expert in the digital literacies associated with social media, who carry out their role within clearly understood parameters as part of court strategic communication plans, has provided a way to manage the appropriate institutional use of social media. It is noted that not all courts use social media — the reasons for this are varied, often relating to resourcing and the requirement for social media to be constantly monitored. Nevertheless, there is a trend in this direction for courts. Drawing on these observations, we propose the first strategy for social media use is to **foster and advance the institutional use of social media, managed by communication and media professionals**.

We do not suggest that personal use of social media does not have a place. Rather, this first strategy is proposed to advance transparency and reach of court practices. Where judges choose to use social media for private or personal use, new guidelines provide some assistance which we now explore.

Ethical guidelines for personal judicial use of social media

The rapidity with which social media has permeated the judicial world can be illustrated by the fact that, as recently as five years ago, a study of judicial conduct guidelines in Australia, Canada and the UK found little to no mention of social media.[33] Things moved a little more rapidly in the US where, in 2010, the Judicial Conference of the United States issued guidance to assist courts in developing ethical guidelines for judges on the use of social media.[34] The US federal judiciary and many US State courts have since published such guidance,[35] as have the UK courts and tribunals.[36]

29 Johnston, above n 21; Bromberg-Krawitz, above n 18.
30 ibid.
31 ibid, p 676.
32 Johnston, above n 20.
33 Bromberg-Krawitz, above n 18.
34 Committee on Codes of Conduct, Judicial Conference of the United States, *Resource packet for developing guidelines on the use of social media by judicial employees*, 2010, at www.uscourts.gov/sites/default/files/socialmedialayout_0.pdf, accessed 2 June 2021.

In Australia, the 3rd edition of the *Guide to judicial conduct*,[37] introduced a chapter on social media. This provides the judiciary with guidance on personal social media use. The guidelines point out that there is no reason in principle to deny judges the use of social media but that the risks should be heeded and:[38]

> The only safe course is to assume that material which the judge creates or receives, or with which the judge comes in contact, may become public without the judge knowing, and contrary to the judge's wishes.

The general tenor of all this advice to judicial officers might be summarised as follows:

- the principles applying to judicial conduct apply whatever the communication medium or context in which it takes place
- choose your social media friends carefully
- pay close attention to privacy settings and keep these regularly updated
- consider what you access as well as what you post on social media
- be aware that the ubiquity of mobile devices means that cameras and recorders are everywhere (you're never not in public), and
- family members of judicial officers should also be mindful of the potential impact of their social media use on the judicial role and on their and the judicial officers' security and privacy.

These guidelines are drawn in fairly broad terms, as are most ethical guidelines for the judiciary. This is necessary because it is generally impossible to foresee the detail of every type of issue or situation that may give rise to an ethical consideration.

This is likely to be even more the case in the rapidly evolving world of social media, where new platforms, tools and modes of use are constantly being developed. Many in the judiciary, in common with many in the community, are relatively new to the world of personal social media use, so that consideration of how to apply these principles is also likely to be an ongoing task.

As with other forms of public communication, judicial officers who choose to use social media need to exercise caution to ensure that they do not compromise their independence or lay themselves open to risks to their personal safety. There are also factors about social media that raise issues for personal privacy that go beyond the content of what is posted and may have additional implications for judicial officers. This includes how social media algorithms

35 United States Courts, Published Advisory Opinions, Guide to judiciary policy, committee on codes of conduct advisory opinion, No 112: Use of electronic social media by judges and judicial employees, pp 221–224, at www.uscourts.gov/sites/default/files/vol02b-ch02.pdf, accessed 2 June 2021; National Center for State Courts, "Social media and the courts — State Links", at www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media, accessed 2 June 2021.

36 UK Courts and Tribunals Judiciary, *Guide to judicial conduct*, March 2018, at www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf, accessed 2 June 2021, pp 20–21.

37 The Council of Chief Justices of Australia, AIJA, *Guide to judicial conduct*, 3rd edn (rev), 2022, Ch 9 "social media".

38 ibid, pp 43–44.

enable the online activity of the individual to be tracked; for behaviours to be monitored; and for personal preferences in everything from food to wine to news to be predicted.[39] While the surveillance features of social media have recently come under the spotlight since the so-called "Facebook data scandal" or "Cambridge Analytica" data breach in 2018, experts have pointed out that data sharing by social media platforms has been going on for years, readily enabled by the standard "terms and conditions" that users consent to.[40] It is likely that the issue of privacy and surveillance will become a more central concern as the impact and ramifications of social media use, and its impacts on society, become better understood. In keeping with this, we suggest that there is a need for a stronger understanding of the field of digital media literacy.

Digital media literacy

The Australian Communication and Media Authority (ACMA) sees digital media literacy as one of the key competencies of the 21st century, on the basis that the effective use of media and communication content and platforms is central to citizen and consumer participation in society.[41] To be media literate in the digital age, individuals need to be able to:

- **Access**: Find and use media and technology tools skillfully
- **Analyse/evaluate**: Comprehend information and use critical thinking to analyse message quality, veracity, etc
- **Create**: Compose or generate content
- **Reflect**: Apply social responsibility and ethical principles to one's own identity and lived experience, communication behaviour and conduct
- **Act**: Work individually and collaboratively to share knowledge and solve problems.[42]

ACMA identifies two key pathways in digital media literacy: first, an educational approach which prioritises the importance of critical interpretive skills needed to decipher media content and messages; second, a regulatory approach that focusses on technical competencies needed to be effective across a range of communication platforms. The first requires the ability to critically analyse and understand language and textual content, as well as media power; the other requires the know-how and skill-set to create and publish.

For those working in roles in society in which media needs to be interpreted and understood, especially where it is challenged or in question, critical literacy is becoming increasingly important. Judicial officers are increasingly likely to find themselves in this category. To take

39 For example, see W Oremus, "Who controls your Facebook feed?" (2016) *Slate*, at www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html, accessed 2 June 2021.

40 J Winston, "The Facebook data breach is a scandal of our own making," 3 April 2018, THINK, nbcnews.com. at www.nbcnews.com/think/opinion/facebook-data-breach-scandal-our-ownmaking-legally-there-s-ncna862211, accessed 2 June 2021; see also Johnston, above n 3.

41 Australian Communication & Media Authority (ACMA), *Digital media literacy in Australia: key indicators and research sources*, 2009.

42 R Hobbs, *Digital and media literacy: a plan of action*, The Aspen Institute, 2010, p 19; see also ACMA, ibid.

one recent example, the inquiry by the NSW Law Reform Commission into access to digital assets upon death or incapacity[43] is likely to result in legislation that will require judicial application, and interpretation in relation to digital assets. Supporting judges to achieve levels of critical literacy skills in relation to social media will require the ongoing provision of information and resources, and opportunities to acquire learning skills and share experience via judicial professional development programs. This points to the importance of our second strategy to **foster and develop critical digital media literacies for the judiciary through adequate resourcing, training and advisories**.

We live in what has been called a "media life", in which media is described as both necessary and unavoidable.[44] Therefore, at a minimum, this second strategy proposes the need to keep guidelines updated and readily available and to provide regular professional development opportunities in social media for judicial officers. Implicit within this strategy is the need for caution in contributing to any social media engagement. At the same time, professional life increasingly demands we understand the digital media world.

Conclusion

We suggest that, in the Australian context, the social media voice of the court may be best managed at the institutional level through its collective voice. To achieve this, the professional communication function will increasingly demand appropriate resourcing and the courts also need to have appropriate internal policies and practices to ensure this enhances the open justice function of the courts. In addition, there is also the need to appropriately resource and support judges to be digitally media literate, as consumers and analysts but also potentially as producers of social media. This requires professional training and development — to understand and apply the critical media literacies that ACMA has identified across any and all professional and personal social media use. It will also require the ongoing review and updating of ethical guidelines.

In summary, the ubiquity of social media, its capacity for disrupting society and its relevance for 21st century open justice means that it cannot be ignored, either at an institutional or individual level. However, the strategic approach for courts is not to rush in headlong, or feel pressured to mediatise, but to take a measured approach with a focus on trained court communication professionals, judicial professional development and shared experience. The idea of "hastening slowly" should take on a special meaning for the judiciary in the social media environment, with its parallel demands of caution and communication in the modern open justice arena.

43 NSWLRC, "Access to digital assets upon death or incapacity: Terms of reference", 26 March 2018, at www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Digital assets/Project-update.aspx, accessed 2 June 2021.

44 M Deuze, *Media life*, Polity Press, Cambridge, 2012.

Speaking the right media language*

The Honourable Justice S Rares†

Justice Rares discusses issues arising from the prevalence of social media, including how should courts and tribunals deal with social media issues that arise from media and parties using social media in and around hearings, and, how should judicial officers and tribunal members deal with social media issues in their personal lives, especially when those interact with their official roles.

Australian judges, at least, in their day jobs, are not generally known for either their expertise or engagement with social media, or popular culture. Of course, this generalisation does not apply to the Honouable Michael Kirby AC, or the moonlighting novelist, the Honourable Ian Callinan AC or the many serving and retired judges who conduct Royal Commissions. Indeed, Australian judges, and I dare say tribunal members, appear much more shy than some of their counterparts overseas. It is hard to imagine the justices of the High Court appearing as judges on Masterchef, as Baroness Hale, the President of the Supreme Court of the United Kingdom, did in April 2018.[1] Even so, things have moved on since 2012 when her predecessor, then Master of the Rolls, Lord Neuberger, criticised the two Supreme Court justices and three Lords Justices of Appeal who had participated in judging on an episode of the show what members of the bench and bar cooked.

Generally, as I will explain later, Australian judges have trodden warily in social and mass media spaces. Few of us are well known figures, in contrast to some of our counterparts in the United States of America.

You may be aware that this year, two biopics, "RBG" and "On the Basis of Sex", have been released about the life of the well-known liberal United States Supreme Court Justice, Ruth

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† A judge of the Federal Court of Australia and an additional judge of the Supreme Court of the ACT and the Supreme Court of Norfolk Island. The author acknowledges the assistance of his associate, Ryan Hunter, in the preparation of this paper.

1 F Gibb, "Baroness Hale to lay down the law on MasterChef", *The Times*, 30 March 2018 at www.thetimes.co.uk/article/baroness-hale-to-lay-down-the-law-on-masterchef-df3pbtfz7, accessed 3 June 2021.

Bader Ginsburg. She was appointed by President Bill Clinton in 1993, and since then her Honor has developed a large online presence on social media. Never a shrinking violet, in July 2016, Justice Ginsburg entered the Presidential election campaign in an interview with a CNN journalist (Joan Biskupic) who was researching a book on Chief Justice John Roberts. RBG, as she is known, described then Republican challenger to Hillary Clinton, Donald Trump, as:[2]

> a faker. He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego…

On 13 July 2016, those remarks got her into their subject's favourite social media platform, Twitter, as follows:

As the copy paste of that tweet shows, within hours of its release over 30,000 people had indicated that they liked Mr Trump's response. That figure belies how many others read it, to say nothing of any who disliked it. The account's controller is not known to disseminate views of his opponents — what they might have had to say would be just dismissed as "fake news".

Apparently younger people appear almost as frantic as the "Tweeter-in-Chief" to share quotes, images, and "memes" of Justice Ginsburg online. She has been called a "Social Media Darling", and is easily one of the most recognisable judges in America, especially among those members of the public who do not work in the legal sector.[3]

The character people ascribe to Justice Ginsburg on social media may not necessarily accord with reality, but that does not stop that character being shared and discussed by millions. One popular meme refers to her Honor as the "Notorious RBG", being what my associate informs me is a pun on someone known as the late American rapper "Notorious BIG". Video clips online feature actor Kate McKinnon, from "Saturday Night Live", portraying the real life judge dropping "Gins-burns". The clips are shared by fans after Justice Ginsberg's significant opinions are published. In one of the recent films, she appears lifting weights and wearing a "Super Diva" sweat-shirt. Her Honor is reputed to have t-shirts made, or sent to her, that reference current popular memes, which she gives out to friends.

2 J Biskupic, "Justice Ruth Bader Ginsburg calls Trump a 'faker', he says she should resign", CNN, 13 July 2016 at https://edition.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html, accessed 3 June 2021.

3 D Scarinci, "Justice Ginsburg is social media darling", *Observer*, 2 July 2015 at https://observer.com/2015/07/justice-ginsburg-is-social-media-darling/, accessed 3 June 2021.

The 86-year old might seem to Australian eyes an unlikely judicial lightning rod for the social media generation. The online fascination with her perhaps exemplifies the unusual nature of social media and raises some of the issues which can arise from publications in the cyber world. Indeed, Mr Trump's robust tweet above is a vivid illustration of what social media interactions can involve or unleash.

Of course, there is nothing new in publishers having to face up to the consequences from their expressing themselves publicly. The law of defamation knows no cyber boundaries. In November 1904, the sadly now defunct satirical magazine *Punch* published a book review that began as follows:[4]

> MANGLED REMAINS
>
> Extract from the Recess Diary of Toby, MP.
>
> Been reading 'Fifty Years of Fleet Street' just issued by Macmillan. Purports to be the 'Life and Recollections of Sir John Robinson', the man who made, and for a quarter of a century maintained at high level, the *Daily News*. The story is written by Mr F M Thomas, who has added a new terror to death.

It might be said that social media has added a new terror to life. The social commentator, Bernard Salt, recently wrote that he suspected that the real audience for social media invective is not the cited target. Rather, he thought that the invective's real purpose was to secure the support of persons who followed its author.[5]

In today's age, courts and tribunals must accept and adapt to the reality that social media is now an established societal institution. That means that, whether or not a judicial or statutory tribunal officer uses social media themselves, his or her public, and sometimes personal work, actions, images and words, will appear there. How then, can they learn to speak the right social media language?

The environment in which courts and tribunals work involves parties who appear before us using social media to help, promote, or, on occasion, unwittingly, hinder their causes, or to explain why something did not turn out as well for them as their earlier online predictions had presaged. Frequently now, media and members of the public comment in real time on proceedings regardless of whether the communicator has any personal knowledge of what is going on. Perhaps this is not new but it is now more pervasive and accessible than in days past. Sometimes, in cyber space exchanges, knowledge of what one is talking about can be a hindrance or dismissed as an "alternative fact". Ignorance may be bliss, but online but may be highly infectious.

Over the last 15 years, many of the present cohort of judicial officers and tribunal members have had one or more social media presences of their own, such as on Facebook, WeChat and Twitter, including from a time before their appointment. Many have retained those accounts, and some have initiated a social media presence since their appointment, as they are entitled to do. However, there are dangers to this activity.

4 *Thomas v Bradbury, Agnew & Co Ltd* [1906] 2 KB 627 at 628.
5 B Salt, "Online warriors bum me out", *The Weekend Australian Magazine*, 3 August 2019.

In this paper, I want to discuss some increasingly common issues arising from the prevalence in our lives of social media. These include how should courts and tribunals deal with social media issues that arise from media and parties using social media in and around hearings themselves, and, how should judicial officers and tribunal members deal with social media issues in their personal lives, especially when those interact with their official roles.

Background

The expression "social media" refers to communication involving a kind of social interaction by technological means. It includes website and mobile phone applications that allow people to communicate or express thoughts or images unilaterally or interactively with the world at large. An interaction or communication on social media is generally instant, can be wide reaching, and will often be one-sided, in that its author does not call for, or rely on, a response. When a response does come, it may be a reaction rather than a direct response. Someone viewing such a communication might acknowledge his or her support, approval or disavowal of the sentiments that the original poster made available to the world at large by using a "like", "share" or "dislike" icon on the social media. I am reliably informed that, perhaps in order to avoid directness, the "dislike" icon is more generally an "angry" or a "sad" face icon.

The most popular social media platforms today are Facebook, Youtube, Instagram, WhatsApp, Snapchat, WeChat and Twitter. They each are open to anyone to join, and reach slightly different (though potentially overlapping) audiences. On Facebook and Instagram, users (at least individuals, as opposed to corporations that also use the platforms) generally post content that they wish to be broadly available to their "friends". Many of those persons are people who have connected with the instigator of the communication because their only awareness or connection with him or her is through the platform. Others either know the instigator or genuinely are interested to learn what he or she has to say and share. Youtube and Twitter generally make videos and posts available to the public at large. The public can view a video or post, share it among their own network of contacts, or comment on it, including (if the instigator has allowed this) to engage in a discussion with that instigator and or other users of the platform at large. On WhatsApp, WeChat and Snapchat, material is generally shared one-on-one or within small groups of users.

Despite the different reaches of each of these social media platforms, and the many others that exist for different niches, there remain risks and issues for judicial officers and tribunal members in trying or failing to "speak the language" of social media effectively.

Risks and issues arise because, it is fair to say, the use of social media in today's society is pervasive. In 2019, one source has precisely identified that there are 3.48 billion "social media users", who, if all were individuals, make up about 80% of all internet users, and almost 50% of the global population.[6] I am not one of them. In Australia, as at January 2019, of a population

6 S Kemp, "Digital 2019: Global internet use accelerates", We Are Social, 30 January 2019 at https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates, accessed 3 June 2021.

of about 25 million, there are 15 million Facebook accounts, 9 million Instagram accounts and 4.7 million Twitter accounts.[7] Of course, not all of these accounts belong to individuals since communication on social media platforms is nowadays almost an essential feature of businesses of all sizes, from multinational corporations to one's local café, to say nothing of their use by other organisations such as political parties, at least when they do so overtly. Another source asserts that 15 million Australians visit YouTube each month, and 2.9 million use WeChat, a China-based social-media-cum-messaging platform.[8]

Depending on the platform, social media can afford each of those users a potentially vast audience. And the immediate audience can grow exponentially as posts are shared by other users. A private post that the author intended to be made only to his or her platform friends, can be reposted, retweeted or sent so that, eventually, it might be read by millions. This can occur without the help, and even against the wishes of the person who made the original post. Once shared beyond an individual's private network, a post generally can never be recalled. Even those shared privately and kept private may evade deletion. As every employer now knows, the best way to find out about an actual or potential employee is to search for them on social media.

This matters for courts and tribunals for main three reasons. First, a judicial officer's or tribunal member's use of social media can give rise to an apprehension of bias because of what he or she puts online about himself or herself.

Second, it may be difficult, especially for less digitally adept judicial or tribunal officers to control who can have access to one's social media account and who can republish a post that the judge or member has made. Your online friends may be very fairweather ones, or even wolves in sheep's clothing. For example, a person who has 200 online "friends", each of whom has his or her own 100 additional unique online friends, would be within the reach of 20,000 people when sharing a post. In social media terms, terrifyingly, that extended circle of one's not very intimate "friends" is possibly a modest collective. There is obviously a risk that potentially a litigant, or his, her or its counsel or lawyers, will be among that audience and may perceive something in what they see online that could cause a problem for the judge or member hearing their matter.

Third, information about what is happening in a court or tribunal room in Melbourne or Sydney, Ballarat or Goulburn, can have a global reach in an instant. In high profile cases, it is increasingly difficult in open court to control the accidental disclosure, via social media, of confidential information or, in a jury trial, the subject-matter of a hearing in the absence of the jury, involving matters that may prejudice the proper conduct of the trial. This has become the more concerning with the demise of trained court reporters for traditional mass media outlets who understood what could and could not be reported, unlike a casual blogger sitting in a hearing who constantly is updating his or her blog with the latest utterances.

7 D Cowling, "Social Media Statistics Australia — December 2018", SocialMediaNews, 1 January 2019 at www.socialmedianews.com.au/social-media-statistics-australia-december-2018/, accessed 3 June 2021. [**Note**: in May 2021, there were 17 million Australians using FaceBook each month; 9 million Instagram accounts and 5.8 million Twitter accounts.]

8 Cowling, ibid. [**Note**: in May 2021, 16.5 million Australians watch YouTube each month, and 2.9 million use WeChat.]

Part I: Apprehension of bias

In many aspects of daily life, there is a real danger that a judicial officer or tribunal member may create a situation where a party before him or her can raise a claim that the judge or member is actually or apparently biased. Often, social media engagements, for example those limited to 140 (or, now, 280) characters leave little room for subtlety or refinement. And once posted, a tweet or Facebook comment can be as indelible as the printed word. But, social media posts can be disseminated very widely and out of any context. Sometimes, in every-day interactions, such as personal face-to-face communications, we say things that are unguarded or casual without necessarily meaning them or thinking through their implications, which, on reflection, we did not really believe or we come to realise were wrong or just silly. Often, someone in conversation points this out and everyone forgets about it straight away. Not so with a post.

An administrative decision-maker will be found to have given rise to an apprehension of bias if a fair-minded lay person might think that the decision-maker might not bring a fair and impartial mind to the making of the decision. The hypothetical lay person is an objective observer of the proceedings and will be assumed to be properly informed as to their nature, the matters in issue and the conduct complained of.[9]

The mere fact that a decision-maker has previously expressed a view on the same or a similar subject does not, of itself, give rise to an apprehension that he or she will not bring a fair and impartial mind to the new decision to be made.[10] After all, decision-makers can be expected to apply the law and relevant policies in a consistent and predictable way. Likewise, decision-makers in the position of a tribunal member or administrative official frequently will have to decide the same issues raised by different persons in separate applications including when a number of persons make generic claims. A decision-maker must have a fair and unprejudiced mind when he or she comes to decide a question including one concerning a generic claim that he or she has addressed on another occasion. However, that does not mean that he or she must have a blank or empty mind on the topic. As Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ said in *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex p Angliss Group*:[11]

> Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.

9 *Re Refugee Review Tribunal; Ex p H* [2001] HCA 28 at [28]–[29] per Gleeson CJ, Gaudron and Gummow JJ; *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 *ALR* 264 at [14]–[21] per Allsop J, with whom Moore and Tamberlin JJ agreed. (In the following discussion I have drawn heavily on what Jagot J and I wrote in *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223 at [37]–[45].

10 See, for example, in relation to judges: *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 352 per Mason J.

11 (1969) 122 CLR 546 at 554.

And, in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[12] Gleeson CJ and Gummow J said:

> The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

Chief Justice Gleeson and Gummow J recognised, in agreeing with the reasons of Hayne J, that the concept of apprehended bias, as an aspect of procedural fairness, has to accommodate, and may vary in, different decision-making environments.[13] Justice Hayne explained that the genesis of rules about the concept of judicial prejudgment is different from that of prejudgment in administrative contexts and that a range of considerations and differing consequences will arise depending on the source and context of the executive power being exercised.[14] His Honour recognised that specialised tribunals, such as the Refugee Review Tribunal, now the Administrative Appeals Tribunal, would "bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications".[15] He said that such a decision-maker was expected to build up "expertise" in matters such as country information, saying:[16]

> Often information of that kind is critical in deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudgment.

Justice Hayne elaborated by explaining that at least four distinct elements require consideration in examining an assertion that a decision-maker has prejudged or will prejudge, or that there is a real likelihood that a reasonable observer might reach such a conclusion. He said that the assertion of apprehended bias contains contentions that, first, the decision-maker has an opinion on a relevant aspect of a matter in issue in the particular case, second, he or she will apply that opinion to the matter in the case and, third, he or she:[17]

> will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. **Most importantly, [fourthly] there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.**
>
> Often enough, allegations of actual bias through prejudgment have been held to fail at the third of the steps I have identified. In 1894, it was said that:[18]
>
>> "preconceived opinions — though it is unfortunate that a judge should have any — do not constitute such a bias, nor even the expression of such opinions, *for it does not follow that the evidence will be disregarded*." [Emphasis added.]

12 (2001) 205 CLR 507 at [72].
13 ibid at [98]–[100].
14 ibid at [179]–[192].
15 ibid at [180].
16 ibid.
17 ibid at [185]–[186]. [Bold emphasis added.]
18 *R v London County Council; Re Empire Theatre* (1894) 71 LT 638 at 639, per Charles J.

> Allegations of apprehended bias through prejudgment are often dealt with similarly.[19]

Accordingly, the way in which a decision-maker may properly go about his or her task and what kind or degree of neutrality, if any, is to be expected of him or her will be relevant considerations in evaluating how and in what way the rules relating to apprehension of bias will be applied in a particular situation.[20] And, as his Honour concluded:[21]

> Once it is recognised that there are elements of the decision-making process about which a decision-maker may legitimately form and hold views before coming to consider the exercise of a power in a particular case, it is evident that the area within which questions of actual or apprehended bias by prejudgment may arise is reduced accordingly.

A professional career can be ruined by a careless or foolish tweet or post. One example of the disastrous effect such a communication can have is what happened to a public relations executive, Justine Sacco. She posted the following tweet to her 170 Twitter followers before she left London on a flight from New York to holiday in South Africa:

By the time her plane touched down in Cape Town, her tweet had gone viral and been retweeted tens of thousand of times. A photographer snapped her in the arrivals hall. The next day, she was sacked from her employment. Her tweet created international outrage. She was denounced by the anonymous purveyors of social media correctness. Yet, when you think about what she did, it was to write a clumsy, silly joke. Had she said it in conversation with some friends, one or more may have said something discouraging, or she may have experienced an awkward silence or look. That would have made her realise that her comment was inappropriate. Or, her listeners may just have had a sense of humour, rather than outrage, and laughed.

Whatever may have been the outcome of a person to person situation, the use of social media and the retweeting with critical, if not denunciatory, comments created a virtual world lynch mob in which Ms Sacco could not be even perceived as having any amount of human frailty

19 See eg, *Johnson v Johnson* (2000) 201 CLR 488 at [13].
20 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [187] per Hayne J.
21 ibid at [192].

or a poor, but not malicious, sense of humour. Rather, she was vilified and became, for a time unemployable. And that was just because she wrote something silly as opposed to having, for example, constructed a deliberate campaign slogan for an extremist organisation such as the Ku Klux Klan.[22]

Things we used to say verbally as part of human communication to a small number of people can now become accessible, if said on social media, to millions instantaneously and in a permanent form. And, just as with direct face-to-face contact, posts can be misunderstood. Nor will the click of the delete button effectively erase an ill-considered post — there is the earlier retweet or republication, not to mention the Wayback Machine to ensure that you cannot hide your deletions in the virtual world.

So while judges and tribunal members should not avoid social media, they would be well advised, just as in their work, to consider carefully their choice of words and, when they publish, have regard to professional and ethical obligations as well as to common sense. In my generation, one commonly used test was to consider what would happen if what you were intending to write appeared on the front page of a daily newspaper — frequently it was a sobering idea.

Part II: Social media in the personal life of judges and tribunal members

A claim for apprehension of bias could possibly also arise if a member of the family or staff of a judge or tribunal member publishes something that reasonably could be attributed as being what the judge or member has said about a matter or issue before him or her. Thus, social media, like Pandora's box, offers all manner of calamity. There is a risk that the online publication or revelation of a judge's or tribunal member's online posts, friends or interests might cause a reasonable layperson to consider that the judge or member might not decide a matter impartially.

Facebook "friends"

Often after giving a decision in a matter one might feel that friends are few and far between. That should not encourage too ready a disposition to "friend" people online.

One example of online stupidity occurred in Wisconsin in 2016. There, Judge Bitney was hearing a child custody dispute. He received a friend request from the mother soon after the close of argument, but before the resolution of the case.[23] You might think this is fanciful, but the judge accepted that request. Needless to say, he did not disclose the request or its acceptance to the father. A central issue in the case was the credibility of his Honour's new friend's allegations that the father had engaged in domestic abuse towards her. Ultimately, the judge decided the case in the mother's favour. In the meantime, before he decided the case,

22 See the account in J Ronson, *So you've been publicly shamed*, Riverhead Books, 2015.
23 *In re the paternity of B J M: Timothy W Miller v Angela L Carroll* [2019] WI App 10.

the mother liked 18 of the judge's posts about other aspects of his life. He did not respond to any of the mother's communications in that period. It is important to understand that judges in Wisconsin are elected, as they are in 38 other States in the United States of America.

Later, on the day of the decision, the guardian ad litem uncovered the Facebook "friendship" when visiting the mother's Facebook page to read a post made about the outcome of the proceedings. Subsequently, the judge denied that he had "liked" or commented on any posts made by the mother, but he did not deny that he had seen and read her posts before he gave his decision. The mother had made a large number of posts about domestic violence, supporting causes that aimed to prevent it.

The father then applied to the judge to quash his decision, to disqualify himself, and for the matter to be re-heard. Judge Bitney dismissed that application. On appeal, the Wisconsin Court of Appeals reversed that decision. The Court of Appeals said:[24]

> First, the time when Judge Bitney and Carroll became Facebook "friends" would cause a reasonable person to question the judge's partiality. Although Judge Bitney apparently had thousands of Facebook "friends", Carroll was not simply one of the many people who "friended" him prior to this litigation. Rather, Carroll was a current litigant who reached out to Judge Bitney and requested to become his Facebook "friend" after a contested hearing, at which Judge Bitney was the sole decision-maker. Judge Bitney then took the affirmative step to accept this "friend" request before he issued his decision in this case.
>
> This timing creates a great risk of actual bias and a resulting appearance of partiality because, even assuming that a Facebook "friendship" does not denote the type of relationship traditionally associated with the term "friendship", it is unquestionably evidence of some type of affirmative social connection. As explained above, two Facebook users may only become "friends" when one user accepts another user's "friend" request. Carroll's choice to send a "friend" request to Judge Bitney, combined with Judge Bitney's choice to accept that request before issuing his decision, **conveys the impression that Carroll was in a special position to influence Judge Bitney's ultimate decision** — a position not available to individuals that he had not "friended", such as Miller [the father].
>
> Second, the great risk of actual bias and resulting appearance of partiality created by the Facebook connection between Carroll and Judge Bitney is heightened because the connection was not disclosed to any of the other parties or attorneys involved in the case.
>
> … (Although we need not determine whether a bright-line rule prohibiting the judicial use of [electronic social media] is appropriate or necessary, we conclude that the circuit court's undisclosed [electronic social media] connection with a current litigant in this case created a great risk of actual bias, resulting in the appearance of partiality.)

And yes, in case you were wondering, there are judicial ethical rules in Wisconsin prohibiting ex parte or undisclosed communications between a judge and one of the litigants in a case.

In *State of New Mexico v Thomas*,[25] during a murder trial that he was hearing, a judge made posts about the case to the Facebook page created for his re-election. For example, the judge

24 ibid at [21]. [Bold emphasis added.]
25 *State of New Mexico v Thomas* 376 P 3d 184 (NM, 2016) at [8].

posted "I am on the third day of presiding over my 'first' first-degree murder trial as a judge", and afterwards "In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers".

The appeal was decided on grounds other than any apprehension of bias. Nonetheless, the New Mexico Court of Appeals took the opportunity to warn judges about social media use in terms equally apposite to tribunal members, saying:[26]

> we caution that "friending", online postings, and other activity can easily be misconstrued and create an appearance of impropriety. Online comments are public comments, and a connection via an online social network is a visible relationship, regardless of the strength of the personal connection …
>
> Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement and take care to limit such actions accordingly …
>
> The use of electronic social media also may present some unfamiliar concerns, such as the inability to retrieve or truly delete any message once posted, the public perception that "friendships" exist between people who are not actually acquainted, and the ease with which communications may be reproduced and widely disseminated to those other than their intended recipient.

Judicial officers and tribunal members will inevitably be personal friends with lawyers and barristers who they have worked with prior and subsequent to their appointment. The current generation of appointees uses, and increasingly will use, social media to stay in touch with their families and friends. This will mean that more and more judges and tribunal members will have online connections to those who appear before them.

Of course, not every social media connection will justify a claim of apprehended bias. A majority of the Supreme Court of Florida held recently that a Facebook friendship between a trial judge and a lawyer appearing before him, by itself, did not constitute sufficient grounds for the judge to recuse himself.[27] An unavoidable consequence of one's appointment to an office, such as that of a judge or tribunal member, will be that one's professional friends and acquaintances will appear before you as representatives of parties in matters that you must decide. That circumstance, of itself, cannot create a reasonable apprehension that the judge or tribunal member might not bring an impartial mind to the resolution of the dispute between the parties, one or more of whom is represented by your friend of acquaintance. The position may be different, as occurred recently in New Zealand, if the judge or member and the representative also have a business relationship together.[28]

However, things can become complicated when all the world can see what the friends or acquaintances say online about their relationship or thoughts. Hence, the need for care before posting or engaging on social media. In the Florida case, the court engaged in a detailed

26 ibid at [49].
27 *Law Offices of Herssein and Herssein v United Services Automobile Association* SC17-1848 (Fl, 2018).
28 See *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35.

examination of the nature of traditional and Facebook friendships. Their Honors acknowledged that a Facebook friendship is different to the traditional variety, and does not give rise to inferences about whether or not there might be an apprehension of bias. Chief Justice Canady, giving the majority's reasons, said that Facebook "friends" may be strangers, animals or inanimate objects. No doubt the Sydney Opera House or your local café will allow you to "friend" them on Facebook, but, that relationship defies any intelligible characterisation as a friendship in pre-21st century parlance. Chief Justice Canady sagely observed:[29]

> A Facebook "friend" may or may not be a "friend" in the traditional sense of the word. But Facebook "friendship" is not — as a categorical matter — the functional equivalent of traditional "friendship". The establishment of a Facebook "friendship" does not objectively signal the existence of the affection and esteem involved in a traditional "friendship". Today it is commonly understood that Facebook "friendship" exists on an even broader spectrum than traditional "friendship". Traditional "friendship" varies in degree from greatest intimacy to casual acquaintance; Facebook "friendship" varies in degree from greatest intimacy to "virtual stranger" or "complete stranger".

However, even in that case there was a dissent. Justice Pariente said that even though an online friendship might convey no more intimacy than "complete stranger", it still "may undermine confidence in the judge's neutrality".[30] This is because, first, a Facebook friendship gives access to the friend's personal information, "including photographs, status updates, likes, dislikes, [and] work information …" on an almost daily basis. Secondly, the mere existence of a Facebook friendship, regardless of whether it is genuine, might convey to others that a lawyer is in a special position to influence that judge.

Judges associates and social media

The impact of social media engagement is not limited to the online conduct of judicial officers and tribunal members themselves. Thus, they must also be aware that the online activity of their staff and family can add to the perils of social media use.

Personal staff, especially young graduates or professionals such as a judge's associate, or a tribunal member's assistant or clerk, will be enthusiastic and no doubt often proud of the importance of their position and a matter that the judge or member is hearing. There will be temptations to post a "selfie" of how the associate or clerk is working, perhaps showing, inadvertently, a confidential document, or part of a draft of the judge's or member's decision. This can compromise the integrity of the court's or tribunal's process and public confidence in it.

In addition, the staff member actually has a life of his or her own, and can hold and express posts or opinions online about all manner of things that may concern issues that the judge or member may need to consider in a particular matter. Enterprising, misinformed or malign litigants or parties may perceive or seek to create some connection between the online posts or opinions of

29 *Law Offices of Herssein and Herssein v United Services Automobile Association* SC17-1848 (Fl, 2018) at 13.
30 ibid at 23.

the staff member with those of the judge or member, merely because of the fact that the staff member works for him or her. Ordinarily, such an assertion could not rationally or reasonably give rise to an apprehension that the judge or member might be biased. However, that common sense position may not be enough as an unfortunate tipstaff to Harrison J found out in *Gaynor v Local Court*.[31]

There, a party who regularly advocated online in support for "traditional" heterosexual values, including opposition to same sex marriage, applied, by his counsel, for the judge to recuse himself. This was because the judge's tipstaff had a large social media presence in which he openly supported the freedom of persons to identify as LGBTIQ+, and to participate in daily life without prejudice.

The tipstaff had sent an email to the parties enquiring, on behalf of the judge, about whether there were any new submissions for the upcoming hearing that had not reached the court file.

The party or his lawyers had accessed the tipstaff's Facebook profile and discovered that, among other things, he had made a post in support of a University production entitled "Peter Pansexual", which was reviewed as a "diverse, nuanced portrayal of the many shades of sexuality"; was "Facebook friends" with another judge's tipstaff who had made a number of posts in support of gay and queer rights, including restricting the ability of religious schools to discriminate against people who identified as queer; and had participated in "Wear it Purple Day", an annual day intended to foster awareness for lesbian, gay, bisexual, transsexual, intersexual and queer rights.

The party submitted that this gave rise to an apprehension of bias because of the personal process engaged in by a judge in hiring their staff. The party submitted that, somehow, "by innuendo",[32] this suggested that the judge shared, or had some sympathy for these views. Justice Harrison dismissed this somewhat arcane reasoning process, saying:[33]

> I am in any event unable to understand the relationship, if any, between the request made by my tipstaff with my authority in those terms and any apprehension of bias … The personal views of

31 [2019] NSWSC 516.
32 ibid at [36].
33 ibid at [33]–[35].

> my tipstaves are largely unknown to me, except to the extent that they are revealed in the context of the relationship I have with them as my assistant in chambers … In my limited experience, cases are decided by judges, not their staff.

The social media habits of my own associates (one of whom has an unduly confident view of things in his draft of this speech) are unknown to me. I would hope they have the common sense to maintain sufficient privacy settings to avoid members of the public, like me, accessing their personal posts. Moreover, the Federal Court (like most modern workplaces) has policies as to the use of social media by its staff. But no such policies can affect what a judge's staff has done before they are hired.

In any event, as Harrison J noted, ordinarily the staff member's views make no difference to the duty or ability of a judge to decide cases fairly and impartially, both under the legal test for apprehension of bias or under a common sense idea of how cases are decided by courts. The position is likely to be the same for tribunal members who properly maintain their independence from all irrelevant considerations in arriving at their decision.

Self-deleting social media

One solution to the perils of life to which we are now exposed may be for social media to "expire", hopefully, for those with guilty consciences at least, leaving no trace of one's social media presence. This approach was first popularised by Snapchat, a social media platform used for sending photos with special effects and text on them, that permanently expire within 10 seconds of the recipient opening them. In the 1960s, the television program, "Mission Impossible", portrayed the heroes receiving their mission through a taped message that literally said "this message will self destruct in 10 seconds" — an early forecast of destructibility.

Today, a variety of social media and online messaging platforms offer the ability to create posts and send messages which delete themselves after they are viewed, or after a set period of time. This has come about as individuals become increasingly concerned about their online "footprint" — the history of posts traceable to them. Instagram "stories" are public to all of a person's followers for 24 hours after they are published. Facebook, Whatsapp and Telegram offer "secret conversations" that can last for as long or short a time as the sender chooses, and are then permanently deleted.

Even Gmail, the email platform hosted by Google, has begun offering a "Confidential Mode", which allows users to send self-destructing emails. Once received, the contents of these emails cannot be copy-pasted, downloaded, printed or forwarded.[34]

It may be that none of this self-destruction will necessarily prevent people creating a screenshot or photographing the contents of temporary or private posts and messages. In this year's federal election campaign, a slew of candidates resigned after some of their old, perhaps forgotten or deleted, social media posts came back to life. At least one of those candidates had deleted

34 T Haselton, "How to send self-destructing emails in Gmail", CNBC, 20 August 2018 at www.cnbc.com/2018/08/20/how-to-send-self-destructing-email-gmail-confidential-mode.html, accessed 3 June 2021.

the posts prior to the campaign, but they resurfaced, probably because someone had taken screenshots earlier while they were public.[35] There are also tools online that can uncover deleted tweets, long after those have been deleted by the person responsible for them.[36] The lesson is that attempts at online self-effacement do not guarantee against later self-destruction.

Avoid social media altogether?

The appropriate course may still be not to have social media at all. Judge Catherine Shaffer, the 2018 president of the American Judges' Association, recently acknowledged that judges can decide for themselves whether to use social media. However, she recommended they "steer clear" because "misperception is all too easy" and "it is extraordinarily difficult to prevent improper ex parte contacts".[37]

Similarly, the Council of Chief Justices of Australia and New Zealand's *Guide to Judicial Conduct*[38] cautions that although "there is no reason in principle to deny judges the use of social media", "a judge should be aware of the risks that go with the use of social media, and should act with care in light of these risks".

Alongside the risks already mentioned today, the Guide notes that while it is important that judges understand and make use of the strictest privacy settings available, they should not rely on this. That is because others can widely disseminate material that the judge wishes to be kept private, and those privacy settings also can change.

Family members of judicial officers and tribunal members should also be aware of the risks that social media presence can pose to their partner, parent, child or sibling's work. First, there are issues as to the personal security of the judge or member. Secondly, like the tipstaff mentioned above, these actions online should not, alone, give rise to an apprehension of bias. But it is always better to be safe than sorry, and better that courts and tribunals' time is not wasted with such applications at all. Family members should recognise these risks and know to alert judicial officers and tribunal members if a case before them is linked in some way to their online network or presence.

Part III: Social media and mass media in courts and tribunals

Ordinarily, proceedings in court are open to the public and the public have a legal right to be present and to report what occurs in such proceedings, and to criticise it: *John Fairfax & Sons*

35 "Social media minefield for election candidates", InDaily, 3 May 2019, https://indaily.com.au/news/2019/05/03/social-media-minefield-for-election-candidates/, accessed 8 June 2021.

36 K Hodgkins, "Undetweetable lets you read deleted tweets", Gizmodo, 3 August 2011, www.gizmodo.com.au/2011/08/undetweetable-lets-you-read-deleted-tweets/, accessed 8 June 2021.

37 "Are Facebook friends really friends?", National Center for State Courts, 29 August 2018, https://content.govdelivery.com/accounts/USNCSC/bulletins/209842b, accessed 8 June 2021; see *Law Offices of Herssein & Herssein, PA v United Services Automobile Association*, Case No SC17-1848 at 22.

38 The Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd edn (rev), 2022 at p 43.

Ltd v Police Tribunal of NSW.[39] Except as required by statute, a court can only restrict access to, and reporting of, court proceedings where it is necessary to do so in the interests of justice. The same very fundamental common law principles do not apply to administrative proceedings, which traditionally do not require transparency or public scrutiny.

Judicial officers and tribunal members must be conscious of what uses of social media may be appropriate during a hearing when persons in the court or room can use online platforms to disseminate or discuss the subject matter of the hearing. This is unavoidable. Regardless of whether the judge or tribunal member has chosen whether or not to use social media for his or her own personal purposes, it will be important, from time to time, to make decisions about how to manage the flow of instantaneous information to protect the integrity of the proceeding. Such a flow can be from journalists, litigants, bloggers, lawyers, part representatives or a member of the public.

It is increasingly common for journalists in the mass media to "live tweet" while sitting in open court. This is a way of immediately updating their audience, online, on developments in the courtroom or tribunal. Although most courts and tribunals have the power to control the use of electronic devices, their use has become more frequent and now it is not uncommon to see journalists, lawyers and others on phones or even laptops in court.

Whatever control a judge or tribunal member can exert over online transmission directly from the court or hearing room, that control has become less and less effective when the publisher communicates from outside the hearing.

Conclusion

Speaking the right social media language means recognising that the role of courts and tribunals is not (and never was) confined to the walls of the courtroom or tribunal. Those hearing and determining proceedings today must be aware, more than ever, of the risks to justice which can arise from social media.

In part, this means regulating the behaviour of parties and observers in court or a hearing. But it also requires judicial officers and tribunal members to be aware of their own conduct online. It is too late to forbid judicial officers and tribunal members from using social media themselves, even if that were a good idea. The vast majority of future appointees will already have social media accounts, and as I have mentioned, the details of those may be impossible to ever truly delete.

There is also, of course, no way to stop members of the public from using social media to comment on court and tribunal processes. To the extent there are ways to limit this, they should be employed at least by judicial officers and courts with reticence, given the fundamental role of open justice in our society.

39 (1986) 5 NSWLR 465.

Right here waiting for you: the new social media chapter in the Australian Guide to Judicial Conduct*

Dr Marilyn Bromberg†

The courts have existed for hundreds of years. Social media has existed for less than two decades. When the two collide there is potential for negative repercussions upon the public's confidence in the judiciary. This article considers the chapter on social media that was included in the third edition of the Australian Guide to Judicial Conduct. It argues that the chapter may help to improve the public's confidence in the judiciary.

Introduction

Arguably, one needs only to read the following to understand why guidelines for judges[1] regarding their social media use may be helpful. In France, two judges tweeted the following during a hearing (translated into English): tweet one – "legal question … if any exasperated assessor/magistrate strangles his chief justice during a hearing, how much would that be worth"; tweet two – "I haven't been listening to anything being said for the past two hours".[2] These

* This article was first published by Thomson Reuters in the *Journal for Judicial Administration* and should be cited as M Bromberg, "Right here waiting for you: the new social media chapter in the *Australian Guide to Judicial Conduct*" (2018) 27 *JJA* 123. For all subscription inquiries please phone, from Australia: 1300 304 195, from Overseas: +61 2 8587 7980 or online at legal.thomsonreuters.com.au/search. The official PDF version of this article can also be purchased separately from Thomson Reuters at http://sites.thomsonreuters.com.au/journals/subscribe-or-purchase.

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1 The word "judge" in this article also includes magistrates.

2 K Eltis, "Does avoiding judicial isolation outweigh the risks related to 'professional death by Facebook'?" (2014) 3 *Laws* 636 at 643.

tweets appear to show judicial officers who lack integrity and have a significant disregard for the judicial process. This could, understandably, negatively impact upon the public's confidence in the judiciary.[3] Unfortunately, this situation was not an isolated occurrence. Judges worldwide have made inappropriate comments on social media that may negatively impact upon the public's confidence in the judiciary.

In the UK, a magistrate for 16 years and former mayor, Professor Steve Molyneux, tweeted[4] that he was going to hand down a sentence.[5] A fellow magistrate learned about the tweets and informed the relevant people about it. Professor Molyneux resigned. He stated: "I did nothing wrong, I did nothing illegal. I didn't mention any names or write about anything in the retiring room. All I wrote was in the public domain already."[6] Indeed, Professor Molyneux may not have written anything illegal, nor included the names of anyone in the courtroom, nor written anything whilst in the retiring room, nor written anything in the public domain. Yet, his actions may have negatively impacted upon the public's confidence in the judiciary for many reasons — including that the former magistrate did not show the respect for his position that it deserves.

In Greece, a judicial officer criticised austerity measures on his blog and the Supreme Civil and Criminal Court disciplined him.[7] In Canada, an Ottawa Provincial Court judge retired in late 2014 due to a comment she made on Facebook about two other judges. She stated the judges' initials and complained that one of the judges gave a woman a reduced sentence because she had cancer. Had the judge who made the Facebook comment not retired, she would have had to participate in a disciplinary hearing.[8]

Several members of the American judiciary have experienced ethical challenges when they used social media. This caused some to request guidance from American State ethics committees and similar organisations,[9] which then created guidelines on the topic[10] that are not usually

3 For a discussion regarding public confidence in the judiciary, see M Gleeson, "Public confidence in the judiciary" (2002) 76(9) *ALJ* 558; S Kenny, "Maintaining public confidence in the judiciary: a precarious equilibrium" [1999] *Federal Judicial Scholarship* 1; W Phillips, "Complaints against judges and public confidence in the judiciary: does South Australia need a complaints handling body?" (2014) 33(4) *Civil Justice Quarterly* 427.

4 E Janoski-Haehlen, "'The courts are all a-twitter': the implications of social media use in the courts" (2011) 46(1) *Valparaiso University Law Review* 43 at 52.

5 "Twittering judge quits bench", *The Express* (online), 26 April 2017 at www.express.co.uk/news/weird/97115/Twittering-judge-quits-bench, accessed 8 June 2021.

6 Janoski-Haehlen, n 4, at 52.

7 D Blitsa, et al, "Judges and social media: managing the risks", Themis Competition, 2015, at www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Greece3.pdf, accessed 8 June 2021.

8 Canadian Centre for Court Technology, "The use of social media by Canadian judicial officers", 2015, at www.cacp.ca/law-amendments-committee-activities.html?asst_id=844, accessed 8 June 2021.

9 See, eg *In the Matter of Whitmarsh*, New York State Commission on Judicial Conduct, 28 December 2016 at www.cjc.ny.gov/Determinations/W/Whitmarsh.Lisa.J.2016.12.28.DET.pdf, accessed 8 June 2021; *In Re Bass*, No 2012-31 (Ga Mar 18, 2013), Public Reprimand, Georgia Judicial Qualifications Commission, 18 March 2013; *In re Stevens* (Agreed Order of Suspension, Kentucky Judicial Conduct Commission, 8 August 2016, https://kycourts.gov/Courts/JCC%20Actions%20Documents/2016AgreedOrderStevens.pdf, accessed 8 June 2021; O Cowcott, "Judge sacked over abusive online posts", *The Guardian* (online), 13 April 2017 www.theguardian.com/law/2017/apr/12/judge-sacked-over-online-posts-calling-his-critics-donkeys, accessed 8 June 2021; Canadian Centre for Court Technology, n 8, at 26–27. Also see Table 1 of this article for a list of the ethical opinions that were drafted as a result of judges' inquiries.

binding.[11] In 2009, the New York Advisory Committee on Judicial Ethics was the first American State (known to the author) to release publicly available guidance for judges regarding social media use, including whether a judge can use social media.[12] The American Bar Association also produced guidelines for judges regarding social media use in 2013.[13] The Senior Presiding Judge for England and Wales and the Senior President of Tribunals published guidelines for judges about blogging in 2012,[14] and the Judiciary of England and Wales amended their *Guide to Judicial Conduct* to discuss social media in 2013.[15] Table 1 lists the guidelines for judges regarding social media use in Australia, the UK and the US. The table may serve as a useful reference for the judiciary and researchers in this area.

Over 20 guidelines for judges regarding social media use were released in the US from 2009 until 2016. By contrast, until 2017 there was only one set of guidelines in this area in Australia known to the author. The Federal Court of Australia released Draft Guidelines for Judges about Electronic Social Media in 2013.[16] For many years, there had been requests that uniform guidelines be created for Australian judges regarding social media use or that the *Guide to Judicial Conduct* ("AIJA Guide") be modified to include such guidelines.[17] As such, in 2017 a chapter was added to the third edition of AIJA Guide entitled "Social Media" ("Social Media chapter").[18]

This article argues that the Social Media chapter can help maintain the public's confidence in the judiciary. Specifically, it explains what the AIJA Guide is, gives a brief definition of social media, discusses the Social Media chapter generally and then considers some of the specific issues in the chapter.

10 See, eg Federal Court of Australia, *Technology and the Court Practice Not*e, 2016 at www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech, accessed 8 June 2021; American Bar Association, *Formal opinion 462 Judge's use of electronic social networking media* at www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf, accessed 8 June 2021; Canadian Centre for Court Technology, n 8.

11 D Smith, "When everyone is the judge's pal: Facebook friendship and the appearance of impropriety standard" (2011) 3(1) *Journal of Law, Technology and the Internet* 1 at 24. See, eg Kentucky Supreme Court Rules, r 4.310(3).

12 N Mitchell, "Judge 2.0: a new approach to judicial ethics in the age of social media" (2012) 4 *Utah Law Review* 2127 at 2130.

13 American Bar Association, n 10.

14 Senior Presiding Judge for England and Wales and Senior President of Tribunals, *Blogging by judicial office holders*, August 2012, at www.familylaw.co.uk/docs/pdf-files/Blogging_by_Judicial_Office_Holders.pdf, accessed 8 June 2021.

15 Judiciary of England and Wales, *Guide to Judicial Conduct*, revised 2018, at www.judiciary.uk/publications/guide-to-judicial-conduct/, accessed 8 June 2021.

16 Federal Court of Australia, n 10.

17 See, eg M Krawitz, "An Examination of Social Media's Impact Upon the Courts in Australia" PhD (Law) Thesis, Murdoch University, 2014 at pp 60–64, at https://researchrepository.murdoch.edu.au/id/eprint/23839/, accessed 8 June 2021. It is noted that there were guidelines for judicial officers regarding social media from the Federal Court of Australia since 2013: Federal Court of Australia, n 10. The author is unaware of how often judges nationwide used those guidelines.

18 Australasian Institute of Judicial Administration Inc, *Guide to Judicial Conduct,* 3rd ed (rev), 2022, ("AIJA Guide").

The AIJA Guide

The AIJA Guide:[19]

> provides principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances. It is by maintaining the high standards of conduct to which the Guide aspires that the reputation of the Australian judiciary is secured and public confidence in it maintained.

Some of the topics addressed in the third edition of the AIJA Guide include judicial independence, the judge as a mediator, public comment by judges, personal welfare and political activities. The first edition of the Guide was published in 2002 due to the Council of Chief Justices of Australia and New Zealand seeking a document that contained principles applicable to judicial conduct.[20] A second edition of the Guide was published in March 2007 and a third edition was published in 2017 (and revised in 2022).[21]

The AIJA Guide is not meant to be "a code":[22] "Although the guide has considerable prestige, it has no legal standing. Moreover, it is indicative or suggestive, and not prescriptive."[23] Nevertheless, the Guide is frequently referred to or cited in case law[24] and is available online for judges and the public to read. Canada and the UK have similar documents for their judges that contain suggestions for the judiciary regarding ethical issues.[25] The AIJA Guide appears to be the best document to outline principles for judges regarding social media use because it is well known nationally, judges read it and its contents are updated.

19 AIJA Guide, n 18, ix.
20 ibid.
21 ibid at vii.
22 M Gleeson, "State of the Judicature", Speech delivered at the 13th Commonwealth Law Conference, Melbourne, 17 April 2003 at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_stateof.htm, accessed 8 June 2021.
23 *DPP v McNamara* [2012] NTSC 81 at [19] (Barr J), quoted in Krawitz, n 17, at 29.
24 See, eg *Lawrie v Lawler* [2015] NTSC 40 at [83]–[84]; *Re Apch Ltd (No 4)* [2017] VSC 451 at [17] (Robson J); *Confidential v Cmr of Taxation* (2013) 93 ATR 491 at [595]–[596] (Deputy President Forgie).
25 See Judiciary of England and Wales, n 15; Canadian Judicial Council, *Ethical Principles for Judges*, 2004, at https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf, accessed 8 June 2021.

What are social media?

It is important to understand what social media are before considering some of the specific ethical issues that they may pose to judges. The Social Media chapter defines social media as "a term commonly used to refer collectively to technologies that facilitate social interaction". It goes on to state:[26]

> [S]ocial media encompasses social interaction via technological means. These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information. Examples of popular social media include: Facebook, Twitter, YouTube, Instagram, LinkedIn and blogs. A person can use social media to share information, including comments, photographs and videos easily and it is normally free to do so. A person merely needs internet access on a computer or a digital media device to use social media. A large number of people can see what a social media user shares, and the information shared "may remain on the internet in perpetuity". A social media user can also add comments, photographs, etc to an existing social media post. Social media users can modify the privacy settings that apply to their social media to control who can see their social media accounts and posts. Social media has some similarities with the average website, but an important difference is that social media permit the public to post information immediately, and the average website generally does not.

Some of the most popular social media are Facebook, Twitter, LinkedIn, Instagram and Snapchat. This article discusses each of these social media in turn.

Facebook is "arguably the most popular" social media;[27] however, that may change over time. It permits users to create a profile that contains information about themself. They may make written or visual posts,[28] including sharing videos, on their profile page. Everyone who signs up to Facebook receives a profile page.[29] A person with a Facebook profile can ask anyone else with a Facebook profile to be their "friend", or they may receive a request from anyone else to be their "friend". If the request is accepted, each can see what is posted on the other person's profile and any future posts on the profile. A person's "friend" is listed on their profile page, unless they choose to hide it.[30] On setting up a Facebook profile, the user must specify the privacy settings for the account, which dictate who may view the profile. The user can choose

26 AIJA Guide, n 18, at 43. Part of this quote is from M Bromberg-Krawitz, "Issues paper for a symposium: challenges of social media for courts & tribunals", May 2016, pp 2–3, at https://aija.org.au/wp-content/uploads/2017/07/Krawitz.pdf, accessed 8 June 2021. For additional definitions of social media, see M Lackey and J Minta, "Lawyers and social media: the legal ethics of tweeting, facebooking and blogging" (2012) 28 *Touro Law Review* 149 at 151; N Boothe-Parry, "Friends of justice: does social media impact the public perception of the justice system?" (2014) 35 *Pace Law Review* 72 at 73; New York Advisory Committee on Judicial Ethics, 08-176 Opinion, 2009; California Judges Association, 66 Opinion, 2011, at www.caljudges.org/docs/Ethics Opinions/Op 66 Final.pdf, accessed 10 June 2021; J Gibson, "Judges, cyberspace and social media" (2015) 12(2) *TJR* 237 at 240–241.

27 S Jones, "Judges, friends and Facebook: the ethics of prohibition" (2011) 24 *The Georgetown Journal of Legal Ethics* 281 at 283.

28 *Dabrowski v Greeuw* [2014] WADC 175 at [2]–[3] (Bowen DCJ).

29 J Ramos, "Facebook page vs Facebook Profile: do you know the difference?", 15 June 2014, at www.business2community.com/facebook/facebook-page-vs-facebook-profile-know-difference-0908808, accessed 9 June 2021.

30 J Crager et al, "Facebook all-in-one for dummies cheat sheet", at www.dummies.com/social-media/facebook/facebook-all-in-one-for-dummies-cheat-sheet/, accessed 9 June 2021.

to have a public profile that enables anyone to view their profile, including all their posts. A business, organisation or celebrity may set up a Facebook page that enables anyone to "follow" the account without being a "friend" or the approval of the account holder (and the person being followed may not even realise that they are being followed). A Facebook page is frequently used for advertising or promotional purposes.[31] Over 1.39 billion people use Facebook monthly.[32]

Twitter is another form of social media. When someone creates a Twitter account, they receive a profile page on which they may "Tweet". A "Tweet" is a short post that includes text and/or photos that a Twitter user can make and is displayed on their profile page. A person's Tweets can be viewed by any other Twitter user, unless the account holder adjusts the settings on the account so that only certain people can see their Tweets. Twitter users can also "follow" other people's Tweets.[33] This means that the other peoples' Tweets will appear on their profile page and private messages can be exchanged between them.[34] Twitter has almost 650 million active users.[35]

LinkedIn is a form of social media that people use to exchange professional, as opposed to personal, information. People can use LinkedIn to post job opportunities and to network.[36] Users may create profiles that state their education, work history and professional goals. They can also post updates.[37]

Users can adjust the settings on their account so that it is accessible to anyone on LinkedIn or limited to certain people.[38] In 2017 there were 467 million LinkedIn users.[39]

Instagram is a form of social media that can be used to create a profile page and post photographs and videos. The account holder can also share those photographs and videos on other social media, such as Facebook.[40] Instagram has special filters that users can apply to their photographs and videos to change colour.[41] Instagram users can also follow other users. Profile pages are automatically public, unless the user adjusts them.[42] Over 300 million people use Instagram daily.[43] It is the fastest growing social media.[44]

31 ibid.
32 S Singh, "Friend request denied: judicial ethics and social media" (2016) 7 *Journal of Law, Technology and the Internet* 153 at 155.
33 *ACCC v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34 at [17] (Finkelstein J).
34 Twitter, "Following FAQs", 2018, at https://help.twitter.com/en/using-twitter/following-faqs, accessed 9 June 2021.
35 M Felsky, *Facebook and social networking security*, Canadian Judicial Council, 2017, at https://cjc-ccm.ca/sites/default/files/documents/2019/Facebook%20security%202014-01-17%20E%20v1.pdf, accessed 9 June 2021.
36 Singh, n 32, at 155.
37 B Hull, "Why can't we be 'Friends'? A call for a less stringent policy for judges using online social networking" (2012) 63 *Hastings Law Journal* 595 at 602.
38 Singh, n 32, 156.
39 "LinkedIn by the numbers: 2017 statistics", LinkedIn, 5 April 2017, at www.readycontacts.com/linkedin-by-the-numbers/, accessed 9 June 2021. **Note**: in 2021, LinkedIn has 756 million registered members, see www.businessofapps.com/data/linkedin-statistics/, accessed 9 June 2021.
40 P Sheldon and K Bryant, "Instagram: motives for its use and relationship to narcissism and contextual age" (2016) 58 *Computers in Human Behavior* 89 at 89.
41 ibid.
42 "What is following and what does it mean on social media", Big Commerce, www.bigcommerce.com.au/ecommerce-answers/what-is-following/, accessed 9 June 2021.

Snapchat is a social media that people can use to share photos and short videos. The person who sends the photos or short videos can choose a specific amount of time after which the photos or short videos disappear.[45] In 2017 Snapchat had 173 million active users.[46]

There are additional social media besides the ones described. These include Pinterest, YouTube, Reddit, Vine, Flickr and Tumblr. A description of each is outside the purview of this article.

The existence of the social media chapter

Good things come to judges who wait. Considerable thought went into drafting the Social Media chapter. It was decided to modify the AIJA Guide at a Council of Chief Justices meeting in October 2016 and to include information regarding social media. The Honourable John Doyle AC supervised the changes to the Guide with the help of a handful of judges nationwide. The author of this article prepared a literature review regarding the existing work in this area that was drawn upon for the Guide modifications.[47] An entire chapter of the Guide discusses judges' social media use, which signifies that it is an important topic that judges should be aware of.

One might argue that any guidelines regarding social media use for judges are unnecessary. However, social media poses situations that have never occurred before, in contrast to some other topics in the AIJA Guide that have existed for centuries (such as whether judges can participate in public debate and whether they can receive payment for writing a legal book). For example, social media permits millions of people to see that a judge is friends on Facebook with a lawyer who appears before them. They may assume that the judge is biased as a result, which can negatively impact upon confidence in the judiciary (discussed below). It is also arguable that specific guidelines regarding social media for judicial officers are not possible because new social media are created all the time. Admittedly, the popularity of a specific social media can increase or decrease very quickly.[48] Still, there are basic principles that apply to social media engagement generally that make providing guidance appropriate. One of these principles is that comments made on social media may be permanent, even though that may not be a judge's intention. Another is that social media privacy settings can change. The Social Media chapter helpfully discusses both issues. Also, it is possible to update the Guide in the future should changes to social media occur that make it useful or necessary.

The Social Media chapter may help future judges who read the AIJA Guide. Lawyers who are interested in becoming judges may ensure they do not use social media in a way that could

43 T Dumas et al, "Lying or longing for likes? Narcissism, peer belonging, loneliness and normative deceptive like-seeking on instagram in emerging adulthood" (2017) 71 *Computers in Human Behavior* 89.

44 G Blank and C Lutz, "Representativeness of social media in Great Britain and investigating Facebook, LinkedIn, Twitter, Pinterest, Google and Instagram" (2017) 61(7) *American Behavioral Scientist* 741.

45 J Vaterlaus, "'Snapchat is more personal': an exploratory study on Snapchat behaviors and young adult interpersonal relationships" (2016) 62 *Computers in Human Behavior* 594 at 595.

46 S Aslam, "Snapchat by the numbers: stats, demographics & fun facts", Omnicore, 1 January 2018, at www.omnicoreagency.com/snapchat-statistics/, accessed 9 June 2021.

47 AIJA Guide, n 18, at p vii.

48 Tennessee Judicial Ethics Committee, *Opinion 12-01*, 23 October 2012, at www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf, accessed 9 June 2021.

prevent them from becoming a judge or that could lower confidence in the judiciary should the public learn about it after they become a judge. For example, if they make a post that makes them appear strongly biased toward prosecutors or the defence.

Admittedly, the Social Media chapter is brief. It is under two and a half pages. It does not address many of the issues in this area, such as whether LinkedIn should be treated differently than other social media because it is meant to be used in a professional, as opposed to personal, capacity[49] and whether judges can state their occupation on their social media pages.[50] However, the other sections in the AIJA Guide are similarly brief. The Guide states that it "does not pretend to be exhaustive".[51] No document can address all of the ethical issues associated with judges' social media use.[52] Australian judges can easily access other Australian[53] and international[54] resources in this area. Presentations for judges regarding social media use are important[55] and have been provided in Australia.[56] The Social Media chapter addresses some of the most important issues in this area, as discussed below.

Should judges refrain from using social media?

It comes as no surprise that the Social Media chapter states that judges can use social media, but must exercise caution when doing so:

> There is no reason in principle to deny judges the use of social media. But a judge should be aware of the risks that go with the use of social media, and should act with care in light of these risks.[57]

Many other jurisdictions give judges similar permission while encouraging them to exercise caution.[58] Some Australian judges have expressed a similar view.[59] Judges' use of social media

49 See, eg Arizona Supreme Court Judicial Ethics Advisory Committee, *Opinion 14-01*, 2014, at www.azcourts.gov/azcjc/JudicialEthicsAdvisoryOpinions/2014.aspx, accessed 9 June 2021; Utah Ethics Advisory Committee, *Opinion No 12-01*, 2012; Florida Supreme Court Judicial Ethics Advisory Committee, *Opinion Number: 2012-12*, 2012, at www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2012/2012-12.html, accessed 9 June 2021; Florida Supreme Court Judicial Ethics Advisory Committee, *Opinion Number: 2009-20*, 2009, at www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html, accessed 9 June 2021.

50 See, eg Senior Presiding Judge for England and Wales and Senior President of Tribunals, *Blogging by Judicial Office-Holders*, UK Government, August 2012, www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/blogging-guidance-august-2012.pdf, accessed 9 June 2021.

51 AIJA Guide, n 18, at p 3.

52 Arizona Supreme Court Judicial Ethics Advisory Committee, n 49.

53 For example, the topic of a judge's family using social media is covered in the Social Media chapter and also in Bromberg- Krawitz, n 26, at pp 14–16.

54 See Table 1.

55 M Bromberg, "The Judiciary's Guides to the Social Media Galaxy" (2017) 1(1) *The Court Administrator* 10.

56 See, eg Australasian Institute of Judicial Administration Inc and the Judicial Conference of Australia, A symposium: challenges of social media for courts & tribunals, 26–27 May 2016 at https://aija.org.au/wp-content/uploads/2017/07/SM2016-Program.pdf, accessed 9 June 2021.

57 AIJA Guide, n 18, at p 43.

58 See, eg Arizona Supreme Court Judicial Ethics Advisory Committee, n 49; Tennessee Judicial Ethics Committee, n 48.

can help to maintain public confidence in the judiciary by demonstrating that they are in touch with their communities and can handle issues that arise in their courtroom that prima facie involve social media (eg whether defamation occurred on social media).[60]

However, while on the one hand, judicial officers' use of social media may keep them connected to their community, on the other hand, if used inappropriately this may lower the public's confidence in the judiciary.[61] This delicate balance supports the need for the Social Media chapter.

Should judicial officers "friend" lawyers who may come before them?

Perhaps one of the most contentious issues in this area is whether judges can have a social media connection (such as being a Facebook "friend" or a Twitter "follower") with lawyers who regularly appear before them and what they should do if they learn that a person appearing before them is their social media connection. In Australia an incident similar to this occurred. Tasmania's Deputy Chief Magistrate Michael Daly stated that he needed to consider whether he could preside over a case involving the State's Director of Public Prosecutions for two reasons: because he was a Facebook friend of the accused's wife; and because he had a long lunch with the accused.[62]

In Quebec, Canada, lawyers for the accused in a trial asked the judicial officer to recuse herself because many of her Facebook friends were Crown prosecutors. The judicial officer stated that she had a Facebook page, under a different name from her own, but she did not use it. She added that some of the lawyers for the accused were her Facebook friends. She would not recuse herself and stated that the accused's lawyers could appeal her decision.[63] To date, the decision has not been appealed.[64]

59 See, eg the references listed in Bromberg-Krawitz, n 26, at 9: W Martin, "Freedom of the Press and the Courts", speech delivered at the Judicial Conference of Australia Colloquium 2015, Adelaide, 9 October 2015 at p 23 at www.supremecourt.wa.gov.au/_files/Freedom_of_the_Press_Martin_Oct2015.pdf, accessed 10 June 2021; V Bell, "The Role of a Judicial Officer — Sentencing, Victims and the Media", speech delivered at the Magistrates' Court of Victoria Professional Development Conference, 22 July 2015, at p 16 at www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bell22jul2015.pdf, accessed 10 June 2021.

60 Krawitz, n 17, at p 39.

61 N Mitchell, "Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media" (2012) 4 *Utah Law Review* 2127 at 2158.

62 AAP, "Facebook friend could rule second Senior Magistrate out of Tim Ellis case", *The Australian* (online), 13 December 2013.

63 Canadian Centre for Court Technology, n 8, at p 27.

64 L Millán, "Request for recusal highlights need for judicial guidelines over social media", Law in Quebec, 5 January 2015, at https:// lawinquebec.com/request-for-recusal-highlights-need-for-judicial-guidelines-over-social-media/, accessed 10 June 2021.

Guidelines overseas are divided regarding whether a judicial officer should be able to have a social media connection with a lawyer who may appear before them. While most guidelines state that judicial officers cannot add lawyers who appear before them on social media,[65] some state that they may.[66] The Social Media chapter states:[67]

> A judge must also be mindful of the persons with whom the judge has a connection through the use of social media. An established connection between the judge and an individual, or between the judge and a lawyer, might be problematic if the person or lawyer comes before the judge. It may be difficult for a judge to keep track of all of the persons with whom the judge has had contact or connection using electronic media, but the record of that contact will always exist, even though the judge has no memory of it.

Importantly, the Social Media chapter does not request that a judge monitor their social media contacts regularly to see if they have a connection to someone who might appear before them and states that doing so "may be difficult". This is opposed to some of the American judicial opinions that require judges to consistently monitor their social media for such connections. For example, the Arizona Supreme Court Judicial Ethics Advisory Committee states that judicial employees "are expected to use reasonable means to know the persons with whom they are associated via electronic and social media and to monitor the cases they are working on to ensure that no conflicts arise".[68] A Utah ethical opinion states that judges must monitor their own social media to make sure that they are "not associated with material that reflects poorly on the judiciary".[69] A California opinion states:[70]

> In a traditional social setting, a judge normally has no obligation to respond to comments made by others, no matter how distasteful or offensive. That is because those comments are normally not attributable to the judge. However such comments on a judge's personal page can become not only permanent but accessible to all of the judge's friends. Leaving them on the page may create the impression that the judge has adopted the comments. Therefore, a judge is obligated to delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge's social networking site. Moreover, a judge has an obligation to be vigilant in checking his/her network page frequently in order to determine if someone has placed offensive posts there.

While the idea of a judge monitoring their social media connections regularly to see if they have a connection to someone who appears in the trial that they preside over may increase the public's confidence in the judiciary, it would be an onerous task to undertake, particularly on a regular basis. Even then, a judge might not be able to find all of the connections (particularly because some may not use their real name on their social media).

65 See, eg Florida Supreme Court Judicial Ethics Advisory Committee, *Opinion Number: 2009-20*, n 49.
66 See, eg Florida Supreme Court Judicial Ethics Advisory Committee, *Opinion Number: 2010-6*, 2010 at www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2010/2010-06.html, accessed 10 June 2021.
67 AIJA Guide, n 18, p 44.
68 Arizona Supreme Court Judicial Ethics Advisory Committee, n 49.
69 Utah Ethics Advisory Committee, n 18.
70 California Judges Association, 2011, at www.caljudges.org/docs/Ethics Opinions/Op 66 Final.pdf, accessed 10 June 2021.

The Federal Court of Australia's Draft Guidelines for Judges about Electronic Social Media provide more guidance than the Social Media chapter on this topic. It states:[71]

> Social media connections with the judge may raise perceptions of possible bias if those connections include members of the legal profession, particularly where they belong to a law firm that is well known for appearing in proceedings before the Court. This may also raise possible disclosure or disqualification issues. If a judge has a social media connection with a lawyer or party who is either appearing or will soon appear before him or her, the judge should consider whether the connection should be disclosed either prior to or at commencement of the matter.

Disclosure and recusal are well known ways to deal with challenging issues in a trial. The AIJA Guide recommends disclosure in other situations (such as whether a judicial officer has shareholding in a litigation company (s 3.3.1)). It may be that disclosure can be inferred as a possibility in the Social Media chapter if a judge has a social media connection to someone who appears before them, and hence that is why the Social Media chapter does not discuss it.

It is important to consider what a connection on social media actually means. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline states:[72]

> A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network "friend" may or may not be a friend in the traditional sense of the word.

Meaning, a connection on social media might not correspond to a real life connection. It would not make sense to have a strict rule that judges should automatically declare that they have a connection with someone who appears before them or should recuse themselves in such a situation. Establishing such a requirement could result in many disclosures and recusals and ultimately be a drain on court resources to the extent that it could negatively impact upon confidence in the judiciary. It could be useful to have a specific test for Australian judges to apply for recusal or disclosure in the particular situation of their having a social media connection to a participant in a trial.

Some lawyers may use knowledge that a judge is a social media connection with opposing counsel as a tactic to request that a judge recuse themselves from a case. The lawyer may hold a genuine belief that the judge is biased as a result of the connection. It could possibly be a way to try to get another judge to decide their case who they believe might be more agreeable to their arguments (though it is assumed that this would be rare due to lawyers' generally high ethical standards). The public may be well aware that a social media connection might not translate

71 Federal Court of Australia, n 10.

72 The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, *Opinion 2010-7*, 2010, at www.ohioadvop.org/wp-content/uploads/2017/04/Op_10-007.pdf, accessed 10 June 2021.

into a real life connection. If they learn that a social media connection between a judge and a lawyer who appears before them exists, it may not have a negative impact upon their confidence in the judiciary. The AIJA Guide states in Ch 3:[73]

> Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider whether to inform the parties of an acquaintanceship before the hearing begins.

Applying this reasoning to the Social Media chapter, if a judge has a social media connection to someone who appears before them, but they are acquaintances in real life, then the judge should consider the "nature and extent" of their acquaintanceship before disqualifying themselves.

If judges and lawyers are social media connections, then a judicial officer could see firsthand if a lawyer posts something inappropriate on social media and they could notify the legal practice board or a similar body regulating lawyers.[74] This occurred in Texas, US, when a lawyer asked for a continuance because her father died, which was granted. The presiding judge then looked at the lawyer's Facebook page and saw photographs of the lawyer attending parties. The judge then denied the lawyer's request for a second continuance and informed a partner at the lawyer's firm about the lawyer's actions.[75] It is assumed that a discovery similar to this by a judge would rarely occur due to lawyers' generally high ethical standards. An incident that may be more likely to occur is that a judge's family member uses social media.

Judge's family member's social media use

The Social Media chapter addresses the issue of a judge's family using social media. It states:[76]

> Family members of a judge and court staff should be alerted to the circumstance that their discussion of, or comment about, cases coming before the judge requires consideration. A judge might be quite unaware of a family member's use of social media. But members of the public may assume that material emanating from a member of a judge's family or from court staff is attributable to the judge, or reflects the judge's views. Like a judge, members of the judge's family should be alert to the possibility of a connection through social media with someone involved in a case before the judge. If this arises, the family member should inform the judge, so that the judge can consider whether any action needs to be taken, and if so, what action is appropriate.

The third edition of the AIJA Guide contains another new chapter, in addition to the Social Media chapter, entitled "Family and Relatives". The "Family and Relatives" chapter is just over a page. The addition of this chapter appears to indicate a new importance upon providing guidance to a judge's family or else a new recognition that the judiciary needs written guidance in this area, which may explain why the Social Media chapter discusses a judge's family.

The Social Media chapter is the only guideline in this area (out of the jurisdictions previously mentioned) that the author could find that addresses this issue. Should judges take its advice and

73 AIJA Guide, n 18, pp 15–16.
74 Hull, n 37, 625.
75 Lackey and Minta, n 26, 166.
76 AIJA Guide, n 18, pp 44–45.

inform their family members that they should be careful about what they post on social media in relation to cases before the judge, then the judge's family members may avoid using social media inappropriately, which would avoid negatively impacting upon the public's confidence in the judiciary.

The Social Media chapter does not mention which specific family members a judge should contact to inform them about restrictions regarding their social media use due to the judge's position (eg spouse, children, siblings). A judge's specific situation and the reality of what a family today consists of likely informs which family members a judge should contact, although the public may assume that a spouse and blood relatives represent a judge's opinion more than other relatives. Importantly, as the section rightly states, a judge may not know whether their family members use social media. They may not want to choose which family members to contact about this issue based on whether or not they know that the family member uses social media.

The author undertook a detailed search to find examples of the family members of Australian judges who use social media inappropriately. She could not find any, though she could find such examples for the US and the UK.[77] Importantly, even though she could not find such information, it does not mean that the family members of Australian judges are not using social media inappropriately, even in large numbers. The media and similar institutions may simply not know that the judge's family member used social media inappropriately because no one has brought it to their attention. The family members may use anonymous names on social media to make it harder (though not impossible) to find their social media pages.

Conclusion

A measured, considered approach was taken regarding providing guidelines to Australian judges about social media. It would be fair to assume that such an approach would be taken should ethical guidance for judges be necessary regarding other new technology, such as artificial intelligence. The Family Court of Australia has used artificial intelligence, Split-Up, which can predict how a couple's assets should be distributed.[78] In the US, some judges use artificial intelligence called COMPAS to help predict whether an offender might reoffend.[79]

This article discussed the AIJA Guide, gave a brief a definition of social media, discussed the Social Media chapter generally, and then considered whether judges should be permitted to use social media and whether they can become social media connections with lawyers who appear

77 See J Browning, "Why can't we be friends? Judges' use of social media" (2014) 68 *University of Miami Law Review* 487, at 508–509; C Greenwood, "Judge in row over online antics of his gay lover who left crude comments on his Facebook page including lewd quip about Chuka Umunna", *The Daily Mail* (online), 1 March 2016 at www.pressreader.com/uk/daily-mail/20160229/281981786668779, accessed 10 June 2021, referenced in Bromberg-Krawitz, n 26, at 15.

78 K Walsh, "Robots are coming to courts — but they won't replace judges: BGC", *Financial Review* (online), 30 March 2017 at www.afr.com/business/legal/robots-are-coming-to-courts--but-they-wont-replace-judges-bcg-20170328-gv7zic, accessed 10 June 2021.

79 L Kamener, "Closing keynote for innovation and excellence in courts conference", speech delivered at the Monash University Law Chambers Auditorium, Melbourne, 28 March 2017.

before them. It also examined issues regarding judges' family members using social media inappropriately. It appears that the Social Media chapter can help to maintain confidence in the judiciary. However, time will tell whether this is correct.

TABLE 1. Guidelines for Judges about Social Media Use in Australia, England and Wales and the United States

Country	State (if applicable)	Year	Title of Guidelines
Australia	Federal Court of Australia	2013	Draft Guidelines for Judges about Electronic Social Media
Australia		2017 (updated 2020)	*Australian Guide to Judicial Conduct* (3rd ed)
England and Wales		2012	*Blogging by Judicial Office Holders*
England and Wales		2013 (revised 2018)	*Guide to Judicial Conduct* (pp 26–27)
US		2016	Advisory Committee on the Code of Judicial Conduct, *Advisory Opinion Concerning Social Media*
US		2013	American Bar Association, *Formal Opinion 462 Judges' Use of Electronic Social Networking Media*
US		2014	United States Courts, Advisory Opinion
US	Arizona	2014	*14-01 Opinion* Arizona Supreme Court Judicial Ethics Advisory Committee
US	California	2011	*66 Opinion* California Judges Association
US	Connecticut	2013	*06 Informal Opinion*, Connecticut Committee on Judicial Ethics
US	Florida	2010	*06 Opinion* Florida Supreme Court Judicial Ethics Advisory Committee
US	Florida	2012	*12 Opinion* Florida Supreme Court Judicial Ethics Advisory Committee
US	Florida	2012	*07 Opinion* Florida Supreme Court Judicial Ethics Advisory Committee
US	Idaho		Idaho Code of Judicial Conduct, r 3.1[5]
US	Kentucky	2010	*JE-119* Ethics Committee of the Kentucky Judiciary
US	Maryland	2012	*Opinion 2012-07* Maryland Judicial Ethics Advisory Opinion
US	Massachusetts	2011	*Opinion 2011-6* Massachusetts Committee on Judicial Ethics
US	New York	2009	*Opinion 08-176* New York Advisory Committee on Judicial Ethics
US	New York	2013	*Opinion 13-39* New York Advisory Committee on Judicial Ethics

US	Ohio	2010	*07 Opinion* The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline
US	Oklahoma	2011	*03 Opinion* Oklahoma Judicial Ethics Advisory Panel
US	South Carolina	2009	South Carolina Judicial Advisory Committee on Standards of Judicial Conduct
US	Tennessee	2012	*01 Opinion* Tennessee Judicial Ethics Committee
US	Utah	2012	*01 Informal Opinion* Utah Ethics Advisory Committee
US	Washington	2009	*Opinion 09-05* Washington State Ethics Advisory Committee
US	West Virginia		*West Virginia Code of Judicial Conduct*

Note: Some of the information in this table is from the National Center State Courts, *Social media and the courts*, 2017.

Thank you for being a friend? Examining social media friendship between judicial officers and lawyers post Charisteas v Charisteas*

Dr Marilyn Bromberg†

The recent case of Charisteas v Charisteas concerned a judicial officer of the Family Court of Western Australia who communicated by text, telephone and in person with one of the lawyers appearing before him in an ex parte manner. These communications formed the basis of a successful ground of appeal in the High Court of Australia. While not addressing it explicitly, this case raises important questions regarding communications between judges and lawyers on social media. As such, this article considers whether judicial officers and lawyers can be "friends" on social media and, if they are, what effect that may have on judicial proceedings. While very general guidance exists on this issue, specific guidance for Australian judicial officers is needed to prevent a similar situation to Charisteas occurring in a social media context.

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Introduction

The recent High Court case of *Charisteas v Charisteas*[1] concerned problems that can result from personal communications between a judicial officer and a lawyer who appears before them. In the light of this case, this article discusses its implications for the use of social media by judicial officers.

In Australia, it is well established that, except in the most exceptional circumstances, there should be no communication or association between a judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way.[2] A judicial officer should take care not to request or receive private communication from a witness or party.[3] Lawyers for one party can only "approach a judicial officer in chambers when the lawyer for the other party is present, or with the knowledge and consent of the other party's lawyer".[4] There are exceptional circumstances when it is acceptable for a judicial officer to communicate with only one party, and not both — for instance, in ex parte applications.[5]

Charisteas involved a husband and wife who originally litigated in the Family Court of WA. The litigation commenced in 2011 and continued for many years. The trial judge delivered judgment and made orders regarding the property dispute between the parties in February 2018. In May 2018, the husband's lawyer wrote to the barrister who had appeared for the wife and stated that the trial judge and the barrister acted outside of court in a manner inconsistent with their respective obligations.[6]

The lawyers complained that, while the trial judge presided over the matter, the wife's barrister met with him for a drink or coffee approximately four times. They also spoke by telephone about four times and exchanged many text messages.[7] The communication stopped when evidence was taken, and it commenced again before final submissions. It continued for 17 months when the written reasons for the judgment were reserved.[8] They also exchanged text messages sporadically during part of the trial.[9] The barrister said that they did not discuss the "substance"

1 (2021) 95 ALJR 824 (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ).
2 Australasian Institute of Judicial Administration Inc (AIJA), *Guide to Judicial Conduct*, 3rd ed, 2017 at pp 19–20.
3 *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122; *Haldane v Chegwidden* (1986) 41 SASR 546 at 565 (Prior J).
4 AIJA, above n 2, pp 19–20.
5 M Groves, "Emailing judges and their staff" (2013) 37(1) *ABR* 69 at 70.
6 *Charisteas v Charisteas,* above n 1, at [7].
7 Above, n 1.
8 Above n 1, at [16].
9 Above n 1 at [8].

of the case.[10] The husband unsuccessfully appealed to the Full Court on the grounds that there was a reasonable apprehension of bias.[11] In a unanimous judgment, the High Court upheld the husband's appeal. The court stated:[12]

> [T]he apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial — that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, "it requires the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.

Their Honours continued:[13]

> As five judges of this Court said in *Johnson v Johnson*, while the fair-minded lay observer "is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice".
>
> Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* in 1986 by adopting what was said by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* in 1972:
>
>> "The sound instinct of the legal profession — judges and practitioners alike — has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

The communication between the trial judge and the wife's barrister was not made in the presence of or with the other party's knowledge or consent.[14] Their Honours held that:[15]

> A fair-minded lay observer, understanding that ordinary and most basic of judicial practice, would reasonably apprehend that the trial judge might not bring an impartial mind to the resolution of

10 Above n 1.
11 Above n 1.
12 Above n 1, at [11].
13 Above n 1, at [12]–[13].
14 Above n 1 at [14].
15 Above n 1, at [15].

> the questions his Honour was required to decide. The trial judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications.

Their Honours allowed the appeal and remitted the case for rehearing to the Family Court of WA.[16]

Charisteas did not address the issue of social media contact between a judicial officer and a party or their lawyers. However, it did consider texting, which can be viewed as similar to sending private social media messages because both can involve sending and receiving messages instantly and potentially frequently.[17] As a result, the case has implications for social media use by judges and the lawyers who appear before them by giving rise to two important questions. First, can judicial officers and lawyers be "friends" on social media? And second, if they are, what effect might that "friendship" have when the lawyer appears before the judicial officer during judicial proceedings?

Social media encompasses "social interaction via technological means":[18]

> These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information. Examples of popular social media include: Facebook, Twitter, YouTube, Instagram, LinkedIn and blogs. A person can use social media to share information, including comments, photographs and videos easily and it is normally free to do so. A person merely needs internet access on a computer or a digital media device to use social media. A large number of people can see what a social media user shares, and the information shared "may remain on the internet in perpetuity". A social media user can also add comments, photographs, etc. to an existing social media post. Social media users can modify their privacy settings to control who can see their social media accounts and posts.

When someone posts on social media, others can see it immediately[19] and the posts may be permanent.[20] If someone deletes a social media post, others may still be able to see it.[21] Social media is ubiquitous. Over 3.6 billion people use it worldwide,[22] including about 80% of Australians.[23] Australians spend, on average, one hour and 45 minutes daily on social media.[24] Facebook and YouTube are the most popular social media in Australia.[25]

16 Above n 1, at [22], [29].
17 A Lenhart et al, "Communications and social media", Pew Research Centre, 19 December 2007.
18 Part of this quote is from M Bromberg-Krawitz, "Issues paper for a symposium: challenges of social media for courts and tribunals", May 2016 at pp 2–3, referred to in M Bromberg, "Right here waiting for you: the new social media chapter in the *Australian Guide to Judicial Conduct*" (2018) 27 *JJA* 123 at 124.
19 K Anders, "Asocial media: when lawyers and judges must disconnect" (2017) 53 *Court Review: The Journal of the American Judges Association* 174.
20 Bromberg-Krawitz, above n 18, at p 7.
21 Anders, above n 19, at 174.
22 Statistica, *Number of social network users worldwide from 2017 to 2025*, 2022.
23 Statistica, *Social media users as a percentage of the total population Australia 2015–2021*, 2022.
24 A Ramshaw, "Social media statistics for Australia", *Genroe*, 11 January 2022.
25 ibid.

In recent times, judicial officers have been expected to engage with the public;[26] however, when someone becomes a judicial officer, they accept some limits on their actions and a need to honour ethical obligations.[27] If judicial officers use social media, it can show the public that they are in touch with what occurs in their communities.[28] A judicial officer's social media use can impact the public's views of that person, the courts generally[29] and their confidence in both.[30]

Unfortunately, social media is not always used wisely. Several American judicial officers have acted inappropriately on social media, which has led to serious repercussions — for example, one judicial officer decided to leave his position after he was accused of making an inappropriate social media post.[31] Ethics committees or other judicial bodies have admonished American judicial officers who act inappropriately on social media: the State of New York Commission on Judicial Conduct admonished a judicial officer who made Facebook posts that implied former President Bill Clinton murdered Jeffrey Epstein;[32] and the State of Tennessee Board of Judicial Conduct publically reprimanded a judicial officer who discussed the law on his Facebook page, including providing legal advice for shoplifters.[33] In the UK, Magistrate Steve Molyneux tweeted about a case that he presided over while he was in the courtroom; a colleague subsequently complained and he resigned.[34]

The author was unable to find any instances of Australian judicial officers acting inappropriately on social media during a WestLaw AU and LexisAdvance search in March 2022, beyond the above-mentioned *Charisteas* case,[35] which involved texting, telephone calls and in-person communications.[36]

It is already accepted that judicial officers do — and should be able to — use social media. Many credible sources in Australia and overseas support this.[37] The Judicial College of Victoria gave an informal survey to its members about their social media use. Some of the survey participants stated that, while they use social media regularly, they are cautious about the posts they make

26 J Marshall, "Judges and social media" (2020) 94(5) *Law Institute Journal* 67.
27 S Rares, "Social media — challenges for lawyers and the courts" (2018) 45(2) *ABR* 105, at 113.
28 American Bar Association, "Formal Opinion 462: Judge's use of electronic social networking media", *American Bar Association*, 21 February 2013.
29 Rares, above n 27.
30 United Nations Office on Drugs and Crime and Global Judicial Integrity Network, "Use of social media by judges: discussion guide for the expert group meeting", Vienna, 5–6 November 2018; D Blitsa, I Papathanasiou and M Salmanli, "Judges and social media: managing the risks" Themis Competition 2015.
31 Law.com, "Town Justice resigns after probe of his Facebook remarks" Yahoo!Sports, 18 December 2017.
32 *State of New York Commission on Judicial Conduct v Robert Schmidt*, New York, 24 August 2020 at https://cjc.ny.gov/Determinations/S/Schmidt.Robert.H.FWC.2020-08-24.pdf, accessed 7 December 2022.
33 Letter from State of Tennessee Board of Judicial Conduct to Judge Gerald Webb, 5 November 2021 at www.tncourts.gov/sites/default/files/docs/webb_public_reprimand_2021_11_05.pdf, accessed 7 December 2022.
34 Birmingham Live, "Twitter magistrate resigns after posting court case details online", 26 April 2009.
35 Above n 1.
36 The author used the search terms "social media" and "judge" and/or "judicial officer".
37 See, eg, J Allsop, "Federal Court of Australia: Guidelines for judges about using electronic social media", 6 December 2013; AIJA, above n 2, at pp 19–20; Bromberg, above n 18, 128–129.

and about which friend requests they accept.[38] An increasing number of judicial officers will use social media for personal and professional reasons over time,[39] and therefore it is likely that more judicial officers will be social media friends with the lawyers who appear before them.[40]

Australian ethical manuals for judicial officers provide very brief, general guidance on this issue, discussed further below.[41] Australian courts do not appear to have considered whether Australian judicial officers can be friends on social media with lawyers, or what to do when they are friends and the lawyer appears before them. More detailed guidance would assist judicial officers in navigating this ethical concern.[42]

This article discusses what being "friends" on social media means more generally, before exploring existing social media guidelines for judicial officers in Australia and abroad. It then discusses the implications of judicial officers and lawyers being social media friends. Ultimately, it argues that consideration should be given to modifying the *Guide to Judicial Conduct* to provide more guidance to judicial officers regarding social media friendship with lawyers.[43]

Being "friends" on social media

> A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network "friend" may or may not be a friend in the traditional sense of the word.[44]

When someone creates a profile page on a social media platform, they can request to become the "friend" of, or to "follow", any other person who uses that platform. If a friendship/follow request is accepted, the two users can interact by, for example, seeing their status updates and sending each other private messages. They can also see the other user's friends/followers, unless the other user modifies their privacy settings.[45]

When a Facebook user adds a friend, the two friends can see each other's profile, updates, photographs and videos. Users can have up to a maximum of 5,000 friends and can control

38 Marshall, above n 26, at 67. Also note that former Supreme Court of Victoria Justice Lex Lasry has a Twitter account and tweeted frequently while a justice: see https://twitter.com/Lasry08, accessed 7 December 2022.

39 R Artigliere et al, "Face-off on Facebook: judges and lawyers as social media friends in a post-Herssein World" (2019) 93 *Florida Bar Journal* 18.

40 Steven Rares, "Speaking the right social media language" [2019] *Federal Judicial Scholarship* 6, at [43].

41 See, eg, AIJA, above n 2, at Ch 9; Courts and Tribunals Judiciary, *Guide to Judicial Conduct*, March 2019, pp 18–19; Florida Supreme Court Judicial Ethics Advisory Committee, *In Re amendments to the rules regulating the Florida Bar: Rule 4-7.6 computer accessed communications*, 19 November 2009; Oklahoma Judicial Ethics Advisory Panel, *In Re Judicial Ethics Opinion 2011-3*, 261 P 3d 1185, 2011; Massachusetts Commission on Judicial Ethics, Opinion No 2016-1, 16 February 2016.

42 Rares, above n 27, at 114.

43 The author believes that this is the first Australian article to consider the social media friendship of judicial officers and lawyers as its primary topic, though some articles discuss it briefly. See, eg, Bromberg, above n 18, at 129–131; M Krawitz, "Can Australian judges keep their friends close and their ethical obligations closer? An analysis of the issues regarding Australian judges' use of social media" (2013) 23 *JJA* 14.

44 The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, *Opinion No 2010-7*, 3 December 2010.

45 ibid.

who can add them as a friend by changing their privacy settings. They can also choose to block their friends. When this happens, the friend who is blocked can no longer see the Facebook user's profile.[46]

Following someone on Twitter means that another Twitter user can see that first user's tweets, which appear on the other person's timeline and homepage; they will also appear in that first user's list of followers. Further, direct messages can be sent between the two.[47]

On Instagram, a user can follow another user to see their posts, profile and stories, and to send direct messages to each other.[48]

Importantly, social media "friendship" may be between two strangers or two acquaintances. Being friends on social media does not mean that the friends' relationship is like those outside of social media. Social media friends may not have trust, respect or affection for each other. While someone might have a few social media friends, another might have hundreds.[49]

People may initiate new friendships on social media and/or interact with their existing friends.[50] Research has found that people tend to use social media to keep or strengthen friendships rather than to start new ones.[51]

Social media friendships between judicial officers and lawyers can be concerning because they can lead to an allegation of an apprehension of bias and/or a judicial officer recusing themselves and/or a judicial officer needing to disclose the social media friendship.[52]

Judicial disclosure

The *Guide to Judicial Conduct* does not address the question of when social media use ought to be disclosed. However, it does address specific issues that judicial officers may want to disclose, such as when a judicial officer has shareholdings that are relevant to a matter before them.[53] It also addresses issues concerning a judicial officer disclosing their friendships or acquaintanceships.[54]

46 Facebook Help Centre, "Friending", 2022 at www.facebook.com/help/1540345696275090, accessed 7 December 2022.
47 Twitter Help Centre, "Following FAQs", 2022, https://help.twitter.com/en/using-twitter/following-faqs, accessed 7 December 2022.
48 Social Buddy, "What Does Followers and Following Mean on Instagram", 2020, at https://socialbuddy.com/followers-and-following-on-instagram/, accessed 7 December 2022.
49 Blitsa et al, above n 30, 8; *McGaha v Kentucky*(Supreme Court of Kentucky, No 2012-SC-000155-MR, 20 June 2013).
50 D Jeske, *Friendship and social media: a philosophical exploration*, Routledge, 2019.
51 S Vallor, "Flourishing on Facebook: virtue friendship and new social media" (2011) 14(3) *Ethics and Information Technology* 185 at 186.
52 G Appleby and S McDonald, "Pride and prejudice: a case for reform of judicial recusal procedure" (2017) 20(1) *Legal Ethics* 89 at 95.
53 AIJA, above n 2, at p 13.
54 ibid, at pp 15–16.

Ethical guidelines for judges on social media

During the past 15 years, the ethical bodies in many jurisdictions in Australia and internationally have created ethical guidance[55] or advisory opinions[56] on social media use, and judicial officers have handed down judgments on the topic.[57] In Australia, the Federal Court of Australia created the *Draft Guidelines for Judges about Electronic Social Media* in 2013.[58] However, the main text in Australia that contains ethical guidance applicable to judicial behaviour is the *Guide to Judicial Conduct*, which was published for the Council of Chief Justices of Australia and New Zealand by the Australasian Institute of Judicial Administration Inc (AIJA Guide).[59]

The AIJA Guide gives "principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances".[60] It "has considerable prestige, [but] it has no legal standing. Moreover, it is indicative or suggestive, and not prescriptive".[61]

In 2016, at a meeting of the Council of Chief Justices, it was decided to modify the AIJA Guide to include new information, especially about social media and judicial officers.[62] The third edition was published in 2017,[63] with a special chapter titled "Social Media".[64]

The social media chapter briefly covers many different issues involving judicial officers' social media use, such as anonymity and privacy.[65] It is not prescriptive and leaves judicial officers with considerable flexibility in this area. As stated above, Australian courts do not appear to have considered whether Australian judicial officers can be friends on social media with lawyers, or what to do when they are friends and the lawyer appears them.[66] The third edition of the AIJA Guide also contains a new chapter about ethical issues concerning the family members of judges;[67] in addition, the new social media chapter has a paragraph about the social media use of the family members of judicial officers.[68]

The New Zealand judiciary has a similar document, *Guidelines for Judicial Conduct2019*, which contains a paragraph about judicial officers using social media.[69]

55 See, eg, ibid.
56 See, eg, Florida Supreme Court Judicial Ethics Advisory Committee, above n 41; Oklahoma Judicial Ethics Advisory Panel, n 41; Massachusetts Commission on Judicial Ethics, n 41; New York State Commission on Judicial Conduct, Opinion No 13-39, 28 May 2013; Maryland Judicial Ethics Committee, Opinion No 2012-07, 12 June 2012.
57 See, eg, *Domville v State of Florida* 103 So 3d 184 (Fla, 4th DCA, 2012); *Law Offices of Herssein and Herssein, PA v United Services Automobile Assn*, Supreme Court of Florida, No SC17-1848, 15 November 2018.
58 Federal Court of Australia, above n 37.
59 AIJA, above n 2.
60 ibid, at p ix.
61 *DPP v McNamara* [2012] NTSC 81 at [19] (Barr J), cited in Bromberg, above n 18, 124.
62 AIJA, above n 2, at p vii.
63 ibid at p vii. The AIJA Guide was further updated in November 2020.
64 Bromberg, above n 18, at 124.
65 AIJA, above n 2.
66 Rares, above n 27, at 114.
67 AIJA, above n 2, at Ch 8.
68 ibid, at pp 44–45.
69 Courts of New Zealand, *Guidelines for Judicial Conduct 2019*, 2019 at [88].

In 2012, the Senior Presiding Judge for England and Wales and the Senior President of Tribunals published guidelines for judicial officers about blogging.[70] In 2013, the Judiciary of England and Wales amended their *Guide to Judicial Conduct* to include social media.[71] Many American judicial ethics committees and similar organisations,[72] including the American Bar Association,[73] have created guidelines and advisory opinions for judicial officers regarding social media. The Global Judicial Integrity Network examined challenges regarding judges' social media use and created non-binding guidelines on the issue in 2018.[74]

Judicial officers and lawyers being friends on social media

There are many different guidelines and advisory opinions that examine judicial officers being social media friends with lawyers. Some forbid it,[75] some permit it with relevant warnings[76] and some discuss the issue generally.[77]

The guidelines in Australia

The Federal Court of Australia's *Draft Guidelines for Judges about Electronic Social Media* state:[78]

> Social media connections with the judge may raise perceptions of possible bias if those connections include members of the legal profession, particularly where they belong to a law firm that is well known for appearing in proceedings before the Court. This may also raise possible disclosure or disqualification issues. If a judge has a social media connection with a lawyer or party who is either appearing or will soon appear before him or her, the judge should consider whether the connection should be disclosed either prior to or at commencement of the matter.

The Guidelines' social media chapter includes the following:[79]

> A judge must also be mindful of the persons with whom the judge has a connection through the use of social media. An established connection between the judge and an individual, or between the judge and a lawyer, might be problematic if the person or lawyer comes before the judge. It may be difficult for a judge to keep track of all of the persons with whom the judge has had contact or connection using electronic media, but the record of that contact will always exist. To an outsider, the contact may seem significant, even though the judge has no memory of it.

70 Senior Presiding Judge for England and Wales and Senior President of Tribunals, "Blogging by Judicial Office Holders", August 2012.
71 Judiciary of England and Wales, *Guide to Judicial Conduct*, p 17 (updated September 2020).
72 See, eg, Florida Supreme Court Judicial Ethics Advisory Committee, n 41; Oklahoma Judicial Ethics Advisory Panel, n 41; Massachusetts Commission on Judicial Ethics, n 41; New York State Commission on Judicial Conduct, n 56; Maryland Judicial Ethics Committee, n 56.
73 American Bar Association, above n 28.
74 United Nations Office on Drugs and Crime and Global Judicial Integrity Network, n 30, 1.
75 Florida Supreme Court Judicial Ethics Advisory Committee, n 41; Oklahoma Judicial Ethics Advisory Panel, n 41; Massachusetts Commission on Judicial Ethics, n 41.
76 American Bar Association, above n 28.
77 AIJA, above n 2, at Ch 9.
78 Federal Court of Australia, above n 37.
79 ibid at p 44.

The chapter also adds: "Comments by a judge relating to litigation or litigants before the judge, or to lawyers before the judge, should be avoided."[80] Relevantly, an earlier chapter states the following regarding friendship between judicial officers and lawyers generally (outside of the social media context):[81]

> Friendship or past professional association with counsel or a solicitor is not generally to be regarded as a sufficient reason for disqualification. An existing commercial or business relationship between the judge and counsel or a solicitor in a matter to be heard by the judge will require very careful consideration, as will the question of the extent and detail of the disclosure required by the judge in the circumstance.

Finally, it advises that "a judicial officer should consider whether to inform the parties of an acquaintanceship before the hearing begins".[82] It goes on to say:[83]

> There is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. Many judges attend Law Society functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge.

The guidelines overseas

The Canadian Judicial Council's 2010 *Consultation on Ethical Principles for Judges* stated that 73% of the approximately 950 respondents to their survey (which consisted of judicial officers, lawyers, academics and the public) thought that judicial officers should not be social media friends with any lawyer who could appear before them in court.[84] While this is merely survey data and not guidelines or an advisory opinion, it provides insights regarding attitudes to this issue.

The New Zealand *Guidelines for Judicial Conduct2019* state:[85]

> [C]are is needed to avoid any compromise to judicial independence or impartiality through expressions of opinion or online activities. This could include links through social media such as for example friending a litigant that may give rise to conflicts of interest or a perception of bias.

American guidelines adopt varied opinions on this topic.[86] The advisory opinions of the ethical bodies of some States — such as Florida,[87] Oklahoma[88] and Massachusetts[89] — take a "strict approach" and forbid judicial officers from being friends on social media with any lawyer

80 ibid.
81 ibid, at p 16.
82 ibid, at pp 15–16.
83 ibid, at p 34.
84 Canadian Judicial Council, Consultation on Ethical Principles for Judges, 2010.
85 Courts of New Zealand, above n 69, at [88].
86 S Singh, "Friend request denied: judicial ethics and social media" (2016) 7 *Journal of Law, Technology and the Internet* 153 at 158. See, eg, Florida Supreme Court Judicial Ethics Advisory Committee, above n 41; New York State Commission on Judicial Conduct, above n 56.
87 Florida Supreme Court Judicial Ethics Advisory Committee, above n 41.
88 Oklahoma Judicial Ethics Advisory Panel, above n 41.
89 Massachusetts Commission on Judicial Ethics, above n 41.

who could appear before them.[90] Other advisory opinions — such as those from New York,[91] Maryland[92] and New Mexico[93] — state that a social media friendship between a judicial officer and a lawyer, without any other supporting facts (such as a real life friendship) is insufficient for a judicial officer to recuse themselves. According to the American Bar Association's Formal Opinion:[94]

> Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.

In the Florida case of *Domville v State of Florida*[95] the appellant applied to disqualify the trial judge because the prosecutor and the trial judge were Facebook friends. The appellant argued that the Facebook friendship meant that the trial judge could not be "fair and impartial".[96] Their Honours applied the Florida *Code of Judicial Conduct*,[97] which states that a judicial officer cannot add lawyers who appear before them as friends on social media and cannot allow lawyers to add judicial officers as their social media friends. Such friendships on social media "reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge".[98] Because the Facebook friendship would cause a layperson to believe that the judicial officer was not impartial and could not provide a fair trial, their Honours quashed the order of a lower court that refused the application to disqualify the trial judge and remanded the matter to the Circuit Court.[99]

About five years after the *Domville* case, another Florida judgment — *Law Offices of Herssein and Herssein, PA v United Services Automobile Assn*[100] — considered this issue. The case involved the plaintiff applying for the trial judge to be disqualified because he was Facebook friends with a lawyer who represented a possible party and a possible witness in the matter. Their Honours had to decide whether "a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit".[101] Their Honours stated that a

90 Singh, above n 86, at 158.
91 New York State Commission on Judicial Conduct, above n 56.
92 Maryland Judicial Ethics Committee, above n 56.
93 New Mexico Committee on the Code of Judicial Conduct, *Advisory opinion concerning social media*, 15 February 2016, at p 17.
94 American Bar Association, above n 28.
95 *Domville vStateof Florida*, 103 So 3d 184 (Fla, 4th DCA, 2012).
96 ibid.
97 Florida Supreme Court Judicial Ethics Advisory Committee, above n 41.
98 ibid.
99 ibid.
100 *Law Offices of Herssein and Herssein, PA v United Services Automobile Assn* (Fla 3rd D Ct App, No 3D17-1421, 23 August 2017).
101 ibid at 3.

Facebook friendship does not necessarily mean that a close friendship exists in reality. A social media friend may be an acquaintance or a stranger, and users may not be able to remember every person they are friends with on the platform. Since a social media friendship is different from real life friendship, a judicial officer who is social media friends with a lawyer can still be impartial. Their Honours disagreed with the *Domville* decision and denied the request for the judicial officer to disqualify himself.

Discussion

As discussed above, a friendship on social media between a judicial officer and a lawyer may lead to an allegation of an apprehension of bias and/or a recusal and/or an appeal. However, the AIJA Guide[102] provides only general guidance on friendships concerning judicial officers and lawyers on social media. This may be considered sufficient since the Guide typically provides only general guidance on other matters as well. Further, Australian judicial officers are considered to be highly ethical and are expected to make the right decisions without more specific guidance. Nevertheless, providing more detailed guidance could help to maintain these high ethical standards in an era of novel and more complex electronic communication.

The AIJA Guide gives advice about friendships between judicial officers and lawyers in real life. Therefore, judicial officers could simply apply this to social media friendships. For example, the Guide clearly states:[103]

> Friendship or past professional association with counsel or a solicitor is not generally to be regarded as a sufficient reason for disqualification.

It also states:[104]

> There is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. Many judges attend Law Society functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge.

Though an attractive solution, applying such an approach may not be as simple as it first seems. Social media friendships are different from real life friendships. In particular, the public may be more likely to know about them because they can be visible to many, whereas the public may never see some real life friendships.[105] The occasion for challenge is therefore more likely to arise even though social media friendships often extend well beyond what would in ordinary life be regarded as a personal friendship. Where a judge relies on privacy settings to limit access to

102 AIJA, above n 2.
103 AIJA, above n 2, at p 16.
104 ibid, at p 34.
105 Steven Seidenberg, "Seduced: for lawyers, the appeal of social media is obvious. It's also dangerous", *American Bar Journal*, 1 February 2011, [39].

the social media on which they engage, they must remain conscious of any friendship that might give rise to a reasonable apprehension of bias. For a judge who has an extensive social media presence, it may be difficult to keep track of all their friends and easy to overlook a relevant one.

Another option would be for judicial officers and lawyers to avoid social media friendships altogether, then the issue would no longer exist. While some may choose to do this, it is unrealistic to expect it of all judicial officers. Social media is here to stay. Judicial officers and lawyers may have been friends on social media before one became a judicial officer and it may be impractical to ask them to stop their social media friendship as a result. Further, upon becoming a judicial officer, they might forget to remove lawyers as their friends on social media. People may also enter and exit the legal profession during their careers, which could make ensuring that a judicial officer is not social media friends with a lawyer difficult.

The number of complaints related to judicial officers' social media use internationally is currently small, but such complaints are increasing and will likely continue.[106] The *Charisteas* decision may make more judicial officers extra cautious regarding their friendships with lawyers who appear before them (both on and off social media); however, such caution may be forgotten over time. The AIJA Guide is a well-known text that judicial officers can consult through the ages.

If it is accepted that the AIJA Guide should give more guidance on this issue, then the question becomes what that additional guidance should be. A starting point could be dividing the issue up into a few scenarios, including:

- what should occur when a lawyer and judicial officer are existing friends on social media and the lawyer appears before the judicial officer?
- should a judicial officer and a lawyer become social media friends when the judicial officer might appear before the lawyer?
- does a newly appointed judicial officer need to scrutinise their social media friendships with lawyers?

Because the first scenario is the most likely to affect the outcome of a hearing or trial, it is considered in more depth below. As was emphasised in *Charisteas*, once a trial is underway or about to get underway, there must be no private communications between a lawyer for one of the parties and the judge. This avoids any reasonable apprehension that the judge's impartiality might have been compromised by something said in the course of the communications, or by some aspect of the personal relationship exemplified by the communications. As the AIJA Guide pithily states, judicial officers should "avoid direct association with members of the profession who are engaged in current or pending cases before the judge".[107] Judicial officers need to consider how to apply this idea in the social media context, where electronic direct association could easily occur.

106 New York State Commission on Judicial Conduct, above n 56; Maryland Judicial Ethics Committee, above n 56.
107 AIJA, above n 2, at p 34.

What should occur when a lawyer and judicial officer are existing friends on social media and the lawyer appears before the judicial officer?

The AIJA Guide could readily be modified to provide more guidance concerning situations when a lawyer appears before a judicial officer who is their social media friend. It could state that:

- the judicial officer and the lawyer should not communicate about the case before them on social media – a prohibition clearly required by the apprehension of bias principle;
- the judicial officer should disclose all relevant social media friendships with lawyers who appear before them;
- the judicial officer and the lawyer should stop all communication on social media for the period that the lawyer appears before the judicial officer;
- the judicial officer could unfriend or unfollow the lawyer on social media for the period that the lawyer appears before the judicial officer.

The second, third and fourth ideas are contentious.

The California advisory opinion on this issue states that when a judicial officer and a lawyer are friends on Facebook and the lawyer appears before the judicial officer, the judicial officer should "unfriend" the lawyer and disclose this information.[108] While it could be onerous and inefficient for a judicial officer to constantly look up the lawyers who appear before them on social media, such behaviour could potentially help to prevent allegations of an apprehension of bias and a corresponding appeal.

It may help to list potential factors that a judicial officer should assess when they consider recusal.[109] The California Judicial Ethics Committee provided the following considerations:

- The "nature" of the social media — if a page is more personal, then it is more likely that the lawyer might appear to be able to influence the judicial officer. For example, if a lawyer interacts with a judicial officer's personal page, as opposed to a group page.
- The number of social media friends a judicial officer has — if a judicial officer has less friends, this means that a lawyer may have more influence on the judicial officer.
- How selective the judicial officer is regarding who they add as a Facebook friend — the pickier the judicial officer, the more likely it may appear that a lawyer can influence the judge.
- How often the lawyer appears before the judicial officer — if a lawyer rarely appears before a judicial officer, then it may be more possible that the lawyer can influence them.

Additional factors to think about are if the judicial officer's page is personal, with many photos and opinions on books, movies and restaurants. This could make it more likely that the friendship would be problematic.[110]

108 California Judges Association, *Opinion No 66*, 2011.
109 Artigliere et al, above n 39, at 18.
110 California Judges Association, above n 108, referred to in Artigliere et al, above n 39, at 18.

Amending and expanding the AIJA Guide on the topic of social media use would help to clarify the obligations of judicial officers and avoid inadvertent infringements of the apprehension of bias principle in this developing area.

Conclusion

The world is experiencing "a communications revolution"[111] and social media is a crucial part of it. Social media's impact is far-reaching — and it has certainly reached the law and the judiciary. One way it has done so concerns judicial officers being social media friends with lawyers. It is therefore important to consider modifying the AIJA Guide[112] to provide more guidance on this issue, particularly in light of *Charisteas*. This article identified different situations in which guidance may help judicial officers when they assess their social media friendships with lawyers. In particular, it found that the AIJA Guide should advise on the proper conduct when a lawyer and judicial officer are existing friends on social media and the lawyer appears before the judicial officer. This is because such a circumstance may result in a recusal and/or an accusation of an apprehension of bias and/or a ground for appeal. It should be noted that in making any changes to the AIJA Guide it will also be important to consider the ethical implications of judicial officers being friends on social media with other participants in a trial, such as witnesses and the parties.[113]

Rares has stated the following on this issue:

> The judicial role, like other traditional roles in our society, cannot stay static. Yet, in evolving to adapt to new communication norms of our age, judges will need to develop careful insights and behaviours to protect not only themselves and their family's safety, but also the integrity of their office and the court.[114]

Modifying the AIJA Guide[115] to provide more information regarding friendships between judicial officers and lawyers on social media is one way to help to develop these careful insights and behaviours.

111 M Warren, "Open justice in the technological age" (2014) 40(1) *Monash University Law Review* 45 at 46.

112 AIJA, above n 2.

113 See, eg, *McManaman v R* [2016] 1 WLR 1096, where a man who sat in a public gallery during a trial in the UK sent a friend request on Facebook to a juror; *State v Madden* Appeal No C-000375, Trial No C-00TRC-8005 (Ohio Ct App Mar 21, 2001), where the trial judge did not abuse his discretion by refusing to recuse himself because he was friends on Facebook with a possible witness; *Chace v Loisel*, 170 So 3d 802, 803–804 (Fla, 5th DCA, 2014), where the trial judge sent one of the parties in the litigation a Facebook "friend" request; *Youkers v The State of Texas* (Court of Appeals 5th District of Texas at Dallas, 15 May 2013), where one of the grounds of appeal was that the trial judge was a Facebook friend of the victim's father and the victim's father sent the trial judge an ex parte communication on Facebook.

114 Rares, above n 27, at 112.

115 AIJA, above n 2.

Relationship with legal profession, bullying and sexual harassment

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Judicial bullying: the view from the bar*

Ms K Nomchong SC†

In January 2018, the NSW Bar Association conducted a Quality of Working Life survey which indicated that 66% of respondents had experienced judicial bullying. A Victorian Bar Association survey has yielded similar results. The following article is an important contribution to an open and frank dialogue about barristers' perceptions of judicial bullying and how this could be addressed in a systematic way.

Legislative and community admonition against bullying in the workplace is well known in Australia. This is evident from media attention to the issue, including calls for an investigation into allegations of bullying in politics.[1] It is also entrenched in the anti-bullying regime under the *Fair Work Act 2009* (Cth).[2]

So where does judicial bullying fit into the picture? In what ways is it similar to the bullying experienced in other spheres of public life and in what ways does it differ? Can we pick and mix from reform efforts elsewhere or does it require a uniquely tailored response?

Discussion of judicial bullying in Australian courts often commences with the qualification that instances are uncommon.[3] Formal complaints to the Judicial Commission of NSW about judicial bullying are rare.[4]

This assumption needs to be reconsidered. In January 2018, 66% of the respondents to the Quality of Working Life survey (QoWL survey) conducted by the NSW Bar Association indicated that they had experienced judicial bullying.[5]

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* Published in (2018) 30(10) *JOB* 95. The views expressed in this article are the views of the author and do not represent any official view of the Judicial Commission of NSW.

† Senior Counsel, Denman Chambers.

1 G Hutchens, "Scott Morrison says Liberals will deal with bullying claims 'inside our team'", *The Guardian*, 4 September 2018, at www.theguardian.com/australia-news/2018/sep/04, accessed 15 June 2021.

2 *Fair Work Act 2009* (Cth), Pt 6-4B, ss 789FA–789FL.

3 G Appleby and S Le Mire, "Judicial conduct: crafting a system that enhances institutional integrity" (2014) 38 *MULR* 1 at 5.

4 Based on Judicial Commission complaints data published each year in the Commission's annual report at www.judcom.nsw.gov.au/publications, accessed 15 June 2021.

5 A Moses, "Judicial bullying can't be tolerated", *The Australian*, 10 May 2018.

This is not unique to NSW courts. In October 2018, 59% of respondents to the QoWL survey conducted by the Victorian Bar Association indicated that they had experienced judicial bullying.[6] Advocates in the United Kingdom have raised concerns that judicial abuse is going unchallenged.[7] Similarly, a 2018 wellbeing survey of criminal lawyers conducted in New Zealand found that 88.1% of respondents had personally witnessed or experienced bullying, and that in 65% of those instances the "bully" was a judge.[8]

First and always the most contentious issue is the definition of "judicial bullying". Trying to find the line between an acceptable robust line of questioning from the Bench and an episode of bullying is not always an easy task. As such, the development of protocols or guidelines, a complaints framework or educational programs to address judicial bullying must grapple with that issue. Consensus must be reached between the Bench and the Bar as to what is and what is not judicial bullying. This includes consideration of whether, unlike the common conception of bullying[9] or how it is defined under the *Fair Work Act*,[10] which requires repeated conduct, one instance of judicial bullying is sufficient to justify a complaint, investigation or potential action.

How is bullying defined?

There is no universal definition of bullying. *The Fair Work Act*[11] stipulates that bullying occurs towards an individual (or group of individuals) in a workplace where there is repeated unreasonable behaviour towards the worker (or group of workers); and that behaviour creates a risk to health and safety.[12] However, access to the anti-bullying orders are only available to employees of the same employer.

More generally, bullying encompasses a range of behaviour. For the purposes of this discussion, it includes a "threat to another's professional status (eg belittling opinion, public professional humiliation, accusation regarding lack of effort); threat to personal standing (eg name-calling, insults, intimidation, devaluing with reference to age) … overwork (eg undue pressure, impossible deadlines, unnecessary disruptions)".[13] Power imbalance is an integral part of bullying because the perpetrator perceives that the victim has little or no ability to retaliate.[14]

6 Victorian Bar, *Quality of working life survey*, Final report and analysis, October 2018, p 18.

7 See J Delahunty, "Judicial conduct: when it goes wrong", *Counsel*, March 2018, at www.counselmagazine.co.uk/articles/judicial-conduct-when-it-goes-wrong; P Ahluwalia, "Judicial behaviour: bullying in the courtroom", *The Law Society Gazette*, 13 November 2017, at www.lawgazette.co.uk/practice/judicial-behaviour-bullying-in-the-courtroom/5063614.article, accessed 15 June 2021.

8 R Hill, "Judges worst offenders in law harassment survey", Radio New Zealand, 25 March 2018, at www.radionz.co.nz/news/national/353269/judges-worst-offenders-in-law-harassment-survey, accessed 15 June 2021.

9 For example, The *Oxford English Dictionary* defines a bully as "[a] person who habitually seeks to harm or intimidate those whom they perceive as vulnerable".

10 Section 789FD(1)(a) of the *Fair Work Act* refers to "repeatedly" behaving unreasonably towards a worker.

11 *Fair Work Act 2009* (Cth), Pt 6-4B, ss 789FA–789FL.

12 *Fair Work Act*, s 789FD(1).

13 C Rayner and H Hoel, "A summary review of literature relating to workplace bullying" (1997) 7 *Journal of Community & Applied Social Psychology* 181 at 183 cited in R Worth and J Squelch "Stop the bullying: the anti-bullying provisions in the Fair Work Act and restoring the employment relationship" (2015) 38 *UNSWLJ* 1014.

What is judicial bullying?

It is sometimes said that intemperate and/or inappropriate behaviour by the judge may be an understandable by-product of the adversarial nature of the courtroom. The pressures of managing ballooning dockets and lengthy directions lists — often with fewer resources — should not be underestimated. However, while the occasional intemperate comment or moment of obvious exasperation by the judge is likely to be inevitable, directed intimidation, sarcasm, discriminatory remarks and outbursts of temper, on the other hand, have the capacity to cause humiliation, stress and more serious psychological reactions in the barrister to whom the remarks are directed. Further, judicial bullying may also cause dysfunction in the judicial process, bring the process into disrepute and ultimately, affect public confidence in the administration of justice.

The relationship between the Bench and the Bar is one of trust, confidence, competence, integrity and honesty. It is crucial to the efficient disposal of litigation that that relationship is not undermined.

In his 2013 comments, Bathurst CJ noted that "an integral part of the adversarial process" involved judges questioning propositions advanced by counsel, correcting errors and drawing to a close misguided lines of argument. However, while being "curt" in order to achieve these objectives would not amount to bullying, it has been suggested that it might nevertheless give the impression that there had not been a fair hearing.[15]

Justice Peter Young, former judge of the NSW Court of Appeal, expressed his view in a 2013 article in *The Australian* titled "Thin-skinned advocates should take a spoonful of cement and harden up". In the article, Young J suggested that the increase in the number of alleged instances of judicial bullying could be attributed to the "growth of 'self-esteem' as a virtue … so that any adverse statement which has a tendency to deflate self-esteem even slightly is taken as unfair bullying".[16]

In a similar vein, judges (and more senior barristers) often respond to the topic of judicial bullying by asserting that many alleged instances arise where incompetent advocates seek to justify their position when their lack of preparation or misconceived arguments are the subject of adverse comment by the Bench. In that regard, there is no doubt that the Bar must accept responsibility for the ongoing role of education and disciplinary control over its members, particularly for those whose lack of diligence add to the pressures of hearings. However, it is essential that the reaction of judges, even to poor advocates, remains civil and professional.

Most instances of judicial bullying are unlikely to be characterised as intentional public ridicule or harassment. However, there are examples. In 2013, Justice Glenn Martin, former President

14 S Einarsen, "The nature and causes of bullying at work" (1999) 20 *International Journal of Manpower* 16, cited in Worth and Squelch, ibid.

15 C Merritt, "Judicial bullying? Not in my courts", *The Australian*, 7 June 2013.

16 P Young, "Thin-skinned advocates should take a spoonful of cement and harden up", *The Australian*, 12 July 2013.

of both the Queensland and Australian Bar Association, recounted a complaint from a junior barrister who had been told by a judge in open court: "You're an idiot. Does your client know you're an idiot?".[17]

Although comments like these make it to the airwaves, the spectrum of behaviour considered to be unacceptable is not and should not be limited to explicit verbal abuse.

Justice Michael Kirby was one of the first judges to speak publicly on the issue of judicial bullying. His Honour believed that this included conduct such as "displaying personal animosity, disrespect towards advocates or litigants or their arguments, courtroom rudeness, arrogance towards advocates or colleagues, gossiping and laughing in private conversations with other judges during argument".[18] This sort of conduct is clearly designed to, and has the effect of, alienating the advocate and the litigant. Such conduct creates an unfavourable impression of the judge and the court process.

It is also worth noting Kirby J consistently articulated the view that a civil and courteous court was more likely to be an efficient one.

The 2018 NSW Bar Association Quality of Working Life Survey

In January 2018, the NSW Bar Association conducted a survey of its members about their level of wellbeing including factors influencing the quality of their working life. One of the questions was directed to judicial bullying.

Qualitative responses from 494 barristers provided an insight into the differing forms of bullying that advocates in NSW have experienced. The responses recounted instances of verbal comments from the bench which were belittling or amounted to public humiliation in front of the barrister's opponent, clients and observers in the court. Others recounted instances of excessively personal or otherwise unfair criticism. Also noted in the survey as a common type of bullying experienced by advocates was being repeatedly interrupted or being intimidated. Remarkably, there were accounts of angry outbursts of yelling and even screaming of derogatory comments.[19] In addition, and disturbingly, there were also some accounts of inappropriate gender-based comments. Barristers also reported judicial bullying in the form of the imposition of unreasonable deadlines which demonstrated favouritism or bias towards one side.

The QoWL survey replicated the anecdotal information that has been voiced by barristers during seminars, discussions and through informal complaints. More often than not, the narrative of unacceptable bullying relates to the same judges, all known by name and notorious for their

17 See J Phillips, "Judicial bullying", paper delivered to the NSW Local Court Conference, Sydney, 4 August 2017, p 10, at http://jeffreyphillipssc.com.au/wp-content/uploads/2017/08/Judicial-Commission-Judicial-Bullying-By-Jeffrey-Phillips-SC.pdf, accessed 15 June 2021.

18 M Kirby, "Judicial stress and judicial bullying" (2014) 14 *QUT Law Review* 1 at 10.

19 *Quality of Working Life Survey*, conducted by the NSW Bar Association, January 2018.

inappropriate and unwarranted behaviour. In many cases, these well-known judicial offenders have gone unchecked for years with barristers each lamenting their similar experiences. All such stories involve a recitation of how demoralising and stressful the litigation became.

While, at first sight, the QoWL survey findings are concerning, it is possible that some of the complaints, if properly investigated, would not amount to bullying. Any conclusion depends on what behaviour is said to "cross the line" — an issue which is currently unclear and has received scant attention to date. There are few existing guidelines as to what conduct constitutes judicial bullying so as to enable judges and counsel to understand what is and is not appropriate, and to identify when judicial misconduct has occurred. There has also been little in the way of collection of the empirical data needed for the development of such guidelines.

It may well be impossible to ring-fence what constitutes judicial bullying. Many instances of potential misbehaviour will fall into a grey zone, where minds will differ. However, the absence of a bright-line test for determining whether conduct from the Bench amounts to bullying does not mean that the issue should be ignored. The opposite is true. There is clearly every reason for the Bench and Bar to engage in an open and frank dialogue about judicial bullying and to address it in a systematic way.

Why does judicial bullying matter?

Judicial bullying necessarily compromises the integrity and the efficiency of the court.

While it is properly the role of the judge to question counsel, aggressive or pejorative comments or interjections from a judge do not assist on this front. Justice Kirby observed that far from prompting an advocate to do better, "a speaker will rarely give his or her best for the client, or the cause, or for the court, when subjected to undue pressure".[20] This has certainly been reflected in the sentiments expressed in the 2018 QoWL survey and anecdotally. Repeated sarcastic or intimidatory remarks often result in advocates becoming intimidated and retreating from the process.

Justice Young, although somewhat dismissive of the "problem" of judicial bullying, similarly conceded that "most judges understand that they are more likely to gain assistance from counsel if relations between the Bench and the Bar are kept cordial than if counsel is unsettled".[21] Bullying behaviour can disrupt and disturb barristers which in turn prevents them from performing their task to the standard they might otherwise be capable of.

In order to avoid further hostile attention, an advocate may be coerced into making potentially disadvantageous or unnecessary concessions. The fear of being subjected to further humiliation from the Bench also deters advocates from advancing their arguments.

20 Kirby, above n 18, at 8.
21 Young, above n 16.

For judges, judicial bullying can also demonstrate or give rise to perceptions of pre-judgment. "Arrogant, rude and inappropriate" behaviour from the Bench can also impact a litigant's opportunity to effectively present their case.[22] Judicial bias of that kind may in turn compromise public confidence in the legal system.

Not a rite of passage

First and foremost, judicial bullying cannot be dismissed as an inevitable feature of courtroom life.

The idea that judicial bullying is a necessary "rite of passage" for junior counsel is outdated, dangerous and wholly unacceptable. Older practitioners relating "war stories" of how they were mistreated by former judges should not be a source of admiration but rather, a sad indictment that this issue has not been addressed earlier. Just because one has suffered the humiliation of judicial bullying and "lived to tell the tale" does not mean that it should be an experience visited upon the newer members of the Bar. Rather, it should be the trigger for right-thinking members of the Bench and Bar to ensure that such behaviour is treated with opprobrium.

Younger lawyers have been educated in a school and university system that has taken bullying seriously for a generation; they are unlikely to be attracted to a profession that does not similarly address it but in some ways continues to celebrate it.

The psychological and adverse reputational damage of being a victim of judicial bullying is significant. The suicide of a young WA Legal Aid solicitor in 2010, regrettably linked to a magistrate recently "berating" her,[23] was an unacceptable cost of a culture which tolerates judicial bullying. Beyond that very serious case, judicial bullying causes psychological stress and may contribute to the development of psychological disorders such as depression and anxiety.[24] The very fact that 66% of barristers in the NSW QoWL survey stated, in the context of a questionnaire about their wellbeing, that they had been subject to judicial bullying may indicate that causative link. For those who do not suffer psychological injury, judicial bullying has other less visible effects on the profession at large, including emotional exhaustion as well as high levels of burn-out and withdrawal from work — all of which have a corrosive effect on the operation of our judicial system. Christopher Shanahan SC, in a discussion on effective advocacy and judicial bullying, noted the following:[25]

> No work place training should be predicated on the need to learn to absorb bullying — that cannot be an appropriate "rite of passage". Indeed advocates subjected to such conduct in their formative years should be at the forefront of measures to eradicate it.

22 See *Reznitsky v DPP (NSW)* [2014] NSWCA 79 per Tobias AJA at [38].
23 J Jerga, "Lawyer 'berated' in court before death", *The Sydney Morning Herald*, 20 August 2010 at www.smh.com.au/national/lawyer-berated-in-court-before-death-20100820-138pm.html, accessed 15 June 2021.
24 Phillips, above n 17 at 13.
25 C Shanahan, "'Instructions on how to use a life-jacket': persuading a hostile court to shift its position" (2013) 38 *Aust Bar Rev* 76 at 81.

Who are the victims?

Judicial bullying and its effect on legal practitioners should feature as part of the wider conversation around mental health and wellbeing in the profession.

Victims of judicial bullying are often reluctant to speak out for fear of retaliation from the Bench which could in turn jeopardise their reputation and future livelihood. It is not surprising that the most detailed publicly available accounts of judicial bullying involve judges from a former era. However, judicial bullying remains a pressing issue today and demands a thoughtful, comprehensive response.

The discussion of judicial bullying however must extend to others. Court staff who are required to bear witness to the humiliation of barristers and advocates would no doubt experience embarrassment, if not shame, at having to be a participant in a process where that sort of conduct occurs.

There is also the effect on the judge him or herself. There will be judges who lack the appropriate civil judicial temperament or sufficient self-awareness of the effect of their conduct. It is even possible that these judges boast about how clever they are because they have had to "correct" barristers appearing in their courtroom. More likely, any judge with empathy or conscience would find that bullying results in their own feelings of shame and distress. They may ruminate on how they ought not to have engaged in the bullying behaviour. They may want to blame others but they know that they should not have reacted in the way in which they did. The factors which may play a part in causing that behaviour include vicarious trauma from dealing with a litany of distressing cases, the pressure of being the person who determines an outcome which will always be adverse to the losing side, their own work schedules and their own personal circumstances.

The courtroom as a workplace

Unlike most workplaces in Australia, the courtroom is not one where the anti-bullying provisions of the *Fair Work Act* apply for barristers. Although the ethical principles which underpin the federal anti-bullying legislation apply equally in the courtroom, the relevant provisions of the *Fair Work Act* only apply to "workers" in the "workplace" as statutorily defined.[26] This does not include barristers and solicitors who are bullied in court.[27] In contrast, employees who have been bullied have an opportunity to seek redress in the Fair Work Commission because the legislation imposes a positive obligation on employers to ensure that workers do not experience bullying or harassment in the workplace.

However, courts are a workplace for court staff and judicial bullying (particularly ongoing behaviour) may result in a risk to the mental health and safety of those employees. In that circumstance, there is an argument that the court system is a "person conducting a business

26 *Fair Work Act*, Dictionary and s 789FC(2).

27 S Le Mire and R Owens, "A propitious moment? Workplace bullying and regulation of the legal profession" (2014) 37 *UNSWLJ* 1030 at 1055.

or undertaking" within the meaning of s 5(1) of the *Work Health and Safety Act 2011* (NSW) ("WHS Act"). If so, court staff are workers pursuant to s 7 of the WHS Act, and courts are a workplace under s 8 of the WHS Act. As such, the courts are under an obligation to the court staff to protect them against the risk of injury from judicial bullying, particularly, if known (or capable of being known) and not acted upon. Pursuant to s 19(2) of the WHS Act, the courts must ensure, so far as is reasonably practicable, that the health and safety of other persons are not put at risk from work carried out in that workplace. Barristers and solicitors are capable of being "other persons" in that context.

Notwithstanding any statutory obligation, court staff, solicitors and barristers are equally entitled to a workplace which is free of bullying.

Addressing judicial bullying

The effectiveness of any measures aimed at reducing instances of judicial bullying will depend on the development of a shared understanding of what constitutes judicial bullying, why it occurs, and an agreement from the Bench to address it.

The development of a transparent set of guidelines will require a thorough investigation into the nature and extent of judicial bullying, including as to its causes. It will survey a wide cross-section of both the Bench and the Bar in order to understand where views converge and diverge (and why). In addition, because judicial officers rarely observe each other, courtroom observation by objective observers would also be beneficial. This would allow for the development of guidelines built around concrete examples of the types of conduct which are and are not acceptable and ensure that these guidelines reflect a shared understanding of conduct considered to be inappropriate. Although there may currently be a gap between the views of the Bench and the Bar (or, equally, the views of older and younger barristers), as to what does and does not constitute bullying, the existence of guidelines would contribute to a convergence of understanding.

A protocol or set of guidelines would also serve as a useful educational tool in orientation and legal development programs for newly appointed judges and also for barristers. Such a protocol would help reshape expectations of what is considered appropriate courtroom behaviour. In time, such guidelines may be able to form the basis of a Code of Conduct.

The procedure for making complaints also needs attention. At present, there is no standardised process for making complaints about judicial bullying. Complaints may be made to the Judicial Commission of NSW, the President of the Bar Association or to the Heads of Jurisdiction. It would be beneficial if there was a clear complaints procedure. Further, once a complaint is conveyed, there is usually very little transparency in the process. The complaint-making procedure needs to be formalised and regulated through established and transparent protocols for the receipt and processing of complaints. The existence and knowledge of these procedures would remind all courtroom participants to be conscious of the need for civil behaviour.

Due to the inherent reluctance in making complaints, attention needs to be given to how judicial bullying may be investigated without identifying any particular complainant. Moreover, there is room to consider a system of intervention that does not result in a formal disciplinary investigation, particularly given the fact that the causative basis for judicial bullying may involve health or personal issues affecting the judicial officer him/herself.

Bar Associations and Law Societies should also ensure that solicitors and barristers are in a position to respond appropriately to judicial bullying. As suggested by Kirby J, on occasions where there is flagrant misconduct, lawyers should act to ensure that there is a verifiable record of the misconduct by confirming that the words and actions appear on the transcript.[28] There is also a role for practitioners, particularly senior practitioners, who may be present in court when judges act inappropriately to intervene by perhaps seeking to speak to the judge in chambers during a break, or in serious instances, to intervene in the courtroom. Organisations representing the interests of lawyers should also ensure that there are networks in place to assist and support those who have suffered judicial bullying.

Correspondingly, there needs to be a more comprehensive understanding of the pressures facing judges. While there has been a reluctance to acknowledge the problem of judicial bullying, equally problematic is the reluctance to discuss the stresses of judicial life arising from (amongst other factors), the loneliness of the role, the strain of constant non-delegable decision-making, the potential exposure to criticism from the media and the increasing demand on finite judicial resources often resulting in heavy caseloads.[29] Despite the emergence of counselling services and wellbeing programs, the suicide of Melbourne magistrate Stephen Myall in 2018 demonstrates that a crippling caseload is still an issue of critical importance.[30] Similarly, the mental health issues consequent upon a long-running hearing into child sexual abuse was made clear by Magistrate Heilpern in his address at the 2017 Tristan Jepson Memorial Foundation Lecture.[31] While judicial stress does not justify bullying behaviour, it is a contributing factor and one which must be addressed in a thoughtful way. Our judicial system relies on both judges and advocates in order to operate efficiently and fairly. Judges are equally entitled to a workplace free from the overwhelming pressure caused by unmanageable caseloads and inadequate resources.

Conclusion

As indicated by the results of the NSW and Victorian Bar Assocation's QoWL surveys, there is an urgent need to establish standards for judicial conduct and to publicise and streamline the processes by which complaints of judicial bullying can be made and investigated, or circumstances where intervention may be warranted.

28 Kirby, above n 18 at 13.

29 Kirby, ibid, at 3 and Shanahan, above n 25 at p 78.

30 N Towell and A Cooper, "Struggling magistrates cry for help", *The Age*, 2 April 2018, at www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html, accessed 15 June 2021. [**Note**: the death of Judge Andrew Guy in 2020 in similar circumstances, see www.abc.net.au/news/2020-10-09/guy-andrew-death-sign-of-crushing-workload-facing-judiciary/12734736, accessed 15 June 2020.]

31 On 25 October 2017. See also D Heilpern, "Lifting the judicial veil — vicarious trauma, PTSD and the judiciary: a personal story", at www.judicialcollege.vic.edu.au, accessed 15 June 2021.

Sexual harassment and the judiciary*

Ms K Nomchong SC†

In the wake of allegations of sexual harassment against a former High Court judge, the assumption that judicial officers are immune from this problem by reason of their judicial office can no longer be made. The following article frankly discusses the impact of sexual harassment on a victim and canvasses current inadequate protections and new and emerging policies to address the safety of workplaces in courts.

The response by the Chief Justice, the Honourable Susan Kiefel AC, in the wake of the allegations of sexual harassment by a former judge of the High Court of Australia, was poignant and powerful. It focused the attention on the women. Her Honour said:[1]

> Their accounts of their experiences at the time have been believed.

That single statement has resonated deeply within the women of the legal profession. While it is not news to us that sexual harassment has been a pervasive and on-going part of life for women in the law, it is big news that these women have been believed so unconditionally and so publicly by the most senior member of the Australian judiciary.

The effect has been cathartic on every level. As one senior female silk stated, "there has been a tsunami of conversations as women call on each other to tell their own stories". Junior women are coming to senior women in the law and relating stories of unwanted, sordid sexual approaches and being treated as no more than sexual prey. The senior women have been listening with compassion because the stories are truly horrible. These are women who have worked so hard to become part of this profession, only to be humiliated by unwelcome comments about their appearance; made to feel lesser because their worth is not measured by merit but rather by gender; made to feel scared to walk down a hallway or to go into a room for fear of being groped. Made to feel ashamed.

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* Previously published in (2020) *JOB* 55.

† Member of the Bar Association's Professional Conduct Committee and the Board of Directors of the Tristan Jepson Memorial Foundation.

1 Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, at https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf, accessed 26 July 2021.

However, Chief Justice Kiefel turned that around when she said that the disgrace lay elsewhere — that she was "ashamed that this could have happened at the High Court of Australia". The dishonour is not the victims' but rather the systemic failure within the courts and the profession to address this squalid underbelly of the profession.

The Sex Discrimination Commissioner, Ms Kate Jenkins, in the recent report titled *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces 2020*, stated:[2]

> sexual harassment is not a women's issue: it is a societal issue, which every Australian, and every Australian workplace, can contribute to addressing … Workplace sexual harassment is not inevitable. It is not acceptable. It is preventable.

Conduct that may amount to sexual harassment includes unwanted touching, hugging, cornering, kissing, leering, insults or taunts of a sexual nature, intrusive questions about a person's private life or physical appearance, repeated or inappropriate invitations to go out, sexually suggestive jokes or comments, and inappropriate physical contact.[3]

Australian citizens have a right to expect that those in whom we entrust the greatest ethical and legal responsibility, the judiciary, ought be directed to the eradication of sexual harassment — not the perpetuation of it.

Clearly, legislation is not enough. It has been over 35 years since the introduction of the *Sex Discrimination Act 1984* (Cth) ("SD Act"), and 43 years since the NSW *Anti-Discrimination Act 1977* (NSW) ("AD Act"). Discrimination and harassment persist however. The stories being told now by the younger women in the profession are all the more wretched because they reveal the same experiences that the senior women suffered 20 years ago and more.

Sexual harassment disproportionately affects women in the legal profession. The numbers have not really changed since 1995 when a significant number of female solicitors and barristers interviewed said that they had been subject to sexual harassment.[4] In 2018, 47% of Australian female respondents to the International Bar Association survey reported experiencing sexual harassment at work.[5] The Women Lawyers Association of NSW stated 71% of the 242 respondents to their 2019 survey reported being sexually harassed but only 18% had made a complaint.[6]

2 AHRC, *Respect@Work: National Inquiry into sexual harassment in Australian workplaces, community guide*, 2020, p 3, at https://humanrights.gov.au/sites/default/files/document/publication/ahrc_respectwork_community_guide_2020.pdf, accessed 26 July 2021.

3 Section 28A *Sex Discrimination Act 1984* (Cth) (SD Act) defines sexual harrassment for the purposes of Div 3 of the SD Act; see also AHRC, ibid at pp 17–18 and "Supreme Court Policy on Inappropriate Workplace Conduct", 2020, p 3, at www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/2020_07_02_Workpace%20Conduct%20Policy_v4.0_FINAL.pdf, accessed 26 July 2021.

4 NSW Bar Association 1995 Survey (part of record of the NSW Bar Association's Gender Issues Committee), undertaken in response to NSW Ministry for the Status and Advancement of Women, *Gender bias and the law: women working in the Legal Profession in NSW*, 1995.

5 International Bar Association, *Us Too? Bullying and sexual harassment in the legal profession*, 2019, pp 51–52, at www.ibanet.org/bullying-and-sexual-harassment.aspx, accessed 26 July 2021.

And there lies the crux of the problem. Women have not complained and of course, there is good reason for that. There are real and lasting consequences for women who complain about sexual harassment — they are not believed, their complaint is treated with derision ("it's just a bit of fun, he doesn't mean anything by it"), the woman is ostracised or most frighteningly, they are persecuted. The rebuffed men punish the women for not acceding to their unwanted advances — rumours are started and careers are ruined. Sexual harassment is cited as a key reason why women leave the law.[7]

In the past it was suggested that problematic judicial behaviour is rare. Now, when considering sexual harassment within the judiciary, we need to rethink those perceptions. Is it the case that sexual harassment by the judiciary is rare or, as we have learned in the past weeks, is it that it is rarely reported? Or worse still, that reports made go unactioned?

Following the emergence of the #MeToo movement in America in 2017, the reports extended to sexual harassment within the judiciary.[8]

The American Judges Association Court Review suggested in 2018 that "despite the stringent codes of conduct that bind judges and judicial employees, employment within the judiciary (and particularly within judicial chambers) has all of the hallmarks of a workplace environment that makes harassment more likely, and that makes speaking up against harassment nearly impossible".[9] Factors that were cited as contributing to this issue include:[10]

- power dynamics between judges and employees
- strict hierarchical structures in which employees have a single supervisor
- autonomy of judicial chambers
- isolation of judicial chambers
- significant turnover in staff, with new clerks joining every year or two
- leadership that is frequently male dominated
- unique requirements of confidentiality, and
- strong desires to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.

6 L Knowles, "Sexual harassment of women rife in Australian legal profession, survey finds", *ABC news*, 8 March 2019, at www.abc.net.au/news/2019-03-08/70-per-cent-female-lawyers-report-sexual-harassment-survey-finds/10880632, accessed 26 July 2021.

7 P Wright, Law Council President, "Statement regarding sexual harassment in the legal profession", 27 June 2020, at www.lawcouncil.asn.au/media/media-releases/statement-regarding-sexual-harassment-in-the-legal-profession, accessed 26 July 2021.

8 For eg, the allegations of sexual harassment against Judge of the US Court of Appeals for the Ninth Circuit Alex Kozinski and Associate Justice of the Supreme Court of the US Brett Kavanaugh.

9 J Santos, "When justice behaves unjustly: addressing sexual harassment in the judiciary" (2018) 54 *Court Review* 156 at 157.

10 ibid.

Further, law clerks are typically at the beginning of their career and are thus most vulnerable and the risk of retaliation is most acute.[11]

In Australia, associate positions are most often filled by law graduates, many of them women. The factors are the same and the parallels to the risks in our own system are plain.

Currently the forms of redress against members of the judiciary are limited. By reason of the scope of the SD Act[12] and the AD Act, they do not apply to judicial officers.

Similarly, the professional conduct rules which proscribe sexual harassment by solicitors[13] and barristers,[14] do not apply to judicial officers.

In NSW, however, a complaint may be made to the Judicial Commission pursuant to the *Judicial Officers Act* 1986 (NSW) in respect of the behaviour of a judicial officer.[15] However, there is no federal judicial commission nor any other similar body.

In cases where the sexual harassment amounts to criminal conduct, charges may be laid.

The Australasian Institute of Judicial Administration's (AIJA) *Guide to Judicial Conduct*[16] is almost silent on the issue, with the rather opaque statements that "appointment to judicial office brings with it some limitations on private and public conduct. By accepting an appointment, a judge agrees to accept those limitations"; and that judicial officers must exercise "discretion in personal relationships, social contacts and activities".[17]

The High Court's immediate adoption of Dr Thom's[18] recommendations was inspiring. However, more needs to be done.

Proposals are currently being ventilated from all aspects of the profession. Currently they include making amendments so that the SD Act and the AD Act apply to judicial officers; setting up a system for bystander complaints; and putting in place mechanisms for supporting women who have experienced harassment to provide them with information and assistance. There is no doubt that the steps taken by the Chief Justice of the Supreme Court of NSW to build on existing protections and policies, and ensure those policies are promulgated widely and understood by all, should be emulated in other jurisdictions. In that regard, the "Supreme Court Policy on Inappropriate Workplace Conduct" has been published.[19] This policy will add to existing protections, such as the Department of Communities and Justice's Code of Ethics

11 ibid.
12 Subject to a possible use of s 28L of the SD Act which makes it unlawful for any person to sexually harass another in the course of performing any function, or exercising any power, or carrying out any other responsibility for the administration of a Commonwealth law or conduct of a Commonwealth program. However, that seems a remote possibility.
13 Rule 42.1.2 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.
14 Rule 123(b) Legal Profession Uniform Conduct (Barristers) Rules 2015.
15 See s 15(1).
16 AIJA, *Guide to Judicial Conduct*, 3rd edn (rev), 2022.
17 ibid at pp 8–9.
18 The High Court commissioned Dr Vivienne Thom AM to investigate the allegations into former High Court judge Dyson Heydon.
19 Above n 3.

and Conduct.[20] It will also clarify the process as it applies to judges and judicial staff in the court and provide additional avenues for a person to raise an issue. The policy is to be delivered to judges and judicial staff to ensure the policy is known and understood. The NSW Attorney General has also ordered a review into the way that NSW courts and tribunals handle complaints of sexual harassment.[21]

All women are entitled to be safe at work and no-one, including judicial officers, should violate that.

20 NSW Department of Justice, "Code of Ethical Conduct", at www.justice.nsw.gov.au/Documents/About%20us/code-of-ethical-conduct.pdf, accessed 3 July 2020. This policy is to be read and complied with in conjunction with the Public Service Commission's Code of Ethics and Conduct available at www.psc.nsw.gov.au/about-us/our-code-of-ethics-and-conduct accessed 26 July 2021.

21 K McClymont and J Maley, "Attorney General orders 'urgent review' of sexual harassment claims after Heydon claims", *Sydney Morning Herald*, 4 July 2020.

Judicial bullying*

Mr J Phillips SC†

Jeffrey Phillips SC traces the growing awareness of stress, judicial bullying and psychological health in the workplace by examining issues raised by Justices Kirby, Thomas and Young, among others, in their articles on this topic over the course of many years. Bullying in the courtroom is not just about judicial officers' behaviour, but can involve a number of relationships. The examples of Escobar v Spindaleri *and* Barakat v Goritas (No 2) *show that in circumstances judges can be subject to bullying.*

Chief Justice Tom Bathurst, who has been President of the NSW Judicial Commission, stated:

> Courts, like any organisation, move with the times and there has been a recognition that bullying of any sort is highly undesirable.[1]

Psychological health in the workplace is well recognised as a desirable outcome across society. The topic of judicial bullying, that is by and against judges, has been a topic of discussion over some years. There are differing views about it and how best to achieve a definitive answer to the problem.

Bullying in the courtroom is not just about judicial officers' behaviour.

Bad behaviour in the courtroom can involve a number of relationships — lawyer v lawyer; lawyer v client; lawyer v witness; lawyer v judge; and judge v any of the above.[2]

One can understand how judges can have their patience tried by rude litigants, ill-prepared or impunctual practitioners, or practitioners engaged in bullying behaviour themselves. Some

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* This paper was delivered on the 4th August 2017 at the Amora Hotel Jamison Sydney to the annual conference of NSW Magistrates under the auspices of the Judicial Commission of NSW. This article was first published by Thomson Reuters in the *Workplace Review* and should be cited as (2018) 8 *WR* 138. For all subscription inquiries please phone, from Australia: 1300 304 195, from Overseas: +61 2 8587 7980 or online at legal.thomsonreuters.com.au/search. The official PDF version of this article can also be purchased separately from Thomson Reuters at http://sites.thomsonreuters.com.au/journals/subscribe-or-purchase.

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1 T Bathurst, "Judicial bullying? Not in my courts", *The Australian*, 7 June 2013.

2 J Phillips, "'White line fever' in the courtroom" (2013) 4 *Workplace Review* 13.

lawyers can be infuriating. To set a better tone in the courtroom, cross-examination needs to be conducted in a more civilised manner than what has been the robust approach in the past. Cross-examiners who shout at or abuse witnesses should be stopped by the judicial officer acting as a true umpire. Many practitioners, once they set foot in the courtroom, seem to have a bad case of "white line fever" common in the sporting arena. Some regard cross-examination as the last of the legal blood sports.

Counsel who have high-conflict personalities may infect the whole process who in turn may become judicial officers with high-conflict personalities. One can understand that in a busy courtroom and in difficult cases tempers can get frayed. Stress in our work and in the courtroom is necessary and can assist to get the work done efficiently. However, one needs to learn and note the signs when stress turns to distress. Too much work with poor administrative assistance affects many in our profession. Many courts have been squeezed by governmental budget restraints. In many courts more cases have been tried by less judges, as judges and advocates we must, like everyone else, demand safer workplaces. We must treat each other better and with dignity. Litigation should not be another form of unarmed combat.[3]

The former High Court Justice and former President of the NSW Court of Appeal, Justice Michael Kirby, has been a long-term believer in better curial manners and psychologically safer courtrooms. In an address to the Supreme Court and Federal Court Judges' conference in Brisbane in January of 1997, Kirby raised the idea of judicial stress. He asked whether it was a sign of a growing open-mindedness of the Australian judiciary, that is, a willingness to tackle this formerly unmentionable topic. He gave a number of examples from the United States where judges had suffered nervous breakdowns, or worse, in connection with the stress of work that they were performing.[4] He gave an example of a judge in Los Angeles who was severely and publicly censured by the Californian Judicial Commission:

> for temperament problems, including the arrest of people who have been whispering in his court room.

He also gave the example of the former Chief Justice of New York State, Sol Wachtler, who was convicted and imprisoned in 1992 for alleging harassing his ex-lover, including by threatening to kidnap her daughter and demanding $20,000.00 and for sending a condom in the mail to the girl.

We have had own problems in NSW in my career with judicial shenanigans such as the District Court judge in the late 1980s found wandering incoherently in the Hospital Road court precinct, late at night, without his pants on; a Supreme Court judge who could not deliver a decision and a Federal Court judge who swore a false statutory declaration about running a traffic light.

Kirby asked whether such egregious behaviour could be linked to an impact of stress upon members of an over-stressed profession?[5] His Honour noted that some of the stress involved

3 ibid at 14–15.
4 M Kirby, "Judicial stress — an update" (1997) 71 *ALJ* 774.
5 ibid, at 775.

in being a judge these days related to "crushing caseloads, novel and complex legal issues, increasing and critical, media scrutiny with relatively few voices lifted to defend Australia's judges."[6]

In addition to this, there are long hours at work, pressures to perform in public and high expectations which now coincided with repeated attacks upon the judicial status which calls into the question the idealism and the past perceptions of it still generally held by the holders (of such office). The kinds of people who get appointed to judicial offices are, or tend to be, perfectionistic. They have high expectations of themselves and others; they are worriers — conscientious people who represent the classical profile of stress-prone individuals. They have to make decisions and cannot or should not delegate very many.[7]

Kirby also recounted bullying or poor behaviour of judge v judge. This was particularly so in the Sir John Latham High Court of which Sir Hayden Starke was a member. Kirby referred to what was stated by Justice Kim Santow of the NSW Supreme Court in an article entitled "Transition to the Bench". Santow recounted a passage from a biographical portrait of Sir Owen Dixon, written by Grant Anderson:[8]

> Sir Hayden Starke was a rude and difficult man both to his brother judges in and out of the court and to counsel. Indeed he once referred to his brethren as "worms". Starke's misbehaviour prompted Dixon to remonstrate with him on more than one occasion. Dixon clearly disliked many aspects of Starke's personality. For example, after Starke had made some distasteful remark at Sir Frank Gavan Duffy's funeral, Dixon recorded that Starke was a "pitiless man".

In fact, at another funeral of High Court Judge, Sir Isaac Isaacs, Sir Garfield Barwick recalled an open grave ceremony held on one of the hottest day that Melbourne could record. As his erstwhile brothers filed past the open grave, Starke leant forward to his colleague and octogenarian, Sir George Rich, and asked "George are you sure it's worth your while to go home".

Justice Kirby's article about the stressors experienced by judges, was not received kindly by some of his fellow judges. In an article in the same volume of the *Australian Law Journal*, Thomas J from the Supreme Court of Queensland took umbrage at judges appearing to regard themselves as victims and looking for sympathy. Justice Thomas's view was that judges should be able to look after themselves and should not tap into the stress bandwagon.[9] Justice Thomas said the whole nature of the job is stressful and there is a constant pressure to get things right. His view was "You need adrenaline, or pressure, to produce your best work".

Some of the reasons which stirred up judges he said were half-baked submissions from counsel, about which he said:

> These sometimes trigger an explosion. Well why not? For some bit of ranting lets some of the pressure out, and if the release is not too violent it might be good for all concerned. Such is life.

6 ibid, at 776.
7 ibid, at 777.
8 K Santow, "Transition to the Bench" (1997) 71 *ALJ* 294.
9 J Thomas, "Get up off the ground" (1997) 71 *ALJ* 785.

He also referred to the pressure to get out unreserved judgments. He said that it was better merely to ask for more time to handle current reserved judgments but the truth was that vanity stops people doing it.

Curiously, Thomas J said another reason for stress by judges was the thought of how much money counsel was making, especially when they are not doing a very good job. He said: "You only hurt yourself when you think about it".[10] (Envy is one of the seven deadly sins.) Justice Thomas accepted that there was overload of work; however the risk of job loss outside the judiciary is a grave additional stress factor from which judges were immune because of security of tenure and the conditions of their office.

Justice Thomas suggested that the examples given by Kirby J of poor US judicial behaviour had more to do with character than stress, and he rejected the accepted dogma that judicial stress was some form of "black robe fever".[11] His suggestions as to how to overcome judicial stress were summed up as follows:[12]

- reduce the workload and let the backlogs find their true level
- count your blessings more than you do
- never think about how much money people make at the Bar
- never look for sympathy from outsiders
- get the subject off the agenda, and
- remember it might be worse still to retire.

Justice Kirby exercised a right of reply to Thomas J's denial of stress in judicial life.[13] He rejected the comment of Thomas J that judges who complained about stress were just nothing more than "whingers". He said he was inclined to agree with the comment made by Handley J to the effect that when judges think about the lives of advocates they realise that in the stress business they are better off on the Bench.[14] It was also noted that when his paper was delivered there was an attempt to laugh it off, whereas some judges urged their colleagues to play more golf as relief, others recognised that some of the work imposed special burdens, such as sentencing convicted prisoners which was a very stressful aspect of judicial life. Justice Cohen suggested that stress may be something we see in others but deny in ourselves. To this, Kirby J said:[15]

> We can certainly retreat into denial. We can keep our anxieties and concerns strictly to ourselves. We can exclude non-lawyers with insight and expertise to offer. We can react by trying to laugh

10 ibid, at 787.
11 ibid, at 788.
12 ibid, at 789.
13 M Kirby, "Judicial stress — a reply" (1997) 71 *ALJ* 791.
14 ibid, at 792.
15 ibid, at 793.

> a subject away. Or we can bring time honoured judicial qualities to bear. Open-mindedness and new ideas. Honesty about newly perceived facts. Attention to people with relevant expertise and experience. Courage on our own part. Compassion and respect for fellow human beings.

Some years later, the idea of judicial stress and judicial bullying was further advanced by Kirby J in a lecture he gave to the National Wellness for Law Forum, at Melbourne University Law School, on 21 February 2013. His paper was reproduced in the *Australian Law Journal*. He stated this:[16]

> Judicial officers are subject to particular risk of stress, depression and pressure. This is so, however some of them may deny that fact. Moreover, responding to the pressures exerted on them, some judicial officers become part of the problem. Some are bullies. Some misuse their power and create intolerable pressures for lawyers and others working in the law. Most are decent and polite. It is time that judges were added to the agenda of a national wellness forum. Particularly if they are the cause of unwellness in others, it is time for the law to provide appropriate responses.

As it has already been stated here, the judiciary's work involves an inescapable component of stress. Urgent, complex matters, elements of high drama, long criminal trials, civil cases worth millions of dollars, people's livelihoods, cases involving access and custody of children and the like necessarily produce stress in all concerned. Justice Kirby acknowledged:[17]

> Such occasions test the capacity both of lawyers and of judges to act with efficiency, courtesy, restraint and mutual respect. Occasionally, the performances of each will leave something to be desired.

He noted that, by and large, the legal profession gets to know judges who are unsuitable to judicial office either because of intellect, or lack of judgment or temperament.[18]

A similar comment was echoed in a paper given by Justice Glenn Martin of the Queensland Supreme Court at the National Judicial College Seminar, *Managing People in Court* conference in February 2013. He said this:[19]

> Most judicial officers who engage in this type of behaviour are repeat offenders. They are known to the profession and, often, to the head of jurisdiction. With respect to one such person, I was encouraged to report any complaints because the head of that court was concerned and wanted to have a case to be put to the judge in question. Even if such a request is not made it is tactically better and more likely to reduce the likelihood of repercussions to individuals, to provide as many examples as possible. It is the same as mounting any sort of case. Detailed particulars and use of the only strongest examples will be more likely to result in success.
>
> …
>
> In my experience, Chief Justices, Chief Judges and Chief Magistrates are very receptive to a properly prepared case and will take it up with the particular judge or magistrate. But in most jurisdictions that can only engage in moral pressure.

16 M Kirby, "Judicial stress and judicial bullying" (2013) 87 *ALJ* 516 at 517.
17 ibid, at 520.
18 ibid, at 521.
19 G Martin, "Bullying in the courtroom" (2013) 4 *Workplace Review* 16 at 16–17.

An alternative view was offered by the then editor of the *Australian Law Journal*, Acting Justice Peter Young AO, who responded to the *Managing People in Court* conference papers. He stated:[20]

> Of course there are cases where judges get stressed and exasperated, and may say things or behave in a way which is regrettable. However, this occurs sufficiently often that all persons admitted to the Bar will know it will happen every so often and are psychologically prepared for it. When I was at the Bar we considered part of the fee was dirt money to compensate us for it.

He went on to say this:[21]

> However, a judge who is considered weak will be exploited by the Bar. When I was first appointed in 1985 I was speaking with a judge who had been appointed the previous year. He told me his problems at the Bar. I considered his problems were caused by him being too nice. I put in place a strategy to show I was not prepared to be trifled with. This succeeded in that I soon got a reputation expecting good work and being unsympathetic to those who fell short of proper standards.

He resented barristers being paid thousands of dollars for a brief which showed very poor preparation. The editor then went on to quote the case of a senior clergyman. He said this:[22]

> Some years ago Norman, a senior clergyman, stated that he had never become a bishop as he was not a big enough bastard. In reply the Diocesan Bishop said: "Norman, sometimes you've got to be." It's the same with judges.

Justice Young was careful also to note there is a serious problem for 21st century advocates shown by the rates of suicide and mental breakdown of lawyers. His dystopian response was:[23]

> However, we must be careful not to class every factor which may have exacerbated the breakdown of fragile personalities to bullying. Further it may be that the Barristers Admission Board should insist on a psychological assessment of candidates to weed out those who are unable to cope with critical comments from the judiciary.

It may be that some people are robust and can cope with criticism, whereas others at a particular moment in their lives may not have that same resilience. Not every advocate is as resilient as Sir Robert Menzies as recorded in his memoirs when he was appearing in the High Court before Sir Hayden Starke:[24]

> On this occasion he tore my poor argument to pieces, while I did my best to hold its tatters together. (Justice Gavan) Duffy came to the rescue by tossing a series of helpful arguments to me. Naturally, I seized on each of them in turn, and tried to put them, in my own words to the Bench.
>
> At last, Starke could not take it any more, and said to me, "Mr Menzies, your argument is nonsense." Before I could say a word, Duffy, my protector, leaned forward and said to me "What was that my brother Starke said?" Playing for time, I replied that I thought that Mr Justice Starke had not looked with favour on my argument.

20 P Young, "Judicial Bullying" (2013) 87 *ALJ* 371 at 372.
21 ibid.
22 ibid.
23 ibid.
24 R Menzies, *Measure of the Years*, Cassel, 1970, p 263.

> "Wasn't this an argument which I had suggested to you?" said Duffy, fairly bristling. All I could say is that I thought it was, but that I had no doubt conveyed it rather clumsily. But Duffy had girded his loins to the battle, and said, "That is not so. You conveyed it admirably."
>
> Whereupon Starke said, in a grumbly sort of way, "I didn't realise this was an argument suggested by my brother Duffy. If I had, I wouldn't have spoken as I did. But treating it as counsel's argument, I thought it was nonsense, as indeed it is!" From Duffy came the final dart "I gather that my brother Starke is apologising. If so the apology is worthy of him, both in matter and manner!"

Turning back to the paper given by Justice Glenn Martin at the Managing People in Court conference, Justice Martin referred to an event where he was the President of the Queensland Bar Association, where junior counsel was greeted with this comment by the judge, "You're an idiot. Does your client know you're an idiot?" The barrister came to see him. The junior barrister was anxious that the judge not become aware of his complaint because he appeared frequently in that jurisdiction. What could be done in such circumstances?[25]

In the same conference, Associate Professor Anthony Foley, with the Australian National University College of Law, recounted a project conducted by his colleagues which followed a group of young lawyers through their first 12 to 18 months of practice. They were asked how they fared in the first year. He said this:[26]

> They did not tell us specifically that bullying was a problem, but they did tell us about their acute anxiety when they had to appear in court. Indeed, if there was any particular benchmark or hurdle they felt they had to get over in the first year of practice, the anxiety of going to court was the most distressing and taxing. It was not an exaggeration to say this anxiety had the potential to affect their mental health.

Associate Professor Foley went on to say:[27]

> Turning more specifically to the topic of bullying. Power is at the heart of bullying in the workplace, and for lawyers the workplace includes the courtroom. The relationship between the Bench and the lawyer appearing in court is not an equal one. Judicial officers, if they are bullies, are no different from any other bully. They pick the weak and the vulnerable, and the young lawyer is perhaps their easiest target.

I suggest that employers of legal practitioners have a responsibility to make sure that young lawyers are ready to go to court. That obligation requires that new lawyers are given sufficient training and support to appear in court with confidence and with mechanisms to overcome their natural anxiety. They should only be given court appearances commensurate with their experience and skill. The potential for the insidious nature of psychological illness and injury needs to be acknowledged. The legal test as to whether an event can cause psychological

25 above, n 19 at 16.
26 A Foley, "The effect of courtroom behaviour on the well-being of lawyers new to practice" (2013) 4 *Workplace Review* 19.
27 ibid at 21.

injury is undemanding. In *State Transit Authority of NSW v Chemler*,[28] Spigelman CJ said that employers take their employees as they find them. There is an "egg-shell psyche" principle which is equivalent to the "egg-shell skull" principle.[29]

In the same case, Basten J said that where events actually occurred in the workplace, if perceived by the victim as creating an offensive or hostile working environment and psychological injury followed, it is open to conclude that causation is established.[30]

In recent years, there has been some unfortunate examples where causation between stress in the courtroom and psychological injury, including suicide, has been broadly established. Back in 2010, the *Sydney Morning Herald*[31] reported that the Western Australian government was seeking legal advice about accusations that a young lawyer who was bullied by a magistrate as a consequence committed suicide. It was reported that:

> Dragana Nuic died in March this year after jumping off The Gap in Sydney's eastern suburbs. The WA Chief Magistrate has received a complaint that prior to Ms Nuic's suicide, the 22 year old Legal Aid lawyer was "berated" by a magistrate in court. A WA lawyer told AAP the magistrate had given Ms Nuic a dressing down in court a short time before she took her own life at The Gap.

The NSW Director of Public Prosecutions, in 2013, circulated a memo to all Crown prosecutors and solicitors warning them to stop bullying one another or face disciplinary action. This was in the context that the previous six months two lawyers from the DPP had committed suicide.[32] The article reporting on the DPP memo noted what Kirby had said about judicial bullying at the National Wellness for Law Forum when he said this:[33]

> In serious and repeated cases, bullying by judicial officers should be recognised as an abuse of public office warranting commencement of proceedings for the removal of the offender from judicial office.

In the same article, Mark Tedeschi QC, Senior Crown Prosecutor, said that Kirby was absolutely right and that the belittling by judges was the greatest source of stress faced by advocates. He said this:[34]

> I have had Crown prosecutors come back from court in tears or virtually in tears wondering how they're going to muster the strength to go back to court the next day.

I know for a fact that the last few years a number of barristers from the NSW Bar have committed suicide. Whether or not those suicides are linked to stress, it certainly is a reflection that the emotional health of members of the Bar is less than ideal, keeping in mind the small number

28 [2007] NSWCA 249.
29 ibid at [40].
30 ibid at [69].
31 J Jerga, Lawyer 'berated' in court before death", *Sydney Morning Herald*, 20 August 2010 at www.smh.com.au/national/lawyer-berated-in-court-before-death-20100820-138pm.html, accessed 17 June 2021.
32 H Alexander, "DPP warns lawyers: stop bullying one another or else", *Sydney Morning Herald*, 23 March 2013 at www.smh.com.au/national/nsw/dpp-warns-lawyers-stop-bullying-one-another-or-else-20130322-2glam.html, accessed 17 June 2021.
33 ibid.
34 ibid.

of barristers compared to the greater population. The Bar Association has established BarCare which provides for confidential psychological counselling for barristers facing psychological illness.[35] Also there is the Tristan Jepson Memorial Foundation established a few years ago, which provides wellbeing best practice guidelines for the legal profession.[36]

In a foreword to the guidelines, the former Chairperson of the Foundation of the Honourable Keith Mason, said this:[37]

> The Tristan Jepson Memorial Foundation honours the name and memory of a lawyer, actor and beloved son who took his own life. Our goals include raising awareness, disseminating research and medical information and bringing about necessary changes in how we respond to the issue in our legal profession. We acknowledge the great achievements that have been made in recent years in the profession. We also seek to respond to widespread demand for the effective tools to assist in moving beyond understanding to effective action.

The guidelines established by the Foundation are:[38]

> For every organisation whether you are a law student, sole practitioner in a rural or regional setting, a barrister, a judge, solicitor in a full service commercial law firm or a boutique law firm, a government agency, legal marketer, human resource professional or non-legal staff involved in the practice and business of law. No one should be left behind when caring for the psychological health of people in our workplaces.

Of course, judges themselves can be bullied by barristers. Judicial officers in such circumstances should be careful not to respond in kind to the contrived provocations of more flamboyant and aggressive members of the Bar. In *Escobar v Spindaleri*[39] was a case which caused concern before the Court of Appeal. The short facts were that at the conclusion of the claimant's case in the Workers Compensation Court, the court invited further evidence from counsel, who then declined to call any. When the court then warned counsel that the claim might be dismissed, counsel told the judge, "You can do what you like". The judge then dismissed the application.

In relation to that appeal, Justice Kirby said:[40]

> This appeal illustrates the importance of courteous and vigilant behaviour in court on the part of counsel and temperate and painstaking conduct by judicial officers. Under the stimulus of contests which can enliven high emotions, it is all too easy to lapse in the observance of these rules. Under the pressure of busy court lists and concern for the rights of other litigants awaiting hearing, impatience can occasionally lead to error. Judicial officers and advocates exercise important responsibilities. The interest of justice of the litigants is at stake. But so too is the interests of the appearance of justice and the observance of the proper forms and procedures which have been

35 See https://barcare.org.au/, accessed 17 June 2021.
36 Tristan Jepson Memorial Foundation, *TJMF workplace wellbeing: best practice guidelines for the legal profession*, at www.tjmf.org.au, accessed 17 June 2021.
37 K Mason, "Chairperson's forward", *TJMF workplace wellbeing: best practice guidelines for the legal profession*, p 9, www.tjmf.org.au/wp/wp-content/uploads/TJMF-Legal-Workplace-Guidelines.pdf, accessed 17 June 2021.
38 ibid.
39 (1986) 7 NSWLR 51.
40 ibid at 52.

> developed over centuries to facilitate its attainment. It does not become counsel to lose his or her temper in court. Still less does it become a judicial officer to depart from proper procedures no matter how provocative may be the ill judged conduct of those before the court.

Counsel's response was described as intemperate, discourteous and ill-considered. Merely by using the formula of "Your Honour", it did not demonstrate the courtesy to the office which the judicial officer was holding.[41] His Honour went on to say:[42]

> Courage and resolution on the part of counsel does not stop at an assertion of the right to conduct the cases counsel thinks best. Courage is not exhibited by inviting a trial judge to do as he pleases. It is the duty of counsel to represent his client. In that representation, it is his obligation to ensure his client's case is presented and argued to the best of his skill and ability. In these circumstances it is not the counsel who invites the judge to do as he pleases. It is a duty of counsel to endeavour to persuade the judge to do as his client's interests necessitate, to the extent to which those interests might lawfully be pressed. As has been said, in the atmosphere of the courtroom, emotions sometimes run high. But when they are indulged at the expense of the protection of the client's interest they ill become counsel whose duty is to represent those interests.

In another example, *Barakat v Goritas (No 2)*[43] the judge had described senior counsel's submissions as somewhat tendentious, to which counsel replied:[44]

> I don't particularly appreciate that, Your Honour. I have been at the Bar for 36 years. I am not used to being accused from the Bench of being tendentious. I have made a responsible submission your Honour. I have explained that I have not given this my meticulous attention.
>
> His Honour: Please don't raise your voice.

In dealing with the appeal point that there was a reasonable apprehension of bias, the Court of Appeal said this:[45]

> The language used does not readily suggest the kind of departure from neutrality that is relevant to the test of reasonable apprehension of bias. His Honour was, on occasion, given to using colourful language. Not long after the passage relied upon, the judge advised counsel for the respondents not to be "offensive". Further and significantly, after the statement of the contempt charge, and the passage reproduced at [36] the trial judge expressed a view of the affidavits which he had earlier read were "not strictly relevant". Many trials will be effectively unmanageable if the judge could not, from time-to-time, read and rule upon the admissibility of prejudicial material which, if rejected, would need to be disregarded in reaching a judgment. The fact that the judge had read affidavits containing such material, at a particular time and for a particular purpose is, by itself, incapable of raising a reasonable apprehension of bias.

Unfortunately as recounted in the appeal decision the trial then entered the twilight zone. A further more detailed account of the exchange between counsel and the judge is reproduced at

41 ibid at 54.
42 ibid at 54–55.
43 [2012] NSWCA 36.
44 ibid at [36].
45 ibid at [45].

[51]. Suffice it to say, the judge asked counsel not to interrupt him. Counsel asked the judge not to raise his voice. The judge told counsel to sit down. Counsel refused and demanded procedural fairness. The judge said counsel was being impudent. The judge ordered counsel to leave the court. Counsel refused. The judge summoned the court officer. Counsel told his Honour that he had "gone far too far". The judge then asked counsel to apologise. He said he would apologise if he could make his submissions. The judge denied having said that. Counsel disagreed with him. The judge said he was not going to have an argument. The judge said this:[46]

> There is a relationship between Bench and Bar, hopefully of mutual respect but it requires counsel not to interrupt and not to berate a judge and I will not be berated and you will apologise.

Counsel refused to apologise. The judge asked counsel to stop over-talking him. Counsel apologised for interrupting and then he said "Can I renew my application?" to which the judge said "I will consider it in due course." Counsel thanked the judge for being "very generous". The judge replied "Nor do I appreciate your irony. Your conduct is disgraceful."[47] At that point, the sheriff's officers appeared in court and were asked to stay.

The court said in such instances tendering of the transcript and the recording, and if necessary the closed circuit television recording of the hearing would be of benefit in order to make up for the deficiencies which may not be immediately evident by reading the transcript.[48]

These two examples of *Escobar v Spindaleri* and *Barakat v Goritas (No 2)* show that in circumstances judges can be subject to bullying. In such circumstances there need to be mechanisms put in place to alleviate the stress and to de-brief a judicial officer from the shock of such behaviour by advocates in court.

46 ibid at [51].
47 ibid.
48 ibid at [55].

Further references on relationship with legal profession, bullying and sexual harassment

For further references on the topics of relationship with legal profession/bullying/sexual harassment, please see the following:

- K Jenkins, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, Australian Human Rights Commission 2020 at https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020#FDOq, accessed 23 June 2021.
- Tristan Jepson Memorial Foundation, *TJMF Workplace Wellbeing: Best Practice Guidelines for the Legal Profession* at www.tjmf.org.au/wp/wp-content/uploads/TJMF-Legal-Workplace-Guidelines.pdf, accessed 23 June 2021.
- Supreme Court of NSW, *Supreme Court Policy on Inappropriate Workplace Conduct*, at www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Unacceptable%20Workplace%20Conduct%20Policy,%2014%20October%202020.pdf, accessed 23 June 2021.
- Judicial Commission of NSW, Videos and Podcasts, Cross-jurisdictional webinar: Sexual harassment prevention and response in the workplace — a new approach, recorded on 10 December 2020, at https://jirs.judcom.nsw.gov.au/menus/videos.php, accessed 18 August 2021.
- A Loughland, "Female judges, interrupted: a study of interruption behaviour during oral argument in the High Court of Australia" (2019) 43(2) *Melbourne University Law Review* at https://law.unimelb.edu.au/mulr/issues/previous-issues/2019-volume-43, accessed 22 October 2021.

Actual or apprehended bias and unconscious bias

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Judicial education on "gender awareness" in Australia*

The Honourable Justice J Basten†

The author explores the role of gender awareness in educational programs for judicial officers. He first considers the need for diversity in the gender composition of Australian courts and opines that the need for judicial education on gender is likely to reduce as women constitute a significant proportion of a court. The author refers to the effect on male judges of their own experiences with the increasing professional profiles of women in the legal profession and professions generally. He considers the vexed question of whether gender differences are reflected in judicial decision-making. The author contends that women's different life experiences and consequential values, if incorporated into judicial decision-making, may complement a judge's terms of reference. He also observes that there are still too many examples of male judges with unconscious stereotypical attitudes about the role of women in society. The author then considers how partiality in the form of unconscious bias is addressed in judicial education. He underscores the importance of judges retaining control of judicial education in protecting against any intrusions on judicial independence.

Introduction

As demonstrated by the book of papers published by Ulrike Schultz and Gisela Shaw, *Gender and judging*,[1] there is a wealth of research being conducted on gender awareness in the judiciary in many countries in Asia, South America, Africa, Europe, North America and Australasia. This conference reflects part of that global process, specifically work undertaken in Japan by Professor Kayo Minamino and her colleagues.[2]

An important preliminary lesson from this research is that, broadly speaking, lack of gender awareness is a problem across different cultures and across different legal systems, but is

* Revised version of a paper presented at the Kyoto International Conference on Judicial Training for Gender Awareness in the Courts, April 2014, Kyoto. Valuable research assistance was provided by my clerk, Steven Gardiner. Published in (2015) 22 *International Journal of the Legal Profession* 151 and (2014) 12 *TJR* 45 and updated 2021.

† Judge of Appeal, New South Wales Court of Appeal.

1 U Schultz and G Shaw, "Introduction: Gender and judging: overview and synthesis", in U Schultz and G Shaw (eds), *Gender and judging*, Hart Publishing, Oxford, 2013, p 3.

2 K Minamino, "Gender and judicial education in Japan" in Schultz and Shaw, ibid, Ch 7.2, p 543.

revealed in different forms; it follows that solutions which will work in one country may fail or be inappropriate in another. That is exactly as one should expect. The lesson applies to me too; I can describe my perceptions of our Anglo/Australian experience, but I cannot (and should not) extrapolate to Japanese legal culture.

There is a fundamental reason why all countries which operate under the political principle of the rule of law share the problem. The reason is that laws must be applied, in the words of our judicial oath, without fear or favour, affection or ill will. Partiality, that is, preferring one party over another for reasons not permitted by law, is prohibited. Judges must be impartial at all times and in all cases: at least, that is the ideal. Sometimes we fall short; and in particular we may fall short because we carry unexamined "baggage".[3] Part of the baggage, and I emphasise part, especially for male judges, is an omission, a lack of appreciation of the experiences of, and values which are commonly held by, women. There are other points of blindness, but this one is particularly important because it potentially affects half the population.

There are a number of assumptions underlying the concept of judicial education with respect to gender awareness. Any proposal directed to this topic must first identify and address those assumptions. One assumption is that differences in gender can affect the way judges administer justice and decide cases. No doubt that is true, but how it works, and why this issue deserves special attention, require consideration.

Having said that culture and the legal system are significant variables in understanding and addressing this issue, let me say a little about our Australian context.

The Australian context

Australian courts (like those in the English tradition elsewhere) are largely constituted by judicial officers who are not trained as such, but are lawyers with many years experience in practice, whether private, public or self-employed. Whilst, in the past, magistrates were part of the public service and obtained experience as clerks of the relevant courts, that is no longer the case. Like judges in higher courts, they are chosen from the ranks of practising lawyers, operate independently of government and are appointed to a statutory retirement age (usually 70).[4]

3 S Elias, "Justice for one half of the human race? Responding to Mary Wollstonecraft's challenge" (2010) 10(4) *TJR* 399 at 402; *Liteky v US* 510 US 540 (1994) at 551–552 (Scalia J); *R v S (RD)* [1997] 3 SCR 484 at [35], L'Heureux-Dubé and McLachlin JJ quoting the Canadian Judicial Council, *Commentaries on judicial conduct*, Les Éditions Yvon Blais Inc, Québec, 1991, p 12, and B Cardozo, *The nature of the judicial process*, Yale University Press, New Haven, 1921, pp 12–13, 167.

4 In NSW and Tas, the retirement age is 72: *Judicial Officers Act 1986* (NSW), ss 44(1) and (3); *Supreme Court Act 1887* (Tas) s 6A(1); *Magistrates Court Act 1987* (Tas), s 9(4)(a). For all others (except magistrates in WA and ACT) it is 70: *Commonwealth of Australia Constitution Act* (Cth), s 72; *Federal Circuit Court of Australia Act 1999* (Cth), ss 9 and Sch 1, Pt 1, cl 1(4); *Supreme Court of Queensland Act 1991* (Qld), s 21(1); *District Court of Queensland Act 1967* (Qld), s 14(1); *Magistrates Act 1991* (Qld), s 42(d); *Supreme Court Act 1935* (SA), s 13A(1); *District Court Act 1991* (SA), s 16(1); *Magistrates Act 1983* (SA), s 9(1)(c); *Constitution Act 1975* (Vic), s 77(3); *County Court Act 1958* (Vic), ss 8(3), 14(1)(b), (c); *Magistrates' Court Act 1989* (Vic), s 12(a); *Judges' Retirement Act 1937* (WA), s 3; *District Court of Western Australia Act 1969* (WA), s 16; *Supreme Court Act 1993* (ACT), s 4(3); *Supreme Court Act* (NT), s 38; *Magistrates Act* (NT), s 7(1). For magistrates in WA and ACT the age is 65: *Magistrates Court Act 2004* (WA), s 5 and Sch 1, cl 11(1)(a); *Magistrates Court Act 1930* (ACT), s 7D(1).

Once appointed, a judge can be removed only by the Parliament, and not by the executive government alone, and then only for misbehaviour or incapacity.[5] Generally, judges are not promoted and expect no preferment. Once appointed, most will remain in that position until retirement. They will acquire seniority and respect based on performance, but they expect that from peers and not from the government.

Our laws may best be described as a mixture of judge-made law and statutes enacted by Parliament. There is room for interpretation and for discretionary judgment in their application. Trial judges (as everywhere) must apply their skills and experience in assessing the evidence, particularly in relation to witnesses giving oral accounts of what they have seen or done, or what has happened to them.

Finally, a special feature of our system of administering justice, probably known to you from American television, should be noted. Trials of serious criminal charges are conducted before a judge and jury of 12 drawn from the community. The jury are solely responsible for fact-finding — applying legal principles explained to them by the presiding judge, but assessing the witnesses based on their diverse experiences. Juries contain roughly equal proportions of men and women. The jury has an important constitutional function in the administration of justice. They are not specifically instructed in how to avoid prejudice and stereotyping in relation to gender.

Identifying the issues

Gender supplies an important consideration for judges in four respects. First, there are gender-based values which infuse substantive legal principles. Much academic writing has focused on this aspect.[6] It is one of which judicial officers should be conscious, but which they have little opportunity to change. Second, there are areas for evaluative judgment where consciousness of gender-based values may be significant. Assessment of damages in tort and sentencing for crimes may provide examples. Third, gender may be relevant to our expectations of how people behave in particular circumstances. In this sense, our understanding of typical responses (what people in fact do, rather than how they should be treated) will affect our assessment of credibility. Fourth, the last issue arises with respect to how juries assess credibility and thus the directions to be given by the judge. The jury should be warned about problems of which they may not be aware (for example, unreliability of identification evidence), but to warn of inappropriate gender stereotyping may be to intrude on the core function of the jury. It is the second and third aspects which engage the core issue for present purposes.

There is no doubt that in many respects men and women share the same experiences and skills. However, there are areas in which experience and (some would say) skills and methods of

5 *Constitution* (Cth), s 72(ii); *Constitution Act 1902* (NSW), s 53; *Constitution of Queensland* 2001 (Qld), s 61; *Constitution Act 1975* (Vic), s 87AAB; *Judicial Commissions Act 1994* (ACT), s 5(1); *Supreme Court Act* (NT), s 40(1). SA, Tas and WA do not prescribe a ground of removal: *Constitution Act 1934* (SA), s 75; *Supreme Court (Judges' Independence) Act 1857* (Tas), s 1; *Supreme Court Act 1935* (WA), s 9.

6 R Graycar and J Morgan, *The hidden gender of law*, 2nd edn, The Federation Press, Leichhardt, 2002.

reasoning differ. Based on personal experience, culture and upbringing, people acquire different values and assess the world differently. On the other hand, as judges, there is much which is likely to unite us in our common training as lawyers.[7]

The fact that judges bring their own values and experience of the world to the function of judging (possibly in varying degrees) has been the subject of concern over the decades and, indeed, through much of the 20th century. The early modern expressions were found in the area of industrial law.[8] The assumption was that by background and upbringing, judges were more likely to be understanding of the values and goals of employers than those of labourers and unionists. A similar concern arose in relation to race. The civil rights movement in the United States, for example, had its own analysis of the composition and operation of courts.

Recognition of gender as a point of difference appears, broadly, to have arisen later than class and ethnicity, and has been followed by concerns expressed by various social minorities, including gay men and lesbians.[9]

To place gender concerns in a list is not to diminish their validity, but to seek to understand the role which gender awareness may properly play in educational programs. Much advocacy for oppressed groups relies on an assumption that a judge's membership of a particular group, at least where that group is not part of the dominant class in society, is a condition of full understanding and hence of providing justice. The move for recognition of the special needs of oppressed or excluded groups thus tends to be expressed not as a demand for judicial education, but for representation.

Diversity — the composition of courts

"Representation" may be appropriate in a legislature, but the executive and the judiciary should reflect, rather than represent, the diversity of the society they serve. Diversity is an important value in the administration of justice. Whilst the rule of law may depend on the availability of mechanisms for enforcement (such as an effective and uncorrupted police force, and sheriff's officers to enforce civil judgments), it will also depend upon a high measure of acceptance, across all social groupings, of the functioning of courts. Thus, in a civil society based upon notions of individual equality, the apparent exclusion of a large and highly visible group from the judiciary will tend to diminish respect for the law and undermine the rule of law as a political institution. The presence of women on courts in significant numbers is a necessary element of a healthy democracy.

7 K Mack and S Roach Anleu, "Skills for judicial work: comparing women judges and women magistrates" in Schultz and Shaw, above n 1, Ch 2.5, p 211, reporting empirical research on how female judicial officers in Australia view their roles.

8 And not only in complaints from workers — see T Scrutton, "The work of the commercial courts" (1921) 1(1) *Cambridge Law Journal* 6 at 8.

9 The late recognition of the need to address gender in judicial decision-making is referred to in K Mahoney, "Gender bias in judicial decisions" (1993) 1(3) *TJR* 197 at 199.

There is a wealth of anecdotal evidence that women appearing as advocates feel uncomfortable and perceive themselves to be outsiders in courtrooms routinely presided over by male judges. To describe the feeling as a "perception" is not to imply that it is unjustified. The feelings of exclusion may extend to female judges, at least when few in number.[10]

In Australia, approximately 33% of judicial officers are women[11] and that percentage applies across almost all jurisdictions (State and federal) and at all levels in the judicial hierarchy, although it tends to be lower in the higher courts.[12] (That achievement has occurred entirely within my adult life: when I graduated from university, there was only one female judge in the superior courts in Australia.[13])

However, the importance of maintaining a reasonable proportion of women in the judiciary is not limited to democratic inclusivity. Although not the primary justification for maintaining a diverse judiciary, women may have an educative function for the judiciary as a whole. That effect will operate differently in different jurisdictions. Thus, our Court of Appeal, excluding the Chief Justice whose sitting time is limited, and excluding the Chief Judges of the trial divisions who also rarely sit on appeals, has a President (who is a woman)[14] and nine other full-time Judges of Appeal, of whom two are female.[15] We sit in Benches of three, so that the chances of a male judge sitting with a female colleague is high. To the extent that a woman's view of a matter were to be significantly different from that of her male colleagues, she is able to express that view, not merely in a judgment, but in discussions that occur both in court and out of court. Of course, that involvement is not available in trial courts, where judges sit alone. The two trial divisions of our Supreme Court comprise approximately 36 full-time judges, of whom six are women.[16] One division hears serious crime and civil negligence cases, while the other deals with much of the commercial work of the court (and has a female Chief Judge). Although the numbers are perhaps lower than one might wish, there is still a group of female judges whose views will be expressed to their colleagues from time to time, including in the course of informal discussions about their respective cases and during regular lunches.

10 P Darbyshire, *Sitting in judgment: the working lives of judges*, Hart Publishing, Oxford, 2011, p 423, in relation to the atmosphere in the dining room at court.

11 **Note**: as at 30 June 2020, 38.8% of judicial officers are women in Australia: Australian Institute of Judicial Administration, *Statistics*, updated 30 June 2020 at https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf, accessed 6 July 2021.

12 See, generally, R McColl, "Celebrating women in the judiciary 2014", address to the Women Lawyers Association of NSW, 27 February 2014, Sydney; L Andelman, "Celebrating women in the judiciary 2020", address to the Women Lawyers Association of NSW, 28 February 2020 at https://womenlawyersnsw.org.au/press/celebrating-women-in-the-judiciary-2020-launch/, accessed 6 July 2021.

13 Dame Roma Mitchell was appointed to the Supreme Court of SA in 1965: see http://en.wikipedia.org/wiki/Roma_Mitchell, accessed 6 July 2021.

14 **Note**: The current President of the Court of Appeal from 28 February 2019 is Andrew Bell who replaced her Excellency Margaret Beazley AO QC who is currently the Governor of NSW.

15 See www.supremecourt.justice.nsw.gov.au/Pages/sco2_contactus/judicialcontacts/judicialcontacts.aspx, accessed 30 September 2021.

16 **Note**: In 2021, 11 Supreme Court of NSW judges are women, see www.supremecourt.justice.nsw.gov.au/Pages/sco2_contactus/judicialcontacts/judicialcontacts.aspx, accessed 6 July 2021.

I derive two propositions from the experience of our court. The first is that the need for judicial education regarding gender awareness is likely to be reduced in circumstances where women constitute a significant proportion of a court. Secondly, and perhaps ironically, judicial education with respect to gender awareness is likely to be taken more seriously, and thus likely to be more effective, where there is a significant number of women on the court.

However, there appears to be a "critical mass", below which women judges are likely to feel themselves to be outsiders and uncomfortable.[17] (That is not to say that achievement of such an outcome is a sufficient response to the need for diversity; nor that it is possible to define that level — either in numerical terms, or across courts.)

The importance of a gender-neutral court

The literature assumes that gender awareness, as an element in judicial education, is intended to address the needs of male judges for insights as to female values and experiences. As a broad proposition, and in the present social context, that focus should be accepted. The introduction of sex discrimination laws in Australia was accompanied by a debate as to whether they should apply both to discrimination against women and discrimination against men. The principle of formal equality suggested that they should apply to both; the goal of substantive equality suggested that men do not need protective laws of that kind, because they generally have enjoyed a position of superiority, rather than inferiority, in the public life of the country.

Sexual assault is often identified as a situation where many men and many women could (and undoubtedly do) have different perspectives. But the courtroom brings its own set of values. Assuming a male accused and a female complainant (the most usual case), it would undermine the rule of law if the outcome were thought to depend on whether the judge was male or female. And race can add another dimension.[18] Diversity may, by raising such questions, highlight the complacency of assumed impartiality in another age. The only appropriate response is to ensure that it does not matter who the judge is. The principle of impartiality does not assume a mind free of personal opinions and values, but rather an ability to recognise, question and consciously allow for the attitudes and sympathies which are held, when deciding a particular case.[19] To that end, judges must be able to discuss, identify and explore assumptions, attitudes and values. To provide a forum for that to happen is an important function of judicial education.

The way in which judges behave in court can be critical to the perception of equal treatment according to law. Any person involved in court proceedings who is treated dismissively is likely to believe they have not been accorded "a fair go". Comments by male judges revealing misogynist or stereotyping views have no place in any courtroom. Although it is not part of this topic, there should be scope for complaints to an independent panel which can review judicial conduct.[20]

17 P Darbyshire, above n 10, p 423.
18 See*R v S (RD)* [1997] 3 SCR 484.
19 ibid at [35] (L'Heureux-Dubé and McLachlin JJ) and [119] (Cory J).
20 In NSW, this is one function of the Judicial Commission of NSW, which has a complaint-handling role (the Conduct Division) quite separate from its role in providing judicial education: see *Judicial Officers Act 1986* (NSW), Pts 5, 6.

One would like to think that such concerns are relics of bygone days, but they clearly are not, or at least not everywhere. On the other hand, most male judges on our court have grown up in an era when it was not unusual to appear with or against female advocates, to be briefed by female solicitors and to appear (at least on occasion) before female judges. Further, many of us live with professionals. In the last decade the number of partners of judges on our court who have held (and often continue to hold) positions in business, government or as self-employed professionals, has increased dramatically.

Expectations and understanding will be affected by such changes in demography. Several factors work together; however, the most important factor in terms of avoiding social ostracism is probably the sheer weight of numbers. Once women exceed a figure around 20–25% of the court's membership, appearing before a female judge is likely to be seen as "normal". Through various processes, the atmosphere in the courtroom is likely to change from the earlier days when a male ethos dominated.

Attitudes can be held subliminally and may be retained despite such changes. These may require conscious exposure, but when exposed may readily be addressed.

Gender and decision-making

The processes of decision-making and judgment writing may be distinguished from issues relating to conduct in court and the atmosphere of the courtroom. Whether women judges decide cases and write judgments differently from men is controversial,[21] as is the proposition that there should be education to teach men these skills, implying that they are a preferred form of judging. Of course, if gender is (or should be) reflected in decision-making, it must be discussed in judicial education.

In the English speaking world, the issue was clearly articulated in a paper by Justice Bertha Wilson, the first woman appointed to the Supreme Court of Canada (in 1982). Prior to attaining that high office, she had been a judge on the Ontario Court of Appeal since 1975. In 1990, with some 15 years' experience on superior courts, she wrote a paper entitled "Will women judges really make a difference?".[22]

Over the 31 years since Wilson J published this paper, the intensity of interest in the question she identified has grown exponentially, at least if measured by academic research and publications.[23] The answers to this question may be important in determining the scope and content of judicial education in the current era.

At one level, the question may readily be answered, "yes". A critical mass of women judges will make a difference in the ways already identified. By reflecting one of the most obvious

21 See E Rackley, "The Neuberger experiment" (2013) 163 (7573) *New Law Journal* 13, reporting an exercise stimulated by Lord Neuberger, President of the UK Supreme Court, enquiring whether a detectable difference could be found between the judgments authored by women and those authored by men. The answer was largely negative: the exercise appears to have identified more by way of stereotyping assumptions on the part of the readers as to how women judges would write.

22 B Wilson (1990) 28(3) *Osgoode Hall Law Journal* 507.

23 Schultz and Shaw, above n 1.

elements of diversity in every society, their presence will help to overcome the sense of disenfranchisement which inevitably results from the absence of women from any of the three arms of government. By the same token, their presence will lend credibility to the administration of justice. There will be consequential effects, including the reduction (and hopefully the removal) of feelings of alienation felt by women working within the legal profession and the courts. The importance of these consequences should not be underestimated; they are likely to build on themselves.

There is another sense in which the inclusion of women in the judiciary may well affect the outcomes in some cases. For the reasons already explained, all of us bring certain values to the administration of justice, which will be based to a significant extent on our life experiences. Arguably, maturity and a range of life experience should be criteria for judicial selection. Further, the desirability of a range of experience across the membership of a court is also a relevant consideration. (Some differences in experience may diminish as women become familiar in the corridors of power, whether political, governmental or commercial. Biological roles will not change, but aspects of oppression may diminish.)

Justice Wilson's question, however, was primarily directed at a different level. It was intended to focus on whether cases will be decided differently when the judiciary contains a significant female membership. At that level, the question itself is fraught, for a number of reasons. First, it must not be allowed to influence the identified need for diversity in the composition of the courts. By analogy, democratic government requires that women have the vote. Although psephologists treat gender as an important factor in studying voting patterns, women should have the vote whether that would affect the outcome of elections or have no influence at all on the outcome of any election or all elections. By parity of reasoning, a conclusion that women judges will not affect the way in which cases are decided does not mean that increasing the numbers of women in the judiciary is not an important goal, or even that it is a goal having a lower priority than it otherwise might.

The question is reflected in feminist literature which seeks to locate specifically feminist sets of values which, to form a social goal, must be both different from and superior to the values presently in place. Justice Wilson drew on the work of Professor Gilligan in search of such values.[24] Justice Wilson noted:[25]

> Gilligan's work on conceptions of morality among adults suggests that women's ethical sense is significantly different from men's. Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other; the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but, rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice. [Citation omitted.]

24 Wilson, above n 22, at 519–520, referring, at n 37, to C Gilligan, *In a different voice: psychological theory and women's development*, Harvard University Press, Cambridge, Massachusetts, 1982.

25 ibid at 520.

Other work has focused on women's superior skills in listening, empathising and communicating.[26]

There are risks of unintended consequences attending this line of argument. Supposing empirical research provided support for the psychological theory, the response would surely be to ask where people with these specialist capabilities are best deployed. The answer is likely to be the trial courts and particularly the magistrates' courts and tribunals with the greatest contact with members of the public. Indeed, there might be a tendency to have women focus on alternative dispute resolution, thus creating a new pressure for women to work outside the mainstream courts. Once established, such a mindset would operate adversely to the interests of the many women in the profession who specialise in constitutional law, commercial law, intellectual property, taxation and land law.[27]

Further, the argument that experience affects outcomes justifies inquiry into the judge's experiences, with the purpose of seeking recusal for apprehended bias if the information gleaned warrants such an application. Public confidence in the judiciary is likely to be diminished, rather than enhanced, by such inquiries and applications. Our system depends on judges identifying potential conflicts and either not sitting, or advising the parties of the issue and seeing if objection is taken. However, recusal is usual only in cases of specific connection, such as knowing a witness or a party, or involvement in related litigation when credibility of a person was assessed, or having acted for a party before appointment to the Bench.

Otherwise, judges are expected to put personal views on matters other than relevant legal principles to one side, so as to reach a decision on the evidence and according to law. Judicial education is devoted to the realisation of the ideal that the identity of the judge should not affect the outcome. As between the parties, he or she should strive for neutrality, although the outcome will not be neutral.

If the established legal principles do not fairly reflect values of gender equality, the proper way to promote those values is to identify them and seek to adapt the system by legislation. Indeed that has happened in one of the areas identified by Wilson J, namely the "complex system of exclusionary evidential rules"[28] which she equated with an adversarial system reflecting male values. Whether or not that characterisation is correct, there have been major reforms of the rules of evidence since 1990 (at least in Australia) which appear to have had nothing to do with the appointment of more women to the Bench, as opposed to broader political pressure on legislatures. Some of the exclusionary rules are designed to protect criminal defendants from juries convicting on the basis of prejudice and stereotyping, rather than by focusing (as they should) strictly on evidence directed to the charge laid by the prosecution. There have been

26 ibid at 521, referring to P Cain, "Good and bad bias: a comment on feminist theory and judging" (1988) 61 *Southern California Law Review* 1945 at 1954.

27 These concerns as to unintended consequences echo the analysis of Professor Rosalind Dixon (now at the University of NSW) in an assessment of female appointees to the US Supreme Court: R Dixon, "Female justices, feminism, and the politics of judicial appointment: a re-examination" (2010) 21(2) *Yale Journal of Law and Feminism* 297. See also S Cooney, "Gender and judicial selection: should there be more women on the courts?" (1993) 19 *MULR* 20 at 25–26, citing A Scales, "The emergence of feminist jurisprudence: an essay" (1986) 95 *Yale Law Journal* 1373 at 1383.

28 Wilson, above n 22, at 520.

changes in recent years in Australia with respect to aspects of criminal procedure designed to reduce the need for complainants in sexual assault cases to relive the experience in a very public forum and before an alleged attacker. They have not been uniformly welcomed, but they have resulted from a public debate and legislative response.

This brief review of concerns raised about the role of women in the judiciary (or more accurately their absence) reveals two matters of importance for judicial education, one involving removal of a negative element, the other a positive benefit. First, while attitudes are changing, there are still too many examples in our country of male judges with unconscious stereotypical attitudes about the role of women in society. Those attitudes, it may be noted, do not necessarily relate to the role of women as judges or lawyers, or as professionals more generally. Thus, a judge who is genuinely and consistently respectful of the views of female colleagues may yet make inappropriate assumptions about women involved in sexual assault cases or women seeking a greater share of a testator's estate. It is desirable for all of us to examine our unconscious thought patterns. By providing structured assistance in this regard, judicial education may be seen as an attempt to counter negative influences.

The second matter is that women's different life experiences and consequential values, if incorporated into judicial decision-making, may complement a judge's frame of reference. Education directed to that end may be seen as promoting a positive benefit, as well as removing a taint on impartiality.[29]

Judicial education in Australia

This discussion appears to raise a paradox: addressing partiality in the form of unconscious prejudices requires some form of judicial education — a process which has the capacity to intrude on judicial independence. This apparent paradox can be resolved. To explain how, it is necessary to look at some history and context.

For a long period, there was resistance to "judicial education" as a legitimate activity. That attitude was based on a concern that any kind of "education" diminished the independence of the judiciary. That was an unsophisticated view from a simpler age. It is now necessary to acknowledge the growing complexity of law and society, which calls for continuing professional education.

Nevertheless, there are limits as to what is acceptable. Discussing how kinds of cases should be addressed is acceptable; direction as to how particular cases should be decided is not. Identifying the skill sets required for judging is acceptable; criticism of individual judges (except of course through appellate judgments) is likely to raise resistance. Anything which carries the hint of political direction will be greeted with deep suspicion.

Yet feminism is a set of political values. Most judges will understand it to be a reflection of the principle of equality and thus in conformity with the rule of law. But as an ideology it

29 The distinction is no doubt one of emphasis rather than a comparison of absolutes. Nevertheless, that may be important in how programs for judges are presented.

has no direct application in legal reasoning, nor is it a requirement for judicial education.[30] A pragmatic approach to gender awareness is to locate it firmly in the broader concept of unconscious partiality. It is then an acceptable (and essential) element of judicial education.

It is somewhat artificial to look for a defining commencement date for moves to introduce gender awareness into judicial education in Australia. That is for two reasons. The first is that whatever date one chooses, it was preceded by laws relating to sex discrimination generally and many other public activities devoted to promoting equality for women.

The literature suggests that the topic of gender awareness was stimulated in Australia by the writings and speeches of various Canadian lawyers, including Professor Kathleen Mahoney, a distinguished Canadian academic.

In 1990 Malcolm CJ, from WA, attended an international conference in Edinburgh entitled, "Equality and the administration of justice: gender, race and class".[31] Stimulated by the presentations at that conference, including from Professor Mahoney, he organised a seminar on the topic, "Gender bias in the administration of justice" held at the Supreme Court of Western Australia on 14 August 1992. He also established a committee to consider the question of gender bias, which reported in 1994.[32]

In the same period, the Senate in the Commonwealth Parliament asked the Standing Committee on Legal and Constitutional Affairs, to inquire into "gender bias" and the judiciary, which resulted in a report dated May 1994.[33]

Much has changed over the last 27 years. Now, three specific propositions should be borne in mind. One is that judges value high quality judicial education but tend to be impatient with, and dismissive of, that which does not live up to their expectations. That proposition flows from two somewhat conflicting factors. On the one hand, when appointed, our judges tend to be highly experienced lawyers, senior in their profession, both in terms of professional status and age. On the other hand, most of us will readily acknowledge that the function of a judge is not something that we have experience of, and will concede the need for assistance.

A second and related point is that many judges will come from a specialist background of legal practice, as to which they are truly expert, but will be required as judges to function across a far broader range of cases. The need to become familiar with new areas of law and procedure and write authoritative judgments about them is a demanding exercise.

The third point is that many lawyers who become judges will have skills drawn from professional and personal experience. They will probably have spent much time in their

30 That view is unlikely to be diminished by such undoubtedly stimulating publications, as R Hunter, C McGlynn and E Rackley (eds), *Feminist judgments: from theory to practice*, Hart Publishing, Oxford, 2010, which stimulated a similar venture in Australia at the University of Queensland Law School, see www.law.uq.edu.au/the-australian-feminist-judgments-project, accessed 6 July 2021.

31 D Malcolm, "Gender bias in the administration of justice" (1993) 1(3) *TJR* 191 at 194. A similar positive response to such experience was noted by North J in the Federal Court in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 135.

32 *Report of the Chief Justice's Taskforce on gender bias*, June 1994, especially Ch 3.

33 Parliament (Cth), Senate, Standing Committee on Legal and Constitutional Affairs, *Gender bias in the judiciary*, Report, May 1994.

professional careers assessing the truthfulness and reliability of witnesses (and clients) and forming judgments about how others will view them as witnesses in court. However, the more senior one is professionally, the more likely one is to resist the suggestion that one has unconscious prejudices, unarticulated and unexamined values and limited understanding of how one reaches one's own decisions and makes one's own judgments. Yet this is the area into which judicial education must delve if there is to be any serious attempt to improve levels of gender awareness.

In NSW, the most focused attempts to raise gender sensitivity are to be found in the *Equality before the Law Bench Book*, produced and regularly updated by the Judicial Commission of NSW with the assistance of a panel of judicial officers.[34]

The Bench Book, which is provided to all NSW judicial officers, identifies sources of inequality, stating:[35]

> In summary, despite the fact that proportionately more women in NSW attain higher levels of qualification than men (see 7.2.1), women work fewer hours in paid work and do more of society's unpaid caring and domestic work than men (see 7.2.1.4). They are paid less from the beginning of their careers (see 7.2.1.1), end up with smaller superannuation balances, and are at a higher risk of poverty in retirement than men. Women also experience more sexual harassment, more sexual violence and more domestic violence than men do (see 7.3 and 7.5.2).

Troublingly, the Bench Book notes:[36]

> It is true that not all individual women fare badly in comparison to men, or feel discriminated against in comparison with men. However, the general existence of gender inequality, sex discrimination or bias in our society means that, for many women, unless appropriate account is taken of the examples of potential gender bias listed, a woman may:
>
> - feel uncomfortable, resentful or offended by what occurs in court
> - feel that an injustice has occurred
> - in some cases be treated unfairly and/or unjustly.

The Bench Book then lists and addresses a number of situations where gender bias could occur, or be perceived to occur:

- using language and terminology carelessly and/or inappropriately — that is, using language, statements or comments that create, or could create, a perception of gender bias
- assessing a woman against how a man would have acted or felt in that situation
- assessing a woman against how a "normal" woman ought to behave
- showing a lack of understanding of the nature of domestic violence or sexual assault, and/or of the impact of domestic violence or sexual assault on women

34 Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Ch 7, "Women".
35 ibid at [7.2].
36 ibid at [7.1].

- showing a lack of understanding of the value of household work and childcare activities
- not taking appropriate account of the statistical differences between men and women in relation to such matters as income level, household work and child care activities
- implying that a woman makes a less credible witness than a man.[37]

Many of the examples are culturally quite specific; others are almost simplistic. For example, we advise judges not to address women by their given names if they address men using a title and a family name.

Further, in major criminal trials, a judge presides, but fact-finding is undertaken by a 12-person jury. Other matters dealt with in the Bench Book concern directions to be given to jurors in considering the evidence. While the use of lay jurors in criminal trials is derived from long-established British tradition and provides many in the community with a direct role in administering criminal justice, jurors will bring to their task both everyday experience and everyday prejudices. Possible prejudices may need to be addressed by directions from the judge.

Beyond the circulation to all judicial officers of the *Equality before the Law Bench Book*, the topic of gender awareness is dealt with incidentally in seminars organised by the Judicial Commission for the courts and at annual court conferences.[38] In our court, we are focusing on understanding the psychology of decision-making and how unconscious biases can (and in some circumstances undoubtedly will) affect the way we make decisions and thus administer justice.

Conclusions

Most judges have a limited role in leading social change; our primary function is to administer the law, rather than make it. However, administering the law frequently involves evaluation and choices, and judicial education can at least help to prevent judges from preserving or reinforcing factors which diminish the equal treatment of women in society. There is an increasing insistence that partiality is more than conscious bias. A truly impartial judge must be able to identify and counter unconscious prejudices, stereotyping and predilections. However, the line between sound judgment and prejudice is porous and contestable. It is an important function of judicial education to raise awareness of such issues, of which gender difference is an important part.

The dangers of unconscious prejudice for true impartiality were recognised long before the concept of "judicial education" became acceptable in common law countries. The appropriate solution was then seen to be self-examination, itself a desirable (if not an essential) skill for a good judge.[39] However, the place of continuing legal education within the legal profession is

37 ibid at [7.7].

38 For a further discussion about how the Judicial Commission addresses gender bias in its educational programs and publications, see K Lumley, "Without fear or favour, affection or ill will: addressing gender bias in NSW judicial education" (2014) 12(1) *TJR* 63 at 72.

39 See quotations from Frankfurter J and Lord MacMillan in Wilson, above n 22, at 508–509, and see F Frankfurter, "The appointment of a justice" in P B Kurland (ed), *Felix Frankfurter on the Supreme Court: extrajudicial essays on the court and the Constitution*, Belknap Press, Cambridge, Massachusetts, 1970, pp 211, 216–217.

now well established (and is a requirement for annual recertification). Thus, our judges, who were practitioners prior to appointment, are amenable to the idea of continuing legal education once appointed to a court.

The important protection against any intrusion on judicial independence is to ensure that control of judicial education lies with the judges themselves. Thus, our court has a committee of judges which organises educational programs, with the help of a Judicial Commission, which is itself governed by a Board comprising the heads of all jurisdictions.

The Australian Council of Chief Justices has approved a goal that judges participate in 5 days of continuing education a year.[40] Attendance is entirely voluntary, but, at least in NSW, it is well-attended and appreciated.

The issues in civil law jurisdictions with a career-judiciary are beyond the scope of this paper and beyond my competence to discuss. The principle of impartiality will not seem foreign to you, but questions of independence will operate differently.

40 National Judicial College of Australia (prepared by Dr C Roper AM), *A national standard for professional development for Australian judicial officers*, 28 April 2006, p 29, at https://njca.com.au/resources/national-curriculum-standards/, accessed 6 July 2021; see also *Review of the national standard for professional development for Australian judicial officers*, Report, December 2010, at https://njca.com.au/wp-content/uploads/2017/12/Review-of-the-National-Standard-for-Professional-Development-for-Australian-Judicial-Officer-Report-2010.pdf, accessed 6 July 2021.

Without fear or favour, affection or ill will: addressing gender bias in NSW judicial education*

Kate Lumley†

This article traces how gender equality has evolved conceptually and provides an overview of the educational initiatives in place for raising gender awareness among members of the NSW judiciary. The author gives examples of gender bias and explores some of the seminal policy and legislative responses at State and federal levels during the reformist decades of the 1970s to the 1990s. North American jurisdictions played an important role in raising judicial awareness of gender bias in the 1980s, with this issue coming to prominence in Australia in the 1990s. The author describes the work of the Judicial Commission of NSW in this area, including training sessions on gender equality, both discrete and as part of integrated education initiatives; its involvement with the National Judicial Orientation Program; and the launch of its Equality before the Law Bench Book in 2006.

Equality is an evolving and controversial ideal.[1] Since antiquity, concepts of equality have informed Western thought about justice, politics, social structure, ethics, morality and religion. Equality emerged as a modern concept from Enlightenment philosophy and was one-third of the slogan of the French revolutionaries who violently sought freedom from the oppression of the ançien regime. Enlightenment ideas of moral equality were eventually adopted in modern constitutions and declarations of human rights.[2]

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1 R Abella, "The evolutionary nature of equality", in K Mahoney and S Martin (eds), *Equality and judicial neutrality*, Carswell, Toronto, 1987, p 4.

2 G Stefan (E Zalta ed), "Equality", *Stanford Encyclopaedia of Philosophy*, Spring 2011 edn, at http://plato.stanford.edu/entries/equality, accessed 7 July 2021.

Defining gender equality

Calls for gender equality found public expression during this era of political and social upheaval. In France, Olympe de Gouges published her *Declaration of the Rights of Woman and the Female Citizen* in 1791. In Britain the following year, Mary Wollstonecraft published her arguments for substantive equality and a rational education for women in *A vindication of the rights of woman: with strictures on political and moral subjects*.[3]

While equality has remained the aspirational objective of freedom from oppression and discrimination, the scope of equality has evolved over time. What was regarded as gender equality by Mary Wollstonecraft and Olympe de Gouges, or by the suffragettes in the 19th century, or by the second wave of feminism 60 years ago that broadened the debate about women's human rights, has changed with community values. Legal recognition of gay marriage is a contemporary example of the evolving scope of equality. After considerable community debate and a national postal survey, the Australian Parliament amended the *Marriage Act 1961* on 9 December 2017 so that the right to marry was no longer determined by sex or gender.

Gender inequality has a diversity of meaning both as to its impact and how society should counter it. It embraces the unequal treatment of men and women (that is, discrimination), inequality of opportunity, and inequality of outcome. Discrimination arises out of both the "unequal treatment of equals, and conversely ... the equal treatment of unequals".[4] This expresses the Aristotelian idea of formal equality and underlies the basis of direct and indirect discrimination. Gender bias, a corollary of unequal treatment, has been defined as a "form of subtle but potent discrimination",[5] and as systemic in nature.[6] Gender bias takes many forms. It manifests in both individual actions and attitudes, in cultural traditions, in institutional and corporate practices, and in the language of the elite. For example, the original *Anti-Discrimination Act*, enacted in NSW in 1977, did not use gender neutral language, instead employing the masculine third person pronoun. It was unlawful for an employer to discriminate against a person "on the ground of *his* sex" [emphasis added].[7] The Act was only changed to gender neutral language 17 years later in 1994.[8]

3 M Wollstonecraft, *A vindication of the rights of woman: with strictures on political and moral subjects*, 2nd edn, J Johnson, London, 1792.
4 *Castlemaine Tooheys Ltd v SA* (1990) 169 CLR 436 at 480.
5 K Mahoney, "Gender bias in judicial decisions" (1993) 1(3) *TJR* 197 at 200.
6 Australian Law Reform Commission (ALRC), *Equality before the law*, Discussion Paper 54, Sydney, 1993 (ALRC DP 54), at [3.41].
7 *Anti-Discrimination Act 1977*, s 25(1).
8 By the *Anti Discrimination (Amendment) Act 1994* (commenced on 8 August 1994). The repealed *Interpretation Act 1897*, s 21(a), provided that "Words importing the masculine gender shall include females".

Gender bias includes undervaluing or not valuing domestic contributions;[9] lack of equal opportunity in the workforce; lack of diversity in senior roles including judicial appointments;[10] inequities in pay scales;[11] reliance on stereotypical attitudes about women and their roles, capacity and ability; the privileging of a male-defined norm, for example, the reasonable man test used in the common law;[12] the disproportionate numbers of female victims of domestic violence and sexual assault;[13] the significant underreporting of domestic violence, sexual assault and sexual abuse;[14] and the lack of procedures, until relatively recently, to minimise the trauma for victims in sexual assault trials.[15]

Closing the door on moral conservatism: government reform 1970s–1990s

The Australian federal government began to address the issue of substantive equality for women in the reformist decade of the 1970s. This was the era of social liberalism when Australia turned

9 See the High Court's decision in *Daly v Thiering* (2013) 249 CLR 381 (Crennan, Kiefel, Bell, Gageler and Keane JJ in a joint judgment) which reversed the NSW Court of Appeal (NSWCA) decision in *Daly v Thiering* [2013] NSWCA 25. The NSWCA dismissed an appeal from the first instance decision in *Thiering v Daly* (2011) 83 NSWLR 498 where Garling J held that damages claimed in proceedings for the gratuitous attendant care provided by a mother to her son catastrophically injured in a motor vehicle accident could be awarded if a statutory scheme (the Lifetime Care and Support Scheme) had not paid or accepted an obligation to pay for such services for the past. Following the NSWCA decision, the NSW Parliament amended the *Motor Accidents Compensation Act 1999* (repealing s 130A) to clarify that the Scheme is only obliged to pay for assessed treatment and care needs and is not obliged to pay for treatment and care provided on a gratuitous basis: *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act 2012*, Sch 2[5] (commenced on 25 June 2012). In effect, the Scheme abolished *Griffiths v Kerkemeyer* ((1977) 139 CLR 161) damages. The High Court held that a participant in the Scheme was prevented from recovering damages for economic loss for their treatment and care needs which were rendered gratuitously: at [36].

10 See R McColl, "Women in the law", address to the Anglo-Australasian Society of Lawyers, 3 May 2006, Sydney; R McColl, "Celebrating women in the judiciary 2014", address to Women Lawyers Association of NSW, Union, University and Schools Club, 27 February 2014, Sydney, pp 8–10, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015 Speeches/McColl/mccoll_270214.pdf, accessed 7 July 2021.

11 See S Glazebrook,"It is just a matter of time and other myths", revised version of a paper presented at the Get Up and Speak 2013 seminar, 15 August 2013, Wellington, New Zealand, pp 3–5.

12 As critiqued in the Canadian decision, *R v Lavallee* [1990] 1 SCR 852 at [43], [55].

13 K Grech and M Burgess, *Trends and patterns in domestic violence assaults: 2001–2010*, Issue Paper No 61, NSW Bureau of Crime Statistics and Research (BOCSAR), Sydney, 2011, p 6, at www.bocsar.nsw.gov.au/Publications/BB/bb61.pdf, accessed 7 July 2021; Australian Bureau of Statistics, *Recorded crime — victims*, Australia, 2013, ABS cat no 4501.0, Canberra, 2014, at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by Subject/4510.0~2013~Main Features~Sexual Assault~9, accessed 7 July 2021; see also Australian Bureau of Statistics, *Recorded crime — victims*, Australia, 2021 at www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release, accessed 7 July 2021.

14 See for example E Birdsey and L Snowball, *Reporting violence to police: a survey of victims attending domestic violence services*, Issues Paper No 91, BOCSAR, Sydney, October 2013 at www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/BB/bb91-Reporting-Violence-to-Police-A-survey-of-victims-attending-domestic-violence-services.aspx, accessed 7 July 2021, which reported that only half (51.8%) of victims report their most recent domestic violence incident to police in NSW.

15 For example, the *Criminal Procedure Act 1986* has since 2000 contained a series of evidentiary and procedural provisions aimed at minimising the trauma of a sexual assault trial for a complainant. These provisions have been further strengthened since 2003.

its back on the moral conservatism of the Menzies era.[16] No-fault divorce was introduced[17] and free tertiary education. As has been observed, the 1970s saw the development of a "robust civil society [that] enabled feminism in its many guises to emerge and establish itself as a political force for change".[18] In NSW, the State government enacted the *Anti-Discrimination Act* in 1977. This included Parts III and IV which proscribed discrimination on the ground of sex and marital status in employment and in the provision of specified goods or services subject to certain exceptions.

The following decade saw the Commonwealth of Australia enacting the *Sex Discrimination Act* ("SDA") in 1984 and the *Affirmative Action (Equal Opportunity for Women) Act* in 1986. These Acts gave effect to the Commonwealth of Australia's obligations under the *Convention on the Elimination of all Forms of Discrimination against Women* ("CEDAW") which Australia had ratified in 1983.[19]

The early 1990s saw the issue of equality for women firmly on the federal government's policy and legislative agenda.[20] The government funded the National Committee on Violence Against Women which published a highly regarded report in 1992, the *National strategy on violence against women*.[21] During the election campaign in February 1993, the Prime Minister announced the federal government's "New national agenda for women".[22] An element of this agenda was the reference to the Australian Law Reform Commission ("ALRC"), chaired by the Honourable Elizabeth Evatt AO, to recommend whether legislative or procedural changes should be made to "remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law".[23] This culminated in the 1994 two-volume report, *Equality before the law: justice for women* and *Equality before the law: women's equality*.[24] In its report, the ALRC reviewed the scope and operation of the SDA and found that the Act fell far short of achieving the substantive objective

16 M Thornton and T Luker, "The Sex Discrimination Act and its rocky rite of passage" in M Thornton (ed), *Sex discrimination in uncertain times*, ANU ePress, Canberra, 2010, p 25.

17 By the *Family Law Act 1975* (Cth).

18 Thornton and Luker, above n 16, p 27.

19 And also to parts of the International Labour Organisation Convention 156, Workers with family responsibilities, 1981, (entry into force generally 11 August 1983; entry into force for Australia 30 March 1991). Australia ratified CEDAW at a special signing ceremony at the UN World Conference for the Decade of Women on 28 July 1983, having signed it in 1980.

20 As noted in B Naylor, "Equality before the law: mission impossible? A review of the Australian Law Reform Commission's Report Equality Before the Law" (1997) 23(2) *Mon LR* 423.

21 Australian Government Publishing Service, Canberra, 1992.

22 P Keating, "National agenda for women", speech presented at the Bankstown Town Hall, 10 February 1993. See Office of the Status of Women, Department of Prime Minister and Cabinet, *Women: shaping and sharing the future: the new national agenda for women, 1993-2000*, Australian Government Publishing Service, Canberra, 1993.

23 ALRC DP 54, above n 6, at p xi.

24 ALRC, *Equality before the law*, ALRC Report 69, Sydney, 1994. The report is divided into two parts: Pt 1, Equality before the law: justice for women, published July 1994 (ALRC Report 69: Pt I), and Pt II, Equality before the law: women's equality, published December 1994 (ALRC Report 69: Pt II).

of equality in law that CEDAW required. The ALRC recommended numerous amendments to the SDA as well as a constitutional guarantee of equality.[25] The latter has not occurred. The ALRC report concluded that:[26]

> Despite apparent and real gains over the last decade women still experience discrimination. Gender bias is embedded in the legal system. Addressing specific issues in particular areas will not solve the problem unless that underlying bias is also addressed.

The need to address gender bias in judicial education

It is axiomatic that the law is administered fairly. Judicial officers in NSW take an oath to administer the law without fear or favour, affection or ill will.[27] The word "equality" is not specified in the judicial oath but it underpins the oath conceptually. Equal justice is an aspect of the rule of law.[28] Equal justice requires that like cases be treated alike, but where there are relevant differences, allowance should be made for them.[29] This expression is derived from the Aristotelian principle of formal equality, namely, that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness".[30] Equality before the law has come to be recognised that access to, and the delivery of justice "requires understanding of and sensitivity to the special requirements and disabilities of particular sections of the community".[31] The law has to address both direct and indirect discrimination. To render justice equally, the law must deal with direct discrimination and take account of difference. Indigenous people, ethnic and religious minorities, people with physical and mental disabilities, vulnerable people including children, women, lesbians, gay men, bisexuals, sex and gender diverse people have come to be recognised as having special requirements in the justice system.[32]

Those entrusted to administer the law fairly are informed by their inherited and learned values, cultural assumptions, and ideologies. Although judicial neutrality is a central tenet of the rule of

25 ALRC Report 69: Pt II, ibid, Recommendation 4.2. Constitutional entrenchment was recommended as "a long-term goal".
26 ALRC Report 69: Pt I, ibid, at [1.12].
27 *Oaths Act 1900* (NSW), Sch 4.
28 *Green v The Queen* (2011) 244 CLR 462 at [28], citing A Dicey, *Introduction to the study of the law of the Constitution*, 7th edn, 1908, p 198; W Holdsworth, *A history of English law*, 1938, Vol X, p 649.
29 *Lowe v The Queen* (1984) 154 CLR 606 at 617–618; *Postiglione v The Queen*(1997) 189 CLR 295 at 301; *Wong v The Queen* (2001) 207 CLR 584 at [65]; *Jimmy v R* (2010) 77 NSWLR 540 at [255].
30 *Jimmy v R*, ibid, at [256], citing Aristotle (W D Ross trans), *Ethica Nichomacea*, Book V3, Clarendon Press, Oxford, 1925, at 1131a-6.
31 J Spigelman, Foreword to Judicial Commission of NSW, *Equality before the Law Bench Book*, Sydney, 2006–, p iii.
32 These categories are recognised in the Judicial Commission of NSW, *Equality before the Law Bench Book*, ibid.

law, it is acknowledged that judicial officers are not ideologically or value-neutral. Unconscious judicial bias, built on cultural values and gender and class assumptions, influences the judicial decision making-process.[33] As North J put it:[34]

> Decisions made upon assumptions or prejudgments concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or preconceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker believes and says, that they have not prejudged a case.

Public expectations have shifted in the human rights' dominated post-war era to require justification for the exercise of power.[35] The exercise of judicial authority requires justification. In their decision-making, judicial officers need to be aware of the values of their society so that they can convincingly identify what is in the public interest, and what is "reasonable" and "fair"; in other words, the core values of their society.[36]

Feminist legal scholarship began to deconstruct legal discourse in the 1980s, questioning the claim of law to be rational, objective and neutral.[37] It was only a matter of time before the issue of gender bias found its way onto the judicial agenda. North America led the way in raising judicial awareness in the common law world with the work of the National Association of Women Judges' National Task Force on Gender Bias in the Courts. From 1982, State Chief Justices across the United States appointed task forces to investigate gender bias in their courts and recommend reform to legislation, judicial education and the administration of justice. The first task force was appointed in New Jersey in 1982 and by the end of the 1980s, five American States were engaged in implementing the recommendations of their respective task forces and developing sessions in judicial education programs to address gender bias with a focus on the role of attitudes and values in judicial decision-making.[38] In Canada, in 1986, a national judicial conference on equality[39] led to the publication in 1987 of Professor Kathleen Mahoney[40] and Sheilah Martin's book, *Equality and judicial neutrality*.[41] The Western Judicial Education

33 K Mason, "Unconscious judicial prejudice" in Judicial Commission of NSW, *A matter of judgment: judicial decision-making and judgment writing*, Education Monograph 2, Sydney, 2003, p 27; ALRC Report 69: Pt II, above n 24, at [2.4].

34 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 135.

35 S Elias, "JUSTICE for one half of the human race? Responding to Mary Wollstonecraft's challenge" (2012) 10(4) *TJR* 399 at 403.

36 ibid at 405; and see generally M Gleeson, "A core value" (2007) 8(3) *TJR* 329.

37 See for example texts referred to in R Graycar and J Morgan, *The hidden gender of law*, 2nd edn, Federation Press, Sydney, 2002, Ch 1, and ALRC Report 69: Pt II, above n 24, at [8.17].

38 See L H Schafran, *Planning for evaluation: guidelines for task forces on gender bias in the courts*, Women Judges' Fund for Justice, 1989, including references on p 1; M Maples and G Zimmerman, *The crucial nature of values and attitudes in judicial decision-making*, National Council of Juvenile and Family Court Judges, Reno, 1991.

39 The Socialisation of Judges to Equality Issues Conference, The University of Calgary, Faculty of Law, Banff, Alberta, May 1986, referred to in Mahoney, above n 5, at 199.

40 Professor of Law at the University of Calgary, Canada, and was a director of the UN-sponsored International Project to Promote Fairness in Judicial Processes.

41 Mahoney and Martin (eds), above n 1.

Centre, a project of the Canadian Association of Provincial Court Judges, developed programs on gender, race and class bias issues in Canadian judicial training programs using a variety of adult learning techniques.[42]

The first recorded mention of the need to address gender bias in the administration of justice in Australia was on 14 August 1992 when the Supreme Court of Western Australia convened a seminar on this subject.[43] The guest speaker, Professor Mahoney, spoke of the Canadian experience and the Chief Justice of Western Australia, the Honourable David Malcolm AC, suggested that Australia had much to learn from the Canadian experience in educating judicial officers about the need to eliminate bias.[44] Professor Mahoney proved to be a trailblazer in raising judicial awareness of gender issues, returning in June 1993 on a visit organised by the National Institute for Law, Ethics and Public Affairs (based at Griffith University, Queensland) to conduct workshops and lectures on gender, race and class bias in the administration of justice in most Australian States.[45] During this visit, Professor Mahoney spoke at an inter-curial seminar in Sydney that the Judicial Commission of NSW convened.[46]

Professor Mahoney's 1993 visit coincided with considerable and intense media scrutiny of the Australian judiciary due to a series of gender-biased comments that judges had made during criminal proceedings.[47] The most notorious remarks were those of a South Australian Supreme Court judge, Justice Bollen, who during a marital rape trial commented that "rougher than usual handling" was acceptable when a husband was endeavouring to persuade his wife to engage in sexual intercourse.[48] The then Prime Minister of Australia, the Honourable Paul Keating, publicly denounced the comments, stating that he was "shocked to read that a judge … had explicitly condoned the use of violence by a man against his wife".[49] A Victorian Supreme Court judge, who in passing sentence on a man who had pleaded guilty to one count of the aggravated rape and one count of the attempted murder of a 17-year-old schoolgirl, said a sentence significantly less than the maximum for the rape offence was warranted as the girl "was not traumatised by the event, indeed was probably comatose at the time".[50] A Commonwealth Senate Standing Committee on Legal and Constitutional Affairs was briefed to consider whether the "recent publicity surrounding judicial comment in sexual offence cases is a proper reflection of a failure to understand gender issues by the judiciary; … and the appropriate response to any such failure".[51]

42 C Parker, "Gender bias: a timely visit" (1993) 18(4) *Alt LJ* 188 at 189.
43 D Malcolm, "Gender bias in the administration of justice" (1993) 1(3) *TJR* 191.
44 ibid at 195.
45 Parker, above n 42.
46 Judicial Commission of NSW, *Annual report 1992–93*, p 16.
47 M Thornton, "The legal profession: gender, legality and authority", address to the Australian Lawyers & Social Change Conference, 22–24 September 2004, Canberra, p 4.
48 Parliament (Cth), Senate Standing Committee on Legal and Constitutional Affairs, *Gender bias and the judiciary*, Report, Canberra, May 1994 (Senate Committee Report), p 3.
49 Keating, above n 22, p 7.
50 Senate Standing Committee on Legal and Constitutional Affairs, above n 48, p 6.
51 ibid p ix.

The committee's conclusion in its 1994 report was that overt prejudice on the part of the judiciary was not a general problem, but it was "wider than a handful of isolated instances".[52] The committee, however, stated that systemic gender bias had to be addressed as a "real, significant but largely unconscious, problem"[53] in the legal system, in legislation and case law, and in the use of "antiquated and inappropriate gender myths and stereotypes when judges sum-up to juries".[54] The committee recommended changes to the process of judicial selection and various initiatives in judicial and legal professional education.[55] The process for judicial appointments to federal courts was only revised in 2008 to ensure both greater transparency and merit-based appointments.[56] There are no longer any current judicial appointment processes for any of the federal courts.[57]

The 1993 Senate Select Committee also recommended that the national Australasian Institute of Judicial Administration ("the AIJA") be adequately funded to develop gender-awareness programs in consultation with the courts.[58] The AIJA had previously accepted federal government grants to develop a national program on "gender equality and the law".[59] In September 1993, the AIJA sent a number of Australian judges to Vancouver, Canada to attend a faculty training workshop on gender equality. These delegates then advised the AIJA's Gender Equality Committee on strategies to develop suitable programs in Australia.[60] The Judicial Commission of NSW was also represented at the Canadian workshop.[61] Throughout the 1990s, various courts developed their own courses on gender awareness training for judges and staff.[62]

The ALRC acknowledged in its *Equality before the law* reference the "considerable activity in the area of gender awareness programs for the judiciary"[63] since 1993. For example, the Federal Court of Australia appointed a standing committee to advise the Chief Justice and other judges about gender issues within the court's administration in the provision of its services.[64] The Western Australian Supreme Court established a gender bias task force to develop a judicial education program.[65] The ALRC made no recommendations in its 1994 report about gender awareness in judicial education, but observed that there was a need "to ensure that the programs are co-ordinated and adequately funded".[66]

52 ibid p xiv.
53 ibid.
54 ibid.
55 ibid, Ch 5; Naylor, above n 20, at 432.
56 L Roth, *Judicial appointments*, Briefing paper No 3/2012, NSW Parliamentary Research Library, April 2012.
57 See www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx, accessed 9 July 2021; noted as a "worrying sign" by R McColl AO, "Celebrating women in the judiciary 2014", above n 10, p 8.
58 Senate Committee Report, above n 48, Recommendation 5, p 117.
59 Noted in the Australasian Institute of Judicial Administration (AIJA), *Annual report for the year ended June 1993*, p 5.
60 Noted in the AIJA, *Annual report for the year ended June 1994*, p 9.
61 By the Chair of the Standing Advisory Committee on Judicial Education.
62 See for example those listed in ALRC Report 69: Pt II, above n 24, at [8.66] and R Graycar, "Gendered assumptions in family law", paper presented at the Gender Awareness Seminar, Family Court of Australia, 15 April 1994, Kooralbyn, Queensland.
63 ALRC Report 69: Pt II, above n 24, at [8.68]. See also [8.63]–[8.66].
64 ibid at [8.66]. This became the "Equality and the Law" committee the following decade: Federal Court of Australia, *Annual report 2006–2007*, p 36.
65 ibid.

Addressing gender bias in the Judicial Commission judicial education program

When the Judicial Commission was established in 1987,[67] there were 222 judicial officers in NSW and only 4.5% of judicial officers were women. In 2013, there were 323 permanent judicial officers in NSW and 34.8% of these were women.[68] This is equivalent to national figures where 8.8% of the judiciary in 1995 were women, rising to 33.5% in 2013.[69] As at 30 June 2021, of the 300 permanent judicial officers in NSW, 124 are female (41%). The Land and Environment Court has the greatest gender parity with 45% of female judicial officers; the Local Court has 43% female magistrates. The Supreme Court has 24% female judges. Although women today are graduating from law school in higher numbers than men and more women are admitted as solicitors than men,[70] women remain underrepresented in the judiciary and among the ranks of partners in law firms and senior counsel.[71]

The Commission's statutory charter is to assist the courts to achieve consistency in sentencing; to organise and supervise an appropriate scheme for the continuing education and training of judicial officers; to investigate complaints concerning the ability or behaviour of a judicial officer; and to give advice to the Minister as the Commission thinks appropriate.[72]

An early objection to the establishment of the Commission and the provision of a judicial education program was that it would interfere with judicial independence and represent an attack on the separation of powers in NSW.[73] These objections were answered when the *Judicial Officers Act 1986* was amended to establish the Commission as a body independent of the executive arm of government with judicial participation in the education program being voluntary and judge-led.[74] This aligned with the educational philosophy of the Canadian

66 ibid at [8.68].
67 By the *Judicial Officers Act 1986*.
68 Judicial Commission of NSW, unpublished data, 16 December 2013. For recent statistics, see https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf, accessed 7 July 2021.
69 *Gender in the Australian judiciary 2013 v 1995*, media release, Australian Women Lawyers, Adelaide, 4 July 2013. In 2020, 38.8% judicial officers are women: see https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf, accessed 7 July 2021.
70 Law Council of Australia, *National attrition and re-engagement (NARS) study*, Final Report, March 2014, p 9. The 2018 *National Profile of Solicitors* reported 52% of solicitors are women: at www.lawsociety.com.au/sites/default/files/2019-07/2018 National Profile of Solicitors.pdf, accessed 7 July 2021.
71 As at 30 June 2013, 9.7% of senior counsel were women whereas 20% of barristers are women: NSW Bar Association, *Annual Report 2012–13*, p 11. In 2021, 12.85% of of senior counsel were women whereas 24.37% of barristers are women, see https://nswbar.asn.au/the-bar-association/statistics, accessed 7 July 2021. The National attrition and re-engagement (NARs) study, ibid, p 15, reports that men are twice as likely as women to be a partner in private practice. The national study surveyed 3,801 practising lawyers, or close to one in 10 members of the legal profession in Australia: ibid p 4.
72 *Judicial Officers Act 1986*, ss 8, 9, 11, Pt 6.
73 These objections are recorded in K Lumley, *From controversy to credibility: 20 years of the Judicial Commission of NSW*, Judicial Commission of NSW, 2008, pp 1–2, at www.judcom.nsw.gov.au/wp-content/uploads/2014/07/judcom-20years-web.pdf, accessed 7 July 2021.
74 ibid p 2.

Western Judicial Education Centre which has peer-leadership and judicial independence as key elements. As Professor Mahoney observed, an internal voluntary reform movement will always be more effective than an imposed one.[75]

The Commission's judicial education policy is not to interfere with judicial discretion but to develop judicial skills, attitudes and knowledge, enhance professional expertise and promote the pursuit of juristic excellence.[76] The overarching purpose of judicial education is to improve the quality of justice so as to maintain public confidence in the impartial and independent administration of justice.[77]

The Commission aims to offer up to five judicial education days a year for each judicial officer in NSW in keeping with the national standard developed by the National Judicial College of Australia (NJCA).[78] The Commission's judicial education program is multi-faceted, comprising conferences, seminars, field trips, interactive educational sessions, an Aboriginal cultural awareness program, a 360 degree feedback program for judicial officers, a voluntary mutual observation program for magistrates, publications, computer training, and online and printed resources. The program is based on sound adult education design principles with a focus on experiential and interactive learning, that is, learning based on experience and enhancing judicial skills. The Commission has been influenced by the work of David Kolb and the National Judicial Institute of Canada.[79]

Since its inception, the content of the program has been developed by the education committees of each court in NSW in accordance with the objective of judge-led judicial education. The committees regularly meet to discuss the proposed judicial education programs for their particular courts. The Judicial Commission's professional staff attend all education committee meetings and provide educational input and support. A Standing Advisory Committee on Judicial Education (SAC) was also established with a representative from each of the court's education committees. The SAC provides general guidance and informs each jurisdiction of the activities in the various courts. Information gathered from complaints lodged to the Commission about judicial officers is also used to develop specific education sessions on subjects that include domestic violence, sexual assault issues and cultural awareness.

From 1993, the Commission offered specific structured sessions relating to gender equality, Aborigines and the law, and ethnicity in the courtroom. The Commission gave evidence to the 1993 Senate Standing Committee on Legal and Constitutional Affairs which specifically noted the provision of education to magistrates about domestic violence.[80] The Legal Aid

75 Mahoney, above n 5, at 216; See also M Gleeson, "Performing the role of the judge" (1998) 10(8) *JOB* 57.

76 Judicial Commission of NSW, *Continuing judicial education policy*, at www.judcom.nsw.gov.au/education/continuing-judicial-education-policy/, accessed 7 July 2021.

77 J Allsop, "Continuing judicial education: the Australian experience" (2012) 10(4) *TJR* 339 at 440.

78 National Judicial College of Australia (prepared by C Roper AM), *National Standard for Professional Development for Australian Judicial Officers*, 28 April 2006, at https://njca.com.au/resources/national-curriculum-standards/, accessed 7 July 2021.

79 See for example D Kolb, *Experiential learning: experience as the source of learning and development*, Prentice Hall, New Jersey, 1984; T Dawson, "Lessons learned for experiential, skills-based judicial education" (2008) 20(6) *JOB* 47.

80 Senate Committee Report, above n 48, at [5.112].

Commission of NSW gave evidence to this inquiry that, as a result of this education, there was "an improvement in the attitudes of magistrates in providing access to Apprehended Violence Orders, and action when an order has been breached".[81] In 1994, the Judicial Commission gave evidence to the ALRC inquiry that it was providing magistrates with education on domestic violence and on women and the law as part of its education program.[82]

Throughout the last three decades, the Commission has continued to offer judicial training on gender equality with the objective of promoting equality before the law in a pluralistic society.[83] Up until 2003, discrete sessions on gender issues, including domestic violence and cultural issues, were offered at the courts' annual conferences, seminars, orientation programs for magistrates and workshops.[84] Since the 2002–2003 reporting year, the approach has been to integrate gender awareness with a range of issues relating to equality and diversity including Aboriginality, ethnicity and disability.[85] The Commission has developed materials, workshops, seminars and sessions in court conferences to provide information and promote awareness of problems and solutions; to develop practical judicial skills (for example, in courtroom communication, assessment of credit, decision-making and sentencing); and to promote analysis and critical self-reflection of disposition, attitudes and values. Faculty and presenters are drawn from the judiciary, academics, legal practitioners, law reformers, criminologists and professional educators. The Commission evaluates every education session offered to judicial officers to ensure that each session meets its learning objectives, and to review and continually improve the judicial education program. The low number of complaints made to the Commission each year about judicial ability or behaviour demonstrably attests to the value of the education program with its objective to enhance judicial capacity and performance and improve the quality of justice.[86]

Training for judicial officers on sexual harassment

It cannot be assumed that judicial officers will not sexually harass their staff or colleagues by reason of their judicial office. While specific data on complaints to the NSW Judicial Commission about judicial sexual harassment is unavailable, this does not lead to the conclusion

81 ibid.
82 ALRC Report 69: Pt II, above n 24, at [8.64].
83 L Armytage, "Judicial education on gender equality: the educational response", submission to the ALRC Equality before the Law Inquiry, 1994; L Armytage, "Continuing judicial education: the education programme of the Judicial Commission of NSW" (1993) 3(1) *JJA* 28.
84 As recorded in the Judicial Commission of NSW's annual reports from 1993 to 2003.
85 The Judicial Commission of NSW's *Annual report 2002–03* lists "social awareness issues, including migrants, interpreters, ethnicity and gender" as an education topic in Appendix 4, p 57.
86 For example in the 2012–2013 reporting year, the Commission received 71 complaints about 53 judicial officers. There were 350 (permanent and acting) judicial officers in NSW in 2012–2013. Of these 71 complaints, 13 complaints alleged bias on the part of the judicial officer. See Judicial Commission of NSW, *Annual Report 2012–2013*, pp 35–37. In the 2019–2020 reporting year, the Commission received 76 complaints about 48 judicial officers. There were 377 judicial officers in NSW in 2019–2020. Of these 76 complaints, 8 complaints allege bias on the part of the judicial officer. See Judicial Commission of NSW, *Annual Report 2019–2020*, pp 48–49 at www.judcom.nsw.gov.au/wp-content/uploads/2020/12/Judicial_Commission_Annual_Report_2019-20.pdf, accessed 7 July 2021.

that the problem does not exist. As workplace sexual harassment is enabled by power disparities,[87] reporting of sexual harassment by judicial officers is arguably under-reported and if reported, not actioned for fear of repercussions for a complainant.[88]

The American Judges Association Court Review suggested in 2018 that "despite the stringent codes of conduct that bind judges and judicial employees, employment within the judiciary (and particularly within judicial chambers) has all of the hallmarks of a workplace environment that makes harassment more likely, and that makes speaking up against harassment nearly impossible".[89] Factors that were cited as contributing to this issue include:[90]

- power of judges over employees
- strict hierarchical structures in which an employee has a single supervisor
- autonomy of judicial chambers
- isolation of judicial chambers
- significant turnover in staff, with new clerks joining every year or two
- leadership that is frequently male dominated
- unique requirements of confidentiality, and
- strong desires to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.

In the wake of allegations against a former High Court justice made public in June 2020, the Chief Justice of Australia, the Honourable Susan Kiefel AC, stated that:[91]

> [t]here is no place for sexual harassment in any workplace. [The High Court has] strengthened our policies and training to make clear the importance of a respectful workplace at the Court and we have made sure there is both support and confidential avenues for complaint if anything like this were to happen again.

The Supreme Court of NSW in June 2020 published the "Supreme Court Policy on Inappropriate Workplace Conduct".[92] This policy is designed to clarify the process as it applies to judges and judicial staff in the court and provide additional avenues for a person to raise an issue. The NSW Attorney General ordered a review in July 2020 into the way that NSW courts and tribunals handle complaints of sexual harassment.[93]

87 AHRC, Respect@Work: national inquiry into sexual harassment in Australian workplaces, 2020, p 18 at www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020, accessed 12 July 2021.

88 K Nomchong, "Sexual harassment and the judiciary" (2020) 32 *JOB* 55 at 56.

89 J Santos, "When justice behaves unjustly: addressing sexual harassment in the judiciary" (2018) 54 *Ct Rev* 156 at 157.

90 ibid.

91 Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, accessed 12 July 2021 at https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf, accessed 13 July 2021.

92 Supreme Court of NSW, "Supreme Court policy on inappropriate workplace conduct", 2020, at www.supremecourt.justice.nsw.gov.au/Documents/Home Page/Announcements/2020_07_02_Workpace Conduct Policy_v4.0_FINAL.pdf, accessed 12 July 2021.

93 The review has not been finalised as at 12 July 2021.

The Judicial Commission has incorporated training for judicial officers about sexual harassment prevention into its program by way of webinars. For example, a webinar "Sexual harassment prevention and response in the workplace — a new approach",[94] presented by Ms Kate Jenkins, Sex Discrimination Commissioner, and introduced by Chief Justice Tom Bathurst AC, was held in December 2020 and a video of the webinar made available on the Judicial Information Research System. The focus of the webinar is on Recommendation 40 of the Respect@Work Report which specifically addresses judicial education and training on this subject.

In June 2021, a national working group on sexual harassment education for judicial officers was established. Led by Court Services Victoria and the Judicial College of Victoria, the Fair Work Commission, National Judicial College of Australia and the NSW Judicial Commission are also involved.

Judicial orientation programs

Since 1993, the Judicial Commission of NSW has worked jointly with the AIJA (and from 2002 with the NJCA) to offer training in gender bias as part of the National Judicial Orientation Program (NJOP). The NJOP is offered to newly-appointed judicial officers from around Australia on a voluntary basis. The average attendance for each course is about 25 judicial officers. The inaugural program was held in October 1994 and since then, programs have been offered once or twice a year, depending on demand.[95]

Until 2003, discrete sessions on gender awareness were offered. A rigorous evaluation process led the NJOP Steering Committee to incorporate gender awareness issues into sessions on topics specifically concerned with the art and craft of judging, such as sentencing. Sessions that focus on equality include: "Unconscious judicial prejudice" and "Cultural barriers in the courtroom".

Since 1988, the Judicial Commission has also offered a five-day orientation program primarily for new magistrates from NSW, although some interstate and Asia Pacific magistrates attend. Participants have consistently rated their approval of this program at 97% or above.[96] The program is practical and includes a session with a hypothetical situation requiring participants to reflect on the attitudes and values that they bring to the judicial process with the aim of deconstructing the "myth of impartiality".[97]

Equality before the Law Bench Book

In 2005, the Honourable J J Spigelman AC, who was then Chief Justice of NSW and President of the Judicial Commission, requested that the Commission develop and publish a Bench Book for judicial officers that would provide the necessary materials and information to assist judicial understanding and sensitivity to the special requirements and disabilities of particular

94 See https://jirs.judcom.nsw.gov.au/menus/videos.php?video=sexual_harassment_prevention&category=Other, accessed 13 July 2021.

95 Judicial Commission unpublished data, 13 December 2013.

96 These results are reported in the education section of the Judicial Commission of NSW's annual reports since 2007 in figures showing the satisfaction ratings for the Commission's education programs over a five-year period.

97 D Heilpern, "Alligator River bias presentation", presentation to the Magistrates' Orientation Program, 16–21 June 2013, Kiama.

sections of the community.[98] In other words, to assist judicial officers to treat "unequals" with the special measures they required during court proceedings and their interactions with the justice system. Chief Justice Spigelman wished to consolidate the considerable body of material that the Commission had acquired over two decades of operations about equality issues and integrate and transform that material into a loose-leaf service, available in hard copy and soft copy through the Judicial Information Research System (JIRS) and the Commission's public website.[99] The Commission also wished to align with other Australian and international jurisdictions which had similar publications addressing equality issues.[100] The then Attorney General of NSW, the Honourable John Hatzistergos, launched the *Equality before the Law Bench Book* on 21 June 2006 at the Banco Court, Supreme Court of NSW.

The *Equality before the Law Bench Book* provides practical guidance to assist the judiciary to take into account the special requirements of 10 different groups of people who face potential barriers in relation to full and equitable participation in court proceedings. The 10 groups are: Aboriginal people; people from culturally and linguistically diverse backgrounds; people with a particular religious affiliation; people with disabilities; children and young people; women; lesbians, gay men and bisexuals; sex and gender diverse people; self-represented parties and older people.

The Bench Book includes a range of suggested ways for judicial officers to adapt court proceedings to ensure that individuals receive a fair and just outcome. For example:

- employing a different method of communication for those who need it, such as children, people with no or poor English, or people with a communication disability
- using a different form of oath for people who practise a non-Christian religion
- knowing and using appropriate terminology so as to avoid causing offence, such as the correct mode of address for people from different ethnic groups or ensuring that religious leaders are addressed by the appropriate title
- adjusting timing and length of court appearances to take account of people with a particular disability or people with childcare responsibilities
- using a translator or interpreter when a witness's English is not good enough to cope with the demands of the courtroom
- intervening in cross-examination to disallow unfair or inappropriate questions
- ensuring that the cultural customs or values of a particular person are respected by everyone in the court.

98 Spigelman, above n 31, at p iii.

99 At www.judcom.nsw.gov.au/publications/benchbks/equality, accessed 7 July 2021.

100 Judicial Studies Board, *Equal Treatment Bench Book*, London, September 2005 (now superseded by the 2021 edition), at www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/, accessed 7 July 2021; Supreme Court of Queensland, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, Brisbane, 2005, at www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin, accessed 7 July 2021; S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (AIJA Model Indigenous Benchbook Project), AIJA, Victoria, 2002, at https://aija.org.au/publications/2nd-ed-aboriginal-benchbook-for-western-australian-courts/, accessed 7 July 2021.

Chapter 7 of the Bench Book focuses on women, providing information on socio-economic factors and gender disadvantage; sexual harassment; intersectional discrimination; violence against women; women and criminal law; practical considerations for judicial officers regarding modes of addressing women, use of language and terminology; timing of proceedings, breaks, and adjournments; and how women may be particularly affected by sentencing decisions (for example the impact of a mother's incarceration on a family), personal injury compensation and property division in family law disputes.

In 2006, the *Equality before the Law Bench Book* received the AIJA's Award for Excellence in Judicial Administration, a biennial award made in recognition of a significant contribution to the furtherance of judicial administration in Australia. An ACLEA Award for Outstanding Achievement was given to the Commission in the Public Interest category on 30 July 2019.[101]

Conclusion

Two decades after feminist legal scholarship began to question the gender bias inherent in the common law, education about gender equality was introduced to the Australian judicial training agenda in 1993. Taking its cue from developments in North America, the Judicial Commission of NSW committed to raising judicial awareness about conscious and unconscious gender bias through its voluntary judicial education program, along with several Australian courts and the AIJA. In 2021, against the backdrop of the #MeToo movement, another North American development which came to prominence in 2017, the Commission has joined other Australian judicial education providers on a national working group on sexual harassment for judicial officers. The Commission's focus has been on the practice and procedure of judging — the judicial method — to assist the judicial officers of NSW to administer the law without fear or favour, affection or ill will.

101 See www.judcom.nsw.gov.au/publications/benchbks/equality/pr01s02.html, accessed 7 July 2021.

The intersection of the Australian law and the Islamic faith: a selection of cases*

Her Excellency the Honourable Margaret Beazley AC QC†

Whatever the underlying religious or cultural controversy may be, disputes between parties must be resolved according to the law. In this paper, the author illustrates from case law how Australian courts have grappled with religious and cultural practices. Some of these cases show how Australian courts can accommodate religious and cultural practices, while others demonstrate how this is not always possible. The author cautions individuals who arrange their affairs in accordance with religious or cultural practices of the need to ensure that the formal requirements of Australian law are met in order to protect their interests.

Introduction

The separation of Church and State is as fundamental to the Australian legal system as is the rule of law itself. That said, religion often underlies the way in which various sections of our community function, both within that particular grouping and more broadly. While religion is undoubtedly intended to pave the way to Heaven for us mortal beings, it is often central to a person's morals, behaviours and sense of identity on this earth. Importantly for the law, religion may order the ways in which a person organises his or her worldly affairs.

Religious and cultural diversity is a great strength of Australian society, however tensions exist. The tension is not necessarily between a religious or cultural grouping and Australian law. Tensions can arise within communities. There is perhaps no better example of this than the long-running battle in the NSW Supreme Court between the Macedonian Orthodox Community Church St Petka and the Archbishop.

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† Governor of New South Wales and former President of the NSW Court of Appeal 2013–2019.

Although the dispute spanned many technical questions of equity and trust law, the underlying "human" dispute arose out of the appointment of a parish priest, by the Bishop in 1996. The relationship between the congregation and the priest deteriorated. The Executive Council of the parish excluded the Bishop and the priest from the Church and appointed two new priests. The Bishop and the priest commenced legal proceedings in 1997.

The intractability of the dispute can be illustrated by reference to the procedural history. There were 10 iterations of the statement of claim. More than 21 first instance decisions of a substantive and interlocutory nature in this matter have been delivered by the court. There were four applications for judicial advice under the *Trustee Act 1925* which gave rise to over 10 decisions by the Court of Appeal, and one High Court judgment. Subject to a question of costs, the proceedings were brought to a conclusion in February 2014, when the High Court refused special leave to appeal, 17 years after the legal battle began.[1]

The point I wish to make for the purpose of this paper, is that individuals who arrange their affairs in accordance with religious or cultural practices cannot afford to ignore Australian civil law in doing so. It is up to each individual or organisation to take responsibility for ensuring that the formal requirements of the law are met in order to protect their legitimate interests.

Wills and freedom of testation

The Supreme Court of the Australian Capital Territory in *Omari v Omari* [2] held that the will of an elderly Muslim woman, Mariem Omari, was invalid. Under the will, which was drafted in accordance with a precedent for members of the Islamic faith, each of Mrs Omari's sons was to receive twice as much money as each of her daughters.[3] The case received media attention, much of which incorrectly assumed that the will was challenged on the basis that Sharia law should not apply to the distribution of Mrs Omari's estate.[4] The daughter's argument, however, was that her mother was suffering from advanced dementia at the time of the will's execution, and thus lacked testamentary capacity.[5] The court applied the test laid down in *Banks v Goodfellow*,[6] to assess the ability of Mrs Omari to understand the will's nature and effect, the extent of her property and the claims of persons recognised under Australian law to be eligible to share in her estate.[7] Having found that at the relevant time Mrs Omari was incapable of this understanding, the court was required, as a matter of law, to hold the will invalid. The nature of the testamentary dispositions and the fact that the will was drafted in accordance with religious principles did not form part of the court's reasoning.

1 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2014] HCATrans 28.
2 [2012] ACTSC 33.
3 ibid at [7]–[8].
4 S Gosper, "Respect our way on wills, say Muslims", *The Australian (online)*, 15 March 2012; P Karvelas, "Roxon baulks at role for sharia by Australian muslims", *The Australian (online)*, 17 March 2012; C Overington, "Daughter disputes Muslim will that gave brothers twice as much", *The Australian (online)*, 14 March 2012.
5 *Omari v Omari* [2012] ACTSC 33 at [2], [9].
6 (1870) 5 QB 549.
7 *Omari v Omari* [2012] ACTSC 33 at [64]–[65].

As academic Jan Ali has noted, the media coverage of the Omari case evinced a fundamental misunderstanding of the treatment of religion within Australia's secular legal system.[8] Australia is a multicultural, multi-faith society and a significant proportion of the population organises their affairs in accordance with cultural practices or principles derived from their religion. When such principles assume relevance in matters that come before the courts, courts will only interfere where there is some inconsistency with Australian legal principle. To put it another way, legal documents are not held invalid because they are drafted in accordance with the tenets of a religion, but because of legal invalidity.[9]

Had Mrs Omari executed her will before she lost capacity, she would have been free to dispose of her estate in whatever manner she wished, including in accordance with the tenets of Islam, provided that the will met the formal requirements for validity in her State or Territory.[10] Her freedom of testamentary disposition was subject to the entitlement of eligible persons, including her daughters, to make a claim for family provision under the *Family Provision Act 1969* (ACT)[11] if they were dissatisfied with the bequest to them. However, it is never certain whether such a claim would be successful. Among other things, the court would take into consideration Mrs Omari's strong desire to dispose of her estate in accordance with the principles of her religion,[12] and to assess whether the will in fact made adequate provision for her daughters.[13] The vast majority of wills are not challenged and, provided that they meet the requirements for validity, estates will usually be distributed in accordance with the deceased person's wishes.

The NSW Supreme Court recently had occasion to examine the validity of testamentary conditions in restraint of religion. In the case of *Hickin v Carroll (No 2)*,[14] the late Mr Patrick Carroll had been "enraged" by his ex-wife and children's conversion to the Jehovah's Witness faith.[15] In his will he made his gifts to his children conditional upon them converting to Catholicism within three months of his death.[16] None of them did so. In proceedings to determine the validity of this condition, Kunc J held that "the requirement for each of them to become a Roman Catholic is a condition precedent which is not void for uncertainty, impossible or contrary to public policy".[17] As his Honour noted, as long as it is not uncertain or impossible, "the law will uphold a testamentary gift which is conditional upon the donee adhering to, embracing or abjuring certain religious beliefs".[18] This approach to conditions in "restraint of religion" is based on the principle of freedom of testation and, as Kunc J observed, they will "not be upheld where they infringe some other aspect of public policy which the courts consider

8 J Ali, "Religion and the law: Sharia-compliant wills in Australia", *The Conversation*, 28 June 2012, at http://theconversation.com/religion-and-the-law-sharia-compliant-wills-in-australia-6795, accessed 28 July 2021.
9 ibid.
10 In NSW, see *Succession Act 2006*, s 6.
11 ss 7, 8. In NSW, see *Succession Act* 2006, s 57(1)(c).
12 *Succession Act 2006* (NSW), s 60(2)(j).
13 ibid s 59(1)(c).
14 [2014] NSWSC 1059.
15 ibid at [20].
16 ibid at [4], [7].
17 ibid at [5].
18 ibid at [113].

should take precedence over freedom of testation".[19] Further, Kunc J held that he was bound to follow the High Court's decision in *In re Cuming; Nicholls v Public Trustee (SA)*.[20] Justice Kunc considered that a convenient statement of the binding principle enunciated in that case was that of Dixon J, where his Honour held:[21]

> For a testator to place adherence to religious beliefs and the adherent's pecuniary interest in opposition is not considered contrary to good morals or any principle of public policy which the law vindicates by the avoidance of counter stipulations or conditions. The sensibilities of the law appear to be not so refined concerning that moral question considered as affecting the mind of the done.

Finding that there was no other relevant countervailing public policy,[22] Kunc J held that the testator's condition was not contrary to public policy.

Islamic family law: marriage and divorce

Mohamed v Mohamed

In *Mohamed v Mohamed*,[23] a couple who were married under Islamic law had entered into a prenuptial agreement stating that the wife was entitled to a $50,000 dowry in the event that her husband divorced her.[24] Under the terms of the agreement, if the wife ended the relationship or there was a mutually agreed separation, the wife would not receive the dowry.[25] It was clear that both parties had received independent legal advice as to the effect of the agreement and had entered into it willingly.[26] However, when the couple's marriage broke down they could not agree as to which of them had initiated the divorce and the husband refused to pay.[27] The wife commenced proceedings in the Local Court seeking to enforce the agreement, and the Local Court found as a matter of fact that the husband had ended the relationship.[28] He was ordered to pay the $50,000.[29]

The husband appealed, arguing that the agreement was unenforceable for public policy reasons. He asserted that the contract was effectively an "agreement of servitude", in that its purpose was to force him to stay in the marriage against his will.[30] The court did not accept this argument.

As a general rule, courts will enforce the principle of "freedom of contract", and will be reluctant to interfere with agreements voluntarily entered into by parties of full legal capacity.[31] There are a number of exceptions to this rule, including where enforcing a contract would be contrary to

19 ibid at [114].
20 (1945) 72 CLR 86, cited in *Hickin v Carroll (No 2)*, ibid, at [130].
21 ibid at 99, cited in *Hickin v Carroll (No 2)*, ibid, at [129].
22 *Hickin v Carroll (No 2)*, ibid, at [132]ff.
23 [2012] NSWSC 852.
24 ibid at [3].
25 ibid at [21].
26 ibid at [22]–[23].
27 ibid at [7].
28 ibid at [8].
29 ibid at [9].
30 ibid at [25].
31 *Cattanach v Melchior* (2003) 215 CLR 1, cited in *Mohamed v Mohamed*, ibid, at [26].

public policy. However, this does not mean that courts have a discretion to declare agreements unenforceable that in the opinion of an individual, or indeed in the opinion of the individual judges, are against the public interest. Rather, as Isaacs J has noted:[32]

> [T]he "public policy" which a Court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted …

Harrison AsJ found that there was no accepted principle within the community that an agreement for the payment of a dowry was against public policy.[33] Her Honour, referring to an academic article by Black and Sadiq, stated:[34]

> [A dowry] is a required component of a valid Islamic contract of marriage … It is a payment designed to provide for a wife when she is no longer required under Sharia law to be financially maintained by her husband, and as such has been an important security net in Muslim societies.

Although there was no Australian authority on the subject, cases from the US, the UK and Canada, were overwhelmingly in favour of enforcing contracts for the payment of dowries.[35] Relevantly, in the process of upholding such an agreement, the British Columbia Supreme Court has stated:[36]

> Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage …

The court's decision that the agreement should be enforced was consistent with comments made by the High Court of Australia in the 1962 decision *Haque v Haque*.[37] In that case, a second wife in a polygamous Islamic marriage sought to enforce a deed that she and her husband had executed immediately prior to their marriage ceremony.[38] The deed provided that she and her children were entitled to share in her husband's estate in accordance with Sharia law, despite any contrary testamentary dispositions.[39] The deceased husband's brother, who was the sole beneficiary under the will, argued that the deed was void for public policy reasons as the second marriage was not recognised under Australian law and the agreement therefore contemplated cohabitation outside of lawful marriage.[40] Although the court ultimately did not have to decide the point, the judges stated:[41]

> In the circumstances of this case it is by no means certain that a court would adopt such a position: for it was an attempt by Muslims honestly and genuinely to establish a relation which Muslim law would recognize …

32 *Wilkinson v Osborne* (1915) 21 CLR 89 at 97 (see also 96), cited in *Mohamed v Mohamed*, ibid, at [27].
33 [2012] NSWSC 852 at [50].
34 ibid at [31].
35 ibid at [32]–[48].
36 *Nathoo v Nathoo* [1996] BCJ No 2720 at [25], cited in *Mohamed v Mohamed*, ibid, at [34].
37 (1962) 108 CLR 230.
38 ibid at 231.
39 ibid.
40 ibid at 238.
41 ibid at 249.

Academic, Dr Ghena Krayem, has observed that the circumstances in *Mohamed v Mohamed* were rare, in that it is not the usual course for Islamic couples to have a lawyer draw up a formal deed setting out their agreement as to the amount of the dowry and the circumstances in which it is to be paid. Several Imams interviewed for Krayem's research expressed concern that, because the dowry is not a right recognised by Australian law, Islamic women could be left in a vulnerable position if their husband refused to pay.[42] In this sense, *Mohamed v Mohamed* is a powerful example of what Krayem describes as the "skilful navigation" of dual systems.[43] The couple married in a Sharia ceremony and did not ultimately obtain a marriage recognised by Australian law. However, the wife nevertheless utilised aspects of the Australian law to protect her interests, by having a formal contract drawn up and by enforcing that contract through the courts.

Kavanagh v Akhtar

Kavanagh v Akhtar[44] also concerned an Islamic marriage, but the issues that arose were very different from those in *Mohamed v Mohamed*. In *Kavanagh v Akhtar*, Mrs Akhtar sustained a shoulder injury after a heavy box fell on her while she was shopping. Due to chronic pain from her injury she was unable to care for her very long hair and felt she had no choice other than to cut it short.[45] Her husband was a strict Muslim and was extremely upset that this had occurred, particularly without his permission, as he believed that he had a right under Sharia law to control his wife's actions in general, and he also believed that there was a specific rule prohibiting women from cutting their hair without their husband's consent.[46] Further, it was customary for women in Mrs Akhtar's cultural group not to cut their hair, and there was evidence that Mr Akhtar had found his wife's long hair very beautiful.[47] The marriage, which had previously been a happy one,[48] was destroyed. Mrs Akhtar's husband left her and she was diagnosed with a major depressive illness.[49] The issue to be decided by the Court of Appeal was whether Mrs Akhtar was entitled to damages from the owner of the shop to compensate her for the psychiatric injuries flowing from the breakdown of her marriage, or whether she should only be compensated for the physical injuries sustained in the accident.

The owner of the shop conceded that the shoulder injury caused Mrs Akhtar to cut her hair.[50] The trial judge made unchallenged findings, based on the evidence of Mrs Akhtar, her daughter, an Imam and several psychiatrists, that the cutting of the hair materially contributed to the marital breakdown, which in turn caused Mrs Akhtar's psychiatric injuries.[51] This meant that,

42 G Krayem, *Islamic Family Law in Australia: to recognise or not to recognise*, Melbourne University Press, 2014, p 145.
43 ibid p xv.
44 (1998) 45 NSWLR 588.
45 ibid at 594.
46 ibid.
47 ibid.
48 ibid at 595.
49 ibid.
50 ibid at 594.
51 ibid at 596.

in legal terms, factual causation was established between the shop owner's negligence and the psychiatric harm suffered by Mrs Akhtar. In other words, "but for" the shoulder injury sustained in the accident, Mrs Akhtar would not have suffered the relevant psychiatric harm.

The question then, was whether it was appropriate to find the shop owner legally responsible for the harm suffered by Mrs Akhtar as a result of her husband's reaction to the cutting of her hair.

In the law of negligence there is a principle that a negligent party takes their victim as they find them.[52] This means that the law places the responsibility on individuals who engage in risky behaviour to bear in mind that some people may have beliefs or vulnerabilities that make them more susceptible to harm than others, rather than imposing legal responsibility on the injured party for possessing that belief or vulnerability.[53] As McHugh J observed:[54]

> [T]he defendant must take the plaintiff with all his weaknesses, beliefs and reactions as well as his capacities and attributes, physical, social and economic.

Although this principle is not absolute, the court in *Kavanagh v Akhtar* found that it could be applied to the facts of the case, stating:[55]

> I see no reason why the appellant should not take the respondent in the family and cultural setting that she lived … Equality before the law puts a heavy onus on the person who would argue that the "unusual" reaction of an injured plaintiff should be disregarded because a minority religious or cultural situation may not have been foreseeable …

What was important was that the general type of injury suffered by Mrs Akhtar was foreseeable, even if the precise chain of events leading to it was not.[56] The court determined that it was a foreseeable result of Mrs Akhtar's shoulder injury that she would struggle to attend to matters of "personal hygiene and adornment",[57] and it was foreseeable that this could cause a marital breakdown.[58] The court also thought it was foreseeable that the breakdown of Mrs Akhtar's marriage following her injury could result in psychiatric harm.[59] That the precise sequence of events leading to the psychiatric injury, including the cutting of the hair and the husband's reaction, may not have been foreseeable, was irrelevant. Mrs Akhtar's damages were re-assessed to compensate her for the distress, illness and suffering inherent in the psychiatric injury she had sustained.

Islamic banking and finance

In recent years, a number of matters have come before the courts involving litigants who have fallen victim to financial disasters due to engaging in Islamic banking practices. This is perhaps

52 ibid, referred to at 601.
53 G Calabresi, *Ideals, beliefs, attitudes and the law*, Syracuse University Press, 1985, p 47.
54 *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501 at 537 (McHugh JA), cited in *Kavanagh v Akhtar* (1998) 45 NSWLR 588 at 601.
55 *Kavanagh v Akhtar*, ibid.
56 *Cth v McLean* (1996) 41 NSWLR 389, cited in *Kavanagh v Akhtar*, ibid, at 600.
57 *Kavanagh v Akhtar*, ibid, at 602.
58 ibid.
59 ibid.

ironic, particularly given that Sharia financial law is founded on principles of social justice. For example, I understand that the prohibition on lending with interest has as its central concerns the protection of the vulnerable and the need to ensure that rewards and losses are distributed equitably.[60] As Salim Farrar has explained:[61]

> [Under Sharia law] opportunist lending is viewed as unfair, whether the borrower is an entrepreneur seeking to start up a business — as only the lender is guaranteed a financial return — or a borrower with a particular need, because the lender could exploit the former's vulnerability. [citations omitted]

While several institutions in Australia offer Sharia-compliant financial products, including Islamic mortgages, the following cases involve individuals who dealt with large sums of money without the assistance of any financial institution, Sharia-compliant or otherwise. These cases demonstrate the risks inherent in such a course of action. They also demonstrate that where individuals have not taken steps at the outset to protect their interests under Australian law, the courts may not be able to assist them.

Khalid v Perpetual Ltd

In *Khalid v Perpetual Ltd*,[62] the appellant, Mr Khalid, entered into an agreement to purchase a home from the second respondent, Mrs Dilati. Under the terms of the agreement Mr Khalid was to pay Mrs Dilati the purchase price of the home in instalments, as he could not afford to buy the property outright and did not wish to enter into a mortgage with a bank due to the prohibition on interest under Islamic law.[63] The parties agreed that once the purchase price had been paid in full, Mrs Dilati would transfer the home to Mr Khalid, but until then Mrs Dilati would remain the registered owner.[64] Under the *Real Property Act 1900*, the register is the source of title,[65] meaning that despite the existence of the contract of sale between Mrs Dilati and Mr Khalid, and despite Mr Khalid's payment of large sums of money to Mrs Dilati, Mrs Dilati remained the legal owner of the home. Mr Khalid did not search the register to ascertain whether the land was already encumbered by a mortgage or other interest before he commenced to pay for the property. Had he done so, he would have discovered that a mortgage taken out with Perpetual Ltd (the mortgagee) was registered to the property. Several years later, Mr Khalid had paid the majority of the purchase price and, with the agreement of the vendor, he and his family were living in the home.[66] In 2009, Mrs Dilati defaulted on her mortgage repayments. The mortgagee filed proceedings claiming possession of the property preparatory to a mortgagee sale in order to recover over half a million dollars outstanding on the mortgage debt.[67] (I pause here to note that in their written agreement Mr Khalid and Mrs Dilati had clearly provided that any disputes

60 A Ahmad, *Theory and practice of modern Islamic finance: the case analysis from Australia*, BrownWalker Press, 2010, p 98.
61 S Farrar, "Accommodating Islamic banking and finance in Australia" (2011) 34(1) *UNSWLJ* 413 at 417.
62 [2012] NSWCA 153.
63 ibid at [6].
64 *Perpetual Ltd v Dilati* [2011] NSWSC 1259 at [10].
65 *Real Property Act 1900*, s 42.
66 *Perpetual Ltd v Dilati* [2011] NSWSC 1259 at [11]–[14].
67 *Khalid v Perpetual Ltd* [2012] NSWCA 153 at [20], [22].

arising from the transaction were to be resolved in accordance with Islamic law and without recourse to the courts.[68] There were several attempts to moderate the dispute with an Imam. However, the involvement of the third-party mortgagee company, which was entitled to seek an order for possession in the Supreme Court in order to exercise its power of sale, meant that there could be no resolution between them. Practical difficulties in resolving the dispute according to Islamic law would have arisen in any event, as Mrs Dilati disappeared and could not be located by Mr Khalid after the extent of her indebtedness came to light.)

The mortgagee sought and obtained default judgment against Mrs Dilati, which allowed it to take possession of Mr Khalid's home in order to exercise its power of sale. Mr Khalid succeeded in obtaining orders setting aside the default judgment.[69] However, those orders were reversed on an initial appeal.[70]

When the matter came before the NSW Court of Appeal, Mr Khalid sought to impugn the decision to reinstate the order for possession on a number of grounds. As the mortgagee's interest was registered and was therefore superior to any interest Mr Khalid might have had, his only option was to challenge the order for possession on a technicality. His main argument was that the default notice the mortgagee had issued to Mrs Dilati was invalid. The court ultimately held that the default notice was valid on the basis that Mrs Dilati was given a reasonable opportunity to comply with the notice, had knowledge of the amount of money due under the loan, and had accepted liability for the outstanding money.[71] The order allowing the mortgagee to take possession of the property was therefore upheld and Mr Khalid lost his home, notwithstanding that he had paid nearly the whole of the purchase price.

Helou v Nguyen

In *Helou v Nguyen*,[72] the plaintiffs were an Islamic family: a mother, father and their five adult children. Each of the children contributed the majority of their income to the family savings, with the intention that it would be used to redevelop the family home.[73] The money was initially held in a bank account, and the children accommodated their religious beliefs by donating any interest earned to charity, however the father, after undertaking the Hajj, became stricter in his religious beliefs and grew uncomfortable with having any money in the bank at all.[74] He instructed his family to withdraw the savings which, at that stage, amounted to almost half a million dollars, and to store it in the roof cavity of the family home. This money was stolen.

Unusually perhaps, the plaintiffs knew who had stolen their money. The defendant, who was the owner of a store in the local area, had formed a friendship with Walid Helou, one of the adult children in the family, who suffered from an intellectual disability.[75] Walid trusted the

68 *Perpetual Ltd v Dilati* [2011] NSWSC 1259 at [10].
69 *Perpetual Ltd v Dilati* [2011] NSWSC 891 at [44]–[45].
70 *Perpetual Ltd v Dilati*[2011] NSWSC 1259.
71 *Khalid v Perpetual Ltd* (2012) 16 BPR 31,225 at [37]–[40].
72 [2014] NSWSC 22.
73 ibid at [12]–[17].
74 ibid at [22], [24].
75 ibid at [87].

defendant, and described him as his "best friend".[76] He told him the location of the family savings and watched the defendant use a ladder to enter the roof cavity and take a portion of the money.[77] The defendant returned for the balance of the cash, using Walid's keys, when he knew no one was home. The plaintiffs reported the theft to the police, who conducted an investigation and ultimately decided that there was not enough evidence to sustain a criminal prosecution.[78] The Helous, not to be defeated, decided to let some time pass before commencing civil proceedings in the hope that the defendant would implicate himself in the theft through extravagant spending or other suspicious behaviour that could be used in evidence against him.[79] At the end of 2013, more than seven years after the theft, the plaintiffs brought civil proceedings against the defendant and his wife. Although the standard of proof in civil proceedings is less stringent than in criminal proceedings, the seriousness of the allegation meant that in order to succeed, the plaintiffs needed to persuade the judge to a high degree of certainty that the theft had occurred.[80] This task was particularly challenging, as the defendant insisted that the money had never existed in the first place and that the plaintiffs had fabricated their story.[81] In addition, the only eye-witness to the theft was Walid, whose intellectual impairment meant that his evidence needed to be treated carefully.[82] Each plaintiff gave oral evidence and was extensively cross-examined as to the existence of the money and the motivation for storing it in the home. In addition, the plaintiffs were able to produce handwritten notes that recorded the amount of money stored in the roof from time to time, from stocktakes they had conducted over the years.[83] Justice Lindsay was impressed by the consistency with which the plaintiffs told their story and formed the opinion that they were truthful witnesses.[84] Regarding their evidence, his Honour stated:[85]

> Had I not had a prolonged opportunity to observe members of the Helou family, and the defendants' witnesses, in the stressful environment of a forensic contest, my initial scepticism about the plaintiff's allegations might not have matured into a conviction that, despite [counsel's] attempts to refute it, the evidence they gave was, in essentials, correct.

Despite acknowledging the "improbability of anybody believing that they had a small fortune in cash held, at home, without security",[86] his Honour also felt compelled to note:[87]

> against the possibility that [Mr Helou's] belief system may be regarded as entirely foreign to Australian tradition, notice might be taken of English Canon law, and English statutes against usury, not remote from the experience of the British who colonised Australia. A mindset not unlike that of Mr Helou Senior is part of this nation's Anglo-Australian heritage.

76 ibid at [86].
77 ibid at [87].
78 ibid at [49].
79 ibid at [72].
80 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343–344.
81 [2014] NSWSC 22 at [52].
82 ibid at [51].
83 ibid at [58].
84 ibid at [68], [70], [92].
85 ibid at [92].
86 ibid at [94].
87 ibid at [26].

In contrast to the plaintiffs' evidence, the defendant's oral evidence was inconsistent and much of it was shown to be false either by concessions made under cross-examination or by other independent evidence.[88] As the plaintiffs had hoped, the defendant's financial records in the intervening seven-year period aroused considerable suspicion. Relevantly, Lindsay J found that:[89]

> after the alleged theft, [the defendant] had systematically made cash deposits, over an extended time, into bank accounts in a pattern designed to conceal the fact that he had in his possession substantial amounts of cash (not disclosed to, or found by, the police investigating the plaintiffs' allegation of robbery) that he was endeavouring quietly to deploy in the acquisition of property or in the maintenance of the lifestyle of himself, his wife and their son … Payments for the acquisition of property apparently funded through a bank appear, on closer examination, to have been sourced from [the defendant's] amorphous, unverifiable reservoir of cash.

Justice Lindsay was therefore satisfied both that the money had existed and that the defendant had taken it.[90] His Honour delivered judgment almost eight years after the theft had occurred, setting out his findings. Justice Lindsay was satisfied that real estate acquired by the defendant during the relevant period was purchased using a combination of the stolen money and the defendant's own money,[91] which meant that the plaintiffs were entitled to a share of the proceeds of sale in proportion to their contribution.

The rule of law and just outcomes

The following two cases have nothing to do with any perceived or actual incompatibility between Australian law and cultural practices. They serve to illustrate the point that any person may be disappointed by the operation of the law, and that courts do not have great scope to avoid those disappointments.

Black v Garnock

The sad tale of Mr and Mrs Garnock's attempt to buy a 1,600-acre farm called "Wanaka" in Southern NSW is a case in point.[92] The Garnocks had entered into a contract for the sale of Wanaka with Mrs Smith. Unbeknown to the Garnocks, Mrs Smith had significant debts, including over $200,000 owed to a firm of accountants. The accountants had obtained a court order against Mrs Smith for the payment of that debt.

At 9.00 am on settlement day, the Garnocks' solicitors did a title search with respect to the land, which revealed no unexpected encumbrance. At 11.53 am the same day, a writ of execution issued by the District Court was recorded on the title at the instance of the accountants. This writ conferred rights upon the sheriff to sell the property to pay the judgment debt. Settlement

88 ibid at [59]–[67], [76]–[79].
89 ibid at [77]–[79].
90 ibid at [96]–[97].
91 ibid at [99].
92 *Black v Garnock* (2007) 230 CLR 438.

went ahead at 2.00 pm and the full purchase price was paid. Only after this did the Garnocks discover, much to their dismay, that the transfer of land could not be registered because of the writ recorded on the title.

The Garnocks were in a bind — they were going to lose the house for which they had already paid the purchase price of $1 million, but their money had already been paid over to the mortgagee of the property. The Garnocks began proceedings in the Supreme Court to stop the sheriff from executing the warrant and selling the land.

It may be recognised that most ordinary people would feel a great deal of sympathy for Mr and Mrs Garnock. Their predicament was caused by no fault of their own. Their solicitors were following the prevailing conveyancing practices of the time, and only five hours had elapsed between their final title search and settlement.

However, due to the strict statutory interpretation that prevailed in the High Court, the Garnocks lost their money. The *Real Property Act 1900*, s 105, permitted the recording of writs on the register. Section 105A prohibited the Registrar-General from registering any dealing lodged within six months after the writ was recorded on the registrar. The majority in the High Court (Gummow, Hayne and Callinan JJ) read these words literally and without any qualification. They held that the Torrens system is a system of title by registration, and because the accountants had their interest in the land registered ahead of the Garnocks' interest, it took priority. It was immaterial that the Garnocks had entered into a contract for the sale of land before the writ was recorded and had obtained an equitable interest in the land. The High Court considered that the Garnocks should have protected that equitable interest by filing a caveat.

The ultimate outcome was that the Garnocks had to pay the accountants the debt they were owed by Mrs Smith to have the writ removed from the title.

Howe v Fischer

Howe v Fischer[93] concerned the will of the late Mrs Marie Fischer, who died at 94 years of age. Prior to her death, she had been visited on the 25 March 2010 by a solicitor, the appellant, as she intended to change her will. The appellant took detailed instructions of her intentions, and arranged to come and see her in the week after Easter (6–9 April 2010). However, less than two weeks after he took those instructions, on 6 April 2010, Mrs Fischer passed away.

Probate was granted on an earlier version of Mrs Fischer's will. However, the respondent, Mrs Fischer's son Henry, would have received a significantly larger legacy under the proposed new will, as Mrs Fischer no longer wished to leave anything to her daughter.

The respondent brought an action in negligence against the appellant, alleging that he had breached his duty of care by failing to have an informal will prepared. The primary judge found that the appellant had breached his duty of care.[94] However, this finding was overturned by the Court of Appeal. In addition to finding that the primary judge erred in a number of factual findings, Barrett JA emphasised that a solicitor's duty to a disappointed beneficiary is

93 [2014] NSWCA 286.
94 *Fischer v Howe* (2013) 85 NSWLR 67.

circumscribed by the terms of the retainer with his or her client.[95] Mrs Fischer had instructed the appellant that she wished to have a formal will drawn up and properly executed in the presence of other persons. The appellant had complied with these instructions, and had the express agreement of Mrs Fischer to come back at the later date. As the appellant could not have breached any duty of care to Mrs Fischer in preparing her will, nor could he have breached any duty to the respondent as an intended beneficiary.

Some might think that these circumstances were unfair to the respondent, who would have received just over $800,000 more had the proposed new will been executed. The sense of injustice may be particularly heightened, given that the evidence was that Mrs Fischer no longer wished to leave anything to her daughter whom she felt had abandoned her in a nursing home after she had broken her hip, and had taken her jewellery and furniture while she was there. However, these were not the considerations that informed the outcome of the case. As with all the cases previously discussed, the impartial application of legal principles determined the outcome.

Conclusion

To conclude, I trust this article has illustrated the willingness of the courts to engage with cultural and religious practices where they assume importance as facts relevant to the determination of the particular case. I trust also, that despite a perception that Islam and the Australian law are incompatible, this is not borne out by the case law. Problems will arise where no attempt is made to ensure that there is compatibility. That is different from saying that the laws cannot operate harmoniously because the "rules" differ. *Mohamed v Mohamed* is a powerful example of this. Equally, *Khalid v Perpetual Ltd* illustrates that when individuals choose to organise their affairs in accordance with religious principles, rather than ignoring the Australian law, they should ensure that that their interests are also adequately protected in accordance with Australian law.

A thread that runs throughout all of these cases is that courts must do justice according to law. It is not open to a court to fashion outcomes according to what they perceive to be the rights or wrongs (in the colloquial sense of those words) of a particular case. This may sometimes be a cause of disquiet or complaint by those who do not receive the remedy hoped for. And sometimes the outcomes of cases certainly may appear to be unfair.

Ours is a wonderfully diverse society. The rule of law is the protector of all individuals in society. The rule of law has as its foundation openness and equality before the law, and the obligation on judicial officers to treat all parties fairly regardless of gender, ethnicity, disability, sexuality, age, socio-economic background, literacy level, or, relevantly for this talk, religious and cultural affiliation. To underline this point, I will finish with my judicial oath:[96]

> I will do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will.

95 *Howe v Fischer* [2014] NSWCA 286 at [71]–[72].
96 *Oaths Act 1900*, Sch 4.

Does unconscious racial bias affect trial judges?*

Professor J Rachlinski,† Professor S L Johnson,‡ A Wistrich,§ and Professor C Guthrie‖ ¶

Race matters in the criminal justice system. Black defendants appear to fare worse than similarly situated white defendants. Why? Implicit bias is one possibility. Researchers, using a well-known measure called the Implicit Association Test, have found that most white Americans harbor implicit bias toward black Americans. Do judges, who are professionally committed to egalitarian norms, hold these same implicit biases? And if so, do these biases account for racially disparate outcomes in the criminal justice system? We explored these two research questions in a multi-part study involving a large sample of trial judges drawn from around the country. Our results-which are both discouraging and encouraging-raise profound issues for courts and society. We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.

Justice is not blind.

Researchers have found that black defendants fare worse in court than do their white counterparts. In a study of bail-setting in Connecticut, for example, Ian Ayres and Joel

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Waldfogel found that judges set bail at amounts that were 25% higher for black defendants than for similarly situated white defendants.[1] In an analysis of judicial decision making under the *Sentencing Reform Act* of 1984, David Mustard found that federal judges imposed sentences on black Americans that were 12% longer than those imposed on comparable white defendants.[2] Finally, research on capital punishment shows that "killers of White victims are more likely to be sentenced to death than are killers of Black victims" and that "Black defendants are more likely than White defendants" to receive the death penalty.[3]

Understanding why racial disparities like these and others persist in the criminal justice system is vital. Only if we understand why black defendants fare less well than similarly situated white defendants can we determine how to address this deeply troubling problem.

Two potential sources of disparate treatment in court are explicit bias and implicit bias.[4] By explicit bias, we mean the kinds of bias that people knowingly — sometimes openly — embrace. Explicit bias exists and undoubtedly accounts for many of the racial disparities in the criminal justice system, but it is unlikely to be the sole culprit. Researchers have found a marked decline in explicit bias over time, even as disparities in outcomes persist.[5]

Implicit bias — by which we mean stereotypical associations so subtle that people who hold them might not even be aware of them — also appears to be an important source of racial disparities in the criminal justice system.[6] Researchers have found that most people, even those who embrace nondiscrimination norms, hold implicit biases that might lead them to treat black Americans in discriminatory ways.[7] If implicit bias is as common among judges as it is among the rest of the population, it might even account for more of the racially disparate outcomes in the criminal justice system than explicit bias.

1 I Ayres and J Waldfogel, "A market test for race discrimination in bail setting" (1994) 46 *Stan L Rev* 987 at 992. To calculate this disparity, Ayres and Waldfogel controlled for 11 other variables, but they conceded that they might still be missing one or more omitted variables that might explain the differential. By comparing differences in both bond rates and bail rates, however, they were able to provide even more compelling evidence that the bail rate differences they observed were race-based. See ibid at 993.

2 D Mustard, "Racial, ethnic, and gender disparities in sentencing: evidence from the US Federal Courts" (2001) 44 *JL & Econ* 285 at 300.

3 R Banks et al, "Discrimination and implicit bias in a racially unequal society" (2006) 94 *Cal L Rev* 1169 at 1175.

4 See C Jolls and C Sunstein, "The law of implicit bias" (2006) 94 *Cal L Rev* 969 at 969–970 (providing examples of both explicit and implicit bias).

5 See P Sniderman and T Piazza, *Black pride and black prejudice*, Princeton University Press, 2002 at pp 6–8.

6 A Greenwald and L Hamilton Krieger, "Implicit bias: scientific foundations" (2006) 94 *Cal L Rev* 945 at 951, 961 ("[E]vidence that implicit attitudes produce discriminatory behavior is already substantial and will continue to accumulate." (footnote omitted)); K Lane et al, "Implicit social cognition and law" (2007) 3 *Ann Rev L & Soc Sci* 427 at 433 (calling implicit social cognitions "robust" and "pervasive").

7 See J Kang and M Banaji, "Fair measures: a behavioral realist revision of 'affirmative action'" (2006) 94 *Cal L Rev* 1063 at 1065 (arguing that implicit bias shows that affirmative action programs are necessary to address "discrimination in the here and now" (emphasis omitted)).

In this article, we report the results of the first study of implicit racial bias among judges. We set out to explore whether judges hold implicit biases to the same extent the general population and to determine whether those biases correlate with their decision making in court. Our results are both alarming and heartening:

(1) judges hold implicit racial biases

(2) these biases can influence their judgment

(3) judges can, at least in some instances, compensate for their implicit biases.

Our article proceeds as follows. We begin, in "Implicit bias", by introducing the research on implicit bias and its impact on behavior. In "The study design", we briefly describe the methods of our study. We provide a much more detailed account in the Appendix. In "The study results", we report our results and interpret them. Finally, in "Mitigating implicit bias in court", we explore the implications of our results for the criminal justice system, identifying several possible measures for combating implicit racial bias.

Implicit bias

Psychologists have proposed that implicit biases might be responsible for many of the continuing racial disparities in society.[8] To assess the extent to which implicit biases account for racial disparities, researchers must first ascertain whether people hold implicit biases and then determine the extent to which implicit biases influence their actions.

Demonstrating implicit bias

In their efforts to assess whether people harbor implicit biases, psychologists have used a variety of methods.[9] Standing front and center among these methods, however, is the Implicit Association Test (IAT).[10] Developed by a research group led largely by Tony Greenwald, Mahzarin Banaji, and Brian Nosek, the IAT is the product of decades of research on the study of bias and stereotypes[11] and has attracted enormous scholarly and popular attention.[12] More than

8 J Kang, "Trojan horses of race" (2005) 118 *Harv L Rev* 1489 at 1512.

9 In addition to the Implicit Association Test, which we discuss in detail, researchers have used subliminal priming techniques, see, eg S Graham and B Lowery, "Priming unconscious racial stereotypes about adolescent offenders" (2004) 28 *L and Hum Behav* 483 at 487–488; reaction-time studies, see, eg Greenwald and Krieger, above n 6 at 950–953 (labeling studies of implicit bias as studies of biases in reaction times); and novel brain-imaging techniques, see, eg, E Phelps et al, "Performance on indirect measures of race evaluation predicts amygdala activation" (2000) 12 *J Cognitive Neurosci* 729 at 729–730.

10 A Green et al, "Implicit bias among physicians and its prediction of thrombolysis decisions for black and white patients" (2007) 22 *J Gen Internal Med* 1231 at 1231–1232.

11 See Greenwald and Krieger, above n 6 at 952.

12 See, eg M Orey, "White men can't help it" *Bus WK*, 15 May 2006, at 54 (discussing the role of expert witness testimony on "unconscious bias theory" in gender and race employment discrimination cases); D Cole, "Don't race to judgment" *US News and World Rep*, 26 Dec 2005/2 Jan 2006, at 90.

4.5 million people have taken the IAT.[13] The test takes different forms, but most commonly, it consists of a computer-based sorting task in which study participants pair words and faces. A typical administration of the "Race IAT" proceeds as follows.[14]

First, researchers present participants with a computer screen that has the words "white or good" in the upper left-hand corner of the screen and "black or bad" in the upper right. The researchers then inform the participants that one of four types of stimuli will appear in the center of the screen: white people's faces, black people's faces, good (positive) words, or bad (negative) words. The researchers then explain that the participants should press a designated key on the left side of the computer when a white face or a good word appears and press a designated key on the right side of the computer when a black face or a bad word appears. Researchers refer to the white/good and black/bad pairings as "stereotype congruent", because they are consistent with negative stereotypes associated with black Americans.[15] The participants complete several trials of this first task.

Then, the computer is programmed to switch the spatial location of "good" and "bad" so that the words "white or bad" appear in the upper left-hand corner and "black or good" appear in the upper right. The researchers explain to the participants that they are now supposed to press a designated key on the left side of the keyboard when a white face or a bad word appears and press a designated key on the right side of the keyboard when a black face or a good word appears. Researchers refer to these white/bad and black/good pairings as "stereotype-incongruent", because they are inconsistent with the negative stereotypes associated with black Americans. The participants then complete several trials of this second task.[16]

Researchers have consistently found that white Americans express a strong "white preference" on the IAT.[17] They make this determination by comparing the amount of time it takes respondents to complete the two tasks identified above — that is, their "response latency".[18] Most white Americans complete the first task (in which they sort white and good from black and bad) more quickly than the second (in which they sort black and good from white and bad).[19] In other words, most white Americans produce higher response latencies when faced with the stereotype-incongruent pairing (white/bad or black/good) than when faced with the stereotype-congruent pairing (white/good or black/bad).

Researchers have observed a different pattern of implicit biases among black Americans. Black Americans do not exhibit the same white preference that whites express, but neither do they

13 See Project Implicit, "About us", at www.projectimplicit.net/about-us/, accessed 14 July 2021. ("Visitors have completed more than 4.5 million demonstration tests since 1998, currently averaging over 15,000 tests completed each week.").
14 Greenwald and Krieger, above n 6 at 952–953 (describing the basic IAT technique).
15 See Online Psychology Laboratory, Implicit Association Test (Race), at https://opl.apa.org/, accessed 14 July 2021.
16 ibid.
17 See B Nosek et al, "Harvesting implicit group attitudes and beliefs from a demonstration web site" (2002) 6 *Group Dynamics* 101 at 105 (reporting data indicating that white adults taking the IAT strongly favored the white/good versus the black/bad pairing on the IAT).
18 ibid at 104.
19 ibid at 105.

show a mirror-image black preference.[20] Rather, black Americans express a much greater variation, with many expressing moderate to strong black preferences that are rarely found in white Americans.[21] But some also express white preferences — sometimes even strong ones.[22] On average, black Americans express a slight white preference, but the average masks wide variation in response.[23] Latinos also express a small white preference. Asian Americans show a white preference that is comparable to but somewhat weaker than that found in white Americans.[24]

The implications of the research using the IAT are a matter of some debate,[25] but the cognitive mechanisms underlying the research are clear enough. The white preference arises from well-established mnemonic links. Whites more closely associate white faces with positive words and black faces with negative words than the opposite. Thus, when they complete the white/good versus black/bad trials, they need only make a judgment about whether the stimulus that appears in the middle of the screen is positive or negative. The incongruent association, in contrast, requires that they first judge whether the stimulus is a word or a face and then decide on which side it belongs. Stereotype-incongruent associations interfere with the sorting task in much the same way that the use of green ink can make the word "blue" hard to read.[26]

The white preference on the IAT is well-documented among white Americans.[27] Researchers have conducted and published hundreds of academic studies, and several million people have participated in IAT research.[28] They have determined that the implicit biases documented through IAT research are not the product of the order in which people undertake the tasks, their handedness, or any other artifact of the experimental method.[29] The prevailing wisdom is that IAT scores reveal implicit or unconscious bias.[30]

20 ibid.
21 ibid. Throughout, we adopt the convention that a "strong" bias means a tendency to favor one pairing over another on the IAT by over three-quarters of a standard deviation, a "small" bias means an effect of less than one-quarter of a standard deviation, and a "moderate" effect means an effect that is in between one-quarter and three-quarters of a standard deviation.
22 ibid.
23 ibid.
24 ibid at 110.
25 See H Arkes and P Tetlock, "Attributions of implicit prejudice, or would Jesse Jackson 'fail' the implicit association test?" (2004) 15 *Psychol Inquiry* 257 at 257–258 (arguing that the IAT does not measure bias or prejudice); M Banaji et al, "No place for nostalgia in science: a response to Arkes and Tetlock" (2004) 15 *Psychol Inquiry* 279 (responding to the arguments of Arkes and Tetlock).
26 See J Stroop, "Studies of interference in serial verbal reactions" (1935) 18 *J Experimental Psychol* 643 at 659–660 (presenting evidence that words colored differently from their semantic meaning are difficult to read).
27 See Project Implicit, above n 13.
28 ibid.
29 See A Greenwald et al, "Understanding and using the Implicit Association Test: I. an improved scoring algorithm" (2003) 85 *J Personality & Soc Psychol* 197 at 209–211 (discussing mechanisms for reducing order effects); see also A Greenwald and B Nosek, "Health of the Implicit Association Test at Age 3" (2001) 48 *Zeitschrift for experiementelle psychologie* 85 at 87 ("Subject handedness was found to have essentially zero relation to magnitude of the race IAT effect.").
30 See, eg, S Bagenstos, "Implicit bias, 'science', and antidiscrimination law" (2007) 1 *Hav L & pol'y rev* 477; Greenwald et al, ibid, at 199–200.

Implicit bias and behaviour

Even if implicit bias is as widespread as the IAT studies suggest, it does not necessarily lead to, or explain, racially disparate treatment. Only if researchers can show that implicit bias influences decision makers can we infer that implicit bias is a cause of racial disparities.

Implicit bias, at least as measured by the IAT, appears to correlate with behavior in some settings. In a recent review, Greenwald and his colleagues identified 122 research reports assessing the relationship between IAT scores and observable behaviors;[31] of these, 32 involved "White-Black interracial behavior".[32] Across these 24 studies, the researchers found a modest correlation of 0.24 between the implicit bias measures and the observed behaviors tested in the studies.[33] This means that implicit bias accounted for roughly 6% of the variation in actual behavior.[34]

Six percent might not sound like much, but a 6% disparity could have an enormous impact on outcomes in the criminal justice system. In a typical year, judges preside over approximately 21 million criminal cases in state courts[35] and 70 000 in federal courts,[36] many of which involve black defendants. Throughout the processing of these cases, judges make many judgments concerning bail, pretrial motions, evidentiary issues, witness credibility, and so forth. Each of these judgments could be influenced by implicit biases, so the cumulative effect on bottom-line statistics like incarceration rates and sentence length is much larger than one might imagine.[37] Furthermore, 6% is only an average. Some judges likely hold extremely strong implicit biases. And some defendants are apt to trigger an unconscious bias to a much greater extent than others.[38] Even this seemingly small effect might harm tens or even hundreds of thousands of black defendants every year.

Researchers have found, however, that people may have the ability to compensate for the effects of implicit bias.[39] If they are internally driven or otherwise motivated to suppress their own

31 A Greenwald et al, "Understanding and using the Implicit Association Test: III. meta-analysis of predictive validity" (2009) *J Personality & Soc Psychol* 17.

32 Note that some of the papers Greenwald and his co-authors include in their analysis report multiple studies using independent samples of subjects. ibid.

33 ibid.

34 To be precise, the square of the correlation coefficient of 0.24 is 0.0576, which we round up to 6%.

35 See National Center for State Courts, *Examining the work of State Courts: an analysis of 2008 State Court caseloads* at p 19 at www.courtstatistics.org/__data/assets/pdf_file/0021/23835/ewsc-2008-online.pdf, accessed 14 July 2021 (providing data for criminal cases entering state courts in 2008).

36 United States Courts, "Statistical Tables for the Federal Judiciary–June 2007", 2007, at tbl D, at www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary, accessed 14 July 2021 (observing US district courts to have 71,652 and 69,697 cases pending in the 12-month periods ending 31 March 2006 and 2007, respectively).

37 Kang and Banaji, above n 7, at 1073.

38 See J Eberhardt et al, "Looking deathworthy: perceived stereotypicality of black defendants predicts capital-sentencing outcomes" (2006) 17 *Psychol Scl* 383 at 384 ("Defendants whose appearance was perceived as more stereotypically black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically black.").

39 See J Glaser and E Knowles, "Implicit motivation to control prejudice" (2008) 44 *J Experimental Soc Psychol* 164 at 164–165, 170–171 .

biases, people can make judgments free from biases,[40] even implicit ones.[41] In one recent study,[42] for example, a team of researchers administered the IAT to a group of physicians and asked them to diagnose and treat a hypothetical patient — identified to some of the physicians as a white man and to others as a black man — based on a description of symptoms.[43] The researchers found a correlation between IAT scores and treatment; the physicians with higher IAT scores were more likely to offer appropriate treatment to white patients than to black patients diagnosed with the same condition.[44] But among the 67 physicians who reported some awareness of the purpose of the study, those with higher IAT scores were more likely to recommend the treatment to black patients.[45] In other words, the doctors who were aware of the purpose of the study compensated for their implicit biases when the situation made them sensitive to the risk of behaving — or being observed to behave — in a biased way. "This suggests", argue the authors, "that implicit bias can be recognised and modulated to counteract its effect on treatment decisions."[46]

Jack Glaser and Eric Knowles found similar results in a study using the so-called "Shooter Task".[47] In research of this type, subjects participate in a simulation akin to a video game in which they watch a person on screen pull either a gun or an innocent object, like a wallet, out of

40 See B Dunton and R Fazio, "An individual difference measure of motivation to control prejudiced reactions" (1997) 23 *Personality & Soc Psychol Bull* 316 at 324–326 ; E Plant and P Devine, "Internal and external motivation to respond without prejudice" (1998) 75 *J Personality & Soc Psychol* 811 at 824–828.

41 See J Bargh, "The cognitive monster: the case against the controllability of automatic stereotype effects", S Chaiken and Y Trope (Eds), *Dual-process theories in social psychology*, 1999, p 361 at pp 375–378; P Devine et al, "The regulation of explicit and implicit race bias: the role of motivations to respond without prejudice" (2002) 82 *J Personality & Soc Psychol* 835 at 845–847; J Dovidio et al, "On the nature of prejudice: automatic and controlled processes" (1997) 33 *J Experimental Soc Psychol* 510 at 535–536; R Fazio et al, "Variability in automatic activation as an unobtrusive measure of racial attitudes: a bona fide pipeline?" (1995) 69 *J Experimental Soc Psychol* 1013 at 1025–1026.

42 Green et al, above n 10.

43 ibid at 1232–1233.

44 ibid at 1235. The researchers also found that white doctors who express white preferences on the IAT were more likely to diagnose black patients than white patients as having coronary artery disease, based upon the same symptoms: ibid at 1234–1235. Indeed, the doctors offered the appropriate treatment — thrombolysis — to an equal number of black patients as white patients! As the authors rightly point out, this does not mean there was no disparity; among patients who were diagnosed as suffering from coronary artery disease, black patients were less likely to be offered the appropriate treatment. It is at least curious, however, that doctors with implicit white preferences would be more likely to diagnose coronary artery disease for black patients than white patients, but less likely to treat it. The diagnosis disparity runs in the opposite direction of the treatment-for-diagnosis disparity, and ultimately, the two effects actually cancel each other out: ibid at 1236–1237. Of course, if doctors behaved the same way in the real world, black and white patients who presented the same symptoms would be treated in the same way. Thus, though the IAT predicted discriminatory acts, implicit bias does not seem to result in discrimination overall: ibid at 1234–1237. This aspect of the study has been the source of some debate. See J Tierney, "In bias test, shades of gray", *New York Times*, 18 Nov 2008, at www.nytimes.com/2008/11/18/science/18tier.html, accessed 14 July 2021. One other recent study also shows no correlation between measures of implicit bias and medical decisions among physicians. See J Sabin et al, "Physician implicit attitudes and stereotypes about race and quality of medical care" (2008) 46 *Med Care* 678 at 682 ("We did not find a relationship between difference in treatment recommendations by patient race and implicit measures.").

45 Green et al, above n 10, at 1235.

46 ibid at 1237.

47 Glaser and Knowles, above n 39, at 167–171.

his pocket.[48] If he pulls a gun, the participants are instructed to "shoot" by pushing a button on a joystick; if he pulls a benign object, they are instructed to refrain from shooting.[49] Researchers have found that most white adults exhibit a "shooter bias" in that they are more likely to shoot a black target — regardless of what object the on-screen target pulls out of his pocket,[50] and that this effect correlates with a white preference on the IAT.[51] Glaser and Knowles found in their study, however, that those rare individuals with a white preference on the IAT and who are highly motivated to control prejudice were able to avoid the shooter bias.[52] In short, "those high in an implicit negative attitude toward prejudice show less influence of implicit stereotypes on automatic discrimination".[53]

In sum, the research on implicit bias suggests that people exhibit implicit biases, that there is some evidence that implicit bias can influence behavior, and that people can overcome or compensate for implicit biases if properly motivated and if the racial context is made sufficiently salient. Whether and how this research applies to judges and the criminal justice system is an open question and one to which we turn in "The study design".

The study design

We are aware of only two IAT studies exploring a behavior of direct interest to the criminal justice system. In one study, researchers found that college student subjects harboring a strong implicit bias in favour of whites imposed longer criminal sentences on a Latino defendants than on a white defendants.[54] In another study in Germany, researchers correlated implicit attitudes towards native Germans and Turkish immigrants among German college students with judgments of guilt of a Turkish defendant.[55] The researchers found a high correlation between negative association with Turkish immigrants and judgments of guilt when the materials made "threatening" aspects of the Turkish defendant salient.[56] Though suggestive, these studies, standing alone, do not tell us much about implicit bias in the criminal justice system. Most

48 J Correll et al, "The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals" (2002) 83 *J Personality & Soc Psychol* 1314 at 1315–1317.
49 ibid at 1315–1316.
50 ibid at 1320.
51 ibid at 1320–1321; Glaser and Knowles, above n 39, at 168–169.
52 Glaser and Knowles, ibid at 169–170.
53 ibid at 171.
54 R Livingston, "When motivation isn't enough: evidence of unintentional deliberative discrimination under conditions of response ambiguity", 2002, 9–10 (unpublished manuscript, on file with the *Notre Dame Law Review*).
55 See A Florack et al, "Der Einfluss Wahrgenommener Bedrohung auf die Nutzung Automatischer Assoziationen bei der Personenbeurteilung" ["The impact of perceived threat on the use of automatic associations in person judgments"] (2001) 32 *Zeitschrift for Sozial Psychologie* 249.
56 ibid at 255, tbl 1.

importantly, they tell us nothing about a central actor in the system: the judge. Do judges hold implicit racial biases? If so, do those biases affect their judgments in court? We sought to answer these two questions in our study.[57]

Judges

We recruited judges to participate in our study at judicial education conferences, as we have in our prior work.[58] The 133 judges who participated in our study came from three different jurisdictions.[59] The judges asked us not to identify their jurisdictions,[60] but we can describe the basic characteristics of each of the three. We recruited 70 judges from a large urban center in the eastern United States.[61] These 70 judges, who are appointed to the bench for renewable terms, constitute roughly three-quarters of the judges who sit in this jurisdiction. We recruited 45 judges from a large urban center in the western United States.[62] These 45 judges, who are appointed to the bench but then stand for election, make up roughly half of the judges in

57 We recognise that we have emphasised disparities concerning black Americans, rather than other races. We have done so for three reasons. First, even though Latinos, Native Americans, and Asian Americans are also targets of racism, both explicit and implicit, in the United States some of the most striking disparities involve black Americans in the legal system. Second, the research on the IAT has emphasised biases concerning black Americans as well. Third, our sample of judges includes a large group of black American judges, but few Latinos, few Asian Americans, and no Native Americans. We thus cannot draw any conclusions about the reactions of judges of these ethnicities. We therefore focus our attention here on biases involving black Americans.

58 See C Guthrie et al, "Blinking on the Bench: how judges decide cases" (2007) 93 *Cornell L Rev* 1 at 13 [hereinafter Guthrie et al, "How judges decide"] ; C Guthrie et al, "Inside the judicial mind" (2001) 86 *Cornell L Rev* 777 at 814–815 [hereinafter Guthrie et al, "Judicial mind"]; J Rachlinski et al, "Inside the bankruptcy judge's mind" (2006) 86 *Boston University Law Rev* 1227 at 1256–1259; A Wistrich et al, "Can judges ignore inadmissible information? The difficulty of deliberately disregarding" (2005) 153 *University Pennsylvania Law Rev* 1251 at 1323–1324.

59 At two of the conferences, we collected data from judges attending a plenary session. At the third, we collected data from judges attending an optional session.

60 Their concerns might be justified. Some of our previous work has been reported in the *New York Times* and the *American Bar Association Journal*, among other places. See, eg, P Cohen, "Judicial reasoning is all too human", *New York Times*, 30 June 2001, at www.nytimes.com/2001/06/30/arts/judicial-reasoning-is-all-too-human.html, accessed 14 July 2021; D Cassens Weiss, "Judges flunk story problem test, showing intuitive decision-making", *ABA Journal,* 19 Feb 2008, at www.abajournal.com/search/results/eyJrZXl3b3JkcyI6Ikp1ZGdlcyBGbHVuayBTdG9yeSBQcm9ibGVtIFRlc3QsIFNob3dpbmcgSW50dWl0aXZlIERlY2lzaW9uLU1ha2luZyJ accessed 14 July 2021. The latter report leads with the unfortunate headline "Judges flunk story problem test", which casts the judges in a more negative light than the data warrant. Interest in the present article is sufficiently high that, despite our own efforts to limit its use before it was finalised, it was cited by Weinstein J in a published opinion, *United States v Taveras*, 424 F Supp 2d 446, 462 (EDNY 2006), and discussed at length in a recent volume of the *Annual Review of Law and Social Science*, Lane et al, above n 6, at 441–445.

61 Eighty judges attended the session at which we collected data, but we excluded 10 from our study. We excluded one judge at his or her request. We excluded nine other judges because they failed to provide us with demographic information. We believe that these failures were largely accidental. To complete the demographic page, the judges had to return to the written materials after completing the final IAT, and these nine judges failed to do so. We did not realise that this process would cause problems at our presentation in the eastern jurisdiction, and hence we did not obtain this data. In the subsequent presentations, we made sure that the judges completed the last page as we collected the surveys.

62 Forty-eight judges attended the session at which we collected the data, but we excluded three from our study. One judge neglected to provide demographic information, and we lost the data for two other judges due to a computer malfunction.

their jurisdiction. We recruited our final group of judges at an optional session at a regional conference. These 18 judges, who sit in various towns and cities throughout the state in which the conference was held, are appointed to the bench but are then required to stand for election.[63]

We did not ask the judges to identify themselves by name, but we did ask them to identify their race, gender, exact title, political affiliation, and years of experience on the bench.[64] Table 1 summarises the demographic information that the judges provided. As Table 1 indicates, our sample of judges, particularly those from the eastern jurisdiction, is fairly diverse, at least in terms of gender and race.

Demographic information of the judges (percentage within group and number)

Demographic parameter		Eastern jurisdiction (70)	Western jurisdiction (45)	Optional conference (18)	Overall (133)
Race	White	52.9 (37)	80.0 (36)	66.7 (12)	63.9 (85)
	Black	42.9 (30)	4.4 (2)	5.6 (1)	24.8 (33)
	Latino	4.3 (3)	11.1 (5)	16.7 (3)	8.3 (11)
	Asian	0.0 (0)	4.4 (2)	11.1 (2)	3.0 (4)
Gender	Male	55.7 (39)	66.7 (30)	50.0 (9)	58.7 (78)
	Female	44.3 (31)	33.3 (15)	50.0 (9)	41.4 (55)
Political affiliation	Democrat	86.6 (58)	64.4 (29)	64.7 (11)	76.0 (98)
	Republican	13.4 (9)	35.6 (16)	35.3 (7)	24.0 (31)
Average years of experience		9.8	10.8	9.3	10.1

63 Over 90% of the judges in the eastern jurisdiction attended this conference (although, as noted, we did not obtain data from all of them). Attendance was lower among the western judges; the sample includes roughly half of the judges in their jurisdiction. These judges' willingness to participate in our study was thus unlikely to have been affected by their interest (or lack thereof) in the content of the material. In fact, the judges were not aware of the subject matter of the talk before the session began. This was not our first presentation to the eastern judges. Three years earlier, we had presented a completely different set of materials to the same educational conference. Some of the results from that earlier session have been published, also without identifying the jurisdiction. Wistrich et al, above n 58, at 1279–1281. Many of the judges were therefore familiar with our methods, although the present study differs from our earlier work. Our prior work dealt largely with judicial reliance on heuristics in making judgments, whereas this research is entirely devoted to the influence of race and gender on judgment. This was our first presentation to the western judges. The regional judges differed from the eastern and western judges in that they opted not only to attend the judicial education conference at which we spoke but also to attend our optional session.

64 We include these questions below in Appendix A.

Methods and materials

To explore the two questions animating this article — that is, whether judges hold implicit racial biases, and if so, whether those biases produce biased judicial decisions — we designed a multipart study requiring the participating judges to complete computer tasks[65] and then to respond to a paper questionnaire.

We proceeded as follows. We placed in front of each judge a laptop computer and a questionnaire. The computer screen and the front page of the questionnaire introduced the study and asked the judges to await instruction before beginning.[66] Once the judges were fully assembled, we announced, "Today, we shall ask you to participate actively in your own education".[67]

We asked the judges to complete the computer tasks and to respond to the questionnaire according to the instructions provided. We assured the judges that their responses were anonymous and that we had no way of identifying them individually, but we also made clear that participation was entirely voluntary and that any judge who wanted to exclude her results from the study could do so. (Only one judge chose to do so.) We informed the judges that we would compile their cumulative results and share them with the group at the end of the session.

With these important preliminaries out of the way, we then asked the judges to begin the study. The study included a race IAT;[68] two hypothetical vignettes in which the race of the defendant was not explicitly identified but was subliminally primed; and another hypothetical vignette in which the race of the defendant was made explicit.[69] The final page of the questionnaire asked judges to provide the basic demographic information identified above.[70]

65 The computer tasks were all conducted on laptop computers rented for the purpose of running the experiment. They were all relatively contemporary machines of similar makes. At the eastern and western sessions, all were Hewlett-Packard NX9010; at the regional conference, they were IBM ThinkPads. All had 15-inch screens. The software to run the tasks was designed with a program called Inquisit 2.0, created specifically for measuring implicit associations by a company called Millisecond Software. See Inquisit, www.millisecond.com, accessed 14 July 2021.

66 The instructions on the survey were as follows:

> Many of the points to be discussed at this session are best experienced directly. We therefore ask that before the session starts, you participate in a series of exercises on the laptop computer and evaluate a series of hypothetical cases in the pages that follow. (Participation in all aspects of this exercise is voluntary, of course.) Please do not discuss these materials while you are participating. We shall collect these surveys before the discussion and present the results during the session.
>
> The first part of the exercise consists of a computer task. Please do not begin the task or turn this page until asked to do so.

The instructions on the computer screen were:

> JURISDICTION: Judicial Education Conference, DATE
>
> We shall begin by making announcements as to the nature of this exercise.
>
> Please DO NOT BEGIN until after the announcements.
>
> After the announcements, please press the space bar to begin.

67 Judge Wistrich conducted the introduction at the eastern and western conferences; Professor Rachlinski did it at the regional conference.

68 We also conducted an IAT related to gender after the race IAT, but do not report those results here.

69 We also included a scenario in which we manipulated the gender of a target legal actor as the third scenario. We do not report these results here.

The study results

We present the results in two parts. First, we report the judges' IAT scores, which demonstrate that judges, like the rest of us, harbor implicit racial biases. Second, we report the results of our judicial decision-making studies, which show that implicit biases can influence judicial decision making but can also be overcome, at least in our experimental setting.[71]

The Implicit Association Test

To measure implicit associations involving race, we gave the judges a computer-based-race IAT comparable to the race IAT given to millions of study participants around the world.[72] We asked the judges to perform two trials of the IAT, as described above. The first required them to pair white faces with positive words and black faces with negative words. In other words, the first trial required them to select stereotype-congruent pairings. The second required them to pair white faces with negative words and black faces with positive words. In other words, the second trial required them to select stereotype-incongruent pairings.[73]

To determine each judge's implicit bias score, we performed two calculations. First, we subtracted each judge's average response latency in the stereotype-congruent round from the stereotype-incongruent round to calculate the IAT measure. This measure reflects the most commonly used scoring method for large samples of data collected on the Internet, and hence allows us to compare judges to ordinary adults.[74] Second, we constructed a standardised measure consisting of the average difference in response latencies for each judge divided by the standard deviation of that judge's response latencies in the target rounds. This measure is less commonly reported, but more stable, and produces higher correlations with other behaviors.[75]

70 The order of the materials was thus as follows: the priming task; the written scenario of the shoplifter; the written scenario of the armed robber; the gender scenario (not reported here); the battery case; the race IAT; the gender IAT (not reported here); and the demographics page.

71 We analysed the three groups of judges separately, but there were no significant differences between the judges, except as noted below, so we have kept them together throughout the analysis. Similarly, we found no differences between the judges on the basis of the gender, political affiliation, or experience. Because previous research on the IAT suggests that Latinos score somewhat closer to black Americans on the IAT we used, we combined the few Latino judges with the black judges for these analyses, Nosek et al, above n 17, at 110 tbl 2. Similarly, we combined the Asian American judges with the white judges.

72 The exact instructions at the outset of the IAT were as follows:

> The remaining computer tasks involve making CATEGORY JUDGMENTS. Once the tasks begin, a word or words describing the CATEGORIES will appear in the upper left and upper right corners of the computer screen, A TARGET word or picture will also be displayed in the center of the screen, which you must assign to one of the two categories
> Please respond AS RAPIDLY AS POSSIBLE, but don't respond so fast that you make many errors. (Occasional errors are okay.)
> An "X" will appear when you make an error. Whenever the "X" appears, correct the mistake by pressing the other key.

73 For a more detailed account of our IAT procedure, see Appendix B.

74 See, eg, Nosek et al, above n 17, at 104–105 (reporting average differences in response latencies among large samples of subjects obtained through the Internet).

75 See Greenwald et al, above n 29, at 209–210 (describing standardised measures). The full account of our scoring methods is included as Appendix C.

We found a strong white preference among the white judges, as shown in Table 2. Among the 85 white judges, 74 (or 87.1%) showed a white preference on the IAT. Overall, the white judges performed the stereotype-congruent trial (white/good and black/bad) 216 milliseconds faster than the stereotype-incongruent trial (black/good and white/bad). The black judges, by contrast, demonstrated no clear preference overall. Although 14 of 43 (or 44.2%) showed a white preference, the black judges performed the stereotype-congruent trial (white/good and black/ bad) a mere 26 milliseconds faster than the stereotype-incongruent trial (black/good and white/bad). Comparing the mean IAT scores of the white judges with those of the black judges revealed that the white judges expressed a significantly larger white preference.[76]

Results of race IAT by race of judge

Race of judge (sample size)	Mean IAT score in milliseconds (and standard deviation)*		Percent of judges with lower average latencies on the white/good versus black/bad round
	Judges	Internet sample	
White (85)	216 (201)	158 (224)	87.1
Black (43)	26 (208)	39 (244)	44.2

Note: Positive numbers indicate lower latencies on the white/good versus black/bad round

Because we used a commonly administered version of the IAT, we are able to compare the results of our study to the results of other studies involving ordinary adults. We found that the black judges produced IAT scores comparable to those observed in the sample of black subjects obtained on the Internet.[77] The white judges, on the other hand, demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet.[78] For two reasons, however, this does not necessarily mean that the white judges harbor more intense white preferences than the general population. First, we did not vary the order in which we presented the materials, and this order effect could have led

76 The specific statistical result was: $t(82) = 4.94$, $p < .0001$. Throughout this article, we reserve the use of the words "significant" and "significantly" for statistical significance.

77 The specific statistical result was: $t(42) = 0.18$, $p = .86$. In conducting this test, we took the effect size among the Internet sample of 0.16 standard deviations to be the "population" effect size among black participants on the Internet, and tested whether our observed difference, with our observed standard deviation, would be likely to be reliably higher or lower than the effect in the Internet data. The priming condition did not appear to affect the judges' IAT scores. Also, the judges themselves varied somewhat in their IAT scores. White judges in the eastern jurisdiction expressed an average standardised preference of 0.33, compared to 0.48 and 0.55 in the western jurisdiction and the regional conferences, respectively. These differences were marginally significant. Because the black judges in our study were concentrated largely in the eastern jurisdiction, similar tests for variations among these judges would not be reliable.

78 The specific statistical result was: $t(84) = 2.26$, $p = .026$. We compared our results to those of the Internet sample reported in Nosek et al, above n 17, at 105. In making this comparison, we took the effect size among the Internet sample of 0.83 standard deviations to be the "population" effect size among white participants on the Internet, and tested whether our observed difference, with our observed standard deviation, would likely be reliably higher or lower than the effect in the Internet data.

to artificially higher IAT scores.[79] Second, the judges performed both trials much more slowly than the other adults with whom we are making this comparison, and this, too, could have led to artificially higher IAT scores.[80] We also suspect that the judges were older, on average, than the Internet sample. To the extent that implicit racial bias is less pronounced among younger people, we would expect the judges to exhibit more implicit bias than the Internet sample.

IAT and judicial behaviour

To assess the impact of implicit bias on judicial decision making, we gave the judges three hypothetical cases: the first involving a juvenile shoplifter, the second involving a juvenile robber, and the third involving a battery. We speculated that the judges might respond differently depending upon whether we made the race of the defendant salient, so in the first two cases, we did not identify the race of the defendant explicitly, but we did so implicitly through a subliminal priming technique described below. In the third case, we made race explicit, informing some of the judges that the defendant was "Caucasian" and others that he was "African American".[81] By comparing the judges' individual IAT scores with their judgments in these hypothetical cases, we are able to assess whether implicit bias correlates with racially disparate outcomes in court.

Race primed

We asked the judges to decide two hypothetical cases, one involving a juvenile shoplifter and one involving a juvenile armed robber. Before giving the judges the scenarios, though, we asked them to perform a subliminal priming task, following a protocol developed by Sandra Graham and Brian Lowery.[82] The task appeared to be a simple, computer-based, spatial recognition task.[83] To complete the task, the judges were required to focus their attention on the center of the

79 We selected data collection and scoring procedures so as to minimise the effects of order of presentation. Greenwald and his fellow authors reported that the effect of order of presentation is less than 1%, using the methods we followed. See Greenwald et al, above n 29, at 210 tbl 2.

80 See ibid at 200 ("IAT effects will be artificially larger for any subjects who respond slowly.").

81 Throughout this article we follow the convention of using the terms "black" and "white" to denote race, as the terms more closely reflect the faces in the IAT, the instructions in the IAT (which refer to black and white), and might more closely reflect how the black judges would describe themselves (although there would be variation on this). When referring to the criminal defendants, however, we use African American and Caucasian, following the references mentioned in the hypothetical cases.

82 Graham and Lowery, above n 9, at 487–488.

83 At the beginning of the task, three asterisks appeared in the center of the screen. A 16 character letter string then appeared in one of the four quadrants of the screen. The judges were instructed to press a specific key on the left-hand side of the computer (the "E" key, which was marked with a red dot) when the letter string appeared in one of the quadrants on the left and to press a specific key on the right hand side of the computer (the "I" key, which was also marked with a red dot) when a word appeared in one of the two quadrants on the right. Reminders as to which key to press also remained on the computer screen throughout the first task (that is, "press the 'E' key for left" and "press the 'I' key for right"). When the judges identified the quadrant correctly, the word "correct" would appear in the center in letters. When the judges made an error, the word "error" would appear instead. In either case, the three asterisks would then replace the words "correct" or "error" and the task would repeat. The exact instructions the judges saw are below.

> Once you begin the first computer task, the screen will go blank, then three asterisks (* * *) will appear in the center. Focus your attention on these. A string of letters will then appear in the upper-right, lower-right, upper-left, or lower-left portion of the computer screen.

computer screen in front of them. Words appeared in one of the four corners for 153 milliseconds before being masked by a string of random letters.[84] At that speed, words are extremely difficult to process consciously.[85] Each judge saw 60 words. Half of the judges saw words associated with black Americans,[86] and half saw words with no common theme.[87] After the 60th trial, the task stopped.[88] The computer screen then instructed the judges to turn to the written materials.[89]

(a) The Shoplifter case

We first presented the judges with a scenario called the "Shoplifter case". The judges learned that William, a 13-year-old with no prior criminal record, had been arrested for shoplifting

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If the string appears on the left-hand side (either up or down), press the "E" key.
If the string appears on the right-hand side (either up or down), press the "I" key.
If you correctly identify the position, the screen will flash the word "correct";
if you identify the wrong position, the screen will flash the word "error".
The task will then repeat a number of times. Other words may appear with the letter string. Ignore these and try to identify the position of the letters as quickly as possible.
When you are ready, press the space bar to begin the task.

84 Each trial thus proceeded as follows: the three asterisks would appear in the center of the screen; 1200 milliseconds later (1.2 seconds) one of the prime words (selected at random) would appear in one of the four quadrants (at random as determined by the computer); 153 milliseconds after that, the letter-string would appear over the prime; this would remain until the judge pressed either the "E" or "I" key; then either the "correct" or "error" in the center (depending upon the judge's response) and would remain for roughly one second; then the three asterisks would replace the word "correct" or "error"; and the process would repeat. Due to an error in the computer programming, the judges in the eastern conference were only exposed to the subliminal prime for 64 milliseconds, rather than 153 milliseconds.

85 Graham and Lowery reported that none of the officers in their study was able to identify the nature of the words being shown to them. Graham and Lowery, above n 9, at 491. We did not ask our judges their assessment of what the words were.

86 The words came directly from the Graham and Lowery study: graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, roots, afro, Oprah, Islam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, soul: ibid at 489 n 5.

87 These words also came directly from Graham and Lowery: baby, enjoyment, heaven, kindness, summer, sunset, truth, playful, accident, coffin, devil, funeral, horror, mosquito, stress, toothache, warmth, trust, sunrise, rainbow, pleasure, paradise, laughter, birthday, virus, paralysis, loneliness, jealousy, hell, execution, death, agony. Graham and Lowery used neutral words that matched the words associated with black Americans for positive or negative associations: ibid.

88 Our study differed from that of Graham and Lowery in several ways, any of which might have affected the results. First, Graham and Lowery used 80 trials, rather than the 60 we used. ibid at 489–490. Second, because we ran a large group of judges at the same time, we did not use audible beeps to indicate correct responses. Third, our hypothetical defendants differed. We did not have access to the original materials Graham and Lowery used, and so wrote our own. See fact pattern below at Appendix A. Fourth, we asked fewer questions concerning the hypothetical defendants. Although we do not see how any of these differences would necessarily affect the results, priming tasks can be sensitive to details.

89 The following appeared on the screen:

Thank you for completing the first computer task.
Now please turn to the written materials.
Please leave this computer on with the screen up.
After you have completed four pages of written materials, please press the space bar to continue with the final computer tasks.

In case a judge accidentally or mistakenly hit the space bar, we added another intervening page before the second computer task, which appeared once the space bar was pressed. It read as follows:

If you have completed the four case summaries, please press the space bar to begin the final computer task.

several toys from a large, upscale toy store.[90] The judges read that there is some conflicting evidence on the degree to which William resisted arrest, but there is no dispute over the fact that he had shoplifted.[91]

Following the scenario, we asked the judges three questions about William. First, we asked them what disposition they thought most appropriate. We listed seven options below the question, ranging from a dismissal of the case to a transfer to adult court.[92] Second, we asked judges to predict on a seven-point scale (from "Not at all Likely" to "Very Likely") whether William would commit a similar crime in the future. And finally, we asked them to predict on an identical seven-point scale the likelihood that William would commit a more serious crime in the future. In short, we asked them one question about sentencing and two questions about recidivism.

The judges' determinations were not influenced by race. As shown in Table 3, judges primed with the black-associated words did not produce significantly different judgments than the judges primed with the neutral words.[93] Our primary interest, however, was in determining whether the judges' implicit biases correlated with their judgments. We found that the judges' scores on the race IAT had a marginally significant influence on how the prime influenced their judgment.[94] Judges who exhibited a white preference on the IAT gave harsher sentences to defendants if they had been primed with black-associated words rather than neutral words, while judges who exhibited a black preference on the IAT gave less harsh sentences to defendants if they had been primed with black-associated words rather than neutral words. We did not find any significant relationship between the judges' IAT scores and either of the recidivism measures, although the data showed a similar trend.[95]

90 The location of the crime would reveal the jurisdiction and hence we delete it. The location was an upscale shopping district.

91 The exact materials for this scenario and all others are included below at Appendix A.

92 The options were as follows:
1. dismiss it with an oral warning
2. adjourn the case in contemplation of dismissal (assuming William gets in no further trouble)
3. put William on probation for six months or less
4. put William on probation for more than six months
5. commit William to a juvenile detention facility for six months or less
6. commit William to a juvenile detention facility for more than six months
7. transfer William to adult court.

93 The results were as follows: Question 1, $z = 0.51$, $p = .61$; Question 2, $z = 0.73$, $p = .46$; Question 3, $z = 1.09$, $p = .28$.

94 To accomplish this analysis, we conducted an ordered logit regression of the judges' disposition against the priming condition, the judges' IAT scores, and an interaction of the two. The interaction term reflects the effect of the IAT score on how the prime affected the judge. This term was marginally significant in the model, $z = 1.84$, $p = .07$.

95 For the first recidivism question, $z = 1.41$, $p = .16$. On the second recidivism question, $z = 1.49$, $p = .14$. On these questions, the black judges and the white judges seemed to respond in similar ways. We ran the full model (predictors of prime, race of judge, IAT, and all interactions between these variables) on all three variables as well. Adding the race-of judge terms and interactions did not produce any significant effects.

Average results on juvenile shoplifter (all three questions on a seven-point scale: higher numbers indicate harsher judgments*)

Prime (and n)	Q: Disposition	Q2: Recidivism — same crime	Q3: Recidivism — more serious crime
Black (63)	2.34	2.58	2.23
Neutral (70)	2.40	2.36	1.94

Note: The seven-point scale for questions 2 and 3 have been transposed from the original for this Table, so that higher numbers consistently meant harsher judgment.

(b) The Robbery case

The second scenario, called the "Robbery case", described Michael, who was arrested for armed robbery at a gas station convenience store two days shy of his 17th birthday.[96] Michael, who had previously been arrested for a fight in the school lunchroom, threatened the clerk at the convenience store with a gun and made off with $267 in cash. He admitted the crime, claiming that his friends had dared him to do it. After they had read this scenario, we asked the judges the same three questions we asked them about William in the shoplifter case.

Again the judges' determinations were not influenced by race. As shown in Table 4, the judges primed with black-associated words did not produce significantly different ratings than the judges primed with the neutral words.[97] As noted, however, our primary interest was in the relationship between implicit bias and these judgments. As with the shoplifting case, the judges' scores on the race IAT had a marginally significant influence on how the prime influenced their judgment in the robbery case.[98] Judges who exhibited a white preference on the IAT gave harsher sentences to defendants if they had been primed with black-associated words rather than neutral words, while judges who exhibited a black preference on the IAT gave less harsh sentences to defendants if they had been primed with black-associated words rather than neutral words. We did not find any significant relationship between the judges' IAT scores and either of the recidivism measures, although the data showed a similar trend.[99]

To summarise, we found no overall difference between those judges primed with black-associated words and those primed with race-neutral words. This finding contrasts sharply with research conducted by Graham and Lowery, who found that police and parole officers primed with black-associated words were more likely than those primed with neutral

96 The use of an armed robbery breaks somewhat with Graham and Lowery, who had used two simple property crimes. See Graham and Lowery, above n 9, at 490.

97 The results were as follows: Question 1, $z = 0.17$, $p = .87$; Question 2, $z = 0.09$, $p = .93$; and Question 3, $z = 1.62$, $p = .11$.

98 Our findings were: $z = 1.85$, $p = .06$.

99 For the first recidivism question, $z = 0.62$, $p = .53$; on the second recidivism question, $z = 0.54$, $p = .59$. As above, on these questions, the black judges and the white judges seemed to respond in similar ways. We ran the full model (predictors of prime, race of judge, IAT, and all interactions between these variables) on all three variables as well. Adding the race-of-judge terms and interactions did not produce any significant effects.

words to make harsh judgments of juvenile offenders.[100] The officers who had seen the black-associated words deemed the juveniles more culpable, more likely to recidivate, and more deserving of a harsh punishment.[101]

Average results on juvenile armed robber (all three question on a seven-point scale: higher numbers indicate harsher judgments*)

Prime (and n)	Q: Disposition	Q2: Recidivism — same crime	Q3: Recidivism — more serious crime
Black (63)	4.92	3.54	3.17
Neutral (70)	4.97	3.61	3.48

Note: The seven-point scale for questions 2 and 3 have been transposed from the original for this Table, so that higher numbers consistently meant harsher judgment.

The overall lack of an effect of the racial prime, however, gives us little reason to conclude that the judges were not affected by their unconscious racial biases. We found in both the shoplifter case and the robbery case that judges who expressed a white preference on the IAT were somewhat more likely to impose harsher penalties when primed with black-associated words than when primed with neutral words, while judges who expressed a black preference on the IAT reacted in an opposite fashion to the priming conditions.

To be sure, we did not find a significant relationship between IAT scores and the judges' judgments of recidivism. That is, white preferences on the IAT did not lead judges primed with words associated with black Americans to predict higher recidivism rates. The judges made fairly race-neutral assessments of the two defendants' character. This result suggests that the correlation we found between IAT score and sentence might not be robust. But, of course, a judges' neutral assessment of character would be a small comfort to a juvenile defendant who received an excessive sentence due to his race.

Race made explicit

The fact that we did not explicitly provide any information about the race of the defendant (although judges obviously might have made assumptions about their race) is important because judges will commonly be aware of the race of the defendant appearing in front of them. To address this concern, we also gave our judges a hypothetical vignette in which we made race explicit. To enable comparison with another study, we used a vignette developed by Samuel Sommers and Phoebe Ellsworth.[102]

100 See Graham and Lowery, above n 9, at 493–494, 496.
101 ibid. Only police officers predicted that the defendant was more likely to recidivate; parole officers did not show any differences on this question.
102 S Sommers and P Ellsworth, "White juror bias: an investigation of prejudice against black defendants in the American courtroom" (2001) 7 *Psychol Pub Pol'y & L* 201 at 216–217. We thank the authors for graciously sending us the materials and giving us permission to use them.

We asked the judges to imagine they were presiding over a bench trial in which the prosecution charges Andre Barkley, a high school basketball player, with battering his teammate, Matthew Clinton. There is no question that Barkley injured Clinton, but Barkley claims, somewhat incredibly, that he was only acting in self-defence. We informed some of the judges that the defendant was an African American male and that the victim was a Caucasian male. We informed the rest of the judges that the defendant was Caucasian and that the victim was African American. Following the scenario, we asked all of the judges to render a verdict and to rate their confidence in their judgment on a nine-point scale (from "Very Confident" to "Not at all Confident").[103]

We found that the white judges were equally willing to convict the defendant whether he was identified as Caucasian or as African American. Among the white judges who read about an African American defendant, 73% (33 out of 45) said they would convict, whereas 80% (35 out of 44) of the white judges who read about a Caucasian defendant said that they would convict.[104] This contrasts sharply with the results obtained by Sommers and Ellsworth, who used only white participants. They found that 90% of the participants in their study who read about an African American defendant said that they would convict as compared to 70% of the participants who read about a Caucasian defendant.[105] On the other hand, we found that black judges were significantly more willing to convict the defendant when he was identified as Caucasian rather than as African American. When the defendant was identified as Caucasian, 92% (24 out of 26) of the black judges voted to convict; when he was identified as African American, however, only 50% (9 out of 18) voted to convict. The difference between the white judges and the black judges is statistically significant.[106] Analysis of the judges' assessments of their confidence in their verdicts produced similar results.[107]

103 We used the same question to elicit verdicts and confidence ratings as the one Sommers and Ellsworth used: "Based on the available evidence, if this were a bench trial, would you convict the defendant?" Below this were the words "Yes" and "No". Finally, we asked the judges, "How confident are you that your judgment is correct?" Below this question, the materials presented a nine-point scale, with "1" labeled "Not at all Confident" and "9" labeled "Very Confident". ibid at 217; see also Appendix A (providing the materials used in our study).

104 This difference was not statistically significant. Fishers exact test, $p = .62$.

105 The difference between our results and those obtained by Sommers and Ellsworth is significant: $X2\ (1) = 6.74$, $p < .01$ (using the expected conviction rates of 70% for Caucasian defendants and 90% for African American defendants, as reported by Sommers and Ellsworth, Sommers and Ellsworth, above n 102, at 217).

106 The analysis consisted of a logistic regression of the verdict against the race of the defendant, the race of the judge, and the interaction of these two parameters. The interaction was significant, $z = 2.12$, $p = .03$, which was the result of the differential treatment of the two defendants by the black judges. The race of the defendant was also significant, $z = 2.81$, $p = .005$, indicating that overall, the judges were less likely to convict the African American defendant than the Caucasian defendant.

107 We combined the nine-point confidence measure with the binary outcome to create an eighteen-point scale. In our coding, a "1" corresponded to a judge who was very confident that the defendant should be acquitted, whereas an "18" corresponded to a judge who was very confident that the defendant should be convicted. The average confidence that the judges expressed in the defendant's guilt were as follows: white judges judging Caucasian defendants-13.64; white judges judging African American defendants — 12.2; black judges judging Caucasian defendants — 16.08; black judges judging African American defendants — 9.89. Statistical analysis of these results (by ANOVA) produced results consistent with the analysis of the verdicts alone. That is, the judges were significantly more convinced of the Caucasian defendant's guilt than of the African American's guilt ($F(1, 129) = 15.04$, $p < .001$). This disparity was much more pronounced among black judges ($F(1, 129) = 5.84$, $p < .025$).

The focus of this study, however, is on the relationship between implicit bias and judgment. As above, we wanted to assess the effect of the interaction between the judges' IAT scores and the race of the defendant on the judges' verdicts. Unlike our results in the first study, however, we did not find even a marginally significant interaction here.[108] Judges who exhibited strong white preferences on the IAT did not judge the white and black defendants differently, and neither did judges who expressed black preferences on the IAT. Analysis of the confidence ratings produced the same result.[109]

Because the white judges and the black judges reacted differently to the problem, we also conducted an analysis to account for these differences. To do this, we assessed the interaction between the race of the defendant and the IAT score, along with the race of the judge.[110] The three-way interaction between race of judge, race of defendant, and IAT score was significant.[111] This result means that the IAT scores of the black judges and the white judges had different effects on the judges' reactions to the race of the defendant, as we explain below in further analyses. Analysis of the confidence ratings produced similar results.[112]

To allow us to interpret this interaction, we ran the less complex analysis separately for black and white judges. That is, we assessed the interaction between the IAT score and race of the defendant in two separate analyses. With respect to the white judges, we found no significant results; if anything, the white judges with a greater white preference expressed a greater propensity to convict the Caucasian defendant rather than the African American defendant.[113] Among black judges, however, those who expressed a stronger black preference on the IAT were less likely to convict the African American defendant relative to the Caucasian defendant.[114] An analysis of confidence ratings produced similar results.[115]

108 To accomplish this analysis, we conducted a logistic regression of the judges' verdict against the priming condition, the judges' IAT scores, and an interaction of the two. The interaction term reflects the effect of the IAT score on how the race of the defendant affected the judges' verdict. This term was not significant in the model, z - 1.04, p = .30.

109 We also replicated this analysis with the eighteen-point confidence ratings. See n 112. Specifically, we regressed the judges' confidence in the defendant's guilt against the defendant's race, the judges' IAT score, and the interaction between the race and IAT score. As with the verdict itself, this analysis showed that the race of the defendant was significant, t-ratio = 3.49, p < .001, but the interaction between race of defendant and IAT score was not, t-ratio = 1.51, p = .13.

110 In this analysis, the race of the defendant and the interaction between race of judge and race of the defendant were significant, just as they were in the simpler models. (Race of defendant, z = 1.99, p = .05; interaction between race of the judge and race of the defendant, z = 2.35, p = .02. The interaction of the defendant's race and IAT score was not significant, z = 1.00, p = .23.)

111 The result was as follows: z = 2.18, p = .03.

112 Regressing the eighteen-point confidence rating against the race of the judge, the race of the defendant, the judges' IAT scores, and all interactions between these variables revealed significant effects for race of the defendant, t-ratio = 2.95, p = .005; a significant interaction of race of the defendant with race of the judge, t-ratio = 2.68, p = .01; and the three-way interaction of race of judge, race of defendant, and IAT score, t-ratio = 2.68, p = .02. The interaction of race of defendant and IAT scores was still not significant in this model, t-ratio = 1.27, p = .20.

113 The results are as follows: z = 1.15, p = .25.

114 The results are as follows: z = 1.87, p = .06. Given the high conviction rate of the black judges for the Caucasian defendant, this trend actually meant that they were more likely to convict the African American defendants to the extent that they exhibited greater white preferences on the IAT.

The findings among black judges can best be seen by dividing the black judges into two groups: those who expressed a black preference on the IAT and those who expressed a white preference on the IAT. Among those black judges who expressed a black preference, 100% (14 out of 14) voted to convict the Caucasian defendant, while only 40% (4 out of 10) of these judges voted to convict the African American defendant. Among those black judges who expressed a white preference, 83% (10 out of 12) voted to convict the Caucasian defendant, while 63% (5 out of 8) voted to convict the African American defendant. In effect, the black judges who expressed white preferences made verdict choices similar to those of their white colleagues, while black judges who expressed a black preference treated the African American defendant more leniently.

In sum, then, IAT scores predicted nothing among the white judges. Among the black judges, however, a black preference on the IAT was associated with a willingness to acquit the black defendant.

Interpretation of results

Our research supports three conclusions. First, judges, like the rest of us, carry implicit biases concerning race. Second, these implicit biases can affect judges' judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias. Third, and conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.

Our first conclusion was perhaps the most predictable, though it is still troubling. Given the large number of Americans who have taken the IAT, and given the frequency with which white Americans display at least a moderate automatic preference for white over black, it would have been surprising if white judges had failed to exhibit the same automatic preference. Similarly, the black judges carry a more diverse array of implicit biases, just like black adults generally: some exhibit a white preference just like the white judges; others exhibit no preference; and some exhibit a black preference. Overall, like adults, most of the judges — white and black — showed a moderate-to-large degree of implicit bias in one direction or the other. If ordinary adults carry a "bigot in the brain", as one recent article put it,[116] then our data suggest that an invidious homunculus might reside in the heads of most judges in the United States, with the potential to produce racially biased distortions in the administration of justice.

It is worth noting, however, that the research on so-called "chronic egalitarians" suggests that this result was not inevitable. Some whites with longstanding and intense personal commitments to eradicating bias in themselves — chronic egalitarians — do not exhibit the preference for whites over blacks on the IAT that most white adults show.[117] Despite their professional

115 The white judges displayed a greater propensity to convict the Caucasian defendant relative to the African American defendant as the IAT score increased, but the trend did not approach significance, t-ratio = 1.00, p = .40. The black judges showed the opposite trend, which was significant: t-ratio = 2.25, p = .03.

116 S Carpenter, "Buried prejudice: the bigot in your brain", *Sci Am Mind*, May 2008, at 32.

117 See G Moskowitz and A Salomon, "Preconsciously controlling stereotyping: implicitly activated egalitarian goals prevent the activation of stereotypes" (2000) 18 *Soc cognition* 151.

commitment to the equal application of the law, judges do not appear to have the same habits of mind as the chronic egalitarians. The proportion of white judges in our study who revealed automatic associations of white with good and black with bad was, if anything, slightly higher than the proportion found in the online surveys of white Americans. Thus, a professional commitment to equality, unlike a personal commitment to the same ideal, appears to have limited impact on automatic racial associations, at least among the judges in our study. Alternatively, the over-representation of black Americans among the criminal defendants who appear in front of judges might produce invidious associations that overwhelm their professional commitment. In either case, our findings are consistent with the implicit associations found among capital defence attorneys. White capital defence attorneys, another group which might be expected to have strong professional commitments to the norm of racial equality,[118] exhibit the same automatic preference for whites as the general population.[119]

Taken together, then, the research on judges and capital defence attorneys raises serious concerns about the role that unconscious bias might play in the criminal justice system. Jurors are drawn from randomly selected adults, and a majority of white jurors will harbor implicit white preferences. If police, prosecutors, jurors, judges, and defence attorneys all harbor anti-black preferences, then the system would appear to have limited safeguards to protect black defendants from bias. Based on IAT scores alone, both black judges and black jurors seem to be less biased than either white judges or white jurors, because black Americans show less implicit bias than white Americans. But even considerable numbers of blacks express implicit biases. Perhaps the only entity in the system that might avoid the influence of the bigot in the brain is a diversely composed jury.

That said, the rest of our results call into question the importance of IAT scores *alone* as a metric to evaluate the potential bias of decision makers in the legal system. Our second and third conclusions show that implicit biases *can* translate into biased decision making under certain circumstances, but that they do not do so consistently.

Implicit associations influenced judges — both black judges and white judges — when we manipulated the race of the defendant by subliminal methods. Judges with strong white preferences on the IAT made somewhat harsher judgments of the juvenile defendants after being exposed to the black subliminal prime, and judges with strong black preferences on the IAT were somewhat more lenient after exposure to the black subliminal prime. In effect, the subliminal processes triggered unconscious bias, and in just the way that might be expected.

The story for the explicit manipulation of race is more complicated, however. The white judges, unlike the white adults in the Sommers and Ellsworth study,[120] treated African American and Caucasian defendants comparably. But the proper interpretation of this finding is unclear. We observed a trend among the white judges in that the higher their white preference, the more

118 See T Eisenberg and S Johnson, "Implicit racial attitudes of death penalty lawyers" (2004) 53 *Depaul L Rev* 1539 at 1540 ("One would hope that those who represent capital defendants (or at least African-American capital defendants) would themselves be free of racialised thinking ... ".)

119 ibid at 1546–1548.

120 See Sommers and Ellsworth, above n 102, at 217.

favorably they treated the African American defendant in the battery case. Thus, among the white judges, implicit bias did not translate into racial disparities when the race of the defendant was clearly identified in an experimental setting.

We believe that the data demonstrate that the white judges were attempting to compensate for unconscious racial biases in their decision making. These judges were, we believe, highly motivated to avoid making biased judgments, at least in our study. Codes of judicial conduct demand that judges make unbiased decisions, at least in our study.[121] Moreover, impartiality is a prominent element in almost every widely accepted definition of the judicial role.[122] Judges take these norms seriously. When the materials identified the race of the defendant in a prominent way, the white judges probably engaged in cognitive correction to avoid the appearance of bias.

The white judges in our study behaved much like the subjects in other studies who were highly motivated to avoid bias in performing an assigned task.[123] What made our white judges different from the subjects studied by these other researchers is that most of the judges reported that they suspected racial bias was being studied, despite the fact that the only cue they received was the explicit mention of the defendant's race.[124] We think this report was truthful, given that the judges behaved the same way as other white subjects who attempted to avoid the influence of implicit bias.

The black judges responded somewhat differently to the overt labeling of the defendant's race. Like the white judges, the black judges in our study also reported being aware of the subject of the study, yet they showed a correlation between implicit associations and judgment when race was explicitly manipulated. Among these judges, a greater white preference produced a greater propensity to convict the African American defendant. In other words, the black judges clearly reacted differently when they were conscious that race was being manipulated — a difference that correlated with their score on the race IAT.

We do not conclude, however, that black judges are less concerned about avoiding biased decision making than white judges. We have no doubt that the professional norms against bias concern the black judges just as deeply as their white counterparts — if not more so. And we are

121 See *Model Code of Judicial Conduct: Canon 2* at www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/, accessed 15 July 2021. ("A judge shall perform the duties of judicial office impartially, competently, and diligently.").

122 See, eg American Bar Association, *Black letter guidelines for the evaluation of judicial performance*, at Guideline 5-2.3, available at www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.pdf, accessed 15 July 2021, (prescribing "[a]bsence of favor or disfavor toward anyone, including but not limited to favor or disfavor based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status").

123 See Glaser and Knowles, above n 39, at 171.

124 During our presentation, one of us asked for a show of hands to indicate how many thought we were studying race. While not the most ideal way to make this inquiry, and while we did not keep a precise count, most of the judges raised their hands.

mindful that research on the effect of race on judges' decisions in actual cases demonstrates no clear effects.[125] We believe that both white and black judges were motivated to avoid showing racial bias.

Why then did the black judges produce different results? We can only speculate, but we suspect that both groups of judges were keen to avoid appearing to favor the white defendant (or conversely, wanted to avoid appearing to disfavor the black defendant). Black judges, however, might have been less concerned with appearing to favor the black defendant than the white judges. Those black judges who expressed a white preference, however, behaved more like their white counterparts in this regard, thereby producing a correlation between verdict and IAT score among black judges.

We also cannot ignore the possibility that the judges were reacting to the race of the victim, rather than (or in addition to) the race of the defendant. In all cases, we identified the victim as the opposite race as the defendant. Furthermore, black judges might have reacted differently to the fact that the case involved a cross-racial crime.

Given our results, we cannot definitively ascribe continuing racial disparities in the criminal justice system to unconscious bias. We nevertheless can draw some firm conclusions. First, implicit biases are widespread among judges. Second, these biases can influence their judgment. Finally, judges seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence. When they are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias.

Whether the judges engage their abilities to avoid bias on a continual basis in their own courtrooms, however, is unclear. Judges are subject to the same significant professional norms to avoid prejudice in their courtrooms that they carried with them into our study. And judges might well point to our study as evidence that they avoid bias in their own courtrooms, where the race of defendants is often reasonably clear, and they never face subliminal cues. But courtrooms can be busy places that do not afford judges the time necessary to engage the corrective cognitive mechanisms that they seem to possess. And even though many decisions are made on papers only, judges might unwittingly react to names or neighborhoods that are associated with certain races. Control of implicit bias requires active, conscious control.[126] Judges who, due to time pressure or other distractions, do not actively engage in an effort to control the "bigot in the brain" are apt to behave just as the judges in our study in which we subliminally primed with race-related words. Moreover, our data does not permit us to determine whether a desire to control bias or avoid the appearance of bias motivates judges in their courtrooms the way it seemed to in our study.

Furthermore, judges might be over-confident about their abilities to control their own biases. In recently collected data, we asked a group of judges attending an educational conference to rate their ability to "avoid racial prejudice in decision making" relative to other judges who

125 See, eg, K Abrams, "Black judges and ascriptive group identification", *Norms and the Law*, J Drobak ed, 2006, p 208, at p 215 ("The most noteworthy feature of these studies is that they find no consistent, and only a few salient, differences in decision making that correlate with the race of the judge.").

126 See Carpenter, above n 116, at 37–38.

were attending the same conference. Ninety-seven percent (35 out of 36) of the judges placed themselves in the top half and 50% (18 out of 36) placed themselves in the top quartile, even though by definition, only 50% can be above the median, and only 25% can be in the top quartile.[127] We worry that this result means that judges are over-confident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions.

To be sure, this is only one study, and it has its limitations. The results might be the product of the particular judges who participated in our study, or the materials we used, or even the fact that hypothetical scenarios were used. Most importantly, we cannot determine whether the mental processes of judges on the bench more closely resemble those of judges subliminally primed with race or those for whom race was explicitly manipulated. Thus, it is not clear how implicit racial bias influences judicial decision making in court, but our study suggests, at a minimum, that there is a sizeable risk of such influence, so we turn in "Mitigating implicit bias in court" to reforms the criminal justice system might consider implementing.

Mitigating implicit bias in court

To minimise the risk that unconscious or implicit bias will lead to biased decisions in court, the criminal justice system could take several steps. These include exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices. Taking these steps would both facilitate the reduction of unconscious biases and encourage judges to use their abilities to compensate for those biases.

Exposure to stereotype-incongruent models

Several scholars have suggested that society might try to reduce the presence of unconscious biases by exposing decision makers to stereotype-incongruent models.[128] This suggestion, in fact, probably represents the dominant policy proposal among legal scholars who write about unconscious bias.[129] We certainly agree, for example, that posting a portrait of President Obama alongside the parade of mostly white male judges in many courtrooms would be an inexpensive, laudable intervention.

127 These data were collected by us at a conference of New York City administrative law judges in the summer of 2008. As one of the questions, we asked the following:

> Relative to the other judges attending this conference, how would you rate yourself on the following:
> Avoiding racial bias in making decisions:
> - in the highest quartile (meaning that you are more skilled at this than 75% of the judges attending this conference)
> - in the second highest quartile (meaning that you are more skilled at this than 50% of the judges in this room, but less skilled than 25% of the judges attending this conference)
> - in the second lowest quartile (meaning that you are more skilled at this than 25% of the judges in this room, but less skilled than 50% of the judges attending this conference)
> - in the lowest quartile (meaning that you are less skilled at this than 75% of the judges attending this conference).

128 Jolls and Sunstein, above n 4, at 988–990; Kang and Banaji, above n 7, at 1105–1108.

129 See, eg, Kang and Banaji, above n 7, at 1112 ("In *Grutter v Bollinger*, the court emphasised that student diversity was valuable because it could help 'break down racial stereotypes'." (quoting *Grutter v. Bollinger*, 539 US 306, 330 (2003))); see also Kang, above n 8, at 1579–1583 (arguing that public broadcasting should be regulated so as to promote positive images of minorities).

Our results, however, also raise questions about the effectiveness of this proposal. The white judges from the eastern jurisdiction in our study showed a strong set of implicit biases, even though the jurisdiction consists of roughly half white judges and half black judges. Indeed, the level of implicit bias in this group of judges was only slightly smaller than that of the western jurisdiction, which included only two black judges (along with 36 white, five Latino, and two Asian judges). Exposure to a group of esteemed black colleagues apparently is not enough to counteract the societal influences that lead to implicit biases.

Consciously attempting to change implicit associations might be too difficult for judges. Most judges have little control over their dockets, which tend to include an over-representation of black criminal defendants.[130] Frequent exposure to black criminal defendants is apt to perpetuate negative associations with black Americans. This exposure perhaps explains why capital defence attorneys harbor negative associations with blacks,[131] and might explain why we found slightly greater negative associations among the white judges than the population as a whole (although as we noted above, the latter finding might have other causes).

Testing and training

The criminal justice system might test candidates for judicial office using the IAT or other devices to determine whether they possess implicit biases. We do not suggest that people who display strong white preferences on the IAT should be barred from serving as judges, nor do we even support using the IAT as a measure of qualification to serve on the bench.[132] The direct link between IAT score and decision making is far too tenuous for such a radical recommendation. And our data shows that judges can overcome these implicit biases at least to some extent and under some circumstances. Rather, knowing a judge's IAT score might serve two other purposes. First, it might help newly elected or appointed judges understand the extent to which they have implicit biases and alert them to the need to correct for those biases on the job.[133] Second, it might enable the system to provide targeted training about bias to new judges.[134]

Judicial training should not end with new judges, however. Training for sitting judges is also important. Judicial education is common these days, but one problem with it, at least as it exists at this time, is that it is seldom accompanied by any testing of the individual judge's susceptibility to implicit bias, or any analysis of the judge's own decisions, so the judges are less likely to appreciate and internalise the risks of implicit bias.[135] As Timothy Wilson and his colleagues have observed, "people's default response is to assume that their judgments are

130 Bureau of Justice Statistics, US Department of Justice, State Court Processing Statistics, *Felony Defendants in Large Urban Counties, 2009 — Statistical Tables*, 2009, at p 5, available at https://bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables, accessed 15 July 2021, (stating that an estimated 45% of defendants were black).

131 See Eisenberg and Johnson, above n 118, at 1553–1556.

132 Others have made tentative suggestions that the IAT be used as a screening device for certain professions. See, eg, I Avrs, *Pervasive Prejudice?*, University of Chicago Press, 2001 ("Implicit attitude testing might also itself be used as a criterion for hiring both governmental and nongovernmental actors.").

133 Green et al, above n 10, at 1237 ("These findings support the IAT's value as an educational tool.").

134 See ibid (recommending "securely and privately administered IATs to increase physicians' awareness of unconscious bias").

135 See Carpenter, above n 116, at 32.

uncontaminated".[136] Surely this is true of judges as well. Moreover, because people are prone to egocentric bias, they readily assume that they are better than average, or the factors that might induce others to make poor or biased decisions would not affect their own decisions. Our research demonstrates that judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do.[137] Therefore, while education regarding implicit bias as a general matter might be useful, specific training revealing the vulnerabilities of the judges being trained would be more useful.[138]

Another problem with training is that although insight into the direction of a bias frequently can be gained, insight into the magnitude of that bias cannot. One group of psychologists provided the following example:[139]

> Consider Ms Green, a partner in a prestigious law firm, who is interviewing candidates for the position of an associate in her firm. When she interviews Mr Jones, a young African-American attorney, she has an immediate negative impression, finding him to be arrogant and lacking the kind of brilliance she looks for in new associates. Ms Green decides that her impression of Mr Jones was accurate and at a meeting of the partners, argues against hiring him. She wonders, however, whether her negative evaluation was influenced by Mr Jones' race.

The psychologists explained:[140]

> Ms Green may know that her impression of Mr Jones is unfairly negative and want to avoid this bias, but have no idea of the extent of the bias. Should she change her evaluation from "Should not be hired" to "Barely acceptable" or to "Best applicant I've seen in years"?

This scenario illustrates the problem well. How is one to know if correction is warranted, and if so, how much?[141] In a circumstance like the one depicted above or like any of the circumstances described in the materials included in our study, there is a risk of insufficient correction, unnecessary correction, or even over-correction, resulting in a decision that is distorted as a result of the adjustment, but simply in the opposite direction.[142] Testing might mitigate this problem by helping judges appreciate how much compensation or correction is needed.

136 T Wilson et al, "Mental Contamination and the Debiasing Problem", *Heuristics and Biases*, T Gilovich et al eds, 2002, p 185 at p 190.

137 See Guthrie et al, Judicial Mind, above n 58, at 814–815.

138 See Green et al, above n 10, at 1237.

139 Wilson et al, above n 136, at p 185.

140 ibid at p 187.

141 See ibid at p 191. ("Three kinds of errors have been found: insufficient correction (debiasing in the direction of accuracy that does not go far enough), unnecessary correction (debiasing when there was no bias to start with), and over-correction (too much debiasing, such that judgments end up biased in the opposite direction).").

142 See ibid (suggesting that people's "corrected judgments might be worse than their uncorrected ones"); see also A Page, "Batson's blind-spot: unconscious stereotyping and the peremptory challenge" (2005) 85 *Boston University Law Review* 155 at 239–240 ("One major problem for any correction strategy is determining the magnitude of the correction required. Unfortunately, people are not very good at this determination. Some research suggests that among those who are very motivated to avoid discrimination, over-correction is a common problem. ... A second problem is that a correction strategy appears to require significant cognitive resources .... (citations omitted)"); ibid at 241–242. ("[T]o consciously and willfully regulate one's own ... evaluations [and] decisions . . . requires considerable effort and is relatively slow. Moreover, it appears to require a limited resource that is quickly used up, so conscious self-regulatory acts can only occur sparingly and for a short time." (omissions in original) (quoting J Bargh and T Chartrand, "The unbearable automaticity of being" (1999) 54 *American Psychologist Journal* 462 at 476).

The results of our study are thus somewhat surprising in that the white judges' corrections in the case in which the defendant's race was explicit seemed to be neither too much nor too little. On average, these judges treated white and black defendants about the same. This result cannot, however, reasonably be taken as meaning that judges correct for the influence of implicit bias perfectly in all cases in which they attempt to do so. We presented only one scenario — other cases might produce over-compensation or under-compensation. And individual judges are apt to vary in terms of their willingness or ability to correct for the influence of unconscious racial bias. Also, the white judges were slightly less harsh on the black defendants. The difference simply failed to rise to the level of statistical significance, as it was small (only six percentage points). Had we collected data on a thousand judges rather than a hundred, we might have begun to observe some over-compensation or under-compensation.

Auditing

The criminal justice system could also implement an auditing program to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit bias. For example, judges' discretionary determinations, such as bail-setting, sentencing, or child-custody allocation, could be audited periodically to determine whether they exhibit patterns indicative of implicit bias. Such proposals have been suggested as correctives for umpires in Major League Baseball and referees in the National Basketball Association after both groups displayed evidence of racial bias in their judgments.[143]

Auditing could provide a couple of benefits. First, it would obviously increase the available data regarding the extent to which bias affects judicial decision making. Second, it could enhance the accountability of judicial decision making.[144] Unfortunately, judges operate in an institutional context that provides little accountability, at least in the sense that they receive little prompt and useful feedback.[145] Existing forms of accountability, such as appellate review or retention elections, primarily focus on a judge's performance in a particular case, not on the systematic study of long-term patterns within a judge's performance that might reveal implicit bias.[146]

Altering courtroom practices

In addition to providing training or implementing auditing programs, the criminal justice system could also alter practices in the courtroom to minimise the untoward impact of unconscious

143 See C Parsons et al, "Strike three: umpires' demand for discrimination", Nat'l Bureau of Econ Research, Working Paper Series, Paper No 13665, 2007, pp 24–25 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077091, accessed 19 July 2021; J Price and J Wolfers, "Racial discrimination among NBA referees", Nat'l Bureau of Econ Research, Working Paper Series, Paper No 13206, 2007, p 30, available at http://ssrn.com/abstract=997562, accessed 19 July 2021.

144 Accountability improves performance in other contexts, so it likely would do so for judges as well. See J Lerner and P Tetlock, "Accounting for the effects of accountability" (1999) 125 *Psychol Bull* 255 at 270–271.

145 See Guthrie et al, How Judges Decide, above n 58, at p 32.

146 See, eg J Dubofsky, "Judicial performance review: a balance between judicial independence and public accountability" (2007) 34 *Fordham Urb L J* 315 at 320–322 (explaining that the judicial performance review system in Colorado focuses only on a judge's performance in a particular case).

bias. For example, the system could expand the use of three judge courts.[147] Research reveals that improving the diversity of appellate court panels can affect outcomes. One study found that "adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases ... and nearly tripled this probability in sex discrimination cases."[148] In trial courts, judges typically decide such issues alone, so adopting this mechanism would require major structural changes. Although convening a three-judge trial court was once required by statute when the constitutionality of a state's statute was at issue,[149] three-judge trial courts are virtually nonexistent today.[150] The inefficiency of having three judges decide cases that one judge might be able to decide nearly as well led to their demise, and this measure might simply be too costly to resurrect.

Another possibility would be to increase the depth of appellate scrutiny, such as by employing de novo review rather than clear error review, in cases in which particular trial court findings of fact might be tainted by implicit bias. For example, there is some evidence that male judges may be less hospitable to sex discrimination claims than they ought to be.[151] If that bias does exist, less deferential appellate review by a diverse panel might offer a partial solution.

Conclusion

Our study contains both bad news and good news about implicit biases among judges. As expected, we found that judges, like the rest of us, possess implicit biases. We also found that these biases have the potential to influence judgments in criminal cases, at least in those circumstances where judges are not guarding against them. On the other hand, we found that the judges managed, for the most part, to avoid the influence of unconscious biases when they were told of the defendant's race.

The presence of implicit racial bias among judges — even if its impact on actual cases is uncertain — should sound a cautionary note for those involved in the criminal justice system. To prevent implicit biases from influencing actual cases, we have identified several reforms that the criminal justice system could implement, ranging from relatively inexpensive measures, like implementing focused judicial training and testing, to relatively expensive measures, like altering courtroom practices. To render justice blind, as it is supposed to be, these reforms are worth considering.

147 See M Solimine, "Congress, ex P Young, and the fate of the three-judge District Court" (2008) 70 *University Pittsburgh Law Review* 101 at 128–134 .

148 J Peresie, "Female judges matter: gender and collegial decision making in the federal appellate courts" (2005) 114 *Yale L J* 1759 at 1778.

149 Notes and comments, "Judicial limitation of three-judge court jurisdiction" (1976) 85 *Yale L J* 564.

150 A Hellman, "Legal problems of dividing a state between federal judicial circuits" (1974) 122 *University of Pennsylvania Law Rev* 1188 at 1225.

151 See Peresie, above n 148, at 1778.

Appendix A: Materials

Shoplifter Case

You are presiding over a case involving criminal charges against a juvenile, William T William is a 13-year-old who was arrested for shoplifting in a large, upscale toy store in __ . He has no prior record. You are trying to get a sense of the case and the only facts available to you follow:

> According to a store clerk, on Saturday, April 2, at about two o'clock in the afternoon, the clerk observed William putting video games under his shirt. The clerk rang for a security guard, but before the guard arrived, the boy started to leave the store. When the clerk grabbed William, the boy dropped the toys and kicked him in an attempt to escape. A uniformed security guard arrived as the clerk let go of William, and when the guard told the boy to stop, he did.
>
> According to the security guard, when he arrived he observed five items on the floor in front of William. The prices of those items together added up to $90. He said that William told him that he was shopping, and showed him $10 he had brought along with which to make purchases. William claimed that he had used his shirt as a sort of pouch to hold the items he was looking at. William also told the guard he was startled when grabbed by someone from behind, and then tripped, but that he did not kick anyone.

1. In your opinion, without regard to the options actually available in this kind of situation, what would be the most appropriate disposition of this case?
   - Dismiss it with an oral warning
   - Adjourn the case in contemplation of dismissal (assuming William gets in no further trouble)
   - Put William on probation for six months or less
   - Put William on probation for more than six months
   - Commit William to a juvenile detention facility for six months or less
   - Commit William to a juvenile detention facility for more than six months
   - Transfer William to adult court.
2. In your opinion, on a scale of one to seven, how likely is it that William will later commit a crime similar to the one with which he is charged?

very likely						not at all likely
1	2	3	4	5	6	7

3. In your opinion, on a scale of one to seven, how likely is it that William will commit more serious crimes in the future?

very likely						not at all likely
1	2	3	4	5	6	7

Robbery case

You are presiding over a case involving criminal charges against a juvenile, Michael S, who was arrested for armed robbery of a gas station when he was two days shy of his 17th birthday. He has one prior arrest for a fight in the school lunchroom the previous year. You are trying to get a sense of the case and the only facts available to you follow:

> According to the gas station clerk, on Friday, March 17, at about seven in the evening, she heard a male voice say, "Don't look at me, but give me the money". She kept her eyes down, and as she opened the cash register, the man said, "I could shoot you, don't think I won't." She handed him the drawer's contents ($267.60) and saw him run out the door with a gun. After he jumped into the passenger side of a car and it left, she called the police.
>
> According to the responding officer, the clerk could not identify the robber, but a customer said he thought he recognised Michael, and gave the officer Michael's name and address. Michael's mother was home, and at 9:45 am, Michael walked in the door, was given Miranda warnings, and waived his rights. He first stated that he had just been hanging around with friends, not doing anything special. After the officer asked who the friends were, Michael admitted that he had walked into the gas station with a gun. He told the officer that he said to the clerk, "Give me the money, please. I don't want to hurt you." Michael insisted that the gun was not loaded and that he no longer had it. He said that the money was gone, that he was sorry, and would pay it back. When asked why he did it, Michael said that his friends had dared him, but he would not reveal who those friends were, or to whom the gun belonged.

1. In your opinion, without regard to the options actually available in this kind of situation, what would be the most appropriate disposition of this case?
   - Dismiss it with an oral warning
   - Adjourn the case in contemplation of dismissal (assuming Michael gets in no further trouble)
   - Put Michael on probation for six months or less
   - Put Michael on probation for more than six months
   - Commit Michael to a juvenile detention facility for six months or less
   - Commit Michael to a juvenile detention facility for more than six months
   - Transfer Michael to adult court
2. In your opinion, on a scale of one to seven, how likely is it that Michael will later commit a crime similar to the one with which he is charged?

very likely						not at all likely
1	2	3	4	5	6	7

3. In your opinion, on a scale of one to seven, how likely is it that Michael will commit more serious crimes in the future?

very likely						not at all likely
1	2	3	4	5	6	7

Battery Case

Defendant: Andre Barkley, 6'0", 175 lbs, African American male, 18-years-old, student

Alleged Victim: Matthew Clinton, 6'2", 185 lbs, Caucasian male, 16-years-old, student

Charge One count of battery with serious bodily injury

Prosecution

The prosecution claims that Andre Barkley is guilty of battery with serious bodily injury. Barkley was the starting point guard on the high school basketball team, but the team had been struggling, and the coach decided to bench him in favor of a younger, less experienced player named Matthew Clinton. Before the first game after the lineup change, Barkley approached Clinton in the locker room and began yelling at him. Witnesses explain that the frustrated defendant told Clinton, "You aren't half the player I am, you must be kissing Coach's ass pretty hard to be starting."

When other teammates stepped between the two players, Barkley told them to get out of the way. When two other players then grabbed Barkley and tried to restrain him, the defendant threw them off, pushed Clinton into a row of lockers, and ran out of the room, according to prosecution witnesses. As a result of this fall, two of Clinton's teeth were chipped and he was knocked unconscious. The prosecution claims that Barkley has shown no remorse for his crime, and has even expressed to friends that Clinton "only got what he had coming".

Defence

The defence claims that Barkley was merely acting in self-defence, and that Clinton's injuries were accidental. According to an assistant coach, Barkley did not get along with many people on the team and had been the subject of obscene remarks and unfair criticism from many of his teammates throughout the season. Barkley claims that he was afraid for his own safety during the altercation in the locker room and "definitely felt ganged up on".

Barkley admits he "might have been aggressive towards Matthew and started the whole thing", but says that he was just frustrated and the argument was "nothing that should have started a big locker room fight or anything". Barkley claims that when several other players grabbed him from behind for no reason, he tried to break free and must have accidentally knocked into Clinton in the attempt to get out of the locker room. He explained that the reason he never apologised to Clinton in the hospital was that he "didn't think he'd want to see me", but Barkley did say he "was truly, truly sorry" that Clinton had been injured.

1. Based on the available evidence, if this were a bench trial, would you convict the defendant?

Yes/No

2. How confident are you that your judgment is correct?

Very Confident								Not at all Confident
1	2	3	4	5	6	7	8	9

Demographic Questions Provided to Judges

1. What is the title of the judicial position you currently hold?
2. How many years have you served as a Judge (in any position)? _ years.
3. Please identify your gender:

Male	Female

4. During your judicial career, approximately what percentage of your time has been devoted to the following areas:
   - Criminal cases
   - Civil cases
   - Family law cases
   - Probate or trusts
   - Other
5. Which of the two major political parties in the United States most closely matches your own political beliefs?

The Republican Party	The Democratic Party

6. Please identify your race (Check all that apply)
   - White (non-Hispanic)
   - Black or African American
   - Hispanic or Latino
   - Asian
   - Native American or Pacific Islander
   - Other.

Appendix B: IAT procedure

We used seven rounds of trials to produce the IAT score. Rounds one, two, three, five, and six are essentially practice rounds designed to minimise order effects and variation associated with unfamiliarity with the task. The study begins with one round in which the participants only sort black and white faces. In this round the word "White" appeared in the upper left and the word "Black" appeared in the upper right of the screen. In each trial, one of ten faces, five white and five black, appeared in the middle of the screen.[152] The faces appeared at random, although an equal number of white and black faces appeared in the 16 trials.[153]

The instructions before each round informed the judges as to what they would be sorting in the upcoming round. For example, in the first round, the instructions indicated that the judge should press the "E" key (labeled with a red dot) if a white face appeared and the "I" key (also labeled with a red dot) if a black face appeared. The materials also state that if the judge pressed the correct key, the next face would appear; if the judge pressed the wrong key, a red "X" would appear. These instructions were similar in all seven rounds of the IAT.[154]

The remaining six rounds were similar to the first, although they varied the stimuli and categories. In the second round, instead of the black and white faces, the computer presented good and bad words. These consisted of seven words with positive associations (joy, love, peace, wonderful, pleasure, friend, laughter, happy) and seven words with negative associations (agony, terrible, horrible, nasty, evil, war, awful, failure). Like the faces, these words were taken from previous work on the IAT. Throughout the trials in the second round, the word "good" remained in the upper-left of the computer screen and the word "bad" remained in the upper-right of the computer screen. The judges were instructed in a similar fashion to round one, to press the "E" key when a good word appeared in the center of the screen and to press the "I" key when a bad word appeared in the center of the screen.

The third round combined the tasks in the first two rounds. The words "white or good" appeared in the upper-left of the computer screen and the words "black or bad" appeared in the upper-right

152 The faces were taken from the Project Implicit website. See B Nosek et al, Project Implicit, Stimulus Materials, 2006, at www.projectimplicit.net/resources/study-materials/, accessed 19 July 2021. They include only the center of the face, with ears, hair, and anything below the chin cropped out. None of the faces has facial hair, eyeglasses, or distinguishing features: ibid (providing faces that can be downloaded under the "race faces" stimulus set).

153 In this respect we varied from the procedures recommended by Greenwald and his colleagues (see Greenwald et al, above n 29, at 198), by reducing the practice rounds from the 20 they suggested to 16. We did this in the interest of saving time. We did retain the forty trials in the critical rounds. We had more time available in the western jurisdiction, and increased the length of rounds three and six to 20 trials.

154 The exact instructions were as follows:

1. In the first round, the two CATEGORIES that you are to distinguish are:
   BLACK vs WHITE faces.
   - Press the "E" key if the TARGET is a WHITE face.
   - Press the "I" key if the TARGET is a BLACK face.
2. Remember that an "X" will appear when you make an error. Whenever the "X" appears, correct the mistake by pressing the other key.
3. Please respond AS RAPIDLY AS POSSIBLE, but don't respond so fast that you make many errors. (Occasional errors are okay.)
4. Press the space bar when you are ready to begin.

of the computer screen. Thus, the task presented both categories in the same spatial location as they had been in the first two rounds. The instructions indicated to the judge that either a white or black face or a good or bad word would appear in the center of the computer screen. The instructions continued that the judges should press the "E" key if either a white face or a good word appeared and the "I" key if either a black face or a bad word appeared. Although the computer selected randomly from the faces and concept words, the computer presented an equal number of names and faces of both types. We presented the judges with sixteen trials of this task.

Round four was identical to round three in every respect except that the computer presented 40 trials, rather than 16.

Round five prepared the judges for the reverse association. To create the reversal, the spatial locations of the good and bad words were reversed. The word "bad" was moved to the left and the word "good" was moved to the right. The fifth round was thus identical to the second round in that the computer presented only the good and bad words, but that the computer presented the words in their new locations. The instructions were also identical to those of round two except that they identified the new locations and corresponding response keys for the words.

The penultimate round paired the good and bad words in their new locations with the black and white labels in their original location. Thus, the words "white or bad" appeared in the upper left and the words "black or good" appeared in the upper right. The instructions resembled those for rounds three and four. They indicated, however, that judges should press the "E" key if a white face or bad word appeared and to press the "I" key if a black face or good word appeared. Round six, like the other practice rounds, consisted of 16 trials.

Round seven was identical to round six in every respect except that the computer presented 40 trials, rather than 16. The computer recorded the reaction times between the presentation of the stimuli and the time of the correct response for all judges in all rounds. The computer also recorded which stimuli it presented and whether an error occurred.

Appendix C: IAT scoring

Scoring the IAT requires researchers to make several judgments about the data. It requires deciding which of the seven rounds to use (some studies make use of the practice rounds); how to manage latencies that seem too long or too short; how to assess erroneous responses; how to identify and score participants who respond too slowly, too quickly, or made too many errors; whether to standardise the responses; and whether to use every round in a trial (or drop the first two, which commonly produce excessively long latencies). Greenwald and his colleagues tested essentially all variations on answers to these issues and produced a scoring method that they believe maximises the correlation between the IAT and observed behavior.[155]

We used two different scoring methods. First, for each judge, we calculated the difference between the average latency in the stereotype-congruent rounds in which the judges sorted white/good versus black/bad and the average latency in the stereotype-incongruent rounds in which the judges sorted white/bad versus black/good. This procedure follows the method that other researchers have used in reporting data from hundreds of thousands of participants collected on the Internet.[156] Hence, we can compare this average score with that of large groups of ordinary adults. (We describe this procedure at greater length below.)

In an exhaustive review of IAT methodology, however, Greenwald and his colleagues concluded that the average difference might not be the best measure of implicit associations.[157] These researchers found that people who are slower on the task produce larger differences in their IAT scores.[158] This tendency confounds the IAT score, as people who are simply less facile with a keyboard will appear to have stronger stereotypic associations. Furthermore, Greenwald and his colleagues also found that the average difference did not correlate as well with people's decisions and behavior as other scoring methods.[159] After conducting their review, Greenwald and his colleagues identified a preferred scoring method, which we followed to assess the correlation between IAT effects and judges' decisions.[160] The method essentially uses the mean difference for each participant divided by the standard deviation of that participant's response latencies, although it includes some variations. (We also describe this procedure at greater length below.)

Mean-Difference IAT score calculation

To calculate the mean-difference IAT score, we largely followed the procedures outlined in Nosek and his colleagues' report of IAT scores from tens of thousands of people collected through the Internet.[161] We also wanted to compare our results with the more detailed, contemporary Internet data collected and reported on the "Project Implicit" website, which

155 Greenwald et al, above n 29, at 212–215.
156 Nosek et al, above n 17, at 103–104.
157 Greenwald et al, above n 29, at 212–215.
158 ibid at 201–202.
159 ibid at 203.
160 ibid at 214 tbl 4.
161 Nosek et al, above n 17, at 103–104.

appears to use the same scoring method.[162] Because the data in these studies come from voluntary participants who access the site on the Internet, the authors have adopted a number of techniques for excluding data from participants who may have wandered off during the study or are otherwise not fully engaged with the tasks.[163] While such techniques are less appropriate for our participants, who were engaged in person, we followed the Project Implicit scoring methods to facilitate a comparison.

The authors of the Internet study first adjusted raw latency scores that seemed much slower or faster than participants who are fully engaged with the task. The researchers treat any latency larger than 3000 milliseconds (ms) as 3000 ms, and any latency shorter than 300 ms as 300 ms.[164] The researchers also eliminated the first two trials in all rounds from consideration, having found that these rounds often displayed an erratic pattern of long latencies — presumably because participants commonly begin the task, and then pause to get settled in.[165] These researchers also excluded participants who failed to perform to certain criteria. They excluded participants who exhibited overall average latencies in the two critical rounds greater than 1800 ms, or who displayed average latencies in either of the two critical rounds (four or seven) greater than 1500 ms.[166] They also excluded participants who produced any critical round in which more than 25% of the latencies were less than 300 ms.[167] Finally, they excluded participants who made more than ten errors in any critical round.[168] These researchers report that these criteria resulted in the exclusion of 15% of their subjects.[169] After these adjustments and exclusions, these researchers calculated the mean difference between the critical stereotype-congruent round (either round four or seven) and the stereotype-incongruent rounds (either round four or seven).[170]

We followed these procedures to calculate the mean IAT score for the judges in our study. We capped latencies greater than 3000 ms as 3000 ms, and raised latencies lower than 300

162 Project Implicit, "Services", 2002, at www.projectimplicit.net/services/, accessed 19 July 2021.
163 See Nosek et al, above n 17, at 104.
164 ibid.
165 ibid.
166 ibid.
167 ibid.
168 ibid.
169 ibid.
170 ibid.

ms to 300 ms.[171] We also discarded the first two rounds from the analysis. We excluded the results of the race IAT from six judges (or 4.5%) who produced either mean latencies greater than 1800 ms in one of the two critical rounds of the race IAT or a mean across both rounds greater than 1500 ms.[172] Similarly, we excluded the results of the gender IAT from ten judges (or 7.5%) who violated one or both of these criteria.[173] Nosek and his colleagues reported that they eliminated 2% of their participants for being too slow,[174] whereas we eliminated more. At the same time, none of the judges in our studies produced more than a 25% error rate in either of the critical rounds in either IAT. By contrast, Nosek and his colleagues eliminated roughly 13% of their participants for having high error rates.[175] The judges were thus slower and more accurate than Nosek and his colleagues' subjects, and overall, the application of their criteria eliminated fewer judges than their results would have predicted.

Unlike Nosek and his colleagues,[176] we did not randomise the order in which we presented the IAT. That is, roughly half of the participants in the Internet sample receive the stereotype-congruent round first, while half receive the stereotype-incongruent round first. The seven-round IAT is designed to reduce order effects substantially, but nevertheless, they remain. Greenwald and his colleagues report that the IAT scores can correlate weakly with the order in which the materials are presented.[177] Randomizing the order would have produced a cleaner measure of the IAT effect across all judges, but would have reduced the correlation between the

171 None of the judges provided latencies that were less than 300 ms in either of the two critical rounds measuring the race IAT; two of the judges provided responses that were faster than 300 ms in the gender IAT (one round each). Many more of the judges produced latencies that exceeded 3000 ms. On the race IAT, 58 judges (or 50.4%) produced at least one latency greater than 3000 ms in the stereotype-congruent round (round four). Specifically, in the stereotype-congruent round:33 judges produced one long latency; 20 produced two; three produced three; and two produced four. In the stereotype-incongruent round on the race IAT (round seven), 68 judges (or 59.1%) produced at least one latency greater than 3000 ms. Specifically, in the stereotype-incongruent round: 33 judges produced one long latency; 12 produced two; 10 produced three; four produced four; two produced five; four produced six; and three produced seven. On the gender IAT, 57 judges (or 49.6%) produced at least one latency greater than 3000 ms in the stereotype-congruent round (round seven). Specifically, in the stereotype-congruent round: 36 judges produced one long latency; seven produced two; nine produced three; three produced four; one produced five; and one produced eight. In the stereotype-incongruent round on the gender IAT (round four), 56 judges (or 48.7%) produced at least one latency greater than 3000 ms. Specifically, in the stereotype-incongruent round: 27 judges produced one long latency; 15 produced two; six produced three; three produced four; two produced five; one produced six; and one produced seven. Note that because some of these long latencies fell into the first two rounds, they are not included in the analysis.

172 One of the judges violated both criteria. We calculated both means after excluding the first two rounds.

173 Four judges violated both criteria.

174 Nosek et al, above n 17, at 104.

175 ibid.

176 ibid.

177 Greenwald et al, above n 29, at 210 tbl 2, report the effect of order with a correlation coefficient, rather than a mean or percent difference. They report that the correlation varies with the IAT, noting that the gender IAT that we used here produces a higher correlation between order and IAT score than do other IATs. They report correlations as high as 0.29 (depending upon the scoring method), which would mean that order can account for up to 10% of the IAT score: ibid. By contrast, the race IAT that we used produces small correlations with order, ranging from 0.002 to 0.054; thus, order accounts for, at most, one-quarter of 1% of the IAT score. The order effects seem to vary with context, and hence we cannot be certain of the extent of the influence of order on our materials.

IAT score and behavior.[178] Hence, all of our judges received the materials in the same order. On the race IAT, judges receive the stereotype-congruent pairing first (white/good and black/bad) and on the gender IAT, judges receive the stereotype-incongruent pairing first (male/humanities and female/science). Our procedure would have tended to increase the IAT score on the race IAT, as compared to the sample by Nosek and his colleagues, and decrease the IAT score on the gender IAT.

By using these procedures, we scored judges in exactly the same method as Nosek and his colleagues in the data that they harvested

Standardised IAT Score Calculation

To calculate the standardised IAT score, we followed the procedures recommended by Greenwald and his colleagues.[179] These researchers designed their methods precisely to improve the reliability and predictive power of their measures.[180] We use the methods that produced the highest correlations between implicit measures and behavioral measures. They differ from the scoring method used to calculate the mean differences. As noted above, we used the Greenwald methodology to collect the IAT scores.[181] Following those scoring procedures, we removed single trials with latencies greater than 10,000 ms (that is, 10 seconds) from the analysis. We otherwise left low and high values in the analysis without adjustment. We made no correction for errors, because our IAT collection methods required the judges to provide the correct response before proceeding and hence the latency includes the delay that would result from an incorrect answer. Error rates were also low, as noted above. Following Greenwald and his colleagues' scoring method, we used all of the trials, rather than dropping the first two in the round.

We departed from the method Greenwald and his colleagues endorse, however, in one respect. Those researchers suggested using the two paired practice rounds (rounds three and six) in the analysis.[182] They reported that using this data produced slightly higher correlations between the IAT scores and explicit choices.[183] We found, however, that latencies in the practice rounds were highly erratic. A high percentage of the trials eliminated for being greater than 10,000 ms were in the trial rounds.[184] Even with these observations removed, the average standard deviation in the two practice rounds on the race IAT was over one second (1064 ms), as compared to 596 ms in the trial rounds. This suggested to us that we ought not to use the practice rounds in

178 Had we randomised the order, each judge's IAT score would have varied with the order to some extent. This would have introduced some variation to the IAT score that would inherently reduce the correlation we observed across all judges. Our measure of the IAT score across all judges would have been more reliable had we randomised, but the IAT score for the individual judges would have been less consistent, thereby interfering with the correlation.

179 Greenwald et al, above n 29, at 199–200.

180 ibid.

181 In the eastern and western samples we reduced the number of trials in the practice rounds (rounds 1, 2, 3, 5, and 6) from 20 to 16, so as to save time.

182 Greenwald et al, above n 29, at 213.

183 ibid at 214–215.

184 In the race IAT, 29 out of the 33 instances in which judges produced latency scores of greater than 10,000 ms on a trial (or 87.9%) occurred during the practice rounds. In the gender IAT, the two instances in which judges exhibited trials that exceeded 10,000 ms occurred in the target round.

the analysis. The practice rounds of the gender IAT were more stable. The standard deviation from the practice rounds (724 ms) was much closer to that of the trial rounds (560 ms). Even though the practice rounds in the gender IAT seemed more stable, for consistency, we dropped these as well. Our measure of the IAT effect for purposes of correlating the IAT scores with judges' decisions was therefore the average difference between the stereotype-congruent round and the stereotype-incongruent round divided by the standard deviation of latencies in both rounds combined. Following Greenwald and his colleagues, we call the measure d'.

Because the latencies that we observed seemed slower than those which have been observed in the Internet study, we assessed the correlation between our two IAT measures and the mean latency. The correlation coefficients between the mean differences and the overall latency were 0.305 on the race IAT and 0.361 on the gender IAT. These correlations are high enough to indicate that our judges have higher IAT scores than other populations simply because they were somewhat slower.[185] The standardised IAT measure using only the trial rounds, however, produced correlations of only 0.046 and 0.002 with the overall mean latencies for the race and sex IATs, respectively. Hence, the d' measure provided a much more reliable measure of the IAT effect than the mean difference.

185 Note that these correlations used all judges, with no exclusions for speed, did not bound the data between 300 and 3000 Ins, and did not exclude the first two rounds, as we did for calculating the mean differences.

"Judge not, that ye be not judged"*: judging judicial decision-making†

Lord Neuberger‡

Lord Neuberger asserts that it must be understood that judges are decision-makers and there must be transparency about their relationship with the other branches of government. Recognising the way judges work should be done openly and more honestly to avoid errors and cognitive biases. Judges have the dual onus of acting within their constitutional role while also policing the boundaries of what that role is. Arising from the increase in judicial power comes a corresponding increase in judicial responsibility, but also an increase in the need for judicial self-awareness and self-restraint.

Introduction

In one of his many elegant and clever couplets, Alexander Pope identified the human aspect of judgement:[1]

> 'Tis with our Judgments as our Watches, none
> Go just alike, yet each believes his own.

Every judge, almost by definition, "believes his own", at least when he gives his judgment. That does not mean that judges do not have doubts while reaching their decisions. Inevitably,

* *King James Version*, Matthew 7:1. The evangelist continues "For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again".

† 38th F A Mann Lecture, London, 29 January 2015.

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The author is most grateful to Hugh Cumber for his very considerable assistance in preparing this article.

1 A Pope, *An Essay on Criticism*, Lewis, 1711, p 4.

the level of doubt will vary with individual temperament. That is well illustrated by an email I received from a colleague (whom I shall not identify) after we had exchanged draft judgments, which came to the same conclusion, on an appeal. My colleague wrote, "[My judgment is] an intensive review while yours is an anxious one. (I don't really do anxiety — it is one of my many failings)".

However, I suspect that few if any judges (not even the writer of the email) believe themselves to be infallible; if anything, most of us are likely to look on some of our past decisions on issues of law, and experience doubt. This doubt is often prompted by arguments in subsequent cases, as our past decisions are analysed and their alleged failings exposed. Experience suggests that some judges seem to enjoy having their earlier judgments read back to them in later cases, whereas others dislike it. I suppose a judge's attitude in this connection reflects the extent to which he believes in his own infallibility.

More importantly, the work of judges is subject to scrutiny by academics more than ever before. And our work is now being discussed far more by politicians, journalists, and indeed members of the public. This is partly attributable to the increased ease of communication. But it is also because judges are being asked to determine more public policy issues, with the growth of judicial review, human rights and EU jurisprudence. And all those developments are, I think, attributable to the ever-increasing power of the executive, and the consequent need for a judiciary which protects citizens from administrative abuses and maintains the rule of law.

The quality of the criticism of judicial reasoning was never more Olympian than when it came from the late and great Francis Mann, who did not hesitate to expose slack intellectual effort by judges. In an obituary written for *The Guardian*, Mr Justice Hoffmann (as he then was) told of a Law Lord who had confessed to the fear he would experience whenever he saw Mann listening to argument in the Committee Room, anticipating that any shortcomings in his judgment would be remorselessly exposed in the next issue of the *Law Quarterly Review*.[2]

Such scrutiny of judges is vital to our constitutional role, as well as being a necessary element of the important principle of open justice. Almost five decades ago, Lord Reid wrote extra-curially that "we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it".[3]

This evening, I would like to consider some pertinent questions in this connection. How do judges reach their decisions? How do the qualities and experiences of particular judges influence their thinking? What are the limits of the judicial function? These questions may be rather self-centred, but an understanding of judges and their decision-making process is important in the light of the judiciary's interaction with the other two branches of government and the judges' increasingly significant constitutional role of interpreting, developing and upholding the law.

2 Cited by L Collins in "F A Mann (1907–1991)", J Beatson and R Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain*, Oxford University Press, 2004, p 437.

3 Lord Reid, "The judge as law maker" (1972) 12 *Journal of the Society of Public Teachers* 22.

How judges think

Three baseball umpires were allegedly asked how they rule on a ball. The first said, "I call it like it is"; the second said, "I call it like I see it"; and the third said, "It ain't nothin' till I call it".[4] One might say that the first umpire was religious, a believer in absolute truth; the second was a classic rationalist or scientist, a follower of Isaac Newton or Rene Descartes; and the third was a student of Bishop George Berkley, a subjective idealist, or perhaps even a quantum physics student, thinking of Erwin Schrodinger and his wretched cat.

A somewhat similar difference of epistemological approach can be detected in the judges' approach to their decisions. The French jurist Saleilles wrote: "one wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction"[5] — an "I call it as I see it" approach. By contrast, his fellow countryman, Montesquieu, pictures judicial automatons, on the basis that, "judges … are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor"[6] — a "call it as it is" approach. In my experience, judicial decision-making is ultimately an iterative process, which involves a combination of both approaches, although the proportions may vary from case to case. And, it must be admitted, from judge to judge — some of us are more Salleillists and others more Montesquian.

The tension between these two approaches reflects in philosophical terms the familiar conflict between getting the fair result in the particular case and ensuring that the law is clear, certain and coherent. And just as there is nothing wrong with the notion of judges, who have worked their way to an answer through a series of legal principles, then checking the answer against their notions of fairness and common sense, so there is nothing wrong with judges starting off with the fair and common sense answer and seeing if they can get there — provided they are intellectually honest and legally principled.

Some of you may have childhood memories of a puzzle involving a maze with six different entrances, only one of which leads to the centre, and you have to find which it is. The natural and instinctive thing to do is to start with one entrance and then, if it doesn't work, to move onto the next and so on until you find the right entrance. But many children gradually realise (or some horribly clever child tells them) that the quickest way to solve the problem is to start at the centre and work outwards till one gets to the right entrance. However, with a judgment, it is not necessarily quite so simple. Unlike the children's maze, there may be more than one arguably right answer, and, having got what you think is the most satisfactory result intellectually, you may then have to ask yourself whether it is the commercially sensible, practical and morally acceptable result — the iterative process at work.

It is almost inevitable that a judge will form an initial view, either because of his opinion of the legal principles or because of his view of the fair and sensible outcome — or both. However, having formed that view, the judge will then consider the various legal and policy arguments

4 Cited in E Peer and E Gamliel, "Heuristics and biases in judicial decisions" (2013) 49 *Court Review* 114.
5 R Saleilles, *De la Personnalité Juridique,* 1922, p 45.
6 C Montesquieu, *Espirit des Lois*, 1748, Livre XI, ch VI.

which have been raised, and often some of these arguments will cast doubt on his initial view. The reasons for departing from that initial view may be sufficiently telling to justify a change of mind, but it may well transpire that consideration of other arguments causes a modification of that change or even a reversion to the initial view.

I would suggest that this ability to self-correct is one of the strongest characteristics judges can possess and is likely to help to lead to a just result. The reality is that, in many cases, it is possible to reach more than one conclusion on the facts, which raises the question of what we even mean by the "right" answer. And the more difficult the case, the more true that is, and so it is scarcely surprising that one not infrequently sees sharp differences of opinion between judges in appellate courts.

The concept of the "right" decision depends on what one views as the objective of the judicial process, and, as already mentioned, there may be a tension between the fair decision in the individual case and the right decision in terms of legal analysis, a tension which lies behind the observation of the great American jurist, Oliver Wendell Holmes that:[7]

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

But, today at any rate, most judges are quite open about such an approach. Thus, it is by no means uncommon for a judgment to analyse the arguments by reference to pure legal principles and, having reached a view, to inquire whether that view meets the practicalities and justice of the case. Whether such judgments always mirror the order (or indeed orderliness) of the anterior, intracranial judicial thought process is a matter of conjecture, but, at least in most cases, I doubt it. Some judges are refreshingly frank. During argument in court, and even in some of his judgments, Sir Nicolas Browne-Wilkinson, when in the High Court and Court of Appeal, would say what outcome seemed to him to be just and would then ask whether there was any reason in law why he should not come to that conclusion — a question he rarely answered yes.[8]

One of my colleagues, Lord Carnwath, in an extra-curial speech in 2013[9] spoke about the tension a between developing broad conceptual principles and doing justice in individual cases in these terms:

> Perhaps we as Judges should cut out the theorising and concentrate on doing justice in real cases. Where doing justice requires us to develop and refine new, more specific principles, we should be willing to do so. Generally we should look to the academics to do the theorising, and to put our efforts into a wider context. That way, we can decide the cases, and then they can tell us what we really meant, so that we can make it sound better next time.

The response to this sentiment from academics was, perhaps predictably, less than enthusiastic. The authors of one leading textbook wrote, "if correct as a mode of analysis, this pragmatism

7 O Holmes, *The Common Law*, Little, Brown, and Co, 1881, p 35.
8 See *Kumar v Dunning* [1989] QB 193 at [21] (answer no) and *Re Collens* [1986] Ch 505 at 511C (answer yes).
9 R Carnwath, "From judicial outrage to sliding scales — where next for Wednesbury?", ALBA Annual Lecture, 12 November 2013, 19–20 at http://supremecourt.uk/docs/speech-131112-lord-carnwath.pdf, accessed 14 July 2021.

renders doctrinal analysis otiose".[10] Another academic commentator worried that this approach "places the doctrinal integrity of [in this instance] administrative law at risk".[11] I suppose judges could go even further than Lord Carnwath's suggestion, and give their decisions without any reasons, leaving it to the academics to explain what the reasons were or must have been, which is the approach of the French Cour de Cassation which seldom gives any reasons — perhaps an "it ain't nothing till I call it" approach.

Of course, one advantage of not giving reasons was encapsulated in Lord Mansfield's famous advice to an army officer, who had no legal knowledge or experience, and had been ordered to resolve legal disputes in the West Indies — "Tut, man, decide promptly, but never give any reasons for your decisions. Your decisions may be right, but your reasons are sure to be wrong".[12] As any judge who has had a decision reviewed in the *Law Quarterly Review* or the *Cambridge Law Journal* knows, it is undoubtedly the case that judicial reasoning can almost always be attacked, and there is much more academic enjoyment and fame to be gained by adversely criticising judicial reasoning than by praising it.

Judges are human (well, most of us are). So, few of us relish adverse criticism, and some really resent it. One judicial tactic to head off criticism is to hide behind the law. Forty years ago, Professor Atiyah observed that English judges, "would prefer to seek shelter behind the declaratory theory of the judicial function in public, and to confine discussion of the nature and use of the creative judicial function among *cognoscenti*".[13] In other words, we pretend to be pure Montesquians who are always bound by previous legal decisions to arrive at the conclusion which we reach. He suggested that judges worried that if they were open about the extent of the scope for creativity available to the judiciary, their powers would somehow be curtailed by government.

Whether or not that was true then, it is not true now. Judges are generally ready to explain what they do and why they do it, and quite rightly so. That is due to a number of factors. I would suggest they include:

- the modern awareness of the need for open justice
- the increased role of the judiciary in determining questions of public policy
- the growth in public communication generally, and
- changes in social and political discourse.

10 H Wade and C Forsyth, *Administrative Law*, 11th edn, Oxford University Press, 2014, p 304.
11 M Elliott, "Where next for the Wednesbury principle? A brief response to Lord Carnwath", *Public Law for Everyone*, 19 November 2013, at http://publiclawforeveryone.com/2013/11/19/where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/, accessed 14 July 2021.
12 J Jeaffreson, *A Book About Lawyers*, Vol 1, Hurst and Blackett, 1867.
13 P Atiyah, "Judges and policy" (1980) 15 *Israel Law Review* 346 at 360 (emphasis in original).

As I suggested in a talk in 2014,[14] "a world in which it is acknowledged that judges do more than just reveal pre-existing law, is one in which they are rightly subject to greater scrutiny". I might add that it is a world where judges must be more open about what they are doing and why they are doing it.

The increase in judicial openness is right and proper, but it leads to a concomitant increase in the risk of inappropriate attacks on judges. Public criticisms of judges and judicial decisions are an inevitable consequence of open justice, and they are an essential ingredient of an open society and free speech. However, the judiciary is the weakest branch of the state (having "no influence over either the sword or the purse ... [and] neither FORCE nor WILL, but merely judgment", as Alexander Hamilton put it),[15] and judges cannot and should not be expected to defend their judgments, once they are delivered. Accordingly, attacks by ministers and MPs on the judiciary generally and on individual judges in particular, are constitutionally inappropriate. And, it is only fair to add, in this country we are fortunate, as such overt attacks have been very rare, and, when they occurred, very short-lived.

Before I turn to another topic, let me give the last word to Lord McCluskey, former Solicitor General for Scotland and Inner House Senator, who gave the 1986 Reith Lectures. In one lecture, he said "so judges do think" (and I believe that there was no comma between "judges" and "do"). He then said that, when called on to decide a legal issue, judges:[16]

> study the results of earlier cases and the reasons given by the judges for reaching those results … . But judges are not engaging in some *inexorable exercise in which every choice is determined by existing* law. Choice there is, but often not the choice between the right answer and the wrong answer. … Between them, law, reason and discretion leave judges free to declare results which derive at least in part from philosophies, attitudes and influences which are not themselves rules of law.

It is perhaps worth mentioning by way of a short detour that immediately after that passage, Lord McCluskey said this:[17]

> It is unnecessary for me to assess the argument advanced by others that the judiciary is biased in its choices and prejudiced in its decisions because of the narrow social, educational and professional background which most judges share. It is enough to acknowledge that no one can be entirely free of the perspectives and assumptions that derive from his background.

This observation highlights the benefit of a diverse judiciary. As I hope I have demonstrated, it is highly desirable to have a genuinely diverse judiciary, because it would result in a greater spectrum of judicial experiences and perspectives, which will enrich the law. Quite apart from the fact that increased judicial diversity is necessary to meet the demands of social justice, the

14 D Neuberger, "Sausages and the judicial process: the limits of transparency", Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014, at [42] at www.supremecourt.uk/docs/speech-140801.pdf, accessed 14 July 2021.

15 Federalist Paper No 78, 28 May 1788.

16 BBC, "Lecture 2: The clanking of medieval chains", *The Reith Lectures: Law, Justice and Democracy*, 12 November 1986 at www.bbc.co.uk/programmes/p00h1c9v accessed 19 July 2021. Transcripts are available at www.bbc.co.uk/radio4/features/the-reith-lectures/transcripts/1980/#y1986.

17 ibid.

need for highest quality judges, and the requirement for as credible a judiciary as possible points ineluctably to real diversity on the bench. Having taken a short detour on diversity, let me return to my central theme. If judges do think, then "how do they think?", and if we are scrutinising how judges think, what forms may this scrutiny take?

Judicial cognitive bias

Lawyers generally, and judges in particular, are expected to be particularly astute assessors of human nature and human motivations. If, which I neither confirm nor deny, we have this special critical faculty, it is, I think, turned too seldom upon the judges themselves. Perhaps we are rightly afraid of what we will see. But the reasons for the increased degree of public scrutiny, which I have been discussing, also justify a need for increased self-scrutiny. Like Alexander Pope (again), I would suggest that we follow the maxim famously inscribed on Apollo's temple at Delphi, "know then thyself".[18] It is notorious that in the worst days of the court of equity, the quality of justice varied with the length of the Chancellor's foot.[19] A modern version of this sentiment is the concept that the outcome of a case will depend on what the judge had for breakfast. This idea, legal realism at its most cynical, is scarcely new; Alexander Pope (yet again) put it thus in the *Rape of the Lock*:[20]

> The hungry judges soon the sentence sign,
>
> And wretches hang that jury-men may dine.

Almost exactly three centuries after they were written, Pope's satirical couplet was rather alarmingly verified in a study of judicial decision-making. Shai Danziger and his colleagues followed eight Israeli judges for 10 months as they ruled on over 1,000 applications made by prisoners to parole boards. Their finding[21] showed that, at the start of the day, the judges granted around two-thirds of the applications before them, but, as the hours passed, that number fell sharply, eventually reaching zero. But leniency returned after each of two daily breaks, during which the judges retired for food. Such food for justice leads to food for thought.

The scientific study of judicial behaviour is a growth area, explored variously by economists, legal academics, psychologists and political scientists.[22] Readers of Daniel Kahneman's *Thinking Fast and Slow* will not be surprised that the theories on cognitive heuristics and biases which he developed with Amos Tversky[23] have been applied to the reasoning of jurors, lawyers and, yes, judges.[24] To give just one example, their theory of anchoring and adjustment (that is, that decision makers start with a suggested "anchor" and then make adjustments to reach a

18 A Pope, *An Essay on Man*, 1734.
19 *Gee v Pritchard* (1818) 2 Swanst 403 at 414 (Lord Eldon LC), referring to J Seldon, *Table Talk,* Smith, 1689 p 43–44.
20 A Pope, *The Rape of the Lock*, 1712/1714, Canto 3.
21 Danziger et al, "Extraneous factors in judicial decisions"(2011) 108(17) *Proceedings of the National Academy of Sciences* 6889.
22 Numerous such examples are cited by L Epstein and J Knight, "Reconsidering judicial preferences" (2013) 16 *Annual Review of Political Science* 11 at 13.
23 A Tversky and D Kahneman, "Judgment under uncertainty: heuristics and biases" (1974) 185 *Science* 1124.
24 D Kahneman, *Thinking, Fast and Slow*, Penguin, 2012.

result) has been experimentally demonstrated to apply to both novice and experienced judges sentencing a hypothetical rape case.[25] Another study suggests that highly specialised judges are as susceptible to such biases as their generalist counterparts.[26]

Also relevant is a very recent study at Duke University which describes a phenomenon the authors term "solution aversion", which should be of particular interest to judges.[27] The authors demonstrate that the instinctive, subjective attraction of a solution affects the degree of *belief* in the anterior problem. Participants were told of a scientific prediction about the projected level of global warming. Some participants were told the proposed policy solution was to be achieved through a free market. Others were told it was to be achieved by a greater level of regulation. Republican participants who were told of the free market solution were more than twice as likely to accept the scientific statement *itself* than those told of the regulation solution. These results were reflected by Democrat participants in relation to gun control. If our natural propensity to accept information as true depends in part on the desirability of the consequences, we must be careful. After all, the daily task of first-instance judges involves evaluating such information in circumstances where they know all too well what the consequences of a particular finding will be.

One study summaries its conclusions as follows:[28]

> Judges, it seems, are human. They appear to fall prey to the same cognitive illusions that psychologists have identified among lay persons and other professionals … Even if judges are free from prejudice against either litigant, fully understand the relevant law, know all of the relevant facts, and can put their personal politics aside, they might still make systematically erroneous decisions because of the way they — like all humans — think.

Such conclusions are entirely predictable, and they should give rise to concern, but not to alarm. As I have suggested, judges are human, and therefore it is inevitable that they are susceptible to cognitive bias. We all, especially the judges themselves, should be aware of it, as it is only by being aware of such potential for error that it can be avoided or mitigated.

Judicial education, both for judicial beginners and for experienced judges, has been impressively developed over the past fifty years or so in the UK. The Judicial Studies Board, now the Judicial College, was founded in 1979, and it has grown in influence and importance under a succession of inspiring judicial chairmen, and Northern Ireland has followed suit with its Judicial Studies Board (1994), as has Scotland with its Judicial Institute (2013).

I believe by far the most important aspect of its teaching is judge-craft, if I may call it that. Substantive and procedural law are obviously of central importance, but they will be part of

25 B Enough and T Mussweiler, "Sentencing under uncertainty: anchoring effects in the courtroom" (2001) 31(7) *Journal of Applied Social Psychology* 1535.

26 J Rachlinkski et al, "Heuristics and biases in bankruptcy judges" (2007) 163 *Journal of Institutional and Theoretical Economics* 167.

27 Findings published in T Campbell et al, "Solution aversion: on the relation between ideology and motivated disbelief" (2014) 107 *Journal of Personality and Social Psychology* 809.

28 C Guthrie et al, "Judging by heuristic: cognitive illusions in judicial decision making" (2002) 86 *Judicature* 44 at 50; itself abstracting the authors' article "Inside the judicial mind" (2001) 86 *Cornell Law Review* 777.

all judge's experience in their previous careers, they are readily accessible in books and in online libraries and the like, and they will be the subject of specific arguments in each case. Understanding how to think and act as a first-class judge, on the other hand, is not part of a lawyer's normal legal experience or education, except through watching judges at work. The college has done excellent work on judge-craft, how to control a court, how to deal with difficult applications and litigants, how to compose a judgment and the like. I would suggest that the topic of subconscious bias, although in its infancy, should now achieve a more prominent position. As a result of the recent research and disclosures I have been discussing, it seems to me that the time has come to address that thorny issue as part of judicial education.

Apparent bias

If such scientific studies can offer such important insights into how judges actually think, this doesn't alter how they are thought to think. This leads me from cognitive bias to apparent bias. It is perhaps appropriate to remind ourselves of the judicial oath itself, whereby each and every new judge undertakes to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will".[29] Within the legal system itself, the law of bias represents an obvious source of judicial self-scrutiny, protecting litigants as it does from that very fear, favour affection or ill will.[30]

Famously, justice must not just be done, but must be seen to be done. Accordingly, where a judge has a financial interest in the outcome of the case, the law is relatively strict, as was confirmed by the Court of Appeal in 1999 in a case[31] decided by Lord Bingham, Lord Woolf and Sir Richard Scott — Tom, Dick and Harry, you might say. In these days of capitalist democracy, unit trusts and so on, it is tedious and a little ridiculous in most circumstances to expect judges to declare that they own a few shares in a publicly quoted company, or that they are council tax payers of a council, which is party in the case. Having discussed the matter among ourselves, and with our court users group, the Supreme Court will shortly issue a statement saying that we will not routinely give out such information to the parties, but, in a particular case where the parties think such information is warranted, they would obviously be entitled to ask.

More generally, the modern law of apparent bias finds its source in the speech of Lord Hope in *Porter v Magill*.[32] The question to be answered is whether the circumstances are such as would lead a "fair-minded and informed observer" to conclude that there was a "real possibility" that the tribunal was biased.[33] Of all of the menagerie of legal fictions with season tickets on the Clapham Omnibus (as entertainingly described by Lord Reed in his judgment in *Healthcare at*

29 See Courts and Tribunals Judiciary, "Oaths", 2015, at www.judiciary.gov.uk/about-the-judiciary/oaths/, accessed 15 July 2021.
30 Not least because judges typically consider their own recusal applications, on which, see below.
31 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.
32 [2002] 2 AC 357.
33 ibid at [103].

Home Ltd v Common Services Agency)[34] the fair minded and informed observer is perhaps the most fleshed out. She[35] has been attributed with an ever-growing catalogue of characteristics.[36] She is "neither complacent nor unduly sensitive or suspicious",[37] she "always reserves judgment on every point until she has seen and fully understood both sides of the argument",[38] and "takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context".[39]

Significantly for present purposes, this character "knows that Judges, like anybody else, have their weaknesses"[40] but also that they "are trained to have an open mind".[41] She will "be aware of the traditions of judicial integrity and of the judicial oath",[42] and will "give it great weight".[43]

She is imputed with the knowledge that the undoubtedly close relationships between the judiciary and the legal profession (not least in the Inns of Court) "promote an atmosphere which is *totally inimical* to the existence of bias",[44] while not being "wholly uncritical" of legal culture.[45] So she is sceptical about the notion that a judge may be biased.

The idea that English legal culture itself could not give rise to bias may appear to some to be admirably self-confident and to others rather self-congratulatory. However, the current stance is as much pragmatic as it is principled. It is all too easy for a litigant who does not want his case heard by the assigned judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialised areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court.

Whatever the correct approach, one question relating to bias is the wisdom of the English approach whereby judges assess their own recusal applications. This is one form of judicial self-scrutiny that poses real practical problems. Some judges are too reluctant to recuse themselves, as they find it hard to believe that they could be seen as biased, because they are

34 [2014] UKSC 49 at [1] (Lord Reed): "The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years."

35 "She" may be the more correct gender-neutral pronoun: *Helow v Secretary of State for the Home Department* [2008] UKHL 62, per Lord Hope at [1].

36 As ably catalogued by A Olowofoyeku in "Bias and the informed observer" (2009) 68 *CLJ* 338 at 393–396.

37 Comments approved by Lord Steyn in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at [14].

38 *Helow v Secretary of State for the Home Department* [2008] UKHL 62 at [2].

39 ibid at [3].

40 ibid at[2].

41 *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 at [26] (Ward LJ).

42 *Robertson v HM Advocate* [2007] HCJAC 63 (Lord Justice-Clerk Gill) at [63].

43 *Helow v Advocate General* [2007] SC 303 at [35] (Lord Nimmo Smith).

44 *Taylor v Lawrence* [2002] EWCA Civ 90, emphasis added.

45 *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at [22].

rightly of the view that they are not biased. Other judges tend to be too ready to "play safe" and recuse themselves, because they do not want to risk presiding over a case where one party feels that the proceedings are unfair.

In a persuasive article written in 2011, Lord Justice Sedley[46] explained, in characteristically elegant terms, why it should not be the judge in question who decides the issue:

> [T]he important thing is that the system should not compound one paradox — a judge who is unbiased but might reasonably be thought not to be — with a further paradox: a judge who, in order to decide whether he will be sitting as judge in his own cause, has to sit as judge in his cause.

There may be much to be said for recusal applications being made to a different judge, particularly when one considers that the purpose behind the stringent approach to apparent bias taken in this country is about preserving public confidence in the quality of justice and the quality of judges.[47]

So much, then, for how judges think. I turn to the issue of what they do.

Judges as lawmakers

In 1980, Lord Diplock said that "Parliament makes the laws, the judiciary interpret them".[48] By that he meant that, where Parliament has legislated, it is for the courts to interpret the legislation, not to rewrite it. But the statement is sometimes invoked to support the view that judges have no business in making law. That view fails to understand the nature of the task that a common law judge in developing the law. Judges are and always have been law-makers; this is inherent in their constitutional role in a common law system. Indeed, even 150 years ago, and maybe more recently, more English laws were made by judges than by legislators. The balance of the functions, a practical matter, may have changed, but the nature of the functions, a matter of fundamental principle, has not.

The notion that Parliament is the only body engaged in law-making in the wider sense is demonstrably untrue and it does not involve so-called "judicial supremacism" to suggest otherwise. An article in 2014 identified "tiers of relative invisibility" as the law-making function is diffused across a spectrum of "intermediate law-makers", such as lobbyists, regulatory bodies and judges.[49] A judge is often called upon to make new law, whether by developing existing principles to address novel situations or lacunae, by interpreting and reinterpreting legislation and statutory instruments, or, more controversially, by revisiting established principles in light of social change.

46 S Sedley, "When should a judge not be a judge?" (2011) 33(1) *London Review of Books* 9.
47 As Lord Steyn made clear in his speech in *Lawal v Northern Spirit* [2003] UKHL 35.
48 *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157 (Lord Diplock). See also *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 at 567 (Lord Mustill).
49 Jonathan Montgomery et al, "Hidden law-making in the province of medical jurisprudence" (2014) 77(3) *MLR* 343 at 374.

In 1970, Lord Reid elegantly identified the quandary which faces judges in this context:[50]

> People want two inconsistent things; that the law shall be certain, and that it shall be just and move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.

And, around the same time, but in a judgment, he said that "it is now widely recognised that it is proper for the courts … to develop or adapt existing rules of the common law to meet new conditions".[51] However, he went on to suggest that "issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers", "it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament".[52]

The most frequently quoted judicial observation about the judge's law-making role is probably in Lord Browne-Wilkinson's judgment in 1993 in the well-known *Bland* case, which concerned the withdrawal of treatment from a patient in a persistent vegetative state following the Hillsborough disaster:[53]

> Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues. … The judges' function in [such an] area … should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.

But, as Lady Hale has pointed out extra-curially, Parliament, unlike the courts, has the option of not acting.[54] By contrast, "If [Judges] are presented with a case within their jurisdiction they cannot refuse to decide it, however much they might like Parliament to tell them what to do".[55] Further, Lord Reid and Lord Browne-Wilkinson made the observations just quoted before the passing of the *Human Rights Act 1998*, whose effect has inevitably been to heighten these tensions in judicial decision-making. The 1998 Act is not merely an authorisation, but an invitation, even a stipulation, by Parliament to the judiciary to "make law" in areas into which the judiciary has traditionally been reluctant to step or even conventionally prohibited from stepping.

The revolutionary effect of the 1998 Act is, in summary terms, threefold. First, judges are now called upon more frequently to rule on moral and political issues, given that is what human rights involve. This means that we have to engage on a review of the merits of any decision

50 Lord Reid, above n 3, at 26.
51 *Pettitt v Pettitt* [1970] AC 777 at 795 (Lord Reid).
52 ibid.
53 *Airedale NHS Trust v Bland* [1993] AC 789 at 880 (Lord Browne-Wilkinson).
54 B Hale, "Law maker or law reformer: what is a law lady for?" (2005)40 *Irish Jurist* 1 at 14.
55 ibid.

or action which impinges on an individual's fundamental rights. Before the 1998 Act, our role in relation to government acts was more circumscribed. Second, judges must perform a quasi-statute-writing function as s 3 of the 1998 Act requires judges to read and give effect to legislation "[s]o far as it is possible to do so … in a way which is compatible with the Convention rights". If legislation does not appear to comply, we must, if we can, recast it so that it does comply. Third, under s 4 of that Act, judges must tell Parliament when legislation cannot be made to comply and, with one exception (prisoners' votes), it has done so.

While these judicial powers are new in the United Kingdom, three points must be made. First, they were conferred by Parliament not grabbed by the judges. Second, in a country with a written constitution (ie, in almost every other democratic country in the world) these powers would be unsurprising. Third, at least in the view of many legal and political thinkers, these powers are necessary if the rule of law is to prevail, particularly considering the ever-greater powers of the executive branch of government.

The reasoning in the judgments of the Supreme Court in the *Nicklinson* case[56] in 2014 on the lawfulness of the blanket criminalisation of assisting a suicide, provide a contrast with the judicial self-denial expressed by Lord Browne Wilkinson in the life-support case of *Bland* in 1993. Comparison of the judicial approach in the two cases provides some sort of indication as to how things have moved on over the past thirty years or so. In *Nicklinson*, two members of the nine-justice panel were prepared to go so far as to hold the blanket ban incompatible with the Convention; three were open-minded on the possibility of doing so, if Parliament did not grapple fully and properly with the issue; and four were more restrained, but did not wholly rule out the possibility of holding the blanket ban incompatible. Lord Reed who was one of the more restrained four, put the point very well:[57]

> [T]he *Human Rights Act* introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy.

But the 1998 Act is not a substitute for the common law, and it should not have the effect of marginalising the common law, which should be reinforced not undermined by the introduction of human rights. This point was emphasised in two recent Supreme Court appeals, namely *Osborn v Parole Board*[58] and in *Kennedy v Charity Commissioners*.[59] In each appeal, the appellants had based their case on human rights, but they succeeded in common law, and in *Kennedy*, in circumstances where the human rights claim failed. In that case, echoing what Lord Reed had said in the earlier case, Lord Toulson observed that:[60]

> The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs.

56 *R (Nicklinson) v Ministry of Justice* [2014] 1 AC 657.
57 ibid at [296] (Lord Reed).
58 *Osborn v Parole Board* [2014] AC 1115.
59 *Kennedy v The Charity Commission* [2015] 1 AC 455.
60 ibid at [113] (Lord Toulson).

> This has always been the way of the common law and it has not ceased on the enactment of the *Human Rights Act 1998*, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the *Human Rights Act* that the common law should become an ossuary.

And, as Lady Hale has colourfully put it "there may be new toys in the nursery but the judges play with them in much the same way as they played with the old ones".[61]

Whether the judges are developing the law under their traditional common law powers or under their newly accorded human rights powers, it has been cogently suggested that this constitutional role of the judiciary is not to be feared but embraced:[62]

> The courts share in the task of policing the boundaries of a rights-based democracy with the legislature and executive; their role is complementary to that of Parliament, and of the executive. To decry the quasi-constitutional functions of the courts as a step towards judicial supremacism is to deny the distinctive functions of the legislative and judicial branches. It also denies the crucial constitutional role of the courts in their habitual recognition of Parliament as sovereign. The constitutional functions and authority of the courts, therefore, form the embodiment of the balanced constitution in its modern incarnation.

The question of the judiciary's relationship with Parliament and the executive most clearly comes to a head when the question of what is usually, inelegantly, termed "deference" is raised.[63] As Lord Sumption has explained, "deference" represents two distinct but overlapping principles, namely what might be termed "constitutional deference", based on the constitutional principle of separation of powers and "institutional deference", which represents a pragmatic recognition of the evidential value of certain judgments of the executive or Parliament on the basis of the specialist institutional competence.[64]

The difficulty with applying a principle with its basis in the separation of powers and functions is that one must first express a clear understanding of precisely where these lines are drawn in our unwritten constitution. In the recent *Carlile* case[65] there is a marked distinction of view. The case concerned a decision of the Home Secretary to prevent a dissident Iranian politician from entering the country following an invitation from a number of members of the House of Lords. Lord Sumption (in the majority upholding the Home Secretary's decision) considered that "the *Human Rights Act 1998* did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was

61 B Hale, above n 54, at 14.

62 J Murkens and R Masterman, "The new constitutional role of the judiciary" (2014) *LSE Law: Policy Briefing Paper No 2* available at https://ssrn.com/abstract=2482312 accessed 16 July 2021.

63 *R v BBC, ex p ProLife Alliance* [2004] 1 AC 185 at [75] (LordHoffmann). Lord Sumption also criticises the term in a recent decision of the Supreme Court in *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department*[2015] 1 AC 945 at [22].

64 *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] 1 AC 945 at [22] (Lord Sumption).

65 ibid.

passed",[66] whereas Lord Kerr, dissenting, appears to consider that this distribution of power *was* so altered.[67] The reason I draw attention to this difference is that the precise constitutional role of the judge may itself be determinative of questions judges have to decide, as it was in *Carlile*.

Conclusion

Francis Mann was at heart a legal realist; he recognised that "in general, irrespective of legal niceties, meritorious litigants won cases and unmeritorious litigants lost them".[68] The more we understand and recognise the way judges as decision-makers work, the greater our ability to avoid errors and biases. Platonic ideals of judicial decision-making which do not acknowledge the reality of judges as human beings are doomed to fail. Judicial automatons are not just an unattractive option; they cannot exist. Instead we must approach the task of judging in a manner which embraces, rather than eschews, our humanity. We should do so more openly and more honestly.

Alongside better understanding judges we must endeavour properly to understand their constitutional role; only by recognising that judges are law-makers and being transparent about their relationship with the other branches of government.

Judges have to shoulder the dual task of acting within their constitutional role while also policing the boundaries of what that role is. This is an unavoidable consequence of our current constitutional position. I have referred to the recent increase in judicial powers. With that increase in judicial power comes not merely an increase in judicial responsibility, but an increase in the need for judicial self-awareness and self-restraint. I started with a couplet from the 18th century Augustan poet, Alexander Pope, but in what some may regard as a rather pathetic attempt at illustrating how judges try to keep in touch, I shall end with a motto from the Spiderman films "with great power comes great responsibility".

66 ibid at [28] (Lord Sumption).
67 ibid at [159], [175] (Lord Kerr).
68 Collins, above n 2, p 436.

Further references on apprehended bias and unconscious bias

For further references on the topics of apprehended bias and unconscious bias, please see the following:

- Judicial Commission, *Civil Trials Bench Book*, [1-000] and ff, “Disqualification for bias”
- Council of Australasian Tribunals, *Practice Manual for Tribunals*, 5th edn, 2020, ch 3.4, “The bias rule”, at https://coat.asn.au, accessed 28 July 2021.
- Judicial Commission of NSW, Videos and Podcasts, Bias against Indigenous Australians: Implicit Association Test results for Australia, Recorded on 14 October 2020; Cross-jurisdictional Webinar: Unconscious Judicial Prejudice: The neurobiology of "prejudice" (or "bias") in legal decision making, Recorded on 24 June 2020, at https://jirs.judcom.nsw.gov.au/menus/videos.php, accessed 18 August 2021.
- Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd edn (rev), 2022, at 11–18

Publicity and social criticism

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The idea of the professional judge: the challenges of communication*

The Honourable Justice P Keane AC†

Politically neutral professionalism is the characteristic ethos of our modern judiciary. Communicating the value of that ethos to the community is an abiding challenge given popular misconception of the role of the judiciary, including the misconception that judges do not actually write their own judgments, the view that the courts are simply part of the mix of service providers in the dispute resolution industry, and the discourse of disrespect in the media, which tends to delegitimise the work of courts. The author considers how the judiciary can address the refrain that judges are "out of touch", suggesting that the judiciary should pursue strategies of closer engagement with legal professional bodies.

The idea

With the 800th anniversary of the signing of Magna Carta being celebrated in 2015, I thought that it might be appropriate to reflect upon cl 45 of the Great Charter in which King John promised that: "We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well." In the historical record, this section of Magna Carta was the birth notice of the judiciary as an arm of government.

The idea that what our judges do in exercising the judicial power of the State is, and should always be, informed by an expert understanding of the law through long training and experience and a professional ethos of disinterested personal restraint. This has been a central theme of the common law since its first moments of self-consciousness.

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At the time John signed Magna Carta, the judges had considerable personal contact with the King himself. We know this because they "often marked their cases 'loquendum cum rege'",[1] that is, "to be discussed with the King". The practice reflected the political reality that the judges were not then independent of the Executive government of the day; they were institutionally connected to, and directly dependent for their authority upon, the King. It may even be that this practice gave rise, to some extent, to the grievance addressed by cl 45 of Magna Carta.

The direct connection between the judges and sovereign power proved to be a source of self-confidence in the English judiciary. This confidence showed itself to be increasingly resistant to the other great institution with a claim upon their allegiance and influence upon their professional ethos — the Catholic Church. That self-confidence proved to be a potent dynamic in the development of the common law as supplanting canon law and civil law ideas derived from continental jurisprudence.

But the very fact that the great promise in cl 45 of Magna Carta was made at all, even though all the powers of government were still concentrated in the hands of the monarch as sovereign, suggests that Ralph Turner was right in his suggestion that the judges and lawyers were, and were seen to be, beginning to develop a view of themselves as members of a profession dedicated to the administration of justice.[2]

Thereafter, the idea that there was something independent about the legal profession and the judiciary developed apace. That development was sufficiently assured by the end of the 14th century that the rights of subjects were being vigorously enforced, even against the King himself in his own courts.

There was, for example, the celebrated litigation in the 15th century between the Abbess of Syon, the head of a cloistered order of nuns, and Henry VI, which arose when the King dispossessed the abbey of an endowment given to it by his father, Henry V. The rights of the nuns were vindicated by the independent judiciary assisted by equally independent counsel. Incidentally, the nuns did not forget. The King's name was not mentioned again in the names of the eminent persons for whom the nuns prayed until 1937.[3]

In the legal tradition that developed over the 800 years after Magna Carta, and as the activities of government came to be the responsibility of separate organs of sovereign power, it became the function of the legal profession and the judges produced from it to ensure that the law is enforced by those who "know the law of the realm" and whose professional ethos ensures that they are "minded to keep it well".

The common law which developed over that time was distinguished by its incremental development by judges (and juries) in contrast to the theory-driven work of continental scholars whose first allegiance was to the academy and the Church.

1 R V Turner, *The English judiciary in the age of Glanvill and Bracton c 1176–1239*, Cambridge University Press, 1985, p 159.
2 ibid.
3 E Makowski, *English nuns and the law in the Middle Ages: cloistered nuns and their lawyers 1293–1540*, Studies in the History of Medieval Religion, Vol 39, Boydell Press, 2012, Ch 4, pp 85–86.

In the tradition of the common law, the names of most of the participants in the most important episodes along the way of the stuttering iterative process, whereby an independent legal profession and judiciary emerged over the centuries, are today virtually unknown.

To be sure, there were some great judges whose names we all know, but, in truth, the common law developed as described by J W Burrow:[4]

> [T]he common law is not a creation of heroic judges but the slow, anonymous sedimentation of immemorial custom; the constitution is no gift but the continuous self-defining public activity of the nation.

In the US, the claims of democracy, asserted most vigorously during the presidency of Andrew Jackson, trumped the claims of professionalism and led to the adoption of an elected judiciary in many of the States. There is some irony in the circumstance that the argument for tenured judges, appointed from the ranks of the legal profession, was made most eloquently by an American. Writing in "The Federalist No 78",[5] Alexander Hamilton said:[6]

> It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them.

The defining characteristic of our modern judiciary is politically neutral professionalism.

Edmund Burke, like Alexander Hamilton, favoured the "cold neutrality of an impartial judge"[7] over the idea of the exercise by judicial proxy of the popular will. Burke's idea of cold neutrality has modern echoes in Sir Owen Dixon's idea of legalism, and in the observation of Laurence Tribe, the distinguished American scholar of constitutional law, that "the whole *point* of an independent judiciary is to be 'antidemocratic'" [emphasis in original].[8]

In the long run, the judiciary, as the unelected third branch of government, is tolerable in a democracy only because of our professional competence and because of a professional background apt to inculcate political neutrality in the exercise of our functions.

A pressing challenge for the Australian judiciary, and for the Judicial Conference of Australia (JCA) as our representative body, is in communicating the value of this idea of politically neutral professionalism to ensure that it continues to be recognised by the broader community.

4 Quoted by F Mount, "No theatricks" (2014) 36(16) *London Review of Books* 14 at 16.
5 In A Hamilton, J Madison and J Jay (C Rossiter (ed)), *The federalist papers*, New American Library, 2003.
6 ibid p 470.
7 E Burke, "Translator's preface" in J Brissot, *To his constituents*, John Stockdale, 1794, p iv.
8 L Tribe, *Abortion: the clash of absolutes*, W W Norton & Company, 1990, p 80.

Misconceptions

Some members of the public and some in the media have a view that the judges see themselves as a self-important, if not self-interested, elite who are far too smart for their own or anyone else's good. One might expect that some of these commentators would know better.

Professor James Allan of the University of Queensland, and a regular commentator on legal matters in *The Australian*, in a recent opinion piece concerning the controversy surrounding the appointment of Carmody CJ, wrote:[9]

> If, like me, you want your judges committed to interpreting the legal texts in the way they were intended by the democratically elected legislature, and in line with their plain meaning, then ubersmart judges are simply those with the resources to avoid such constraints … Put differently, the unspoken premise among the "top judges need to be the biggest brains in the room" crowd is that we want our judges to be out there pursuing social justice (or their version of it, to be a little more exact) and indulging in social engineering from the bench and that you can't do that in any plausible way unless you are really, really smart … I think there are plenty of people out there who would make perfectly acceptable chief justices. Sure, a really smart person might make a great chief justice. But that same he or she is also more likely, in my opinion, to make an awful one.

Just think about that: a really smart person is more likely to make an awful judge.

Perhaps Professor Allan should try to get out and meet more judges.

Even within the Executive governments of the Commonwealth and States, there is a profound lack of understanding of the function of the judiciary. Getting the message across to those of the managerialist mindset in government is a challenge which needs continually to be addressed.

Judges in Australia write our judgments. Not everyone understands that. I say that, not only in respect of the angry unreflective people who are ignorant about what we do.

The most worrying misconception I have encountered is the belief among officers of the Executive government that judges do not actually write their own judgments.

When I was Chief Justice of the Federal Court, I was told by one of my colleagues who was responsible for negotiations concerning judicial salaries, that in the course of discussions with officers of the Executive government, those officers had expressed disbelief when told that our judges spend more time writing judgments than sitting in court. The bureaucrats assumed that we delegate the writing of judgments to our associates.

It may be that this misunderstanding is a consequence of the high profile of the US Supreme Court and the fact that justices of that court have four clerks each of whose task it is to prepare opinions for the consideration of the justices. Anecdotal evidence suggests some of the justices do little actual writing. It is said that one former justice did not even make that level of contribution to the opinions that appeared under his name. The suggestion was that the justice's contribution was limited to an instruction as to the desired outcome and then checking the citations made by his clerk. It was said that his Honour was "one hell of a citechecker".

9 J Allan, "Objections must be ruled out of order", *The Australian*, 20 June 2014.

This practice does not seem to be confined to the US Supreme Court. Some thoughtful Americans deprecate it. Judge Richard Posner, of the seventh Circuit Court of Appeals, writing extra-judicially, has said that judges cannot hope that "by careful editing they can make a judicial opinion [written by a clerk] their own".[10]

It is difficult to imagine how the integrity of this judgment-writing process can be upheld when the selection from the record of the material facts on which the decision is based is made by a person who does not have the professional experience which, presumably, justified the appointment of the judge in the first place.

One might also observe that the attractions of clinging to office well into one's eighth or ninth decade might be reduced if the judge were required to do the hard grind of actually writing his or her judgments.

And there is a broader problem of the perception of our role. Even among sophisticated professionals, such as the Productivity Commission, there is the view that the courts are simply part of the mix of service providers in the dispute resolution industry. This view has powerful implications for the level of support which the political branch provides the courts.

If you view the courts as service providers, then it might make sense to adopt a cost recovery model as the basis for fixing court fees. We all know the other famous clause in Magna Carta: "To no-one will we deny or delay or sell justice"; but it doesn't seem to loom large in the managerialist consciousness.

But to see the courts as providers of services is a constitutional nonsense.

An accused person who is tried, convicted and sentenced is not being provided with a service. And when a civil court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed. And the decision which resolves their dispute is the most concrete expression of the law of the land and saves further litigation because it enables the profession to advise their clients so as to avoid litigation.

By way of an interesting footnote here, the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v British Columbia (A-G)*[11] recently held that court hearing fees imposed by regulation in British Columbia were unconstitutional because they interfered with access to the constitutionally protected core jurisdiction of the provincial superior courts and the rule of law as a fundamental constitutional principle.

The media

It is of the essence of what we do that we operate in public. Our decisions are the rational application of predetermined laws to facts found on evidence adduced by the litigants in open court. Unlike decision-makers in the other arms of government, our decisions are entirely subject to public scrutiny. And that is a very good thing.

10 R Posner, *Reflections on judging*, Harvard University Press, 2013, p 46.
11 [2014] 3 SCR 31.

It is a vital aspect of our democracy that our newspapers and other media should not be afraid of criticising our work, just as it is vital that they should not be afraid of criticising the political branches of government. But the media are rarely our natural allies. Indeed, in some respects, with the best will on both sides, unfortunately, we are natural enemies.

Some of you may have seen recently the outrage in the US media when the US Supreme Court declined to review a lower court's order requiring a reporter for the *New York Times* to testify in a case of espionage brought against a former officer of the Central Intelligence Agency. The reporter claimed reporter's privilege to protect his confidential source. The reportage emphasised that the reporter was highly respected: indeed, he had won a Pulitzer Prize.

What was significant for our purposes was that, even in the quality newspapers, there was not the faintest mention of the importance of the evidence to actually doing justice, and of the enormous social harm involved in disabling the system from getting at the real truth. If the judicial system is disabled in this way, then justice becomes only something that journalists talk about, not something that we actually do as a community.

And it is fair to say that the media do not value the careful thought and reflection which characterises the work of what has become indisputably the most deliberative branch of government. That is understandable, given that the demands of the market and the news cycle necessarily breed a "preference for heat over light and simplicity over nuance".[12]

So far we have been speaking of differences which are perfectly understandable given the different roles, each legitimate, which these different institutions perform. But these differences don't explain the emergence of a wave of intemperate criticism of judges which politicians of a populist bent seek to ride.

In an important paper published in 2008 in the *Journal of Judicial Administration*,[13] Dr Pamela Schulz recorded the results of a number of studies into coverage of the courts by sections of the Australian media. From these studies Dr Schulz discerned a "consistent pattern of reporting which inexorably demands that the justice system be modified".[14] The conclusion of a further article by Dr Schulz and Dr Andrew Cannon was that:[15]

> It is no longer sufficient, or safe, to rely on traditional media to translate or deliver the information to the public, because they no longer just deliver an accurate record of events. Rather, court reports are now infotainment which is simplified by the use of the discourse of time to create a discourse of disrespect and control over the judicial process.

And of course, this discourse of disrespect enables the political arms of government to delegitimise the work of the courts knowing that they will be supported by the media and will thus garner popular support.

12 T Mauro, "Five ways appellate courts can help the news media" (2007) 9(2) *Journal of Appellate Practice and Process* 311 at 312.
13 P Schulz, "Rougher than usual media treatment: a discourse analysis of media reporting and justice on trial" (2008) 17(4) *JJA* 223.
14 ibid at 223.
15 P Schulz and A Canon, "Public opinion, media, judges and the discourse of time" (2011) 21(1) *JJA* 8 at 18.

The most pressing challenge comes from media comment in the area of criminal law, and sentencing in particular. Judges are today subjected to a level of criticism which was unknown when I began my time as a lawyer.

It is the sad fact that bad news is more saleable than good news; and a simple story is more saleable than a complex one.

In 1997, Gleeson CJ delivered the Sir Earle Page Memorial Oration. On that occasion he spoke of the problem created by the reaction of politicians to media agitation for "a tough on crime" stance which leads to the cynicism of the law and order situation. Gleeson CJ said:[16]

> It always has been the case that some courts have attracted public attention and some individual cases have received a lot of publicity. However, what constituted widespread publicity even 30 years ago was very different from what constitutes widespread publicity today. It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television news programmes depicting casualties with unprecedented visual and emotional impact. To an extent, a similar phenomenon may account for the fact that modern citizens have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims, or relatives of victims, of violent crime, telling their stories, and being asked whether they are satisfied with the sentences imposed on convicted offenders. Talk-back radio programmes are filled with people expressing feelings of insecurity and demanding ever-increasing severity of penalties. To all of this, politicians respond by competing with one another to be seen to be tough on crime. This phenomenon is not peculiar to New South Wales, or to Australia. The same thing is happening in America, England and New Zealand.

This state of affairs has not improved in the years since Murray Gleeson's speech. We cannot allow it to go unchallenged.

There are reasons to think that crime rates are coming down across the countries of the first world. In a 2013 edition of *The Economist* magazine, a number of articles detailed the fall over the past 15 years of rates of crimes against persons and property in the Western democracies.

In the US, for example, the number of violent crimes across the country as a whole has fallen by 32% since 1990 and in the biggest cities by 64%. No-one quite knows why this has occurred.[17]

One suggestion is that the ageing population means that the proportion of 16 to 24-year-old males — the most crime-prone demographic — has declined. The repopulation of the inner cities is also thought to be a contributing factor. Another view is that the increase in incarceration rates is responsible.[18]

The supporters of this view point out that over the past 20 years, the prison population has doubled in the UK and almost doubled in Australia and the US. This seems unlikely to be the

16 The Hon Chief Justice A M Gleeson AC, "Who do judges think they are?", Sir Earle Page Memorial Oration, 22 October 1997, Sydney, published in (1998) 22(1) *Crim LJ* 10 at 15.

17 "Where have all the burglars gone?; Falling crime", *The Economist*, 20 July 2013, p 21.

18 ibid.

answer because in Canada and the Netherlands, prison populations have actually reduced at the same time as the crime rate reduced. And in the US, there is growing disquiet with the increasing levels of incarceration, both on the grounds of expense and effectiveness and on the ground of fairness, given that the prison population clearly reflects social disadvantage due to ethnic background.[19]

The Economist suggests that the explanation for falling crime rates is to be found in better policing, including the advent of DNA testing, surveillance cameras, and private security, all of which have increased the risk of an offender being caught. And cultural change matters too: domestic violence has fallen as wife-beating has been socially stigmatised. Since 1994, self-reported domestic violence has fallen by three-quarters in Britain and two-thirds in the US.[20]

Our public discourse should be informed by awareness of these realities. But the media has little interest in publishing this information. And governments will not do it because of the political advantages adverted to by Gleeson CJ, or because it would open a debate about the doubtful value of ever more deterrence in sentencing and the mounting costs of imprisoning ever larger portions of our population.

Perhaps it is a job for the JCA, in liaison with Australia's legal professional bodies and our schools, to outflank the media. I wonder whether it might not be feasible to ensure that legal studies courses at secondary schools and criminal law and criminology courses at our universities are offered written materials or a guest lecture or two on these topics by practising lawyers. That strategy seems to offer a prospect, over time, of de-terrorising our populace.

A particularly galling aspect of the media's discourse of disrespect, indeed, almost mystifying, is the now constant refrain that judges are "out of touch" with our fellow citizens because of our elitist self-regard. I say that it is galling, and mystifying, because in Australia at this time in history, the judiciary is more of the people than ever. Most of the people attending this conference are members of the first generation in their families to attend university.

In recent times, Gleeson CJ,[21] de Jersey CJ[22] and Bathurst CJ[23] have all spoken out to make the point that their general experience of life is no narrower than the members of other occupational groups. And why would anyone doubt that in the open and egalitarian society which has flourished in Australia since the Second World War?

In the March 2014 issue of *Current Issues in Criminal Justice*,[24] Professor Warner, Associate Professor Davis, Professor Walter and Dr Spiranovic considered media claims and public opinion surveys which suggest that there is a broad public perception that judges are out of touch with what ordinary people think, especially in relation to sentences, which are thought to be too

19 ibid.
20 ibid.
21 A M Gleeson, "Out of touch or out of reach?" (2005) 7(3) *TJR* 241.
22 The Hon Chief Justice P de Jersey AC, "Address", speech delivered at the Central Queensland Law Association Annual Conference, 26 August 2006, Yeppoon.
23 T F Bathurst, "Community participation in criminal justice" (2012) 50(2) *LSJ* 55.
24 K Warner et al, "Are judges out of touch?"(2014) 25(3) *CICJ* 729.

lenient, so that the public is less likely to have confidence in the work of the courts. The article proceeded to examine these perceptions by a study of the views of jurors, that is to say, those members of the public who have been most closely exposed to the actual work of the courts.

Their findings were that most jurors did not agree that judges were out of touch with public opinion on sentencing. Even more interesting was the circumstance that some jurors who were prepared to accept that judges were "out of touch" did not think that this was necessarily a bad thing. These were the jurors who themselves disapproved of the populist demand for more punitive sentences.[25]

But we are talking about only that small proportion of our fellow citizens who actually serve on juries.

What can judges do?

There is little scope for judges to reach out individually to the broader community. Attempts to do so are likely to foster the perception that we are a proselytising elite who see ourselves as discharging the role of tribune of the people.

An example, not too close to home to be unduly uncomfortable, is Justice Sonia Sotomayor of the US Supreme Court. Her Honour has made television appearances with Jon Stewart, Stephen Colbert, Katie Couric and Oprah Winfrey. She has appeared twice on Sesame Street. She made appearances at bookstores across the US promoting her autobiography and on New Year's Day 2014 she presided over the ball drop in Times Square in New York alongside Miley Cyrus.[26]

Now call me old fashioned …

In April 2014, an article in *The Wall Street Journal* quoted Professor David Fontana of George Washington University Law School as saying that by being more accessible and showing a willingness to talk candidly about herself, Justice Sotomayor is exerting a new kind of influence and that by appearing in different places and talking about the law in a different language, her Honour has the potential to be a new kind of liberal judge by appealing to a broader audience. Her fame might bring new followers to the liberal cause. Her humanity, it is said, might make her followers appreciate the liberal cause even more. She has the potential to become what Professor Fontana calls "the people's justice".[27]

Her Honour has obvious popular appeal. It might be something that could translate into a political candidacy. Indeed, it is difficult to see how her efforts are not calculated to serve that agenda rather than an educative role on behalf of the judiciary as a whole. One would not suggest that her enthusiastic accessibility is apt, of itself, to undermine the confidence in which the US

25 ibid at 739–740.

26 D Fontana, "The people's justice?" (2014) 123 *Yale Law Journal Forum*, at www.yalelawjournal.org/forum/the-peoples-justice, accessed 27 July 2021.

27 J Gershman, "Sonia Sotomayor: the people's justice?", *The Wall Street Journal*, 1 April 2014, at http://blogs.wsj.com/law/2014/04/01/sonia-sotomayor-the-peoples-justice/, accessed 27 July 2021.

public holds its Supreme Court; but what if all nine justices pursued the public cultivation of political constituencies? And perhaps more fundamentally, if the notion of a "people's justice" has any real meaning at all, the way to achieve it is by election of judges.

In this regard, one might cite, as proof of the cynicism, if not the intellectual bankruptcy, of the criticisms that our judges are "out of touch", that for all the populist sound and fury generated by the shock jocks, there has been no suggestion that the system should be overhauled by the introduction of an elected judiciary. In truth, of course, no sensible person would suggest that change to our community. But we need to be alert to "bell the cat" promptly should such a suggestion be made. It is not a difficult task.

In the US, of course, judges in many States are elected. The most startling thing about that is that huge amounts are spent on judicial election campaigns although judicial salaries are low — much lower than in Australia — and, relatively speaking, at an historical low throughout the US. Last year, Wallace B Jefferson, the highly respected former Chief Justice of the Supreme Court of Texas, resigned his position and returned to private practice in order to ensure that he would be able to send his children to college.[28]

When one pauses to consider how a campaign expenditure of USD 1 million for four years' occupation of a job which pays USD 150,000 per annum can be justified, the answer, however charitable one may be inclined to be, cannot be consistent with judicial independence whether apparent or actual. It is impossible to believe that campaign finance does not come with an expectation of some form of quid pro quo.

Corporations, political parties, unions, trial lawyers, unabashedly seek ideologically compatible State judges because their rulings can affect electoral redistributions, and decisions on workers' compensation and medical malpractice suits.

In 2012, USD 30 million was spent nationwide on television advertising alone for State court campaigns, and attack ads are not uncommon.[29]

The content of the advertising which appears in the course of campaigns for judicial office is sometimes nothing short of appalling.

In April 2014, an advertisement appeared on television in North Carolina alleging that Justice Robin Hudson had coddled child molesters and sided with predators in a dissenting judgment on the Supreme Court of North Carolina. The advertisement was shown frequently until the primary election. It was not published by either of the judge's opponents in the election, but by a group that received USD 650,000 from the Republican State Leadership Committee in

28 R Ramsey, "Perry: Hecht will replace Jefferson as Chief Justice", *The Texas Tribune*, 10 September 2013, at www.texastribune.org/2013/09/10/texas-chief-justice-jefferson-resigns/, accessed 27 July 2021.

29 A Bannon et al, *The new politics of judicial elections 2011–2012*, Report, Brennan Center, Justice at Stake and the National Institute on Money in State Politics, October 2013, at www.brennancenter.org/our-work/research-reports/new-politics-judicial-elections-2011-12, accessed 27 July 2021.

Washington, which raises money to promote conservative candidates at the State level. Hudson J was forced to respond to the attack on her by spending USD 86,000 on an advertisement defending her record.[30]

At the end of April, the Republican State Leadership Committee, which had previously focused on elections to State legislatures and for State governors, announced a Judicial Fairness Initiative focused "on educating voters to better understand the ideology of candidates up for judicial branch elections".[31]

In the 1 September 2014 issue of *Politico Magazine*, an article entitled "Justice for sale"[32] contained some harrowing details in relation to the influence of money on elective judgeships in the US. In the US, State courts dispose of 98% of all cases and more than 85% of State judges are elected. Since 2000, State judges vying for election have raised more than USD 275 million in campaign funds. There had not been a problem on this scale until that time. The explosion occurred as a result of the work of the political consultant, Karl Rove, who organised the campaign to win majorities on the Supreme Courts of Texas and Alabama.

It is in the State Supreme Courts where the nation's tort wars are waged in cases relating to product liability, workers compensation and insurance claims. The author of the *Politico Magazine* article cites an official of the American Federation of Labor and Congress of Industrial Organizations (the peak union body equivalent to our Australian Council of Trade Unions) as saying: "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators".[33]

The judges themselves feel the pinch. In 2004, two judges competing for a single State Supreme Court seat raised USD 9.3 million between them. That was more than was raised in 18 out of 34 races for the US Senate that year. The winner was Justice Lloyd Karmeier, who commented about the expenditure: "That's obscene for a judicial race. How can people have faith in the system?"[34]

That we have avoided the appalling state of affairs which afflicts the judiciary in the US is, no doubt, due to a number of factors, structural and cultural. I would venture the suggestion that prominent among these is the professionalism which characterises the work of our courts in which, faithful to the model established so long ago in the relationship between the Inns of Court and the Courts at Westminster, the judges and the legal profession share a common experience of professional development, and lawyers still regard themselves first and foremost as servants of the administration of justice.

30 E Eckholm, "Outside spending enters arena of judicial races", *New York Times*, 5 May 2014, at www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html?_r=0, accessed 27 July 2021.
31 ibid, quoting the Committee's president, Matt Walter.
32 B Brandenburg, "Justice for sale", *Politico Magazine*, 1 September 2014 at https://www.politico.com/magazine/story/2014/09/elected-judges-110397/, accessed 27 July 2021.
33 ibid.
34 ibid.

The professionalism which is the basis for our claim to legitimacy as the department of government whose province it is to say what the law is, is a bulwark against threats from outside as well as within that department.

The professional associations which have moulded us are our natural allies in this endeavour. They have an enduring historical stake in the success of our institution. The professional bodies are the trustees of the best traditions of the legal profession. They both influence and reflect public perceptions of the judiciary. Rightly, they have a stake in judicial appointments and their views should be heeded. When the professional bodies approve of an appointment they are, and are seen to be, expressing the confidence of the community in the new appointee as a proxy for the citizenry.

The professional bodies which represent the legal profession are our natural allies in ensuring that the public has an accurate understanding of what it is that we do. For this reason we should be exploring strategies of closer engagement with them.

Individual and institutional responsibility

For most of our professional lives the statement of Bowen LJ in *Cropper v Smith*,[35] which was cited with approval by the High Court in *JL Holdings Pty Ltd v Queensland*,[36] served to identify the mission of the courts as focused upon the achievement of justice in the individual case. It is a beautifully expressed articulation of a great ideal:[37]

> Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.

In *JL Holdings*, this statement of principle held its ground against the claims of efficient case management as an answer to the growing demands on the system of the administration of justice. The plurality, Dawson, Gaudron and McHugh JJ, said that while "[c]ase management … is an important and useful aid for ensuring the prompt and efficient disposal of litigation",[38] it is not an end in itself, and the "ultimate aim of a court is the attainment of justice".[39] And when their Honours spoke of the attainment of justice, they were speaking of justice in the ultimate resolution of a particular case.[40]

35 (1884) 26 Ch D 700.
36 (1997) 189 CLR 146 at 152–153.
37 *Cropper v Smith* (1884) 26 Ch D 700 at 710.
38 (1997) 189 CLR 146 at 154.
39 ibid.
40 ibid at 155.

Aon Risk Services Australia Ltd v Australian National University,[41] and notably in the joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ, rejected the *Cropper v Smith* approach, and decisively recognised that the doing of justice in the modern world of multitudinous claims on the limited resources of the judicial system is an institutional project with a necessarily systemic element.[42] This recognition was no more than due deference to legislated changes in the rules governing the conduct of litigation which reflected the pragmatic judgment that "[s]peed and efficiency, in the sense of minimum delay and expense, are … essential to a just resolution of proceedings",[43] and that the institutional responsibility of the courts is to "do justice to all litigants".[44] The procedures of the court must, therefore, operate with an awareness of the impact of unreasonable demands by individual litigants upon the system of doing justice and upon the reasonable expectations of all litigants that justice will be rendered efficiently and without unnecessary delay.

It behoves us all to accept that the great idea expressed in *Cropper v Smith* is an idea whose time has passed. That is, in my personal view, an occasion for regret; but we cannot indulge that regret so that it becomes recalcitrance.

This institutional and systemic perspective of the work of the courts has implications beyond the need to support case management.

41 (2009) 239 CLR 175.
42 ibid at [111].
43 ibid at [98].
44 ibid at [94].

Community confidence in the justice system: the role of public opinion*

The Honourable T F Bathurst AC†

The author reflects on the role and relevance of public opinion of the judiciary in the context of criticism from the media, members of the community and members of Parliament that judicial officers are "out of touch" with public opinion. He considers what is meant by this criticism and explains why the accusation that judges do not understand the reality or seriousness of crime is erroneous. The author responds to the accusation that the courts are ignoring the interests of victims and argues that it is a mistake to see an excessively punitive approach as the only way courts can recognise their interests. He examines the judiciary's obligation to serve the community and considers the nature of the judicial function in this context. The author disavows personal attacks of particular judges by the media.

Criticism of the judiciary has a long, if not illustrious history. In the 17th century for example, an assassination attempt was made against a Judge Richardson, by an offender who pelted a large piece of flint at his Honour's head, claiming he was trying to "be a benefactor to the Commonwealth [by taking away] the life of a man so odious".[1] Thankfully for Judge Richardson, his would-be assassin's aim was as bad as his logic. Some two centuries later, Malins V-C was attacked somewhat less frighteningly, when an egg was thrown at him as he presided in court. He promptly observed, "[t]hat must have been intended for my brother Bacon".[2]

Historical jokes notwithstanding, it seems that in the last 50 or so years there has been a sharp increase in both the quantity and the stridency of criticism aimed at the courts. In 1979, Lord

* Opening of Law Term Address, 3 February 2014, Sydney. Published in (2014) 12 *TJR* 27, statistical information in footnotes updated in 2021.

† Chief Justice of NSW. The author wishes to thank his Research Director, Sienna Merope, for her assistance in the preparation of this article.

1 R Megarry, *A second miscellany at law: a further diversion for lawyers and others*, Stevens & Sons Ltd, London, 1973, p 70.

2 ibid pp 70–71.

Devlin was able to proclaim, without sarcasm, that there was "virtually no popular criticism of the judiciary"[3] in England and that judges tended to be "admired to excess".[4] I am relatively certain this is a problem that no longer afflicts either the Australian or English judiciaries.

Unequivocally, close scrutiny and informed criticism of the judiciary is a good thing. Often, criticism is reasonably based. The courts make decisions that have a huge impact on the lives of citizens and "[i]t is better that people who exercise authority feel uncomfortable than that they feel complacent".[5] However, criticism of the judiciary today does not solely consist of informed comment borne of close scrutiny. Instead, there has been a tendency to target the judiciary as part of the well-worn "law and order debate" that reignites whenever a particularly shocking or high profile crime takes place.

This so-called debate invariably raises similar themes. The judiciary is publicly condemned for being out of touch with public opinion. Governments of the day proclaim their commitment to being tough on crime, and proposals for new offences, or mandatory minimum sentences, are suggested. It is a cycle that is familiar to all of us. However, that does not mean that courts should be impervious to community concerns voiced in these debates or to ignore social ills as they emerge. In sentencing, courts have a statutory obligation to "recognise the harm done to [both] the victim of the crime and the community"[6] and must therefore be cognisant of the community's views. In any case, the relationship between the community and the judiciary is a vital one, and public opinion of the courts is something we cannot ignore.

In that context, I would like to use the occasion of this Opening of Law Term to reflect on the role and relevance of public opinion of the judiciary. How, if at all, should judges react to and take into account public opinions on sentencing and crime? Is there validity to criticisms that judges are out of touch when it comes to sentencing? What can the courts do to improve public confidence in the administration of criminal justice?

Context

The first thing to note is that when we talk about public opinion and community criticism of the judiciary, we are overwhelmingly referring to the administration of criminal justice, and in particular to judicial decisions on sentencing. The debate therefore concerns a narrow part of the courts' work. In fact, much of what the courts do is accepted as uncontroversial. Cases involving the extinguishment of easements rarely excite public passions, and, to my knowledge, few newspaper columns have been written on the law of contract.

3 See P Devlin, *The judge*, Oxford University Press, Oxford, 1979, pp 25–26, cited in S Kenny, "Maintaining public confidence in the judiciary: a precarious equilibrium", Sixth Lucinda Lecture, Monash University, 24 March 1998, Melbourne.

4 ibid.

5 M Gleeson, "Public confidence in the judiciary", paper presented at the Judicial Conference of Australia Colloquium, 27 April 2002, Launceston, p 3.

6 See *Crimes (Sentencing Procedure) Act 1999*, s 3A.

Community views on the administration of criminal justice however, have broader implications. As former Chief Justice Spigelman observed:[7]

> Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

The second thing to acknowledge is that the community's strong interest in, and concern about, the administration of criminal justice is entirely understandable and legitimate. As the Honourable Fred Flowers put it over 100 years ago when introducing the legislation establishing the Court of Criminal Appeal:[8]

> [This is not] a matter which belongs purely to those whose occupation takes them to the court … Law and order in the community, the protection of life and property, the punishment of those who do wrong, it must be admitted are some of the most serious and important considerations of a civilised state.

The unfortunate reality is that many people in the community are victims of crime or indirectly affected by criminal activity. These persons look to the criminal justice system to vindicate them and to provide justice for what they have suffered. They are naturally acutely concerned with the process and outcomes of judicial decisions on matters of crime and sentencing.

The whole community also shares a strong interest in criminal justice and punishment. Crime strikes at the heart of the community's concerns about safety and social cohesion. Many people feel that criminal activity threatens their personal safety. Crime also represents a breach of society's mores. Violent crime in particular is emotionally and morally shocking to all of us. It is not surprising, in this context, that the public has a strong interest in criminal justice.

In addition, criminal trials are often sensational and, at the surface at least, easy to understand. There is generally a coherent narrative of factual events. The alleged wrongdoing is often not technical. The harm to the victim is apparent. This means that criminal trials tend to receive more media coverage than other matters which come before the courts. It also means that the public does not readily think of a criminal sentence as an outcome of specific and technical legal principles, requiring expert evaluation. Members of the community therefore feel able and qualified to express an opinion about sentencing.

All this can be recognised. That said, the question remains: how are judges to react to the recurring accusations that we are out of touch with public opinion, cloistered from reality, soft on crime, or anti-victim? As I alluded to earlier, courts must not simply dismiss and ignore such charges as meaningless abuse. I think that former Chief Justice Gleeson put it well when he said in a 2004 speech that we "need to try to understand the meaning of the accusation, and do what we can to assess its merits, even though that may be difficult".[9] To this I would add that, having

7 J Spigelman, "Fairness in criminal justice: the sentencing debate", Opening of Law Term Address, 2002, Sydney, p 1.
8 Second Reading Speech, Criminal Appeal Bill, NSW, Legislative Council, Debates, 5 December 1911, p 2,303 (the Honourable F Flowers).
9 M Gleeson, "Out of touch or out of reach?", paper presented at the Judicial Conference of Australia Colloquium, 2 October 2004, Adelaide, p 1.

done so, we need to confront and counter criticisms that are not well founded and attempt to respond constructively to any that are, subject of course to the constraints which prevent judges from commenting on individual cases.

Is the judiciary "out of touch"?

So what is meant by the accusation that judges are out of touch and soft on crime? To again quote former Chief Justice Gleeson, if the accusation is more than just a smear:[10]

> it must mean that judges as a class take crime, or some forms of crime, less seriously than the general public … [and that] sentences reveal a systemic failure to understand, or a determination to ignore, the seriousness with which the community regards deviant behaviour.

In other words, judges do not understand the reality or seriousness of crime, systematically give an "easy ride" to offenders, and ignore the community's legitimate views on how to sentence offenders.

This, I think, is an accusation without merit. First, the proposition that judges are a cloistered elite who do not understand the real world impact of crime is simply untrue. It is undeniable that judges, generally speaking, enjoy socio-economic privilege and do not live in the neighbourhoods most affected by violent crime. However, as the tragic events of recent times have demonstrated, criminal conduct can affect all socio-economic and geographic areas of the community.

Judges are not isolated from the reality of crime. Not only are judges members of the community, but sentencing judges have seen more of the reality of crime than most members of the community can imagine. With great respect to the media, the community and members of Parliament, it is judges who day after day have contact with people from disadvantaged social backgrounds, both offenders and victims of crime; it is judges who review gruesome exhibits; it is judges who hear evidence of violence and abuse in criminal proceedings; it is judges who read victim impact statements and see in court the grief of victims whose lives have been torn apart; it is judges who grapple with the history that many offenders have of addiction, mental illness and neglect; and it is judges who try to balance an often impossible set of competing considerations to come to a result that is appropriate according to law. To accuse the judiciary of not understanding crime simply fails to take account of these matters and is incorrect.

Interestingly, a new variant on the "out of touch" theme has emerged. One media commentator has suggested that far from being cloistered, judges have too much exposure to the realities of crime and become, in effect, immune to it. That criticism, like the one that judges are isolated from the consequences of crime, simply fails to recognise that judges do not sentence according to their emotional reactions, but according to established legislative requirements, guidelines and binding precedent, and with regard to the submissions made by the parties. Decisions are also subject to a right of appeal. The process is designed to ensure that factors personal to the judge are taken out of the equation.

10 ibid p 2.

Second, accusations that the judiciary is out of touch with the public on sentencing wrongly assume that the "public" has a homogenous view on these matters. The public who the judiciary serves is each and every member of the community, and the community does not speak with only one voice.

Third, research[11] suggests that a significant proportion of the community is misinformed about crime and sentencing, and change their views of sentencing when presented with accurate information. That misinformation exists is perhaps not surprising. It is trite but true to point out that it is only the unusual, controversial or macabre cases that the public hears about. There are hundreds, if not thousands, of other criminal cases dealt with each year before our courts that never receive publicity. This naturally skews perceptions. Further, media coverage of the cases that do garner public attention is often selective. The judicial reasons given, the submissions of the prosecution, and the many factors which a judge must have regard to in sentencing, are rarely mentioned. The sentence is often reported as though the non-parole period represents the total term of imprisonment. These are just two of many examples.

These may not be the only reasons for misinformation, but as a substantial body of research from Australia and around the world consistently indicates, the fact is the community is misinformed. Most people overestimate both the frequency of violent crime and the chance that they will become a victim. A significant section of the population believes that crime rates are rising, when in fact statistics released in late 2013 reconfirm that almost all categories of crime, including non-domestic assaults, robberies and shootings have fallen over the last five years.[12] A majority of the community also underestimates both conviction and imprisonment rates.[13]

Research from the United Kingdom also suggests that members of the community who wrongly believe that crime rates are rising tend to perceive lenient sentencing as a cause of that increase, with many citing it as a major cause.[14] While, to my knowledge, similar studies have not been conducted in Australia, this would suggest that the community sees sentencing as a "control mechanism", and perceives lenient sentences as a failure on the part of the judiciary to prevent

11 A Butler and K McFarlane (eds), *Public confidence in the NSW criminal justice system*, Monograph 2, NSW Sentencing Council, Sydney, May 2009, p 15; C Jones, D Weatherburn and K McFarlane, "Public confidence in the New South Wales criminal justice system", *Crime and Justice Bulletin*, No 118, NSW Bureau of Crime Statistics and Research (BOCSAR), August 2008, pp 5–6; D Weatherburn, E Matka and B Lind, "Crime perception and reality: public perceptions of the risk of criminal victimisation in Australia", *Crime and Justice Bulletin*, No 28, May 1996.

12 **Note:** statistics released in 2021 reconfirm that almost all categories of crime, excluding sexual assault and domestic violence related assault, fell over the last two years: see "NSW Recorded Crime Statistics quarterly update March 2021", BOCSAR, Media Release, 10 June 2021, at www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2021/mr-NSW-Recorded-Crime-Statistics-Quarterly-Update-Mar-2021.aspx, accessed 27 July 2021.

13 E Moore, "Public confidence in the New South Wales criminal justice system: 2019 update", Crime and Justice Bulletin No 227, BOCSAR, July 2021, at www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CJB/CJB227-Public-Confidence-NSW.aspx, accessed 27 July 221; Jones, Weatherburn and McFarlane, above n 11; Butler and McFarlane, above n 11, p 15.

14 Butler and McFarlane, above n 11, p 8, citing C Kershaw, S Nicholas and A Walker (eds), *Crime in England and Wales 2007/08: findings from the British Crime Survey and police recorded crime*, Home Office Statistical Bulletin, July 2008.

crime.[15] The reality is more complicated. The legislation under which judges operate requires a sentencing judge to take into account many factors beyond general deterrence, punishment and retribution, although these are all key considerations.[16]

What is telling about this misinformation is that when members of the community are provided with accurate information about the facts of a particular case and offender, they overwhelmingly support the sentences imposed, and many would impose more lenient sentences than the sentencing judge.[17] That is not to say, of course, that there is not a spectrum of legitimate and informed opinions about the appropriate punishment of crime, some of which would support greater severity than that imposed at present. What the research does suggest however, is that on many occasions, the opinions that judges are out of touch are based on misunderstandings, and that those opinions alter when the individuals holding them are presented with accurate information. Emotional responses by the community based on misinformation are sincerely held and understandable, but they cannot shape the administration of criminal justice.

The courts' obligation to victims

There is however, I believe, a subtly different although related meaning to the accusation that judges are soft on crime and out of touch with community expectations. Particularly when it comes from victims of crime or their families, it often appears to be a means of saying that the court has not done enough, in their eyes, to assuage the pain they have experienced. Victims and their families, particularly of violent crime, speak of sentencing in very personal and emotional terms; of being horrified, bewildered and hurt by the imposition of what they perceive as a lenient sentence. Such a sentence is often seen as a proverbial kick in the guts and a mark of lack of respect for the victim.

I can well understand the anguish that victims of violent crime and their families experience, particularly at the loss of a family member through a violent and unnecessary death. I also understand, as I believe do all judges, that "victims come to the criminal justice system seeking recognition and validation of what happened to them".[18] Victims rightly enough see the courts as responsible for publicly acknowledging the seriousness of what has been done to them. Some victims may want retribution; for the offender to experience something comparable to what they have suffered. Most want to know that what they have experienced will not be repeated, either by this offender or others.

15 Butler and McFarlane, above n 11, p 9.

16 See references collected in T Bathurst, "Beyond the stocks: a community approach to crime", keynote address to the Legal Aid Criminal Law Conference, 1 August 2012, Sydney, published in (2013) 11(2) *TJR* 165.

17 See discussion in J Spigelman, "Sentencing guideline judgments" (1999) 73(12) *ALJ* 876; K Warner et al, "Public judgement on sentencing: final results from the Tasmania Jury Sentencing Survey", *Trends & Issues in Crime and Criminal Justice*, No 407, Australian Institute of Criminology, Canberra, 2011.

18 J Wemmers, "Where do they belong? Giving victims a place in the criminal justice process", paper presented at the National Victims of Crime Conference, 23 September 2008, Adelaide, p 6.

In that context, the accusation that courts are ignoring the interests of victims needs to be considered carefully. As the High Court made clear in *Munda v Western Australia*,[19] there is undoubtedly an obligation to victims in sentencing. The court stated:[20]

> To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

Courts should not dismiss or ignore the validity of victims' emotional responses to crime. Nor do I believe judges currently do so. However, it is a mistake to see an excessively punitive approach as the only way courts can recognise the interests of victims. It is unfortunate that the number of years an offender will spend in custody has come to be seen, at least in some sections of the media, as the only measurement of whether the experience of victims has been acknowledged by the justice system. Not only can no sentence of imprisonment erase the psychological and physical scars of violent crime, but, I reiterate, most victims want to see a non-repetition of criminal activity and protection of the community. The length of a prison sentence, while important, is not necessarily the best way to achieve this.

In sentencing, judges must take account of a number of sentencing purposes including punishment, deterrence, denunciation, accountability, rehabilitation, protection of the community and recognition of the harm done.[21] Community protection from criminal activity flows through several of these legislative "purposes" and is a central factor in the sentencing process. However, as was stated by Howie J in *R v Zamagias*:[22]

> although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation.

That is not to say that long custodial sentences should not generally be imposed for the most serious crimes or that courts should not necessarily respond to outbreaks of particular criminal conduct. Rather, it is to recognise that sentences which focus on rehabilitation are not imposed because judges do not care about victims and their families, but because this appears to be the best way to achieve the purposes of sentencing in those cases.

Recognising and alleviating the harm done to victims is not the courts' sole obligation in criminal proceedings. Nor do judges have a discretion at large to reach a sentencing result within their own moral compass. The aggravating and mitigating factors to be taken into account

19 (2013) 249 CLR 600.
20 ibid at [54].
21 See *Crimes (Sentencing Procedure) Act 1999*, s 3A.
22 [2002] NSWCCA 17 at [32].

in sentencing are specifically provided for in the legislation. The obligation of judges is not to express their own abhorrence at a particular offender's conduct. It is to dispense justice according to law.

In sentencing, this means that the court must not only balance the overlapping and sometimes contradictory sentencing purposes to which I have just referred, but must also take into account the individual circumstances of the offender and the offence. While administering individualised justice, judges must also strive to treat like cases alike, ensuring that cases which provoke newspaper headlines are addressed in the same way as the countless others that receive no public attention and garner no outrage. This consistency is essential to ensuring equality under law and respect for the equal dignity of each person.[23]

Judges are also constrained by a complicated web of legislative and common law principles, by decisions of courts superior to them, and in the adversarial system, by the manner in which parties conduct their cases. Judges would be derelict in their duty if they ignored the parties' submissions in reaching a conclusion. Judges often comment, with good reason, that sentencing is one of the hardest things they do. None of this is about privileging an offender over a victim, or ignoring community concerns about crime. It is about fulfilling the judicial duty to dispense justice according to law.

That is why it is misconceived to say that judges are not properly performing their task simply because a number of sentences have been considered by the community, or sections of it, to be inadequate. In this context it must be remembered that there is an appeal process and the Attorney General or the Director of Public Prosecutions has the right to appeal to the Court of Criminal Appeal against any sentence imposed. In 2013, the Supreme Court sentenced 94 offenders.[24] In the 12-month period ended 30 September 2013, the District Court imposed 2,889 sentences.[25] In the same period 51 Crown appeals were lodged. Twenty-nine were allowed, 14 dismissed and eight abandoned.[26] That is hardly indicative of systematic failure by judges to apply correct sentencing principles.

The role of the judiciary in a democratic society

This, in fact, feeds into a broader point often ignored in criticisms of the judiciary. It is commonly said that judges have an obligation to serve the community. While certainly true, it is important to consider what this obligation consists of. The judiciary does not serve the community by formulating its own policy agenda, or by enshrining into law the opinions of particular sections of the community, or even the policy platform of a political party. We serve

23 G Brennan, "Courts for the people — not people's courts", Inaugural Deakin Law School Oration, 26 July 1995, Melbourne, p 3.

24 **Note:** in 2020, the Supreme Court finalised 382 cases: see Supreme Court of NSW, *Supreme Court of NSW Provisional statistics (as at 14 May 2021)*, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional statistics (as at%20 14 May 2021).pdf, accessed 28 July 2021.

25 **Note:** In 2019, the District Court finalised 2,446 sentences: see District Court of NSW, *Annual Review 2019*, p 19, at https://districtcourt.nsw.gov.au/documents/reports/2019DistrictCourtAnnualReview.pdf, accessed 28 July 2021.

26 **Note:** There were 1,325 conviction appeals lodged in 2019 and 1,426 finalisations; and 5,500 sentence appeals lodged in 2019 and 5,652 finalised.: see ibid, pp 20–21.

the community by applying and upholding the laws that have been passed by democratically elected legislatures, by determining cases based on established principle and judicial methods of reasoning, and by upholding the rule of law in an impartial and just manner. This does not mean that the judiciary should not take account of community expectations. Judges must have regard to informed public opinion — a difficult task given the breadth of views that exist in the community. Further, in many cases the legislation that the courts apply in fact represents a codification of public expectations and opinions. What it does mean, however, is that courts should not be responsive to media or community outrage in particular cases or categories of offence.

It is not part of a judge's function to react directly to political concerns or policy agendas. If that were the case, we would lose both the separation of powers and the impartiality that the rule of law demands. Imagine for a moment that we elected judges — a proposal bandied around from time to time on talkback radio. A hypothetical judge, let's call him Justice Jeffrey, then ran and was elected on the basis that in all criminal cases he would guarantee that the minimum sentence he would give would be six months longer than the previously imposed maximum. This sounds absurd to us, but I would direct you to the elections for the Supreme Court of Texas, where aspiring judges run slick political ads proclaiming their "proven conservative record" and featuring endorsements describing them as "the judicial remedy to Obamacare".[27]

To put it simply, with good reason, judges with official partisan positions would not be considered impartial. If judges were to respond to political concerns of this nature, our decisions might be popular in the immediate sense. This popularity, however, would come at the expense of community confidence that the judiciary administers the law impartially and independently, something that in the medium to long term is far more harmful to public confidence and to the rule of law than any hostility currently directed at the courts. As former Chief Justice Gleeson has pointed out, there is a difference between public confidence and day-to-day popularity.[28] It is protecting the former that is of central importance.

Now I don't mean to suggest from anything I have said so far that judges should be immune from criticism. As I stated at the outset, the administration of criminal justice is a matter of significant and legitimate concern to the community. Courts have nothing to fear, and indeed much to gain from informed, honest and balanced criticism. Nor am I saying that judges never get it wrong. However, the nature of the judicial role, in my view, entails that so long as judges are doing their work conscientiously and with integrity, criticism should be directed toward the decision or the relevant legal principle, as opposed to the judge personally.

Towards the end of 2013 we saw two contrasting situations play out in the media. First, a judge of the Supreme Court delivered a verdict that many people found unsatisfactory. This resulted in extraordinarily aggressive and vitriolic criticism being levied, not just against the decision but against the judge personally. Overwhelmingly, that criticism, which included defamatory

27 A Cohen, "Would you trust these State justices to review your case?", *The Atlantic*, 11 October 2012, at www.theatlantic.com/national/archive/2012/10/would-you-trust-these-state-justices-to-reviewyour-case/262480/, accessed 27 July 2021.

28 Gleeson, above n 5.

and threatening material, failed to consider the reasoning process that had been undertaken. By contrast, in another case shortly thereafter, another judge reached a decision that seemed to satisfy the media and public. The judge in question was then treated as some kind of folk hero. The accolades heaped on her, while by no means undeserved, were irrelevant to the proceedings in question. This personalised approach to commenting on judicial decision-making, while it may sell newspapers and advertising space, is deeply problematic.

In 2013–2014 at least three judges of the Supreme Court have received death threats, for having done no more than make a decision that was unpopular in the community.[29] Some might say that this is part and parcel of the judicial role. If so, it is a highly undesirable element of it. One assurance I can give, however, is that judges, consistent with their judicial oath, will continue to apply the law as they perceive it without fear or favour. That, I would suggest, is the true mark of judicial courage.

Most importantly however, the fundamental problem with individualised criticism is the effect it has on community confidence. It leads to a totally false appearance that judges sentence according to their individual perception and beliefs. As was said in *R v Whyte*,[30] "nothing is more corrosive of public confidence in the administration of justice than the belief that criminal sentencing is primarily determined by which judge happens to hear the case". I would add to that, that public confidence would also be undermined if the community believed that a judge's approach to sentencing depended on his or her own idiosyncratic view.

Indeed this really raises the central reason as to why the public's opinion of the judiciary matters. The community's opinion is an issue not because judges want to be liked, but rather because it is of central importance to community confidence in the administration of justice and in turn the rule of law. As former Chief Justice Brennan has put it:[31]

> The rule of law depends on and is perhaps synonymous with confidence in the courts. If we regard the law as the expression of the values of our civilization, to govern the conduct and the relationships of powerful and weak, rich and poor, government and governed, the majority and a minority, there must be an arbiter whose authority will be accepted by all parties. The law would not be effective if conformity to its precepts depended on force or the imminent threat of force. Such a situation would consume the resources of the nation if it did not first destroy the nation itself … No, the rule of law must rest on a surer foundation than force … It must rest on the common acceptance by all who are subject to the jurisdiction of the courts of the authority of the courts to determine cases and controversies.

Sadly, I think the appeal to maintaining community confidence in the judiciary is often seen as self-serving — a cry by judges to protect themselves from criticism. Let me be clear.

29 In a 2020 survey of judicial officers conducted by K O'Sullivan, J Hunter, R Kemp and P Vines, "Traumatic stress in judicial officers — prevalence and impact", at www.researchgate.net/publication/344420667_Traumatic_Stress_in_Judicial_Officers_Pre-print/link/5f74342e299bf1b53e000d94/download, accessed 27 July 2021, indicated "61% of respondents had experienced threats of violence to themselves or someone close to them". See also K O'Sullivan, "'Waiting to stab me': new research reveals the threats and daily trauma judges face in their jobs", *The Conversation*, 11 June 2021, at https://theconversation.com/waiting-to-stab-me-new-research-reveals-the-threats-and-daily-trauma-judges-face-in-their-jobs-145012, accessed 27 July 2021.

30 (2002) 55 NSWLR 252 at [190].

31 Brennan, above n 23, pp 2–3.

Community confidence in the administration of justice is not something that judges want to maintain for our personal benefit. It is something that is necessary for the functioning of the administration of justice and for the maintenance of the rule of law. Community confidence in the administration of criminal justice is critical to the willingness of victims to report crimes, to the readiness of witnesses to testify, to the peaceful acceptance of verdicts — even those which are vehemently disagreed with — and to compliance with court orders. It is for these reasons that the judiciary is anxious to preserve confidence.

Maintaining community confidence does not mean that there should be no criticism of the judicial system or judicial decisions. There will always be unpopular decisions, and it is a democratic right to comment on them. Moreover, confidence is not maintained by stifling legitimate criticism. Debate, robust scrutiny, and discussions about reform are essential to the legal system. We must not be too defensive about our faults, because it is only by acknowledging them that we can improve.[32] The law is a product of society and as society evolves, so too must the legal system. No doubt there is room for improvement today, as there has always been.

Constructive criticism does not undermine the rule of law; in fact it helps preserve it. However, unconstructive attacks on the judiciary that are based on partial and sensationalist information, and which perpetuate community misinformation about the judicial system, "do a disservice not only to the judiciary but to the community at large … for [they undermine] without adequate cause, the judiciary's trusteeship of the rule of law and … puts nothing comparable in its place".[33]

We should debate the adequacy of the legal system; but let it be informed debate. Take one topic of some controversy at present — mandatory sentencing. To the extent that such legislation is enacted then the courts will implement it. That is their duty.

However, an informed debate on the issue must go further than simply attacking sentences currently imposed by the courts, particularly if such attacks are without regard to the common law and legislative principles which underpin such sentences. There are a number of questions which must also be considered, including:

- Is the minimum penalty intended to apply generally to most offences the subject of the mandatory minimum, or is it really a minimum for the least serious cases only?
- Does the minimum apply in circumstances where the offender has pleaded guilty, or has provided assistance to the authorities?
- Will juries convict in circumstances where they know that particular penalties will be imposed regardless of the circumstances in issue?
- Will the imposition of minimum sentences be a disincentive to early guilty pleas and to offenders seeking to rehabilitate themselves, with a consequent increase in the prison population?

32 See G Davies, "Judicial reticence" (1998) 8(2) *JJA* 88 at 100.
33 Kenny, above n 3, p 12.

It is not my role to attempt to answer these questions or to join in the debate. However, these are the types of matters that should be raised and debated when discussing legal reform. Ultimately the question must be whether, regardless of the circumstances in which an offence was committed and regardless of the circumstances of the offender, a particular mandatory minimum sentence will always be justified.

In that context may I give one example of where, in my view, the debate on this issue has been misinformed. A justification for mandatory minimum sentences has been that the judiciary is not doing its job; that claim relying on statistics said to show that the average sentence for manslaughter over the period 2008 to 2012 is less than four years. There are problems with that approach on three levels. First, it begs the question of what is the job of the judiciary. I have already said something about that. Secondly, the suggestion is made without any apparent analysis of the myriad of types of offences which can fall within the crime of manslaughter, the particular facts of any case, the submissions of the parties and the many other matters a court is required to take into account. At the third level, the underlying premise is incorrect. The figure of less than four years presumably was taken from figures provided by the NSW Bureau of Crime Statistics and Research. However, those statistics merge manslaughter and driving causing death. The correct position was that in the years in question there were 176 persons sentenced for manslaughter, of which 163 were sentenced to a term of imprisonment. The average term of imprisonment was seven years and one month, and the average non-parole period four years and five months. If one looks at the middle 50% range, the head sentences range from five years and eight months to eight years, and the non-parole periods from three years and one and a half months to five years and six months.[34]

Now I am not saying that a consideration of the factors to which I have referred would necessarily change a person's views or beliefs. However, it would contribute to those views being arrived at on a properly informed basis.

Measures to improve confidence

Of course, you may well be thinking, "all well and good to lecture for 20 minutes, but achieving a sober, balanced and informed debate about law and justice is hardly an easy task". You would be right. While some members of the community gain their information about the judicial system through direct interaction with the court, most of the public's knowledge about crime

34 Judicial Commission of NSW, Judicial Information Research System (JIRS) sentencing statistics concerning manslaughter 2008–2012. Note that from 2019–2020, 58 people were sentenced to manslaughter. Of these, 56 people (or 96.6%) were sentenced to full-time imprisonment; one person received a limiting term for 10 years (not counted in the imprisonment statistics); and the other person received a Community Correction Order with supervision for 2 years. For the 56 people sentenced to imprisonment:

- the median full term of sentence was 9 years; and the median non-parole period was 5 years and 9 months (where a non-parole period was set — a non-parole period was not set in 8 cases where a s 53A aggregate sentence was imposed).
- the middle 50% range of sentences were 7 years to 10 years and 6 months for the full term; and 4 years and 6 months to 7 years and 3 months for the non-parole period.

and punishment comes through secondary information, the vast majority through television, radio and newspapers. What is required, therefore, is a shift in public discussion about crime and justice.

I recognise that the role of journalists and the media today is to report what their audiences will consider to be news, and that most of the courts' work does not fall in this category. Sensationalism sells, and I imagine that relentless media cycles do not always facilitate the careful digestion of judicial reasoning. A heart-wrenching set of circumstances, a crim "getting off" because of an out-of-touch judge, and a message of outrage are themes which make for an appealing story, and which resonate with the community's instinctive and understandable revulsion for crime.

If we are to improve community understanding of the sentencing process and the administration of criminal justice generally, then the courts must play a role in stimulating informed debate. There remains a judicial reticence to engage in public discussion, in keeping with Lord Kilmuir's old rule that "[s]o long as a judge keeps silent when off the bench, his or her reputation for wisdom and impartiality remains unassailable".[35] Thinking of some of the things that were said on the Bench in past decades, I'm not sure if that rule ever held true. Any of you who have opened a newspaper in the last few years will know that silence is certainly no longer deemed to imply wisdom.

Judicial reticence is understandable, and has much to recommend it. As Sir Anthony Mason has observed, judges are not renowned for their sense of public relations.[36] I am probably living proof of the wisdom of his comments. I do not think the judiciary should be regularly appearing on talkback radio, still less discussing individual cases or judgments. By the same token however, the days when judges could speak solely through their judgments and expect the confidence of the community are, I think, gone. If judges do not take an active role in explaining what we do and why, criticisms of the administration of justice are likely to go unanswered and thus be accepted by many as unanswerable.[37] Community confidence in the judicial system is too important to allow that to occur.

I do not pretend to have a clear solution. However, I propose two measures that I hope will facilitate better community understanding of the judiciary's work. First, in 2014 I encouraged judges to produce summaries of their judgments that give an overview of the reasoning behind a particular decision in a simple and concise fashion. Links to these summaries and to the judgments themselves were published on the court's Twitter account, which was launched in late 2013. This allows the community and media to readily access and digest judgments of interest and will further strengthen the transparency of the court.[38]

Secondly, in 2014 the court, in conjunction with the NSW Bar Association and with the support of the Law Society of NSW, hosted seminars on the process of judicial decision-making

35 Contained in a letter from Lord Chancellor Kilmuir to the Director-General of the BBC dated 12 December 1955.
36 A Mason, "Judicial independence and the separation of powers — some problems old and new" (1990) 13(2) *UNSWLJ* 173 at 181.
37 See Davies, above n 32, at 90.
38 See https://twitter.com/NSWSupCt, accessed 27 July 2021.

in criminal matters. One seminar will be for the media, one for parliamentarians, and one for community representatives, including groups working with victims and offenders. These seminars will include an explanation by judges of the principal matters that the judiciary must take into account in sentencing and will seek to answer questions and address concerns in respect of the process.

I must immediately emphasise that these seminars cannot involve a discussion of particular judgments or cases, much less the quality or performance of particular judges. However, those will be the only limitations. The judiciary is ready and committed to better explaining how we function. I sincerely hope that the media, parliamentarians and community will respond so that these seminars can stimulate discussion, and go some way toward better informing the public about the administration of criminal justice.

Conclusion

Community confidence in the judicial system is not an easy issue to address, but it is one that the judiciary cannot ignore and which is essential to the administration of justice and the rule of law. There are some things courts cannot do, but we can and should help stimulate informed discussion, explain how we operate, counter misinformation and reach out to the community. The ultimate aim of criminal law is to protect society from crime while doing justice to individuals. It is a goal I believe the public and judiciary share.

Haters gonna hate: when the public uses social media to comment critically or maliciously about judicial officers*

Dr M Bromberg† and Mr A Ekert‡

It is important that the public has confidence in the judiciary so that it will abide by its decisions. However, there are many ways to undermine the public confidence in the judiciary. A relatively new method of undermining the public confidence in the judiciary can occur when the public writes highly critical or malicious comments about the judiciary on social media. Such comments can spread on social media instantaneously to a huge number of people — this makes it unique in comparison to some of the other methods of undermining confidence in the judiciary. This article examines how the government and business deal with critical or malicious comments on social media and applies this to the judiciary. It argues that it is important that the judiciary take preventive action in this area so that they are in the best position to deal with critical or malicious comments on social media when they are posted.

Introduction

A private citizen tweeted the following about the Family Court of Australia in 2016 "@FamilyCourtAU Yep the abuser gets his privacy, while his victims are abused by this court. The court needs to be shut down".[1] The public can write similar comments about the judiciary

* This article is dedicated to Brett Osler and Professor Henry Ekert.

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1 D Healy, "When social media is used maliciously or contemptuously to denigrate, threaten or cyberstalk judicial officers or tribunal members: the issues involved, can judicial officers and tribunal members be protected, and the potential for government response", speech delivered at A Symposium: challenges of social media for courts & tribunals, 26 May 2016, Melbourne.

on social media. If they do, what impact can the comments have on the public confidence in the judiciary? What actions should be taken, if any? What considerations should be included when deciding whether to take action? This article seeks to provide some information to consider when contemplating answers to these questions.

Fair criticism of judicial officers is an important part of democracy, and useful criticism may benefit the judiciary.[2] The public may expect some people to criticise judicial officers because of the nature of their work, especially because of their role in sentencing. However, some comments that are critical or malicious regarding judicial officers can negatively impact the public confidence in the judiciary. Consequently, it is important to consider what actions should be taken when such comments are made.

This article explores the issues that arise when a member of the public makes critical or malicious comments about a judicial officer on social media.[3] First, it considers the effects such comments may have on the public confidence in the judiciary. It examines the underlying principles of the "scandalising the court" offence, a branch of contempt of court law traditionally used to safeguard the judiciary from undue criticism. Next, it examines social media moderating strategies that different non-legal sectors use and applies them to the judiciary. Finally, it considers what protections, both statutory and policy based, may be used to punish people who write malicious comments about judicial officers on social media, in addition to possibly protecting judicial officers from future harm by acting as a deterrent. This article argues that the courts should take precautionary measures in this area so that they are in the best position to deal with critical or malicious comments about the judiciary when they are posted. Critical or malicious comments about the judiciary can spread to millions of people instantaneously and without the judiciary knowing. These are characteristics of social media that make it different from existing forms of criticising the judiciary and any potential response requires fresh consideration in a 21st-century context.

This article is a modified version of a section in a paper that was prepared for "A Symposium: Challenges of Social Media for Courts & Tribunals" (Symposium). This article has expanded on what was written in the relevant chapter in the paper, added new material and modified parts of it. The authors of the paper decided to write this article due to the great interest that judicial officers, court staff and others at the Symposium demonstrated regarding this topic.

2 R Sackville, "How fragile are the courts? Freedom of speech and criticism of the judiciary" (2005) 31 *Monash University Law Review* 191 at 194.

3 For a definition of social media, see: P George et al, *Social media and the law*, 2nd ed, LexisNexis Butterworths, 2016, p 2–4; N Meyer, "Social media and the courts: innovative tools or dangerous fad? A practical guide for court administrators" (2014) 6 *International Journal for Court Administration* 1 at 3–5; *Comite Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110 [133]–[142] (Beach J); L Bartels and J Lee, "Jurors using social media in our courts: challenges and responses" (2013) 23 *JJA* 35 at 36–37.

Under attack: what is at stake when a judicial officer is criticised on social media?

The common law has long been protective of the judiciary's reputation. In 1765, Wilmot J asserted that:

> a libel upon a Court is a reflection upon the King, and telling the people that the administration of justice is in weak or corrupt hands; that the fountain of justice itself is tainted, and, consequently, that judgments, which stream out of that fountain, must be impure and contaminated.[4]

Justice Wilmot made these remarks in the context of a trial for a form of contempt of court offence known as scandalising the court. The offence prohibits making public statements regarding courts or judges that seek to impugn their integrity, impartiality or competence. Accepting that the "authority of the law rests on public confidence",[5] such comments, if broadly enough accepted, threaten to rob the judiciary of "the legitimacy necessary [for] its effective functioning as the third arm of government".[6] Notwithstanding its ancient origins, it remains an offence to scandalise an Australian court today.[7] Although no one in Australia has been convicted of scandalising the court through social media comments to date,[8] the Indian Supreme Court recently issued a contempt notice to former Supreme Court Justice Markandey Katju for making critical comments on his Facebook page. Justice Katju criticised a recent judgment in which the Supreme Court commuted an offender's death sentence to life imprisonment.[9]

Threats of physical harm aside, one of the main risks that critical or malicious comments about a judicial officer on social media (and any potential response) poses is how they affect the public confidence in the judiciary. Examining the rationale behind the offence of scandalising the court is helpful to consider what potential harm these comments might cause. As a starting point, it is helpful to determine how broadly the loss of confidence may extend.

4 *R v Almon* (1765) Wilm 243 at 270.
5 *Gallagher v Durack* (1983) 152 CLR 238 at 243.
6 D Williams, "The courts and the media: what reforms are needed and why" (1999) *University of Tasmania Law Review* 4 at 21.
7 See, eg *R v Hoser* [2001] VSC 525; *DB Mahaffy & Associates v Mahaffy* [2015] NSWSC 1959.
8 According to the research of the authors of this article in November 2016.
9 B Sinha, "Justice Katju apologises for slamming Supreme Court judges on Facebook", *Hindustan Times*, 10 December 2016 at www.hindustantimes.com/india-news/justice-katju-apologises-to-sc-for-slamming-judges-onfacebook/ story-72p0gldqxCMBh5qrCw4u5I.html accessed 28 July 2021; "SC issues contempt notice to Katju for 'scandalising judges'", *Times Now*, 11 November 2016 at www.timesnow.tv/india/video/sc-issues-contempt-notice-to-katju-for- %E2%80%98scandalising%E2%80%99-judges/51764 accessed 28 July 2021; "Soumya rape, murder case: SC issues contempt notice to Markandey Katju over his blogs", *The Indian Express*, 11 November 2016 at www.newindianexpress.com/ nation/2016/nov/11/sc-issues-contempt-notice-to-katju-for-allegedly-scandalising-court-judges-1537435.html accessed 28 July 2021. For examples of American judges who have made contentious comments on social media, see: S Jones, "Judges, friends and Facebook: the ethics of prohibition" (2011) 24 *The Georgetown Journal of Legal Ethics* 281 at 294; S Nelson and J Simek, "Feature: Attention: The perils of social media for judges" (2014) 57 *Res Gestae* 27–28; M Glowicki, "Judge Olu Stevens again removed from case", *Courier-Journal*, 12 January 2016 at www.courier-journal.com/story/news/ crime/2016/01/11/judge-againremoved-case-chief-justice/ 78645530/ accessed 28 July 2021.

Loss of confidence in the judiciary as a whole

As stated above, the classic justification for the "scandalising the court" arm of contempt law centres upon the notion of "public confidence". The argument is that unfounded attacks on the integrity of individual judicial officers erode the public confidence in the judiciary and ultimately undermine the authority and efficacy of the law.[10]

The offence has come under scrutiny in recent years, notably for being "so vague and general that it is an oppressive limitation on free speech".[11] Several academics[12] and law reform bodies[13] question the leap from malicious comment directed towards judicial officers to the total collapse of the legal system. In its 1987 report titled "Contempt", the Australian Law Reform Commission called much of the thinking in this area "pure speculation" and cautioned against pursuing the maintenance of public confidence in the courts as an "absolute good".[14] In fact, the High Court itself acknowledges that "in many cases, the good sense of the community will be a sufficient safeguard"[15] to such a breakdown. Given that the offence has been either abolished[16] or severely restricted[17] in many other common law jurisdictions with no perceivable damage to their justice systems, it is arguable that the community's general common sense is a strong safeguard that can prevent the collapse in all but the most egregious of attacks. Nevertheless, even if malicious comments do not have such a highly significant impact on the community's overall support of the judiciary, their existence may still contribute to a loss of public confidence in discrete elements of the justice system and its capacity to provide consistently fair and unbiased outcomes.

Loss of confidence in a particular court or tribunal

A malicious or critical comment on social media could possibly shake the public view of a particular court or tribunal. The potential damage occasioned by scandalising the court has been formulated more narrowly in this way before.[18] There are precedents for such a loss of confidence in a particular court in Australia's recent history. The High Court of Australia's

10 D Williams, "The courts and the media: what reforms are needed and why?" (1999) 1 *University of Technology Sydney Law Review* 13 at 21.

11 *Gallagher v Durack* (1983) 152 CLR 238 at 248 (Murphy J).

12 See, eg Sackville, above n 2, at 198; O Litaba, "Does the 'offence' of contempt by scandalising the court have a valid place in the law of modern day Australia?" (2003) 8 *Deakin Law Review* 113 at 145–146; M Pearson, "Scandalising media freedom: resurrection of an ancient contempt" (2008) 14 *Pacific Journalism Review* 64 at 75–76.

13 See, eg Law Commission, *Contempt of court: scandalising the court*, Law Commission Report No 335, 2012; Law Commission, *Contempt in modern New Zealand*, Issues Paper No 36, 2014, pp 56–64; Australian Law Reform Commission, *Contempt*, Report No 35, 1987 at [425]; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt*, Project No 93, 2003, p 116.

14 Australian Law Reform Commission, *Contempt*, Report No 35, 1987 at [425]; see also Sackville, above n 2 at 198; Litaba, above n 12, at 124–135.

15 *Gallagher v Durack* (1983) 152 CLR 238 at 243.

16 See C Dyer, "Archaic law used against critic of 'legal mafia'", *The Guardian*, 1 October 1999 at www. theguardian. com/uk/1999/oct/01/claredyer accessed 28 July 2021; Law Commission, *Contempt in modern New Zealand*, Issues Paper No 366, 2014, at [6.38]–[6.57]; cf, D Tan, "Any risk will do — the new law on scandalising contempt in Singapore" (2016) *The Law Gazette* 29.

17 Law Commission, above n 16 at [6.54]–[6.57].

18 For example, in *DB Mahaffy & Associates v Mahaffy* [2015] NSWSC 1959, Schmidt J found that "Mr Mahaffy's conduct was calculated to undermine public confidence in the District and Supreme Courts" at [48].

landmark decision *Mabo v The State of Queensland (No 2)*[19] exposed the High Court to considerable criticism from the media and the executive government of the time. Justice Kirby compiled a list of such rebukes, which include the following:[20]

> "bogus, pusillanimous and evasive," guilty of "plunging Australia into the abyss," a "pathetic, self-appointed [group of] Kings and Queens," … purveyors of "intellectual dishonesty," unaware of "its place" … "unfaithful servant[s] of the Constitution" [and] "undermin[ers of] democracy".

Similar accusations of "institutional bias"[21] were also directed towards the Refugee Review Tribunal (RRT). At their core, these accusations all alleged that RRT decision-makers did not decide the matters before them free of executive government influence.[22] Such comments might reasonably undermine the public confidence that "justice is being done",[23] sentiments that were reflected, at least, by statements produced by refugee rights activist groups at the time.[24] Although these examples involve traditional media, as opposed to social media, such criticisms could easily be replicated on social media today.[25] They illustrate the principle that critical social media comments pose a potential risk to the legitimacy of a specific court or tribunal. Although neither the High Court nor the RRT struggled to enforce their judgments even during the peak of their respective controversies, widespread reporting of their perceived bias is arguably damaging enough.

Loss of confidence in an individual judicial officer

Narrowest in scope is the risk of loss of public confidence in a particular judicial officer through questioning her or his integrity, impartiality or competence. There are instances of this phenomenon dotted throughout Australia's legal history.[26] For example, in the 1980s, the media was instrumental in creating widespread doubt over Lionel Murphy's fitness for judicial office through the publication of documents suggesting criminal wrongdoing by his Honour.[27] Although Murphy J passed away before Parliament could rule decisively on the matter, it is arguable that sufficient confidence was lost to militate against his Honour's return to the High Court.[28] More recently, a sustained media attack on Queensland Supreme Court Chief Justice Tim Carmody brought about his Honour's resignation within a year of being appointed to the court.[29] Both Carmody CJ's impartiality and competency were the subjects of frequent and harsh

19 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1.
20 M Kirby, "Attacks on judges: a universal phenomenon" (1998) 81 *Judicature* 238 at 240.
21 S Kneebone, "Is the Australian Refugee Review Tribunal 'institutionally' biased?" in F Crépeau et al (eds), *Forced migration and global processes: a view from forced migration studies*, Lexington Books, 2006, p 237.
22 ibid p 255.
23 ibid.
24 See, eg S Stephen, "Ruddock's refugee tribunal biased" *Green Left Weekly*, 28 August 2002 at www.greenleft.org. au/content/ruddocks-refugee-tribunal-biased, accessed 28 July 2021.
25 Some Australian courts have been the subject of critical or malicious comments on social media to date. For example: Healy, above n 1.
26 J Thomas, *Judicial ethics in Australia*, 3rd edn, LexisNexis, 2009, pp 21–72.
27 Australian Government, National Archives of Australia, *The Age tapes and the investigation of Lionel Murphy*, 1984.
28 Thomas, above n 26, pp 1–3.
29 See generally, R Ananian-Welsh, G Appleby and A Lynch, *The Tim Carmody affair: Australia's greatest judicial crisis*, UNSW Press, 2016.

questioning by the media, the Queensland Bar Association and fellow judicial officers.[30] Given this precedent, there is good reason to surmise that critical comments made about a judicial officer on social media (and any response by the judicial officer) could threaten their reputation among the community. Depending on the severity of the criticism, substantiated or not, such comments could impact the legitimacy of the judicial officer and the extent to which the public abides by their judgments. Consequently, it is important to take precautionary measures to prepare to deal with these comments should they occur.

This section has considered how a malicious or critical comment about a judicial officer on social media could impact the public confidence in the judiciary by considering specific examples outside of social media. An appreciation of the scope of the potential damage that a critical or malicious social media comment has on the judiciary can help a court decide:

(i) which social media comments are the most important to address, and

(ii) which judicial officers or court staff and/or which jurisdictions should be involved in considering a response.

Moderating social media accounts: lessons learnt from business and government

Although considerable literature exists regarding whether judicial officers should use social media,[31] very little thought has yet been dedicated towards responding to critical or malicious comments levelled at courts and judicial officers. Fortunately, there has been considerable literature available in this area in the corporate and government context. This section provides an overview of the common strategies that these sectors use when responding to criticism with a view to assessing how they can be useful to judicial officers.

Social media presents obvious benefits to the business world. It has the capacity to connect companies with previously unreachable customers in new and exciting ways. However, social media also poses significant threats that must be managed. At the heart of corporate social media management is the concern that, through social media, a single angry customer has "the equivalent of a soapbox and a megaphone at their disposal".[32] A failure to satisfactorily address a customer's complaint may result in a company's brand being irreparably tarnished. On the other hand, addressing a customer's grievances quickly and thoughtfully could have

30 J Robertson, "Tim Carmody accused of 'ducking the issue' over fellow judge's criticism", *The Guardian*, 30 March 2015 at www.theguardian.com/australia-news/2015/mar/30/tim-carmody-accused-of-ducking-the-issue-over-fellow-judges-criticism, accessed 29 July 2021; M Eaton, "Queensland Chief Justice Tim Carmody roundly condemned by retiring Supreme Court justice", *ABC*, 27 March 2015 at www.abc.net.au/news/2015-03-26/ queenslands-chief-justice-roundly-condemned-by-retiring-justice/6350074, accessed 29 July 2021.

31 See, eg J Gibson, "Judges, cyberspace and social media" (2015) 12(2) *TJR* 237; W Martin, "Freedom of the press and the courts", speech delivered at the Judicial Conference of Australia Colloquium 2015, 9 October 2015, Adelaide; M Krawitz, "An examination of social media's impact upon the courts in Australia", PhD (Law) Thesis, Murdoch University, 2014, pp 26–64.

32 S Sadowski, "Using social media in customer service and support" in R Wollan, N Smith and C Zhou (eds), *The social media management handbook: everything you need to know to get social media working in your business*, John Wiley & Sons, 2010, p 142.

positive consequences flowing beyond that individual customer extending to others viewing the comments online, too. Converting criticism to compliments is the focus of corporate complaint handling and the driving force behind social media moderation in these sectors.[33] Admittedly, this is very different from the courts and the judiciary — which instead seek the public confidence. Fair complaints regarding the judiciary are expected and are part of business as usual. It is unfairly critical or malicious comments that deserve consideration. Nevertheless, given the large body of knowledge regarding handling of the public social media comments by non-legal sectors, the following information can be of some help.

Methods of moderation

Central to an effective corporate social media strategy is being prepared. As a first step, an organisation should consider the extent to which it intends to moderate its social media account. This means how the organisation intends to monitor the comments on its social media account and how it responds or does not respond to comments. A cautious organisation may wish to disallow user comments entirely so that only its staff can post on its social media account. Although such an approach does not truly embrace the social aspect of social media, it may be useful to organisations with a reasonably new social media presence. Engaging this strategy temporarily would allow an organisation to develop their protocols and procedures without the risk of reputational damage occurring in the meantime.[34]

"Premoderation" is a slightly more engaging moderation strategy. In this method, all content is reviewed for suitability by the organisation prior to becoming publicly visible.[35] Such an approach allows the organisation to take time to respond to inappropriate content effectively, although arguably still negates the spontaneous and interactive nature of social media.[36] Additionally, unless the organisation has significant moderation resources at hand, there could be a considerable delay between a user posting a comment on an organisation's account and it becoming publicly visible.[37]

A "postmoderation" strategy allows user comments to be publicly visible as and when they are made. Staff then systemically review each comment and remove, amend or comment on those deemed problematic for whatever reason. This approach embraces the interactive aspect of social media, but requires organisations to respond quickly to any potentially damaging content.[38] Depending on the volume of comments received, it also requires a significant resourcing commitment to ensure problematic content is swiftly addressed.

33 T Wager, "Social media: responding to customer complaints" in R Wollan, N Smith and C Zhou (eds), *Social media management handbook*, John Wiley & Sons, 2010, p 161.
34 See, eg Loddon Shire Council, *Social media strategy*, 2013 at [7.3.1].
35 Interactive Advertising Bureau Australia, "Best practice for user comment moderation: including commentary for organisations using social media platforms", *IAB Australia*, 17 July 2013, Appendix A at https://iabaustralia.com.au/guideline/best-practice-for-user-content-moderation/, accessed 29 July 2021.
36 Department of Finance and Deregulation, Australian Government Information Management Office, *Engage: getting on with Government 2.0*, Government 2.0 Taskforce Report, 2009, p 19 at https://apo.org.au/sites/default/files/resource-files/2009-12/apo-nid19954.pdf, accessed 29 July 2021.
37 ibid.
38 Interactive Advertising Bureau Australia, above n 35, p 13.

Finally, "reactive moderation" takes place only after a complaint is made via the social media account.[39] Users may freely comment on an organisation's social media account with a review of any comment only occurring if other users flag it as necessary. This approach is the least taxing on an organisation's resources but leaves that organisation open to the risk that damaging comments may not be reported promptly, if at all.

It is worth noting that not all of the above styles of moderation are available across all social media. For example, on Twitter, there is no way to stop users from "mentioning" your account in their tweets. This means that, short of reporting that user for violating Twitter's terms of use, there is no way to stop a user's tweet that mentions an organisation from appearing publicly, even if the organisation has blocked that user.[40] Regardless of which moderation strategy is employed, the organisation should ensure that it has the appropriate record-keeping procedures to make sure that all problematic social media comments are preserved for future reference.[41]

Deciding which comments to address

Once an organisation has determined how it will moderate its social media account(s), it should decide what kinds of comments it considers are most threatening to its reputation. It is important to recognise that not all criticism is equally harmful and that responding to every such comment may be impractical or counterproductive. A useful three-step approach for businesses to identify the kinds of comments that should be addressed[42] is as follows:

1. The value of the complaining customer should be considered first, remembering that "not all customers are created equal".[43] As Wager is writing in the corporate context, value is measured in purely economic terms, the rationale being that the organisation's limited moderation resources should be allocated to its most valuable clients.
2. Risk is the second consideration. This requires examination of what the complainant is actually saying and a calculus of the potential damage stemming from the comment. For example, a complaint about a product's dangerous safety defect will usually be more threatening than a comment regarding a broken link on a company's webpage.
3. Finally, an organisation should consider the "noise level" of a complaint — that is "how far the complaint could travel via social media and how many people could listen".[44] Factors such as how prolific, popular and credible the complainant is will all be relevant to determining how much "noise" their complaint may cause.

In the government context, the NSW Ombudsman[45] has developed detailed guidelines on handling unreasonable complainant conduct. This guide identifies five major factors to consider

39 Interactive Advertising Bureau Australia, above n 35, p 13.
40 Twitter Help Center, "About replies and mentions", *Twitter, Inc.* at https://support.twitter.com/articles/14023, accessed 29 July 2021.
41 NSW Ombudsman, *Managing unreasonable conduct by a complainant workbook*, 2020, p 112 at www.ombo.nsw.gov.au/__data/assets/pdf_file/0004/3568/MUCC-2020_Workbook.pdf, accessed 4 August 2021.
42 Wager, above n 33, p 163.
43 ibid p 165.
44 ibid p 166.
45 NSW Ombudsman, above n 41, pp 110–111.

in determining whether a complaint received through social media requires corrective action. These five factors are outlined below and are accompanied by a summary of the relevant considerations:

1. **Content** Is the comment constructive criticism or is it just negative in an offensive way? Is the comment illegal or against the social media platform's terms of use? Does the comment contain inappropriately obtained personal information? Is the comment grossly misinformed or inaccurate so that it could mislead?
2. **Visibility and credibility** Is the comment accessible to a large number of people? Could the comment go viral?[46] Is the comment, although inaccurate, plausible enough that people could give it attention?
3. **Apparent purpose/objective** Is the comment sincerely made or does it appear that it was created with the intention to embarrass or humiliate its target? Does the comment incite others to engage in particular acts or omissions?
4. **Impact** Could the comment significantly damage the organisation's or a staff member's reputation? If directed towards an individual, how does the individual feel about the comment? Does the existence of the comment contribute to an unsafe or unhealthy working environment? Does the comment have the potential to affect relationships within the organisation?
5. **Context** What are the circumstances surrounding the making of the comment? Does the complainant voice a legitimate concern (even if the manner is disproportionate or unreasonable)? Is the comment made at a time when the organisation is under increased public or media scrutiny?

Of course, not all of the considerations in the two methods described above are always relevant. It is impossible to craft a definitive rubric to distinguish innocuous comments from threatening ones. However, these prompts provide a valuable starting point regarding relevant considerations when facing social media criticism. They can also be helpful to decide how to respond to the comment.

Determining how to respond

After the organisation has determined which comments it will address, it should develop guidelines about the content of any response and who should respond.[47] As to the content of responses, four basic options are:[48]

(i) mastery inactivity

(ii) deleting messages or engaging with the attacker

46 Viral means "quickly and widely spread or popularized especially by person-to-person electronic communication": *Merriam-Webster Dictionary* at www.merriam-webster.com/dictionary/viral accessed 29 July 2021.

47 Interactive Advertising Bureau Australia, above n 35, p 11.

48 D Smith, A Sutin and L Kaneff, "How should I respond to Facebook attacks?", *Managing Intellectual Property*, 27 March 2012 at www.managingip.com/Article/3002260/How-should-I-respond-to-Facebook-attacks.html, accessed 29 July 2021.

(iii) using the platform's takedown procedures, and

(iv) reaching for the heavy legal weaponry.

Different circumstances will call for a response in the form of one of these four options, and it may be helpful to decide in advance which kind of comment calls for which kind of response or combination of responses.

"Masterly inactivity" may be effective where the user's comment is trivial, ridiculous or clearly a joke. Of course, the line between "careless inactivity" and "masterly inactivity" is a fine one and picking the right approach is reliant on a thorough understanding of the nuances of social media communications. Although inaction may seem counterintuitive to trained lawyers,[49] given the fast-paced nature of social media, it can sometimes be the wisest approach. In the case of a trivial comment, the comment may be quickly forgotten as it is "superseded by new content".[50] That is, a critical comment may well be lost within a sea of positive, neutral or entirely unrelated comments within a matter of hours and cause no further damage. A comment so far-fetched that no reasonable person would believe it may not damage the organisation nor warrant a reply.[51] If a comment is a joke, the time-tested internet adage "don't feed the trolls" likely still applies.[52] Any attempt to respond to such a comment may draw more attention to it than it deserves.

When a user's comment is clearly obscene or illegal, it may be appropriate to delete that user's comments without warning or explanation (if possible) or to ask the social media to remove the comment. However, deleting a user's complaint regarding, eg a faulty or unsafe product/service (substantiated or not) may be seen as evasive or an act of censorship. Such a response risks creating even more comments from a larger pool of irate users.[53] Further, government organisations arguably have an obligation to listen and respond to complaints from users. This responsibility may come from statutory obligations to consult[54] various anti-discrimination laws regulating the body's online and offline behaviour[55] or by the operation of the basic principles of representative democracy.[56] Regardless, government organisations must be mindful that their

49 ibid.

50 ibid.

51 NSW Ombudsman, above n 41, p 111.

52 Smith, Sutin and Kaneff, above n 48. Note: An online "troll" is normally "an internet user who takes on a fake identity, which they then use to cause disruption and trigger conflict among others for their own amusement" and "[t]rolling behaviours typically include deliberately posting inflammatory comments and argumentative messages in an attempt to provoke, disrupt and upset others": E March, "Don't feed the trolls really is good advice — here's the evidence", *The Conversation*, 7 October 2016 at http://theconversation.com/dont-feed-the-trolls-really-is-good-advice-heres-the-evidence-63657, accessed 29 July 2021.

53 Smith, Sutin and Kaneff, above n 48.

54 See, eg A Howard, "Connecting with communities: how local government is using social media to engage with citizens", *ANZSOG Institute for Governance at the University of Canberra and Australian Centre of Excellence for Local Government*, August 2012, p 35 at www.howardpartners.com.au/work-in-progress/Howard_Partners_Connecting_with_Communities_Report.pdf, accessed 29 July 2021.

55 See, eg *Equal Opportunity Act 2010* (Vic); *Disability Discrimination Act 1992* (Cth); Australian Public Service Commission, "APS Values and Code of Conduct in practice", *Australian Public Service Commission*, 2016 at [1.2.18] at www.apsc.gov.au/publication/aps-values-and-code-conduct-practice, accessed 29 July 2021.

56 See generally, C Saunders, *The Constitution of Australia: a contextual analysis*, Hart Publishing, 2011, pp 109–145.

moderation processes do not appear to be discriminatory in nature or are exercised for political purposes.[57] Engaging with the commenter may be a wise step where the comment, while not obscene, malicious or illegal, has incorrect or misleading information. In such circumstances, it may be appropriate simply to respond and correct the facts, link to an accurate source and, if possible, rectify the situation.[58] Government bodies need to be cautious to ensure that their comments in reply reflect the apolitical character of their office.[59]

Lastly, the organisation will need to consider whether a public or private response is appropriate. If the comment is highly visible and contains grossly inaccurate and misleading information, a public response may be necessary to set the record straight.[60] Any such public response should be unemotional and professional in nature so it will not further inflame the situation. Indeed, the public is often more concerned about the manner of the organisation's response than the original comment.[61]

If the comment is on a social media account with minimal traffic, a private response may be more appropriate to avoid bringing further attention to it.[62] Of course, it is possible that traffic to the social media account could increase in the future. If the content is illegal or potentially defamatory, these private communications may also be used to request that the commenter take down the comment before the organisation takes further remedial action.[63] This article discusses some of these remedial actions later on.

In the case of a comment that has "gone viral" or is otherwise considered particularly damaging, elements of both public and private response strategies may be necessary.[64] This could include, for instance, a tactical public response by the organisation's social media account(s) and/or more conventional media in addition to private messages to the complainant.[65]

Transparency in comment moderation

Once an organisation develops a moderation strategy, it should be as transparent as possible in using it when operating its social media account(s). Organisations should publish their moderation guidelines in an accessible and easy way to locate on any social media account

57 ACT Government, "ACT Government social media policy guidelines", Version 1, March 2012, p 25 ; Sackville, above n 2, at 194.
58 ACT Government, above n 57, p 24.
59 See, eg Australian Public Service Commission, "APS Values and Code of Conduct in practice", *Australian Public Service Commission*, 2016 at www.apsc.gov.au/publication/aps-values-and-code-conduct-practice, accessed 29 July 2021.
60 NSW Ombudsman, above n 41, p 112.
61 ibid.
62 ibid.
63 ibid.
64 ibid.
65 ibid.

so that users know how their comments will be managed prior to posting.[66] Such an approach helps ensure that users are not surprised if the organisation deletes, amends or responds to the comment. Further, if an organisation amends a user's comment, the organisation may want to inform the user why they did so and, where appropriate, invite the user to resubmit a compliant comment.[67] This approach is particularly important in the government context where the moderation process risks appearing biased or discriminatory.

Professional moderation services

An organisation should consider whether it will be their own staff who moderate their social media account(s) or whether they use a specialist social media moderation service to do so.[68] Various products and services exist that can assist an organisation to moderate its social media presence.[69] These choices will be determined primarily by the magnitude of the expected work involved in moderating the organisation's social media account(s) and the availability of appropriately skilled employees.

Applying the lessons learnt: how should a judicial officer respond?

The previous section considered some of the common strategies that corporate and government sectors use to moderate comments on an organisation's social media account(s). The respective goals of the two sectors to engage customers and consult with the community while preserving brand reputation are evident. Although there is some common ground between a judicial officer's role and that of a corporate/government employee, there is also much difference.

The next section first considers the defining characteristics of the role of a judicial officer, stemming from professional and community expectations. It will then explore which of the strategies canvassed in the previous section are relevant to a judicial officer with a view to crafting a plan to be employed practically online.

Defining judicial values: how can social media affect them?

In discharging their professional duties, judicial officers "are entrusted, day after day, with the exercise of considerable power", the exercise of which has an enormous impact on those who

66 See ACT Government, above n 57, p 25; Queensland Government Chief Information Office, "Principles for the official use of social media networks and emerging social media", *Queensland Government Enterprise Architecture*, December 2017 at [2.2.4] at www.qgcio.qld.gov.au/documents/principles-for-the-use-of-social-media, accessed 29 July 2021; Interactive Advertising Bureau Australia, above n 35, p 11; Smith, Sutin and Kaneff, above n 48. Courts do so also, see, eg Supreme Court of Tasmania, "Social media policy", *Supreme Court of Tasmania*, at www.supremecourt.tas.gov.au/the-court/social-media-policy/, accessed 29 July 2021.

67 ACT Government Social Media Policy Guidelines, above n 57, p 25.

68 Interactive Advertising Bureau Australia, above n 35, p 11.

69 See, eg Google Alerts, Social Mention, Technocrati, TweetBeep, Boardtracker, Dialogix and The Search Monitor.

come before them.[70] For the reasons previously discussed, such power cannot safely be "reposed in anyone whose honesty, ability or personal standards are questionable".[71] It follows that the public expects judicial officers to "behave according to certain standards both in and out of court" (emphasis added).[72]

The Australasian*Guide to Judicial Conduct*[73] (Guide) is the authoritative text in the field of Australian judicial ethics. It is known as the "persuasive authority" on how a judicial officer may best meet professional and community standards in her or his daily conduct.[74] The Guide identifies three primary principles by which all such conduct should be tested:[75]

(i) impartiality

(ii) judicial independence, and

(iii) integrity in personal behaviour.

The potential threat that critical or malicious social media communications pose to each of these three principles will be briefly considered below.

At the heart of the first limb is the requirement that a judicial officer's conduct, both in and out of court, "maintains and enhances public confidence in the judge's impartiality".[76] A judicial officer must safeguard against any perception that her or his opinion is clouded by bias, a conflict of interest or prejudgment of an issue.[77] The manner in which a judicial officer responds to critical social media comments poses a particular problem, as this remarkably public act arguably serves as a kind of window into a judicial officer's mind, actual or not. For instance, a judicial officer's decision to respond to a certain kind of complaint (or complainant) but not another may create a perception of bias or prejudgment in the eyes of the public. In fact, even in the absence of a written reply, a decision to remove a comment may raise similar concerns, if not properly substantiated.

A judicial officer must not only guard against influence from her or his own personal opinions and interests but also against the perceived influence of others. Central to this requirement is the constitutional independence from the other arms of government.[78] However, similar pressures may also come from other sectors of the community, such as the media or "disgruntled parties, or special interest groups".[79] Again, social media raises a novel problem in this regard in that it potentially provides determined individuals with a very public vehicle through which to pressure a judicial officer. Further, any additional replies to a critical comment on a judicial

70 Thomas, above n 26, pp 8–9.
71 ibid.
72 ibid.
73 Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, 3rd edn (rev), 2022.
74 Thomas, above n 26, p 2.
75 The Australasian Institute of Judicial Administration Incorporated, above n 73, at [2].
76 ibid at [3].
77 ibid at [2.1], and the wealth of case law on judicial bias, eg *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [331]; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 562.
78 ibid at [2.2.1]; see further, Saunders, above n 56, pp 185–220.
79 ibid at [2.2.2].

officer's social media account made by other members of the community may appear to associate the judicial officer with that person or organisation. Comments such as these, if not properly dealt with, risk undermining the independence of the judicial officer to whom they are directed.

The third relevant consideration is the judicial officer's integrity as exemplified by their personal conduct. This is important in maintaining the public confidence that the judicial officer is capable of competently discharging the responsibilities that her or his role requires.[80] Ways in which the public may measure a judicial officer's fitness for the role include, for instance, her or his intellectual honesty, respect and observance of the law and discretion in personal and social relationships and activities.[81] Once more, the public nature of social media serves as a potential threat to a judicial officer's public standing. In particular, a judicial officer may need to ensure that the language and tone of any response to a critical comment is appropriate to a person entrusted with judicial office.

How should a judicial officer address critical social media comments?

Having now identified the guiding values of judicial office, the authors can now consider which of the strategies previously considered are appropriate for a judicial officer to employ.

Public or private account?

Although not a consideration in the corporate or government context, assuming a judicial officer operates their social media account(s) in their personal capacity, she or he may consider it wisest to have a private account. This setting restricts the amount of information about the account that is available to the general public (ie people whom the judicial officer has not actively accepted into their social network). On most social media platforms, a user may customise which content on their account is and is not publicly viewable.[82] While this option may provide some degree of protection to a judicial officer, on many social media platforms (such as Facebook and Twitter), the general public may still contact the judicial officer through the private messaging mechanism.[83] Although ostensibly private, such messages may still be captured and shared online by the public. Further, on some social media platforms (such as Twitter and Instagram), strangers may also "tag" a judicial officer in their own comments or pictures, notwithstanding that the judicial officer's account is private.[84] This would, at least superficially, associate the judicial officer with that content until the judicial officer has taken some form of corrective action.

80 ibid at [2.3].
81 ibid.
82 I Wise, "How to manage your social media privacy settings", *The University of Texas at Austin: Center For Identity*, 2017.
83 Facebook, "Send messages" at www.facebook.com/help/326534794098501/, accessed 30 July 2021; Twitter, "About Direct Messages" at https:// support.twitter.com/articles/14606. accessed 30 July 2021.
84 Instagram, "Can a person I blocked still mention me?" at https://help.instagram.com/112436292285729, accessed 30 July 2021; Twitter, "How to block accounts on Twitter" at https://support.twitter.com/articles/117063, accessed 30 July 2021.

As a further safeguard, a judicial officer may adopt a pseudonym on their social media account. This is a common tactic employed by many people who wish to limit their social media audience and protect their identity.[85] While this strategy provides an extra layer of defence to a judicial officer's online anonymity, it is not foolproof. For instance, it requires the utmost discretion from anyone who knows the judicial officer's pseudonym, in both online and offline communications, to maintain the confidentiality of that pseudonym. Using a fake name on Facebook is technically a breach of its terms that may lead to account suspension,[86] a further obstacle to a judicial officer wishing to employ this strategy.

Methods of moderation

If a judicial officer decides to make her or his social media account at least partially publicly viewable, she or he will need to determine how to moderate any public social media comments. Considering the three methods of moderation discussed above, a premoderation strategy seems most appropriate for judicial use. Such an approach, when it is available,[87] allows the judicial officer to strictly moderate which comments are publicly visible while still allowing for some sense of public online presence. Additionally, if a judicial officer considers that she or he lacks the time or resources to moderate their social media account(s) properly, they may also consider using the professional moderating services previously described.

Deciding which comments to address

If a judicial officer receives a critical comment via social media (either publicly on their page, via the private messaging function, through being "tagged" in another user's content, or through a member of the public posting a comment on another social media page, such as their own), she or he will need to determine how, if at all, to respond.

One of the first things that a judicial officer should consider doing when they learn about critical comments about them on social media is to take screenshots of the comments and ensure that they keep a copy of them.[88] A screenshot is a copy of the visible content on a computer screen. If a judicial officer takes a screenshot, they will have a copy of the comments regardless of whether the comments are deleted.[89]

85 Chayn CIC, "Do it yourself online safety" at https://chayn.gitbook.io/diy-online-safety/, accessed 30 July 2021.

86 Facebook, "What names are allowed on Facebook?" (2017) at www.facebook.com/help/112146705538576?helpref=faq_content, accessed 30 July 2021.

87 See, eg Facebook, "How do I stop people from posting on my profile on Facebook?" at www.facebook.com/help/115469971 891543/?ref=u2u, accessed 30 July 2021.

88 E Angelotti, "How to handle personal attacks on social media", *Poynter Institute*, 20 August 2013 at www.poynter.org/2013/ how-to-handle-personal-attacks-on-social-media/219452/, accessed 30 July 2021.

89 For information on how to take a screenshot, see: Microsoft Windows, "Copy the window or screen contents" at https://support.microsoft.com/en-us/topic/copy-the-window-or-screen-contents-98c41969-51e5-45e1-be36-fb9381b32bb7, accessed 30 July 2021; Apple, "Take a screenshot on Your Mac" at https://support.apple.com/en-au/HT201361, accessed 30 July 2021.

The criteria previously explored, provided by the NSW Ombudsman, provide a useful framework to decide what other action to take. Although prescriptive criteria are impossible (and unadvisable) to provide in this context,[90] a judicial officer may wish to consider the following questions when determining whether to address a social media comment:

1. **Content** Who is the target of the criticism? As previously discussed, if the complainant's comments are broad in nature and directed towards the judiciary as a whole, it may be that they do not actually pose a significant risk. Such comments may be more likely to be viewed as an irritated litigant expressing their displeasure, something that "the good sense of the community"[91] may be trusted to ignore. Conversely, if the target of the complaint is the particular judge or a court/tribunal, the potential harm may be greater, particularly where that complaint alleges plausible bias or wrongdoing. Does the comment contain illegal content (such as a threat or personal information) or is it otherwise misleading or inaccurate? Is the comment directed towards a particular matter before the judicial officer, or is it general?

2. **Visibility and credibility** Is the comment publicly visible on a judicial officer's page, or is it a private comment? Keep in mind that a screenshot of a private message may still be shared and runs the risk of going "viral", even if not responded to. Is the comment/allegation so outrageous that no reasonable person is likely to believe it?

3. **Apparent purpose/objective** Is the comment sincerely made or does it appear that it was created with the intention to embarrass or humiliate its target?

4. **Impact** Could the comment significantly damage the reputation of the judicial officer or a court?

5. **Context** Does the complainant voice a legitimate concern? Is the complainant involved with a matter that is currently (or was previously) before the judicial officer? Is the complainant a credible individual?

Admittedly, the answers to some of these questions are speculative in nature. However, some online research could make them less so. For example, a court could research the complainant. It could investigate whether the complainant appeared in the court in which they posted the comment or appeared before the judicial officer who made the comment. If the answer is "yes" to either, then it may be more likely that the complainant voiced a legitimate concern. It is important to note that if the complainant used a fake name on their social media account, instead of their real one, it may be difficult or impossible to find information about them.

A judicial officer, or a court, may not know that critical or malicious comments were written about them. They can learn about these comments by using different programs. A judicial officer or a court can create Google alerts, which will inform them when their name is mentioned

90 Thomas, above n 26, p 3.
91 *Gallagher v Durack* (1983) 152 CLR 238 at 243.

online.[92] Judicial officers can use Hootsuite's "social media monitoring" function to see what many social media platforms post about them.[93] Judicial officers can also use the program Social Mention to see what is posted about them on several social media sites.[94]

Determining how to respond

A judicial officer can either do nothing when faced with a critical or malicious comment on social media, or respond. Many people may be able to see the posts and the judicial officer's response.[95] If the judicial officer responds, this can incite further negative comments.[96] As discussed above, the four broad options can be summarised as follows:

(i) inactivity

(ii) deleting or responding to the complainant

(iii) using the social media platform's takedown mechanisms, and

(iv) employing criminal or civil mechanisms.

If a complaint relates to a matter currently or previously before the court, it is a well-established principle that a judicial officer does not comment publicly on it, even to clarify an apparent ambiguity.[97] In circumstances where such a comment is likely to occasion significant harm to the judicial officer or court, it may be appropriate for the chief justice (or comparable head of jurisdiction) to respond formally on behalf of the court.[98] This approach may be particularly important where the comment appears likely to create significant publicity.

If a social media comment instead refers to a judicial officer's personal conduct, and is likely to be publicly visible to a significantly large audience, action of some kind may be appropriate. If the comment contains an accusation about a judicial officer that is so far-fetched that it is unlikely to be believed, it may be appropriate to delete the comment (if possible) or merely ignore it. If the comment was made on the judicial officer's social media page, then the judicial

92 Angelotti, above n 88; Law Institute Victoria, "Dealing with negative feedback: how to handle it", *LIV Business Letter* at www.liv.asn.au/PDF/Practice-Resources/Social-Media/Dealing-with-negative-feedback.aspx accessed 3 August 2021.

93 A Pressault, "Online reputation management: extremely important and surprisingly easy", *Business 2 Community*, 25 June 2014 at www.business2community.com/social-media/online-reputation-management-extremely-important-surprisingly-easy-0926398, accessed 2 August 2021.

94 SocialMention at http://socialmention.com/about/, accessed 1 August 2021. For a list of additional programs that judicial officers can use to check their social media reputation, see: M O'Connor, "10 top social media monitoring & analytics tools", *Tweak Your Biz*, 18 September 2018 at http://tweakyourbiz.com/ marketing/2013/03/06/10-top-social-media-monitoring-analytics-tools/, accessed 2 August 2018.

95 "How to deal with negative comments on your brand's page", *Adweek*, 29 September 2014 at www. adweek.com/socialtimes/how-to-deal-with-negative-facebook-comments/301063, accessed 30 July 2021.

96 Angelotti, above n 88; S Dekay, "How large companies react to negative Facebook comments" (2012) 17 *Corporate Communications: An International Journal* 289 at 294.

97 The Australasian Institute of Judicial Administration Incorporated, above n 73, at [5.6.2]; Thomas, above n 26 p 46.

98 The Australasian Institute of Judicial Administration Incorporated, ibid; see also M Warren, "The Chief Justice's response to media criticism of judges", *Supreme Court of Victoria*, 7 December 2016 at www.supremecourt.vic.gov.au/news/the-chief-justices-response-to-media-criticism-of-judges, accessed 2 August 2021.

officer can remove it right away, or right after taking screenshots of the comment.[99] Even so, people may have seen the comment before it was removed and may continue to circulate the comment after its removal.

However, if the comment is not immediately implausible, it may require some form of response. The judicial officer can send a private personal message to the person who posted the comment by social media[100] or by email[101] and ask the person to remove the comment. It can be risky to contact the person who posted the comment. Such contact may cause the person who wrote the comment to write further comments or comments that are more critical and/or malicious.

The guidance previously provided can assist to decide whether such a response should be made privately and/or publicly. Of course, a judicial officer would ensure that the content of any written response adopts a manner and tone that maintains the impartiality, independence and integrity of their office. Additionally, the legal mechanisms discussed in the next section may also be appropriate for use in this circumstance.

Finally, members of the public may also physically threaten judicial officers on social media. Although this is not a new phenomenon,[102] social media offers the ability for people to post their threat to a judicial officer to an extremely large audience.[103] A judicial officer (and anyone who sees such comments) should inform the police about any physical threats immediately[104] and take screenshots of them to give to the police. Members of the public can also post "personal information" about a judicial officer on social media, such as a judicial officer's physical address, and millions of people can see it.[105]

Transparency in comment moderation

One way to ensure that a judicial officer's moderation of their social media account maintains their impartibility, independence and integrity is through publishing a comment moderation

99 "How to deal with negative comments on your brand's page", above n 95; M Pantic, "How to handle negative comments about you and your business", *Social Media Today*, 22 July 2013 at www.socialmediatoday.com/news/how-to-handle-negative-comments-about-you-and-your-business/463390/, accessed 2 August 2021.

100 Angelotti, above n 88.

101 Law Institute Victoria, above n 92.

102 The Australasian Institute of Judicial Administration Incorporated, above n 73, pp 5–6.

103 A Henson-Armstrong, "Suffering in silence: the dark side of judging in 2013" (2013) 63 *Syracuse Law Review* 253 at 267. This occurred when Peter James Jamieson allegedly threatened Tasmanian Magistrate Michael Brett on Facebook. Jamieson posted on his Facebook page a photograph of shells from a shotgun and beside it the words: "Thanks honourable Judge Brett, you've really made things so good for my family. I'll get you". See: ABC News, "Man accused of threatening to 'get' Tasmanian Magistrate in Facebook post", *ABC News* (online), 14 January 2015 at www.abc.net.au/news/2015-01-14/ man-accused-of-threatening-tasmanian-magistrate-on-social-media/6017676, accessed 3 August 2021.

104 Angelotti, above n 88.

105 Henson-Armstrong, above n 103. For example, Santo Bonacci posted the email addresses of the chief judge of the County Court of Victoria, his associate and four of his Honour's staff members on Facebook and told the public to contact them. See: "Self-styled 'astro-theologist' Santo Bonacci in contempt of court for Facebook campaign against judge", *The Age*, 7 April 2015 at www.theage.com.au/victoria/selfstyled-astrotheologist-santo-bonacci-in-contempt-of-courtfor- facebook-campaign-against-judge-20150404-1mekeb.html, accessed 3 August 2021; S Deery, "Abusive fine-dodger guilty of contempt of court after attacking judge", *The Herald Sun*, 7 April 2015 at www.heraldsun.com.au/news/law-order/ abusive-finedodger-guilty-of-contempt-of-court-after-attacking-judge/news-story/daac08b9b79d290669744092527d086f, accessed 3 August 2021.

policy on their social media account. Such a policy forewarns users about how any comments will be assessed and responded to, safeguarding against the perception that the judicial officer treated any two commenters differently.[106] This section discussed the actions that judicial officers can take when they learn of comments that are critical or malicious about them on social media. It is also important to consider whether one of these actions involves legal actions or referring to a judicial social media policy.

How best to protect judicial officers: statutory offences and judicial social media policies

A judicial officer can also use legal and non-legal safeguards in order to draw the greatest benefit from social media while minimising the potential harm to her or his public image.

Legal protections: criminal and civil mechanisms

Defamation

A judicial officer may be able to commence defamation proceedings against a person who made critical or malicious posts about them. In many respects, a judicial officer who commences such proceedings is similar to other parties who start defamation proceedings against parties who are not judicial officers. However, a judicial officer must be mindful of not appearing overly sensitive to the public perception of her or him. Too great a concern about the judicial officer's public approval may threaten the public confidence in the judicial officer's ability to act, in their judgment, "without fear or favour, affection or ill will".[107]

Further, if judicial officers commence defamation proceedings, the public may be less likely to criticise judicial officers reasonably.[108] Nevertheless, people could already have seen the posts prior to the judicial officer commencing the lawsuit,[109] so the damage to the public confidence in the judiciary may have already happened. Generally, although some judicial officers have been successful with defamation proceedings,[110] judicial officers may want to avoid this cause of action, except when the circumstances are exceptional.[111]

Criminal offences

Scandalising the court

As previously discussed, scandalising the court remains a common law offence in Australia and continues to be prosecuted to this day. Its existence may dissuade members of the public from

106 To read about how Australian Courts have dealt with this issue to date, see: M Bromberg-Krawitz, "Issues paper for a Symposium: Challenges of social media for courts and tribunals", Australasian Institute of Judicial Administration and the Judicial Conference of Australia, 26–27 May 2016, Melbourne, available at https://aija.org.au/wp-content/uploads/2017/07/Krawitz.pdf, accessed 3 August 2021.

107 Thomas, above n 26, p 10.

108 R Sackville, "How fragile are the courts? Freedom of speech and criticism of the judiciary" (2005) *Federal Judicial Scholarship* at 11. Also see A Sahore, "An awkward situation: the courts' approach to a judicial officer suing for defamation", Honours Thesis, University of Sydney Law School, 2014.

109 Angelotti, above n 88.

110 Thomas, above n 26, pp 46–48.

111 ibid, pp 46–58.

making baseless accusations about judicial officers or the judiciary as a whole. Of course, for the reasons already canvassed, this offence is vulnerable to criticism regarding its unfair stifling of legitimate public critique of the judiciary. For this reason, prosecutions under it may in fact have a net negative effect on the public confidence in the judiciary. Nonetheless, it remains a safeguard for judicial officers who find themselves the subject of malicious attacks on social media.

Criminal Code Act 1995 (Cth) and State criminal offences

A number of criminal offences may also be successfully deployed in defence of a judicial officer the subject of attacks on social media.[112]

Although this article will not consider these offences, it is important to note that various criminal avenues exist if a judicial officer determines that the police should be made aware of a particularly malicious or threatening comment.

A unique Criminal Code offence

People who make critical or malicious comments about judicial officers on social media could also face a new criminal code offence for exactly this situation.[113] This offence could help encourage the public not to take such action.

Social media takedown mechanisms

The judicial officer can report the comments to the social media site that they were posted on and ask for the posts to be taken down.[114] Twitter has a form that allows people to report abusive or harassing behaviour.[115] Twitter can then require the person to delete the comments or take other serious action.[116]

Facebook users can also report comments that breach its policies. Facebook can delete the comments and tell the person who posted them not to post them again. They can also remove the user's access to Facebook or their access to certain parts of Facebook.[117] If a judicial officer reports the comments to the social media site and asks the social media site to help, this does not guarantee that the social media site will help, nor does it guarantee that the social media site will act quickly to assist the judicial officer.

112 See further, NSW Ombudsman, above n 41, p 113.
113 G Brandis, "Social media and courts & tribunals: a view from government", speech delivered at Australasian Institute of Judicial Administration and the Judicial Conference of Australia, A Symposium: Challenges of Social Media for Courts & Tribunals, 26–27 May 2016, Melbourne.
114 Angelotti, above n 88.
115 Twitter, "Staying safe on Twitter and sensitive content", at https://help.twitter.com/en/forms/safety-and-sensitive-content/abuse, accessed 3 August 2021.
116 S Doshi, "Policy and product updates aimed at combating abuse", *Twitter*, 21 April 2015 at https://blog.twitter.com/2015/ policy-and-product-updates-aimed-at-combating-abuse, accessed 3 August 2021.
117 Facebook, "What happens when I report something to Facebook?", at www.facebook.com/help/103796063044734, accessed 3 August 2021.

Policy approach: Crafting a judicial social media policy

The legal mechanisms described above all operate against a person who has made a potentially critical or malicious comment about a judicial officer on social media. Although such legal mechanisms, if successfully deployed, provide a strong defence to judicial officers, they rely on the cooperation of several other independent actors, such as the courts and social media sites themselves. This kind of cooperation may not always be possible. Even once secured, the various actors may be difficult to coordinate and slow in response time. Further, as already discussed, these legal mechanisms may actually lower the public confidence in the judiciary by painting a particular judicial officer (or the judiciary as a whole) as reactionary and resistant to legitimate critique.

An alternative approach is the development of a judicial social media policy, much like those adopted by the corporate and government sectors referenced previously. Many such policies exist for judicial officers in other jurisdictions,[118] and such a policy could be developed and incorporated into the Guide.[119] The policy would operate simultaneously to the existing legal protections, providing a further safeguard for judicial officers. Additionally, it would empower judicial officers to consistently address problematic social media comments without the delay and coordination inherent in the legal mechanisms referenced above.

Conclusion

The beginning of this article provided a real-life example of a tweet that was critical of the Family Court of Australia. This article provides some valuable information to consider regarding what should be done in a similar situation, but it does not provide exact answers regarding the actions to take. Research that could help provide some answers, or at least additional valuable information to consider, involves giving surveys to people who see critical or malicious comments on social media about the judiciary to ask about their thoughts regarding the judiciary at that time. It also involves providing surveys to these same people again once the court takes action to learn how the court's actions regarding the critical or malicious comments impacted them.

This article considered:

(a) the offence of scandalising the court

(b) the concept of confidence in the judiciary

118 See, eg American Bar Association, "Formal Opinion 462: Judge's use of electronic social networking media", *American Bar Association*, 21 February 2013 at www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam. pdf, accessed 3 August 2021; British Columbia Workers' Compensation Appeal Tribunal, "WCAT Member Social Media and Social Networking Policy", which is Appendix 3 in Canadian Centre for Court Technology, "The use of social media by Canadian judicial officers", May 2015, at www.cacp.ca/law-amendments-committee.html?asst_id=844, accessed 3 August 2021. .

119 See generally, Australasian Institute of Judicial Administration, above n 73. It is noted that in Australia, there is the Federal Court of Australia, "Guidelines for Judges about using electronic social media", 6 December 2013, however, it does not address what judicial officers should do if a critical or malicious comment about them is posted on social media.

(c) social media moderating strategies that different non-legal sectors use and it applied them to the judiciary, and

(d) what protections, both statutory and policy based, may be used to punish people who write malicious comments about judicial officers on social media.

It advocated for courts to take a precautionary approach in this area, so that it will be easier to deal with such comments when they are known. While each critical or malicious comment about the judiciary on social media should be considered in its own right, the guiding principles that this article presented may be of benefit.

Further references on publicity and social criticism

For further references on the topics of publicity and social criticism, please see the following:

- NSW Sentencing Council, *Public confidence in the NSW criminal justice system*, Monograph 2, May 2009 at www.lawlink.nsw.gov.au/sentencingcouncil.

Stress and vicarious trauma

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Australia's first research measuring judicial stress: what does it mean for judicial officers and the courts?*

C Schrever†

This article summarises the key findings of Australia's first research measuring judicial stress and wellbeing, and discusses the implications for individual judicial officers and the courts. This report has revealed a judiciary not yet in mental health crisis, but under considerable stress.

Why the research was undertaken

In May 2019, after several years of data collection and analysis, and one year presenting the findings to the Australian and international judiciary, the first report of Australia's first research measuring judicial stress and wellbeing was published in the *Journal of Judicial Administration*.[1]

The original impetus for the research came from the former Chief Judge of the County Court of Victoria, Michael Rozenes AO QC. His Honour was aware of the large and growing body of research on the high rates of psychological ill-health within the legal profession, and was also acutely conscious of the increasingly demanding nature of judicial work within his

* Published in (2019) 31(5) *JOB* 41, updated in 2021.

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The author acknowledges the generous guidance and assistance received in the preparation of this article from her supervisors, Associate Professor Carol Hulbert (Melbourne School of Psychological Sciences) and Professor Tania Sourdin (Newcastle Law School). She thanks the Heads of the five participating jurisdictions, and the judicial officers of those courts, for their support for and participation in the project. She acknowledges also the generous support of the Judicial College of Victoria and the Australasian Institute of Judicial Administration throughout the project.

1 C Schrever, C Hulbert and T Sourdin, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" (2019) 28 *JJA* 141.

court. He had, for some years, observed senior judges choosing to leave the court when they reached the minimum, rather than the statutory, retirement age, and sensed that, for many, their decision proceeded from exhaustion, burnout, and the cumulative impact of stress on the bench. He encouraged the author to undertake research that could provide insight into the nature, prevalence, severity and sources of work-related stress among the judiciary, and provide a basis for appropriate interventions by the courts. This ultimately led to a doctoral project through the University of Melbourne (School of Psychological Sciences), in which 152 judicial officers from five Australian courts participated.

The full outcomes of the research project will be published across three long reports. The first, recently published,[2] compares judicial officers' measured levels of stress with those previously reported for the Australian legal profession and general population (the first report). The second will explore the jurisdictional and gender differences in judicial officers' stress and wellbeing levels. The third will discuss the qualitative findings regarding the sources and experiences of judicial stress arising from 60 in-depth interviews with judicial officers and discuss possible structural and systemic responses. The second and third reports are expected to be published over the forthcoming year.

Key findings of the first report

The key findings of the first report are as follows:

- On a standardised measure of "non-specific psychological distress", 52.9% of judicial officers scored in the moderate to very high ranges (compared with 32.8% of the general population).[3]
- On the World Health Organisation's "Alcohol Use Disorders Identification Test" (AUDIT),[4] 30.6% of judicial officers scored in the medium to high-risk ranges (sometimes referred to as the ranges indicating "problematic" alcohol use) — a rate similar to the Australian legal profession (32%) but considerably higher than the general population (18.8%).[5]
- Three-quarters (75.2%) of judicial officers had scores on at least one of the three burnout factors (exhaustion, cynicism, and reduced professional efficacy) that indicated some level of burnout risk — only one-quarter (24.8%) scored in the low-risk range on all three burnout factors.[6]
- The overwhelming majority (83.6%) of judicial officers reported experiencing at least one symptom of secondary traumatic stress in the week prior to completing the survey, and almost one-third (30.4%) scored in the moderate to severe ranges — the level at which formal assessment for post-traumatic stress disorder (PTSD) may be warranted.[7]

2 ibid.
3 ibid at 155.
4 J Saunders et al, "Development of the Alcohol Use Disorders Identification Test (AUDIT): WHO collaborative project on early detection of persons with harmful alcohol consumption — II" (1993) 88 *Addiction* 791.
5 C Schrever et al, above n 1, at 162.
6 ibid at 163.
7 ibid at 159–161.

- Despite this, judicial officers' reported levels of mental health concerns were comparatively low — their rates of "moderate to severe" depressive and anxious symptoms were dramatically lower (approximately one third) than those of lawyers, and slightly lower than those suggested for the general population.[8]
- In addition, 62% reported finding judicial office a little or much less stressful than their previous careers,[9] and 76% reported experiencing personal wellbeing and satisfaction related to their work most or almost all of the time.[10]

What the research means and doesn't mean

The publication of these research findings attracted some media attention, with a number of outlets, perhaps unsurprisingly, choosing to focus on the alcohol-use data.[11] In light of this, it is important to be clear on what the research means, and also what it does not mean.

First, it does not mean that there is a pervasive problem of alcoholism or alcohol dependency among Australian judicial officers. While a little over 30% of judicial officers scored in the medium to high risk (or "problematic" alcohol use) range on the AUDIT, compared with 18.8% of the general population, the great majority scored at the lower end of this range, and the most strongly endorsed items all related to the frequency and quantity of drinking, as opposed to dependent or harmful drinking.[12] A typical profile of a judicial officer scoring at the low end of the "problematic" drinking range is one who drinks no more than twice a week, but has the best part of a bottle of wine (ie six or more standard drinks) each time. There is no indication in the data that judges and magistrates engaging in "problematic drinking" are addicted or unable to control their drinking, and there is certainly no suggestion that judges are "drinking on the job". What the research does mean is that the pattern of alcohol consumption within the broader Australian legal profession (where the documented rate of "problematic" drinking is 32%)[13] extends to the Australian judiciary. Whether the use of alcohol among judicial officers and lawyers is principally to manage stress, or is simply a cultural feature of the profession, is not known, nor how this might compare to other professions like medicine and journalism. However, it is clear that the legal profession as a whole engages in more problematic drinking than the general population.

Second, the research does not mean that there is a widespread mental health problem among the Australian judiciary. Judicial officers' rates of depressive and anxious symptoms were comparable to, and in the severe ranges somewhat lower than, those suggested for the general

8 ibid at 156–157.
9 ibid at 154.
10 ibid at 153–154.
11 See eg M Johnston, "Burn-out and booze risks revealed in study of nation's judiciary", *Herald Sun*, 8 May 2019; M Pelly, "Stressed out judges turn to the drink", *Financial Review*, 7 May 2019, at www.afr.com/companies/professional-services/stressed-out-judges-turn-to-the-drink-20190506-p51kly, accessed 9 August 2021.
12 C Schrever et al, above n 1, at 163.
13 J Chan, S Poynton and J Bruce, "Lawyering stress and work culture: an Australian study" (2014) 37 *UNSW Law Journal* 1062 at 1087.

population. This puts the judiciary in distinction to the broader Australian legal profession, for which research has consistently reported alarmingly high rates of depressive and anxious symptoms — approximately three times the national average.[14] Just what drives this difference between the judiciary and the practising profession is an interesting question, and likely a combination of the age, qualities, and "goodness of fit" of those typically appointed to judicial office, as well as the differing nature of the stressors confronted on the bench.[15] However, the absence of a widespread mental health problem does not mean that there is no problem to be addressed. Most judicial officers reported elevated levels of "non-specific psychological distress", three-quarters had burnout scores indicating some level of burnout risk, and a third were candidates for PTSD assessment. Also, while rates of severe depressive and anxious symptoms were low, they were not altogether absent among the judicial officers in this study, indicating that, at any given point in time, there are likely to be a small number of judges and magistrates suffering serious psychological ill-health. Continuing to fulfil the intellectually and emotionally demanding task of judging while burdened by severe depression or anxiety must be a very difficult and isolating struggle, and one only complicated further by the public nature and visibility of the role. So, the research does not mean that there is a judicial mental health crisis, nor that there is no judicial wellbeing issue at all. What it does mean, as the author has previously noted, is that there is a simmering occupational health and safety concern among the Australian judiciary that demands attention.[16] Courts, governments, judicial education bodies, and individual judicial officers need to grapple with this reality to prevent a deterioration of judicial occupational wellbeing.

Finally, the research does not mean that there is cause for concern about the quality and integrity of judicial decisions, or any reason for a loss of public confidence in the courts. Implicit in concerns of this nature is an equation of stress with impairment, which is a common but erroneous assumption from a psychological perspective. Stress, and even distress, does not necessarily entail a difficulty or inability to function at a high level — especially when one is experienced and skilled in one's role, and supported to acknowledge the distress and seek appropriate help. There are many irreducible sources of stress in judicial work, and it is only natural that judicial officers will feel personally impacted from time to time. As the current Chief Judge of the County Court of Victoria, Justice Peter Kidd, said when questioned about the research in a recent radio interview:[17]

> Being a really good, competent, hard-working, skilful judge is not inconsistent with being distressed. Distress is sometimes inevitable and just needs to be worked upon, and a judge can be completely functional and they are … [but] they need to have the opportunity to speak to somebody about it.

So, the research does *not* suggest that judicial officers who experience distress are a liability to the court or incapable of fulfilling their judicial function. What it does suggest is that judicial

14 ibid.
15 C Schrever et al, above n 1, at 163.
16 C Schrever, "Current issues: Australia's first research measuring judicial stress and wellbeing: a preview of the findings" (2018) 92 *ALJ* 859 at 862.
17 Chief Judge Peter Kidd, interviewed by Neil Mitchell on Melbourne Radio 3AW 693 News Talk, 15 May 2019.

officers and courts need to take action to establish and maintain a culture of openly discussing the human dimension of judging, and to normalise participation in proactive counselling and debriefing to manage the inevitable periods of distress that arise in judicial work. In addition, the research suggests that judicial stress and judicial satisfaction are not mutually exclusive. Supporting judicial wellbeing is as much about fostering meaning, satisfaction and purpose, as it is about responding to stress.

In a nutshell

The first report of Australia's first research measuring judicial stress and wellbeing has revealed a judiciary not yet in mental health crisis, but under considerable stress. This research provides the basis for beginning an evidence-based conversation on judicial wellbeing in Australia. This would acknowledge the inevitability of some distress in judicial work, recognise that judicial distress is not necessarily incompatible with high level judicial performance, promote open dialogue among judicial officers about the personal challenges of their work, encourage judges and magistrates to engage proactively with professional and peer support, and foster a deepening of the sense of meaning and satisfaction that judicial officers derive from their work. In many Australian jurisdictions this kind of conversation is already well underway, and underpinning structural and systemic changes to support judicial wellbeing.

Judicial stress and judicial bullying*

The Honourable Mr M Kirby AC CMG†

Judges, magistrates and tribunal members are acknowledging the profession is subject to particular risks of stress, depression and pressure, although this has been denied in the past. Since this topic was opened up in Australia by the Honourable Michael Kirby over 25 years ago, much greater attention has been given to the topics of stress, depression and pressure in the legal profession. However some judicial officers have become part of the problem, and misuse of their power creates intolerable pressures for lawyers and others working in the law.

Judges subject to stress

A national forum on wellness in Australian legal practice is timely. The growing attention to wellness in this context is welcome. Recent editions of professional journals in Australia and overseas bear witness to the increasing attention to, and concern about, stress, depression and pressure amongst law students[1] and legal practitioners.[2] The new-found attention is commendable. It was not always so.

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† Patron of the Tristan Jepson Memorial Foundation. Former Justice of the High Court of Australia (1996–2009); President of the Court of Appeal of New South Wales (1984–1985); President of the Court of Appeal of Solomon Islands (1995–1996); Judge of the Federal Court of Australia (1983–1984); Deputy President of the Australian Conciliation and Arbitration Commission (1975–1984). Personal views.

1 W Larcombe, I Malkin and P Nicholson, "Law students' motivations, expectations and levels of psychological distress: evidence of connections" (2012) 22 *Legal Education Review* 71, at 76–79; K Sheldon and L Kreiger, "Does legal education have undermining effects on law students? Evaluation changes in motivation, values and well-being" (2004) 22 *Behavioural Sciences and the Law* 261.

The change may have something to do with the increasing numbers of women entering the legal profession. On the whole, women appear more willing to speak about these formerly unmentionable topics than men. They do not so commonly feel inhibited, as men do, in recognising that wellness is not simply the absence of debilitating depression or feelings of abject failure. It may, or may not, be significant that the participants attending the Melbourne forum were overwhelmingly women: on my count, a proportion of more than four women attendees to one man. Many male lawyers still feel that talking about stress, pressure and depression is an admission of personal inadequacy or weakness. Or that it is embarrassing or irrelevant. They are afraid that they will be seen as "sooks" or "cry-babies". This is something men, from early childhood, have been told they must never be. As Neville Wran QC once famously observed in a political context: "Balmain boys don't cry." The equivalent professional motto seems to be: "Barristers don't blub"; "Lawyers aren't lachrymose." We have to move beyond this.

One criticism of the program of the forum was that it contained no session to address the problems caused to, and by, judicial officers. They are, after all, the iconic figures of legal practice, or so they like to think. Normally, they are the symbolic leaders, and standard bearers, of the culture and traditions of the law. Members of the community, and not just lawyers, generally look up to them. They are supposed to be paragons of virtue, industry, judgment, courtesy and efficiency. So can we put judicial officers on such a high pedestal as to be completely out of account in a discussion about wellness?

Those who designed this forum appear to have thought that we could. This involves a misjudgement. Judicial officers (judges, magistrates and some tribunal members) are subject to particular risks of stress, depression and pressure. This is so, however some of them may deny that fact. Moreover, responding to the pressures exerted on them, some judicial officers themselves become part of the problem. Some are bullies. Some misuse their power and create intolerable pressures for lawyers and others working in the law. It is time that judges were added to the agenda of a national wellness forum. Particularly if they are a cause of unwellness in others, it is time for the law to find appropriate responses.

The unmentionable subject

Shortly before I moved from my office as President of the New South Wales Court of Appeal to take my seat on the High Court of Australia, I was invited to a judges' conference in Canada. Many topics were discussed. One that caught my eye was judicial stress. Because this was a topic that I had never heard discussed in Australian judicial circles, I paid close attention. I became convinced that there was more in the topic than sceptical commentators were prone

2 L Mezrani, "Feeling the pressure" (2013) *Lawyers Weekly*, 8 February, 24; L Mezrani, "Poor mental health programs failing lawyers" (2013) (Feb) *Lawyers Weekly*, 2; "Big firms' mental health façade" (2013) (Feb) *Lawyers Weekly* 3; S Quine, "Bullying 'pandemic' in law firms" (2013) (Mar) *Lawyers Weekly*, 1. See also "Executive health" (2013) (Feb) CPA Australia, *ITB* 58.

to admit. Accordingly, when I returned to Australia, I resolved to share my insights. I found that the organisers were willing to give me a platform. Yet I discovered that Australian judicial audiences were sometimes resistant.

I addressed the inaugural Judicial Orientation Program of the Judicial Commission of New South Wales on the topic.[3] I then elaborated on this talk in an address for the Australian Institute of Judicial Administration.[4] I even undertook a stressful interview on the subject, on video, that could be shown forever to magistrates and others.[5] Drawing on the Canadian material, I sought to explain the physiological and psychological features of stress in a judicial context.[6] Ever helpful, I offered ways in which a judicial officer might be able to promote self-relaxation and diminish feelings of stress when they arose in judicial life.[7]

Appointed to the High Court of Australia in 1996, I received an invitation to address the annual conference of Supreme Court and Federal Court judges, in January 1997, at their meeting in Brisbane. To them, I delivered a paper "Judicial stress — an update".[8] In it, I recounted six then recent cases in the United States of America where judges, Federal and State, had suffered "crack ups".[9]

The American cases included the Chief Justice of New York, Honourable Sol Wachtler. He had been convicted and imprisoned in 1992 for harassing his ex-lover, including threatening to kidnap her teenage daughter, demanding a ransom and mailing a condom to the girl. In the course of reading about Judge Wachtler's case, and his response to the combined effect of personal and judicial pressures, I read how Justice John Paul Stevens of the Supreme Court of the United States, as a private citizen, had visited Sol Wachtler in prison as a mark of their previous friendship. I was to remember this in 2010 when Marcus Einfeld, former judge of the Federal Court of Australia, a friend from law school days, was convicted and sentenced to imprisonment for perjury offences. I visited him in Silverwater Prison in Sydney.[10] Judges are human.

Before and after the paper I gave in January 1997, there were a number of Australian instances involving judicial officers exposed to great public stress. Confining the list to NSW, they included: Chief Magistrate Murray Farquhar; Justice Lionel Murphy; Justice David Yeldham (who committed suicide after untested allegations were made against him in State Parliament). Later were to come Justice Vince Bruce and two magistrates against whom removal proceedings were commenced following adverse reports of the Judicial Commission of NSW. Removal proceedings have also been brought against senior judges overseas, including the contested, but ultimately successful, removal of the Chief Justice of Gibraltar.[11]

3 M Kirby, "Judicial stress" (1995) 3 *TJR* 199.
4 M Kirby, "Judicial stress" (1995) 1 *ABR* 101.
5 M Kirby, "Judicial stress" (1997) 71 *ALJ* 774.
6 Panorama, August 1996, 36.
7 Kirby, above n 5, at 778.
8 ibid, at 774.
9 M Kirby, "Judicial crack-ups fracture the bench" (1996) 18 *National Law Journal (US)* 32, A1.
10 M Kirby, "The graduating class of sydney 1962: talented, lucky, unquestioning" (2012) 36 *ABR* 189 at 192.
11 *Re Chief Justice of Gibraltar* [2010] 2 LRC 450 (PC).

My paper in 1997 sought to explain how the inherent features of the judicial function were prone to occasion stress amongst office holders. The isolation and frequent loneliness of the work. The pressure of growing case-loads without commensurate increases in support, resources and salaries. The common lack of specific training, save for on-the-job observance of earlier appointees. The unavailability (available in most other senior positions) of delegation of the essential decision-making responsibility. The frequent lack of feelings, and expression, of appreciation for work conscientiously performed. The susceptibilities to mid-life pressures; emotional, sexual and physical crises. The added stress of frequent changes in the law and the need to adapt to new and unfamiliar legal doctrine and to technological innovations. The particular stresses of rural, appellate and leadership positions were all mentioned. As well, I elsewhere described the media and political attacks on the judiciary, who were usually disabled from responding. These issues constitute an added element of stress in the present world.[12] Little did I know that, in 2002, such an attack was just around the corner waiting for me.[13] My paper for the Brisbane Judges' Conference was a review of themes regularly explored in judicial conferences in North America. But I had not counted on the macho hostility, even to discussing those themes, that then prevailed in parts of the Australian judiciary.

Justice Jim Thomas of the Supreme Court of Queensland (a civilised man, later a Judge of Appeal) signalled his distaste for my temerity in raising the unmentionable subject by the title of his commentary on my paper: "Get up off the ground".[14] With an advocate's flair, he blamed his wife for the derision that, he said, talk of judicial stress would occasion in the community in the hard-nosed culture of Australia:[15]

> You lot, says my wife, are surrounded by people who jump when you say. You are used to people who bow and scrape and tell you how clever you are. You get so that you can't take it when you don't get your own way. You don't know how pampered your (sic) really are.

He regarded my paper as one that wrongly saw judges as "victims", and was "look[ing] for sympathy". I was accused of jumping on the "stress band wagon" in a way likely to "release howls of derision".[16] He charged me with failing to define "stress". Of referring to descriptions of feelings that were of nothing more than "normal reactions". And of trying to make judges join the "whingers" who, inferentially, pester social security officials and increasingly the courts themselves. Judges, he declared "need adrenalin, or pressure, to produce [their] best work".[17] Barristers were blamed for "half baked submissions". Judicial vanity was essential to provide the cure for delay in tackling reserved decisions. Money for judges' salaries was woefully inadequate. Publicity given to cases of judicial breakdown should not be emphasised

12 M Kirby, "Attacks on judges — a universal phenomenon" (1998) 73 *ALJ* 599. See also P Schulz, "Courts, the media and infotainment: a disclosure of disrespect" in Australian Institute of Judicial Administration, *Australian courts: serving democracy and its publics*, AIJA, Melbourne, 2013, p 69, at pp 72–74.

13 A Brown, *Michael Kirby: paradoxes/principles*, Federation, Sydney, 2009, p 319. The reference is to the attack without notice (later withdrawn) by Senator Bill Heffernan, based on false evidence.

14 J Thomas, "Get up off the ground" (1997) 71 *ALJ* 785.

15 ibid, 785.

16 ibid.

17 ibid at 787.

as it damaged the public's perception of the judicial institution. Untoward events had "more to do with character than stress".[18] My closing remarks, with their tribute to the advantages and nobility of the judicial calling, were condemned as inadequate "lip service".[19] Nobility, it was suggested, required a noble silence about judicial stress.

The presentation of Thomas J's paper produced waves of delight amongst the judicial audience in Brisbane that hot summer's day in 1997. In the individual comments that followed, several of the participating judges appeared to line up with Thomas J. Only Justice Jane Matthews of the Federal Court explored the particular stress that she felt was involved in sentencing convicted prisoners. And Justice Brian Cohen of the Supreme Court of New South Wales acknowledged that "stress may be something we see in others but deny in ourselves".[20]

I responded to Thomas J's paper. My reply was published alongside his.[21] I regretted the tendency amongst some judicial officers to ignore the topic, or to laugh it away:[22]

> We can keep our anxieties and concerns strictly to ourselves. We can exclude non-lawyers with insight and expertise to offer. We can react by trying to laugh the subject away. Or we can bring time-honoured judicial qualities to bear. Open-mindedness to new ideas. Honesty about newly perceived facts. Attention to people with relevant expertise and experience. Courage on our own part. Compassion and respect for fellow human beings.

The intervening 25 years, since this topic was opened up in Australia, have seen much greater attention to the topics of stress, depression and pressure in the legal profession. Whilst it is true that the pressure upon judges is different, sometimes easier to control and probably less intense in degree than that upon advocates, from whom most Australian judges are derived,[23] this does not necessarily say very much. The pressure on advocates and other lawyers, as well as on law students, is a subject of increasing concern. That pressure appears to be escalating. It risks diminishing the effectiveness, and output, of those subjected to the pressure. It has lessons for the organisation of legal work and the training and instruction of novices. If this is true of practitioners and students, it is likely to be true, to an appropriate degree, also for judges.

The passage of the intervening years has not necessarily vindicated the attention to the problem of judicial stress that I called for in 1997. It is the fate of those who provide discordant opinions in the law, as elsewhere, if they live long enough, to see some of their opinions vindicated, as some of mine will be. Occasionally, as Steve Jobs showed, it is the role of outsiders to stimulate their more orthodox and unquestioning colleagues to think fresh thoughts. In the law, this is sometimes met with derision or rejection. But occasionally the message gets through.

18 ibid at 788.
19 ibid at 789.
20 See M Kirby, "Judicial stress — a reply" (1997) 71 *ALJ* 793.
21 ibid, at 791.
22 ibid, at 792–793.
23 Justice K Handley's comment: Kirby, above n 20, at 792. A recent survey of Australian judges confirmed the perceptions of stress in judicial work but reported that this was often counterbalanced by the high satisfaction of much of the work: K Mack and S Anleu, *Judicial Workload: Time, Tasks and Work Organisation*, AIJA, Melbourne, 2012, pp 38–39. See also S Anleu and K Mack, "The work of the Australian judiciary: public and judicial attitudes" in Australian Institute of Judicial Administration, *Australian Courts: Servicing Democracy and Its Publics*, AIJA, Melbourne, 2013, p 149, at p 167.

My purpose in reviving the memories of the exchange between myself and Australian judicial colleagues in 1997, is to introduce now a second aspect of some judicial lives, namely the judicial imposition of stress on others. The fact is that judicial officers can also be the cause, and occasion, of stress. Within their courtrooms they can produce stress in judicial colleagues. From a position of power and substantial invulnerability to complaint, they can also inflict needless stress on those junior to them. In the legal profession, this means advocates, lawyers, clerks, employees, litigants, witnesses and officials who are subject to their conduct and humours.

Judges occasioning stress

The judiciary's work involves an inescapable component of stress. The circumstances of the matter may be extremely urgent, requiring frantic endeavours to deal with problems within a deadline occasioned by circumstances outside the control of the lawyers, outside the control of the client and, in part at least outside the power of the judge. Attempts to stop an urgent medical procedure,[24] or to deal with an important and novel constitutional question before it is overtaken by events,[25] or to prevent the broadcast of a program said to be highly damaging to the litigant's interests, are just a few examples.[26] In such matters, judges and lawyers are subjected to stress by the very circumstances themselves. Those circumstances demand a high degree of efficiency and effectiveness in the performance both of lawyerly and judicial functions. With that comes stress.

Moreover, some judicial activity involves inherent elements of high drama and pressure both on advocates and judges alike. No amount of sermonising about stress will entirely banish such pressure from the courtroom. Long and complex criminal trials nearing their conclusion, the final addresses to the jury and the judicial summing up, will present such circumstances. A big civil hearing with millions of dollars and people's livelihoods and reputations at stake is another. The advocates and the judge will be alive to the risks and dangers of miscarriage by decisions that they each are obliged to make *instanter*, without the benefit of lengthy contemplation. Inevitably, this produces stress.

The special leave list in the High Court of Australia is another instance where, because of the stakes, and the very short time limits for oral argument and disposition that are imposed, both the lawyers and the judges are often under great pressure. They are working in taut circumstances that demand the delivery of outcomes which, in a few minutes, may have very serious consequences both for the litigant's interests and those of the law itself.[27]

I acknowledge that such occasions test the capacity both of lawyers and of judges to act with efficiency, courtesy, restraint and appropriate mutual respect. Occasionally, the performances of each will sometimes leave something to be desired. Doubtless in my own judicial life, in such circumstances and others, I have been guilty of occasional lapses.

24 In *Re B (a Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 (CA).
25 *Cormack v Cope* (1974) 131 CLR 432.
26 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.
27 M Kirby, "Maximising special leave performance in the High Court of Australia" (2007) 30 *UNSW Law Journal* 731.

However, I did try to avoid such errors and, in particular, the sin of bullying fellow judges, lawyers and others in the law with whom I dealt. Although at school I achieved success in debating, I never forgot the anxiety produced by the combination of talents demanded of good debaters: intellect, efficiency and public performance. In debating, as in practice moots at law school, I was often trembling like a leaf and sweating profusely because of the stress that the performance imposed. Yet something drove me on to continue the attempts at public persuasion that was inherent in my later life in the courts. Something spurred me on, yet again, to approach the jaws of danger.

I have never forgotten how terrified I was before my first student moot in 1960. It was on a contract law problem before Macfarlan J, Judge of the Commercial List in the Supreme Court of New South Wales. Fortunately, he was a perfect gentleman: careful, courteous and kindly. I will never forget how grateful I was to him for encouraging me to put my propositions as well as I could without collapsing in a heap of nerves. In my earliest days of legal practice, as a young articled clerk, I saw angry judges. I saw bullies. Judges with favourites. Nasty performers. I also saw excellent judges, who had fine judicial temperaments. Amongst the good I would name Judge Theo Conybeare and Judge Colman Wall, each of them of the then Workers' Compensation Commission (NSW).[28] Amongst the terrifying judges, whom I prayed to avoid, were Justice Edward ("Dumbo") Dunphy of the Commonwealth Industrial Court, Justice Freddie ("Funnelweb") Myers of the Supreme Court of NSW,[29] and Justice J J ("Black Jack") McKeon of the Industrial Commission NSW. By and large, the legal profession gets to know judges who are seriously unsuitable to judicial office, either because of intellect, temperament or lack of judgment. In my youth, there was virtually nothing that could be done to secure redress against such judicial officers except to appeal against their orders or to resolve to try to do better, if ever a judicial appointment came one's way.

The High Court of Australia has not been exempt from unpleasant behaviour and attempted bullying. In my 1997 paper, I drew on earlier published histories to describe the "pitiless"[30] conduct of Justice Hayden Starke, Justice of the High Court between 1920–1950. Upon the appointment of Evatt and McTiernan JJ in 1930, Starke refused to have any dialogue with them or even to supply final drafts of his reasons before delivery.[31] These internal difficulties affected the collegiate operations of the High Court during this period. Justice Thomas, in his Brisbane commentary, denied that such conduct represented an example of judicial stress. He regarded the circumstances, whilst "titillating", as having "more to do with temperament than stress" or with "character".[32] Still, the judicial behaviour, as described, sounds pretty stressful to me. It would have diminished the possibility even of the minimum internal co-operation necessary

28 M Kirby, "Conybeare, AT" in J Ritchie (ed) *Australian Dictionary of Biography*, Melbourne University Press, 1993, p 13, at p 489.

29 Frederick George Myers was a Judge of the Supreme Court of New South Wales in the Equity Division, (1953–1971), known for his contra-suggestibility and having favourites.

30 This was Dixon J's word. See Anderson, "Sir Owen Dixon" (unpublished monograph) cited by K Santow, "Transition to the Bench" (1997) 71 *ALJ* 294 at 301. C Lloyd, "Not peace but a sword: the High Court under JG Latham" (1971) 11 *Adelaide Law Review* 175 at 182.

31 As Evatt J complained. C Lloyd, above n 30, at 182.

32 Thomas, above n 14, at 788.

for the operation of an appellate court.[33] Essentially, it represented an attempt by one Justice (Starke) to delegitimise the constitutional commissions of two others (Evatt and McTeirnan) and to destabilise the efforts of Latham CJ, as he endeavoured to ensure that the court, as an institution, could operate as the Constitution envisaged.

In the 1950s and 60s, as a clerk and young solicitor, I regularly witnessed the arguments of counsel before the High Court. Justice Frank Kitto, indisputably a great judge, was sharp, brusque and ill-humoured, at the expense of many of the barristers appearing before him.[34] Years later I came to know him quite well. Out of court, and especially following his judicial retirement, he was charm itself. But he struck terror in the hearts of most advocates appearing before him. Justice Taylor was not much better and he was often more brutal. At that time the High Court was a fearful place for most advocates.

Taking their cue from this practice, when the Court of Appeal of New South Wales was created in 1965, some its judges sought to out-Kitto, Kitto. Justice Athol Moffitt (later President) and Justice Ray Reynolds were much feared. Justices Kenneth Manning and Frank Hutley could be extremely sharp because of their withering comments and sustained questioning. Of course, there were exceptions to this pattern, including Justices Cyril Walsh and Kenneth Jacobs — both later appointed to the High Court. They were invariably calm, efficient and courteous. Many members of the legal profession at the time excused the misbehaviour as a "rite of passage" that those who wished to succeed as advocates in the upper echelons had to go through to "earn their stripes".

A story of the unpleasantness that existed in the NSW Court of Appeal in the early days has been told by Ian Barker QC.[35] Because Justice Athol Moffitt was my predecessor as President of the Court of Appeal of New South Wales, I came to enjoy a professional association with him. Our differing views about the law and society meant that our relationship never developed into a friendship. On my arrival in the court, I was determined to change the atmosphere. My own experience at school, as a solicitor and at the Bar had taught me that a speaker will rarely give of his or her best for the client, or the cause, or for the court, when subjected to undue pressure. Securing change was made easier by the retirement of some of the most feared of the judges. In the High Court, the retirement of Barwick CJ from the central seat led to a change in the atmosphere there. His successors, Gibbs, Mason, Brennan and Gleeson CJJ were polite and cool. I have no doubt that French CJ, whose arrival in the High Court roughly coincided with my departure, is likewise an exponent of courtesy, with due efficiency.

This is not to say that individual judges, even in my time, did not occasionally fall short of the best standards. In the Court of Appeal, Justice Roddy Meagher, although brilliant and often charming and engaging, could sometimes give advocates a very hard time and be guilty of

33 Kirby, above n 5, at 779.

34 M Kirby, "Kitto, Frank Walters" in T Blackshield, M Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, Melbourne, 2001, p 398, p 400. Kirby, above n 5, 564–565.

35 I Barker, "Judicial practice" in I Frechleton and H Selby (eds), *Appealing to the future, Michael Kirby his legacy*, LawBook Co, Sydney, 2009, Ch 22, pp 564–565.

seemingly prejudiced expostulations.[36] Occasionally, he would also fall asleep on the bench. Because I was normally presiding, I tried where appropriate, to step in to uphold my view of the court's standards. I was influenced by something I had heard at the Canadian conference which had first set my mind to thinking about issues of stress and courtroom behaviour by judges. Justice Louise Arbour, then a Judge of Appeal in Ontario, later a Justice of the Supreme Court of Canada and later still the United Nations High Commissioner for Human Rights, observed: "I do not accept prejudice or misconduct on the part of a litigant. Nor of an advocate. Nor of a judicial colleague. I always disassociate myself from it." Dissociation is easier, of course, for a judge than for an advocate. It is also easier in a collegiate court, if one is presiding.

In the New South Wales Court of Appeal, in the decade before my appointment where it had normally been Moffitt P presiding, the atmosphere was frequently, to use Ian Barker's expression, "unpleasant":[37]

> The Court of Appeal was not a happy forum for lawyers, largely because of the malign influence of Moffitt P and Justice Ray Reynolds.

In his elaboration of this assessment, Ian Barker explained how a senior and experienced barrister reacted to a situation that arose in that court. The barrister, Mr L J Priestley QC, was later himself to be appointed to be a Judge of the Court of Appeal and served 1981–2001. In a case concerning an application to remove the name of Peter Livesey from the roll of barristers, Moffitt P and Reynolds JA had earlier delivered a decision which, Mr Priestley contended, disqualified those judges from sitting in the subsequent strike off application, because of the appearance of prejudgment. As Ian Barker describes it:[38]

> The responses of Moffitt P and Reynolds JA to Priestley during argument in the application, that they disqualify themselves, was sarcastic, contemptuous and personally abusive of counsel. As observers saw it, the conduct of the two judges, particularly Moffitt P, was a disgraceful display of judicial savagery.

Fortunately, Mr Priestley had laid the ground to take the matter further. He sought, and obtained, on behalf of Mr Livesey, special leave to appeal to the High Court of Australia. In that court the bench unanimously, and in joint reasons, upheld the contention advanced by Mr Priestley. The High Court offered "due respect to the members of the Court of Appeal who saw the matter differently".[39] But they ordered that the proceedings be returned to the Court of Appeal, to be heard afresh. It was a very obvious rebuke.

36 ibid, at 567, 573. See also M Kirby, "RP Meagher and I: the best of times the worst of times" (2011) 35 *Australian Bar Review* 26 at 29–31.
37 ibid, at 566.
38 ibid, at 564–565.
39 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 297.

The change in the atmosphere of the New South Wales Court of Appeal following the retirement of Moffitt P has been mentioned by several observers. My successor as President of the Court, Justice Dennis Mahoney, observed:[40]

> In earlier times, when I was in practice at the Bar, one did not expect kindness from the Bench. That was not the custom. Those who remember their appearances before Sir Alan Taylor, Sir Frank Kitto and later before Sir Garfield Barwick will understand what I mean. The Court of Appeal, understandably perhaps, adopted a similar ethos. The Moffitt Court believed that one procured most help from the Bar by the whip rather than a kind word. Perhaps that was right.

Nevertheless, the Court of Appeal changed. Justice Mahoney went on to describe the change:[41]

> A patient courtesy in a Court is no small thing. For myself I found the Court to be a more pleasant place in which to be.

Here, then, is the quandary. Judges need to ensure that lawyers, especially advocates, in the testing circumstance of litigation, master their briefs, familiarise themselves with the applicable law, command the detail of the facts, reflect seriously on the structure and content of their arguments, obey the practice rules and help the court to reach a lawful and just conclusion. They need to test the propositions advanced by the advocates and to ask them tough questions. The judges themselves are often under considerable pressure. The circumstances are often dramatic and emotional. Judge Learned Hand remarked in the United States:[42]

> Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trial needs a firm hand as much as constant determination to give each one his due.

There is less excuse for rudeness and disrespect on appeal, where judges and counsel have the luxury of more time to scrutinise the words and conduct used in the court below. While holding the adversaries to a high standard and ensuring efficiency, there is no place for rudeness. The excuse that I have sometimes heard advanced is that appellate judges are cleverer and therefore entitled to demand brilliance from those appearing before them. However, displaying personal animosity, disrespect towards advocates or litigants or their arguments,[43] courtroom rudeness, arrogance towards advocates or colleagues, gossiping and laughing in private conversations with other judges during argument, and forgetting the litigant and the impression that such conduct makes, are all conduct that amounts to forms of bullying.

Responses to judicial bullying

Judicial bullying, in whatever form, should not be tolerated or excused on the footing that "it was ever thus". Nevertheless, at the outset, it is essential to keep the problem in perspective. Any response to instances of judicial bullying should not disproportionately inhibit the robust

40 D Mahoney, Speech on the unveiling of a portrait of Justice Michael Kirby, Supreme Court of New South Wales, 19 November 2007 (quoted in Barker, above n 35, at pp 565–566).

41 ibid.

42 *Dennis v United States* 183 F2d 201 (2d Cir 1950) cited by Martin J, Supreme Court of Queensland, "Overbearing conduct in court by judges and lawyers" unpublished, 9 February 2013 at [22]. See also in J Phillips, "Managing people in court", unpublished 9 February 2013. See also *Galea v Galea* (1990) 19 NSWLR 263 (CA) at 277–278.

43 *Ex p Corbishley; re Locke* [1967] 2 NSWR 547 (CA), per Holmes JA.

independence of, and candid speaking by, those who hold judicial office. Executive government and the media are often jealous of the independence of the judiciary and desirous of challenging it. Although there are a few serial judicial offenders in the judiciary, who are widely known in the legal profession, in my experience, the problem of judicial bullying is not widespread. Most judges are aware of the need to keep their personalities in check when they are exercising public power.

The circumstances of litigation are often highly charged. The pressure on judges themselves is great and it appears to be increasing. Occasional evidence of judicial ill-temper may simply indicate that the judge, under much provocation, has exhibited human emotions of impatience, anger at time-wasting, and distaste for poor professional performance. Above all, any system for complaints against judicial officers must be compatible with the independence enjoyed by each of them. Judges are not employees of the state or government. Statute apart,[44] they are not subject, in the performance of their judicial functions, to the chief justice or presiding officer of their court or tribunal.[45] Outsiders and some lawyers sometimes think that a chief justice or presiding judge, receiving a complaint, has power ex officio to decide the complaint and pull the alleged offender into line. Especially in the higher courts, the powers of discipline over judges are strictly limited and generally reposed elsewhere.

A number of steps might be taken to deal with the problems presented by judicial bullying:

(1) Empirical evidence is the foundation of good policy, not gossip, suspicion, hunch, or personal belief. Progress in evaluating and tackling judicial bullying effectively depends on evidence and data. Empirical evidence should be gathered by responsible institutions of the judiciary and legal profession. Instances said to amount to judicial bullying and anonymised, but authenticated, examples of judicial bullying should be collected and written up so that unacceptable judicial conduct can be illustrated and considered with actual instances in mind. Talk of judicial bullying is sometimes vague, imprecise and only dimly remembered. Virtually every judge and every barrister has a story they can tell. Transcripts will occasionally be available to verify unacceptable instances. Hard examples help to demonstrate the type of language and conduct that is unacceptable in an officeholder exercising public power. It is by such illustrations that the education of the judiciary will be improved and a body of principles derived that judicial officers, members of the legal profession, and others become familiar with, understand and accept.

(2) Judicial officers themselves should discuss the problem of judicial bullying in their conferences. Like the associated problem of stress and depression in legal practice and at law school, the topic should not be off the agenda, as it has tended to be. Uncomfortable as it may sometimes be to address the defaults of each other, it would be desirable for the matter

44 Recent legislation has enhanced the powers of chief justices or presiding members of tribunals to give directions but typically this does not relate to decision-making. See *Federal Court of Australia Act 1976* (Cth), s 15(IAA) and especially *Fair Work Act 2009* (Cth), s 582. In 2012, s 581B was added to the *Fair Work Act* empowering the President of the Fair Work Commission to deal with complaints against Members and to promulgate at code of conduct for Members.

45 *Rees v Crane* [1994] 1 LRC 57 (PC).

of bullying to be on the calendar for consideration by bodies such as the Conference of Australasian Chief Justices, the Australian Institute of Judicial Administration, the Judicial Commission of New South Wales and other bodies concerned with judicial administration and education.

(3) The Australian Bar Association and State and Territory Bar Associations, as well as the Law Council of Australia, should accept this topic as one suitable for examination by the organised legal profession. Practical solutions, including procedures and facilities of mentoring, counselling and complaint, should be explored in dialogue with senior members of the judiciary.

(4) Complaints about judicial bullying and misconduct will commonly be made to chief justices and presiding judges. They, in turn, should adopt publicly available protocols for bringing such complaints to the attention of the judges who are the subject of them, and where necessary taking them further. So far as possible, complaints about judicial conduct should be anonymised to avoid risks of retaliation against complainants, although in some cases anonymity will be impossible because the circumstances described will be remembered. Consideration should be given to counselling, support and available therapy for judicial officers, especially those who are repeatedly identified as causing a sense of bullying in litigants and members of the legal profession. Independent bodies with disciplinary authority in respect of judges should initiate, and publish, protocols for receiving complaints about judicial bullying and like misconduct. In serious and repeated cases, bullying by judicial officers should be recognised as an abuse of public office warranting commencement of proceedings for removal of the offender from judicial office, in accordance with the law.

(5) Judicial education and orientation courses should include lectures to new recruits that refer to judicial behaviour and bullying as well as to stress management and identification of any available assistance. Some Bar Associations, such as the Victorian Bar, have instituted a facility of psychological support for members of the practicing profession. This is provided in circumstances of strict privacy and confidentiality. Of course, many judges are also members of the Bar Association and thus have access to these facilities. However consideration should be given to the provision of specifically targeted therapy and advice, on a confidential footing, for members of the judiciary.

(6) Members of the legal profession should not suppress complaints about cases of bullying by judicial officers, especially serious and repeated cases. I recognise that there is a natural reluctance on the part of practitioners, to complain about the conduct of a judicial officer lest doing so might have a deleterious effect on their careers or on the interests of their client in the case at hand. Still, absence of complaint will reduce the possibility of redress and the termination of unacceptable conduct. It may permit a course of conduct to take root, to the disadvantage of later practitioners and litigants. Lawyers, and in particular members of the Bar, should include in their training polite ways of dealing with complaints about bullying or like misconduct so that the complaint can be recorded in the transcript, to be available in appropriate cases for appellate review. In many courts, oral argument (during which instances of judicial bullying will often arise) may not be recorded in the transcript. It is then the duty of lawyers to ask that particularly egregious words and actions on the part of judicial officers should be recorded in the transcript. The request can be made

politely, respectfully, but firmly. The fact of doing so may have a corrective effect, at least in cases that are subject to appeal and review. Appellate courts should, in appropriate cases, overcome a reluctance to embark upon such subjects.

(7) Senior members of the legal profession, in particular, have a responsibility to stand up to bullying. In effect, they do so on behalf of younger and more junior practitioners who may be anxious to avoid harming their careers and reputation. The actions of Bill Priestley QC in the *Livesey* case, described by Ian Barker, represents a template for what should be done. In some cases, it will be appropriate, to seek, as Mr Priestley did, to meet the judge(s) with other counsel, in private chambers so as to record the intended application. But the application should certainly be made where serious misconduct has occurred or is reasonably envisaged. In significant instances, where bullying might have affected the outcome of the case, the application should be taken on appeal or review. Appellate courts are, or should be, guardians of proper judicial standards, as the High Court proved to be in *Livesey*.

(8) Judges in collegiate courts should also accept the standard that Louise Arbour stated (above in "Judges occasioning stress"). They should not accept misconduct, discriminatory remarks or more than the most transient instances of judicial hostility and bad temper by members of the same bench. They should immediately place on record their disassociation from it. At least this will signal to litigants, who are the most important observers of judicial conduct, the exceptional and possibly unacceptable character of what has occurred. It will enhance the record.

(9) Where statutory provisions are enacted, or subordinate legislation authorised, to address misconduct warranting discipline and removal from judicial office, bullying and intimidation should be expressly included, so as to give an express foothold for complaint and appropriate action. And to support judicial education.[46]

(10) Legal and civil society organisations and community groups, medical legal academics and the media, should maintain an involvement in the problem of judicial bullying. Whilst the responses must avoid the imposition of other public forms of bullying against the judiciary, and whilst the importance of judicial tenure and independence for the effective judicial management of litigation must be recognised, this topic should be kept alive. It is not sufficient that repeat offenders are known to the cognoscenti. Sometimes their misconduct might be explained as a response to the problems of pressure and depression faced by them. As with cases of child abuse, empirical data should be gathered. It seems likely sometimes to demonstrate that abusers have themselves been abused. Sometimes they are in need of help, therapy, and guidance. But occasionally they need to find another vocation which is not one of public trust involving the exercise of the law.

Justice in our courts is human justice. Human beings are subject to the imperfections of human nature. The stress and pressure of litigation, in particular, is to some extent unavoidable.

46 United Nations, Office on Drugs and Crime, Judicial Integrity Group, *Commentary on the Bangalore Principles of Judiciary Conduct*, Vienna, 2007, 124 [187]–[188]. The author is rapporteur of the Judicial Integrity Group.

However, bullying at work in other vocations is now recognised as a serious problem. Often it gives rise to legal redress.[47] Remedies have been increasingly provided against such conduct because of the inimical consequences for the economy, for the rights of subordinates and the vulnerable, and the due operation of institutions and of those working within them. In the case of the judiciary, there are special difficulties in providing effective responses lest such responses interfere in the capacity of judges to perform their functions strongly and robustly, without fear or favour, affection or ill-will. The initiatives that I have suggested may be a beginning for a calibrated response to a largely unaddressed and unmet problem that is as old as our judicial tradition. Finding solutions to stress received and stress imparted is a challenge for the law and for the judiciary in Australia.

Those who deploy public power do so on behalf of the people and for the limited purposes and period for which the power is conferred. It is not granted to bully or intimidate or to discriminate unlawfully or misbehave or to humiliate or belittle others. As Callinan J and I said in joint reasons in *Gerlach v Clifton Bricks Pty Ltd*:[48]

> All repositories of public power in Australia ... are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer absolute power on anyone. Laws made by the Federal and State Parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this court, in accordance with the constitutional standard. Judges within the integrated judicature of the Commonwealth are answerable to appeal and to judicial review. This [means] that there are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose.

47 Bullying at work is increasingly the subject of legislation, judicial decisions, scientific scrutiny and education. See eg *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249.

48 (2002) 209 CLR 478 at [70].

Lifting the judicial veil — vicarious trauma, PTSD and the judiciary: a personal story*

Mr D Heilpern†

David Heilpern shares his challenges and insights regarding vicarious trauma, PTSD, fatigue, the inability to recognise problems and reluctance to seek help during his lecture at the 2017 Tristan Jepson Memorial Foundation Sydney Lecture. Mr Heilpern raised six key issues which need to be addressed in order to "lift the judicial veil" on the serious mental health issues affecting judicial officers: modern technology; decision fatigue; viewing emotion as bad, intellect as good; security threats; loneliness of the job and the need for more research on mental health issues and the judiciary and remedies.

Introduction

This paper is written as an adjunct to my speech at the Tristan Jepson Memorial Lecture. A speech should be fluid and entertaining. If I tried to fit all this in it would be dense and droll. There is only so much one can say in a speech, and this paper is designed to provide a more comprehensive analysis and reflection on the issue of vicarious trauma and the judiciary.

This paper is not written in my professional capacity — I do not speak for the magistracy nor do I write as a judicial officer. That is what I do for a living, not who I am, and while of course I draw on my experience in my work, similarly I am shaped by my experiences as a student of life, a father, a husband and a friend.

I do not want people to think for a moment that I am whining about the job itself. Mostly it is an extraordinary privilege with opportunity to apply justice in a manner that changes lives for the better, and it is continuously stimulating, challenging and fulfilling.

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* Speech presented at the Tristan Jepson Memorial Foundation, 25 October 2017

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This paper is not intended to be an academic exploration of vicarious trauma and PTSD and the judiciary. I am aware of excellent work being done in this field by the Judicial College of Victoria, and will add a reading list as an addendum. This paper is a personal exploration of some of the issues.

Perspectives on trauma

In July this year there was a topical Law Report titled "Is practising criminal law bad for your mental health?" on ABC Radio National. Peter McGrath SC, a vastly experienced criminal barrister, was speaking of a particularly distressing sexual assault case:

> and during the trial I can remember different stages, at one stage the officer in charge was giving evidence before the jury and just burst out crying in the witness box and couldn't go on and we had to adjourn. At another time, the judge's associate, and she was a very experienced woman who had seen a lot of trials, she was unable to come into court, we had to adjourn because she was very affected. At one point the court officer, who was a crusty old fellow who had been in so many cases and heard it all, he was … we couldn't start the call one morning and where was he, he was in the corner of the anteroom and he was just sitting on his chair and weeping and shaking his head and saying, "Those poor boys, those poor boys." And I was thinking, God, who's next?

Of course there is someone missing from his description. The judge. What was he or she feeling? How was the judge dealing with all this evidence that he or she was going to need to rule on?

Mental conditions and the judiciary

Much has been written about "Judicial Stress", including the seminal work by Michael Kirby. This is important work, however it seems to me that the term is really a euphemism for a mental disorder. Just like people used to speak of a "nervous breakdown" — as though your nerves had suddenly just stopped working due to some physical dysfunction. Now we call a nervous breakdown for what it is — a mental health crisis. Similarly, whilst the early work in this topic was useful and ground-breaking, we ought to stop talking of judicial stress, and start calling it for what it is — anxiety, panic attack, insomnia, traumatic response, depression, PTSD, substance use disorder and the like.

About one in five Australians will suffer from a mental health episode each year. One in seven Australians will suffer from depression in their lifetime, and an even greater number will suffer from an anxiety disorder. The rates are far higher amongst law students, solicitors and barristers. According to the most recent research, 33% of solicitors and 20% of barristers suffer disability and distress due to depression. They tend not to seek help and often self-medicate with alcohol. Given that judicial officers are almost exclusively drawn from the ranks of the profession, it would be a reasonable conclusion that a significant number of judicial officers suffer from debilitating mental health issues during their time on the bench.

Reflecting on the line immediately above is important. This is a fairly revolutionary statement and debunks some myths about the judiciary. Of course we are meant to be above all this, unaffected by depression, trauma, anxiety, bi-polar disorder or alcoholism. Our objectivity, or what is left of it in a post-modernist world, must remain untouched by our own fragility.

And if many will suffer from a mental health issue, then almost all the rest will suffer from the "normal" stresses and strains of life caused by death of loved ones, divorce, conflict and physical

ailment. Unsurprisingly, judicial officers did not just spring from the womb to the bench and many have backgrounds as victims of crime, witnesses to domestic violence, and experience of addiction or mental dysfunction. Judicial officers are just humans doing a job, and the sooner this becomes the accepted norm, the better the judiciary will be able to serve the community.

And of course the mental health issues and stresses and strains of life affect work life. I don't mean that we are necessarily unable to do our jobs, or even that we will do them badly, but we may do it more slowly, or hesitantly, or arrogantly or grumpily at different times due to those circumstances. This is not something to fear or turn away from — I'm sure the same is true of surgeons, airline pilots, police and politicians too.

There is a veil based on assumptions regarding judicial officers. The sooner that veil is lifted, the sooner judicial officers can admit to difficulties, access help and better serve the community. So, this paper is not primarily about helping judicial officers meander through struggles of life and work — it is the community's interest that is my focus.

My story

I wish to preface this part of the paper by paying tribute to the others in the court process who suffer direct trauma as a result of crime. First and foremost are the victims. Victims of sexual assault, domestic violence, robbery and the like suffer first-hand trauma which is tragic and deep. Seeing them bravely confront their tormentors and give evidence is a humbling experience and I pay homage to them. Second, the first responders such as the police who have to deal day in and day out with the violence, death and despair that they see often struggle with trauma and I appreciate that their experience is much more direct and immediate than from the perspective of the bench. Third, I acknowledge the trauma encountered and experienced by the legal practitioners on both sides of the adversarial system. They often live, breathe and eat their cases, striving for justice by representing the accused or crown.

I have been a Magistrate for 18 years. I do not drink, and I am a committed meditator, yoga practitioner and I took my lay Buddhist vows a decade ago. Prior to that I was a criminal lawyer and an academic. I represented those charged with child sexual assault, murder and serious domestic violence. I taught mainly criminal law and co-wrote a leading case book, that meant reading copious transcripts and judgments of a violent nature. I researched and published papers and a book on sexual assault of prisoners — primarily by interviewing victims and perpetrators. I thought I had a pretty good "distance" from my work, in the sense that whilst it occasionally upset me, it did not stay with me too often in my personal life.

About 12 years ago I was sitting in a series of cases involving child pornography in Batemans Bay. In those days, it was necessary for the court to view the pictures and videos to determine the seriousness of the charges — fortunately that is far less often today due to computer classification. As is regularly the case, the charges included thousands and sometimes tens of thousands of images and hundreds of videos. I will not re-traumatise all of us or re-victimise the victims by describing the images, except to repeat something that the Chief Magistrate wrote in the case of *Police v Power* [2007] NSWLC 1 at [36]:

> To see the pale death of innocence and trust in the eyes of so many young children is to bemoan the capacity for some members of the human race to descend into the dark and depraved side of the human condition.

I dealt with over a dozen of these cases within a couple of months. I started dreaming of these children and the torment perpetrated upon them. I would wake up in the witching hour screaming, sweating and panicked. I thought it would pass, but it did not. I was pretty scared about going to sleep, and that fear was well placed. I began thrashing around in my sleep, making it impossible for my wife to remain in bed with me for fear of getting struck. After a period of weeks of this, I sought professional help and was referred to a trauma psychologist who engaged in some talk therapy by way of de-briefing. I also informed the Chief Magistrate of my difficulties, and asked his permission to avoid such cases for a time. He was extremely sympathetic and my colleagues from Nowra and Queanbeyan carried the load for that time. The relief from the nightmares was immediate and dramatic. "Cured!" I thought.

I interpose to note that the help I received at that time was via the then newly formed Judicial Assistance Program in NSW. This program provides judicial officers and their families with confidential psychological counselling. The service was excellent then, and continues to this day.

In the intervening years, and up to the present, my involvement in judicial education increased, and I became a lead trainer of new magistrates in Australia and the Pacific. One of the sessions I ran, and still run, is on mental health, and I would use my Batemans Bay experience as a salutary lesson.

Some 10 years later I had a bad six months on my current circuit. Over all of that time, I dealt with a child sexual assault case which was later accurately described by the sentencing judge as the "worst of the worst". She sentenced the father to 48 years imprisonment, and the mother to 12 which is probably all I need to say about the horrors that were perpetrated on this poor child. I had to deal with bail applications, contested interim apprehended violence orders, committal hearings and subpoena issues all of which required reading and making determinations on the evidence. My grandchildren had been born around that time, and I think I was in, as we on the north coast of NSW would say, a "heart-opened" state. I now know that empathy is a key determinate of vicarious trauma. I now know that empathy is not a static — it fluctuates with time. I think I was particularly empathetic at that time.

During this period the ice problem was escalating in my area, and there were four violent incidents inside the court, including a young addicted man who jumped out of the dock, fought his way out of the courtroom and jumped over the balcony at the front, breaking his spine. I dealt with two juveniles from the far west of NSW who, having been bailed, that very night held a toddler at knife point while they raped his mother, a nurse. And I dealt with another horrible case of child pornography where I had to watch a video which involved binding, gagging, suspending upside down and violating a conscious two year old. That week, a friend died in a freak surfing accident and at the funeral I was very messy. I was very nervous for my own and my family's safety. I now see this as hyper-vigilance. I found making hard decisions in court really painful. Actually physically painful — my head would hurt (just like Winnie the Pooh) when trying to decide whether to imprison someone, or refuse them bail, or admit evidence. A good night's sleep had become a distant memory. I would wake myself up screaming. My family and friends had been concerned about me for some time. They were encouraging me to take some time off work and to seek help. I stubbornly refused.

In retrospect of course this stubbornness was completely unreasonable. I would like to try to explain it though without excusing it. Firstly, my reaction seemed so pathetic in comparison to

the victims. I kept thinking what a wuss I was. I saw victims work their way out of psychiatric care and through university with flying colours, the calm determination of domestic violence victims and the shaking voices of police officers in coronial matters and I was thinking that my reactions were just so much "weak little me me me". Second-hand trauma just seemed so, well, second-hand. Secondly, up to that point, in my entire working life I had rarely had a single sick day. This was a question of pride and I saw it as part of my reputation as a reliable, dependable rural magistrate. After all, if the magistrate gets sick at short notice literally hundreds can be inconvenienced, hearings that have been waiting with defendants in custody and witnesses from interstate may have to wait another six months. I think that one of the symptoms of trauma is catastrophisation, and another is an inflated sense of irreplaceability. Third, there were the usual reasons people don't want to admit to mental fragility, especially men.

After probably three months of bleakness I took the "advice" of my GP and took a couple of weeks off. Advice is in inverted commas because she was utterly insistant. I wrote a letter to the Deputy Chief Magistrate responsible for leave, and spilt the beans on my state of mind. She was a friend and colleague of many years standing and to this day I cannot believe how hard this letter was to write. It was achingly difficult, and I can honestly say it was the hardest letter I have written in my life. Crazy but true.

Being a practitioner of Buddhism I went on retreat with a long-term teacher at Chenrezig on the Sunshine Coast. This was an ice breaker and over the period of the next few months I progressively improved. I do not wish to be proscriptive on treatment, as I'm sure different processes work for different people. I started with talk-based therapy (good, but sometimes re-traumatising), tried medication (a nice mental holiday, but didn't last) and then EMDR (Eye Movement Desensitisation Reprocessing) which was brilliant. If someone had once told me that wiggling fingers in front of eyes could actually work I would have laughed out loud. I do not mean to belittle EMDR. It has truly been a wonderfully successful treatment for me. I did nine sessions with a terrifically skilled psychologist, and from the outset felt a lifting of anguish.

During this time support of my colleagues and the Chief and Deputy Chief Magistrates was magnificent. Calls, emails, check-ins were almost but not quite overwhelming. I am fortunate indeed that the NSW bench is collegiate and supportive. This is no accidental development. As the Chief Magistrate has often commented — the strength of the bench, in the end, comes down to the health of the people who sit on it.

Apart from the two weeks at Chenrezig and normal leave I have been back at work while getting better. I approach my ability to cope with traumatic cases with a mixture of confidence and trepidation. Did it affect my ability to competently do my job during my darkest days? It is difficult to tell. Certainly, there was no rash of appeals from my decisions or criticisms by higher courts. There were no complaints to the Judicial Commission. I probably consulted more with my colleagues on harder cases to check I was on the right path, and perhaps I was gruffer than usual with lawyers who I perceived as incompetent or worse.

I now view my mind as a big sponge when dealing with traumatic cases. It sucks up some of that trauma vicariously, and I am watchful to ensure that the sponge does not get too full. I would not hesitate to seek help should the sponge feel close to full, and I am certainly better placed to watch for the signs given my experience.

It is certainly not my intention to become some sort of poster boy for vicarious trauma or PTSD and the judiciary. Nor can I remain silent. I am convinced that it is time to lift the veil for the benefit of the judiciary, but also for the system of justice itself. The community is best served by recognising and acknowledging this issue, rather than hiding it.

Random reflections

Having given this some issue some thought over the last few years it seems that there are some issues that require addressing.

Technology

Obviously, the key causation issue is exposure to trauma. For country magistrates the sheer volume of traumatic work is hard for those outside the criminal justice system to comprehend. We are also coroners, and I will often spend my lunch time running through gruesome evidence and reading suicide notes. Responses to trauma for judicial officers are often cumulative and exponential.

Modern technology has made the trauma much more "in your face". I can read a violent scene in a book and be unaffected, but a movie is far more challenging. Real violence is now captured on CCTV, smart phones, in-car-videos and DVEC's. When I started in this job, some form of graphic video or photographic evidence was a rarity. Now there are few cases without it. I have put in place protocols to protect myself and my staff as much as possible. Our coronial files have the on-scene photographs in a sealed envelope. The reality is that accessing them is rarely necessary. I resist observing child pornography videos, and having them played in open court is a very last resort. Similarly, once tendered, photographs of wounds are sealed to avoid accidental exposure.

The intimacy of the decision-maker

In our court there is no jury, and so we alone must determine guilt or innocence, largely based on the evidence of the victim and the defendant. That means we have to assess the truthfulness of the witnesses very carefully. This involves, to some extent, "getting inside the head" of both. Often that is a very frightening place. Did the victim really get touched like that? Did the defendant really believe the victim was consenting? Is the inconsistency of the victim's first complaint and evidence today suggestive of fabrication? Is a person of such fine character really likely to have done such an abhorrent thing?

These are tough questions to answer, and for a conscientious judicial officer requires a determined focus and concentration. My hypothesis is that this level of absorption makes vicarious trauma unsurprising. We cannot just listen dispassionately to the evidence; we have to digest and ruminate on each morsel and literally judge the people before us. This is a level of intimacy, for want of a better word that perhaps fills the sponge more rapidly than one would expect.

Decision fatigue

The relationship between decision fatigue and vicarious trauma is, as far as I can tell, completely unresearched. However, in my view there is a fair chance that each exponentially affects the

other. In the Local Court, on my current circuit I have four list days per week. Most of those involve in excess of 100 cases. On average I will have over 15 people in custody, and deal with around eight bail applications every list day. I will have 15–20 coronial matters on the boil inevitably involving gore and grief. Some days I will come home and be asked some innocuous question involving choice — what would you like to eat for example — and I will respond that if I have to make one more decision I will actually just dissolve or burst. This pressure, felt at all levels of the judiciary to some extent or other, is I suggest poisonous to maintaining a vicarious trauma shield.

Emotion bad/intellect good[1]

Throughout our education, our practice and our role as a judicial officer we are taught to supress our emotions in a quest for apparent objectivity. It is perhaps time to recognise that the expression of emotion is not the opposite of administering justice. I have laughed on the bench, and I have teared up on the bench. This is neither good nor bad. It just is, and part of recognising that judicial officers are humans not automatons. I have learnt that supressing emotion every day is a recipe for mental health fragility.

Statutory barriers to disclosure

One great fear of Judicial Officers is that if they have a mental health issue of some sort or other they could lose their appointment. In New South Wales, there is a process established under Pt 6A of the *Judicial Officers Act 1986* which indeed could lead to this result. In essence, pursuant to s 39G(1), the Conduct Division must assess if the judicial officer is:

> physically or mentally unfit to exercise efficiently the functions of a judicial office

If so, the Conduct Division is to present a report to the Governor. This in summary means that there is a parliamentary vote of both Houses to determine dismissal. In reality, those with mental health issues have nothing to fear if my experience is anything to go by. I am aware of others of my colleagues who have suffered mental health issues, and returned to work after months without any suggestion of referral to the Judicial Commission.

Community acceptance

In NSW, two magistrates in the last decade survived a parliamentary vote after the Conduct Division referred the matters for misconduct in office. Both magistrates made references to mental health issues in their address to parliament. One had undiagnosed bi-polar disorder, and the other explained her conduct in part by reference to a change in her depression medication. I have carefully reviewed the media surrounding these referrals. The commentary and discussions showed a degree of acceptance of their mental conditions, and there was no outcry at the decision to permit them to continue on as magistrates despite this. In my view, this is indicative

1 I am grateful to Justice Jennifer Coate for this heading.

of a level of acceptance that judicial officers are indeed mere mortals, and that even those with significant mental health conditions ought be able to continue their work as judicial officers after being properly treated.

In Victoria, the Judicial College has established its Judicial Wellbeing program and associated research, which frankly and controversially addresses issues relating to judicial officers and mental health. In 2012, Justice Marshall of the Federal Court of Australia publically acknowledged his personal struggle with depression, again with little fanfare or controversy.

Politicians have long since broken through perceived barriers with John Brogden, Andrew Robb, Scott Ludlam and Geoff Gallop all disclosing mental health issues with a high degree of bipartisan acceptance.

Security

Security threats are inherently traumatic experiences, and like many judicial officers I have had a significant number over the years. I had a makeshift bomb put on a gas tank at a court related to a family court matter, the KKK graffiti my house, specific death threats that resulted in 24-hour surveillance and presently there is a person in custody charged with allegations relating to a contract killing. These threats pose a real danger to the mental health of judicial officers for obvious reasons, and it is difficult to separate hyper-vigilance from realistic precautions at times.

Loneliness of the job

I have worked in both the city and the country, and the job can feel exceptionally lonely despite the collegiate nature of the bench. There are real limits on your social life, and in particular the mates and friends from the legal profession are likely to give you some distance. Many judicial officers work in single courts and are away from loved ones for days or weeks at a time. There is little opportunity for the kind of informal talk therapy or debriefing that can empty the sponge in that scenario.

In discussing the tragic fall from grace of former Attorney General and Supreme Court Justice Jeff Shaw QC, then Chief Justice James Spigelman wrote:

> There is a loneliness about it … and that's what really got to Jeff. He started drinking alone. It was a huge personal tragedy and I actually attribute it to the loneliness of being a judge. He had a predilection and the loneliness of the job tilted him into this world that he couldn't escape from

The need for research

Clearly there needs to be more research into mental health issues and the judiciary. There has been some limited and now out-dated research on vicarious trauma and PTSD in judges in the United States.

In the first study in 2003, 105 Family and Juvenile Court judges from across the USA were surveyed. The majority of judges (63%) reported one or more symptoms of work related vicarious trauma. Most at risk were female judges, and those of seven or more years of experience. In the second study in 2009, nine judges underwent detailed assessment and the researchers found that all were at risk of secondary trauma and most displayed symptoms. A similar result was found in Immigration Judges.

Similar research obviously needs to be undertaken in Australia. Particular focus could be on the following issues:

- What are the current rates of vicarious trauma/PTSD in Australian judicial officers? I see no reason why it would be any lower than in the USA.
- When does the issue become more acute? After 5–10 years on the bench? The research would suggest that this would be likely.
- Is there a relationship between judicial officers sitting alone and in country courts and increased levels of PTSD. I suspect so. My father sits on the Mental Health Review Tribunal and he often comments on the joy of having tribunal members to bounce issues off. In England, there are usually two or three Magistrates making decisions. Comparative research would be useful.
- What percentage of disciplinary matters involving judicial officers have an underlying mental health issue. For lawyers it is reportedly 80%.
- Is there evidence to support the hypothesis that an annual "mental health" check-up for judicial officers would be of assistance?
- Does opting out of certain types of cases for a time help? It certainly did for me.
- What are the most effective methods of increasing resilience — mentoring, education, buddying, debriefing, supervision?

Conclusion

I am grateful for the support of the Tristan Jepson Foundation for facilitating this paper. This is an organisation of extraordinary import, and I pay tribute to its founders and board. It is clear that the guidelines promulgated by the Foundation and adopted by some courts, ought to be embraced by all courts. In my view, the bench should lead by example in the area of mental health. We are blessed by incumbency, security of tenure and status absent for many in the private profession, and those benefits should provide a firm basis for making a safer workplace.

This paper is not intended to be a final word on these issues. I hope that it engenders debate, and that my personal experience is useful in formulating approaches in protecting the law's most precious assets — its people.

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Identifying and combatting judicial stress*

Mr P Harvey†

The article provides a personal account of work-related stress as a judicial officer, and practical advice to prepare mentally and physically to handle the stresses of the role, and to identify the symptoms of stress and to have them treated quickly and effectively.

It is only in fairly recent times that much has been said about the effect of stress on judicial officers. Justice Kirby[1] has identified articles going back to 1981 but the emphasis has been on the stresses of the job rather than the responses of the judicial officers to those stresses.

Professor Cooksey's paper[2] refers to the general types of stress, breaking them into two groups, the desirable stress that can enhance our performance, and distress, which impedes it, and he lists the objective causes of stress. He considers the constant tug of war going on between the demands of our evolutionary roots (experiential thinking) and "civilised" expectations (characterised by rational thinking), stressing the importance of distinguishing between a functional and a dysfunctional stress response. He takes these generalised concepts concerning stress and relates them to the *feelings* one experiences when actually involved in the judicial process, in particular, the formulation and delivery of decisions. It is these feelings, ie, the subjective response of the body to the stressors it has to face, that determine whether or not you will suffer adversely from the stress that you will inevitably encounter in your judicial career.

It is my hope today that I can, by personalising the issue more than by taking an academic approach, bring home to you the importance of preparing yourself mentally and physically to handle the stresses of your job in a healthy way, and, if you are suffering from the symptoms of stress, to identify those symptoms and to have them treated quickly and effectively.

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* Paper delivered to National Judicial Orientation Program, Sydney, October 2003 (updated March 2013 and August 2021).

† Retired Magistrate (now deceased), Licensing and Local Court, New South Wales.

1 M Kirby, "Judicial stress", AIJA and Judicial Commission of New South Wales, Inaugural National Judicial Orientation Programme, 1994 at p 21.

2 R Cooksey, "Dealing with Stress", Judicial Commission of New South Wales, Industrial Relations Commission Annual Conference, Hunter Valley, NSW, June 1998.

Richard Gates has talked about the things lawyers do to themselves that exacerbate the effect of the stressful environment they find themselves in, such as sleep deprivation, overdosing on caffeine and/or alcohol etc.[3] He says "lawyers sometimes lose sight of the human processes side of the legal profession with unfortunate outcomes for their own health and happiness". Regrettably, things don't necessarily change when lawyers become judges.

Richard emphasised[4] that it is essential that judicial officers look at this issue of stress in a meaningful way now. I offer myself as an example of why you should do something about this now.

In doing so I want to emphasise that I am not going to deal with the objective stressors that have been referred to by Justice Kirby[5] and by Professor Gates, nor to the techniques available to reduce the level of stress these cause, such as the effective management of time and the need for adequate exercise and relaxation, etc. My aim is to emphasise the importance of recognising that the answer to problems caused by unremitting stress ultimately lies with you, and that once this is realised, the solution can be an amazingly simple one, and one that will serve you well for the rest of your judicial career.

Ask yourself these questions:

- Are you a type-A personality?
- Do you like to be in control — of your work, your home, your life generally?
- Are you a perfectionist?
- Do you make heavy demands on yourself?
- Are you sensitive, emotional and worry easily?
- Are you the one in the family or at work that everybody depends on?

It might be said that these attributes, or most of them, are desirable in one who carries the burden of judicial office, who is constantly forced to adjudicate between the state and its citizens and between citizen and citizen.

But also ask yourself the following questions, because they refer to attributes you would not wish upon anybody, judicial officer or otherwise:

- Are you tired all the time, depressed, angry, feeling pressured, prone to illness?
- Have you or a member of your family recently had a serious illness?
- Is your blood pressure high, or are you on constant medication for it?

3 R Gates, "Happy and healthy or wealthy and dead: the things lawyers do to themselves", New Zealand Law Conference, Dunedin, New Zealand, April 9–13 1996.
4 R Gates, Magistrates' Orientation Programme, Leura, March, 1999.
5 Kirby, above n 1.

- Do you suffer palpitations, horrible sensations in the pit of the stomach, unexplained chest pains, periods of breathlessness, quick breathing, hot and cold flushes, sweaty hands, racing pulse?
- Are important decisions being delayed: are you putting off dealing with difficult matters?
- Are you worried that you may be developing a serious psychological problem … that you may be suffering a mental disease?

Obviously if the answer to any of these questions is yes, any physical symptoms should be followed up with your doctor. You may have heart disease, tumours of the brain, cancers of various organs of the body, bipolar disorder, late onset diabetes or other serious, perhaps life-threatening, illnesses or diseases. On the other hand, you may have none of these, but be suffering to a greater or lesser degree from stress. And, let me emphasise again, it is not the stressors themselves that cause these problems, but your reaction to them.

Background

Who am I, you may be asking, to lecture judges on the effects of stress? The answer to that is that I suffered unknowingly from the effects of stress for many of the 15 years I spent on the Licensing and Local Court bench, and it is only in very recent times that I have learned how to address and to overcome the problem.

I was one who thought *"it can never happen to me"*. I would like to make as sure as possible that it doesn't happen to you. In other words, I would like to personalise the theory — to bring home to you as strongly as possible that this is not something that can be left until you first notice the symptoms … that might already be too late. It nearly was for me!

And I also want to emphasise that once identification of the problem has been achieved, the most difficult part is over. The cure and the antidote can often ultimately be most simple, such as merely taking a few deep calming breaths whenever symptoms of stress appear.

But how do you recognise the symptoms of stress?

For me, the first problem was that I didn't really accept that stress existed. And I anticipate that a fair percentage of you here today view the subject with some scepticism. Sure, being a member of the judiciary is a demanding job, but so what? I'm trained both academically and experientially, I'm intelligent, I know when to seek assistance. What's the problem? I can handle it. I don't need any assistance, and I certainly have no time for all those alternative methods of approaching health problems.

The then Chief Magistrate of NSW told me personally in 1998 that the magistracy was not a stressful job. A judge attending this conference a few years ago described the topic as "bullshit".

I certainly accept that for some of you there is very little, if any, possibility that you will develop adverse reactions to stress. Professor Beverley Raphael, in her paper delivered to the New South Wales Compensation Court in May 2000,[6] pointed out that even the very disturbing

6 B Raphael, "Traumatised worlds", Compensation Court of New South Wales Annual Conference, Bowral, May 2000.

traumatic events that can lead to post-traumatic stress disorder, such as repeated exposure to violent deaths, do not psychologically traumatise most people. But for those of us who may be susceptible to the damaging effects of stress, it is extremely important to be aware of its potential for serious damage to our quality of life, and even its threat to life itself, fatal.

One of the problems for members of the judiciary is that the stress is insidious and compounding. And so the effects of that stress on the individual can be overlooked, not only by themselves but even by their colleagues and close ones, until the "disease" is well advanced.

I was impervious to the problem, even after I had begun to experience bizarre reactions. The catalyst for the move to inappropriate responses to stressful situations can often be a significant life event. In my case, with the benefit of hindsight, I believe it to have been a life-threatening illness suffered in 1988, after I had been on the bench some five years. It was not long after that that I started to become frustrated with work and my colleagues, angry at lawyers, intolerant of stupidity.

I used alcohol as a shield, and drank coffee to excess, but luckily kept more or less to a reasonable standard of fitness. I started to suffer manifest symptoms of an anxiety disorder, without of course appreciating it at the time. This culminated in rushes of blood to the head, at times in my legs vibrating with pressure when I was driving, periods of rage at news of inappropriate political activity or disturbing news items, feelings of impotence to do anything about anything, hands shaking, and then ultimately, whilst on circuit in the south of the state, admission to Albury Hospital with atrial fibrillation in 1991.

Extensive cardiac tests showed that I had no heart damage, and the cardiologists sent me away with their best wishes and nothing else. Following this distressing incident, I started to accept that I may be the victim of stress, but in an objective rather than subjective way. That is, I blamed outside forces such as pressure of work and study, family problems etc. I had co-incidentally discovered the inability of many members of the medical profession to look beyond the mere physical problem confronting them to the reasons why that problem had occurred, that is, the real cause and not the apparent cause.

It was sometime after this that I became aware that I was suffering from peptic ulcers, another manifestation of stress. The response of my physician was to caution me to take things easy and make sure I took a holiday every year, but again there was little appreciation of the need to look beyond the immediate complaint to its causes.

There were other indications that all was not well. When your family or your colleagues or court staff give you little gifts such as "the stress express", stress socks, a "mood-barometer" to hang on your wall, or little figures to hang on your door handle with words such as "caution, high stress levels within" on them, they may not just be being funny but rather, either consciously or unconsciously, be trying to tell you something about yourself.

Despite receiving a number of such gifts, I continued blithely unaware that I may be in any way at fault in any of this, blaming the job, fate, politicians and even my then spouse, for the situation I found myself in.

It was only when I entered the bizarre realm of panic attacks that I became aware that there was something seriously wrong, although I had still had no idea that it was my inappropriate responses to stress that were the cause of this terrifying manifestation of anxiety.

I find such an experience difficult to describe, even now many years after the event. I liken it most to a living death. Others have described it in the following terms:

Actor Garry McDonald (then only 22):[7]

> I went to a party where people were smoking dope, had some, and suddenly this extremely ghastly wave of terror shot through me, with hideous, crippling, sweating panic — I had to flee. I was an ashen, trembling wreck all the next day, my self-confidence plummeted. I thought it must have been an attack of paranoia that people sometimes get smoking marijuana, so I swore off dope forever. But the panic attacks kept returning.

Bev Aisbett, a Melbourne illustrator and cartoonist, (then 39):[8]

> This tidal wave of cold terror came out of nowhere and slammed into me. I was in a shocking state, my heart and mind racing, shaking. I felt disconnected and sickeningly out of control, as I was falling through space in sheer, crazed terror. It went on like this all day in surges, and when it finally stopped I wept like a child with relief. Then, my God, it kept coming back.

Bronwyn Fox was a national credit manager (then 30):[9]

> Whammm … it felt like I'd been struck by lightning. An electric shock whizzed through my body, my heart pounded furiously, I couldn't breathe, I was choking, nauseous. I had this weird out-of-body experience and felt sure I was watching myself dying from a heart attack. I was consumed by horrific fear and panic and wanted to scream and run for help, but I could only manage to grip the wheel and shake uncontrollably.

Now I hear you say, horrible as this is, what is its relevance to me?

Well firstly, anxiety disorders, the result of inappropriate responses to stress, affect one in eight of the population. If my view is correct, that judicial officers are by their nature and calling more controlled, more perfectionist, more sedentary, more scrutinised, more lonely in their work, then they are even more likely to be victims of stress than the average person. In their working environment, they have precious little opportunity to follow the fight or flight response to a stressful situation. Furthermore, being intelligent and, at least till now, in control of their lives, they are at risk of being the last to accept that they have a problem. Thus of the 30 or so people attending this course, it is possible that five or more are experiencing the serious effects of unremitting stress, and that many more of you may face them in the future if you fail to take proactive steps right now.

It may be that you are experiencing symptoms which are not recognised by your medical advisers as being stress related. Physical manifestations of stress can mimic a variety of "real" illnesses, from heart attack to bowel cancer.

Garry McDonald took 24 years to find a cure. Those of you who were wondering why he was unable to complete a comeback series as Norman Gunston, some years ago now know the reason why.

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7 J Hawley, "dreadlocked", Good Weekend, *Sydney Morning Herald*, 21 May 1997, at p 12.
8 ibid.
9 ibid.

The tragedy with a lack of correct diagnosis, and lack of understanding from your peers, your family and the general community as well as the medical profession, is that inadequate or inappropriate treatment can lead to an insidious cycle, whereby people develop avoidance behaviours and become subject, as I did, to real life-threatening illnesses, such as high blood pressure, heart attack, stroke, ulcers, stress-induced cancers. At the least, you may lead a very unhappy life constantly limited by fear.

> Evidence pouring in from many quarters suggests that stress may indeed impair our immune systems and increase the risk of illness. Both massive stressors — death of a spouse or a child, divorce, marital discord, a major depression, chronic care-giving for a family member with Alzheimer's disease and everyday stressors, such as taking a set of examinations, have been linked with decreased immune function and, in the case of the more extreme stressors, increased mortality. Stressful periods have been shown to precede the onset of immune-related disorders such as multiple sclerosis, post-polio syndrome, and juvenile diabetes. People who are more psychologically stressed are less resistant to respiratory infections that cause the common cold. Stress also appears to play a role in the development of cancer: stress, including social stress, will cause tumors to grow faster in laboratory rodents, and render the rodents' bodies less capable of rejecting a tumor. In humans, stressors such as major depression are associated with increased risks of cancer years after the depression. Cancer victims in support groups live longer, while people with few social relationships — a situation associated with greater stress — have shorter life expectancies and are at greater risk for a variety of diseases.[10]

You may think this is a black picture I have painted, but now comes the happy part.

Whilst stress-induced anxiety — particularly that which used to be called a nervous breakdown — and stress-induced depression, are still classified by many as mental illnesses, they are in fact physical manifestations of stress. And they can be dealt with by physical responses.

This is because the "illness" is not a direct result of the response to stress, but damage caused by the stress-response itself.[11] As Professor Cooksey pointed out,[12] responses to stress can be either damaging or non-damaging. An example of a beneficial stress response is that known as the "runner's high" that kicks in after about half an hour of aerobic exercise, such as jogging, swimming, etc. This high results from the release of beta-endorphin from the pituitary gland. Sapolsky says that to his knowledge, there is no stress-related disease that results from too much opioid (endorphin) release during sustained stressors[13] but if that release results from some more permanent or more severe stress than mild exercise, or from the direct intake of opiate drugs, it will be of short-term benefit only and the pain will soon return.

The clearest example for me of a harmful response to a stressful event came when I was fitted with a Holter monitor to test my blood pressure over a 24 hour period. This was done because every time I visited my GP I recorded very high blood pressure. The fitting of the monitor showed that, thanks to keeping reasonably fit, my average blood pressure was within the normal

10 R Sapolsky, *Why zebras don't get ulcers*, W H Freeman & Co, New York, 1994, at p 147.
11 ibid at p 177.
12 above, n 2.
13 Sapolsky, n 10.

range. However, there were two occasions during the 24 hours when both my systolic and diastolic pressures were way above normal — when I was delivering a decision and when I was imposing sentence — stresses related directly to the judicial process.

There are two lessons from this. First, giving decisions and imposing penalties are stressful on the judge just as they are on the judged. You must equip yourself to deal with the stress occasioned by the process in a healthy way.

The benefits of exercise and relaxation techniques in combatting stress in the long term have become well known.

The second lesson is to beware of the inclination of doctors to give you medication for high blood pressure when that high reading in the surgery may not indicate a weakness in the heart or blood vessels but rather an anxiety response which should be treated in an entirely different and less harmful way.

Although drugs may be called for to treat acute conditions, the optimum treatment of stress-related disorders requires a drug free approach.

I was fortunate that after some years of trauma without obtaining effective relief through the medical profession, I was directed to a caring and intelligent GP who immediately recognised acute symptoms of stress and anxiety. Her immediate reaction was to write me a medical certificate saying I needed at least three months leave. I can still remember the rush of relief that flowed through me at this recognition of the problem. That in itself was a first step towards a cure.

As it turned out, I never needed to take that leave, because, whilst referring me to a psychiatrist with the aim of gaining entry into St Vincent's anxiety clinic, she also referred me to a psychologist/aromatherapist whose relaxation techniques, including massage, led me to a state of bodily relaxation that I had no memory of ever reaching before and to the realisation that a cure was at hand. I did ultimately attend a cognitive behaviour therapy clinic but my cure had already begun with that introduction to the benefits of relaxation.

It substantially followed the recognition that responsibility for dealing with stress is yours alone. That is, if you blame the court process, the parties, the pressure of lists, the inadequate resources available to do your job properly, or any other outside agency, for the stress you are experiencing, you will not develop an appropriate response to stress. What you must do is accept that it is your body that is responding inappropriately, and only you can fix it. In the end result, although the pathway may be rough, you can train your body to deal with stress by an acceptance of stress and by relatively simple relaxation techniques. Peace lies on the other side of panic.[14] Step back from your problems and take a deep breath.[15]

There will continue to be many stressors that you can objectively do nothing about. Accepting lack of control over things you cannot change is important. Maintaining practices that keep your body and mind fit and healthy is obviously advantageous. The aim for all of you who have

14 C Weekes, *Peace from nervous suffering*, Harper Collins, Sydney, 1997, p 59.
15 K Cooper, *Can stress heal?*, Bookman Press, Melbourne, 1997, at p 241.

not already experienced symptoms of stress is prevention; for those who are suffering, cure; for those who have suffered and can identity symptoms of stress in others, assistance to your fellow judges.

Listening to your body's reaction to stress can be a lifesaving technique. Not listening or reacting inappropriately can be a fatal reaction. The choice is yours.

In my experience, the best way to determine whether you are unduly stressed is to ask yourself whether you are happy. If, in the hard day to day grind of being a judicial officer, you can nonetheless maintain a happy mood, you are on the right track. Achieving and maintaining this condition will add considerably to the enjoyment of your chosen profession and protect you from the ravages of stress.

Having gained the ability to deal with stress doesn't mean you will never again be affected by it. The pressure of the job is constant. Situations will continue to arise that cause you some level of distress. Some of us are genetically programmed to react more acutely than others. It is thus important to continue to use whatever techniques work for you, whether it be relaxation therapy, walking, meditation, aromatherapy, counselling, discussion groups, prayer or yoga: whatever works for you.

The point of this introductory paper is to emphasise that uncontrollable stressors will arise in the best managed judicial proceedings, often without warning, but that you can be ready, equipped to deal with them, in a way which, at the end of the day, will leave you not a stressed out wreck, but a relaxed and happy person looking forward to life's challenges.

Stress can be a lifesaver or a killer. It's up to you.

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The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing*

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This article presents the methodology and primary quantitative analysis of Australia's first empirical research measuring judicial stress and wellbeing. The findings arise from the survey of 152 judges and magistrates from five Australian courts. Using standardised and validated psychometric instruments for a broad range of stress constructs, the survey robustly explored the varying ways in which stress in judicial office can manifest, allowing comparisons with the Australian legal profession and general population. The results suggest that, like lawyers, judges and magistrates report elevated psychological distress and problematic alcohol use, and that symptoms of burnout and secondary trauma are prominent features of the judicial stress experience. However, unlike the broader legal profession, judicial officers' rates of depressive and anxious symptoms are relatively low. Together, the findings reveal a judicial system not yet in mental health crisis, but under considerable stress. The implications of the findings and areas for future research are discussed.

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Introduction

A central feature of a well-functioning democracy is a well-functioning judiciary. As the third arm of government, the judiciary and courts provide an essential check on executive power and require judges to model the highest standards of integrity and ethical behaviour expected in civil society. As guardians of the rule of law, they do more than simply adjudicate and determine disputes; in their role they must do so while maintaining transparency and independence, and intervening to protect the rights of minorities and individuals. Australia is fortunate to have a strong and independent judiciary, whose robust culture has been forged over centuries of British and Australian common law. Notwithstanding this solid cultural framework, it remains (and thankfully so) a fundamentally *human* system, dependent upon the faculties and capacities of the human beings appointed to judicial office. This human capital is a precious national resource and, therefore, the wellbeing of our judicial officers is an important community concern.

Despite its importance, judicial wellbeing has not received the same research attention as the wellbeing of lawyers and law students.[1] Alongside a large and growing body of international research revealing alarmingly high rates of depression and anxiety within the legal profession,[2] sits a much smaller collection of studies relating to judges,[3] none of which were conducted in

1 J Chamberlain and J Richardson, "Judicial stress: a topic in need of research" in M Miller and B Bornstein (eds), *Stress, trauma, and wellbeing in the legal system,* Oxford University Press, 2013, p 269.

2 For a summary of Australian research on stress within the legal profession, see C Parker, "The moral panic over psychological wellbeing in the legal profession: a personal or political ethical response" (2014) 37(3) *UNSW Law Journal* 1103.

3 At the time of writing, there are believed to be no more than 15 published studies worldwide purporting to systematically examine judicial stress: C Showalter and D Martell, "Personality, stress and health in American judges" (1985) 69(2) *Judicature* 82; J Rogers, S Freeman and P LeSage, "The cccupational stress of judges" (1991) 36(5) *Canadian Journal of Psychiatry* 317; T Eells and C Showalter, "Work-related stress in American trial judges" (1994) 22(1) *Bulletin of the American Academy of Psychiatry and the Law* 71; C Graff, "Stress management: controlling the hidden stalker within the Immigration Courts", *National Centre for State Courts*, 8 February 2000 at https://ncsc.contentdm.oclc.org/digital/collection/hr/id/66/, accessed 6 August 2021; P Jaffe et al, "Vicarious trauma in judges: the personal challenge of dispensing justice" (2003) *Fall Juvenile and Family Court Journal* 1; D Flores et al, "Judges perspectives on stress and safety in the courtroom: an exploratory study" (2008) 45 *Court Review* 45 at 76; J Chamberlain and M Miller, "Evidence of secondary traumatic stress, safety concerns, and burnout among a homogenous group of judges in a single jurisdiction" (2009) 37 *Journal of the American Academy of Psychiatry and the Law* 214; S Lustig et al, "Burnout and stress among United States Immigration Judges" (2008) 13 *Bender's Immigration Bulletin* 22; S Lustig et al, "Inside the judges' chambers: narrative responses from the National Association of Immigration Judges Stress and Burnout Survey" (2008) 23 *Georgetown Immigration Law Journal* 57; M Ciocoiu, M Cojocaru and S Ciocoiu, "Implications of levels of stress factors in the magistrate's activity" (2010) 15(3) *Romanian Biotechnical Letters* 126; M Ciocoiu, M Cojocaru and S Ciocoiu, "Stress related manifestations regarding magistrates" (2010) 15(3) *Romanian Biotechnical Letters* 134; F Tsai and C Chan, "Occupational stress and burnout of judges and procurators" (2010) 83 *International Archives of Occupational and Environmental Health* 133; A Resnick, K Myatt and P Marotta, "Surviving bench stress" (2011) July *Family Court Review* 610; L Krieger and K Sheldon, "What makes lawyers happy? A data-driven prescription to redefine professional success" (2015) 83(2) *George Washington Law Review* 554; M Miller et al, "Judicial stress: the roles of gender and social support" (2018) 25(4) *Psychiatry, Psychology and Law* 602.

Australia.[4] As senior members of a stress-prone profession,[5] managing workloads bordering on the oppressive,[6] in the context of professional isolation,[7] intense scrutiny[8] and often highly traumatic material,[9] there is good reason to expect that judicial officers are at particular risk of work-related stress. Given the impact of judicial decisions on people's lives, and the pivotal role they play in our democratic system, courts arguably have a duty, not only to individual judges, but to the community more generally, to investigate and promote judicial wellbeing.

In a number of previous papers, it has been suggested that robust empirical research into work-related stress among the Australian judiciary is required.[10] This research was undertaken to meet that identified gap and to consider how judicial stress can be characterised, quantified and, where required, addressed. This article sets out the methodology used in this groundbreaking research and presents the primary quantitative analysis of the survey data. This article is in four parts. Part I sets out the methodology used and describes the sample of participating judicial officers. Part II provides commentary relating to the measurement instruments used in the survey. Part III analyses the primary survey data, with reference to outcomes in previous studies relating to lawyers and other professional groups. Part IV discusses the implications of the findings, the strengths and limitations of the study, and areas for future research.

4 Extensive, high-quality research has been conducted in Australia on the judicial *experience*, looking at judicial workload, work-practices and job satisfaction. This research, conducted principally by Emerita Professor Kathy Mack and Professor Sharyn Roach Anleu from Flinders University, is closely related to judicial wellbeing, and has greatly informed the present research. See, eg, K Mack, A Wallace and S Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation*, Australasian Institute of Judicial Administration, 2012.

5 Chamberlain and Richardson, above n 1; J Chamberlain and M Miller, "Stress in the courtroom: call for research" (2008) 15(2) *Psychiatry, Psychology and Law* 237.

6 M Kirby, "Judicial stress: an unmentionable topic" (1995) 13 *Australian Bar Review* 101, 106.

7 I Zimmerman, "Isolation in the Judicial Career" (2000) *Winter Court Review* 4.

8 Resnick, Myatt and Marotta, above n 3, at 610–611.

9 See, eg, Jaffe et al, above n 3.

10 C Schrever, "Judge stress" (2015) *September Law Institute Journal* 29; C Schrever, "Current issues: Australia's first research measuring judicial stress and wellbeing: a preview of the findings" (2018) 92 *ALJ* 885 at 859.

Methodology

Research design and aims

This was an exploratory, mixed-methods study. The research aims were to explore the nature, prevalence, severity and sources of judicial stress in Australia.

Approval and support

Support from Heads of Jurisdiction was essential to the viability of the study. Five courts, from summary to appellate level, were identified as possible participant jurisdictions. Informal consultations with each of the five Heads of Jurisdiction indicated that safeguarding confidentiality and anonymity of both the individual participants and the courts was a key concern. In light of this, formal support was sought and granted from the five Heads of Jurisdiction on the basis that neither the names of the courts nor their geographical locations would be reported. Also in principle and in kind support was extended from the Judicial College of Victoria and the Australasian Institute of Judicial Administration. Subsequently, approval to conduct the research was granted from the Human Research Ethics Committees for the University of Melbourne and the participating courts.

Recruitment methodology

With the support of the Heads of the five participating jurisdictions, the researcher delivered a presentation on Judicial Stress and Wellbeing at each of the courts' internal judicial conferences. These took place between July 2016 and April 2017. The presentation set out the rationale for empirical research into judicial wellbeing, and explained the aims and methodology of the current research project. During the presentation, printed copies of the survey were distributed, together with stamped envelopes addressed to a secure post office box. To reach judicial officers who were not present at the conferences, and to provide an alternative means of survey completion, a follow-up email was sent the next day to all judicial officers of the relevant court with a link to an electronic version of the survey hosted on Qualtrics — a secure online survey platform. A participant information sheet and consent form accompanied both versions of the survey. Participation was voluntary and anonymous.

The study involved three stages, with participants invited to participate in one, two or all three stages. The first stage was a short survey (Part 1), taking 10–15 minutes to complete, relating to stress symptoms and experiences, and involved the collection of some limited demographic information (see below for details of survey contents). The second stage involved a longer survey (Part 2), taking 15–20 minutes to complete, relating to mental health literacy, burnout, secondary trauma and alcohol use. The third stage comprised an in-depth semi-structured interview, taking 40–60 minutes, relating to particular experiences of work-related stress, the major sources of judicial stress, and ideas for programs and initiatives to reduce judicial stress. At the completion of each stage, participants were invited to opt in to the next stage or to decline further participation in the study. To opt in to a third stage interview, participants provided their contact details by completing a form and returning it in a separate envelope from their completed survey, thereby preserving the anonymity of the survey responses. Participants were offered the opportunity to opt in to receive personalised feedback regarding their responses to the survey measures by providing their email address at the end of the survey.

The rationale for the staged recruitment approach was to balance the competing aims of maximising sample size and optimising data richness. In the knowledge of judicial officers' general time poverty, it was anticipated that a shorter survey would attract greater voluntary participation than a longer survey. However, in order to collect data on additional relevant measures, the longer survey was retained as an option for those judicial officers prepared to dedicate the additional time.

The rationale for offering personalised feedback was to balance another pair of competing considerations — anonymity of survey completion, and notifying and supporting participants when scores indicated psychological distress. Given the survey included several widely used screening tools for mental health concerns, scores in the very high ranges could warrant further investigation and possibly supportive intervention. However, the provision of such support was dependent upon being able to contact the relevant participants and, therefore, incompatible with participant anonymity. In order to reconcile these competing concerns, participants had the option to voluntarily forsake their anonymity by providing an email address in order to receive a personalised feedback report on their survey scores. Seventy-three participants (48%) took up this option. The report, which was emailed as a password-protected document, set out several options for independent and confidential psychological support, and recommended accessing such support if any scores were in the high or severe range.

The survey was closed in May 2017. Hardcopy and online survey data were entered into the Software Package for the Social Sciences (SPSS) by an independent research assistant and checked by the researcher prior to analysis.

The sample

Five Australian courts, from summary to appellate level, participated in the study. From these courts, 152 judicial officers participated in Part 1 of the survey.[11] Of these, 125 went on to complete Part 2 of the survey, and 60 participated in in-depth interviews. Table 1 sets out the sample size according to jurisdiction, gender, age, stage of career and main area of practice. Participants' average age was 57.8 years (range = 38–71; standard deviation = 6.9) and average length of service was 9.5 years (range = .2–30; standard deviation = 6.6).

11 There were 164 surveys returned at the close of the survey. Nine did not have completed demographic data, and were therefore removed from the analysis, leaving a total of 152 valid responses to Part 1 of the survey.

Sample size and composition by demographic variables

Demographic variable	Sample Size: *n* (%)		
	Survey		**Interviews**
	Part 1 (*n* = 152)	**Both Parts (*n* = 125)**	**(*n* = 60)**
Jurisdiction			
Summary	84 (55.3%)	68 (54.4%)	30 (50.0%)
Intermediate	34 (22.4%)	31 (24.8%)	12 (20.0%)
Superior	34 (22.4%)	26 (20.8%)	12 (20.0%)
Gender			
Female	66.(43.4%)	59 (47.2%)	36 (60.0%)
Male	86 (56.6%)	66 (52.8%)	24 (40.0%)
Age (Years)			
<50	20 (13.2%)	15 (12.0%)	*
50–59	60 (39.5%)	48 (38.4%)	*
60–69	67 (44.1%)	59 (47.2%)	*
>70	5 (3.3%)	3 (2.4%)	*
Years Since Appointment			
<2	21 (13.8%)	13 (10.4%)	*
2–5	20 (13.2%)	17 (13.6%)	*
5–10	63 (41.4%)	53 (42.4%)	*
10–15	26 (17.1%)	22 (17.6%)	*
15–20	10 (6.6%)	9 (7.2%)	*
>20	12 (7.9%)	11 (8.8%)	*
Demographic Variable	**Sample Size:** *n* (%)		
	Survey		**Interviews**
	Part 1 (*n* = 152)	**Both Parts** (*n* = 125)	(*n* = 60)
Main Area of Practice			
Crime or Coronial	89 (58.6%)	73 (58.4%)	*
Combination	35 (23.0%)	29 (23.2%)	*
Civil or Commercial	28 (18.4%)	23 (18.4%)	*
Total	**152 (100%)**	**125(82.2%)**	**60 (39.5%)**

Note: *This demographic data was not collected for interviewees.

As explained above, approval for the research project was obtained on the basis that neither the names nor geographical locations of the participating courts would be reported. It is not possible to report specific response rates according to these demographic variables without risking identification of the courts involved; however, two important points can be made. First, within each of the five participating courts the response rates were very strong, varying

between 51% and 85%, and averaging 67%. That is, of the judicial officers to whom the survey was distributed, 67% responded by completing at least Part 1. Second, the sample was, with one exception, broadly representative across the five demographic variables measured. The exception was that female judicial officers were significantly over-represented among those who chose to participate in an interview: women comprised 43.4% of survey respondents, but 60% of interviewees. The interview data therefore will need to be interpreted with this in mind.

The survey

In constructing the survey, much thought was given to the choice of both psychological constructs to be measured and psychometric instruments by which to measure them. The term psychological construct arises from the field of empirical psychology and refers to psychological phenomena and experiences one may want to measure and analyse, but are not directly observable — for example, intelligence, happiness and stress. Psychometric instruments are the questionnaires, scales, tests and tasks that have been scientifically developed to validly and reliably measure different psychological constructs. While stress and wellbeing are psychological constructs in their own right, their conceptual breadth is such that they could more accurately be described as psychological categories comprising a broad range of qualitatively different psychological experiences, each of which would be defined and measured differently.

In the current study, the following principles guided the choice of psychological constructs and psychometric instruments:

- was there a strong theory-driven basis for expecting that the construct may be a prominent feature of the judicial experience?
- was the construct measured in research relating to lawyer stress?
- did the instrument have strong face validity (ie did the questions and items sufficiently translate to the judicial context)?
- did the instrument have robust psychometric properties (ie had it been validated, standardised, and found to have good reliability)?
- was the instrument used in other relevant judicial or lawyer stress research?

The application of these principles, and the piloting of a draft survey in May 2016 with a group of 14 retired judicial offices, lead to the inclusion of the constructs and instruments set out in Table 2. These are briefly described in detail in Part II below.

Survey contents and structure

Psychological construct	Psychometric instrument	Number of items
Part 1 — Short survey		
Perceived stress and satisfaction	N/A (Questions developed by researcher)	3
Basic psychological needs satisfaction	Basic Psychological Needs Satisfaction at Work Scale (BPNSW Scale) [A]	24
Non-specific psychological distress	Kessler 10 (K-10)[B]	10
Depressive and anxious symptoms	Depression, Anxiety and Stress Scales 21 (DASS-21)[C]	21
General reflections on the stress of judicial office	N/A (Open question with free-text response)	1
Demographics	N/A (Questions developed by researcher)	7
Part 2 — Longer survey		
Mental health literacy and attitudes to help-seeking	International Depression Literacy Survey (IDLS)[D]	27
Burnout	Maslach Burnout Inventory — General Scale (MBI-GS)[E]	16
Secondary traumatic stress	Secondary Traumatic Stress Scale (STSS)[F]	17
Alcohol use and dependence	Alcohol Use Disorders Identification Test (AUDIT)[G]	10

Notes:

[A] B Ilardi et al, "Employee and supervisor ratings of motivation: main effects and discrepancies associated with job satisfaction and adjustment in a factory setting" (1993) 23(21) *Journal of Applied Social Psychology* 1789; T Kasser, J Davey and R Ryan, "Motivation and employee-supervisor discrepancies in psychiatric vocational rehabilitation setting" (1992) 37(3) *Rehabilitation Psychology* 175; E Deci et al, "Need satisfaction, motivation, and well-being in the work organisations of a former Eastern Bloc country: a cross-cultural study of self-determination" (2001) 27(8) *Personality and Social Psychology Bulletin* 930.

[B] R Kessler et al, "Short screening scales to monitor population prevalences and trends in non-specific psychological distress" (2002) 32 *Psychological Medicine* 959.

[C] P Lovibond and S Lovibond, "The structure of negative emotional states: comparison of the depression anxiety stress scales (DASS) with the Beck Depression Inventories" (1995) 33(3) *Behaviour Research and Therapy* 335.

[D] N Highet, I Hickie and T Davenport, "Monitoring awareness of and attitudes to depression in Australia" (2002) 176 *Medical Journal of Australia* S63.

[E] W Schaufeli et al, "MBI general survey", 1996, available for purchase from www.mindgarden.com; W Schaufeli, M Leiter and R Kalimo, "The Maslach Burnout Inventory — general survey: a self-report questionnaire to assess burnout in the workplace" in M Leiter (ed), "Extending the burnout construct: reflecting changing career paths", APA/NIOSH Conference, Work, Stress and Health, Creating Healthier Workplaces, 14–16 September 1995, Washington, DC, 1995. Copyright © 1996 W Scjaufeli, M Leiter, C Maslach and S Jackson, Licence to reproduce in hardcopy and online format granted on 23 June 2016.

[F]B Bride et al, "Development and validation of the secondary traumatic stress scale" (2004) 14(1) *Research on Social Work Practice* 27.

[G]J Saunders et al, "Development of the alcohol use disorders identification test (AUDIT): WHO collaborative project on early detection of persons with harmful alcohol consumption II" (1993) 88 *Addiction* 791.

The interviews

Judicial officers who completed both parts of the survey were invited to participate in an in-depth semi-structured interview. Sixty judicial officers accepted this invitation by returning a form with their contact details and signing a consent form at the start of their interview. The interviews were conducted by the lead researcher in the judicial officers' chambers between November 2016 and July 2017, each lasting approximately one hour. They were audio-recorded and independently transcribed. All identifying information was removed prior to analysis. The interview questions were developed following a review of the literature relating to judicial stress and discussions with research colleagues and several judicial officers regarding the areas of greatest relevance to understanding and responding to judicial occupational stress. The first draft of the questions was developed by the lead researcher for an earlier internal project within one of the participating jurisdictions, and further refined following feedback from that pilot. The final list of nine stem questions, each with several supplementary questions, was framed around four board topics: experiences of judicial stress; perceived sources of judicial stress and satisfaction; strategies for managing judicial stress; and ideas of initiatives to support judicial wellbeing.

Over the course of conducting the 60 interviews, the researcher noted themes that emerged as prominent and recurring, refining these throughout the interview process. This preliminary observational process yielded six key themes, which provided the initial basis of the formal thematic analysis of interview transcripts. As a further step, the researcher read the interview transcripts, totalling 1,386 pages and over 400,000 words, in full three times. In the first reading, the researcher noted all statements that supported or contradicted the six key themes, also recording other recurring themes. From these, codes were created for each theme. In the second reading, the codes were applied to the relevant passages and colour-coded on the transcript. In the third reading, the colour-coded passages were reviewed for patterns and themes, and names applied to each of the themes. A final review was undertaken, using the Microsoft Word search function, to extract the passages that best illustrated the identified themes.[12]

The survey

Part 1 — short survey

Perceived stress and satisfaction

Three questions, framed by the researcher, provided an initial measure of judicial officers' perceptions of stress and satisfaction in the role. On a five-point scale, participants were asked:

12 A forthcoming article by the present author, C Schrever, will explore these themes in more detail.

how much of the time they experience stress and personal wellbeing and satisfaction related to their work (1 = none of the time; 5 = almost all of the time); and how the stress of judicial office compares to their career prior to appointment (1 = much less stressful; 5 = much more stressful).

Basic psychological needs satisfaction

Much of the recent empirical research on lawyer stress has adopted the framework of Self-Determination Theory[13] (SDT) as a model for understanding the factors influencing lawyer wellbeing.[14] SDT is a well-established and evidenced-based model of wellbeing, with more than three decades of empirical research behind it.[15] In essence, SDT posits that human wellbeing is a function of the extent to which our basic psychological needs of autonomy, competence and relatedness are met within our environment. Autonomy refers to the experience of self-determination, full willingness, and volition when carrying out an activity.[16] Competence refers to feeling effective and capable to achieve desired outcomes.[17] Relatedness refers to the experience of intimacy and genuine connection with others.[18]

Dozens of psychometric instruments based on SDT have been developed.[19] The present study adopted the Basic Psychological Needs Satisfaction at Work Scale (BPNSW Scale) — a 24-item, seven-point scale assessing the extent to which participants agreed (1 = strongly disagree; 7 = strongly agree) that a series of work-related feelings applied to them over *the past four weeks*. Each of the three factors — autonomy, competence and relatedness — is measured by eight items, generating an average score between 1 and 7 for each factor, and an average overall score, with higher scores indicating greater basic psychological needs satisfaction. Sample items are as follows: for autonomy, at work, I feel a sense of choice and freedom in the things I undertake; for competence, when I am at work, I feel competent to achieve my goals; for relatedness, at work, I feel close and connected with other people who are important to me. Earlier versions of the BPNSW Scale had fewer items (21[20] or 15[21]), and have documented construct validity, internal reliability[22] and a well-developed factor structure.[23] The internal reliability in the present study was good across the three sub-scales (Cronbach's alpha coefficients: for autonomy = .83; for relatedness = .85; for competence = .80)

13 R Ryan and E Deci (eds), "Self-determination theory and the facilitation of intrinsic motivation, social development, and well-being" (2002) 55 *American Psychologist* 68.
14 See, eg, Krieger and Sheldon, above n 3.
15 R Ryan and E Deci, *Self-determination Theory: Basic Psychological Needs in Motivation, Development and Wellness*, Guilford Publishing, 2017.
16 E Deci and R Ryan, "The general causality orientations scale: self-determination in personality" (1985) 19 *Journal of Research in Personality* 109.
17 R Ryan, "Psychological needs and the facilitation of integrative processes" (1995) 63 *Journal of Personality* 397.
18 ibid.
19 Ryan and Deci, above n 15.
20 E Deci et al, "Need satisfaction, motivation, and well-being in the work organisations of a former Easter Bloc country: a cross-cultural study of self-determination" (2001) 27(8) *Personality and Social Psychology Bulletin* 930.
21 T Kasser, J Davey and R Ryan, "Motivation and employee — supervisor discrepancies in psychiatric vocational rehabilitation setting" (1992) 37(3) *Rehabilitation Psychology* 175.
22 ibid; Deci et al, above n 20.

Non-specific psychological distress

Non-specific psychological distress, or ill-being, was measured using the standardised and widely employed Kessler 10 Scale (K10).[24] The K10 is a 10-item, five-point scale assessing how often (1 = none of the time; 5 = all of the time) subjects have experienced 10 symptoms of psychological distress (eg how often did you feel restless and fidgety; how often did you feel that everything was an effort) in *the past four weeks*. It generates scores within a possible range of 10–50, with higher scores indicating more severe distress. The K10 is a screening tool, not a diagnostic instrument. It provides a broad indication of the risk of mental illness by measuring the severity of generalised psychological distress.[25] Excellent normative data exists for the K10, as it was the instrument used by the Australian Bureau of Statistics (ABS) in the 2007 National Survey of Mental Health and Wellbeing and 2007–2008 National Health Survey.[26] The K10 has also been used in several Australian studies on lawyer and law student wellbeing, including the landmark Courting the Blues study.[27] Normative data allows for the classification of K10 scores into one of four severity ranges: low or no distress (scores of 10–15); moderate distress (scores of 16–21); high distress (scores of 22–29); very high distress (scores of 30–50).[28] The K10 has outstanding and well-documented psychometric properties, including content and construct validity and internal reliability.[29] In the current study, the internal reliability was found to be strong (Cronbach's alpha coefficient = .85).

Depressive and anxious symptoms

Population mental health research has consistently reported that depression and anxiety are the highest prevalence mental disorders,[30] and that the rate and severity of depressive and anxious symptoms are good indications of the level of mental ill-health within a population. In the current study, depressive and anxious symptoms were measured using the Depression Anxiety Stress Scales-21 (DASS-21).[31] The DASS-21 is not a diagnostic scale, but rather a validated and standardised test of affective distress symptoms along the three axes of depression, anxiety

23 E McAuley, T Duncan and VV Tammen, "Psychometric properties of the intrinsic motivation inventory in a competitive sport setting: a confirmatory factor analysis" (1987) 60 *Research Quarterly for Exercise and Sport* 48.

24 R Kessler et al, "Short screening scales to monitor population prevalences and trends in non-specific psychological distress" (2002) 32 *Psychological Medicine* 959.

25 G Andrews and T Slade, "Interpreting scores on the Kessler psychological distress scale (K10)" (2001) 26(6) *Australian and New Zealand Journal of Public Health* 494.

26 Australian Bureau of Statistics, *Use of the Kessler Psychological Distress Scale in ABS Health Surveys, Australia, 2007–2008, National Health Survey 2007–2008*, Information Paper, 4817.0.55.001, 2012.

27 N Kelk et al, *Courting the blues: attitudes towards depression in Australian law students and legal practitioners*, Monograph 2009-1, Brain and Mind Research Institute, 2009 (Courting the Blues Study); N Kelk, S Medlow and I Hickie, "Distress and depression among Australian law students: incidence, attitudes and the role of universities" (2010) 32 *Sydney Law Review* 113; C Leahy et al, "Distress levels and self-reported treatment rates for medicine, law, psychology and mechanical engineering students: cross-sectional study" (2010) 44 *Australian and New Zealand Journal of Psychiatry* 608.

28 N Kelk et al, above n 27, p 9–10; Australian Bureau of Statistics, above n 26.

29 Andrews and Slade, above n 25.

30 Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing, 2007*, Summary of Results, Category no 4326.0, 23 October 2008.

31 P Lovibond and S Lovibond, "The structure of negative emotional states: comparison of the depression anxiety stress scales (DASS) with the Beck depression inventories" (1995) 33(3) *Behaviour Research and Therapy* 335.

and stress. Depression is described as symptoms associated with dysphoric mood, sadness and worthlessness. Anxiety is described as symptoms associated with physical arousal, panic and fear. Stress is described as symptoms of tension, irritability and a tendency to over-react. Separate factors in the DASS-21, the anxiety and stress sub-scales, measure distinct aspects of anxious symptomatology – the somatic and cognitive aspects, respectively.

The DASS-21 is a 21-item, four-point combined severity/frequency scale, measuring the extent to which participants have experienced a series of symptoms over *the past week* (0 = did not apply to me at all; 3 = applied to be very much or most of the time). Example items across the three sub-scales are as follows: for depression, I couldn't seem to experience any positive feeling at all; for anxiety, I was aware of dryness of my mouth; for stress, I found myself getting agitated. Total scores for each sub-scale (range 0–21) are obtained by summing the scores for each sub-scale item, with higher scores indicating more severe symptomatology. Percentiles derived from normative data allow for the classification of scores into one of five severity ranges – normal, mild, moderate, severe and extremely severe.[32] The DASS-21 has excellent psychometric properties and normative data,[33] and was employed in the majority of Australian studies into lawyer and law students' wellbeing,[34] as well as numerous studies involving other occupational groups. In the current study, the internal reliability was sound across the three sub-scales (Cronbach's alpha coefficients: for depression = .87; for anxiety = .78; for stress = .87).

General reflections on judicial stress

Participants were given the opportunity to express any other reflections relevant to the study, by providing a free text response to the following question: Please let us know anything else that would help us understand the personal challenges and rewards of judicial office, and the factors that contribute to both stress and wellbeing in the role.

Demographics

Part 1 of the survey concluded with seven questions about participant demographics: age; gender; years since appointment; jurisdiction; main area of legal practice; location (ie urban, suburban, rural); and living arrangements (eg living alone, living with partner and children etc).

Part 2 — Longer survey

Mental health literacy and attitudes to help-seeking

Mental health literacy and attitudes to help-seeking were explored using the International Depression Literacy Survey (IDLS),[35] a measure developed by Australian researchers and

32 Norms are provided by P Lovibond and S Lovibond, *Manual for the Depression Anxiety Stress Scales* (DASS), Psychology Foundation Monograph, 1993 (DASS Manual).

33 See T Brown et al, "Psychometric properties of the depression anxiety stress scales (DASS) in clinical samples" (1997) 35(1) *Behaviour Research and Therapy* 79.

34 See Parker et al, above n 2, at 1108–1110.

35 N Highet, I Hickie and T Davenport, "Monitoring awareness of and attitudes to depression in Australia" (2002) 176 *Medical Journal of Australia* S63.

used in the landmark Courting the Blues study.[36] Focused specifically on depression, the IDLS comprises questions (some checklists, some Likert scales) relating to knowledge about depression (eg statistics, facts, symptoms), as well as attitudes, awareness and personal experiences.[37] Sample questions include: for knowledge, what proportion of the Australian population will experience depression?; for awareness, which of the following [checklist of symptoms] are the most typical of a person with depression?; for help-seeking attitudes, if you thought you might be experiencing depression, how likely would you be to seek help from a [GP/psychologist/family member/friend etc]?. The original version of the IDLS also incorporated several published measures of psychological distress, including the K10 described above, and a number of demographic questions. To avoid duplication, these were excluded in the present study.

Owing to its use in the Courting the Blues study, useful normative data on the IDLS is available for the Australian legal profession. It has also been used in several other settings, mostly relating to depression literacy among Chinese and Australian medical students.[38] Beyond this, however, information relating to scoring, norms, psychometric properties and interpretation is limited,[39] and therefore it cannot currently be used to generate a depression literacy score, nor to compare literacy levels between different groups. It does, however, probe a number of interesting aspects of mental illness experiences and attitudes, and was included in the present study to extend the Courting the Blues research to the judiciary, as the only arm of the legal profession not included in that landmark study.

Burnout

The theoretical literature on judicial wellbeing,[40] including two papers proposing structural models of judicial stress,[41] posits that occupational burnout is a feature of judicial officers' work-related stress. Burnout is not a diagnosable mental disorder, but rather a psychological phenomenon that has been identified and described within the research literature on occupational stress and since become a prominent field of empirical research. Burnout is broadly defined as a syndrome of emotional exhaustion, depersonalisation, and reduced personal accomplishment that can occur among individuals who work with people in some capacity.[42] Burnout is distinguished from depression and anxiety in that those conditions are global, pervading all aspects of a person's life, whereas burnout is more distinctly linked to

36 Courting the Blues Study, above n 27.
37 I Hickie et al, "The assessment of depression awareness and help-seeking behaviour: experiences with the international depression literacy survey" (2007) 7 *BMC Psychiatry* 48.
38 Ye Rong et al, "Recognition and treatment of depression: a comparison of Australian and Chinese medical students" (2009) 44(8) *Social Psychiatry and Psychiatric Epidemiology* 636; Y Rong et al, "Improving knowledge and attitudes towards depression: a controlled trial among Chinese medical students" (2011) 11 *BMC Psychiatry* 36.
39 Hickie et al, above n 37.
40 See, eg, Chamberlain and Miller, above n 5; Chamberlain and Richardson, above n 1.
41 M Miller and J Richardson, "Model of causes and effects of judicial stress" (2006) *Fall Judicature* 20; T Hagen and S Bogaerts, "Work pressure and sickness absenteeism among judges" (2014) 21(1) *Psychiatry, Psychology and Law* 92.
42 C Maslach, S Jackson and M Leiter, *Maslach Burnout Inventory Manual*, Mind Garden, 3 edn, 2013 at p 4.

the working environment.[43] It is also distinguished from general occupational stress in that it is a more specific and complex phenomenon that is in contrast to a sense of engagement with work,[44] rather than a generalised experience of tension that is contrasted to broad feelings of relaxation and wellbeing.

Two principal psychometric instruments have been developed for measuring burnout: the Maslach Burnout Inventory (MBI);[45] and the Copenhagen Burnout Inventory (CBI).[46] Although the CBI was used in two previous judicial stress studies, one involving United States (US) immigration judges[47] and another involving Taiwanese judges,[48] the MBI since its introduction in the early 1980s[49] has become accepted as the gold standard assessment tool for burnout,[50] and for this reason was selected for the present study. Several versions of the MBI are available: the General Survey (MBI-GS);[51] the Human Services Survey (MBI-HSS);[52] and the MBI-Educators Survey.[53] The present study adopted the MBI-GS as, of the three, it had the strongest face validity for judicial respondents, and was also the recommended instrument in one seminal article calling for research into judicial stress.[54]

The MBI-GS is a 16-item, seven-point scale measuring the frequency (0 = never; 6 = every day), with *no timeframe imposed*, of certain job-related feelings across the three dimensions of occupational burnout — exhaustion, cynicism and professional efficacy. It differs from the other versions of the MBI in that it de-emphasises people's work as the cause or origin of the work-related feelings. Exhaustion refers to fatigue and the depletion of emotional and mental energy. Cynicism refers to an attitude of distance or indifference towards one's work, including a loss of meaning. Professional efficacy refers to satisfaction with past and present accomplishments and expectations of continued effectiveness. Burnout is associated with high exhaustion, high cynicism and low professional efficacy. Sample items are as follows: for exhaustion, I feel emotionally drained from my work; for cynicism, I doubt the significance of my work; for professional efficacy, I feel exhilarated when I accomplish something at work. The MBI-GS is not time-limited but measures the frequency of these feelings over a respondent's history in their job. The MBI-GS has very good psychometric properties and normative data. The official manual provides cut-offs, based on normative data across a range

43 ibid at p 16; M Leiter and J Durup, "The discriminant validity of burnout and depression: a confirmatory factor analytic study" (1994) 32 *Anxiety, Stress and Coping* 357.
44 Maslach, Jackson and Leiter, n 42, at p 16.
45 C Maslach and S Jackson, "The measurement of experienced burnout" (1981) 2 *Journal of Occupational Behaviour* 99.
46 T Christensen et al, "The Copenhagen burnout inventory: a new tool for the assessment of burnout" (2005) 19 *Work & Stress* 192.
47 Lustig et al, Burnout and stress among United States Immigration Judges, n 3.
48 Tasi and Chan, n 3.
49 Maslach and Jackson, n 45.
50 N Schutte et al, "The factorial validity of the Maslach burnout inventory-general survey (MBI-GS) across occupational groups and nations" (2000) 73 *Journal of Occupational and Organizational Psychology* 53.
51 W Schaufeli et al, *MBI general survey*, 1996, (available for purchase from www.mindgarden.com).
52 C Maslach and S Jackson, *MBI-Human Services Survey*, 1981, (available for purchase from www.mindgarden.com).
53 C Maslach, S Jackson, and R Schwab, *MBI-Educators Survey*, 1986, (available for purchase from www.mindgarden.com).
54 Chamberlain and Miller, n 5, at 244.

of cultural and occupational groups, for three severity ranges (low, moderate, high) within each of the sub-scales.[55] In the present study, the internal reliability was good across the three sub-scales (Cronbach's alpha coefficients: for exhaustion = .90; for professional efficacy = .79; for cynicism = .86).

Secondary traumatic stress

Another psychological construct that is much discussed in the commentary on judicial stress is secondary trauma, which broadly refers to the psychological distress a person can experience as a result of exposure to information about the primary trauma suffered by another. Numerous theoretical papers[56] and, more recently, published personal accounts[57] have highlighted secondary trauma as an occupational hazard of judicial work. It is axiomatic that judicial officers are exposed to potentially traumatic material. Courts deal, on a daily basis, with the very worst that humanity does to itself, and judicial work entails regular contact with distressing subject matter and distressed court users. What is less known, however, is whether this exposure translates to psychological distress in the form of secondary trauma *reactions* among judicial officers. A number of US studies have explored judicial experiences of secondary trauma reactions, variously defined as vicarious trauma, compassion fatigue and secondary traumatic stress (STS);[58] however, in most cases these experiences were not empirically measured using validated instruments. An exception is a US study of immigration judges, which employed the Secondary Traumatic Stress Scale (STSS)[59] and reported judges' levels of STS were higher than those previously found for social workers.[60] As the only validated measure of secondary trauma reactions that had been used in previous judicial research, the STSS was selected for the current study.

STS is defined as the natural, consequent behaviours and emotions resulting from knowledge about a traumatizing event experienced by a significant other. It is the stress resulting from helping or wanting to help a traumatised or suffering person.[61] The negative effects of STS are understood to be qualitatively similar to those of primary trauma — namely, experiences of intrusion (eg unwanted memories, flashbacks and nightmares), avoidance (eg of reminders of the trauma, emotional numbness) and arousal (eg hypervigilance). As such, the STSS was

55 Schaufeli et al, n 51.

56 See, eg, Chamberlain and Miller, n 5; Chamberlain and Richardson, n 1; Miller and Richardson, n 41; Schrever, "Judge stress", n 10; I Zimmerman, "Helping judges in distress" (2006) 90(1) *Judicature* 10 at 11–12.

57 D Heilpern, "Lifting the judicial veil — vicarious trauma, PTSD and the judiciary: a personal story", speech delivered at the Tristan Jepson Memorial Foundation Annual Lecture, Sydney, 25 October 2017; K Adam, "The price I paid for being a good judge", National Centre for State Courts, 20 April 2017, www.judges.org/price-paid-good-judge/, accessed 11 August 2021.

58 Jaffe et al, n 3; Chamberlain and Miller, n 3; Lustig et al, "Burnout and stress among United States Immigration Judges", n 3; Resnick, Myatt and Marotta, n 3.

59 B Bride et al, "Development and validation of the secondary traumatic stress scale" (2004) 14(1) *Research on Social Work Practice* 27.

60 Lustig et al, "Burnout and stress among United States Immigration Judges", n 3, at 27.

61 Bride et al, n 59, at 27, quoting C Figley, "Compassion fatigue: towards a new understanding of the costs of caring" in B Stamm (ed), *Secondary Traumatic Stress: Self-Care Issues for Clinicians, Researchers, and Educators*, Sidran, 2 edn, 1999, p 3, at p 10.

developed to maintain congruence with the diagnostic criteria for post-traumatic stress disorder (PTSD),[62] and it has been suggested that it can be used as a proxy measure for the presence of PTSD symptomatology.[63] The STSS is a 17-item, five-point scale measuring the frequency (1 = never; 5 = very often), over *the past seven days*, of intrusion, avoidance and arousal symptoms associated with the indirect exposure to traumatic events via one's professional contact with traumatised individuals. The official STSS refers throughout to clients, but permits substitution of another noun that better represents the work of the target population. In the current survey clients was changed to people who come before me, and work with clients was changed to court work. Sample items were as follows: for intrusion, I had disturbing dreams about the people who come before me; for avoidance, I avoided people, places, or things that reminded me of my court work; for arousal, I felt jumpy. Raw scores are obtained for each sub-scale by summing responses to sub-scale items, and average scores are calculated by dividing the raw score by the number of relevant items. A Total STSS raw score (the sum of all scale items) ranges from 17 to 85, with high scores indicating more severe STS. Percentile ranks from a normative sample of US social workers (n = 282)[64] allows classification of Total STSS scores into one of five severity ranges: normal (50 percentile; scores less than 28); mild (51 to 75 percentile; scores from 28 to 37); moderate (76 to 90 percentile; scores from 38 to 43); high (91 to 95 percentile; scores from 44 to 48); and severe (above the 95 percentile; scores above 48).[65] There is good evidence of reliability, convergent and discriminant validity, and factorial validity of the STSS. In the present study, the internal reliability was found to be acceptable across the three sub-scales (Cronbach's alpha coefficients: for intrusion = .76; for avoidance = .82; for arousal = .80).

Alcohol use and dependence

The relationship between stress and alcohol dependence is well documented.[66] In addition, the theoretical[67] and empirical[68] literature on lawyer stress suggests that alcohol use, especially to manage feelings of stress and sadness, is notably high within the legal profession — higher, it seems, than in other professions. In light of this, it was decided to include a measure of alcohol use in the survey. The instrument chosen was the World Health Organisation's Alcohol Use Disorders Identification Test (AUDIT). It is widely used, has excellent psychometric properties,

62 DSM-IV at the time of scale development, in the Diagnostic and Statistical Manual of Mental Disorders, APA, 4 edn, text revision, 2000.

63 B Bride, "Prevalence of secondary traumatic stress among social workers" (2007) 52(1) *Social Work* 63 at 67; J Caringi et al, "Secondary traumatic stress and licensed clinical social workers" (2016) 23(2) *Traumatology* 186 at 190.

64 Bride, n 63, 68.

65 Bride, n 63; Caringi et al, n 63, 190.

66 See, eg, Beaton Consulting, *Annual Professions Survey*, Summary Research, Beyondblue, April 2007 at 2–3.

67 P Schiltz, "On being a happy, healthy, and ethical member of an unhappy, unhealthy and unethical profession" (1999) 52 *Vanderbilt Law Review* 871 at 876.

68 G Andrew et al, "The prevalence of depression, alcohol abuse and cocaine abuse among United States lawyers" (1990) 13 *International Journal of Law and Psychiatry* 233; Beaton Consulting, n 66; J Chan, S Poynton and J Bruce, "Lawyering stress and work culture: an Australian study" (2014) 37(3) *UNSW Law Journal* 1062; P Krill, R Johnson and L Albert, "The prevalence of substance use and other mental health concerns among American attorneys" (2016) 10(1) *Journal of Addiction Medicine* 46.

helpful cut-off scores, good population norms,[69] and was used in at least one Australian[70] and one American[71] lawyer stress study. The AUDIT contains 10 items relating to frequency, quantity, dependence and harmful consequences of alcohol use (eg How many standard drinks do you have on a typical day when you are drinking?), which participants rate on a three- or five-point Likert scale, depending on the question. A total AUDIT score is obtained by summing responses to individual questions. Possible scores range from 0 to 30, with higher scores indicating higher risk drinking. Normative data allows for the classification of AUDIT scores into one of four levels of risk: non-drinker (scores of 0); low risk (scores of 1–7); medium risk (scores of 8–15); and high risk (scores of 16+).[72] Scores in the medium- to high-risk range are sometimes referred to as indicating problematic use.[73] The internal reliability in the present study was found to be acceptable (Cronbach's alpha coefficient = .76).

Analysis

This article presents the primary analysis of the quantitative survey data — that is, descriptive statistics and normative comparisons across the various measures of stress and wellbeing:

- perceived stress and wellbeing;
- non-specific psychological distress (K10);
- depressive and anxious symptoms (DASS-21);
- burnout (MBI-GS);
- secondary traumatic stress (STSS); and
- alcohol use and dependence (AUDIT).

Forthcoming articles will present the secondary analysis of the quantitative data (ie relationships among stress variables, relationships between stress variables and basic psychological needs satisfaction, and differences among demographic groups), and the qualitative data arising from the interviews.

Perceived stress and wellbeing

Three questions provided an initial measure of judicial officers' perceived stress and wellbeing. The first two related to the frequency (1 = none of the time; 5 = almost all the time) that

69 J Saunders et al, "Development of the alcohol use disorders identification test (AUDIT): WHO collaborative project on early detection of persons with harmful alcohol consumption II" (1993) 88 *Addiction* 791; T Babor et al, AUDIT: the alcohol use disorders identification test — Guidelines for use in primary health care, World Health Organisation, 2 edn, 2001, at https://apps.who.int/iris/handle/10665/67205, accessed 11 August 2021, (AUDIT Manual); D Reinert and J Allen, "The alcohol use disordered identification test: a update of research findings" (2007) 31(2) *Alcoholism: Clinical and Experimental Research* 185.

70 Chan, Poynton and Bruce, n 68.

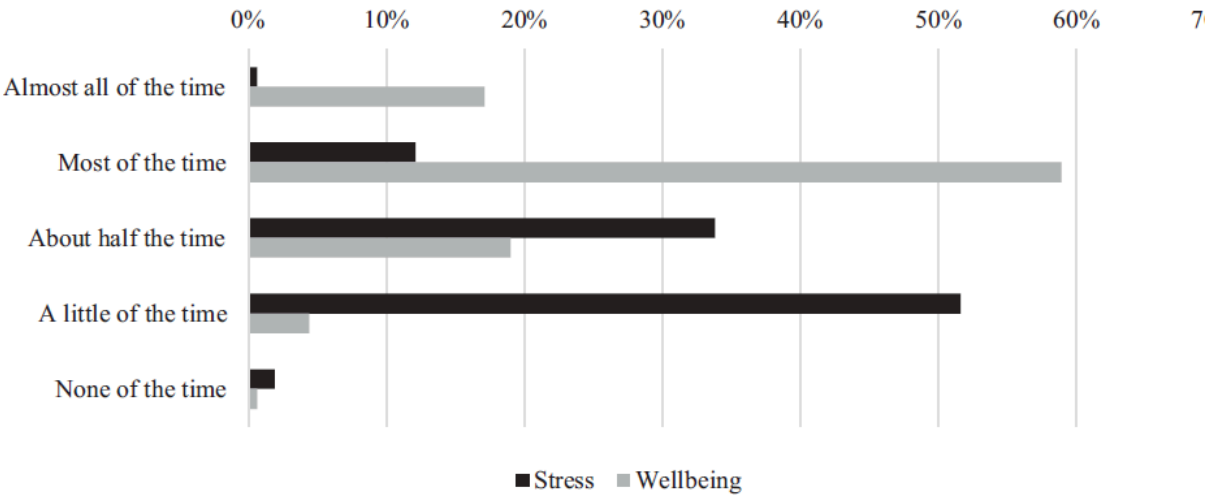
71 Krill, Johnson and Albert, n 68.

72 Chan, Poynton and Bruce, n 68 at 81; AUDIT Manual, n 69 at 21–22. Note that the AUDIT Manual divides the high-risk category into two zones, the first (scores 16–19) indicating simple advice plus brief counselling and continued monitoring are necessary, and the second (scores 20+) indicating referral to a specialist for diagnostic evaluation and treatment.

73 Krill, Johnson and Albert, n 68 at 47.

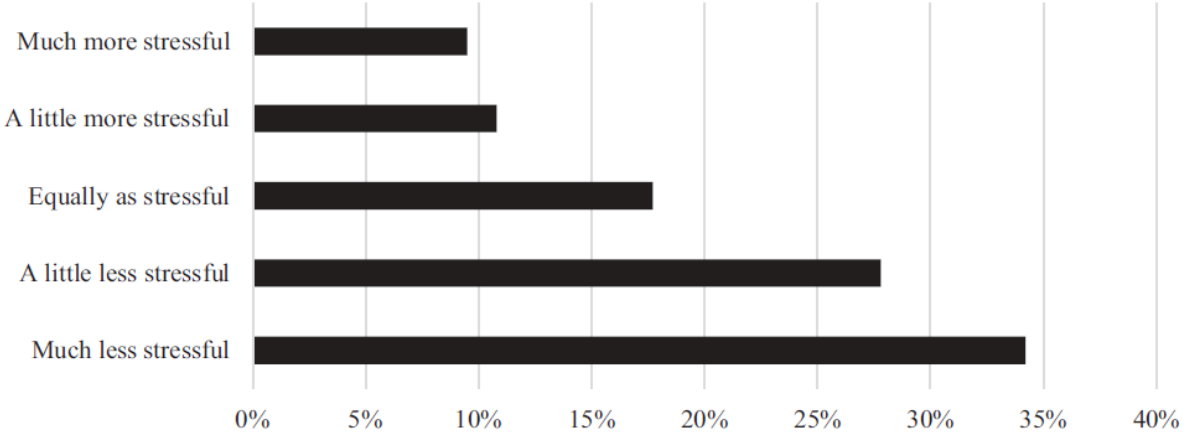
judicial officers had experienced stress and personal wellbeing and satisfaction related to their work since their appointment. As shown in Fig 1, perceived stress was negatively skewed and perceived wellbeing was positively skewed. Approximately one-eighth (12.7%) of respondents reported experiencing stress most or almost all of the time, while more than three-quarters (76.0%) reporting experiencing personal wellbeing and satisfaction most or almost all of the time. An analysis of individual responses revealed that subjective experiences of stress and wellbeing were not mutually exclusive — for example, of those who reported experiencing stress most of the time, the majority (60.0%) also reported experiencing personal wellbeing and satisfaction most of the time.

FIGURE 1. Responses to Questions "Since Your Appointment, How Much of the Time Did You Experience Stress/Personal Wellbeing and Satisfaction Related to Your Work? Shown as Percentages (*n* = 152)



A third question was directed to perceptions of the relative stress (1 = much less stressful; 5 = much more stressful) of judicial office compared with respondents' career prior to appointment. The results are show in Fig 2. Sixty-two per cent of judicial officers reported that judicial office was a little or much less stressful than their pre-appointment careers, 20.3% reported that it was a little or much more stressful, with the remainder (17.7%) reporting that it was equally as stressful.

FIGURE 2. Responses to the Question "Relative to Your Career Prior to Appointment, How Does the Stress of Judicial Office Compare?", Shown as Percentages (*n* = 152)



Non-specific psychological distress (K10)

The descriptive statistics for judicial officers' K10 scores were as follows: mean = 16.64; standard deviation = 4.87; possible range = 10–50; observed range = 10–31. The K10 asks about the frequency of experiences over the past four weeks. The highest scoring items were about how often did you feel tired out for no good reason? and about how often did you feel nervous?, with 14.2% and 4.5% of judicial officers respectively reporting they felt this way most of the time or all of the time over *the past four weeks*. As noted above, K10 scores can be categorised into one of four severity ranges, from low or no distress through to severe distress. The frequencies of K10 scores within each severity range for judicial officers in the present study, and those reported in previous studies of the Australian legal profession[74] and general population,[75] are set out in Table 3 and expressed graphically in Fig 3. The majority (52.9%) of judicial officers' scores indicated some level of non-specific psychological distress, with 14.8% of scores indicating high or very high distress.

K10 Severity Range Frequencies, Expressed as Percentages, for Australian Judicial Officers (n = 152) Compared with Those Reported for Barristers, Solicitors, Law Students and the Australian General Population

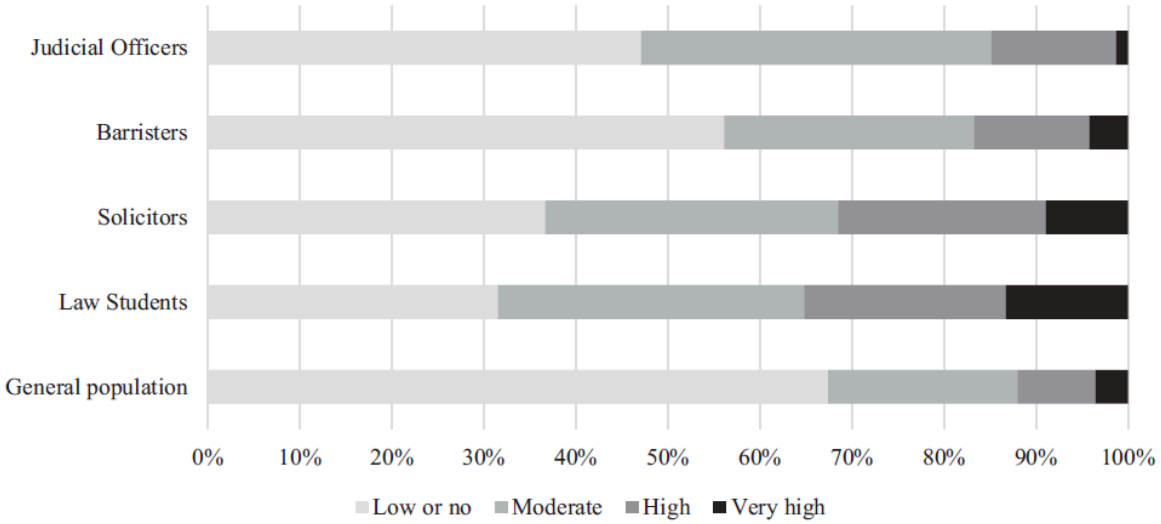
K10 Severity Range Frequencies (%)					
Population	*n*	**Low or No Distress**	**Moderate Distress**	**High Distress**	**Very High Distress**
Judicial officers	152	47.1	38.1	13.5	1.3
Barristers	756	56.2	27.2	12.5	4.2
Solicitors	924	36.4	31.6	22.3	8.7

74 Courting the Blues Study, n 27.
75 Australian Bureau of Statistics, n 26; Australian Bureau of Statistics, n 30.

K10 Severity Range Frequencies (%)					
Law students	741	31.5	33.3	21.9	13.3
General population	15,740	67.3	20.8	8.5	3.5

Sources: Data for barristers, solicitors and law students is as reported in the landmark study by N Kelk et al, *Courting the blues: attitudes towards depression in Australian law students and legal practitioners*, Monograph 2009-1, Brain and Mind Research Institute, 2009; Brain and Mind Research Institute, January 2009, 9; data for the general population are as reported in Australian Bureau of Statistics, Use of the Kessler Psychological Distress Scale in ABS Health Surveys, Australia, 2007–2008, National Health Survey 2007–2008 (Information Paper, 4817.0.55.001, 4 April 2012).

FIGURE 3. K10 Severity Range Frequencies, Expressed as Percentages, for Australian Judicial Officers (*n* = 152), Compared with Those Reported for Barristers (*n* = 756), Solicitors (*n* = 924), Law Students (*n* = 741) and the Australian General Population (*n* = 15,740)



Sources: Data for barristers, solicitors, and law students is as reported in the landmark study by N Kelk et al, *Courting the blues: attitudes towards depression in Australian law students and legal practitioners*, Monograph 2009-1, Brain and Mind Research Institute, 2009 9; data for the general population are as reported in Australian Bureau of Statistics, Use of the Kessler Psychological Distress Scale in ABS Health Surveys, Australia, 2007–2008, National Health Survey 2007–2008 (Information Paper, 4817.0.55.001, 4 April 2012).

These results indicate that Australian judicial officers experience elevated rates of non-specific psychological distress, as measured by the K10, in the moderate to high ranges, compared to the general population and the barrister arm of the legal profession. However, when we consider distress within the very high range, judicial officers' rates are considerably lower than all levels of the profession and the general population.

Depessive and anxious symptoms (DASS-21)

The descriptive statistics for judicial officers' scores on the DASS-21, across the three sub-scales of depression, anxiety and stress, are set out in Table 4. The frequencies of judicial officers' scores within each of the five normative severity ranges are set out in Table 5.

Means, Standard Deviations and Ranges for Judicial Officers' Scores on the DASS-21 Sub-Scales (n = 152)

Sub-Scale	Mean	Standard Deviation	Possible Range	Observed Range
Depression	2.22	2.81	0–21	0–18
Anxiety	1.50	2.23	0–21	0–13
Stress	5.03	3.66	0–21	0–20

Severity Range Frequencies for Judicial Officers' Scores on the DASS-21 Sub-Scales (n = 152)

Sub-Scale	Severity Range				
	Normal	Mild	Moderate	Severe	Extremely Severe
Depression					
Score cut-off	0–4	5–6	7–10	11–13	14+
Count	126	12	12	1	1
Percentage	82.9%	7.9%	7.9%	.7%	.7%
Anxiety					
Score cut-off	0–3	4–5	6–7	8–9	10+
Count	131	10	6	3	2
Percentage	86.2%	6.6%	3.9%	2.0%	1.3%
Stress					
Score cut-off	0–7	8–9	10–12	13–16	17+
Count	120	20	6	4	2
Percentage	78.9%	13.2%	3.9%	2.6%	1.3%

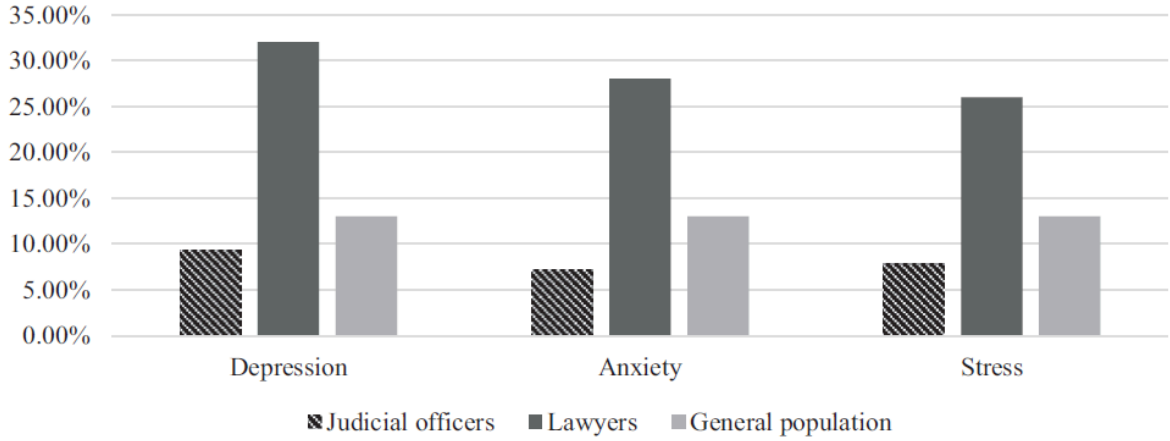
Note: Score cut-offs for the severity ranges are derived from normative percentiles as set out in the DASS official manual.

The three most strongly endorsed DASS-21 items were all from the stress sub-scale: I found it hard to wind down; I found it difficult to relax; and I found myself getting agitated. The percentage of respondents who indicated that these experiences applied to them a good part or most of the time over the past week was 25.0%, 15.3% and 8.6%, respectively.

A number of lawyer and law student wellbeing studies have focused on the rates of scores in the moderate to extremely severe ranges — sometimes reporting rates three times higher than the general populations — as an indication of the scale of the mental health problem afflicting

the legal profession.[76] Figure 4 shows the rates of judicial officers' scores in the moderate to extremely severe ranges, compared with Australian lawyers and the general population — according to results reported in a large-scale study of the Australian legal profession (n = 965)[77] and the population normative percentiles set out in the DASS-21 official manual.[78] The results show that judicial officers' rates of moderate to extremely severe depression, anxiety and stress symptoms (9.3%, 7.2% and 7.8%, respectively) were dramatically lower than those reported for Australian lawyers, and lower also than those suggested for the Australian general population.

FIGURE 4. Rates of Judicial Officers' DASS-21 Scores (*n* = 152) in the "Moderate" to "Extremely Severe" Ranges, as Compared to Those Reported for Australian Lawyers (*n* = 756) and Suggested for the General Population



Sources: J Chan, S Poynton and J Bruce, "Lawyering stress and work culture: an Australian study" (2014) 37(3) *UNSW Law Journal* 1062 at 1081; P Lovibond and S Lovibond, *Manual for the Depression Anxiety Stress Scales* (DASS), Psychology Foundation Monograph, 1993 (DASS Manual).

Burnout (MBI-GS)

The descriptive statistics for judicial officers' scores on the MBI-GS, across the three burnout sub-scales of exhaustion, cynicism and professional efficacy, are set out in Table 6. Scores on the professional efficacy sub-scale are interpreted in reverse to the exhaustion and cynicism sub-scales — that is burnout is associated with higher exhaustion and cynicism scores, but *lower* professional efficacy scores. The frequencies of judicial officers' scores within these normative severity ranges of low, moderate and high are set out in Table 7. On each of the exhaustion

76 See, eg, Chan, Poynton and Bruce, n 68; A Bergin and N Jimmieson, "Australian lawyer well-being: workplace demands, resources and the impact of time-billing targets" (2014) 21(3) *Psychiatry, Psychology and Law* 427; W Larcombe et al, "Does an improved experience of law school protect students against depression, anxiety and stress? An empirical study of wellbeing and the law school experience of LLB and JD students" (2013) 35 *Sydney Law Review* 407.

77 Chan, Poynton and Bruce, n 68 at 1081. Note: Chan, Poynton and Bruce used the extended version of the DASS, the DASS-42, so (as permitted by DASS Manual) the cut-off scores were divided by two to match the cut-offs for the DASS-21.

78 Normative percentiles reported in official DASS Manual, n 32. No n for the normative sample was provided.

and cynicism sub-scales, a little over one quarter (26.6% and 29.6%, respectively) of judicial officers scored in the high range. Approximately one in 10 (10.4%) scored in the low range on the professional efficacy sub-scale. Four per cent (4.0%) scored high on both exhaustion and cynicism, and low on professional efficacy, indicating *high risk* of burnout, whereas 24.8% scored low on both exhaustion and cynicism, and high on professional efficacy, indicating *low risk* of burnout.

Means, Standard Deviations and Ranges for Judicial Officers' Scores on the MBI-GS Sub-Scales (n = 125)

Sub-Scale	Mean	Standard Deviation	Possible Range	Observed Range
Exhaustion	2.27	1.40	0.00–6.00	0.00–5.40
Cynicism	1.61	1.40	0.00–6.00	0.00–6.00
Professional efficacy	5.04	.87	0.00–6.00	1.17–5.04

Note: One incomplete response on the exhaustion sub-scale lead to an overall sample size of n = 124 for that sub-scale.

Burnout Severity Range Frequencies for Judicial Officers' Scores on the MBI-GS Sub-Scales (n = 125)

Sub-Scale	Burnout Severity Range		
	Low	Moderate	High
Exhaustion			
Score cut-off	#2.00	2.01–3.19	#3.20
Count	64	27	33
Percentage	51.6%	21.8%	26.6%
Cynicism			
Score cut-off	#1.00	1.01–2.19	#2.20
Count	58	30	37
Percentage	46.4%	24.0%	29.6%
Professional Efficacy			
Score cut-off	#4.00	4.01–4.99	#5.00
Count	13	27	85
Percentage	10.4%	21.6%	68.0%

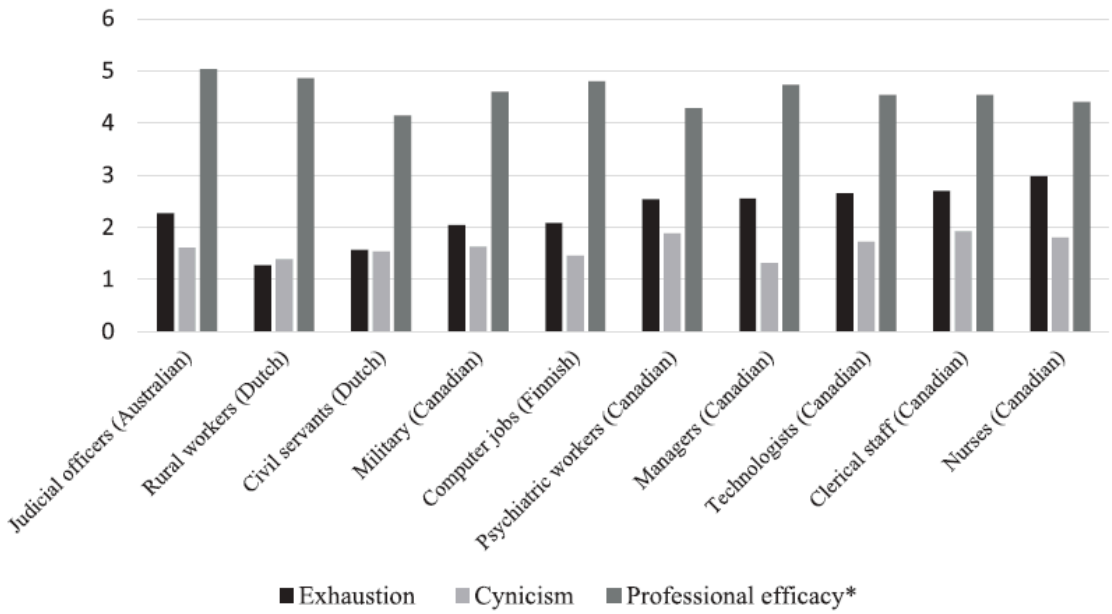
Note: One incomplete response on the "exhaustion" sub-scale lead to an overall sample size of n = 124 for that sub-scale.

The most strongly endorsed items were all on the professional efficacy sub-scale, for which high scores indicate *lower* burnout. Among the items for which high scores indicate *higher* burnout (ie items on the exhaustion and cynicism sub-scales), the three most strongly endorsed were: I feel used up at the end of the workday (exhaustion); I just want to do my work and not be

bothered (cynicism); and I feel emotionally drained by my work (exhaustion). The percentages of respondents who indicated that they experience these feelings at least once a week were 40.4%, 38.4%, and 30.4%, respectively. Almost 8% (7.8%) of respondents indicated that they feel used up at the end of the workday every day.

To the knowledge of the author, the MBI-GS has not been used in other studies involving judicial officers or lawyers. It has, however, been used in a number of large-scale North American and European studies across a range of occupational groups (including military, nurses, civil servants and psychiatric workers).[79] Figure 5 shows judicial officers' mean scores across each of the sub-scales, alongside those reported for different occupational groups in previous studies. The results reveal that, on average, judicial officers in this sample experienced moderate levels of exhaustion and cynicism, but very high levels of professional efficacy, compared with the available data for other occupational groups.

FIGURE 5. Australian Judicial Officers' Mean Scores on the Three MBI-GS Sub-Scales ("Exhaustion", "Cynicism" and "Professional Efficacy") Compared with Those Previously Reported for Other Occupational Groups



Source: C Maslach, S Jackson and M Leiter, *Maslach Burnout Inventory Manual*, Mind Garden, 3 edn, 2013, (MBI Manual) p 24.

Secondary traumatic stress (STSS)

The descriptive statistics for judicial officers' raw and average scores on the STSS, for total STSS and across the three sub-scales of intrusion, avoidance and arousal, are set out in Table

79 Results of these studies are summarised in C Maslach, S Jackson and M Leiter, *Maslach Burnout Inventory Manual*, Mind Garden, 3 edn, 2013, (MBI Manual) p 24 at p 48.

8. An STS symptom was considered to be endorsed if the respondent indicated that it was experienced occasionally, often or very often in the preceding seven days. The great majority (83.6%) of judicial officers endorsed at least one STS symptom, with the arousal sub-scale (mean = 2.04; standard deviation = .70) more strongly endorsed than the intrusion (mean = 1.83; standard deviation = .62) and the avoidance (mean = 1.79; standard deviation = .63) sub-scales. The most strongly endorsed items were: I had trouble sleeping (arousal; endorsed by 48.7%); I thought about my court work when I didn't intend to (intrusion; endorsed by 46.7%); and I was easily annoyed (arousal; endorsed by 37.5%). Responses to a number of other items are also notable: 22.4% of judicial officers endorsed I wanted to avoid working on certain types of cases or cases involving certain people (avoidance); 18.4% endorsed it seemed as if I was reliving the traumas experienced by a person/some people who came before me (intrusion); and 10.5% endorsed I had disturbing dreams about the people that came before me (intrusion). Figure 6 shows judicial officers' mean scores for the three STSS sub-scales, as compared with those reported for three occupational groups in the United States: immigration judges (n = 96);[80] social workers (n = 287);[81] and clinical social workers (n = 256).[82]

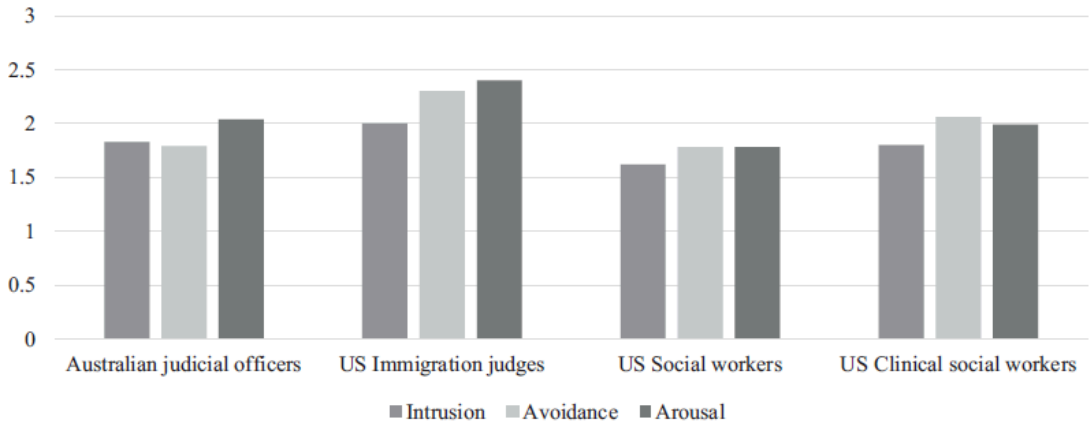
Means, Standard Deviations and Ranges for Judicial Officers' Raw and Average Scores on the STSS Sub-Scales and Total STSS

Scale	Mean	Standard Deviation	Possible Range	Observed Range
Raw Scores				
Intrusion	9.15	3.10	5–25	5–18
Avoidance	12.52	4.43	7–35	7–27
Arousal	10.20	3.48	5–25	5–21
Total STSS	31.78	10.04	17–85	17–85
Mean Scores				
Intrusion	1.83	.62	1.00–5.00	1.00–3.60
Avoidance	1.79	.63	1.00–5.00	1.00–3.86
Arousal	2.04	.70	1.00–5.00	1.00–4.20
Total STSS	1.87	.59	1.00–5.00	1.00–3.41

Note: Several incomplete responses lead to slightly different sample sizes across the three sub-scales: intrusion (n = 123); avoidance (n = 124); arousal (n = 125); and total STSS (n = 122).

80 Lustig et al, Burnout and stress among United States Immigration Judges, n 3.
81 Bride et al, n 59.
82 Caringi et al, n 63.

FIGURE 6. Australian Judicial Officers' (*n* = 122) Mean Scores on the Three STSS Sub-Scales – "Intrusion" (*n* = 123), "Avoidance" (*n* = 124) and "Arousal" (*n* = 125) – Compared with Those Previously Reported for Other Occupational Groups in the United States



Sources: Immigration judges (S Lustig et al, "Burnout and stress among United States Immigration Judges" (2008) 13 *Bender's Immigration Bulletin* 22; social workers (B Bride et al, "Development and validation of the secondary traumatic stress scale" (2004) 14(1) *Research on Social Work Practice* 27); clinical social workers (J Caringi et al, "Secondary traumatic stress and licensed clinical social workers" (2016) 23(2) *Traumatology* 186 at 190).

The frequencies of judicial officers' total STSS raw scores within each severity range are set out in Table 9. The results indicate that 62.3% of judicial officers were experiencing mild or higher levels of STS, with 13.2% experiencing high or severe STS. As noted above, STSS items mirror the diagnostic criteria for PTSD[83] and its lead author has suggested it could be used as a proxy measure of PTSD symptomatology.[84] Total STSS raw scores of 38 or higher (ie scores in the moderate to severe ranges) are considered pertinent to the question of whether formal assessment for PTSD might be indicated.[85] In the current study, 30.4% (n = 37) of judicial officers scored at or above 38. Figure 7 shows judicial officers' rates of scores at or over 38, alongside those previously reported for two samples of US social workers.

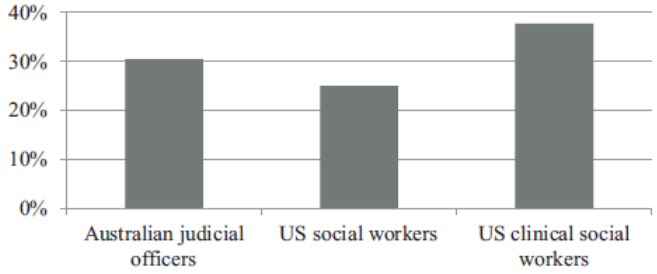
Severity Range Frequencies for Judicial Officers' Total STSS Raw Scores (n = 122)

Total STSS	Severity Range				
	Normal	Mild	Moderate	High	Severe
Score cut-off	>28	28-37	38-43	44-48	49+
Count	46	39	21	8	8
Percentage	37.7%	32.0%	17.2%	6.6%	6.6%

83 As set out in the DSM-IV, n 62, which was current at the time the STSS was produced.
84 Bride et al, n 59.
85 Bride, n 63; Caringi et al, n 63.

Note: Severity ranges and score cut-offs were suggested by Bride based on percentile ranks of total STSS raw scores found in his study of 282 US social workers; see B Bride, "Prevalence of secondary traumatic stress among social workers" (2007) 52(1) *Social Work* 63.

FIGURE 7. Percentage of Australian Judicial Officers (30.4%) Whose Total STSS Raw Score Was 38 or Above, Compared with Percentages Previously Reported for a Group of US Social Workers (25.0%) and US Clinical Social Workers (37.7%).=



Sources: B Bride, "Prevalence of secondary traumatic stress among social workers" (2007) 52(1) *Social Work* 63 at 67; J Caringi et al, "Secondary traumatic stress and licensed clinical social workers" (2016) 23(2) *Traumatology* 186 at 190.

Alcohol use and dependence (AUDIT)

The descriptive statistics for judicial officers' AUDIT scores were as follows: mean = 6.12; standard deviation = 4.11; possible range = 0–30; observed range = 0–23. The three most strongly endorsed items all related to frequency and quantity of drinking, as opposed to dependent or harmful drinking. The highest scoring item was How often do you have a drink containing alcohol, with 76% of judicial officers indicating that they drink at least twice weekly. Almost half (48.4%) reported that they have at least 3–4 standard drinks on a typical day when they are drinking. Fourteen per cent (14.6%) reported that they consume six or more standard drinks on one occasion at least weekly.

The frequencies of judicial officers' AUDIT scores within each normative level-of-risk range, alongside those reported in previous studies of the Australian legal profession[86] and general population,[87] are set out in Table 10 and expressed graphically in Fig 8. Just over 30% of judicial officers scored in the moderate- to high-risk or problematic use levels, as compared with 32% of lawyers and 18.8% of the general population.

86 Chan, Poynton and Bruce, n 68 at 1087.

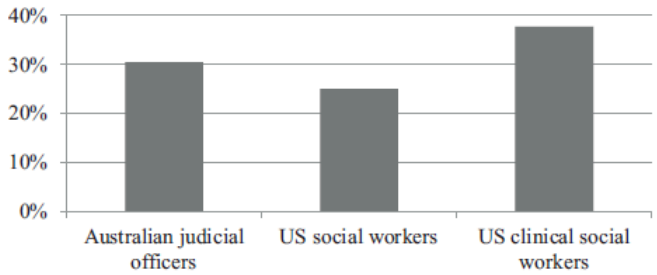
87 C Moller, R Tait, and D Byrne, "Self-harm, substance use and psychological distress in the Australian general population" (2013) 108(1) *Addiction* 211 at 215. Figures reported for Australians in their 40s. An error in the table (figures for abstainer and low risk have been interchanged). In addition, there is an error in the calculation of the percentage of abstainers: paper reports 6.7% but manually calculated the correct percentage is 8.1%.

AUDIT Level of Risk Frequencies, Expressed as Percentages, for Australian Judicial Officers (n = 121) Compared with Those Reported for Australian Lawyers and the General Population

		AUDIT Level of Risk Frequencies (%)			
Population	*n*	**Non-Drinker**	**Low-Risk**	**Medium Risk**	**High Risk**
Judicial officers	121	4.0	65.4	28.1	2.5
Lawyers	772	9.0	59.0	25.0	7.0
General population	4,100	8.1	73.1	15.5	3.3

Sources: J Chan, S Poynton and J Bruce, "Lawyering stress and work culture: an Australian study" (2014) 37(3) *UNSW Law Journal* 1062 at 1087; C Moller, R Tait, and D Byrne, "Self-harm, substance use and psychological distress in the Australian general population" (2013) 108(1) *Addiction* 211 at 215.

FIGURE 7. Percentage of Australian Judicial Officers (30.4%) Whose Total STSS Raw Score Was 38 or Above, Compared with Percentages Previously Reported for a Group of US Social Workers (25.0%) and US Clinical Social Workers (37.7%).=



Sources: J Chan, S Poynton and J Bruce, "Lawyering stress and work culture: an Australian study" (2014) 37(3) *UNSW Law Journal* 1062 at 1087; C Moller, R Tait, and D Byrne, "Self-harm, substance use and psychological distress in the Australian general population" (2013) 108(1) *Addiction* 211 at 215.

Discussion

This research was the first psychologically grounded study of judicial stress and wellbeing to be conducted in Australia. Based on a survey of 152 judicial officers from five Australian courts, the primary quantitative analysis presented in this article provides the first empirical data on the nature, prevalence and severity of stress among Australian judicial officers. These results deliver a picture of how Australian judges' and magistrates' levels of stress fit within the broader conversation about lawyer wellbeing that is taking place around the world.

Key findings

A number of important findings have arisen from this research. First, it has revealed that the pattern of stress and psychological ill-health among judicial officers in the study is different from that which has been reported for the Australian legal profession. This finding draws upon the results from the K-10, which measures psychological distress, and the DASS-21, which measures depressive and anxious symptoms. For the former, compared with K-10 data

published for Australian barristers[88] and the general population,[89] judicial officers reported elevated rates of non-specific psychological distress in the moderate to high ranges. However, when considering distress in the very high range, judicial officers' rates were considerably lower than all levels of the profession and the general population. Alongside the K-10 results, the DASS-21 results show that judicial officers reported symptoms of depression and anxiety at rates similar to (and, in the moderate to extremely severe ranges, lower than) those suggested for the general population,[90] which is dramatically lower than those previously found for the broader legal profession.[91] In fact, in the moderate to extremely severe ranges, lawyers' reported rates of depression, anxiety and stress symptoms were more than three times those found for judicial officers in this study. Taken together these results suggest that while there is not a widespread mental health problem among the Australian judiciary, there is a stress problem. This is consistent with the limited empirical research on judicial stress from the United States, which has collectively suggested that judicial officers experience elevated occupational stress, but their rates of stress and mental ill-health are generally lower than practising lawyers.[92] Given that judicial officers are, almost without exception, drawn from the population of practising lawyers, this difference in rates of mental ill-health between the two groups is interesting. It may be due to a number of factors. It may indicate that judicial work is quantitatively less demanding than legal practice, such that a key driver of mental ill-health within the legal profession is reduced among judges. Alternatively, it could suggest that those appointed to judicial office are generally well-adapted to legal work and well suited to the judicial role — in other words, that the appointment process is generally sound. Finally, it may be a reflection of the well-documented observation that late middle life (the age at which most judicial officers serve their time in office) is a period of relative mental stability. Indeed, it may indicate a combination of all three. Of course, the impact of these factors may vary between different levels of the court hierarchy and different practice areas; these issues will be explored in forthcoming articles.

Second, this research found that symptoms of burnout and secondary trauma were features of the occupational stress experience for many judicial officers. Considering first the MBI-GS burnout results, while only 4.0% of participants' scores fell within the highest risk profile (ie high exhaustion, high cynicism and low professional efficacy), still only 24.8% fell within the lowest risk profile (ie low exhaustion, low cynicism and high professional efficacy), indicating that three-quarters (75.2%) of judicial officers in this study reported scores on at least one sub-scale that was consistent with some level of burnout risk. The burnout symptoms reported by judicial

88 Courting the Blues Study, n 27 at 9–10.
89 Australian Bureau of Statistics, n 26.
90 DASS Manual, n 32.
91 Chan, Poynton and Bruce, n 68.
92 To the knowledge of the research, there is only one study worldwide that has specifically compared levels and rates of distress between judicial officers and practicing lawyers (Krieger and Sheldon, n 3) reporting that judges' levels of depression were the lowest of all legal practitioner groups. Other studies have reported elevated distress symptoms among judges without reference to the legal profession: see, eg, Showalter and Martell, n 3; Eells and Showalter, n 3; Jaffe et al, n 3; Flores et al, n 3; Lustig et al, "Burnout and stress among United States Immigration Judges", n 3; Miller et al, n 3.

officers' were chiefly along the axes of exhaustion and cynicism; while reported experiences of professional efficacy were generally very strong. The mean scores for both exhaustion and cynicism were in the moderate range, whereas the mean score for professional efficacy was in the high range — and higher, in fact, than the professional efficacy means reported for other occupational groups, such as psychiatric workers, civil servants and the military.[93] These results suggest that although judicial officers' are vulnerable to burnout, their experiences of burnout symptoms are likely to be characterised by feelings of emotional depletion and loss of meaning, rather than feelings of incompetence and ineffectiveness.

Turning to the STSS results, the overwhelming majority of judicial officers in this study (83.6%) endorsed at least one STS symptom, with almost a third (30.4%) obtaining total STSS scores in the moderate to severe ranges. Given that these statistics relate to symptoms experienced occasionally, often or very often in *the one week* prior to survey completion, these results suggest that, at any given point in time, a considerable proportion of judicial officers are burdened with one or more symptoms of STS. Promoting the STSS as a proxy measure of PTSD, Bride, the lead author of the STSS, has recommended that a total STSS score of 38 or higher be interpreted as indicating PTSD due to STS[94] — in other words, all people scoring in the moderate to severe ranges can be considered, according to Bride, likely to meet diagnostic criteria for PTSD.[95] By this analysis, 30.4% of judicial officers in the present study should be considered to be experiencing symptoms similar to, and likely qualifying for, PTSD. Although Bride reported good sensitivity and specificity for this cut-off value, this methodology has been followed in only one other study[96] and hence has not been externally validated. Further, the STS does not address PTSD diagnostic criteria relating to duration of symptoms and functional impairment.[97] It therefore provides, at best, a very crude basis upon which to infer post-traumatic psychopathology. Nonetheless, participants' mean scores fell somewhere between those previously reported for other high stress professional groups, US social workers[98] and US immigration judges,[99] suggesting that STS is a prominent feature of the occupational stress experienced by Australian judicial officers. This is consistent with several American studies which have explored secondary trauma (and the related constructs of vicarious trauma and compassion fatigue) among judges.[100] Third, the study found that judicial officers' alcohol use was comparable to that reported for the Australian legal profession, which is considerably higher than the documented level of use within the Australian general population. A little over 30% of judicial officers' AUDIT scores were in the medium- to high-risk levels, indicating problematic alcohol use; previous studies with Australian lawyers[101]

93 MBI Manual, n 79 at 24.
94 Bride, n 63.
95 As set out in the DSM-IV, n 62, which was current at the time the STSS was produced.
96 Caringi et al, n 63.
97 Diagnostic criteria E and F in DSM-IV, n 62.
98 Bride et al, n 59.
99 Lustig et al, Burnout and Stress Among United States Immigration Judges, n 3.
100 Jaffe et al, n 3; Chamberlain and Miller, n 3; Lustig et al, "Burnout and stress among United States Immigration Judges", n 3; Resnick, Myatt and Marotta, n 3; Miller et al, n 3.
101 Chan, Poynton and Bruce, n 68 at 1087.

and the general population[102] reported rates of medium- to high-risk scores as 32.0% and 18.8%, respectively. To the knowledge of the researcher, this is the first study internationally to measure judicial officers' alcohol use. A number of Australian[103] and American[104] studies have investigated alcohol use among practising lawyers, frequently reporting that lawyers' levels of use are higher than those of other occupational groups, especially as a way of managing stress and depression. The Law Institute of Victoria's 2012 report, Mental Health and the Legal Profession: A Preventative Strategy, suggested that there may be a culture within the profession of self-medicating, noting alcohol abuse (and, to a lesser extent, substance abuse) is prevalent in the legal profession as a maladaptive strategy for dealing with stress.[105] Although the present study did not investigate judicial officers' functional goals for alcohol use, the results suggest that the pattern of alcohol consumption within the broader Australian legal profession extends to judicial officers.

Strengths and limitations

The present study makes a significant contribution to the conversation on judicial wellbeing taking place in Australia and around the world. As the first research to empirically measure levels of stress and psychological ill-health among Australian judicial officers, the present study is groundbreaking nationally, and — given the limited number of judicial stress studies undertaken using empirically validated measurement instruments[106] — it is pioneering internationally. In addition, whereas previous studies of lawyer and judicial wellbeing have generally confined the analysis to one or two stress constructs, the present study operationalised judicial stress and wellbeing across six qualitatively different stress constructs and used empirically validated psychometric instruments to measure each. This expansive and rigorous measurement approach has afforded a rich and reliable picture of the varied ways in which the unique pressures of judicial office are experienced by judges and magistrates, and how judicial stress compares to the stress experienced by lawyers, other professionals and the general population. The clinical and social significance of this study is considerable. It directly targeted the suffering of senior public officials, judges and magistrates, which is not readily acknowledged and was historically taboo.[107] Given the pivotal role that judicial officers play in Australia's democratic system and the daily impact of their decisions on people's lives, their psychological health and wellbeing is a vital community concern. As more and more judicial officers speak out about their experiences of stress and mental ill-health on the bench, and as

102 Moller et al, n 87, 215.
103 Beaton Consulting, n 66; Chan, Poynton and Bruce, n 68.
104 G Andrew, H Benjamin, E Darling, and B Sales, "The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers" (1990) 13 *International Journal of Law and Psychiatry* 223; Krill, Johnson and Albert, n 68.
105 L Helm, *Mental Health and the Legal Profession: A Preventative Strategy*, Final Report, Law Institute of Victoria, 11 September 2014, p 14.
106 Of the 15 published studies directed to systematically exploring judicial stress, less than half (seven in total) reported using validated stress measurement instruments: Showalter and Martell, n 3; Eells and Showalter, n 3; Flores et al, n 3; Lustig et al, "Burnout and stress among United States Immigration Judges", n 3; Tsai and Chan, n 3; Krieger and Sheldon, n 3; Miller et al, n 3.
107 Kirby, n 6.

courts in Australia and around the world begin to grapple with the question of how best to support judicial officers in their complex and critical work, the results of this study provide an initial basis for appropriate intervention and support.

There were of course some limitations with the present study. First, while this was the first empirical research into judicial wellbeing in Australia, it was not a fully national study. There are, at the time of writing, 38 courts in Australia;[108] five were invited to participate in the study. These five spanned the court hierarchy from summary to appellate level and, given the study's strong (67%) response rate and broad representativeness across the demographic variables, the survey data can be considered to reliably reflect the prevalence and severity of judicial stress within the five participating courts. However, the question of whether these findings can be generalised to the Australian judiciary as a whole is more nuanced. The five participating courts represent just over one-eighth of the courts currently operating within the Australian federal, State and Territory systems, and the 152 judicial participants represent approximately 14.4% of the Australian judicial population, which — at the time of writing — is estimated to number 1,052 judges and magistrates.[109] It should be remembered in interpreting the results that the context and circumstances of judicial work varies considerably from jurisdiction to jurisdiction, and therefore the prevalence and severity findings generated by this study may not be representative of every Australian court.

Second, several aspects of the study design and recruitment methodology may have influenced the sample and responses. First, regarding the use of a survey — self-report bias and social-desirability bias are well-documented phenomena,[110] and are limitations intrinsic to all survey-based psychological research. In this regard, it is possible that participants' responses reflected their aspirational, rather than their actual, experiences. For example, in responding to the AUDIT, participants may have indicated their *intended* frequency and quantity of alcohol use, which may well be considerably lower than their actual level of use.[111] Even if participants were trying to answer honestly, some may have lacked the introspective ability to provide accurate responses. Given that most of the measures assessed the frequency and intensity of negative stress symptoms, a lack of insight or introspection would likely lead to an under-reporting of symptoms. Although validated measurement instruments, like those used in this study, are scientifically developed to minimise the impact of self-report bias, it is not possible to completely eliminate under- or over-reporting of experience. This, of course, is equally a limitation for the survey-based studies cited throughout this article relating to the legal

108 The figure of 38 was arrived at by counting courts as presented in various annual reports and this number may be slightly higher. For example, the researcher has included as separate courts Children's/Youth Courts and Coroners Courts where possible and it may be that some separate courts are not included in the figure of 38.

109 Australasian Institute of Judicial Administration, *Judicial Gender Statistics*, 7 March 2018, at https://aija.org.au/research/judicial-gender-statistics/, accessed 11 August 2021. This information is collated by the AIJA Librarian using the court websites.

110 See M Hunt, J Auriemma and A Cashaw, "Self-report bias and underreporting of depression on the BDI-II" (2003) 80(1) *Journal of Personality Assessment* 26.

111 See K Kypri et al, "Social desirability bias in the reporting of alcohol consumption: a randomised trial" (2016) 77(3) *Journal of Studies on Alcohol and Drugs* 526; M Devaux and F Sassi, "Social disparities in hazardous alcohol use: self-report bias may lead to incorrect estimates" (2016) 26(1) *European Journal of Public Health* 129.

profession and the general population. However, given the reputed stress denying culture[112] of the Australian judiciary, it is possible that self-report and social-desirability biases are more pronounced among judicial officers. Second, the recruitment methodology (distributing the survey during internal courts conferences) may not have reached judicial officers' at their most stressed, given that conferences usually provide a short reprieve from the many stressors faced by judicial officers in their daily work. It was also unlikely to have reached the most acutely unwell judicial officers, who may have been on extended sick or stress leave or who may not have been prepared to dedicate the time to survey completion. While these limitations cannot be overlooked, they are arguably most likely to have contributed to an *under-representation* of the true prevalence and severity of judicial stress, such that is it possible the real extent of the stress experienced by judicial officers is higher than the findings suggest.

Future research

The results of the present study raise a number of questions that should be addressed in future research. Perhaps most importantly: are the findings indicative of the state of stress and wellbeing among judicial officers throughout Australia, or are they the idiosyncratic experience of the five participating courts? The Australian judicial system is diverse and dynamic, and while there are undoubtedly many commonalities in judicial work across the Australian courts, it is equally apparent that courts vary dramatically in terms of workload, work type, and work culture, any or all of which may impact the pressures confronted by judicial officers and the stress they experience. The present study highlights the need for a national study, involving all Australian courts, to determine the overall nature, prevalence and severity of judicial stress in Australia and to identify jurisdictions, practice areas and demographic groups that may be particularly affected. If such a study were to occur, it would be a world first. National judicial studies have been undertaken in Australia[113] and the United Kingdom[114] with great success and practical application; however, to date these have focused on workload, job satisfaction and judicial attitudes, and have not included validated measures of stress and wellbeing. As already noted, the small number of previous studies measuring judicial stress were all relatively small scale and jurisdiction specific. No country has yet embarked upon a full-scale national study of judicial wellbeing.

A related question is to what extent the findings of the current study reflect the general experience of judicial stress around the world. The current research adds to a very small body of empirical research into the psychological impact of judicial work, most of which has been conducted in North America. Judges around the world encounter many of the same occupational stressors (heavy workloads, dealing with distressing subject matter, daily

112 See Kirby, n 6, 101; M Kirby, "Judicial stress — a reply" (1997) 71 *ALJ* 791.

113 See the extensive and high-quality work conducted principally by Emerita Professor K Mack and Professor S Roach Anleu from Flinders University on judicial workload, emotion and job-satisfaction, eg, K Mack, A Wallace and S Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation*, Australasian Institute of Judicial Administration, 2012.

114 C Thomas, "2016 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals" Report, UCL Judicial Institute, 7 February 2017, at www.judiciary.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf, accessed 11 August 2021.

immersion in conflict and disagreement, responsibility for decisions that significantly impact people's lives); however, there are obviously also enormous differences in terms of history and culture, political and social context, terms and conditions, and practical support, to name but a few. Future studies into judicial stress and wellbeing in other countries should attempt to use the same validated measurement instruments as used in the current study, or one of the previous North American studies, to enable meaningful transnational comparisons.

A further area that needs to be explored is the positive side of judicial wellbeing. The present study has focused on the negative side of judicial wellbeing — that is, judicial stress. However, the results from the three questions measuring perceived stress and wellbeing provide an initial indication that personal wellbeing and satisfaction were prominent feelings alongside the stress of the role. It is possible that the sources of fulfilment, accomplishment and purpose within judicial work compensate or offset for the sources of stress, providing for a demanding but meaningful professional life. As research within the relatively recent but now very well-established field of Positive Psychology has demonstrated, meaning may be more integral to sustained wellbeing than ease or pleasure.[115] Numerous validated measures of positive wellbeing now exist. Future studies could look into the nature and parameters of judicial wellbeing and satisfaction and explore the relationships between wellbeing variables and stress variables.

Finally, future research could attempt to determine the workplace factors that contribute greater judicial stress or wellbeing. There is much to guide such an inquiry. Extensive research in the fields of occupational stress and organisational psychology has generated a large evidence base for a number of models of workplace wellbeing, including the Mental Health Commission of Canada's 13 factors for psychological health and safety in the workplace,[116] which were adopted by the Tristan Jepson Memorial Foundation (now Minds Count, the peak body for lawyer wellbeing in Australia) in its best practice guidelines for psychologically healthy legal workplaces.[117] The 13 factors include organisational culture, civility and respect, psychological demands, and workload management, and provide a framework both for assessing the extent to which a workplace is supportive of psychological health and wellbeing, and for developing initiatives to improve wellbeing. Future research could be directed to exploring the presence and impact of these factors within the court environment, and their relationship to experiences of judicial stress.

Conclusion

This article has presented the methodology and primary quantitative analysis of Australia's first empirical research measuring judicial stress and wellbeing. The findings arise from the

115 For a discussion of the relationship between meaning and wellbeing in judicial work, see A Brafford and R Rebele, "Judges well-being and the importance of meaningful work" (2018) 54 *Court Review* 60.

116 Mental Health Commission of Canada, *13 Factors: Addressing Mental Health in the Workplace*, 2018, at www.mentalhealthcommission.ca/English/13-factors-addressing-mental-health-workplace, accessed 11 August 2021.

117 Tristan Jepson Memorial Foundation, *TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession* at www.mcw.com.au/content/Document/TJMFMentalHealthGuidelines_A4_140426.pdf, accessed 11 August 2021.

survey responses of 152 judicial officers from five Australian courts. Using standardised and validated psychometric instruments for a broad range of stress constructs, the survey robustly explored the varying ways in which stress in judicial office can manifest, and provided a rich picture of the psychological impact of judicial work. The findings reveal a judicial system not in mental health crisis, but under considerable stress. Judicial officers' rates of psychological distress were markedly higher than those previously reported for the general population and the barrister arm of the legal profession. Three-quarters of judicial officers' burnout scores indicated some level of burnout risk. The great majority endorsed at least one symptom of STS, with approximately a third scoring in moderate to severe ranges. Almost one in three judicial officers reported problematic alcohol use. Alongside this, however, judicial officers' rates of depressive and anxious symptoms were similar to and, in the moderate to extremely severe ranges, considerably lower than population norms, which is dramatically lower than rates reported for the legal profession. This research suggests that judicial officers in Australia are under pressure. Psychological distress, burnout and STS appear to be occupational hazards of judicial office, and, like lawyers, judicial officers seem more likely than others to rely on alcohol to manage the demands of the role. The good news is that judicial work does not appear to be associated with increased risk of mental illness and, for most judicial officers, judicial work is perceived as highly satisfying and less stressful than legal practice. While there are many questions yet to be explored, this first report from Australia's first study measuring judicial stress provides the basis for beginning an evidence-based conversation on judicial wellbeing in Australia, and contributes to the international conversation on this important topic taking place beyond our shores.

A fragile bastion:* UNSW judicial traumatic stress study†

J Hunter,‡ R Kemp,§ K O'Sullivan‖ and P Vines¶

The UNSW study# examined 205 NSW judicial officers' survey responses regarding the prevalence and impact of three kinds of traumatic stress: threats to the person, vicarious trauma, and vilification and included two psychometric tests, measuring PTSD symptoms and psychological distress. It follows Carly Schrever's pioneering Victorian study on judicial officers' stress and well-being.♠ The UNSW study reveals alarmingly high levels of psychological distress among respondents with 30% receiving tests scores indicative of likely PTSD. Over half reported being the subject of one or more type of threat, including 23% who had experienced death threats. Three quarters of judicial officers reported suffering negative effects associated with vicarious trauma and more than half of the respondents reported vilification in the form of harsh public criticism. The findings enable comparisons to be drawn between courts. Compared to judges in the higher courts, magistrates reported qualitatively and quantitatively different experiences, including significantly higher levels of trauma-related symptoms.

* The title, "Fragile bastion", comes from Sir Ninian Stephen's "Southey memorial lecture 1981: Judicial independence — a fragile bastion" (1982) 13 *University of Melbourne Law Review* 334.

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♠ C Schrever, C Hulbert and T Sourdin, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" (2019) 28 *JJA* 141; *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021. This compared judicial stress with that of lawyers and the general population; see also C Schrever, "Australia's first research measuring judicial stress: what does it mean for judicial officers and the courts?" (2019) 31 *JOB* 41; *Handbook for Judicial Officers*, ibid.

Introduction

In Australia in the mid-1990s, the Honourable Michael Kirby AC CMG attracted criticism from the profession with his article on judicial stress (subtitled, "An unmentionable topic").[1] The general topic of judicial well-being then languished until 2017 when former magistrate David Heilpern spoke at the Federal Court-hosted Sydney Lecture of the Tristan Jepson Memorial Foundation (now known as "Minds Count") with a personal account of the traumatic nature of his work presiding over trials involving evidence of horrific child abuse cases.[2] As one Local Court survey respondent to the UNSW study noted, there have been tangible and tragic indicators of workplace pressures on judicial officers with the deaths in Victoria in 2018 and 2017 respectively of Magistrates Stephen Myall and Jacinta Dwyer.[3]

The tragic deaths in 2020 of Federal Circuit Court Judge Guy Andrew and of New Zealand District Court Judge Robert Ronayne, add further evidence to the contemporary challenge for judicial officers to maintain good psychological health.

In 1997, the Honourable John Doyle AC, then Chief Justice of South Australia, observed that "the judiciary as an institution has suffered in silence when it … [has been] the subject of inaccurate and ill-informed discussion and criticism".[4] This observation has potency in the age of social media, and it is notable that these concerns are repeated in responses to the UNSW Study 20 years later showing continuing ill-informed or unfair media comment about judicial officers. An illustration of this "suffering in silence" comes from one magistrate in the UNSW study who said that negative comment "without any true understanding of the case or decision" causes concern and "it is difficult not to be upset by it when family, friends and others comment on it to you".

The researchers undertook the UNSW study with the working hypothesis that judicial officers are not exempt from the human condition[5] and that many are confronted by the trauma of others' lives in episodic and often relatively predictable ways. Vicarious trauma (known also

1 M Kirby, "Judicial stress" (1995) *Australian Bar Review* 1; see also M Kirby, "Judicial stress and judicial bullying", *Handbook for Judicial Officers*, ibid; M McMurdo, "Should judges speak out?", Judicial Conference of Australia, Uluru, April 2001 at www.austlii.edu.au/au/journals/QldJSchol/2001/49.pdf, accessed 9 June 2022.

2 D Heilpern, "Lifting the judicial veil – vicarious trauma, PTSD and the judiciary: a personal story", address to the Tristan Jepson Memorial Foundation, Sydney, 25 October 2017; *Handbook for Judicial Officers*, ibid.

3 See also N Towell and A Cooper, "Struggling magistrates cry for help", *The Age*, 2 April 2018 at, www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html, accessed 9 June 2022; P Wilmoth, "Loneliness, panic attack, insomnia: life for some on the judicial bench", *Sydney Morning Herald*, 4 August 2018, at www.smh.com.au/national/loneliness-panic-attacks-insomnia-life-for-some-on-the-judicial-bench-20180731-p4zukq.html, accessed 9 June 2022; T Mills and A Cooper, "Overworked and burdened, death of a magistrate in a judiciary under pressure", *The Age*, 7 August 2020, at www.theage.com.au/national/victoria/overworked-and-burdened-death-of-a-magistrate-in-a-judiciary-under-pressure-20200807-p55jpf.html, accessed 9 June 2022.

4 J Doyle, "The well-tuned cymbal", in H Cunningham (ed), *Fragile bastion: judicial independence in the nineties and beyond*, Education Monograph 1, Judicial Commission of NSW, 1997, p 39, at p 42.

5 See for example, T Maroney and J Gross, "The ideal of the dispassionate judge: an emotion regulation perspective" (2014) 6 *Emotion Review* 142.

as secondary traumatic stress or compassion fatigue or the "cost of caring")[6] is one of three focal points of the UNSW study. Recognising the presence of vicarious trauma to some extent challenges conventional wisdom that judicial officers adjudicate by putting to one side their emotions (along with their beliefs and personal predilections). Indeed, some respondents to our survey indicated that the mix of other potential trauma (such as threats to their safety, and vilification) and the intensity of their workload means there is little relief between trauma episodes.

A number of studies have shown that vicarious trauma can be a side effect of work as lawyers,[7] as jurors,[8] as fire fighters,[9] among social workers,[10] as well as those working in medicine.[11] Of course, the dynamics of judicial officers' exposure to vicarious trauma differs from that of first responders to crises. One difference is that judicial officers' trauma burden is affected by the constraints of their role and features of their workplace. For instance, in the United States, Zimmerman[12] observed in the 1980s, the consequence of judicial isolation[13] is that judicial officers may have limited debriefing opportunities beyond their own collegiate setting.[14] As well as the impact of isolation in judicial practice, writers have also examined judges' and magistrates' exposure to, and engagement with, the details of acts of violence and sexual predation.[15] Finally, in Pennsylvania, a 2001 empirical study with over 1,000 judicial respondents, initiated by the judiciary, found that 52% of respondents had received a threatening communication of some kind, including physical assaults during the previous year.[16] A series of three studies by Monica Miller and colleagues[17] concluded, somewhat uncontroversially, that

6 See C Figley (ed), "Compassion fatigue: coping with secondary traumatic stress disorder in those who treat the traumatized" (1995) 23 *Brunner/Mazel psychological stress series*.

7 J Chan, et al, "Lawyering stress and work culture: an Australian study" (2014) 37 *UNSWLJ* 1062; P Weir, et al, "Australian lawyers' experience of exposure to traumatic material: a qualitative study" (2020) *Psychiatry, Psychology and Law* 1. See also Meritas, Australia & New Zealand Wellness Survey 2019, at www.swaab.com.au/assets/download/Meritas-Wellness-Survey-Report.pdf, accessed 9 June 2022.

8 N Robertson, et al, "Vicarious traumatisation as a consequence of jury service" (2009) 49 *Howard J of Criminal Law* 1–12; M Lonergan, et al, "Prevalence and severity of trauma and stressor-related symptoms among jurors: a review" (2016) 47 *Journal of Criminal Justice* 51.

9 J Lee, et al, "Duty-related trauma exposure and posttraumatic stress symptoms in professional firefighters" (2017) 30 *Journal of Traumatic Stress* 133.

10 B Bride, "Prevalence of secondary traumatic stress among social workers" (2007) 52 *Social Work* 63.

11 U Imo, "Burnout and psychiatric morbidity among doctors in the UK: a systematic literature review of prevalence and associated factors" (2017) 41 *BJ Psych Bulletin* 197; K Ahola and J Hakanen, "Job strain, burnout, and depressive symptoms: a prospective study among dentists" (2007) 104 *Journal of Affective Disorders* 103; C West, et al, "Interventions to prevent and reduce physician burnout: a systematic review and meta-analysis" (2016) 388 *The Lancet* 2272.

12 I Zimmerman, "Stress: what it does to judges and how it can be lessened" (1981) 20 *The Judges' Journal*, ABA, 5.

13 I Zimmerman, "Isolation in the judicial career" (2000) *Court Review* 4.

14 A Resnick, et al, "Surviving bench stress" (2011) 49 *Family Court Review* 610-617; I Zimmerman, ibid.

15 Resnick, ibid.

16 D Harris, et al, "Violence in the judicial workplace: one State's experience" (2001) 576(1) *The Annals of the American Academy of Political and Social Science* 38.

17 M Miller and J Richardson, "A model of causes and effects of judicial stress" (2006) 45 *Judges' Journal* 20; D Flores, et al, "Judges' perspectives on stress and safety in the courtroom: an exploratory study" (2008) 45 *Court Review* 76; M Miller, et al, "An examination of outcomes predicted by the model of judicial stress" (2018) 102 *Judicature* 50; M Miller, et al, "Judicial stress: the roles of gender and social support" (2018) 25 *Psychiatry, Psychology and Law* 602.

"stress likely affects judges in many ways".[18] A 2020 US study adds a little more empirical data about events that contribute to traumatic impact. However, as indicated below, its response rate was very low.[19]

The UNSW Study

The UNSW study's researchers, two academic lawyers, one psychology academic and a clinical psychologist, were aware of Carly Schrever's excellent work on judicial well-being undertaken in association with the Judicial College of Victoria.[20] The Victorian study applies a range of psychological scales to evaluate the prevalence and severity of judicial stress and also interviewed judicial officers. The UNSW study has taken a different approach in various respects. For example, it sought judicial officers' views and strategies on managing work-based distress and (like Schrever) employed the K10, a standardised scale which is widely used to measure non-specific psychological distress.[21] Further, while Schrever employed the Secondary Trauma Stress Scale (STSS),[22] the UNSW study used the Impact of Event Scale (IES-R) to measure the extent to which respondents experience psychological distress related to a specific stressful life event following a traumatic event.[23] The Impact of Event Scale items, like the STSS scale, broadly align with the diagnostic criteria for PTSD.[24]

18 M Miller, et al, "An examination of outcomes predicted by the model of judicial stress", ibid, at 55.

19 See D Swenson, et al, "Stress and resiliency in the US judiciary" (2020) *Journal of the Professional Lawyer*, ABA 1. For a comprehensive review of studies on judicial stress, see E Rossouw and S Rothmann, "Well-being of judges: a review of quantitative and qualitative studies" (2020) 46 *SA Journal of Industrial Psychology* 1.

20 Note that at the time the UNSW study was conceived and the survey administered, we were not aware of Schrever's methodology, or her findings. See C Schrever, et al, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing", above n ♠. This compared judicial stress with that of lawyers and the general population; see also C Schrever, "Australia's first research measuring judicial stress: what does it mean for judicial officers and the courts?", above n ♠.

21 R Kessler et al, "Screening for serious mental illness in the general population" (2003) 60 *Archives of General Psychiatry* 184; G Andrews and T Slade, "Interpreting scores on the Kessler Psychological Distress Scale (K10)" (2001) 25 *Australian and New Zealand Journal of Public Health* 494.

22 That is, "a 17-item, five-point scale measuring the frequency (1 = never; 5 = very often), over the past seven days, of intrusion, avoidance and arousal symptoms associated with the indirect exposure to traumatic events via one's professional contact with traumatised individuals": Schrever et al, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing", above n ♠, p 152 and see B Bride et al, "Development and validation of the secondary traumatic stress scale" (2004) 14 *Research on Social Work Practice* 27.

23 There are subscales for intrusion, avoidance and hyperarousal (the three clusters of PTSD symptoms): M Horowitz, et al, "Impact of event scale: a measure of subjective stress" (1979) 41 *Psychosomatic Medicine* 209; D Weiss and C Marmar, "The impact of event scale-revised" in J Wilson and T Keane (eds), *Assessing psychological trauma and PTSD: a practitioner's handbook*, Guilford Press, 1997, at 399.

24 The psychometric properties of the IES-R are well established: J Beck, et al, "The impact of event scale-revised: psychometric properties in a sample of motor vehicle accident survivors" (2008) 22 *Journal of Anxiety Disorders* 187. Although not designed to diagnose PTSD, IES-R cut-off scores have been widely adopted including 33 as cut-off for probable diagnosis of PTSD: M Creamer, et al, "Psychometric properties of the impact of event scale–revised" (2003) 41 *Behaviour Research and Therapy* 1489; and a cut-off of 37 as high enough to suppress normal functioning of the immune system: N Kawamura, et al, "Suppression of cellular immunity in men with a past history of posttraumatic stress disorder" (2001) 158 *American Journal of Psychiatry* 484.

Methodology of the UNSW Study

In mid-2019, 371 currently appointed and retired[25] NSW judicial officers were invited to participate in an online survey study of the frequency and impact of certain challenging circumstances in their work.[26]

The Judicial Commission of NSW supported the project in crucial ways, assisting with the construction, distribution and de-identification of the survey and facilitating arms-length engagement between judicial officers and researchers. The Commission also communicated with heads of jurisdictions in all levels of the NSW court structure and hosted communications with an advisory committee of nominees of each jurisdiction.[27] A small pilot evaluation by some judicial officers finessed the survey's scope and detail. The survey responses were automatically de-identified before being released to the researchers, and additional checks were undertaken to remove inadvertent identification by respondents.

Survey responses and findings

Both the overall response rate of 205 out of 371 judicial officers (55.3%), and the Local Court response rate of 71.8% (125 of a total of 174 Local Court judicial officers) are very high, particularly in light of the survey's demands on respondents' time.[28] Notwithstanding lower response rates in the higher courts, the overall response rate provides a rich insight into NSW judicial officers' experiences and views, particularly within the Local Court. That respondents took time to provide over 200 additional comments indicates that the subject matter is of considerable interest to respondents. These comments are a valuable source of information relevant to formulating effective practical responses to the study's findings.

25 That is, those who had held a commission in NSW in the previous 10 years.

26 Ethics approval was granted by the University of NSW: HC no 180920 UNSW.

27 Two judges of the Supreme Court, one judge of the Land and Environment Court, one judge of the District Court, two magistrates from the Local Court, two judicial officers with a close association to the Tristan Jepson Memorial Foundation (now called "Minds Count"), and a retired judicial officer.

28 Responses were sought for 428 potential variables using Likert scales and yes/no questions. These strong response rates are comparable (but not as high as) Schrever's study (with response rates between 51% and 85%, averaging 67%), above, Schrever, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" n ♠. The study conducted in Pennsylvania at a 1999 trial judges meeting achieved a response rate of 1029/1112 (93%): D Harris, et al, above n 16. Compare however the US Judicial and Resiliency Survey from 2020, the first United States national picture of judicial stress. Its data reflects only 6% of the entire US judiciary. See D Swenson, et al, above, n 19.

Demographic particulars

Demographic Variable	N	% Sample^
Jurisdiction		
Supreme Court/Land and Environment Court	21	10
District Court	23	11
Local Court	125	61
Missing	36	17.6
Total years on the bench		
0–5	51	24
6–10	48	23
11–15	34	17
16 or more	47	23
Missing	24	11.7
Gender		
Male	110	54
Female	78	38
Missing	17	8.3
Location in last 12 months		
Metropolitan	121	59
Regional	51	25
Remote	4	2
Missing	29	14.1
Age		
24-34	0	0
35-44	5	2
45-54	41	20
55-64	83	41
65 and over	47	23
Missing	29	14.1
Status of appointment		
Current	173	84
Retired	11	5
Missing	21	10.2
TOTAL number of respondents	**205**	

^ = Not all categories were completed by all respondents. Note, percentages are rounded.

Note: Varying across categories, between 17 (8.3%) and 36 (17.6%) respondents did not provide a response to the questions on demographic details.

Distinction between trauma and stress

The survey drew a distinction between trauma and stress. Trauma was used to indicate the result of a deeply distressing event that shocks the organism and is not processed in the way other life events are processed.[29] Stress was used to mean the impact of ongoing demands in the ordinary course of a person's life. Stressful events included a large workload, unfair allocation of work, poor administrative support, legal or other constraints on determinations, public expectations and negative public comment on the judiciary. We provided three categories of trauma events in the survey:

- *experience of threat*: with 10 different types (for example, aggressive and threatening behaviour by parties, or others)
- *vilification*:[30] including personal vilification in print, broadcast or social media and negative references of a personal nature from a higher court
- *vicarious trauma*: that is, accounts of trauma in the lives of others (exposure to graphic material).

The survey presented a list of 15 events that might cause stressful or traumatic distress. Respondents were asked: How often did it happen?[31] How big a negative impact did it have?[32] Two aggregate scores gauged the overall level of distress by summing the scores for responses to the first question: prevalence of events and for the second question: impact of events.[33] These scores were called Potential Distress Experience (PDE) and Potential Distress Impacts (PDI), measuring perceived severity of impact. We also calculated subscores within these two measures for events that were related to traumatic distress (PDE-Trauma, PDI-Trauma), and those related to stress (PDE-Stress, PDI-Stress).

Eleven of the 15 potential distress events were reportedly experienced by more than 75% of the respondents.[34] Four of these experiences[35] were endorsed by over 90% of respondents; only four were endorsed by fewer than 75% (one of these by 74.9%). This indicates a very high level of exposure to events which have the potential to contribute to significant levels of traumatic

29 Trauma is defined in the DSM-5 as resulting from being "exposed to one or more event(s) that involved death or threatened death, actual or threatened serious injury, or threatened sexual violation": APA, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn, 2013.

30 "Vilification is a rhetorical strategy that discredits adversaries as ungenuine and malevolent advocates": M Vanderford, "Vilification and social movements: a case study of pro-life and pro-choice rhetoric" (1989) 75 *Quarterly Journal of Speech* 166.

31 Using the Likert scale responses where 1 = never; 5 = constantly.

32 Using the Likert scales responses where 1 = none; 5 = very significant.

33 Applying the approach of J Lee et al, "Duty-related trauma exposure and posttraumatic stress symptoms in professional firefighters", above n 9.

34 The four events scored by less than 75% of respondents were:
(i) threatening behaviour by others (not parties) (74.9%);
(ii) personal vilification in the media (67.6%);
(iii) bullying (38.9%), and
(iv) negative references of a personal nature from a higher court (28.3%).

35 These were excessive volume of workload (98.9%); aggressive and threatening behaviour by parties (94.1%); exposure to graphic material (93.5%); and negative public comment on the judiciary (90.3%).

stress. Impact scores were similarly spread with at least 40% of respondents reporting a more than "slight" impact from eight of the 15 events, with "excessive workload", endorsed by 84.8% of respondents; exposure to graphic material endorsed by 54% of respondents and inadequate administrative support by just slightly fewer respondents (53.3%).

Variation by gender, location and jurisdiction

Both the Potential Distress Experience (PDE) and Potential Distress Impacts (PDI) scores varied by gender, location and jurisdiction, summarised below.

- Perhaps the most striking finding is that Local Court judicial officers reported more stressful and traumatic events than those sitting in the higher courts. The Local Court respondents reported also suffering a greater impact from these events overall, both for stressful events and for trauma events.
- Compared to judicial officers in metropolitan courts, those in regional locations reported experiencing events significantly more often (PDE) and reported a significantly greater impact of all events, of stressful events (PDI-Stress), and traumatic events (PDI-Trauma).
- Men and women reported experiencing these events to a similar degree, but compared to men, women reported significantly greater impacts both overall and for trauma (PDI-Trauma).
- There is a hint that retirement may be beneficial for judicial officers' mental well-being, with slightly lower K10 scores reported by retired compared to serving judicial officers. However, the IES-R score (that is, a measure of PTSD symptomatology) shows a significant increase with more years of service as a judicial officer but, given the small number of retired judicial officers in our sample, this difference was not statistically significant.

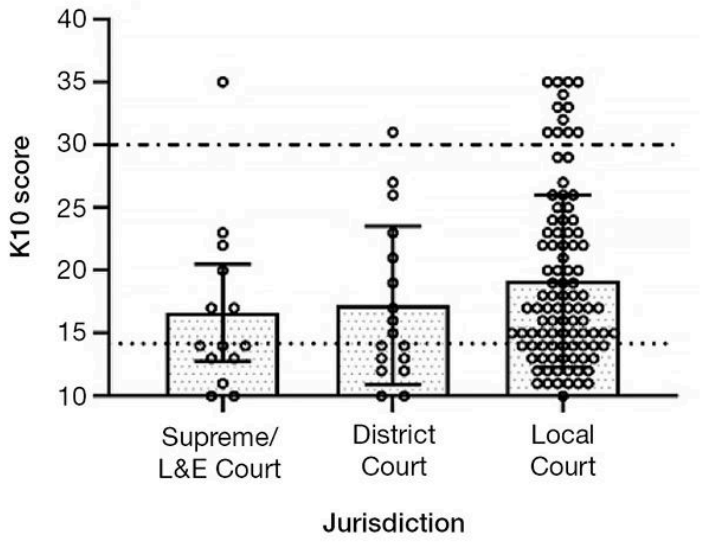
Figures 1 and 2 below map the responses in the two psychological well-being scales (K10 and IES-R)[36] across the court hierarchy. IES-R is a 22-item self-report scale which measures PTSD symptoms. Scores can range from 0-88, with a score of 33 widely adopted as a likely indicator of PTSD. The K10 is a 10-item scale which is used to screen for psychological distress and possible mental illness. Scores can vary between 10 and 50, with a score of 30 or greater indicating the respondent is likely to be experiencing severe distress. A total of 124 respondents answered all items on the IES-R and 143 answered all K10 items, and of these respondents, some chose not to indicate the court they worked in. This resulted in small numbers of valid scores for the higher courts, so for the purposes of statistical analysis, these courts were combined to form one "Higher Court" category.

36 Scores were only calculated for respondents who answered all items on the K10 (143 respondents) and IES-R (124 respondents) scales.

Figure 1 shows the distribution of responses applying the K10 scores by jurisdiction.

- Almost 10% of respondents (14, 9.8%) scored 30 or higher on the K10 compared to 2.2% of the general Australian public. A score of 30 is widely accepted to indicate severe mental distress.
- Overall, only 50 (35%) of judicial officers scored below 15 indicating they were likely to be well. This compares to 68% of the general population of Australia.
- The mean K10 score for respondents (18.4) was significantly higher than the mean for the Australian population (14.2) which is shown by the lower line in Figure 1 below (t=7.42; df=128; p<.001).
- Average K10 scores were slightly higher for the Local Court than for the higher courts (19.2 vs 17.0) but this difference was not statistically significant (t=1.57; df=127; p<.001). There were also no significant differences in K10 scores as a function of gender or location of the court, or jurisdiction.

Figure 1. Kessler Psychological Distress Scale (K10) by Jurisdiction



KEY: Distribution of K10 scores for Supreme (N=14), District (N=17) and Local (N=98) Court respondents. Top line (a score of 30) indicates cut-off for severe mental distress. Dotted line at 14.2 indicates Australian population mean K10 score (judicial mean =18.4).

Figure 2, below, shows the IES-R scores across the courts.[37]

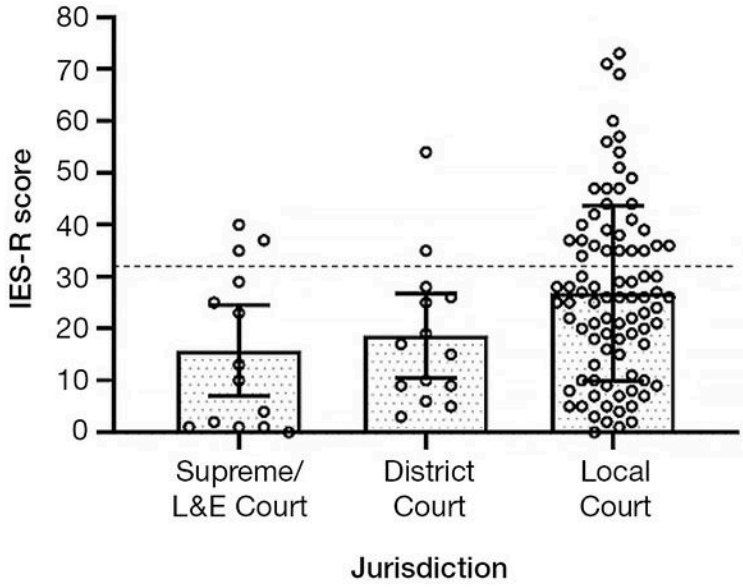
- 38 (30%) respondents scored high enough (score of 33) to suggest a probable PTSD diagnosis[38]

37 D Weiss and C Marmar, "The impact of event scale-revised", in J Wilson and T Keane (eds), *Assessing psychological trauma and PTSD: a practitioner's handbook*, Guilford Press, 1997, p 399.

38 See n 24, above.

- 27 (22%) had an IES-R score high enough (score of 37) to indicate possible suppression of normal immune system functioning[39]
- Mean IES-R scores were significantly higher in Local Court respondents than in the higher courts (26.8 vs 17.2; t=2.71; df=113; p<.01).

Figure 2. Impact of Event Scale-Revised (IES-R) Score by Jurisdiction



KEY: Dotted line indicates cut-off point for probable diagnosis of PTSD (score of 33).

The three trauma incident variables summarised

Vilification

Across all court levels, 108 (59%) of current or retired judicial officers in the study reported experiencing commentary from various sources that they considered vilifying. The vast majority took no action and "suffered in silence". In terms of public criticism, the pattern of responding to questions about vilification indicated that this was experienced at a marginally higher rate in the higher courts relative to the Local Court. More than a quarter of respondents identified print (58, 28%) and broadcast (54, 26%) media as sources of such vilification; and an additional 29 (14%) respondents pointed to such comment occurring in court. Other sources of unfair and distressing comment included online sources (31, 15%) and social media (33, 16%). Respondents offered detailed accounts in their additional comments in relation to "unfair" and "distressing" media vilification. One Local Court magistrate described "The 'shock jocks' (having) had a field day … Unfortunately, the judicial officer has to fend for themselves. There is no 'time out' from court".

39 See n 24, above.

Threats

Overall, 125 (60.9%) of respondents indicated they had been subject to one or more type of threat, including threats to kill the respondent (47, 23%), their family (7, 4%), or their children (5, 2%), or to otherwise harm them (86, 42%), their family (22, 11%), children (10, 5%) or staff (16, 8%), to damage property (9, 4%), or threats in the form of offensive language (100, 49%) or gestures (84, 41%). Almost one quarter (46, 22%) of respondents reported being the recipients of at least four different types of threat. The experience of threats was more common for members of the Local Court than for the higher courts (mean of 2.6 vs 0.75 threat types).

One Local Court magistrate reported receiving "several serious threats on my life".

Vicarious trauma

In this "cost of caring" category, respondents were asked to describe the "most distressing incident". Common examples included sentencing proceedings and the consequences flowing from a determination (bail, AVO, etc) and evidence of fatal injuries. However, evidence of violent and degrading offending against children dominated, with more than half of respondents reporting exposure to violence (132, 64%), sexual violence (137, 67%) and degradation (102, 50%) of children. Their descriptions took the form of graphic images and evidence of brutal and sometimes fatal harm to young children. They were particularly raw when accompanied by chilling indifference from those whom one would have expected to intervene. For example, a Local Court magistrate recalled a case involving the violent abuse of a child victim which was ignored by neighbours despite being heard well beyond the home.

In another response, a judicial officer described repeated child sexual assaults on a young girl, requiring restorative surgery and followed by acts of callous indifference by the girl's mother. The description concluded with, "I cried." Other responses described similar (or worse) acts of brutality and tragedy. Overall, 66% of respondents reported experiencing negative effects from exposure to one or more of these forms of evidence, and respondents from the Local Court (79%) were significantly more likely than those in the higher courts (21%) to report experiencing negative effects from exposure to one or more of these forms of evidence ($x\chi$=6.2; df=1; p<.05).

Conclusions

This study found that judicial officers identified the main stressors as including large and/or unfairly allocated workload, poor administrative support, legal or other constraints on determinations, public expectations and negative public comment on the judiciary.[40]

The impact of these stressors is likely to be accentuated when combined with the range and frequency of distressing and traumatic events experienced by judicial officers. Given these experiences, it is perhaps unsurprising that many judicial officers experience significant

40 See *Gilham v Ministry of Justice* [2019] UKSC 44 for an account of the negative impact of budget cuts on English judicial officers.

levels of psychological distress (K10, Figure 1) and trauma-related symptoms (IES-R, Figure 2). These findings are alarming and require a response. While vicarious trauma may be unavoidable, it is not part of the judicial officers' job to be vilified, threatened or placed in danger from threats, acts of aggression and poor security.

Our findings are broadly consistent with Schrever's findings based on Victorian judicial officers' experiences. Although our respondents reported a slightly higher mean K10 score (18.4 vs 16.6), the distribution of scores across the two studies is very similar. In the UNSW study, 54.5% of the judicial officers reported some degree of psychological distress (K10 scores >15), and 28.7% reported high or very high levels of psychological distress (K10 scores >21). The comparable figures from the Schrever study were 52.9% and 14.8% respectively.

In the UNSW study, judicial officers also reported very high levels of PTSD-related symptoms. The two studies' use of different psychological instruments to measure slightly different constructs prevents direct comparison of respondents' level of trauma symptoms. However, there are broad similarities. A total of 30% of the respondents in the NSW study had IES-R which placed them in a category in which full clinical assessment for the presence of PTSD is indicated, while Schrever reports that 30.4% of judicial officers returned a score on the STS Scale indicative of needing formal assessment for PTSD.

Unlike Schrever's Victorian study, the NSW study compared judicial officers' experiences across the court levels and across geographic locations. Compared to judges in the higher courts, magistrates[41] reported qualitatively and quantitatively different experiences (including significantly higher levels of trauma-related symptoms). Judicial officers in regional courts reported experiencing events significantly more often, and with a greater impact, than their metropolitan peers. It should be noted that the particularly high response rate from Local Court magistrates gives rise to confidence in the finding of high levels of distress among judicial officers in these courts. The lower response rates from the District, Supreme Court and Land and Environment Courts means that we cannot have quite the same degree of confidence about distress among these respondents.

We sincerely thank our respondents for taking the time to describe their experiences to us. We hope our reports of these experiences will contribute to reforms which can help protect the mental health of all judicial officers.

41 See also the discussion of stress by magistrates in S Roach Anleu and K Mack, *Performing judicial authority in the lower courts*, Palgrave Macmillan, 2017, pp 74–79.

Introducing solutions for maintaining positive psychological health: the judicial wellbeing portal*

E Kennedy†

The Judicial Commission has launched a judicial wellbeing portal on the Judicial Information Research System (JIRS) to assist judicial officers maintain and sustain a healthy judicial life.

In recent years there has been a spotlight on judicial wellbeing, with a number of studies highlighting the unique stressors placed on judicial officers. The death by suicide of two Victorian Magistrates in 2017 and 2018 shocked the judicial community around Australia. The NSW Judicial Commission, together with the University of NSW, agitated for an investigation into the psychological health of NSW judicial officers.

Professors Jill Hunter and Prue Vines, Faculty of Law; Professor Richard Kemp, Faculty of Psychology; and Kevin O'Sullivan, Clinical Psychologist, prepared a report which analysed the responses of 205 NSW judicial officers to questions about traumatic stress, threats to person, vicarious trauma and vilification.[1]

Respondents reported alarmingly high levels of psychological distress, with 30% receiving test scores indicative of likely PTSD. Twenty-three per cent of us had experienced death threats. Seventy-five per cent of us experienced negative effects associated with vicarious trauma and more than half reported vilification. Magistrates reported significantly higher levels of trauma-related symptoms, compared to other judicial officers.

In some ways, the different results for magistrates are unsurprising, given the huge volume of criminal matters that pass through the Local Court. In NSW, the Local Court processes all

* Published at (2021) 33(11) *JOB* 111.

† Her Honour Magistrate E Kennedy is a Magistrate of the Local Court of NSW.

1 K O'Sullivan, J Hunter, P Vines and R Kemp, "Traumatic stress in judicial officers — prevalence and impact", pre-print available, accessed 9 June 2022. See also, J Hunter, R Kemp, K O'Sullivan and P Vines, "A fragile bastion: UNSW judicial traumatic stress study" (2021) 33(1) *JOB* 1.

the State's criminal and domestic violence matters. Since the advent of the EAGP reforms and changes to the Tables of offences which may be finalised in the summary jurisdiction, many more of the serious assaults, including sexual offences, and serious domestic violence offences are dealt with to finality in the Local Court. Any one magistrate may have to deal at times with over 100 such matters in just one day.

There are different and sometimes greater pressures and stressors in the higher jurisdictions. The workloads are high and time is finite. The civil jurisdictions are often forgotten in the conversation about judicial wellbeing, but should not be, with a huge volume of often lengthy cases, usually involving complex issues. Pressure increases as reserved decisions bank up and judges do not have enough time to prepare and deliver decisions of the quality that might be preferred by them. There is only so much time to do the task well. All jurisdictions are under huge pressure, now even more so with COVID delays.

The Honourable Justice Michael Kirby AC CMG (as he then was) wrote an article in 1995, entitled "Judicial stress: an unmentionable topic" in which he observed:[2]

> The time has come to break the silence. Bringing stress out into the open will be good for us all. I can write about the topic because, after 30 years in various judicial offices, subjected to a lot of stress over that time by the work, the legal profession, politicians, the media and (on occasion) my colleagues, I feel I can discuss stress without the embarrassment which others might feel. By identifying its causes, classifying its features and suggesting a few solutions, I may contribute usefully to the orientation of those who are beginning their lives as judicial officers. What I say may also have relevance to other judges, lawyers and others. Judicial stress is just one variety of stress in human beings. But daily exposure to sharp differences, disputes and argumentation render judicial officers especially vulnerable as a group.

Since 1995, few have sought to study and consider this issue.

In 2017, his Honour Magistrate David Heilpern (as he then was) presented an important paper from a personal perspective called "Lifting the judicial veil: vicarious trauma, PTSD, and the judiciary: a personal story" to draw attention to the issue.[3]

In 2019, Ms Carly Schrever from the University of Melbourne,[4] published the results of an investigation and research involving 152 judicial officers from five Australian courts.[5] Ms Schrever made this clear statement:[6]

> As senior members of a stress-prone profession, managing workloads bordering on the oppressive, in the context of professional isolation, intense scrutiny and often highly traumatic

2 M Kirby, "Judicial Stress" (1995) 2(3) *TJR* 199, and a revised version at Judicial Commission of NSW, *The role of the judge*, Education Monograph No 3, 2004, p 43.

3 D Heilpern, "Lifting the judicial veil — vicarious trauma, PTSD and the judiciary: a personal story", *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021.

4 In conjunction with Associate Professor Carol Hulbert (Melbourne School of Psychological Sciences) and Professor Tania Sourdin (Newcastle Law School).

5 C Schrever, C Hulbert and T Sourdin, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" (2019) 28 *JJA* 141; *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021.

6 *Handbook for Judicial Officers*, ibid.

> material, there is good reason to expect that judicial officers are at particular risk of work-related stress. Given the impact of judicial decisions on people's lives and the pivotal role they play in our democratic system, courts arguably have a duty, not only to individual judges, but to the community more generally, to investigate and promote judicial wellbeing.

Ms Schrever has continued her impressive work, recently publishing "Where stress presides: predictors and correlates of stress among Australian judges and magistrates".[7] Subject to funding, it is hoped that a national study can proceed with the UNSW team, Carly Schrever and others.[8] This is supported by the Victorian Judicial College, NSW Judicial Commission and Chief Justices in the other jurisdictions.

With the support of the former Chief Magistrate, his Honour Judge Henson AM, the NSW Magistrates Association responded to this research and created a wellbeing sub-committee to support its members. It privately commissioned a further report from the UNSW that extracted and analysed relevant results from the original study that related to the some 140 members of the judiciary based in the Local Court.

That report highlighted a simple but obvious truth: as in so many professions within the community, there will be stressors, direct trauma and vicarious trauma — those things can never be eliminated — but to ignore their very existence is to invite the development of serious psychological harm through development of conditions such as PTSD, or exacerbate existing underlying conditions such as anxiety and depression.

While you can't eliminate stressors or trauma exposure, you can address psychological health to prevent damage to the mind. Past focus has been always on physical health and wellbeing, ignoring the fact that the mind also needs care.

Many of us are regularly privy to psychological reports setting out issues that have caused great distress in other's lives. We might have said to people appearing before us, "you can't bottle it up, it will boil over". Perhaps 26 years after the Honourable Michael Kirby articulated the problems, it is now time to take our own advice and start positively addressing our own psychological health.

Fortunately, the NSW Judicial Commission has done just that with the creation of the judicial wellbeing portal on JIRS. The Commission is changing the culture of the psychological conversation in NSW. It has been a driving force in keeping up with evolving WHS law around the world to support a healthy mind in the workplace. The courtroom is our workplace; we need to be equipped to deal with the unique stressors in that environment.

The judicial wellbeing portal has drawn together solutions and supports for positive psychological health. Included among these is the now almost ubiquitous concept of

7 C Schrever, C Hulbert and T Sourdin, "Where stress presides: predictors and correlates of stress among Australian judges and magistrates" (2021) *Psychiatry, Psychology and Law*, accessed 9 June 2022.

8 Professor Natalie Skead (University of WA); Associate Professor Kylie Burns (Griffith University, Qld); Professor Sharyn Roach Anleu (Flinders University, SA); Governor Kate Warner and Associate Professor Terese Henning (University of Tas) and Carly Schrever (University of Melbourne, Vic).

mindfulness. Mindfulness as a practice has achieved almost cultish status, but perhaps is just a modern name for a concept that has existed for centuries. Be it called reflection, meditation, retreat, sometimes as part of a religious or cultural tradition, such practices have spanned the globe for as long as we have been here. Yet it seems that in recent times that we have put less emphasis on these matters. Perhaps we are now seeing the results of that neglect.

So, whether it is mindfulness, meditation education or information, or psychological and scientific studies and explanations, the portal will have something for you. You may be coping well in your judicial space but other life stressors may be causing you some distress like parenting, your relationships, or dealing with parents who are aged, frail or who have dementia. The portal has some ideas to help. It may be that managing your judicial judgment load is a current difficulty. Again, the portal can help.

If you would like to know how to support colleagues — the portal has information and suggestions. All of this is found in one place, and is very easy to navigate. It is practical and it has been designed for you.

It is incumbent on all of us to look after ourselves and those around us. We need to remove the negative connotations that attach to workplace stress. It is merely psychological health. Experiencing psychological ill-health or trauma is no more a weakness than suffering a strained knee ligament; both have causes and both can be treated.

The new Chief Magistrate, his Honour Judge Johnstone, has embraced the wellbeing sub-committee of the Magistrates Association and is establishing a formal Local Court wellbeing committee, with the aim of further addressing these issues to promote the psychological wellbeing of all magistrates and actively prevent personal and judicial disaster.

It would be good to see a modern and necessary strategy for all jurisdictions around the country to implement a structure for psychological care of their judicial officers. At the end of the day, we are the end point of the administration of justice. We need to be well to ensure that all who come before us are dealt with as they should be.

Ms Schrever said it succinctly:[9]

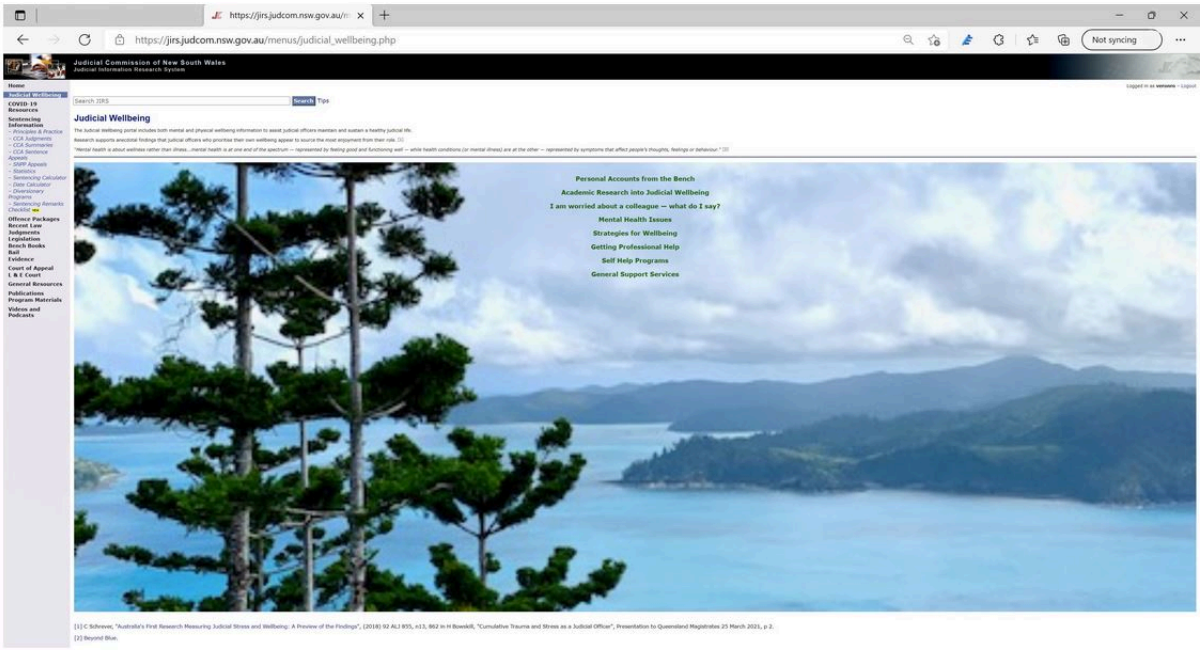
> Judicial officers are the pinnacle of the legal profession, protectors of the rule of law, and the third arm of government, and as such their occupational wellbeing and sustainability is a vital community concern.

To the Honourable Michael Kirby and those who have issued warnings in the past — thank you, we have been a bit slow but we are waking up. And congratulations to the Judicial Commission for creating this portal to help us all take the next step forward.

Note: The judicial wellbeing portal is an evolving and responsive portal. The Judicial Commission welcomes any suggestions as to its scope and content.[10]

9 C Schrever, "Australia's first research measuring judicial stress and wellbeing: a preview of the findings" (2018) 92(11) *ALJ* 859 at 862.

10 Please contact Catherine Kenny, Education Projects Manager, with suggestions at ckenny@judcom.nsw.gov.au.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Judicial Information Research System
Judicial Wellbeing
Personal Accounts from the Bench
Academic Research into Judicial Wellbeing
I am worried about a colleague — what do I say?
Mental Health Issues
Strategies for Wellbeing
Getting Professional Help
Self Help Programs
General Support Services

Further references on stress and vicarious trauma

For further references on the topics of stress and vicarious trauma, please see the following:

- Judicial Commission of NSW, *Judicial Wellbeing*, at https://jirs.judcom.nsw.gov.au/menus/judicial_wellbeing.php, accessed 23 June 2022.
- Judicial College of Victoria, *Judicial Wellbeing resources*, at www.judicialcollege.vic.edu.au/resources/judicial-wellbeing-resources, accessed 28 July 2021.
- K O'Sullivan, J Hunter, R Kemp and P Vines, "Traumatic stress in judicial officers — prevalence and impact", at www.researchgate.net/publication/344420667_Traumatic_Stress_in_Judicial_Officers_Pre-print/link/5f74342e299bf1b53e000d94/download, accessed 27 July 2021.
- K O'Sullivan, "'Waiting to stab me': new research reveals the threats and daily trauma judges face in their jobs", *The Conversation*, 11 June 2021, at https://theconversation.com/waiting-to-stab-me-new-research-reveals-the-threats-and-daily-trauma-judges-face-in-their-jobs-145012, accessed 27 July 2021.
- Judicial Commission of NSW, Cross-jurisdictional Webinar: 2020 Interrupted – judicial wellbeing in trying times, recorded on 18 November 2020, at https://jirs.judcom.nsw.gov.au/menus/videos.php, accessed 18 August 2021.
- C Schrever, C Hulbert and T Sourdin, "Where stress presides: predictors and correlates of stress among Australian judges and magistrates" (2022) 29 *Psychiatry, Psychology and Law* 290 DOI: 10.1080/13218719.2021.1904456.

Unrepresented, querulant and vexatious litigants

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Dealing with unrepresented litigants in lengthy and complex trials*

Her Honour Judge Flannery SC†

This paper, authored by her Honour Judge Flannery SC, outlines key considerations when faced with an unrepresented litigant including Dietrich applications and the McKenzie friend, as well as outlining the role of the trial judge in these circumstances and providing tips on how to handle various aspects of the trial.

Introduction

The starting point is that an accused person may conduct his or her own trial[1] and the court cannot force him or her to have a lawyer.

However, it is rare for an accused not to be disadvantaged in such a case and so it is critical to ask the accused if it is his or her decision or whether there is another reason for his or her lack of legal representation.

As the *Equality Before the Law Bench Book* "Self-represented parties" at [10.1] points out, there are many reasons why a person may be unrepresented, for example:

- being refused legal aid or presuming he or she was ineligible
- not being able to afford legal representation
- being told by lawyers that their case had no merit, but believe that it does have merit
- being perceived by lawyers as in some way too "difficult" (for example, they are unable to speak English or to communicate well or sufficiently logically)

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* District Court of NSW Twilight Seminar, Dealing with Unrepresented Litigants in Lengthy and Complex Trials, 8 May 2019.

† Judge of the District Court of NSW.

1 *Criminal Procedure Act 1986* (NSW) ss 36(1) and 37(2).

- not trusting lawyers
- believing he or she is the best person to put his or her case across
- withdrawing instructions from their lawyer relatively recently and not had time to find alternative representation,
- representing themselves for part of the court proceedings and engaging a lawyer only for the part they consider (or have been advised) to be most important or critical.

If you consider the accused may be able to get representation, and is not unwilling to do so, it is in everyone's interest to facilitate this happening.

It is likely that attempts will have been made before the matter is set down to try and ensure the accused is represented, however it not infrequently occurs that instructions are withdrawn late, or funding has not been forthcoming and so there is an application by counsel to withdraw.

If that is the situation, I would generally adjourn the matter for a few days to give the accused an opportunity to find new lawyers or apply for legal aid etc, or to reconsider his or position about his or her lawyers.[2]

Dietrich[3]

However, if every avenue has been explored, and the accused remains unrepresented, you should then consider whether the trial is likely to be unfair if the accused is forced to proceed unrepresented. You would only get to this point if you were satisfied that the accused was indigent,[4] and that his or her failure to obtain legal representation was not caused by any unreasonable behaviour on his or her part.

To determine these things you would first need to know something about:

- the prosecution case, and
- the accused's situation.

The prosecution case

To find out something about the prosecution case, you should read the *Crown case statement* which will be on the file.

2 See further, Judicial Commission of NSW, *Equality before the law Bench Book* at [10.3.1].
3 (1992) 177 CLR 292.
4 Indigent, that is, the value of his or her assets and income fall "well short" of what is required to conduct a trial. In order to be regarded as indigent, however it should not be considered necessary for a person to charge their home to pay their legal expenses in a criminal trial but it would be expected that they would demonstrate they had been refused legal aid and other pro bono assistance and would make full financial disclosure to the court (Garling J in *R v Warwick (No 64)* [2019] NSWSC 163 at [25]–[27] quoting from *R v Macdonald (No 4)* [2016] NSWSC 486 at [95] and *Craig v State of SA* (1995) 184 CLR 163).

If there is no Crown case statement, or you do not consider it is sufficient, you should ask the Crown prosecutor to tell you something about the case, including what evidence he or she perceives may be the subject of objection.

I find Crown prosecutors are generally helpful in this situation, no doubt conscious of their obligations under ODPP Guideline 2.3.[5]

The accused's situation

You should ask the accused what he or she has done to try to get legal representation.

If he or she does not have legal representation because he or she has failed or refused to take the appropriate steps to obtain it, or has refused to comply with all reasonable and proper requirements of the Legal Aid Commission, it has been held that it cannot be said that he or she is deprived of a fair trial.[6]

However, the High Court in *Craig v State of SA*[7] made it clear that in determining whether or not to grant a stay, the trial judge must consider the reasonableness of the conduct of the accused in all of the circumstances and the fact that there was fault on his or her part does not mean that a stay cannot be granted.

If legal aid has been refused, you should find out why and whether an appeal against that refusal has been pursued. The Legal Aid Commission will often attach conditions to a grant of aid that an accused is unwilling to meet and you may need to consider whether the accused's unwillingness to comply with those conditions is unreasonable.

For example, in the case of *R v Warwick (No 64)*[8] the accused, who faced 24 charges, including four of murder, was confronted with a circumstantial case which relied on coincidence and tendency reasoning.

After 103 hearing days, he made an application for a stay of proceedings, on the basis that he could no longer afford his legal representation. He had applied for a grant of legal aid but the Legal Aid Commission made the grant conditional on his wife signing a charge over a property held in her name.

Mr Warwick had spent over $800,000 for his legal representation up until what was about the mid-point of his judge alone trial.

Justice Garling found that the accused had acted reasonably in seeking and obtaining a grant of legal aid, and found that the fact that he was not able to compel his wife to give a charge in favour of Legal Aid NSW over the property could not be regarded as unreasonable conduct on his part.

5 See ODPP NSW, *Prosecution Guidelines* at www.odpp.nsw.gov.au/sites/default/files/attachments/f-prosecution-guidelines.pdf, accessed 30 July 2021.
6 *Karounos v R* (1995) 77 A Crim R 479.
7 (1995) 184 CLR 163.
8 [2019] NSWSC 163.

His Honour granted the stay. He found the accused was indigent and was unable to obtain legal representation. He found the Crown's submission that the accused could conduct the balance of the trial without legal representation unpersuasive as:

- there were a large number of witnesses still to be called
- the issue of whether or not he should give evidence and what evidence might be appropriate was a complex one
- the legal directions were complex, and
- he would be taking over part way through the trial.

He recognised that there was a public interest in the hearing and determination of the Crown case against the accused, however was firmly of the view that without legal representation the likelihood of a fair trial being achieved was very low.

If the accused dispenses with counsel during the trial

If the accused withdraws his or her instructions during the trial, and you grant counsel leave to withdraw, you should then ask the accused in the absence of the jury whether he or she has an application for an adjournment or a discharge.

Although there is also a strong public interest in ensuring that a criminal trial, which is well advanced, proceeds to verdict, the appropriate test at this stage is the same test that applies at the outset; that is, whether it is reasonable for the accused to withdraw representation in all the circumstances.[9]

If I considered that it was unreasonable for the accused to withdraw his or her instructions, it would only be if new lawyers could be available within a few days that I would adjourn the trial.

In *R v Gilfillan*[10] the Court of Criminal Appeal found that it was not unreasonable for the accused to withdraw his instructions during the trial in circumstances where the Crown indicated late in the trial that he intended to call certain witnesses with whom, it turned out, the accused's solicitor had a conflict of interest.

Assessing the accused

During these preliminary discussions, you should take the opportunity to assess the accused's mental health, as this may explain his or her lack of representation. He or she may say things which suggest that he or she is incapable of adequately defending himself or herself. You might find it helpful to have the *Presser* criteria[11] handy to enable you to assess this.

9 *R v Gilfillan* (2003) 139 A Crim R 460.
10 (2003) 139 A Crim R 460.
11 See *R v Presser* [1958] VR 45; Australian Law Reform Commission, *Unfitness to stand trial*, 20 May 2014, at www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/7-access-to-justice/unfitness-to-stand-trial/, accessed 30 July 2021.

If you are concerned about his or her fitness you should see if the prosecution is prepared to organise a fitness assessment quickly, if the accused is amenable.

Even if there is no apparent mental health issue, you should take the opportunity to assess the accused's intelligence and his or her understanding of the case, as these things may help you decide:

- whether the trial is likely to be unfair if he or she is forced to proceed unrepresented, and, if not
- the level of assistance you give him or her during the trial.

Conclusion on Dietrich

If you are satisfied that the accused is

- indigent, and
- his or her failure to obtain legal representation was not caused by any unreasonable behaviour on his or her part,

then based upon what was said by Mason CJ and McHugh J in *Dietrich*, I would either stay or adjourn the proceedings to enable the accused to get legal representation:[12]

> The decision whether to grant an adjournment or a stay is to be made in the exercise of a trial judge's discretion by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained. While, in some jurisdictions, judges once had the power to direct the appointment of counsel for indigent accused, … this power has been largely overtaken by the development of comprehensive legal aid schemes in all States and, as such, trial judges now cannot be asked to appoint counsel in order that a trial can proceed … However, even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights to review that refusal, it is possible, perhaps probable, that the decision of a Legal Aid Commission would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused.

Preliminary matters

Make sure the accused has all of the statements

If you refuse a *Dietrich* application or the accused is determined to appear for himself or herself, then you must ensure that he or she has all of the material upon which the Crown relies. It is worth getting the Crown to go through the brief of evidence to confirm that the accused has a

12 (1992) 177 CLR 292 at [31].

copy of each of the statements etc, or asking the Crown to provide the accused with an exact copy of the brief, preferably in a folder so that you are confident the accused can readily access the material.

I would also ask for a copy of the whole Crown brief at this stage, to enable me to acquaint myself with the Crown case and consider whether there are any obvious objections the accused should make.

Should the accused be in the dock?

Unless there are security concerns, I would normally allow the accused to sit at the bar table, so that

- he or she has access to his material, and
- his or her unrepresented status is not given undue prominence.

If you are told by Corrective Services that there are security concerns, I would ask that a senior Corrective Services officer come to court to explain to me what they were, or if I did not think that was appropriate, I would make arrangements for that person to come and see me in chambers.

McKenzie friend

It sometimes occurs that an accused will ask to be assisted by a person the law describes as a McKenzie friend, that is, someone an unrepresented person uses to assist him or her by making suggestions and taking notes.[13]

A trial judge has the discretion to allow an unrepresented accused to have a McKenzie friend. However, courts have been cautious about allowing this because a McKenzie friend is not bound by ethical rules, and their "assistance" can sometimes lengthen the proceedings and make the trial more complicated. It has been held that the overwhelming factor in deciding how to exercise the discretion is the interests of justice and the interest that the public has in the effective, efficient and expeditious disposal of litigation in the courts.[14]

I had a trial involving an elderly accused charged with a large number of historic sexual offences against a daughter and a stepdaughter. He was accompanied to court by a work colleague. Without objection from the prosecutor, he sat at the bar table with the accused throughout the trial and was of great assistance to the accused. The Court of Criminal Appeal implicitly approved of this procedure.[15]

Obviously McKenzie friends will not always be of this calibre and whether you exercise your discretion to allow the accused to have a McKenzie friend will very much depend on your assessment of the person.

13 See Judicial Commission of NSW, *Civil Trials Bench Book* at [1-0850].
14 *Damjanovic v Maley* (2002) 55 NSWLR 149 at [162]–[164].
15 *JM v R* [2017] NSWCCA 138 at [127].

Transcript

You should make an order that the accused be provided with transcript and recommend that the fee for it be waived. He or she will need to fill in an order form and a fee waiver form and although these forms are available online, I would get my Associate to give them to him or her and explain what he or she needs to do with them.

The fee waiver form must be provided to the Registry and the application must be approved by the Registrar. The Registrar will take the judge's recommendation into account in deciding whether to approve the waiver of the fee.

Alibi

You should enquire early in the proceedings whether the accused wishes to rely on an alibi, and if so whether he or she has served an alibi notice or he or she needs to seek leave to rely on an alibi.[16]

If leave is granted, which it normally would be, the Crown may need time to investigate the alibi.

Witnesses

You should also ask the accused at an early stage whether he or she has any witnesses he or she intends to call to give evidence and what steps he or she has taken to ensure they attend court.[17] If he or she needs help to arrange their attendance or to arrange the production of documents, I would ask the prosecutor to assist, without requiring the accused to explain the purpose of the evidence.[18]

If the accused is charged with a prescribed sexual offence (or there is a witness who is vulnerable)

If the accused is charged with a prescribed sexual offence,[19] or a witness in the proceedings is vulnerable, the accused is not permitted to cross-examine the complainant or the vulnerable person, and any cross-examination must be conducted through a court appointed intermediary.

However, the court may choose not to appoint such a person with respect to a vulnerable person if the court considers it is not in the interests of justice to do so.[20]

The *Equality before the Law Bench Book* at [10.3.4.2] lists the steps you should take in this situation, and suggests the directions you should give to:

- the accused about the procedure that will be followed
- the intermediary about his or her job, and
- the jury about the use of the intermediary.

16 *Criminal Procedure Act 1986* s 150.
17 *Equality before the Law Bench Book* n 2 at [10.3.4.1].
18 *R v Nair* (Unreported, Court of Criminal Appeal Victoria, 16 April 1982).
19 *Criminal Procedure Act 1986* s 294A.
20 *Criminal Procedure Act 1986* s 306ZL(5).

In summary, you should explain to the accused that he or she is not permitted by law to cross-examine the complainant, but that any questions he or she would like to ask the complainant can be asked on his or her behalf by a person appointed by the court.

You would tell him or her that the person appointed, known as an intermediary, is only present to help him or her by asking the complainant the questions he or she has prepared and cannot give him or her legal advice, although he or she can put into other words the questions the accused has prepared.

You should encourage him or her to commence writing down the questions he or she would like the complainant to be asked, and suggest that a starting point would be for him or her to read the statements of the complainant.

Intermediary

You should also appoint the intermediary as soon as possible, as he or she needs to be appointed in sufficient time to ensure he or she can be present during the examination in chief of the complainant.

In the Downing Centre, the Registrar Joseph Karam is in charge of organising the intermediary. He often does the questioning himself. However, he tells me he only arrives at the court at the time he is to begin the cross-examination on behalf of the accused and at that time is introduced to the accused and given the accused's questions. He does not assist the accused in any way.

In my view, this approach is contrary to what the Court of Criminal Appeal said in *Clark v R*[21] to the effect that since s 294A of the *Criminal Procedure Act* takes away or modifies rights which accused are ordinarily taken to possess, the section should be applied in a manner no broader than is sufficient to achieve its purpose. Specifically, the court said:

> Nothing in s 294A requires the appointed person to be absent while the complainant is giving evidence in chief, and it is not easy to see how the purpose of the section may be advanced by such a requirement. On the other hand, asking the questions in cross-examination, while perfunctory, cannot have been intended to be carried out without understanding. In *MSK* and *MAK* Wood CJ at Common Law, with whom I agreed, said, at [82], that the restriction on giving legal advice does not extend to the formulation of questions. One can imagine that there will be cases in which the appointed person cannot effectively and intelligently cross-examine without having heard the evidence-in-chief. Such a cross-examiner could, if the complainant appeared not to understand a question, put it into other words, aiding the complainant's understanding and so furthering the purpose of the section and the interests of justice.

A protocol used in the Local Court headed "Questioning of vulnerable witnesses by unrepresented accused" has been brought to my attention.[22] I understand it may have been adopted by the District Court. The protocol provides in part:

> In order to minimise the risk that a question that is offensive and/or would be otherwise disallowed is asked on behalf of the defendant, wherever possible, the defendant should be asked to submit

21 *Clark v R* [2008] NSWCCA 122 at [45].
22 CM Circular 565. See also Judicial Commission of NSW, *Local Court Bench Book*, at [10-120] and [12-000]ff.

> his/her questions to the Court prior to the questions being asked. As the second reading speech (attached) also raises the possibility that the judicial officer themselves could ask the question there should be no objection to this practice.

Yet the court said in *Clark*:[23]

> … no reading of s 294A reveals any requirement for an unrepresented accused to inform the Court of any question it is proposed to ask the complainant, let alone write out every question, the accused having read only the complainant's statement and not having heard the evidence-in-chief.
>
> In my opinion, a requirement that an accused person write out all questions in advance is likely to give rise to the risk of a miscarriage of justice. It is not unknown for witnesses, particularly children, not to give evidence in accordance with statements they have made, sometimes describing events differently, sometimes omitting mention of events. A real risk would arise in such circumstances that a reference in a proposed script of questions to matters dealt with in a statement but not ultimately emerging in evidence might have the effect of restoring or even establishing the Crown case. To guard against that risk, an unrepresented accused would need the kind of exceptional vigilance that he might well lack. It might be difficult for an unrepresented accused to divert the court-appointed questioner from the script. The damage might be done before the unrepresented accused could act, particularly if the accused had the impression that he could not give any direction to the court-appointed questioner without prior reference to the trial judge.
>
> Moreover, the requirement may ultimately be impossible to meet. To a significant degree any question to be asked of a witness in cross-examination may ride upon the answer just given. The requirement to frame all questions in advance may impart a rigidity which robs a cross-examination of its effectiveness.

In the trials I have had where the accused has been unrepresented, I have made it clear to the intermediary that he or she will be required to meet the accused at an early stage of the trial, and if necessary, assist him or her to formulate the questions, making sure though not to give him or her any legal advice. He or she would be present throughout the complainant's evidence-in-chief and would then meet with the accused again to assist him or her to formulate any further questions that may arise from the complainant's evidence. Following that, he or she would question the complainant on behalf of the accused, using the questions the accused has prepared.

The trial judge's role

As the *Equality before the Law Bench Book* says at [10.3.3] the duty of the trial judge is to give information and advice as is necessary to ensure that the unrepresented accused receives a fair trial so that "he or she is put in a position where he or she is able to make an effective choice as to the exercise of his or her rights during the course of the trial, but it is not the judge's duty to tell the accused how to exercise those rights".[24]

23 *Clark v R* [2008] NSWCCA 122 at [46]–[48].
24 *R v Zorad* (1990) 19 NSWLR 91 at 99; *R v Anastasious* (1991) 21 NSWLR 394 at 399.

The judge may express an opinion as to what would best serve the interests of the unrepresented accused, if it is appropriate, although there is no obligation to do so. However the trial judge must maintain the appearance of impartiality

In *Dietrich*,[25] Deane J noted that although the assistance that can be given to an unrepresented accused is limited, the trial judge should aim as far as possible to redress any imbalance in the presentation of the prosecution and defence case and ensure the procedures adopted fairly reflect the case which the accused wishes to put in his or her defence.

It is important to keep in mind that the rights of an unrepresented accused should never be compromised for the sake of administrative convenience, and so, although it is likely that the trial will take longer than a trial in which the accused is represented, to avoid the jury getting fractious and you feeling under pressure as a result, you should ensure that the estimate given to the jury panel before the empanelling, is an overly generous one. You should also carefully explain to the jury that the accused is appearing for himself or herself, and, if appropriate, the reason why he is unrepresented, and encourage the jury to bear in mind the difficulty that that situation presents for him or her.[26]

A publication called *Self-represented parties: a trial management guide for the judiciary* is referred to in our bench book.[27] It was prepared for the County Court in 2004. It makes reference to Judge Kelly's charge book.[28]

In his charge book, Judge Kelly suggests that the jury be told something like this:

> The accused in this case is not represented by counsel. That imposes additional duties of fairness on the prosecutor, upon me to see that the accused's case is fairly put before you, and upon you to consider it, and what might have been said about it by counsel on the accused's behalf. In a sense we all have to be the accused's counsel, whilst being careful to fulfil our own duties.
>
> It is proper for you to make every allowance, in assessing the demeanour and personality of the accused for the fact that he has had no counsel to guide him in presenting his case and his evidence.

For suggested directions, see *Criminal Trial Courts Bench Book*, "Self-represented accused" at [1-820]ff.

Bench Book

The *Equality before the Law Bench Book* helpfully sets out at [10.3.2] what you should say to the unrepresented accused at the commencement of the proceedings and suggests you either give the accused all of the information and advice about the trial process at the commencement of the trial or at appropriate times during the proceedings.

25 (1992) 177 CLR 292 at [17].

26 See *Equality before the Law Bench Book* at n 2 at [10.3.4.4] Guidance to the jury — points to consider.

27 E Richardson, *Self-represented parties: a trial management guide for the judiciary*, County Court of Victoria, Melbourne, 2004.

28 Please also see Judicial College of Victoria, *The Victorian Criminal Charge Book*, at www.judicialcollege.vic.edu.au/eManuals/CCB/19202.htm accessed 29 July 2021. *The Victorian Criminal Charge Book* aims to take the place of the charge book authored by His Honour Judge Michael Kelly. The publication is not, however, a new edition of that work. This new project undertakes to completely rewrite all charges, and to present wholly new explanatory material.

My preference is to give the accused a copy of everything I propose to say to him or her and then to read from the document at various stages of the trial.

I would commence with the first page of the *Criminal Trial Courts Bench Book* directions at [1-820]ff, which includes information about:

- the charges
- the onus and standard of proof
- the role of the judge and the jury, and
- legal argument and opening addresses.

If the trial involves a prescribed sexual offence, if you haven't done so already, I would give the accused the bench book direction about the appointment of the intermediary, etc.[29]

I would then ask the accused if he or she had any objections to any of the material in the Crown case as, by this stage, he or she should have had the opportunity to go through the brief. You will also be alive to possible objections at this stage. If there are objections, I would then deal with those.

I would then give the accused the bench book direction about the empanelling of the jury and his or her right to challenge.[30]

At that stage, I would empanel the jury, and give my opening remarks to the jury.

I would then take a break.

I would then remind the accused that the Crown would then open, and then, if he or she wanted to, he or she could, although what he or she could say at that stage must be limited to the issues in dispute, and if he or she wished, the matters he or she proposed to raise in his or her defence.

I would complete the openings and take another break.

I would then read to the accused the bench book directions about:[31]

- the Crown case
- cross-examination of Crown witnesses, other than the complainant
- the availability of a no case to answer submission
- his or her opportunity to present evidence, and
- how he or she should ask questions of his or her witnesses.

I would enquire whether he or she was likely to suggest that he or she was of good character, and if so, give him or her that direction.

I would leave the direction about closing addresses until a little later as a question is likely to arise about whether the Crown should address.

29 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, at [1-870]ff.
30 ibid at [1-830].
31 ibid at [1-820].

Should the Crown Prosecutor give a closing address?

There is a practice that the Crown not give a closing address in cases where an accused is unrepresented. This practice apparently developed at a time before legal aid was readily available as it was thought that it would be unfair to an accused who could not afford legal representation to be pitted against a trained advocate in the final stages of the trial.

However in *Zorad*[32] the Court of Criminal Appeal said that:[33]

> With the ready availability of legal aid at the trial stage, however, there must be at least some question whether such an approach continues to be appropriate. There is an increasing tendency of accused persons with a long experience of the criminal justice system electing to dispense with legally aided professional representation in order to obtain certain tactical advantages, but in our view the practice needs to be reconsidered whatever the purpose may have been of the election to appear unrepresented.
>
> This is not the case in which to undertake such a reconsideration. We should add, however, that nothing which we have said should be interpreted as suggesting that an accused should suffer an added disadvantage because of his election to appear unrepresented. That election is a fundamental right which should not be interfered with. What we are concerned to point out is that, with the availability of legal aid (so that the election is no longer dictated by financial considerations) an accused who nevertheless makes that election should not expect to be given an advantage which is not given to an accused who is represented.

The court made it clear that the decision was a discretionary one, however suggested if the factual issues were complicated, the jury and the judge may be assisted by an address from a Crown prosecutor.

The court made a distinction between cases where an accused has elected to appear unrepresented (whether or not in order to obtain tactical advantages) and cases where the accused is unrepresented through no fault of his or her own.

I do not know of any accused in the present day who has chosen to be unrepresented so as to obtain a tactical advantage, and frankly I would have a concern about their mental health if that was their motivation.

The people who appear unrepresented these days do so either because Legal Aid is under-resourced and so fewer people are eligible for aid, or because the accused, either reasonably, but most often unreasonably, does not feel that his or her lawyers will follow his or her instructions.

In a relatively recent case, *MS v R*[34] the Court of Criminal Appeal found that it was irregular for the Crown to give a closing address as:

> there were no circumstances which rendered it appropriate to depart form the ordinary practice that the Crown does not give a closing address when the accused is unrepresented.

32 *R v Zorad* (1990) 19 NSWLR 91.
33 ibid at [3]–[4].
34 [2017] NSWCCA 252 at [68].

In order to assist you to decide how to exercise your discretion, it might be helpful to ask the Crown to give you a draft of what he or she would say in his or her closing address, if he or she was permitted to address. This can focus the mind.

Once you have decided whether or not the Crown will address, you should explain the situation to the accused and read to him or her the relevant parts of the bench book, so that he or she understands:

- he or she can address, whether or not the Crown Prosecutor does,
- the sorts of things he or she should say, and
- those things he or she is not entitled to say.

Summing up

If the Crown does not address, your summing up will probably need to be more comprehensive than usual.

You must ensure that you give the jury directions on all matters which might be fairly said to give rise to a defence, whether or not the unrepresented accused relied upon or stressed these matters in the presentation of his or her defence.

Giving the accused the assistance you consider is required

In a very difficult trial I had involving an unrepresented accused, I took the view that it was in everyone's interest that I conduct the examination-in-chief of the accused. I did so by taking him to the Crown allegation in respect of each of the 25 counts on the indictment, and asking him something like "is there anything you want to say about that?"

At the end of this process, I asked him if there was anything else he wished to say.

This would not be an approach I would adopt in every case, but having regard to the difficulties we had experienced up until the accused gave evidence, I considered the only way we would get to verdicts, if we did, was to adopt this approach.

Querulous litigant

As part of my research I have discovered some very good advice in a paper written by Justice Margaret Wilson.[35] In the paper she refers to 10 guidelines for judicial officers when they are dealing with people psychiatrists term "querulous litigants", that is, people who have psychiatric conditions which cause them to lack perspective.

35 M Wilson, *Expert evidence, self-represented litigants and the evidence of children*, Address to Queensland Industrial Relations Commission, 2 September 2005 at https://archive.sclqld.org.au/judgepub/2005/wilson020905.pdf, accessed 30 July 2021. See also G Lester, "The vexatious litigant" 17(3) *JOB*.

Those 10 guidelines are:

- "do no harm" that is, your goals should be safety and containment rather than completion and satisfaction
- recognition via the six "V"s — querulous litigants display volatile emotions, feel victimised, seek vindication, produce voluminous and vague communications, and vary their demands
- maintain rigorous boundaries — querulous litigants will rapidly form attachments to those they feel are "favouring" them and feel catastrophically betrayed if the favourable treatment is not maintained
- querulous litigants are responsive to hierarchy and the formality of court must be maintained
- while they appear legally hyper-competent, querulous litigants have a very shallow knowledge of the law. All communication with them should be simple and repetitive, and there should be recognition that their understanding of the law is generally no deeper than that of the average citizen
- it is important to clearly and repetitively maintain their focus on what the court is able to offer in terms of outcomes
- more time granted will lead to more confusion — querulous litigants are disorganised and overwhelmed, and more time rarely changes this
- take all threats seriously and be aware of the psychological, as well as physical, safety of self and court staff
- any recommendation that a querulous litigant seek psychiatric support or evaluation will lead to extremely angry and potentially threatening responses. The role of psychiatry is generally limited. However, for those individuals who threaten self-harm or harm to others or carry out aggressive behaviour, treatment is important, and
- never seek to specialise in an individual. Always seek to share the load with others.

Managing litigants in person*

The Honourable Justice E Kyrou†

The following article suggests practical strategies for a judicial officer to employ when faced with managing a civil trial at which a self-represented party appears. The article considers three categories of self-represented parties: non-querulant litigants, querulant litigants without a mental illness and litigants with a mental illness.

In my experience, each litigant in person is a unique individual and it would be a mistake to assume that identical strategies can be used to manage them.

Some litigants in person are intelligent and courteous and appear for themselves involuntarily because they cannot afford a lawyer. Some can afford a lawyer but are convinced that only they understand their case and can present it successfully. Yet others have mental health problems which cause irrational behaviour.

A mentally ill litigant in person is not necessarily insolent and aggressive. Some are well-meaning individuals who have been let down by the mental health system and who turn to the legal system in desperation.

I will refer to litigants in person who are persistent, insolent and aggressive as querulants. They pose serious management problems in court.[1]

I will consider three categories of litigant in person: nonquerulants, querulants without a mental illness and mentally ill litigants in person. My observations are based on my experience in presiding over civil cases with litigants in person over the past five years.

Non-querulant litigants in person

The challenges of managing non-querulant litigants in person mainly concern eliciting relevant information about their cases. These litigants understand the general nature of the legal issues

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1 See G Lester, "The vexatious litigant" (2005) 17 *JOB* 17. See also Section 10, "Self-represented parties", in Judicial Commission of NSW, *Equality before the Law Bench Book*, Sydney, 2006.

in their case but tend to get confused about what is relevant. Often, the result is that they file lengthy and repetitive affidavits and submissions that deal with a multiplicity of events and issues and go off on tangents. These litigants hope that among the material there is something that will assist their case. For a judge, it is inefficient and extremely frustrating to read so much irrelevant material.

Some well-meaning non-querulant litigants in person spend countless hours on the internet and in law libraries researching principles of law that might assist their case. Unfortunately, they often latch on to legal maxims, phrases and cases that appear to be helpful when taken out of context.

The judge's frustration increases when non-querulant litigants in person give oral evidence. The absence of counsel means that the litigants in person give evidence by way of narrative. They often focus on particular incidents and do not use their pleading as a checklist to ensure that they have established all the elements of their cause of action or defence.

Cross-examination by non-querulant litigants in person can be a nightmare because they tend to ask the wrong questions and neglect to ask important questions. Some questions are offensive or are asked for collateral purposes.

The objections that litigants in person take to questions put to them or to their witnesses can be amusing. Sometimes the reason given for an objection is simply that the question is unfair because the answer will be damaging.

In my experience, the best way for a judge to manage non-querulant litigants in person is to explain to them at the beginning of the trial the court processes in brief and simple terms, and to use this explanation as a reference point for the duration of the trial. The aim is to provide a simple but clear framework within which the litigant in person can conduct his or her case.

Thus, at the beginning of the trial, it is useful to summarise the issues from the pleadings, the roles of the parties and the judge and the nature and purpose of each stage of the trial. As each stage is reached, it is often helpful to remind the litigant in person of what that stage involves. This is a useful strategy because every time the litigant in person digresses or makes a mistake, the judge can guide him or her by reference to what the judge has already said. With constant repetition, a well-meaning litigant in person will gradually learn what is required and what is not permitted, thus reducing the need for judicial intervention.

Imposing generous but firm time limits for the completion of various steps, such as the examination of a particular witness or the making of submissions, can be a useful trial management tool for a judge. The litigant in person should be reminded of the deadline if he or she becomes repetitive or strays off topic.

A civil trial can be streamlined even further if counsel for the represented party co-operates. Important areas of cooperation are the use of simple language that avoids legal jargon and Latin words and phrases, confining the evidence to relevant matters, and objecting to the evidence of the litigant in person only when absolutely necessary.

A significant challenge for a trial judge is that some litigants in person believe that the judge has a duty to advise them not only on procedural and evidentiary rules, but also on how to conduct their cases. Notwithstanding that a judge may take considerable care to bring various issues

to the attention of the litigant in person and to inform him or her of the available rights and options, some accuse the judge of failing to advise them properly. They erroneously believe that it is the judge's role to anticipate developments in the trial and to recommend proactively that the litigant adopt particular courses of action.

Although self-represented plaintiffs undoubtedly face significant difficulties in presenting their cases, in practice, represented defendants experience considerable disadvantages when they are sued by a self-represented plaintiff. The trial judge's duty is to conduct the trial in a manner that is fair to all parties.

Achieving the right balance is not always easy, particularly when decisions have to be made immediately in the midst of a challenging trial. If the judge provides too much assistance to the litigant in person, there may be a miscarriage of justice because the judge may have compromised his or her impartiality. On the other hand, a totally hands-off approach which ignores the fact that one of the parties is self-represented could also lead to a miscarriage of justice if the litigant in person is deprived of a fair opportunity to present the substance of his or her case through ignorance of the judicial process.

The risk of a miscarriage of justice can be reduced if the judge gives counsel for the represented party prior notice of what the judge proposes to do to assist the litigant in person and seeks feedback before providing that assistance. In my experience, counsel adopt a sensible approach and tend not to object to fair and measured assistance being given by the judge, because they appreciate that such assistance reduces the length and the cost of the trial. For example, brief checklists which are prepared by the judge and vetted by counsel are often a useful device to assist a litigant in person and to streamline the conduct of the trial.

In summary, if the judge remains courteous, patient, calm and even-handed and continues to explain what he or she proposes to do and why, there are good prospects that both parties will recognise and respect the judge's efforts and that the trial will not be too unwieldy.

Querulant litigants in person without a mental illness

I will now consider querulant litigants in person who are not mentally ill.

The observations I have made about the problems of managing non-querulant litigants in person also apply to querulants. An additional complication is that some querulants are obsessed by the legal process and are not really looking for closure of their legal problem. Every setback reinforces their view that the system is against them and makes them more determined to press on. They are often very cunning and are not beyond playing games and trying to force the judge to make rulings that they can later appeal. This means that the judge must be vigilant to avoid being set up.

The favourite words and phrases of querulants include:

> "You are biased." This is usually trotted out when the querulant realises that the trial is not going well and that he or she is likely to lose. The accusation of bias is usually accompanied by an application for the judge to disqualify himself or herself.
>
> "I have a right to natural justice." This is usually code for "I have a right to get my way".

> "What about my human rights?" This is usually not an appeal to a specific human right in a statutory charter, but is more in the nature of a catch-all phrase. The message to the judge is that "surely there is a principle of law that can help me" and that "you had better find it for me".

Querulants have a tendency to argue and to not follow judicial directions. Deliberately or otherwise, they can antagonise the judge and can cause a loss of judicial composure. This, in turn, may lead to rash rulings by the judge which can result in a successful appeal.

In theory, the strategies that I have outlined for managing non-querulant litigants in person should also be deployed for querulants. In my experience, however, these strategies are often insufficient. At best, they are a starting point. The precise mix of appropriate strategies must be assessed on a case by case basis in the course of the trial.

The behaviour of some querulant litigants constitutes contempt in the face of the court. In such a situation, it is tempting for a judge to charge the litigant with contempt and to either deal with the charge immediately or at some future time. What is the correct course depends on the circumstances. However, the judge should take great care not to act impetuously.

If a contempt of court is committed in the course of a long trial whose outcome will be affected by the judge's assessment of the credibility of witnesses, a finding of contempt against one of the parties before all the evidence is heard may give rise to an apprehension of bias, which may require the judge to recuse himself or herself and for the trial to be aborted. A retrial will cause additional delay and cost, resulting in prejudice to the other party and the tying up of valuable judicial resources.

Even if the trial is not aborted, a charge of contempt will be a time-consuming distraction. It may be better for the judge to state to the litigant in person that his or her conduct may constitute a contempt of court and that, after final orders are made in the case, consideration will be given to whether he or she should be charged with contempt.

Mentally ill litigants in person

The final category of litigants in person is mentally ill litigants in person who are plaintiffs. I will confine my remarks to litigants whose illness is not such that a litigation guardian is necessary.

Some mentally ill plaintiffs sometimes make allegations which appear to be far-fetched. Their favourite words include "conspiracy" and "corruption".

In the absence of a successful strike-out application, once the trial of the proceeding commences, the plaintiff is entitled to pursue the allegations in accordance with the rules of natural justice. He or she can give evidence in support of the allegations and call witnesses. In the absence of a no case submission at the end of the plaintiff's case, the plaintiff is entitled to cross-examine the defendant's witnesses in relation to the allegations.

A self-represented plaintiff's vigorous pursuit of allegations which seem to have little merit poses serious challenges for a trial judge. The hearing rule of natural justice requires that the plaintiff be given a fair opportunity to make good his or her claim. Often, however, such plaintiffs will not understand the difference between an assertion and evidence that is adduced

to prove that assertion. In addition, they may be convinced that any witness that disagrees with their assertion is lying and that the witness will eventually relent if a question is repeated numerous times.

Efforts by the trial judge to direct and to guide mentally ill self-represented plaintiffs are often made in vain because such plaintiffs are incapable of understanding what is required or are unwilling to cooperate. Some self-represented plaintiffs become aggressive towards the trial judge if an adverse ruling is made against them or if they perceive that the trial judge may be biased.

In my experience, there is no particular approach that will work in dealing with these problems. Each self-represented plaintiff is unique and must be managed in the light of his or her particular attributes. An accommodating and patient approach may work in some situations, whereas a firm and disciplined approach may be required in others. In some cases, aggressive trial management results in arguments, time wasting and unscheduled adjournments. The imposition of deadlines for the completion of particular steps, such as cross-examination of witnesses, may also be of limited utility because the deadlines are often not met and valuable time is then wasted debating whether the deadline was fair.

In some cases, the behaviour of mentally ill self-represented plaintiffs can vary greatly from day to day, and even in the course of a day. Their behaviour may depend on whether they have taken their medication, the dosage of medication that they have taken, and on events that occur inside and outside the courtroom. The variable behaviour will require constant adjustments to the judicial management of the trial.

Given the constraints that are imposed by the rules of natural justice, sometimes the most efficient approach to managing a trial with a mentally ill self-represented plaintiff is to allow it to proceed with little judicial intervention. Such intervention can be confined to necessary explanations, guidance and rulings and the taking of measures to ensure court security.

Court security is an important issue with mentally ill litigants who become not only aggressive, but also threatening. At the first sign of threatening behaviour, the judge should explain to the litigant that all the parties, the court staff and members of the public have the right to feel safe while they are in court and that threatening conduct will not be tolerated. If there is further threatening conduct, the judge should warn the litigant of the potential consequences, including an adjournment, the temporary exclusion of the litigant from the courtroom or a stay of the proceeding.[2]

Ideally, court security staff should be present in court if there is a risk of harm to anyone in court. This issue, however, is not always straightforward because some mentally ill litigants become agitated in the presence of armed security guards. Sometimes, the solution is for security personnel to be stationed outside the courtroom. In the final analysis, as the judge has a duty to ensure the safety of everyone present in the courtroom, he or she must take whatever steps are necessary to discharge that duty.

2 *Slaveski v Victoria* (2009) 25 VR 160 at [68]–[72].

It is always prudent for a trial with a mentally ill self-represented plaintiff to take place in a courtroom that has CCTV security cameras and that is readily accessible to security personnel.

Inappropriate communications

Some litigants in person make inappropriate telephone calls to a judge's associate, leave inappropriate telephone messages on the associate's telephone, and send inappropriate emails, all of which cause considerable discomfort. Often, written communications are not copied to the other party.

The court's communication protocols need to be clearly explained to litigants in person, so as to protect court staff from inappropriate communications and to ensure that the other party is aware of all such communications. If the protocols are not followed, the judge should ensure that every fax and email from the litigant in person is forwarded to the other party; that all telephone discussions are disclosed in open court at the next sitting day; that all telephone messages are transcribed; and that copies of the transcribed messages are forwarded to the other party.

In some cases, it may be necessary for the judge to direct a litigant in person to refrain from telephoning court staff and to communicate with them only in writing.

The querulant litigant*

Dr G Lester†

In the following article, Dr Lester describes the pathology of the querulant/vexatious litigant and suggests guidelines for judicial officers to manage difficult complainants.

Increasingly common in our society is the persistent complainant who disrupts the work of complaints officers, ombudsmen, commissioners and, ultimately, tribunals and courts. In the process, they leave their own lives in chaos and show a significant potential for threats and violence. As government agencies, businesses, and professional organisations have established formal mechanisms for responding to complaints, so a small but vocal group of complainants has emerged which, by persistence and insistence, consumes disproportionate amounts of time and energy.

Understanding the vexatious litigant

In attempting to understand and cope with the vexatious litigant, little account has been taken of well established literatures both in law and psychiatry.

The legal discourse is on the topic of the vexatious litigant. The psychiatric discourse is centred on querulous paranoia.[1]

From the early 18th century, a small but significant group of the unusually persistent complainants and litigants brought psychiatry and the law together. The earliest forensic psychiatrists were exposed to litigants who did not simply complain, but who were relentlessly driven by a "pursuit of justice" which seriously damaged the individual's economic, social, and

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1 While the European ICD-10 remains more comfortable with the diagnosis of paranoia, it is now subsumed under the diagnosis of "delusional disorder — unspecified type" in the American Psychiatric Association, Diagnostic and Statistical Manual, 4th ed, 2002, Washington DC. Regardless of nomenclature, the diagnosis remains one which requires both psychiatric expertise and a fuller understanding of the balance of positive and negative consequences of such a diagnosis.

personal interests, and disrupted the functioning of the courts and/or other agencies attempting to resolve the claims. The cascade in type and target of complaints over many years inundate the courts and also devastate the lives of the complainant.

To place this group, it is useful to view the spectrum of complaining behaviour.

A "normal" complainant believes they have experienced a loss. If the loss is evaluated as being caused by an external agent they may feel aggrieved. They may seek redress, usually in the form of reparation or compensation. The complainant *maintains perspective*, shown by the balance between the value of the loss and the effort (both physical and emotional) expended in the course of seeking redress, and the individual's ability to negotiate and accept reasonable settlement.

The "difficult" complainant also believes that they have experienced a loss. This complainant will generally attribute loss to external causes and become not only aggrieved but also, to varying degrees, indignant. This is because, cognitively, their egocentric view of the world centralises their own importance and devalues and dehumanises others. There are distinct themes of victimisation. Hence they feel angry, innocent of responsibility and a victim of an unjust act.

This is a heterogeneous group. There are those who are purely mendacious and avaricious, and whose indignation is counterfeit.

Difficult complainants may also suffer from a major psychiatric illness, most often schizophrenia. These complainants are easily identified as they have the general signs of the illness, are aggrieved primarily by feelings of persecution and victimisation, and the content of their complaints arises totally from their delusional beliefs, which are often bizarre and in a constant state of flux. As a result, it is often impossible to define, let alone resolve, their complaints. Their pre-existing major psychiatric illness requires treatment, rather than the complaint being initially addressed.

Others have egocentric personalities and are incapable of viewing any perspective other than their own. They are fearful and suspicious of others and a grandiose sense of entitlement has them constantly over-valuing their own worth. These chronic grumblers simply lurch from irritation to irritation ensuring that their whole life is a series of complaints.

At times, these chronic grumblers may become "querulant" (morbid complainants). In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation.

Despite 150 years of psychiatric research into querulous paranoia, there is no consensus as to the underlying pathology. Theories range from an underlying organic disease process, similar

to schizophrenia, through to psychogenic processes, that is, certain vulnerable characters are sensitised by certain life experiences and are then struck by a key event which triggers their complaining. Preceding the querulousness, they have often received some form of blow to their individual sense of self-esteem or security. This was often in the nature of a loss of relationship, through separation or death, ill health or loss of employment.

The key event is usually a genuine grievance and seems to echo previous losses. The key event is often of a type to threaten the (male) status symbols of prestige, position, power, property and rights. Environmental factors influence their complaint.

In general, these difficult complainants are middle-aged and males predominate 4:1.

Prior to the development of the complaint, they are reasonably high functioning, with a past history of education and employment. The majority of querulant complainants have had partners, however, their relationships or marriages are often failing or have ended. It is uncommon for them to have a past criminal history, psychiatric history or a history of substance abuse.

Their premorbid personality has been described by a variety of researchers over the years. Kraft Ebbing described them as having a "rough, irritable, egotistic personality, defective in their notions of justice".[2] Kolle described them as "restless, excitable, irritable, inflated self-esteem, assertive, combative, defiant and fanatical".[3] Ungvari described them as "inflexible with difficulties with intimacy, assertive, hyper-sensitive to criticism, and distrustful".[4]

They present as highly energised with labile emotions. They will have an overflowing suitcase, briefcase or box. They will appear to have pressure of speech such that interrupting them is difficult and they will speak to you as if you already know all the details of the case. Their speech is vague and full of unnecessary and often confusing and irrelevant detail.

Written communications have the appearance of having been written in excitement with numerous notes of exclamation and interrogation. These are often like a legal document except the entire surface is covered with script (including the margins). The substance is repeated in several different ways with undue grammatical emphasis and underlining. They will often refer to themselves in a third person legalistic style, for example, as "the defendant". Coloured inks are used for emphasis as are the star asterisk key and the use of capitalisation. Cut outs from newspapers, personal diaries and irrelevant materials abound. They will be initially seductive and recruiting, however, if you show any lack of response they rapidly become angry and will speak to you as if you are part of the persecuting opposition.[5]

2 R Krafft-Ebbing, *Text book of insanity: based on clinical observations, for practitioners and students of medicine*, trans C Chaddock, MD, FA Davis Co, Philadelphia, 1905.

3 K Kolle, "Uber Querulanten. Archiv fur Psychiatrie und Nervenkrankheiten", 1931, Verrlag von Julius Springer, Berlin.

4 G Ungvari, A Pang, C Wong, "Querulous behaviour" (1997) 37 *Medicine Science and Law* 265.

5 G Lester, B Wilson, L Griffin, P Mullen, "Unusually persistent complainants" (2004) 184 *British Journal of Psychiatry* 352.

Recent research has found that the majority of these individuals will commence litigation, and when and if they become exhausted, either through a lack of financial capacity, emotional exhaustion or through being declared a vexatious litigant, the complainant will now rest and recuperate in complaints departments and ombudsmans' offices.

In court they will nearly always be self-represented, as they desire vindication which is best gained through their "day in court". Their legal counsel will be viewed as an impediment, needlessly taking the focus away from themselves and "the truth" of the matter. They will appear legally hyper-competent, but will show no true understanding of the cases they cite. They will be disorganised and overwhelmed and will constantly request more time.

While not appearing low in mood, they will often describe the failure of their claim as life threatening and may overtly threaten suicide or violent consequences to those frustrating their efforts.

Past psychiatric management was dependent on the behaviour of the querulant. Those who made threats, harmed self or others were institutionalised. Prior to the advent of psychopharmacology, they showed a chronic waxing and waning pattern over decades. With the advent of anti-psychotic medication, it has become evident that use of this medication, along with psychotherapy, is able to normalise their behaviour and thinking over a period of months. However, the querulant rarely commences any treatment voluntarily.

Managing the persistent complainant

There are existing rules for courts to manage difficult complainants. Superior courts have inherent powers to prevent an abuse of process. The policy behind these powers is the protection of courts and the maintenance of public confidence in the administration of justice.[6] In the *Vexatious Proceedings Act 2008*, "vexatious proceedings" includes proceedings that are an abuse of the process of a court or tribunal (s 6(a)), proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose (s 6(b)), proceedings instituted or pursued without reasonable ground (s 6(c)), and proceedings that are conducted to achieve a wrongful purpose, or in a way that harasses, or causes unreasonable annoyance, delay or detriment, regardless of the subjective intention or motive of the person who instituted the proceedings (s 6(d)).[7] The courts may also prescribe certain procedures. For example, the court may restrain a litigant from making oral submissions by requiring that the litigant make submissions only in writing.[8] There is a separate power to prevent a person exercising a right of access to the court.[9] Under s 8, the Supreme Court (or the Land and Environment Court) may make a vexatious proceedings order.[10] Section 13 provides for the stay (s 13(2)) or dismissal (ss 13(3), (4), (5)) of proceedings instituted in contravention of such an order.

6 *Ridgeway v The Queen* (1995) 184 CLR 19 per Gaudron J at [31].
7 See *Civil Trials Bench Book*, "Vexatious litigants" at [2-7600]ff.
8 *Wentworth v Graham* [2003] NSWCA 307.
9 *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311.

Management of the querulant broadly falls into three categories:

1. management by staff of complaints and ombudsmans' offices, and by staff from, for example, registry offices or court libraries
2. management by the judiciary
3. psychiatric management.

For the purposes of this article I will only outline guidelines for judicial officers.

1. "first: do no harm". A medical aphorism which highlights your goals, which should be safety and containment rather than completion and satisfaction.
2. recognition via the six "V"'s — they display *volatile* emotions, feel *victimised*, seek *vindication*, produce *voluminous* and *vague* communications, and *vary* their demands
3. maintain rigorous boundaries — they will rapidly form attachments to those they feel are "favouring" them and feel catastrophically betrayed if the favourable treatment is not maintained
4. they are responsive to hierarchy and the formality of court must be maintained
5. while they appear legally hyper-competent, they have a very shallow knowledge of the law. All communication with them should be simple, repetitive, and there should be recognition that their understanding of the law is generally no deeper than the average citizen
6. it is important to clearly and repetitively maintain their focus on what the court is able to offer in terms of outcomes
7. more time granted will lead to more confusion. They are disorganised and overwhelmed and more time rarely changes this
8. take all threats seriously and be aware of the psychological, as well as physical, safety of self and court staff
9. any recommendation that they seek psychiatric support or evaluation will lead to extremely angry and potentially threatening responses. The role of psychiatry is generally limited. However, for those individuals who threaten self-harm or harm to others, or carry out aggressive behaviour, mandated psychiatric treatment is important
10. never seek to specialise in an individual. Always share the load with others

It is important to recognise that these individuals make threats of self-harm and violence to others. About 50% will make threats of violence to others. It is unknown how many actually carry out those threats but it is not rare for secure forensic psychiatric hospitals to treat querulants who have threatened and harmed others.

It is probable that one is not born a querulant. The "key event" when it comes can be quite minor, however, it will often echo losses, recent or far past. They will become locked into a "pursuit of

10 *Vexatious Proceedings Act 2008*. See, for example, *Bahattacharya v Minister for Police* [2001] NSWCA 109; *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [16]–[19], [41]–[56].

justice" which becomes the central preoccupying focus of their world and they will eventually sacrifice all other life domains for their quest. We are only just beginning to understand how to manipulate the environmental factors to improve the outcome for the individual locked into this destructive pattern of behaviour.

Responding to unreasonably persistent litigants*

Mr C Wheeler†

This article outlines the work of the nine Australasian parliamentary ombudsman in developing strategies for the management of unreasonable conduct by complainants, and provides insights from research into unreasonably persistent complainants and the dynamics of conflict escalation. The author examines the relevance of these to the issues faced by courts in responding to unreasonably persistent litigants, and suggests a variety of management strategies that might be available to the courts. Interestingly, he observes that there was some overlap between individuals who are on the Supreme Court's vexatious litigant register and who are also complainants to other bodies such as the NSW Ombudsman, the Judicial Commission of NSW, the Office of the Legal Services Commissioner and the Independent Commission against Corruption. The detrimental impacts of such conduct are vast: work, health and safety impacts; strains on limited resources; equity implications; and sometimes dire outcomes for the litigant. The author was originally highly critical of the Vexatious Proceedings Act 2008 and explored other options for managing unreasonable litigant behaviour, including civil restraint orders. The author is of the opinion that while amendments to this Act in 2018 were a considerable improvement, there is room for further improvements to be made.

Introduction

In 2006, the nine Australasian parliamentary ombudsman began a joint project to identify strategies and techniques to better manage what we referred to as "unreasonable complainant conduct". This was their first joint project and culminated in the publication of a set of guidelines.[1] This project was initiated in response to what was seen as a growing number of

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1 The project resulted in the publication of guidelines, the most recent edition being the NSW Ombudsman, *Managing unreasonable conduct by a complainant*, 2021, at www.ombo.nsw.gov.au/__data/assets/pdf_file/0004/3568/Managing-unreasonable-conduct-by-a-complainant-manual.pdf, accessed 12 October 2021.

complainants presenting with behaviours that were increasingly challenging and serious.[2] We were, and still are, seeing more complainants who are very angry, aggressive and abusive to our staff; who are threatening harm, who are dishonest or intentionally misleading in presenting the facts, or who deliberately withhold information from us. Our offices are frequently flooded with unnecessary telephone calls, emails and massive quantities of irrelevant printed material. We are seeing complainants who are insisting on outcomes that are clearly not possible or appropriate, or who are making demands that they are not entitled to make, or who, at the end of the process, are unwilling to accept our decisions and continue to demand that we take further action on their complaints. While these guidelines may assist court (and tribunal) registry staff to manage unreasonable conduct by litigants, they do not necessarily address the issues confronting presiding officers. This article identifies a number of strategies that may help to fill this gap.

When people come to a complaint handling body, regulator, court or tribunal it is certainly not uncommon that they are upset, often very upset if they believe they have been treated badly by the organisation or person to which they first raised their concerns. Dealing with people who we perceive as being somewhat "difficult" is therefore an integral part of the roles of such bodies. We should recognise and accept that this is part and parcel of the work of such bodies.

However, a problem arises when "difficult" (as in challenging) becomes "unreasonable" (as in unacceptable). "Unreasonable" conduct is something out of the ordinary compared to the conduct of complainants generally. It does not encompass people who behave a bit strangely, or who are difficult to understand because they cannot put their thoughts together in ways that are easily comprehensible, or even those whose anger leads them to pepper their language with expletives. Rather, it is conduct by a small percentage of complainants and litigants that unacceptably impacts on the:

- health and safety of the staff of an organisation, or visitors to its premises
- limited resources of the organisation that are available to deal with complaints/complainants and litigation/litigants
- equitable distribution of the resources of the organisation between all users, of a service, both current and potential.

What complicates the situation is that most people whose conduct is perceived by courts or complaint handlers to be unreasonable are likely to view their own conduct as being reasonable in the circumstances. How reasonableness (and fairness) is assessed can vary

2 Unreasonable conduct by complainants is not a recent phenomenon. In a paper presented to a seminar, "The Ombudsman through the looking glass", at the Australian National University Law School, Canberra, on 7 September 1985, Justice Michael Kirby (then President of the NSW Court of Appeal) noted that:

> One of the universal problems of the Ombudsman is the chronic complainer: people who feel passionately about their own cause and are uncompromising in their reaction to a negative conclusion on the part of the Ombudsman. Such people can sometimes cause a great deal of disproportionate disruption to the work of the Ombudsman and his staff … This issue was discussed at a recent meeting of ombudsman in Helsinki. It is a universal phenomenon.

See M Kirby, "Ombudsman — the future?" (1985) 12(4) *Canberra Bulletin of Public Administration* 297 at 300.

considerably depending on the perspective of the person or body making the assessment. For example, members of the public can be expected to adopt a very subjective approach based on assessments of "fairness", whereas independent review bodies adopt a more objective standard based on assessments of "reasonableness".[3] Further, while "reasonableness" is a central issue for independent review bodies (such as courts or ombudsman), research[4] supports the idea that this is a secondary concern for members of the public. Another factor is that while in the subjective judgment of a litigant or complainant his or her conduct might appear reasonable because of its *cause*, a court or complaint handler may validly assess the conduct to be unreasonable due to its *impact*.

What is the experience of courts and complaint handlers?

The NSW Ombudsman provides training to complaint handlers (both public and private sector) and court and registry staff on the management of unreasonable conduct by complainants and litigants.

Complaint handlers participating in these training sessions across Australia consistently report that unreasonable conduct by complainants appears to be a growing phenomenon, both in terms of the number of people engaging in such conduct and the seriousness of the conduct. Indeed, there are some indications that this is a world-wide phenomenon.

Court staff have reported some common scenarios in our training sessions with them:

- **The litigant who deflects responsibility onto the presiding officer or registrar** It is often very difficult for litigants to understand why court processes and procedures must be followed. These litigants may feel that their matter is the most complex and urgent matter,

3 While there is a degree of overlap in the characteristics of conduct that might be seen as being "fair" or "reasonable", there seems to be some consensus in dictionary definitions and in writings on the topic that there is a significant difference in the nature of the assessments these terms refer to:
- conduct is seen as being "fair" if it is perceived to be morally right, for example, ethical, dictated by conscience, honest, uncorrupted and free from prejudice, favoritism or self-interest, unbiased, balanced, impartial (the focus is primarily *internal* and *subjective*)
- conduct is seen as being "reasonable" if it is perceived to be in accordance with accepted standards of conduct, for example, in accordance with the law, in good faith and for legitimate reasons, rational, what is appropriate for a particular situation (the focus is primarily *external* and *objective*).

4 Research into "justice theory". See for example, J Colquitt et al, "Justice at the millennium: a meta-analytic review of 25 years of organizational justice research" (2001) 86(3) *Journal of Applied Psychology* 425; B Sparks and J McColl-Kennedy, "The application of procedural justice principles to service recovery attempts: outcomes for customer satisfaction" (1998) 25(1) *Advances in Consumer Research* 156; J Greenberg, "Organizational justice: yesterday, today, and tomorrow" (1990) 16(2) *Journal of Management* 399; T Tyler, *Why people obey the law*, Yale University Press, Newhaven, 1990, Ch 1, "Procedural justice, legitimacy and compliance"; G Leventhal, "What should be done with equity theory? New approaches to the study of fairness in social relationships" in K Gergen, M Greenberg and R Willis (eds), *Social exchange: advances in theory and research*, Plenum, New York, 1980, p 27; S Blader and T Tyler, "A four-component model of procedural justice: defining the meaning of a 'fair' process" (2003) 29(6) *Personality and Social Psychology Bulletin* 747; T Nabatchi, L Bingham and D Good, "Organizational justice and workplace mediation: a six-factor model" (2007) 18(2) *International Journal of Conflict Management* 148; D Jepsen and J Rodwell, "A new dimension of organizational justice: procedural voice" (2009) 105(2) *Psychological Reports* 411.

warranting prompt or immediate attention, while to court staff the matter is one of many and may not be given the priority the litigant expects. Accusatory statements such as "it will be on your head if something happens to" or "it is your fault that [X or Y] has happened" are often used. Litigants may also twist information to add dramatic effect to their argument.

- **The demanding litigant who is never satisfied** There is an increasing number of self-represented litigants who court staff diligently guide through the maze of legislation, forms and court proceedings. For some, however, this is a cue to become demanding and the common experience is that the more their demands are met, the more they want, even to the point where they complain about inefficiency. For example, the litigant may demand an early hearing date, and when a date is given, complain that he or she will not be ready in time.
- **The intelligent litigant who might have a mental health issue** Court staff find such litigants by far the most difficult to deal with.[5] While such litigants come across as logical and as having an understanding of the process, they seek to manipulate the process to their advantage. Often fuelled by the internet, they will launch into attacks on court officers and/or the justice system generally, quoting historical remedies to support their positions (for example, the Magna Carta). Such litigants are often intransigent, refusing to follow directions, appear in court proceedings, or adhere to orders.
- **The litigant with the hidden agenda** Some people appear to litigate for the sake of litigation, not wanting a matter to end. Commonly such litigants will avoid the resolution of the substantive issues by making numerous objections and interlocutory applications, and by lodging appeals. The behaviour of these litigants is time consuming; they will not listen to reason and constantly question the process. Registrars are often inundated daily with emails and phone calls, resulting in micro-management of case files.
- **The litigant who does not listen** Some litigants, no matter how many ways or times something is explained to them, do not listen. This can lead to litigants feeling frustrated and angry. When this manifests itself in abusive and defensive behaviour towards court staff, the staff will inevitably be adversely affected.

Who complains?

The NSW Supreme Court keeps a public register of individuals against whom vexatious proceedings orders have been made (referred to below as vexatious litigants).[6] A comparison by the NSW Ombudsman, the Judicial Commission of NSW, the Office of the Legal Services

5 Etienne Esquirol, an early 19th century French physician referred to one manifestation of this phenomenon in terms of the surprise experienced by people when they observe that somebody who appears to function normally in nearly every respect, doesn't in relation to one aspect of their lives. Esquirol observed that: "Partial delirium is a phenomenon so remarkable, that the more we observe it, the more are we astonished, that a man who feels, reasons and acts like the rest of the world, should feel, reason and act no more like other men upon a single point": E Esquirol (E Hunt trans), *Mental maladies: a treatise on insanity*, Lea and Blanchard, Philadelphia, 1845, p 321, quoted by K Kendlar, "Delusional disorder" in G Berrios and R Porter, *A history of clinical psychology: the origin and history of psychiatric disorders*, New York University Press, New York, 1995, p 361.

6 *Vexatious Proceedings Act 2008*, s 11.

Commissioner (OLSC) and the Independent Commission against Corruption (ICAC) of the names on this register as at December 2013[7] with the names of repeat complainants to each of them revealed some interesting results.

NSW Ombudsman

The NSW Ombudsman's records showed that:

- of the 25 vexatious litigants, 20 had a history of complaints to the NSW Ombudsman (182 complaints between them)
- of these, 10 had been informed by the NSW Ombudsman that any further correspondence raising the same or similar issues would be read and filed without acknowledgement
- only one of the 25 vexatious litigants was also on the NSW Ombudsman's list of people who are the subject of restricted access directions.[8]

Judicial Commission of NSW

The Judicial Commission's records showed that:

- of the 25 vexatious litigants, 12 had a history of complaints to the Judicial Commission
- the Judicial Commission had declared three of these "vexatious complainants" under s 38 of the *Judicial Officers Act 1986*.[9]

Office of the Legal Services Commissioner (OLSC)

OLSC's records showed that:

- of the 25 vexatious litigants, 19 had a history of complaints to the OLSC (93 complaints)
- of these, seven had been informed (in relation to at least one complaint) that no further response would be provided without fresh evidence about existing complaints or unless they had complaints about fresh issues
- four had been given warnings about unacceptable conduct and behaviour in their dealings with the OLSC.

7 In relation to the register, a telling comment made by one of the people the author consulted in preparing this article concerned what appears to be the reluctance of the Supreme Court to declare a person a vexatious litigant: "other than its surprising brevity, the list is notable chiefly for who is not on it, rather than who is".

8 This is a list of people who because of issues caused by their behaviour towards our staff or office (for example, threats, aggression, excessive numbers and frequency of phone calls or emails, etc) have been advised that, for example, they may only contact the office via correspondence delivered by Australia Post, they may only communicate by telephone with a particular officer, etc.

9 Out of a total of nine people so declared by the Commission since it commenced operation in 1987. This provision appears to be a provision unique to the Judicial Commission of NSW.

Independent Commission against Corruption (ICAC)

The ICAC's records showed that:

- of the 25 vexatious litigants, 15 had a history of complaints to the ICAC
- of these, three had been informed by the ICAC that any further correspondence raising the same or similar issues would be read and filed without acknowledgement
- only one of the 25 vexatious litigants was also on the ICAC's list of people who had been advised that they may only contact the ICAC via correspondence.

Categorisation of unreasonable conduct by complainants

Based on the many years of experience of ombudsman offices with a wide range of complainants and the work of various researchers,[10] the nine Australasian parliamentary ombudsman developed an approach for the management of unreasonable conduct by complainants. The ombudsman avoid "diagnosing" the person and focus on strategies to address the problems caused by particular types of unreasonable conduct. At the core of their approach is the realisation that a "one-size-fits-all" focus on the person is unworkable. To effectively and fairly manage unreasonable conduct, the strategies used need to be tailored to address the particular problems caused by particular complainants. To facilitate this approach, the ombudsman have identified five separate categories of unreasonable conduct with associated management strategies:

1. **Unreasonable *persistence*** this includes persisting with a complaint even though it has been dealt with to finality, refusing to accept the complaint handler's decision, excessive correspondence, etc. This conduct is addressed through management strategies that are about saying "no".
2. ***Unreasonable* demands** this includes insisting on outcomes that are unattainable, demanding that a complaint be handled in a particular manner. This conduct is addressed through management strategies that are about *setting limits*.
3. **Unreasonable *lack of cooperation*** this includes deliberately withholding information and acting dishonestly, providing disorganised information, giving excessive or unrelated information, refusing to define the issue of complaint, etc. This conduct is addressed through management strategies that are about *setting conditions*.
4. **Unreasonable *arguments*** this includes seeing cause and effect links where there are clearly none, postulating conspiracy theories unsupported by evidence, irrational

10 Such as Dr Grant Lester and Professor Paul Mullen who have explored the "querulant" discussed in more detail below.

interpretations of the facts, irrational beliefs, and focusing on excessively trivial matters. This conduct is addressed through management strategies that are about *declining* or *discontinuing* involvement at the earliest opportunity.

5. **Unreasonable *behaviour*** this includes anger, aggression, threats, threatening conduct, etc. This conduct is addressed through management strategies designed around a *risk management* protocol that we are developing.

What are the possible causes of or motivations for such conduct?

The possible causes of conduct that court staff, presiding officers and complaint handlers find to be unreasonable can be categorised in a range of ways. Looked at from the perspective of the likely effectiveness of possible response/management strategies, it is convenient to initially divide the various causes into those potentially amenable to reason, and those unlikely to be amenable to reason.

Causes potentially amenable to reason

Unreasonable/unrealistic

- **Expectation** where expectations are not met this can result in frustration, which can in turn lead to anger.
- **Entitlement** some people have an unreasonable sense of entitlement, either generally or in relation to their conduct in pursuing their complaint or dispute ("It's all about me").
- **Retribution** it is not uncommon for complainants to want to see people punished for the perceived wrong they have suffered (for example, by being dismissed from their employment and/or criminally charged) or the payment of "punitive damages".
- **Recreation** there are some people in the community, particularly some retirees, who make an extraordinary number of complaints as part of an all-consuming hobby or activity (for example, to keep the mind active in retirement!).

Misguided

- **Tactical** some complainants are focused solely on the tactics they are employing in a dispute (that is, their approach, actions/conduct) without considering the broader strategic implications of these tactics on their ability to achieve, or likelihood of achieving, their original objective.
- **Certainty** some complainants have a firm conviction that they are right and that any presiding officer or complaint handler reaching a different conclusion is either incompetent or there is a cover-up, which means a conspiracy, which in turn means corruption (often due to a misunderstanding about the role and methodologies of courts and complaint handlers).
- **Control** it is quite reasonable that people will want to have some control over how their issue is dealt with. However, the desire for control can be one of the primary triggers for unreasonable conduct, particularly where there is a misunderstanding about who effectively "owns", and therefore controls, the handling of the issue. While litigants/complainants

effectively own their issue and can do with it as they will, it is the presiding officers/complaint handlers who have control over the handling of the litigation/complaint and who will be held accountable for how it is dealt with.

- **Blame** a misconception about who is to "blame" for the problem. Some people exhibit an inability to accept responsibility and a need to blame others ("It's not my fault").

Inappropriate

- **Strategic** some complaints are made or litigation commenced in an attempt to obtain a strategic advantage in a negotiation or conflict. This can be particularly the case in relation to some complaints/reports alleging misconduct by colleagues in the context of ongoing workplace conflict.
- **Revenge** on occasion, litigation or complaints are seen as a means to exact revenge, for example to harass, intimidate, embarrass, annoy, or inflict pain and suffering on those seen as responsible for perceived wrongs.

Causes unlikely to be amenable to reason

Aspirational

- **Principle** where a person decides that an issue is a matter of "principle" or "justice", he or she may well see its pursuit as virtuous or necessary in the public interest.[11] Once people frame an issue in this way, they have effectively claimed what they see as the moral high ground and are likely to find it increasingly difficult to compromise.[12] In such circumstances, over time they are likely to be less and less able to let go and move on — what is sometimes referred to as to "normalise".
- **Vindication** some litigants and complainants have an all-consuming need public recognition of the injustice they have suffered, as well as an acknowledgement of the seriousness of the issue and/or the extent of the battle they have waged in the public interest or as a matter of principle.[13]

Emotional

- **Dissatisfaction** dissatisfaction with a person, agency, organisation, government body, or general discontent.
- **Venting** an overwhelming desire to express his or her feelings and have views heard — to "let off steam". This is particularly the case in circumstances where a person is more interested in expressing feelings or views than in getting a concrete outcome.

11 W Barnett Pearce and S Littlejohn, *Moral conflict: when social worlds collide*, Sage Publications Inc, California, 1997, p 43.

12 For a related discussion see: M Deutsch, "Justice and conflict", in M Deutsch and P Coleman (eds), *The handbook of conflict resolution: theory and practice*, Jossey-Bass Publishers, San Francisco, 2000, p 41.

13 Such a desire might not be communicated overtly.

Obsessional or irrational

- **Obsession** sometimes people can get so fused with their issue that they are unable to "let go" and move on. There are also people who are obsessive compulsive, for example, people often referred to by complaint handlers as "suitcase people", who approach complaint handlers with a suitcase full of a mass of disorganised documents that they believe show that they have been wronged.
- **Identity** for some people, their original issue grows into what might best be described as a "campaign" which can become the main purpose or meaning of their life and part of their very sense of identity. Where resolution of the issues in dispute would mean a significant loss of such purpose and meaning, they may want to hold onto and continue their campaign regardless of whether a proposed outcome might address their original issue or current interests.
- **Short fuse** some people have a low anger threshold or limited self-control.
- **Reduced mental capacity** some people engage in conduct that presiding officers and complaint handlers find extremely difficult to deal with due, for example, to the effects of alcohol or drugs, reduced mental capacity due to mental illness, and so on.
- **Querulance** some litigants exhibit behaviour characteristic of *litigious paranoia* (associated with vexatious litigation), and some complainants exhibit behaviour characteristic of querulous paranoia (in their interactions with bureaucracies and large service providers). This issue is discussed in more detail below.

In practice, it would be inappropriate for presiding officers, court staff or complaint handlers to attempt to psychoanalyse a litigant or complainant. Presiding officers and complaint handlers are unlikely to have the professional qualifications to identify personality or psychiatric issues, and even if they did, they are unlikely to have the necessary face-to-face contact to be able to do so.

Querulance

One of the most problematic complainant behaviour encountered by complaint handlers is described in psychiatric literature as "querulance".[14] The behaviour appears to develop slowly over time (possibly over some years), so complaint handlers and courts are likely to experience people at various stages of this development.

The most significant and frequently cited Australian research on this subject was published in the *British Journal of Psychiatry* in 2004.[15] This pioneering study, conducted by Dr Grant

14 From the Latin "plaintiff murmuring" or "queri" — to complain.
15 G Lester et al, "Unusually persistent complainants" (2004) 184 *British Journal of Psychiatry* 352.

Lester, Beth Wilson, Lyn Griffin and Professor Paul Mullen, investigated "unusually persistent complainants". It found that compared to a control group, the people identified as "unusually persistent complainants":

- pursued their complaints for longer, including after their cases were closed
- produced far greater volumes of documentation in support of their cases
- telephoned more frequently and for longer and attended the complaint handler's premises more frequently without an appointment
- engaged in behaviour that was typically more difficult and intimidating
- often wanted what a complaint-handling system is not designed to deliver — vindication, retribution and revenge.

The authors associated these behaviours with "querulousness", a psychiatric diagnosis.

The distinguishing features or manifestations of querulance may include some or all of the following:

- behaviour that is disproportionate to the loss or injury
- an emotionally-charged belief that they were unjustly treated/wronged
- a rejection of any responsibility
- a quest for total vindication, retribution and revenge
- over-optimistic expectations of compensation and/or punishment
- a strong belief that their issue is of far greater importance than the facts indicate
- logical and clear reasoning, but from an incorrect or unfounded premise
- the underlying assumption at the core of their quest is held with an absolute conviction that is impervious to reason
- an incapacity to be deflected from their course by logical argument
- a loss of focus on their grievance over time
- written communications that have an idiosyncratic look (but not always) — for example, use of uppercase, underlining, bold, highlighting; numerous notes of exclamation and interrogation; references to themselves in the third person by name or, for example, as "the defendant"; repeating the substance of their complaint in several different ways; and extensive use of inappropriate "legalese"
- other idiosyncratic characteristics of communications may include attaching voluminous documentation (which may or may not be relevant to the issue); sending emails with multiple "ccs"; including unnecessary detail and background information, but without clarity as to the central issue of the complaint or grievance.

Research into querulous paranoia undertaken since the 1800s[16] has found that:

- as noted above, querulous behaviour develops over time — there is an initial trigger, often a traumatic event such as a court case or other legal problems, disciplinary action, dismissal from work, divorce, etc, and as the number of grievances and parties escalates over time, the collateral damage to the person's life can be described as a downward spiral to self-destruction (which might include unemployment, divorce, bankruptcy, violence and/or suicide, etc).
- 70–80% of persons affected are male and in the majority of cases, the querulous behaviour first manifests when they are in their 30s to 50s (in my experience 50s to 70s), and there can be a period of some years between onset and first manifestation.
- the author's own experience with persons manifesting behaviours characteristic of querulance is that affected persons are generally of at least average intelligence and competence — the description "bright and manipulative" is apt.

What can be expected as a conflict escalates?

In the late 1970s an Austrian political scientist and social psychologist, Dr Friedrich Glasl[17] developed a model that explores the internal logic of conflict.

In the context of complaint handling, the Glasl model contains many useful insights that can assist complaint handlers to analyse what is occurring when confronted by an ongoing and escalating dispute, particularly those involving complainants exhibiting behaviour described as "querulance".

Taken together, the Glasl model of conflict escalation, the Mullen and Lester (et al)[18] research into unreasonably persistent complainants (and "querulance"), and common anecdotal evidence from experienced complaint handlers give some insight into what may well occur when a conflict escalates. Such insight is important if complaint handlers wish to address or appropriately respond to the forces underpinning and shaping the development of the conflict, for example, to attempt to move the conflict towards a more constructive path.

The relevant conflicts in the complaint-handling context might be between complainants and the persons or organisations the subject of their original complaints, and/or other parties drawn into the conflict as it escalates, for example a complaint handler or its case officers, court registry staff and/or presiding officers. While Glasl's writings seem to suggest that both parties to a conflict are at each conflict level concurrently, in other writings he recognises that some of the

16 In an article entitled, "Inventor, entrepreneur, rascal, crank or querulent? Australia's vexatious litigant sanction 75 years on" (2006) 13(1) *Psychiatry, Psychology and Law* 1, Dr Grant Lester and Simon Smith refer to research/papers by, among others, E Esquirol (1845), Von R Krafft-Ebbing (1879), E Kraepelin (1904), Von H Dietrich (1968), C Astrup (1984), I Freckelton (1988), P E Mullen and G Lester.

17 F Glasl, *Konfliktmanagement. Ein handbuch für führungskräfte, beraterinnen und berater*, Paul Haupt Verlag, Bern/Stuttgart, 1997; F Glasl (P Kopp trans), *Confronting conflict: a first-aid kit for handling conflict*, Hawthorn Press, Stroud, 1999, originally published in German by Freies Geistesleben as *Selbsthilfe in konflikten*, 1997.

18 Lester et al, above n 15; P Mullen and G Lester, "Vexatious litigants and unusually persistent complainants and petitioners: from querulous paranoia to querulous behaviour" (2006) 24(3) *Behavioral Sciences and the Law* 333.

behaviours do not proceed in a linear fashion and it is enough if at least one party perceives that there is a conflict. In fact, a competent complaint handler should not get to Glasl's first level, and no complaint handler should ever go beyond level 1.

The following scenarios are just as likely to arise in the litigation context if the references to "complainant" are read as "litigant", the references to "complaint handler" are read as "court" and the reference to "head of the complaint handling organisation" is read as "presiding officer". Looked at in the context of the Glasl model, what may occur as a conflict escalates includes:

Win-win

- **Level 1 — Rational arguments** ("*Hardening*"): The focus is on finding a solution, but in the context of fixed and mutually inconsistent views. The complainant may begin to perceive, and give more weight to, negative information about the other party to the dispute, while at the same time not disregarding or discounting positive information. Glasl describes this as "personal differences",[19] where the relationship between the parties breaks down. At the same time, a selective filter may increasingly affect the perception of relevant information about the reasons for, and background to, the dispute. Glasl refers to this as "conflict about the conflict" where the reasons and background to the conflict are interpreted differently.
- **Level 2 — Emotional arguments** ("*Debates and polemics*"): The focus is still on finding a solution, but in circumstances of decreasing trust, increasing resistance to rational argument, and the adoption of tactical and emotional/manipulative arguments, interactions become more and more confrontational. Verbal and written communications from the person may well shift from rational arguments to a focus on emotions and relative power issues. The complainant may adopt what Glasl refers to as "tactical and manipulative argumentative tricks", that is, quasi-rational arguments to advance his or her cause. For example, the complainant may strongly exaggerate the implications and consequences of the other party's position in an attempt to present it as absurd. The alternatives may be presented as extreme in order to get the subject of the complaint (or litigation) and/or any mediator, conciliator, reviewer or adjudicator to accept what the complainant believes is a reasonable compromise, etc.
- **Level 3 — Unilateral actions** ("*Actions not words*"): The focus is on blocking the other party from achieving its goals. At this stage, the complainant may well disagree with the way the complaint is being, or will be, dealt with. For example, the complainant may object to the appointment of a particular person to handle or investigate the complaint, the priority given to the complaint, the methodology used to investigate the complaint, etc. Glasl refers to this as "conflict about the conflict resolution", where the parties seek to resolve the conflict in different ways.[20]

19 Glasl notes that as a conflict escalates, over time there is a change in focus from: "factual differences" to "personal differences", to "conflict about the conflict" (that is, the reasons and background to the conflict are interpreted differently), to "conflict about the conflict resolution" (that is, each seeks to resolve the conflict in different ways): Glasl (P Kopp trans), above n 17, pp 23–24.

20 ibid.

Win-lose

- **Level 4 — Negative perceptions about judgment** ("*Images and coalitions*"): The focus is on winning and no longer on the substantive issues in dispute. Over time, negative images of the subject of their complaint (or litigation) and/or particular staff of the complaint handler may dominate whenever the complainant interacts with them. The complainant may engage in what Glasl refers to as "deniable punishment behaviour", involving veiled slurs and/or attacks on the character of the other party (be that the subject of the original dispute, staff of the complaint handler, or both). Such conduct is intended to gain the "upper hand" in what the complainant believes to be a power struggle with the subject of their complaint and/or the complaint handler. Glasl argues that another characteristic of the dynamics of a conflict at this level is that the parties are likely to actively try to enlist the support of others, which increasingly can be expected to include the use of social media to bring pressure to bear.
- **Level 5 — Negative perceptions about morality** ("*Loss of face*"): The focus is on defeating the other party, following the "revelation" that they are not just wrong but unethical or even "evil". Over time, the conflict may move from a focus on the substantive issues originally in dispute to a focus on victory or defeat. If the complainant continues to escalate the conflict, he or she may well experience the "revelation" that the other party is not merely wrong but unethical, immoral, malicious, dangerous, corrupt, criminal or just plain "evil". A complainant's loss of focus on the original grievance is a not an uncommon phenomenon experienced by complaint handlers.
- **Level 6 — Threats of sanctions** ("*Strategies of threat*"): The focus is on making strategic threats of sanctions that could be applied to the other party. The complainant may threaten to escalate the dispute, for example, to the media, the chief executive officer and/or the board, a professional body, regulatory agency or oversight/watchdog body, a relevant minister or parliamentary committee, etc. Complainants may also make veiled threats to harm persons or damage premises related to the dispute if their demands are not met. In this regard, Dr Lester has written that: "It is important to recognise that these individuals [that is, "unreasonably persistent complainants"] make threats of self harm and violence to others. About 50% will make threats of violence to others".[21] In referring to the results of their research, Professor Mullen, Dr Lester and others noted that: "Over half of the persistent complainants made some form of threat of violence directed at the complaint professionals [and] … threats are very much a part of the behaviour of the querulant".[22]

Lose-lose

- **Level 7 — Application of sanctions** ("*Limited destructive blows*"): The focus is on damaging or destroying the other party and its losses are perceived as gains. Malice may well become a driving force and the complainant's calculation of the consequences of his or her actions may become increasingly skewed. What the complainant perceives to be "losses"

21 G Lester, "The vexatious litigant" (2005) 17(3) *JOB* 17.
22 Lester et al, above n 15, at 355.

experienced by the subject of their complaint and/or the complaint handler may be counted by the complainant as "gains", even though these outcomes do not give any benefits to the complainant in terms of the substantive issues originally in dispute.

- **Level 8 — Targeting members and supporters** ("*Fragmentation of the enemy*"): The focus is on attacking the members and/or supporters of the other party. At this stage, the complainant may target perceived allies and supporters of the subject of complaint and/or the complaint handler and complain and/or make verbal attacks/defamatory comments about particular complaint-handling staff. If the complainant perceives that these complaints have not been dealt with satisfactorily, the complainant may make complaints about the head of the complaint-handling organisation to third parties such as the media, a professional body, a regulatory agency or oversight/watchdog body, a relevant minister or parliamentary committee, etc. Professor Mullen and Dr Lester have noted that:[23]

  > Attacks by the querulous on court officials, claims officials and politicians are by no means uncommon. In such cases there has often been a course of conduct characterized by increasingly threatening and intrusive activities, usually over many months …

  Dr Lester has also written that:[24]

  > It is unknown how many actually carry out … threats [of harm] but it is not rare for secure forensic psychiatric hospitals to treat querulants who have threatened and harmed others.

- **Level 9 — Self-preservation instinct overridden** ("*Together into the abyss*"): The focus is on destroying the other party at any cost — self-destruction is seen as an acceptable price to pay. Particularly in the "querulant" context, the complainant may well neglect his or her self-preservation instinct and the crusade will be pursued no matter the personal cost, be that unemployment, bankruptcy, divorce, imprisonment, etc. Alternatively, feelings of intense frustration may lead a litigant or complainant to self-harm, including suicide (thought to be a not uncommon occurrence at the bottom of the downward spiral of querulance).[25]

How do differing perceptions complicate problems caused by unreasonable conduct?

It is not uncommon for people to view the same circumstances or events very differently for a range of reasons, including for example:

- emotional reasoning where persons allow their emotions/sentiments to colour their judgment about the facts — believing what they want to believe
- the common human practice of giving more weight to (or being more aware of) factors that support preconceptions and prejudices and less to those that don't — confirmation bias including selective awareness

23 Mullen and Lester, above n 18, at 345.
24 Lester, above n 21, at 19.
25 In their writings on querulance, Dr Lester and other researchers have commented on the significant risk of physical and sexual violence, as well as death through suicide.

- different personalities and life experience
- different understanding of the applicable law or standard practices and procedures that apply
- differing levels of competence/intellectual ability[26] — which can lead to such problems as misunderstanding of the facts, misinterpretation of the facts, erroneous inferences drawn from agreed facts, etc
- different perspectives/awareness of relevant facts — complainants (and litigants) often have limited access to/awareness of all relevant facts and circumstances about what caused their problem, or impacted on or were relevant to the cause(s) of their problem.

Differing perceptions about the relevant facts and circumstances are a fact of life for complaint handlers and courts, if not a primary reason for their very existence.

Complaint handlers and presiding officers of courts must reach conclusions based on available evidence. They cannot accept the unsupported claims of either side as being the truth. They recognise that there are generally two sides to every dispute and that sometimes it is not possible to conclusively prove who was right or wrong on the evidence available.

On the other hand, experience suggests that the starting point for many complainants is that it is only fair and reasonable that their concerns be fully addressed and that the outcome will be one which they are entirely satisfied with. Thankfully, where desired outcomes are not achieved, most complainants are able to "normalise", that is, they are able to balance the possibility and practical value to them of success against the effort/cost of further pursuing their issue. Unfortunately, experience shows that there remain a significant proportion of complainants who are unable to normalise and "move on". These complainants:

- hold an honest belief about the truth of the facts and circumstances in issue and that their cause is just
- will not be deflected from their preconceived views about the "truth" in the face of evidence to the contrary or lack of evidence in support[27]
- view the "adjudicator's job" as requiring acceptance of their view of the truth.

What are the detrimental impacts of such conduct?

While in practice, complainants and litigants who engage in unreasonable conduct make up a very small proportion of the total number of complainants and litigants, the detrimental impact of their conduct on others (and even themselves) is vastly disproportionate to their numbers.

26 What is commonly referred to as the "Dunning and Kruger effect" is a cognitive bias in which individuals mistakenly rate their competence much higher than it is (that is, the poorest performers are likely to be the least aware of their own incompetence). They fail to learn from their mistakes or take much notice of negative feedback: J Kruger and D Dunning, "Unskilled and unaware of it: how difficulties in recognizing one's own incompetence lead to inflated self-assessments" (1999) 77(6) *Journal of Personality and Social Psychology* 1121; D Dunning et al, "Why people fail to recognize their own incompetence" (2003) 12(3) *Current Directions in Psychological Science* 83.

27 At least one commentator has argued that this might be a problem shared by the legal profession! In his final article for *The Sydney Morning Herald* in 2013, Richard Ackland referred to "one of the enduring qualities for which the law is justly famous — clinging to a belief in the face of overwhelming evidence to the contrary": *The Sydney Morning Herald*, 27 December 2013, p 15.

Work health and safety impacts

Dealing with unreasonable behaviour will inevitably cause stress, which in turn raises issues relating to work, health and safety and the common law duty of care. In research conducted in various complaint-handling organisations in Victoria, Professor Mullen and Dr Lester found that 48% of case officers reported avoidance behaviour in their dealings with persistent complainants compared to 0% in their dealings with the control group.[28]

Some litigants and complainants who do not obtain the desired outcome will then complain, as a matter of course, to oversight bodies, ministers, etc, about the conduct of the presiding officer, complaint-handling organisation, or the case officer, etc. This can adversely affect the people involved and the organisation generally. Verbal attacks on those seen as responsible, often in the most intemperate terms, are not uncommon. One judge has described people who regularly complain about the conduct of any judicial officer who decides against them as people who are "prone to impute the worst motives to those who are opposed to him or who have to adjudicate upon his case".[29] It is not uncommon for self-represented litigants to also make complaints about the presiding officer to the Judicial Commission,[30] to the Law Society about the solicitors representing the other side, and even to the Bar Council about the conduct of opposing counsel.

There can also be a risk of violence. As Professor Mullen and Dr Lester noted in a 2006 paper:[31]

> Attacks by the querulous on court officials, claims officials and politicians are by no means uncommon. In such cases there has often been a course of conduct characterized by increasingly threatening and intrusive activities, usually over many months, which, with the benefit of hindsight, takes on a sinister import. In a number of cases of serious or fatal violence, of which we have knowledge, clear and specific threats had been used.

Resource implications

The number of complaints made by some complainants, and the way some complainants pursue their complaints, can have a disproportionate impact on the resources of an organisation.

From the author's discussions with complaint handlers in complaint-handling organisations across Australia, New Zealand and Canada, the general consensus is that approximately 3–5% of complainants take up 25–30% of resources. However, many examples were also given where one or two unreasonable complainants had taken up 70–90% of the available resources for considerable periods of time.

The litigation and/or complaint activities of certain people can also have resource implications for more than one organisation. Experience with, and research into, the activities of unreasonably persistent complainants indicates that a number spread their attentions across a

28 Lester et al, above n 15, p 354.
29 *R v Collins* [1954] VLR 46 at 57–58 (Sholl J).
30 Interestingly, in each of its last 11 annual reports the Judicial Commission has specifically commented on the high proportion of complaints to the Commission by persons who were self-represented: 2019–2020 (46%), 2018–2019 (49%), 2017–2018 (58%), 2016–2017 (56%), 2015–2016 (48%), 2014–2015 (40%), 2013–2014 (37%), 2012–2013 (49%), 2010–2011 (27%), 2009–2010 (37%), 2008–2009 (40%).
31 Mullen and Lester, above n 18, at 345.

range of organisations. For example: "The persistent complainants themselves were more likely to involve other agencies as the complaints procedure progressed, with 77% contacting at least one other agency … and 37% contacting four or more".[32]

Equity implications impacting on other users of a service

Most complaint handlers have limited resources, so the more that are devoted to a fewer number of people, the less there will be available for others. This is a very important equity issue and one of the objectives of properly managing unreasonable conduct is to ensure equity in the distribution of complaint-handling resources between complainants.

Impact on the complainant/litigant

Unreasonable conduct taken to an extreme can also have serious impacts on the complainants themselves as their crusade gradually takes over and destroys their lives. Professor Mullen and Dr Lester referred to this as a "gradual but ultimately devastating social decline"[33] in the course of which vexatious litigants and unusually persistent complainants have "laid waste to the financial and social fabric of their lives".[34]

What strategies are available to courts to deal with unreasonably persistent litigators?

Unreasonably persistent litigants may be divided into at least two broad categories. The first category comprises litigants who exhibit some or all of the characteristics of querulants, obsessives, "crusaders" and the like, including the more recent typical manifestation of the vexatious litigant (that is, litigants who institute numerous actions and appeals against a growing number of respondents, generally arising out of a single issue). The chances are that this type of litigant may present the greatest challenge to courts. Such litigants are likely to reason logically and clearly, but from a false premise — the underlying assumption that is the foundation of their view about the wrong they have suffered is likely to be incorrect. This may be due to these litigants drawing erroneous inferences from agreed facts, misinterpreting the facts, using emotional reasoning (that is, allowing emotions/sentiments to colour their judgment about the facts), and the common human failing of giving more weight to factors that support preconceptions and less weight to factors that do not, etc.

The second category comprises hobbyists or those who in the past represented the typical manifestation of the vexatious litigant (that is, litigants who commence numerous actions against a range of respondents concerning a variety of issues, but seldom appeal unfavourable decisions).[35]

32 Lester et al, above n 15, at 354.
33 Mullen and Lester, above n 18, at 338.
34 ibid, at 339.
35 Examples of vexatious litigants who commenced a flood of litigation against a wide range of respondents raising a wide variety of issues, include Alexander Chaffers in the United Kingdom in the late 1800s, Rupert Millane in Victoria in the early 1900s, Ellen Barlow in Western Australia in the 1930s and Goldsmith Collins in Victoria in the 1950s.

While we cannot change the person who is engaging in such conduct, there are a various strategies which can be used to manage the person's:

- interactions with the organisations and staff
- access to the services and premises
- expectations about the process that we will follow, their involvement in that process, and the likely outcomes
- perceptions about the fairness of the process
- perceptions about the fairness of how they were treated, including whether they were given adequate, accurate and timely information, and treated with respect and courtesy.

Many of the strategies available to complaint handlers to respond to unreasonable conduct by complainants[36] could be used by registry staff to respond to the common scenarios outlined earlier in this article. Unfortunately, most of those strategies are unlikely to be options available to the presiding officers of courts in the management of unreasonably persistent litigants (particularly self-represented litigants) given that they are exercising a legal right to commence proceedings. However, depending on the nature of the activity and behaviour of a particular litigant, some or all of the following 10 strategies may be appropriate:

1. **Dismissing matters where no apparent cause of action:** Where there is a history of litigation, particularly unsuccessful litigation, a robust assessment should be carried out as to whether the originating documentation discloses a valid cause of action. The author is aware of irrational, fanciful or misguided complaints that the presiding officer has allowed to proceed, and which have resulted in the defence incurring considerable expense, and the court reaching an obvious conclusion. This may occur for a number of reasons, for example, there may be a reluctance to deny somebody the ability to exercise their right of access to the court, there may be a concern that the decision might be overturned on appeal, or the presiding officer may be looking to the defence to develop arguments that could be included in the judgment.

2. **Clarifying evidentiary requirements:** Ensure that the evidentiary requirements for success are clear (that is, clarifying what the litigant must prove through evidence and that the litigant's absolute conviction about the truth of his or her claim is insufficient). It is important in any such discussion with the litigant to avoid challenging his or her underlying assumptions/beliefs, but instead to focus on the evidence that will be required to substantiate that assumption/belief.

   It is also important to explain the evidentiary requirements in simple, non-technical language. While querulants, in particular, commonly use legal terminology that suggests a competence in the law, it is likely that they will not have any significant understanding of

36 Set out in the *Managing unreasonable conduct by a complainant*, 2021, above n 1.

the legal concepts or principles or the relevant rules and procedures that apply (at least in their early litigation, although over time such litigants may well gain detailed knowledge through experience).

3. **Managing litigant's expectations:** It is very important that the presiding officer and registrar take steps at the outset to ensure that the litigant is clear about:

   - the fact the court effectively "owns" and therefore controls its practices and procedures — they should have no expectation that they will be able to control (or even influence) the court's practices and procedures
   - the various limitations on the discretions and powers available to the court
   - the likely outcomes that might be achieved through the litigation, including the likelihood of significant compensation and/or punishment of the persons or organisations the litigant perceives to be responsible for the wrong (if deemed necessary this message may need to be regularly reinforced).

   Given that research and experience indicate that querulance does not appear fully formed from the outset but develops over time, attempts to manage the expectations of such litigants (including questioning the correctness of their underlying assumptions) are more likely to have some chance of success if undertaken at the outset of the litigation.

4. **Managing presiding officer's expectations:** It is important for presiding officers to understand that for these litigants, the only acceptable outcome is likely to be total vindication. Anything less is likely to result in an appeal and most probably a complaint about the presiding officer's conduct to the Chief Justice of the court and/or the Judicial Commission (possibly along with complaints about opposing counsel to the Bar Council and about the opposing solicitors to the Law Society, etc).

   It is unlikely that such litigants will feel suitably vindicated by merely winning the action without an explicit acknowledgement that the respondent's conduct (and/or relevant staff) was criminal, corrupt or at a minimum, seriously negligent. This becomes more problematic in the case of querulants (and to a lesser degree other repeat self-represented litigants) as they typically "move the goalposts".

5. **Requiring compliance with rules and directions:** The court rules should be rigorously enforced, particularly time limits[37] for lodging or responding to submissions or the provision of information/documentation. Querulants in particular (and most probably other repeat self-represented litigants) are likely to be disorganised and overwhelmed by the pressures created by the growing number of actions, complaints, etc, they have taken or made as the issue(s) escalate. Granting more time is unlikely to result in compliance, or less confusion.

37 Dr Lester notes that: "More time granted will lead to more confusion. They are disorganised and overwhelmed and more time rarely changes this": Lester, above n 21, at 19.

6. **Orders for costs:** In exercising any discretion to impose orders for costs, weight should be given to factors such as the numbers of:

   - actions the litigant has commenced (in total)
   - unsuccessful actions
   - actions against the same respondents
   - actions substantially concerning the same issues.

   For some years the author has tracked the campaigns of various repeat self-represented litigants in the Administrative Decisions Tribunal, a number of whom had also been repeat complainants to the NSW Ombudsman before we closed that door. When their names stopped appearing in the lists and in judgments, I found that this often followed the imposition of a costs order.

7. **Redistributing the load:** Since a presiding officer who hands down a decision that does not support the litigant is likely to be the subject of complaint (as well as the decision being appealed), it is not fair or reasonable to allocate all matters concerning the same litigant to one presiding officer.[38] When it becomes clear that an individual is commencing multiple actions, matters should be shared among available different presiding officers.

8. **Responding to threats:** The presiding officer, registrar and/or other court staff, should react to all threats (to others or self), or implied threats, by a litigant by explicitly acknowledging and reproving them and directing the person to stop the behaviour. The person should be informed:

   - in all cases, of the courts protocols for responding to threats
   - in relation to less serious threats, of the repercussions that will flow if the behaviour continues
   - in relation to more serious threats, that they will be reported to police.

   If appropriate, affected persons could be encouraged to seek an order under the *Crimes (Domestic and Personal Violence) Act 2007*.

9. **Reacting to aggressive or violent behaviour:** The presiding officer, registrar and/or court security staff should react immediately to all aggressive or violent behaviour:

   - aggressive individuals should be directed to leave the premises and should be physically removed by security or the police if they fail to do so
   - violent individuals should be removed by police and charged with relevant offences
   - in such circumstances, consideration should be given to whether the litigant should be barred from either representing themselves or appearing in person in any future hearings, or the matter should proceed on the papers.

38 ibid.

If necessary, affected persons should be encouraged to seek an order under the *Crimes (Domestic and Personal Violence) Act*.

10. **Maintaining boundaries:** Presiding officers should maintain the formality of the court, discourage any over-familiarity during proceedings, and avoid any personal contact with the litigant outside the courtroom.

While in theory an order under the *Vexatious Proceedings Act 2008* can be sought in extreme cases, as discussed below, the availability of such orders is severely limited in practice by the evidentiary requirements that apply.

What were the problems with the Vexatious Proceedings Act 2008?

In the original version of this article published in 2014, I was critical of the *Vexatious Proceedings Act 2008* which had replaced the vexatious litigant provisions of the former s 84 of the *Supreme Court Act 1970*. While, in my view, those new provisions were an improvement on those they replaced (for example, they included a broader definition, they applied to certain tribunals, there was greater flexibility for the courts to make and rescind orders), arguably they did not go far enough.

When introducing the Vexatious Proceedings Bill 2008, then Attorney General (NSW), the Honourable John Hatzistergos, stated that the courts are:[39]

> there to administer justice and help people to resolve their disputes. They are not for people to misuse by harassing, intimidating or embarrassing people … If people abuse the system we need to make it easier for judges to banish them from courtrooms, freeing up the justice system and protecting the good citizens of this State.

The provisions of the original 2008 Act did not address a fundamental issue: the rationale for the largely unfettered right of access to the civil courts and tribunals is to seek the resolution of disputes. However, as research and experience have shown, the only resolution that is acceptable to many of the people who engage in litigation (and/or complaining) practices is complete vindication.

Compromise is not an option and satisfaction is unlikely because the goalposts are commonly either quite unrealistic to start with or move in that direction.

Two of the key problems with the earlier provisions in the *Supreme Court Act* were that they required an assessment to be made of the litigant's motive in "habitually and persistently"

39 J Hatzistergos, *New laws to stop legal harassment*, media release, NSW Attorney General's Department, Sydney, 11 May 2008.

bringing proceedings and it was necessary to show a history of failure in those proceedings. The original 2008 provisions unfortunately largely retained those requirements (although in a different form):

- the person must have "frequently" instituted or conducted "vexatious proceedings"
- the definition of "vexatious proceedings" still required the court to make an assessment as to the purpose or motive of the litigant (that all the proceedings were "instituted" and "conducted" so as to "harass or annoy", to "cause delay or detriment", or for/to achieve "another wrongful purpose")
- the proceedings must have been "instituted or pursued without reasonable ground".

Apart from the difficulties involved in identifying the motive of the person in each of multiple proceedings, to the satisfaction of the court, if the person has been successful in any of those proceedings, the chances of obtaining an order diminish considerably.[40]

Arguably, the 2008 Act was drafted primarily to address the impact of such litigation on the courts and tribunals, and on the individual respondents.[41] It appears that much less emphasis was placed on the broader resource and equity implications of persistent litigation outlined above. These considerations warranted a rethink about the threshold over which repeat litigation can be considered to be so unreasonable as to outweigh the public interest in allowing individuals unfettered access to courts and tribunals.

The amendments to the 2008 Act in the*Vexatious Proceedings Amendment (Statutory Review) Act 2018*, amongst other things, replaced s 6(d) of the definition of vexatious proceedings with:

> proceedings that are conducted to achieve a wrongful purpose, or in a way that harasses, or causes unreasonable annoyance, delay or detriment, regardless of the subjective intention or motive of the person who instituted the proceedings.

This new provision addressed the key issue raised in the original version of this article published in the September 2014 edition of *The Judicial Review*.

40 For example, a few years ago one litigant was a party to 23 decisions of the NSW Administrative Decisions Tribunal (the ADT) in its Privacy jurisdiction (of which only two were successful). While one of these decisions involved what was probably the first award of damages by the ADT for a breach of privacy, at one point this applicant and another repeat applicant between them were a party in approximately 40% of the privacy cases in the ADT in a four-year period (involving 38 decisions). Another self-represented litigant was a party to 80 freedom of information (FOI) decisions of the ADT, including 46 decisions of the General Division of the Tribunal and 34 decisions of the Appeal Panel. He was also a party to 15 decisions of the Supreme Court of NSW and six decisions of the Court of Appeal. Of the General Division decisions, 20 related to procedural/bias/costs issues and 27 to merit issues. While this litigant was successful to one degree or another in a number of the cases before the ADT, Supreme Court and Court of Appeal, with few exceptions these were cases dealing with procedural issues only

41 See for example the comment by Johnson J in *A-G (NSW) v Bar-Mordecai* [2009] NSWSC 218, when referring to former s 84 of the *Supreme Court Act 1970* and the *Vexatious Proceedings Act 2008*: "The provision is designed to protect the Court's own processes against unwarranted usurpation of its time and resources and to avoid loss caused to those who face actions which lack substance: *Jones v Skyring* (1992) 66 ALJR 810 at 814".

Is there a better approach?

In the original article I put forward the view that it should be possible to draft a provision that would allow courts and tribunals to manage their interactions with people who are creating resource, equity and/or safety issues through repeat litigation (particularly involving self-represented litigants). While the 2018 amendments were a step in the right direction, what is still needed is an approach that:

- labels the conduct not the person
- enables the courts to implement a number of management strategies to respond to different types and seriousness of problems
- introduces an explicit "substantial" purpose test to reduce the evidentiary burden on the party seeking to demonstrate that the other party is acting unreasonably or inappropriately
- incorporates criteria explicitly addressing common content, conduct and resource issues.

In relation to *content* issues, relevant criteria might include a belief by a presiding officer, on reasonable grounds, that a number of proceedings have been instituted by a litigant that:

- are repetitious in relation to their subject matter and the respondent
- contain clearly false or intentionally misleading statements of a significant nature relating to matters in contention
- are made without reasonable grounds or are lacking in any substance
- are so obviously untenable or manifestly groundless as to be utterly hopeless, misguided or misconceived
- are on their face clearly delusional, imaginary, irrational, absurd or an exercise in futility (based on a "reasonable person" type test).

In relation to *conduct* issues, criteria might include:

- the conduct of the litigant has raised significant work health and safety issues for court staff
- a number of proceedings have been commenced that can reasonably be characterised as habitual, persistent or manifestly unreasonable in the circumstances
- a certain number of proceedings have been commenced within a specified period
- a number of proceedings against the same or related parties raising substantially the same issues as in previous proceedings that were unsuccessful (particularly if there has not been a significant interval in time between them or significant changes in relevant circumstances).

In relation to *resource* issues, criteria might include:

- the proceedings, considered together with previous or concurrent proceedings instituted by the same litigant, if allowed to commence or to continue, would substantially and unreasonably divert the court's resources away from their use by the court in the exercise of its functions.

What options should be available for courts to manage unreasonably persistent litigants?

Possible options include:

- requiring the leave of the court prior to the commencement of any further proceedings, either generally or in relation to a specific party
- requiring as a condition of the commencement of proceedings that the litigant agree to an indemnity/full costs order if the proceedings are unsuccessful, including the provision of security for costs
- imposing an upper limit on the number of separate proceedings a person can commence, either generally or in relation to a specific party, in any given period.

It would be important to also consider including an offence provision to deter people from aiding or abetting a person to avoid any such order or condition.

There are precedents for restraint-type provisions which are not based on assessments as to whether a litigant is vexatious. Under the Civil Procedure Rules (UK), a practice direction can be made which, among other things, sets out the circumstances where a court can make a civil restraint order against a party to the proceedings, and the consequences of such an order.[42]

A supplementary practice direction on the making of such civil restraint orders contains provisions about the making of:

- **limited civil restraint orders:** "where a party has made 2 or more applications which are totally without merit", preventing the party from "making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge"[43]
- **extended civil restraint orders:** "where a party has persistently issued claims or made applications which are totally without merit", preventing the party from "issuing claims or making applications"[44]
- **general civil restraint orders:** "where the party against whom the order is made persists in issuing claims or making applications which are totally without merit", preventing the party from "issuing any claim or making any application" without the permission of the judge identified in the order.[45]

The circumstances in which such restraint orders can be made under these rules and the practice direction are based on criteria concerning volume and merit, not intent (that is, without any reference to the prejudicial term "vexatious").

42 Rule 3.11 Power of the court to make a civil restraint order
A practice direction may set out –
(a) the circumstances in which the court has the power to make civil restraint order against a party to proceedings;
(b) the procedure where a party applies for a civil restraint order against another party; and
(c) the consequences of a court making a civil restraint order.

43 Practice Direction 3C — Civil Restraint Orders (UK), [2.1]–[2.2].

44 ibid at [3.1]–[3.2].

45 ibid at [4.1]–[4.2].

A relevant NSW precedent is s 110 of the *Government Information (Public Access) Act 2009*, which authorises action to be taken using criteria based on merit, not intent.[46]

Conclusions

As the experience of numerous complaint handlers from across Australia, New Zealand, Canada and the US, and various Asian countries has shown, a growing phenomenon over recent years is that more and more complainants are engaging in conduct that the complaint handlers find to be unacceptable. The seriousness of the conduct is also increasing. Anecdotal evidence suggests that courts and tribunals are experiencing a similar phenomenon relating to unreasonably persistent litigants, particularly self-represented litigants.

The Australasian parliamentary ombudsman has identified a range of strategies to assist complaint handlers to manage unreasonable conduct by a complainant, which have been well received both across Australasia as well as internationally.[47] While many of those strategies should assist the registry staff of courts and tribunals to manage unreasonable conduct by litigants, unfortunately they are not designed to address the issues that can confront the presiding officers of such bodies. This article identifies a number of strategies that may help to fill this gap.

While the 2018 amendments to the *Vexatious Proceedings Act 2008* were a considerable improvement, the approach that has been adopted in the UK, discussed above, warrants serious consideration.

46 In a Special Report to Parliament in 2009, the NSW Ombudsman suggested that the proposed new access to information legislation contain a provision giving the ADT the power to make orders along the lines of civil restraint orders in the Civil Procedure Rules (UK) and the supplementary Practice Direction 3C: NSW Ombudsman, *Opening up government — Review of the Freedom of Information Act 1989*, Report, February 2009, p 88.

47 For example, the 2nd edition of the *Managing unreasonable complainant conduct manual*, was translated by other international ombudsman offices (or the equivalent) into Mandarin, French and Farsi.

Self-represented litigants: tackling the challenge*

The Honourable Mr J Faulks.†

There are three things, the author suggests, that can be done in relation to self-representation by litigants: one is to get them lawyers, the second is to make them lawyers and the third is to change the system. This paper explores how each of the three suggestions could assist self-represented litigants' interaction with the court system and improve the conduct of litigation where self-represented litigants are involved.

Introduction

Most judges tend to couple the word self-represented litigant (SRL) with an expletive. It is customary to regard them as difficult, time-consuming, unreasonable, and ignorant of processes of the law.

Some 20 years ago I wrote a paper in which I proposed that courts should regard self-representation by litigants as a challenge rather than as a problem. In revisiting the subject, I find that my views about the matter have not changed substantially. There have been some developments in all courts in relation to SRLs but the challenge remains.

It has been said there are three things that can be done in relation to self-representation by litigants: one is to **get them lawyers**, the second is to **make them lawyers** and the third is to **change the system**. Self-representation has reached a level in many courts where it is common for at least one of the parties to be unrepresented for one half of the time. This means that courts are no longer dealing with a minority aberration but are being obliged to contend with change

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which may require altering the way in which courts operate. If it becomes the norm for many litigants to be self-represented, the justification for retaining existing court procedures based on parties' being legally represented may no longer be valid.

This paper explores how each of the three suggestions could assist SRLs' interaction with the court system and improve the conduct of litigation where a SRL is involved. This paper does not purport to provide the answers. It is acknowledged that the challenges presented by SRLs have existed for some time and solutions have been difficult to find. His Honour, Justice Geoffrey Davies (as he then was) said:[1]

> I believe that the question of how to cope with [the plight of the unrepresented litigant] is the greatest single challenge for the civil justice system at the present time.
>
> … Cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges.

What this paper aims to do is generate ideas and discussion about possible ways to improve the situation.

The challenge of the self-represented litigant

The challenges presented by self-represented litigants

The Australian court system is an adversarial system. In this system, the court has a substantially passive role and relies on the parties to present all material that will be relevant/necessary to enable the court to make its decision. A SRL is not a qualified legal practitioner and usually does not have the expertise to provide the assistance to the court that a solicitor or barrister would. In the adversarial system, this lack of assistance from parties hinders the court in discharging its function[2] — that is, to make decisions about disputes parties cannot themselves resolve.

Because SRLs are not properly qualified and are not officers of the court, they are:[3]

> independent of, and not governed by the duties owed to a court by a legal practitioner upon which the operation of the court system is so highly dependent. Those duties are duties of disclosure to the court, of avoidance of abuse of the court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously.

Moreover, when a dispute involves one party who is self-represented and another who is represented by a legal practitioner, this appears to create an unlevel playing field. This in turn

1 G Davies, "The reality of civil justice reform: why we must abandon the essential elements of our system" (2003) 12(2) *Journal of Judicial Administration* 155 at 168.

2 R Stewart, "The self-represented litigant: A challenge to justice" (2011) 20(3) *Journal of Judicial Administration* 146 at 155.

3 R Nicholson, "Australian experience with self-represented litigants" (2003) 77(12) *The Australian Law Journal* 820 at 821.

raises issues "about the fairness of the legal process facilitated by the court".[4] It might be said that the "playing field" of litigation is never truly level, even when both parties are represented, because of the varying skills and abilities between solicitors and counsel. However, the field is more markedly uneven in cases where a lay-person is on one side and a qualified practitioner is on the other. The disparity in skill and knowledge raises issues as to a court's duty to assist the SRL. This is explored in more detail later in this paper. The obligation of the court to provide some advice (if not assistance) to SRLs,[5] and a SRL's lack of understanding of the process, necessarily means more time is required to finalise the proceedings.

A SRL does not only present challenges for the court; the court proceedings present challenges for the SRL. He or she is dealing with foreign and complex rules and processes (many of which might feel counter-intuitive to a lay person) and a language that sounds like English but nevertheless does not make any sense to him or her.

In addition to the procedural barriers, the SRL also faces administrative barriers which lawyers are generally not troubled by. Unlike lawyers, SRLs are not familiar with the appropriate forms to fill out and knowledge of such basic things as where the court building is located. They do not have working relationships with court staff. All of these can make the litigation process much harder to navigate.[6]

The process of presenting a case before the court is also unfamiliar to SRLs and, again, may feel counter-intuitive:[7]

> A plaintiff must frame the facts in a way which includes all legally relevant allegations, and is not obscured by extraneous material. Thus, in most civil claims, matters such as motive will be wholly irrelevant. This is counterintuitive. From a layperson's perspective, the task of the court is to do justice. From such a viewpoint the malicious motivation of a contract breaker is highly relevant — much more so, it could be argued, than the fact that the breach is tenuously justified by a contractual force majeure term, or that the plaintiff first breached the contract by failing to deliver on time due to unavoidable external matters.

Why are people self-representing?

There are a variety of reasons why people are self-represented. Some may not be able to afford to pay a lawyer. Some may feel they do not need a lawyer. For example, in uncontroversial matters such as an uncontested divorce the value of the dispute is seen to be disproportionate to the lawyer's fees. Some may be disenchanted with the legal profession and hold the view that involving a lawyer will only make the dispute more acrimonious whereas they could resolve it themselves in an amicable fashion.[8]

But, regardless of the reasons as to why someone is self-represented, it is clear from available data that SRLs continue to make up a significant proportion of litigants. In the 2011–2012

4 Stewart, above n 2.
5 *In Re F: Litigants in Person Guidelines* [2001] FamCA 348.
6 D Webb, "The right not to have a lawyer" (2007) 16(3) *Journal of Judicial Administration* 165 at 172.
7 ibid, at 171.
8 ibid, at 170–171.

financial year, 27% of finalised cases in the Family Court involved at least one SRL. In 2007–2008, the figure was the same.[9] In the High Court, 41% of special leave applications in the 2011–2012 financial year was filed by SRLs.[10] In 2007–2008, that figure was 67%.[11]

The significant number of SRLs coupled with the types of challenges they present to the court system should cause everyone in the court system to think about what can be done to tackle those challenges.

Tackling the challenge

What has already been done

In 2001, the AIJA published the *Litigants in person management plan: issues for courts and tribunals* ("*Litigants in person management plan*").[12] This document was "intended to provide a range of information and ideas for courts and tribunals to draw on in formulating their own management plans".[13]

Since the publication of *Litigants in person management plan*, regardless of whether courts have adopted the ideas discussed in that document, courts in Australia have "increasingly undertaken initiatives designed to assist [SRLs] and to ease their impact on the court system".[14]

The Family Court, for example, has implemented various strategies to streamline the process for SRLs. These include providing do-it-yourself kits for guidance and assistance on completing some of the most common forms, including consent orders, financial statements and affidavits; providing compulsory training for all client service staff to help them recognise the need to spend more time with SRLs and assisting staff in tailoring services to meet the needs of the court's different client groups; and providing information on the Family Court website including electronic versions of information brochures, kits and court forms which can be downloaded by SRLs; interactive information including a virtual tour of the court, a step-by-step guide to proceedings in the court and links to legislation and Rules of the court.[15]

The Queensland courts' website has a specific section for SRLs. That section provides information about advice and support available to SRLs, possible avenues where SRLs can obtain legal advice, obtain a trial date, forms and practice directions.[16]

Institutions other than courts have also implemented strategies to improve the plight of SRLs. In 2008, Victoria Legal Aid published a DIY kit for family law matters, *How to run your family*

9 Family Court of Australia, *Annual Report 2011–2012*, at 62.
10 High Court of Australia, *Annual Report 2011–2012*, at 15.
11 High Court of Australia, *Annual Report 2007–2008*, at 18.
12 P Sheiner, *Litigants in person management plan: issues for courts and tribunals*, AIJA Courts and the Public Committee, 2001.
13 ibid at 1.
14 Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on self-represented litigants*, Report, at 2004, 3.
15 Family Court of Australia, *Self Represented Litigants*, at www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2000/fcoa_pr_self_represented_litigants, accessed 16 August 2021.
16 Queensland Courts, *Representing yourself*, at www.courts.qld.gov.au/representing-yourself-in-court, accessed 16 August 2021.

law case. Unlike the Family Court's DIY kits which relate only to specific forms such as an application for consent orders form or an application for divorce form, the Victoria Legal Aid DIY kit covers family law proceedings more broadly, including information on areas such as alternatives to litigation, making an application and choosing the right forum for the application, preparing an affidavit and preparing for a trial or hearing.[17]

The Queensland Public Interest Law Clearing House Incorporated operates a (unique) service that provides free, confidential and impartial legal advice to SRLs.[18] This service is discussed later in this paper and it is argued that such a service could be established nationally to assist SRLs in all jurisdictions.

Despite the efforts to date to assist SRLs in the court system, the challenge remains and from the statistics available, it would seem that SRLs continue to form a significant proportion of litigants in the system. Therefore, it is necessary to explore what more can be done to address the challenge.

Getting them lawyers

Legal Aid

If a person is self-representing because he or she cannot afford a lawyer, the state may assist through the provision of Legal Aid. However, there is always a finite limit to the amount of Legal Aid available. Although governments might view Legal Aid as a funding black hole, the funding provided to Legal Aid is always perceived as not enough. In the 2011–2012 financial year, NSW Legal Aid had a total income of $243.6 million and a total expenditure of $244.7 million,[19] leading to a deficit of $1.1 million. In the 2011–2012 financial year, Victoria Legal Aid received total income of about $153.8 million and total expenses of about $160 million — a deficit of $6.2 million.[20] Even when Legal Aid operates at a "surplus", it is not a big one. Legal Aid Queensland achieved a budget surplus of $3.025 million in the 2011–2012 financial year.[21]

The strain on Legal Aid funding is demonstrated by changes to Legal Aid in Victoria. Victoria Legal Aid changed some of their eligibility guidelines. Some of these changes came into effect on 7 January 2013. In family law matters, "funding of parents who do not resolve matters through mandatory family dispute resolution will be limited to trial preparation". Victoria Legal Aid say that they are not funded to meet the growing demand in the family law courts and their priority is to fund Independent Children's Lawyers in matters where the court has identified that this is important. Changes to eligibility guidelines in criminal matters mean that "appeals

17 Victoria Legal Aid, *How to run your family law case: representing yourself at a final hearing*, June 2013.
18 Queensland courts, above n 16.
19 Legal Aid New South Wales, *Annual Report 2011–2012*, at p 68, www.legalaid.nsw.gov.au/__data/assets/pdf_file/0013/15241/Annual-Report-2011-2012-complete.pdf, accessed 16 August 2021.
20 Victoria Legal Aid, Annual Report 2011–2012, at p 55 at www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-seventeenth-statutory-annual-report-2011-12.pdf, accessed 16 August 2021.
21 Legal Aid Queensland, *Annual Report 2011–2012*, at p 38 at www.legalaid.qld.gov.au/About-us/Corporate-publications/Annual-reports, accessed 16 August 2021.

in the Victorian Court of Appeal and the High Court that do not have a reasonable prospect of resulting in a lesser effective sentence or non-parole period will not be funded". Legal Aid is "prioritising conviction and sentence appeals that would have a bearing on the overall period of imprisonment the client would be liable to serve".[22]

There were also changes to eligibility guidelines which will came into effect in 2013. In family law, clients who are "found to have contravened orders in the Federal Magistrates Court, the Family Court and/or the Magistrates Court without reasonable excuse will not be eligible for funding or will have their funding removed". Independent children's lawyers will appear personally for children in final hearings in the Federal Magistrates Court and the Family Court rather than instructing counsel. In relation to summary crimes, "only those facing actual imprisonment will be eligible for a grant of legal assistance". However, duty lawyers will continue to provide advice and representation to people charged with less serious offences who are not eligible for Legal Aid.[23]

Whatever may be the system for supplying Legal Aid, the state cannot provide legal assistance to every litigant because there is a limit to the amount of funding that the state can inject into Legal Aid. In my opinion, the state also should not provide legal assistance to every litigant. To do so would almost inevitably encourage litigation or prolong it.

In addition, within the concept of providing Legal Aid the question of proportionality must inevitably arise. Lack of means should not ensure that a case that lacks merit is pursued interminably at tax payers' expense. Moreover, priority should probably (and properly) be afforded to some classes of cases rather than others. Criminal cases involving the serious risk of incarceration would feature on most priority lists — as would cases involving children and child abuse.

While Legal Aid is an important and established means of obtaining lawyers for SRLs, there are clearly limits to its availability both because of funding issues and eligibility criteria.

Pro bono lawyers

SRLs may obtain legal representation from a lawyer who does pro bono work. There are a variety of organisations who provide pro bono legal services — Law Societies, Bar Associations or some community legal services.

It is arguable that lawyers should not be expected to provide free legal services any more than plumbers might be expected to provide free plumbing. However, the professionalism of lawyers and the community-centric nature of Australian society mean that lawyers, as with other trades-people and professionals, will frequently provide services to those who cannot afford to pay for them and who do not qualify for Legal Aid. It would be a mistake for Government

22 Victoria Legal Aid, *Eligibility guideline changes have come into effect*, at www.legalaid.vic.gov.au/about-us/news/eligibility-guideline-changes-have-come-into-effectwww.legalaid.vic.gov.au/about-us/news/eligibility-guideline-changes-have-come-into-effect, accessed 16 August 2021.

23 ibid.

to impose the institutionalisation of such free services (other than through the provision of government-funded Legal Aid). Governments ultimately must wear the responsibility for providing what the individual cannot and for making policy decisions about who is to be assisted and who is not. This is a community obligation which must be subject to the priority allocated to it by the elected government.

There are also ethical and practical issues associated with pro bono services. One is the issue of liability and accountability when a client is dissatisfied. Consider, for example, a client who is not able to pay for a lawyer and who is ineligible for Legal Aid, but who has been able to obtain legal assistance through a centre that provides pro bono services. If the client feels the service may not have been up to the standards he or she would have received from a paid lawyer, should the pro bono lawyer be held accountable? The service may have put the client in a better position than if he had no legal assistance whatsoever, but the client may not feel that the level of service was equal to thatwhich would have been provided by a privately retained lawyer.[24] The ethical questions raised by this issue are articulated by a US article about the ethical issues of pro bono advocacy:[25]

> It seems dangerous for the profession to chastise those who are willing to provide help when others will not, but whose performance does not meet a client's expectations. On the other hand, it is very important that the assistance provided to individuals in these settings be held to an objective standard, and failure to meet that standard means something must be done. Determining this standard, however, may be more difficult

A pro-bono lawyer may suffer a moral conflict when providing pro bono services. Helping a client who has drug issues, for example, may cause moral conflict for some lawyers.[26] This raises the question of what it means to "do the public good":[27]

> it might be necessary to shift the perception that pro bono work should align with the moral interests of those who are performing it, and rather advocate the position that "doing public good" means assisting all those in need, regardless of whether the volunteer sympathises with their plight.
>
> The issue then becomes whether a lawyer would be able to perform a service competently if he or she had a moral conflict with the outcome … Normally money is a good way to bridge this gap, but in the pro bono sector, it may be far more difficult.

Lawyers who undertake pro bono work provide a commendable and important service. Pro bono lawyers are an excellent avenue through which SRLs can obtain advice and representation. However, the availability of the service depends on the availability of lawyers who are volunteering and, furthermore, there are ethical and practical issues which may mean that pro bono services are not suitable for every SRL.

24 E Anderson, "Unbundling the ethical issues of pro bono advocacy: articulating the goals of limited-scope pro bono advocacy for limited legal services programs" (2010) 48(4) *Family Court Review* 685 at 694.
25 ibid.
26 ibid at 695.
27 ibid.

Unbundled legal services

One way of expanding legal services available to SRLs, whether through Legal Aid or pro bono services, is to provide unbundled legal services, that is, to provide legal services for part of the legal proceedings rather than for the whole. A litigant may be able to obtain legal advice initially "just to know where [I] stand" or a litigant may obtain legal advice for the preparation of court documents or obtain representation just for the trial.

There are advantages and disadvantages associated with unbundled legal services. The most obvious advantage is that a SRL who lacks financial resources can obtain legal assistance for some of the proceedings, if not for all of the proceedings. An obvious disadvantage of unbundled legal services is that the lawyer will not have as good a working-knowledge of the matter as a lawyer who provides the "whole service". If a lawyer has carriage of a matter from beginning to end, he or she has a good working-knowledge of the facts of the whole case (rather than segments of it). This means the lawyer is in a good position to provide competent advice about the litigation. If a lawyer is consulted only for one particular stratum of the litigation, he or she may be given inadequate information or instructions which can, in turn, lead to less than optimal advice — or possibly to negligent advice.

The Queensland Self Representation Service

In Queensland, the Queensland Public Interest Law Clearing House has set up the Self Representation Service ("the SRS"). The SRS provides pro bono unbundled legal services to SRLs and was modelled on the Citizens Advice Bureau at the Royal Courts of Justice in London.[28] This paper suggests that the SRS is model of how unbundled legal service can and should be provided nationally in Australia.

The SRS started operation in 2007. It initially assisted SRLs whose matters were in the Queensland Supreme Court, District Court and Court of Appeal. The SRS expanded into the jurisdiction of the Queensland Civil and Administrative Tribunal in 2010. A pilot service has been implemented in the Federal Court and Federal Magistrates Court in Brisbane.[29]

The SRS provides one initial appointment to all SRLs.[30] However, for clients who are unable to afford private legal assistance and who are ineligible for Legal Aid, the SRS provides any number of appointments (as necessary) to legally assist those clients.[31] The type of unbundled assistance provided to SRLs usually falls within the following categories:

- legal advice, including advice about commencing proceedings, prehearing and compulsory conference advice, advice about making interlocutory applications and complying with or enforcing decisions;
- assistance to draft documents, including forms, submissions and affidavits;

28 A de Smidt and K Dodgson, "Unbundling our way to outcomes: QPILCH's Self Representation Service at QCAT, two years on" (2012) 21(4) *Journal of Judicial Administration* 246 at 247.
29 ibid at 246.
30 T Woodyatt, A Thompson and E Pendlebury, "Queensland's self-representation services: A model for other courts and tribunals" (2011) 20(4) *Journal of Judicial Administration* 225 at 226.
31 de Smidt and Dodgson, above n 28, at 247.

- referral to non-legal support services.[32]

The SRS model is unlike the traditional client-solicitor relationship as the clients are not "represented" by the SRS solicitors. The SRL clients "remain responsible for the conduct of their proceedings" — they are responsible for appearances before and communications with the court, the other parties and the other parties' lawyers.[33]

The existence of the SRS is dependent on a non-recurrent grant of $127,882 from the Department of Justice and Attorney-General. That budget is sufficient to employ one full-time solicitor and one part-time paralegal.[34] However, the SRS is also assisted by member firms whose practitioners provide pro bono services.[35]

The SRS is beneficial to SRLs in various ways. By giving SRLs advice and assistance about all aspects of litigation, including how to commence proceedings, make interlocutory applications, complete forms, and draft affidavits and submissions, SRLs are better prepared and have a better understanding of the court process. The SRL can "better communicate their case to the court and other party" and the court benefits from a better prepared participant.[36]

However, the operation of the SRS also presents challenges.

One recognised challenge of operating the SRS is how to disseminate information about the SRS to people who need it most. To that end, the SRS has taken an "active approach" and "identif[ied] the [SRS] to key stakeholders and thus ensure that appropriate referrals to the [SRS] are made".[37] Referrals to the SRS are made by the courts, Legal Aid, legal practitioners, government departments, the Queensland Bar, community organisations and other sources. By far, the greatest number of referrals come from the courts. An annual email is sent by the SRS to the new intake of judges' associates so they are aware of the service and judges can make appropriate referrals.[38]

One problem which the SRS, or a similar pro bono unbundled legal service provider, might face is how to properly limit the scope of assistance provided. When a person retains a lawyer, the parameters of the service are usually set out in an engagement letter or a costs agreement. However, when someone is providing unbundled legal services (especially when this is done pro bono), the process of limiting the scope of the representation/assistance can be difficult because "individuals are not guided by payment parameters". If a service similar to the SRS is established across Australia, the organisations providing the service should have signed agreements with the SRLs that clearly detail the parameters of the service to be provided and the relationship that will be formed. Other important information that should be included in the signed agreements include information about confidentiality and follow-up procedures.[39]

32 ibid.
33 ibid, at 247.
34 ibid.
35 Woodyatt, Thompson and Pendlebury, above n 30.
36 ibid.
37 ibid, at 227.
38 ibid, at 228.
39 Anderson, above n 24, at 689.

Another issue with pro bono unbundled legal services is that of lawyer/ "client" privilege. Where the person privately pays for and retains a lawyer, privilege applies to lawyer/client communications. However, where a lawyer is providing pro bono unbundled legal services, that lawyer is not "representing" the "client". The person is not a "client" in the traditional sense of the word. Rather, the lawyer is providing the person with assistance in discrete tasks. The issue of privilege in relation to lawyer/ "client" communications should probably be the subject of legislative prescription.

There is also the question of whether the services provided are covered by professional indemnity insurance.

If the issues outlined above are properly addressed by Government, it would be extremely beneficial for SRLs, the courts and the legal profession if a similar service were implemented nationally across Australia.

Making them lawyers

If a SRL is not able to obtain any sort of legal assistance, an alternative means of assisting SRLs is to provide them with some sort of training or information so they can undertake their own litigation. (The SRS is one way of doing this.) Obviously, the type of assistance provided to the SRL will depend on the needs of the individual SRL. "[N]ot all [SRLs] are created equal" and some need more guidance than others.[40]

Information and assistance can be provided to SRLs from a variety of sources — court website, information sessions, and the Bench, to name a few. This section examines each of these and the issues surrounding them.

Court websites

It has been mentioned above that the Family Court website provides a vast amount of information for SRLs.[41] The benefit of this website is that the SRLs can access the information at their leisure and the information can help familiarise SRLs with court processes so they have a better idea of what to expect.

However, providing information on a website is clearly not going to assist SRLs with every issue that confronts them during the litigation process. While website information can provide SRLs with a basic understanding of the court and trial process, websites cannot provide detailed information in relation to the substantive aspects of the SRL's case. For example, website information cannot advise the SRL about his or her prospects of success nor can it draft affidavits in accordance with the rules of evidence. A SRL requires more assistance than a website can provide to run his or her own case.

40 J Greacen, "Self-represented litigants: learning from ten years of experience in Family Courts" [2005] *The Judges' Journal* 24 at 25.

41 Family Court of Australia, above n 15.

The effectiveness of website information is also dependent on how easy it is to access and how the information is organised so that the SRL can identify what information is relevant for their matter. Providing a link to different pieces of legislation will not be very effective if the SRL does not know the name of the relevant legislation, or does not know the relevant section and has to trawl through a long Act in order to find the law relevant to their matter.

The Alaska Court System Self-Help Centre for Family Law website is an example of a website that effectively provides information for SRLs.[42] Information is divided into different categories such as "child custody for unmarried parents", "child support", "property and debt when ending marriage" and "grandparents — visitation and custody". Each category is, helpfully, a link to the more relevant information. For example, the "grandparents — visitation and custody" link leads to relevant information such as "what rights do grandparents have regarding their children?", "what forms are used to ask for grandparent visitation?", and "how do grandparents try to get visitation with a grandchild?".

While Australian courts provide information for SRLs, it is important that the information is set out in a way that is easily accessed by SRLs and organised in a way that is easy for SRLs to identify what is relevant for them.

Information sessions run at a court registry

Face-to-face information sessions held at the relevant court registry can be an effective way of providing SRLs with the relevant information. Face-to-face information sessions can be particularly beneficial because they give the SRL the opportunity to ask questions of a real person if there is an issue in need of clarification or explanation.

Alternatively, information sessions can by conducted by video, that is, SRLs attend the court registry in groups and view an information video. This is done in the family law jurisdiction in Indiana in the US. The "Family Matters" video is:[43]

> intended to help litigants make an informed decision regarding legal representation, provide resources for securing representation if they so desire, and provide important information about the legal process and the responsibilities they will be expected to fulfil if they represent themselves.
>
> To avoid "information overload" for litigants, the video is broken down into 30 short chapters which are designed to be easily understood by the viewer. Chapters range from approximately one to three minutes in length … Although it is possible to view the entire video at one time, it is suggested that litigants view it in sections as they progress through the stages of their case.

This paper will focus only on face-to-face information sessions.

The information sessions should not simply give SRLs an overview of the different stages of court proceedings and the various forms that may need to be completed. People may find it

42 Alaska Court System, *Self-Help Center: Family Law*, 1 February 2013, at http://courts.alaska.gov/shc/index.htm, accessed 17 August 2021.

43 R Shepard, "The self-represented litigant: implications for the bench and bar" (2010) 48(4) *Family Court Review* 607 at 612–613.

difficult to retain information in bulk and any information that is not needed for immediate processing may be easily forgotten.[44] Instead, the information sessions should ideally be targeted at specific areas of the litigation process. For example, how to prepare an affidavit, subpoenas, cross-examination, court-etiquette. That way, SRLs can attend the information session(s) relevant to them and apply that knowledge immediately.

A question that arises in relation to face-to-face information sessions is whether they will be run by court staff or by volunteers from the legal profession. There are issues with both.

If the sessions are run by court staff, staff will need to be trained to ensure the information provided is correct. The question arises as to whether/how much funding will be provided for this. Training staff will require funding and, if some staff are occupied with providing information sessions, additional staff will be required to perform the court's routine administrative work.

Some topics, such as cross-examination and preparing affidavits, raise further issues. First, these topics require staff to undertake some sort of legal training. In that case, it would be more appropriate for information sessions on these topics to be run by volunteer lawyers rather than by court staff.

However, a question arises as to whether information sessions on such topics should be run by the court registry at all. Topics such as cross-examination and preparation of affidavits fall into a grey area where information provided might constitute legal advice. A court must be impartial and independent and must not provide legal advice to a litigant. If a court were to run information sessions, whether through staff or volunteer lawyers, it would have to be careful to ensure the content does not constitute advice.

If the information sessions are run by volunteer lawyers, conflicts of interest can arise.[45] For example, if the volunteer lawyer represents one party to litigation in his paid employment as a lawyer, and the opposing party is a SRL attending an information session run by the same lawyer, then that lawyer may be precluded from providing information to the SRL or from continuing to represent his or her client. This is even more so in circumstances where the information is on a topic which can cross the boundary of information into the area of legal advice.

The likelihood of conflicts of interest arising can be diluted by having at least two independent lawyers participate in the information sessions.[46]

Assistance from the Bench

Where there is a SRL in proceedings before the court, the court has a role in providing the SRL with information. This role of the court has been the subject of some discussion in case law.

44 Greacen, above n 40, at 25 and 26.
45 Greacen, above n 40, at 30.
46 ibid.

In Re F: Litigants in Person Guidelines[47] ("*Re F*") the Full Court of the Family Court considered the principles in *Johnson v Johnson*[48] and set out revised guidelines for judges when dealing with SRLs. Those guidelines are:[49]

1. a judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
2. a judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
3. a judge should explain to the litigant in person any procedures relevant to the litigation;
4. a judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;
5. if a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
6. a judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
7. if a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;
8. a judge should attempt to clarify the substance of the submissions of the litigant in person, expecially in cases where, because of garrulous or misconceieved advocacy, the substantive issues are either ignored, given little attention or obfuscated …
9. where the interests of justice and the circumstances of the case require it, a judge may:
   - draw attention to the law applied by the court in determining issues before it;
   - question witnesses;
   - identify applications or submissions which ought to be put to the court;
   - suggest procedural steps that may be taken by a party;
   - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

47 [2001] FamCA 348.
48 (1997) 22 Fam LR 141.
49 *In Re F: Litigants in Person Guidelines* [2001] FamCA 348 at [253].

The concept of the judicial officer's role when assisting a SRL in court was considered in*Kenny v Ritter*:[50]

> The courts have recognised that when faced with a litigant in person, a measure of judicial intervention is not simply permissible but necessary, in order to ensure a fair hearing. The nature of the duty of a judge conducting a trial with a self-represented party has been the subject of a number of authoritative discussions. The general approach which a court should take to a litigant in person in civil proceeding was addressed by Samuels JA in *Rajski v Scitec Corporation Pty Ltd*:
>
> > In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend it auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent …
>
> The scope of the duty of the court to the litigant in person is constrained by the fact that the judge must endeavour to maintain the appearance of impartiality.
>
> …
>
> when the self-represented litigant is before the court, the judge must ensure that a fair trial takes place. In order to achieve this, the judge is required to assist the self-represented litigant. However, the judge must equally ensure that despite any assistance to the litigant in person, the perception of impartiality is maintained.[51]
>
> [footnotes omitted, emphasis added]

Both *Re F* and *Kenny v Ritter* recognise that when a SRL appears in court, there is a need for the court to provide the SRL with some assistance. However, what is also recognised is the conflict between assisting the disadvantaged SRL (the principle of fairness) and maintaining an appearance of impartiality and independence (the principle of impartiality)[52] and, of course, being impartial.

Impartiality is a fundamental characteristic of the court system:[53]

> The court, as one of the three arms of government, is the institution ultimately and specifically charged with the function of resolving disputes and imposing penalties for breaches of the rules of society (ie laws) …
>
> It is suggested that public confidence in the court exists because there is a presumption that the court is independent, impartial, fair and competent.
>
> [footnotes omitted]

In an adversary system like ours, SRLs need assistance from the Bench because they are at a disadvantage. In an adversary system, it is up to the parties to run their case, to present the necessary evidence in order for the judge to make a finding in their favour. SRLs are required to do this as well, but their task is much more difficult because they are not familiar with

50 [2009] SASC 139.
51 *Kenny v Ritter* [2009] SASC 139 at [17], [19] and [23].
52 Stewart, above n 2, at 159.
53 ibid, 149 and 151.

the processes, the language is foreign, the rules are complex and the SRL has an emotional investment in the proceedings before the court which makes his or her task less objective and more difficult.

A judge can attempt to "level the playing field" by assisting the SRL in accordance with the principles set out in *Re F* and *Kenny v Ritter*. But the judge must take care not to assist the SRL so much so as to appear to be partial towards the SRL or to create disadvantages for the represented party. This is almost always easier said than done. The difficulty in achieving this balance is aptly summarised by the Full Court in *Re F*:[54]

> neutrality is a key feature of the adversarial system. Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality.
>
> …
>
> It is simply not possible to create a level playing field where one party is represented by a professional and the other is not. Thus, to provide a guideline to judges of this type, if applied literally, not only sets the judge an impossible task but is likely to create unreal expectations on the part of the litigant in person and at the same time give a false impression of lack of impartiality by the judge to the party who is represented.

The presence of SRLs in our adversary court system represents a conflict in the fundamental principles upon which our court system is predicated — namely fairness and impartiality. It is possible for the judicial officer to provide the SRL with some assistance while at the same time preserving an appearance of impartiality, but the assistance which the judicial officer can provide is extremely limited. In circumstances where SRLs are a significant proportion of all litigants, perhaps the most effective way to assist manage SRLs is not to help the SRLs better understand and adapt to the existing system, but to change the system to reflect the needs of the SRL.

Changing the system

It is so much more comfortable to play the game with people who know the rules and play by the rules, for knowledge to prevail over ignorance, experience over naivety and skill over bumbling. However, what we should ask ourselves from time to time, is whether the practices we follow, the laws we make, the laws we interpret and apply, and the processes by which we reach decisions need to be as complicated as someone "on the outside" might find them to be.

There are three areas, or perhaps three targets, that I want to address under this general heading. They are the courts, the Government (the legislature) and the profession.

A less adversarial system

A big part of the reason why SRLs are such a problem in our court system is because our court system is an adversarial one where the judge is passive and relies on the parties to present all the relevant matters to the case in order for the judge to make a decision. For reasons discussed above, the SRL does not fit well in this system.

54 *In Re F: Litigants in Person Guidelines* [2001] FamCA 348 at [221] and [242].

Perhaps one way to tackle the challenge of SRLs is to change the system and make it less adversarial.

The Family Court introduced the Less Adversarial Trial ("LAT") in relation to children matters to provide an opportunity for a more understandable process, a fairer process, and a process where the litigants themselves have a more direct involvement in the proceedings and have a sense of ownership. The LAT was designed to enable litigants to understand the proceedings better and for the proceedings themselves to be more directive and hence more focused on the matters that had to be decided, rather than on the multiple issues that the parties may have felt were worthy of being dealt with.

There are several features of the LAT which would make the court system somewhat easier for SRLs to participate in.

Speaking directly to the judge

In the Family Court, on the first day of the LAT, both of the parties are usually given an opportunity to speak directly to the judge about what they would like for their children. When a party speaks directly to a judge, rather than through a lawyer, this may elicit admissions and concessions which would not ordinarily have been made by lawyers, whose principal job (appropriately in the adversary system) is to be the champions of their clients. By taking control away from the lawyers and speaking directly with the parties, judges are able to get a much clearer picture of the relationship between the parents and the aspirations the parents have for the children.

Of course, the benefits of having a party speak directly to a judge are premised on the SRL being an articulate and reasonable person. A querulous litigant who speaks directly to a judge may complicate the proceedings rather than simplify them.

Judge finalises and settles with the parties the issues in dispute

Unlike a conventional trial where it is up to the parties to identify the issues in dispute, in the LAT the judge identifies the issues in dispute early on in the proceedings. The judge settles the issues in dispute (and in need of judicial determination) before the finalisation of the LAT or hearing/trial commences. This approach focuses the SRLs attention on what needs to be resolved, instead of allowing the SRL to canvas matters which are not relevant to the issues in dispute.

This approach also allows the judge to identify to the parties what sort of evidence is required in order to assist him or her in determining the dispute. Again, this approach helps to focus the SRL's attention on adducing evidence that is relevant rather than allowing the SRL to drive the proceedings and adduce evidence that the SRL thinks is relevant.

Judicial consistency

This is an aspect of the LAT that is helpful to both SRLs and to lawyers. In a LAT, one judge presides over the whole proceedings, from beginning to end. This allows the SRL to become familiar with the judicial style. There is consistency in the way the proceedings are conducted, and the SRL does not have to repeat the history of the proceedings to a different judicial officer every time the matter comes before the court.

Litigants sitting at the Bar table

Most judges prefer to have a triangle of dialogue that involves a judge and two lawyers, preferably counsel, at the Bar table. In my opinion this is a perpetuation of the "old boys club"-like environment associated with litigation. The triangle of dialogue should be at least as broad as the litigants. After all, it is their matter which is the subject of deliberation. When I conduct a LAT, I prefer litigants to sit at the Bar table. This brings them within the triangle of dialogue and enables them to have a better understanding of what is occurring. It also tends to discourage the "old boy chat" that sometimes occurs between counsel and the judge and vice versa.

This applies also when one of the parties is self-represented. These days it would be difficult to imagine a judge excluding a SRL from the Bar table. If a SRL is at the Bar table and, at the same time, the other litigant is sitting further back in the court, there may be a temptation for that person to regard the process as excluding him or her in favour of the SRL.

Others will judge the success of the LAT — but it represents at least a bold step in reviewing the court processes that have been in place for decades. It is not simply accepting that change is a bad thing and that what has been for a long time "tried and true" should never change.

The Government

Legislation is often complicated and sometimes incomprehensible — even to judges. The law is there to govern all of society, not just lawyers. It is therefore important that all of society, not just lawyers, understand the law.

It is arguable that a law that is not easily understood, or understood with difficulty, should not be a law. How is it that a person, a citizen, is expected to comply with something which is extremely complicated or incomprehensible? Each of you will have a different favourite piece of incomprehensible legislation but let me share one of mine with you.

The *Income Tax Assessment Act* has grown from a relatively thin pamphlet to a two-volume Act — the 1936 Act and the 1997 Act. The 1997 Act was enacted in an attempt to simplify the 1936 Act which had been amended so many times that it became thousands of pages long and very complex with subsection after subsection being created. An example of how complex the *Income Tax Assessment Act 1936* had become is s 102AAZBA which concerns the modified application of CGT, in particular the effect of certain changes of residence:

> For the purposes of applying this Act in calculating the attributable income of a trust estate of a year of income (in this section called the attributable income year), where:
>
> (a) disregarding the assumption in paragraph 102AAZB(b), at any time (in this section called the residence-change time) during the attributable income year or an earlier year of income, the trust estate ceased to be a resident trust for CGT purposes, and became a non-resident trust estate; and
>
> (b) the trust estate owned a CGT asset at the residence-change time; and
>
> (c) a CGT event happens in relation to the asset during the attributable income year; and
>
> (d) section 104-170 of the *Income Tax Assessment Act 1997* (CGT event 12) applies to the asset in respect of the change of residence for the purposes of the application of this Act apart from this Subdivision;

then sections 411 to 414 (inclusive) apply to the asset as if:

(e) those sections had effect for the purposes of calculating attributable income under this Subdivision instead of Part X; and

(f) any reference in those sections to an eligible CFC were a reference to the trust estate; and

(g) any reference in those sections to a commencing day asset were a reference to the asset; and

(h) any reference in those sections relating to the eligible CFC's commencing day or the day following the eligible CFC's commencing day were a reference respectively to the residence-change time or a time immediately after the residence-change time; and

(i) subsections 412(2) and (3), and paragraphs 414(3)(b) and (4)(b), referred only to the market value of the asset concerned.

A lawyer might find this provision difficult to understand. A lay person would almost certainly find this provision difficult to understand. There are some things which contribute to this. First, the section is number 102AAZBA. The numbering shows how complicated the tax rules are and how often they have been amended — there are so many rules in place and the rules have been changed so often that legislators had to resort to numbering the section with five different letters. Second, there are many words in the section which have legislative definitions. For example, "attributable income", "trust", and "resident for CGT purposes". In order to understand what these terms mean and to understand s 102AAZBA itself, the lay person must flick back and forth between this section and the interpretation section of the Act. Third, the interpreter must read and understand ss 411 to 414 and then apply those sections to the asset in the manner stipulated by s 102AAZBA. Finally, there are terms which are technical terms whose definitions are not easily found in the Act. For example, "an eligible CFC" is not defined in s 102AAZBA nor is it defined in the interpretation section of the 1936 Act. Difficulty in finding the meaning of this term will make it difficult for any reader to understand this section.

Legislators and drafters might reasonably say they have been forced to be more complicated in their drafting and obliged to amend the Act again and again to prevent lawyers from finding ways of circumventing what is there. What seems to happen is that an initially relatively straightforward concept has accretions of complications plastered onto it as, increasingly, clever lawyers find increasingly complicated ways of getting around the original provisions. When an accretion is added to an accretion the interaction between the various laws becomes difficult, if not impossible to follow.

I suggest that there should be a new statutory office created of a "Legislation Ombudsman". This would be a person to whom bad drafting or incomprehensible parts of legislation can be referred. The Legislation Ombudsman's job would be to report such legislation to Government, which might reasonably accept an obligation to do something about bad pieces of legislation. I am not sufficiently naïve as to believe that there would be a rush to fix the problems revealed. In fact, I suspect they would receive a very low legislative priority. Nevertheless, Governments ought to take some pride in their work and the institutionalising of a process of identifying bad or difficult legislation may serve to bring the need to draft comprehensible legislation to the forefront of the minds of legislators and drafters.

Drafting less complicated and more comprehensible legislation ensures that laypeople and not just lawyers can understand it. SRLs who are able to understand the law will be able to better present their case in court.

The profession

The legal profession is one which guards its turf jealously. To a SRL, being in a court room feels somewhat like being in an old-boys' club where members of the club are speaking to each other in a strange language known only to them, where the members know each other quite well and are disparaging and discouraging of interlopers.

There are some judges and lawyers who strive to explain proceedings to SRLs and to provide appropriate assistance where needed. However, there are others who might resent the presence of SRLs and who "wish to turn back the clock to a time when they did not exist in large numbers".[55] In order to better manage SRLs, it is necessary to change this attitude.

Training would play an important role in doing so. Training on the handling of SRLs should become a standard part of the orientation of new judges. This training should address the ethical issues in assisting SRLs and equip judges with the skills to manage SRLs in the court room.[56] Training about SRLs should also form part of the curriculum of the courses required for admission to practise. Practitioners should be aware of their obligations when involved in proceedings where a SRL is the opposing party.

Conclusion

There is no silver bullet to the challenge of self-representation in our courts. There are a number of suggestions in this paper which may or may not find favour with the community, Government, lawyers or judges. However, if courts remind themselves that access to justice requires that it should be to all "without fear or favour, affection or ill-will"[57] then it follows that we should place all of our processes, language, practices and assistance under the microscope of that access to justice to determine whether, in a world in which the self-represented are a large proportion, we are showing sufficient awareness, courtesy, consideration and ultimately fairness and justice to those who appear before the court without a lawyer. After all "Sir Gerard Brennan used to say that we may never attain perfect justice, but that doesn't mean we can't aspire to it".[58]

55 Greacen, above n 40, at 26.
56 ibid, at 27.
57 Oath of Office.
58 S Brown, ABC Radio National, *The Law Report*, "Judges lose sleep over work stress", 5 February 2013.

Further references on unrepresented/querulant and vexatious litigants

For further references on the topics of unrepresented/querulant and vexatious litigants, please see the following:

- Judicial Commission, *Civil Trials Bench Book*, 2007–, Sydney, "Unrepresented litigants and lay advisers" at [1-0800],
- Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at Ch 10, "Self-represented parties".

Non-adversarial justice

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Reflecting on the practice of non-adversarial justice*

The Honourable Mr W Martin AC QC†

The article examines therapeutic jurisprudence in the civil and criminal justice systems. Criminal courts, such as drug courts and mental health courts, produce better outcomes for reduced cost, and they have thrived despite antipathy for non-adversarial justice from those who clamour for a "tough on crime" approach. The reasons for the discontinuance of specialty courts, such as family violence courts and Aboriginal courts, are analysed, despite the benefits the courts conferred. The Chief Justice discusses ways in which the civil system in WA has become less adversarial by adopting practices to identify the issues in dispute and prepare those issues for mediation, as well as reducing interlocutory disputes and discovery.

The traditional owners

I would like to acknowledge the traditional owners of the lands being the Gadigal people of the Eora nation. I pay my respects to their elders past and present and acknowledge their continuing stewardship of these lands. The capacity for non-adversarial justice to mitigate the harm caused to the traditional owners of the land now called Australia as a result of colonisation, dispossession and the intergenerational trauma which has resulted in the multifaceted disadvantages experienced by too many of the descendants of the traditional owners is one of the topics I hope to address.

Eleven years at the coalface

About a month after my appointment to the bench, I was invited to address the Third International Conference on Therapeutic Jurisprudence, which was held in Perth in 2006. The

* Second International Conference on non-adversarial justice: integrating theory and practice, Sydney, 6 April 2017. Published (2018) 13 *TJR* 397, updated 2021.

† Former Chief Justice of Western Australia.

invitation to address that conference at the outset of my judicial career was serendipitous because it required me to discover the basic concepts of therapeutic jurisprudence and exposed me to the prolific writing in that burgeoning field. Fifteen years later I am very pleased to have been invited to address another international conference dealing with similar issues.

I would like to reflect upon some of the basic concepts and practices that I referred to in my first address in this area, by drawing upon my 11 years of experience not only as a judge, but as the head of a judicial system. At the most general level, the conclusion which I draw from that experience can be expressed shortly, but with as much emphasis as I can muster, and that is that development and expansion of the principles of non-adversarial justice are essential if the systems in the various jurisdictions are to provide effective justice to the communities which we all serve.

My fundamental point can be illustrated by drawing upon two quotes which I cited in my first paper in 2006. The first is from Ambrose Bierce, who described litigation as a machine which you go into as a pig, and come out of as a sausage. The second is attributed to Voltaire: "I was never ruined but twice, once when I lost a law-suit and once when I won one". The point I draw from those quotes is that there are rarely winners in adversarial litigation, which can often bring out the worst in people.

This point can be developed more specifically by considering the two fundamental branches of the justice system in most jurisdictions — namely, criminal justice and civil justice. In the criminal justice system we have an elaborate and extremely expensive system involving numerous taxpayer-funded agencies, primarily police, courts and corrective services, which have resulted, at least over the last two decades, in the incarceration of ever increasing proportions of our communities, with little or no evidence of any causal effect upon re-offending rates. Our civil justice systems retain many of the characteristics described by Dickens in *Bleak House* and by Dean Roscoe Pound more than 100 years ago in his paper descriptively entitled "The causes of popular dissatisfaction with the administration of justice"[1] — namely, cost, delay, complexity and uncertainty of outcome.

Of course, we are all familiar with the proposition that insanity can be defined by doing the same thing again and again and expecting different outcomes, but that description characterises the justice systems in most of our jurisdictions.

There is, however, one notable exception to that characterisation — the development of systems of non-adversarial justice — an exception which gives me cautious optimism with respect to the future of our justice systems and encourages me to hope that we may be able to better serve our communities.

In this paper I will endeavour to explain the reasons for that cautious optimism by drawing upon my experience, and the literature — first by reference to criminal justice, and then by reference to civil justice. Because I am drawing upon personal experience, my observations will inevitably have a parochial flavour, for which I apologise.

1 (1906) 29(I) *American Bar Association Report* 395.

Criminal justice

Over the last few decades, many governments in Australia have embraced and applied policies with respect to criminal justice which criminologists would describe as "popular punitivism". Politicians anticipating electoral support for these policies claim that they are "tough on crime", and many State and Territory elections turn into a "law and order auction" in which participants endeavour to outbid each other with increasingly punitive policies. Those decades have been characterised by increases in maximum penalties and, more significantly, by the expansion of mandatory minimum penalties for an increasing number of offences.

Popular punitivism and non-adversarial justice

So, in Australia at least, the political and public policy environment in which non-adversarial justice practices have been developed in the criminal justice system has been antithetical to those practices. The tension between non-adversarial criminal justice and public sentiment, as perceived and reflected by politicians in the policies which they adopt, can be seen at both a philosophical and practical level. At a philosophical level, non-adversarial justice aims to protect the community by addressing, and hopefully resolving the causes of offending behaviour, or at least reducing the risk that identified underlying conditions will be criminogenic, in the sense that they will cause or contribute to offending behaviour. By contrast, "popular punitivism" focuses upon the consequences of crime, rather than its causes, and contends that the community is best protected by increasing levels of punishment which will deter future crimes by the offender and others.[2] At a practical level, mandatory minimum sentences discourage offenders from acknowledging or admitting their guilt, and pre-determine the outcome of the sentencing process in the event of conviction — both of which are antithetical to any and all forms of non-adversarial justice. The question of whether legislative provisions which, in effect, remove any element of discretion from the sentencing process and pre-determine its outcome are compatible with more general notions of justice, whether adversarial or not, is beyond the scope of this paper.

Non-adversarial justice survives

Given the acidic nature of the soil in which the seeds of non-adversarial justice have been planted, it is remarkable that those seeds have germinated and developed into thriving plants bearing fruit for the benefit of the community. Perhaps the most prolific fruit-bearing trees in the non-adversarial orchard are drug courts and mental health courts, which are to be found, in varying forms, in many, if not most, jurisdictions. How have these courts flourished and borne fruit in the hostile environment which I have described? I believe the answer lies in the fact that, despite the methodological problems of analysing the outcomes of such courts, analysis has repeatedly shown that such courts produce better outcomes for a significantly reduced overall cost. Perhaps just as significantly, the philosophical and practical underpinnings for such courts

2 A contention supported only by the intuition of its proponents and which lacks substantive empirical or evidentiary support.

are almost self-evident to a wide section of the community, and their elected representatives. The proposition that a person who is addicted to illicit drugs or who suffers a mental illness or disability will continue to offend, unless and until their drug addiction or mental health issue is resolved, is not difficult to accept.

The survival and development of non-adversarial practices in the environment which I have described is one of the sources of my cautious optimism. Nevertheless, it would be naive to underestimate the potential impact of popular punitivism in the future development of non-adversarial justice practices.

Development phases

In my foreword to the second edition of *Non-adversarial justice*[3] I paraphrased the development of the new occupational practices described in that book[4] as occurring in four stages:

- optimistic embracing
- hostility
- institutionalisation entailing a more measured understanding of benefits and pitfalls
- a strong interdependence between the developed initiative and other services demonstrated by the cross-fertilisation of practices and philosophies.

I suggested that non-adversarial justice had reached the third phase of development and would shortly enter the fourth phase. I was wrong. It is clear that non-adversarial justice continues to generate responses which fall within the second phase of development — that of hostility. I tender the following evidence in support of that proposition.

Adherents to non-adversarial justice, and the related concepts of therapeutic jurisprudence, restorative justice, problem-solving or solution-focused courts, have long acknowledged the criticism implicit in the language sometimes used to describe those practices — such as "touchy feely", "new age", "flaky", or "soft on crime". In the scale of criticism generally, and in the scale of criticisms of courts more particularly, language of this kind is relatively benign. However, there have been much more specific and pointed criticisms of non-adversarial justice principles in the media. I will provide two examples which suggest that there may have been less warmth in the reception of non-adversarial justice than I had hoped.

Justinian — "A jihad on adversarialism"

Following the First International Conference on Non-adversarial Justice in Melbourne in 2010, a report of the conference was published in Justinian — an Australian journal focused on

3 M King, A Freiberg, B Batagol and R Hyams, *Non-adversarial justice*, 2nd edn, The Federation Press, 2014, pp v–vi.
4 Based on the work of L Boulle, *Mediation: principles, process, practice*, 2nd edn, LexisNexis, 2011 in M King, A Freiberg, B Batagol and R Hyams, *Non-adversarial justice*, 2nd edn, The Federation Press, 2014, pp 103–104.

legal issues and the legal profession. The author, using the nom de plume Portia, described the conference as launching a "jihad on adversarialism" and, in a generally facetious description of the conference, drew an analogy to:[5]

> a Billy Graham … gospel-tent experience with members of the audience mumbling "Amen sister" during the homily, delegates rushing to the front, shaking with the fervor [sic] from the love flowing down.

The author described the character of the papers as referring to "naughty lawyers who failed to settle and undisciplined judges who audaciously allowed them to proceed to a trial".[6] The article concluded, consistently with its headline, by proposing that:[7]

> the practice of non-adversarialism requires its devotees, adherents, followers and believers to be fighters in a jihad against adversarialism.

The Australian — "Society expects justice from courts, not therapy"

In 2017, an article was published in *The Australian*, a national newspaper, under the heading "Society expects justice from courts, not therapy".[8] The article was published adjacent to a cartoon depicting a tattooed patient on a couch attended by a robed "counsellor" sitting in a chair with a gavel resting on the arm of the chair.

Revolutionary courts

The author described restorative justice and therapeutic jurisprudence as "political ideals"[9] which had been developed by a "revolutionary court"[10] without "a parliamentary vote or public consent".[11] In case readers might have missed the author's insinuation that courts were acting undemocratically, later in the article she observed that:[12]

> In liberal democracies ... making systemic changes to the law is generally understood as a matter for parliament and the people, not the unelected judiciary.

Significantly omitted from the article is any acknowledgement that the protection of the community by the rehabilitation of offenders is a long-recognised principle of sentencing, commonly, if not universally, embodied in statutes setting out the principles of sentencing in most jurisdictions. Nor does the author acknowledge that the mental health and drug courts to which she refers in the article are, in most cases, created with express statutory authority and in all cases operate within the statutory provisions relating to sentencing.

5 Portia (nom de plume), "A jihad on adversarialism", *Justinian*, at https://justinian.com.au/archive/a-jihad-on-adversarialism.html, accessed 17 August 2021.
6 ibid.
7 ibid.
8 J Oriel, "Society expects justice from courts, not therapy", *The Australian*, 30 January 2017.
9 ibid.
10 ibid.
11 ibid.
12 ibid.

Emotions not law

The author went on to assert that the proponents of the pernicious principles to which she referred were promoting the notion that:[13]

> the efficacy of courts is measured not by the faithful application of legislation and just punishment for crime but the degree to which criminals emote and judges manage their emotions.

The judge as talk-show host

The author refers to a scenario apparently cited by a US opponent of therapeutic courts in which a judge roams around the court with a microphone in hand "like a talk-show host" before prompting an offender, described as a client, to confess his crime and emote about it before all celebrate his rebirth with courtroom applause, a certificate and a pen. It seems that this scenario was taken from a now somewhat dated textbook by Professor James L Nolan, in which it was cited as one example of a range of ways in which different judges approached drug courts in the United States. Professor Nolan pointed out that in the circumstances he described, Judge Stephanie Duncan Peters was dealing with mainly African-American participants and that her approach was markedly different from other judges. Professor Nolan concluded that in the US:[14]

> the widespread popularity of the drug court movement suggests that its defining philosophy and forms are consistent with the dominant sensibilities of American culture.

In making that point, Professor Nolan highlighted the capacity of non-adversarial justice to respond appropriately to the different cultural sensibilities of the communities in which it is applied.

Therapeutic justice and mass killings

Returning to the article "Society expects justice from courts, not therapy",[15] the author was apparently not content with falsely alleging that specialty courts were acting undemocratically, and trivialising the sentencing process by implying that talk-show-host-styled court proceedings are "the" model for therapeutic justice. She went on to question whether therapeutic jurisprudence was responsible for a man being granted bail who was later charged with murdering many innocent victims by deliberately driving his car into the crowd on the footpath of a street in the central business district of Melbourne. The implicit suggestion that therapeutic justice had any role in these tragic events is entirely unsupported by any evidence of which I am aware.

The article also wrongly asserts that empirical research into the longitudinal impact of therapeutic approaches to the law is "rare" when in fact the longitudinal impact of speciality courts is commonly and frequently analysed.[16]

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13 ibid.
14 J Nolan, *Reinventing justice: the American drug court movement*, Princeton University Press, 2003, p 14.
15 See n 8, above.
16 See, for example, the research reports referenced in n 3, above.

Systemic failure

The author concludes by asserting that the "quiet revolution transforming court practice from black letter law to therapy culture"[17] was responsible for "the systemic failure of our legal system to protect innocent citizens from violent criminals".[18] In her view:[19]

> Therapy is no substitute for justice. We expect justice in our courtrooms. Leave therapy to the therapists.

Happily, I am confident that not even ill-informed criticism of this character will discourage my judicial colleagues from protecting the community — by addressing the causes of offending and thereby reducing the risk of re-offending. However, I am not so confident that the electoral process is immune to attacks of this character. There is a very real danger that politicians may perceive these views as reflecting popular sentiment and therefore matters properly taken into account in the formulation of justice system policy.

Speciality courts in WA — the rise and fall

I cannot exclude the possibility that criticisms of this kind may have contributed at least indirectly to a reduction in the specialty courts applying principles of non-adversarial justice in my jurisdiction of WA, notwithstanding a report from the Law Reform Commission of WA in 2009 which emphatically and enthusiastically endorsed the activities of such courts and made various recommendations for their continued expansion, development and enhancement.[20]

When I was appointed Chief Justice, specialty courts or court lists applying principles of non-adversarial justice operated in four areas — namely, drug-addicted offenders,[21] mentally impaired offenders,[22] family violence offenders,[23] and, in two locations,[24] Aboriginal offenders. This was followed by a significant expansion of speciality courts. The Kalgoorlie-Boulder (Aboriginal) Community Court opened within a year of my appointment, the Barndimalgu Court opened in Geraldton as a specialist Aboriginal court dealing with Aboriginal family and domestic violence offenders in 2007, and another five metropolitan family violence courts also commenced operating over the next few years, and in 2013 the Specialist Treatment and Referral Team (START) Court was launched for mentally ill offenders. While the Drug Court and Mental Health Court remain in operation,[25] the specialty Aboriginal courts[26] have

17 See n 8, above.
18 ibid.
19 ibid.
20 Law Reform Commission of Western Australia (LRCWA), *Court intervention programs*, *final report, project no 96*, 2009 at www.wa.gov.au/sites/default/files/2021-04/LRC-Project-096-Final-report.pdf, accessed 17 August 2021.
21 The Perth Drug Court which commenced in 2000.
22 The Intellectual Disability Diversion Program which commenced operating in the Perth Magistrates Court in 2003.
23 The Joondalup Family Violence Pilot Court which commenced operating at the Joondalup Magistrates Court in 1999.
24 Norseman Community Court which commenced in early 2006, and Geraldton, as the Geraldton Alternative Sentencing Regime, which operated from 2001.
25 In metropolitan Perth only.
26 Described as Community Courts in WA.

effectively been wound up and offenders returned to mainstream courts. The specialist family violence courts were formally discontinued — with some fanfare[27] — although as I explain below the reality is rather different.

The reasons for the discontinuance of those specialty courts in the face of independent and authoritative recommendations that they be continued and expanded[28] is an appropriate subject for detailed analysis and study. In the absence of such a study, the nomination of the reasons must necessarily involve a degree of conjecture. Despite that risk, I will nevertheless venture my suggestions as to the factors which may have contributed to these courts falling out of favour, dealing firstly with factors which may have been common to both, and then factors which may have been specific to the particular courts.

Objectives more aspirational than realistic

The literature in this area[29] recognises two recurrent deficiencies which have bedevilled initiatives and programs in this field. First, programs, including specialty courts, have often been launched and promoted by reference to objectives which are more aspirational than realistic. Family violence and Aboriginal offending are both issues of profound importance to the criminal justice system, and to the community of WA. No reasonable person would not aspire to significantly reduce the magnitude of offending in either category. However, both categories of offending behaviour present problems which are extremely complex and multi-faceted, and in the case of Aboriginal offending, intergenerational. However worthy our ambitions, it is unrealistic to suppose that significant inroads will be made with respect to either category of offending behaviour in the short term, and in particular, within any one electoral cycle. Nevertheless, the objective of significantly reducing offending behaviour has been at the forefront of the launch of specialty courts in these areas.

Recidivism studies

The second recurrent problem in this area arises from the frequent analysis of courts of this kind by reference to their longitudinal impact upon re-offending rates.[30] The difficulty with that form of analysis could sustain a paper all on its own. For present purposes it will be sufficient if I mention just two of the problems.

Comparing apples with apples

The first problem is that any analysis of the re-offending rates of offenders dealt with in a specialty court must be compared to an analysis of the re-offending rates of an equivalent cohort

27 See for example, S Kohlbacher, "Domestic violence offenders may no longer avoid jail in WA", *The Australian*, 24 June 2015; A Banks, "Special domestic violence court axed", *The West Australian*, 23 January 2015.

28 The community courts were not specifically considered within the scope of the LRCWA's court intervention programs reference, but had been recommended in the LRCWA's *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Project No 94, Final Report, 2006, see Recommendation 24, at www.indigenousjustice.gov.au/resources/aboriginal-customary-laws-final-report-the-interaction-of-western-australian-law-with-aboriginal-law-and-culture/, accessed 17 August 2021.

29 See n 1 , above.

30 Contrary to the assertions made in *The Australian*, see n 1 above.

of offenders dealt with in a mainstream court. Researchers customarily undertake their analysis of the respective cohorts by reference to objective criteria available from files, such as age, prior offending record, nature of the offence, etc. However, there is an inherent qualitative bias which such analysis can never reveal, and which tends to skew the more difficult cases towards the specialty court. The bias is best illustrated by an example. Let us take a busy lawyer in Kalgoorlie with two Aboriginal clients, both charged with assault. Because of the qualitative nature of the assault committed by one client, who has a lengthy history of offences of a similar kind, as compared to the qualitatively less serious nature of the assault committed by the second client, who has strong family support and good prospects for rehabilitation, the first client is much more likely to receive a custodial sentence than the second. In a mainstream court, the process between plea and sentence of the latter client will be brief and will not require the offender to engage with the process in any significant way, and will very likely result in the imposition of a fine which can be commuted to a period of community service. On the other hand, if either client elects to be dealt with in the specialty court for Aboriginal offenders,[31] the hearing will take much longer, would involve the client being subjected to detailed analysis and questioning by a group of Aboriginal Elders and perhaps "shaming". This course is unlikely to be attractive unless there is a very real prospect of a custodial sentence which might be avoided. In those circumstances, lawyers and their clients are making decisions as to the path that will be followed which qualitatively skew the more serious cases, with a greater risk of imprisonment, and therefore a greater risk of re-offending, towards the specialty court. Put simply, apples are not being compared with apples.

It is more than recidivism

The second problem with analysis by reference to rates of recidivism is that it tends to distort the underlying objectives of non-adversarial justice, which are much broader than the reduction of re-offending. So, in the case of the Kalgoorlie community court, one of the very real advantages of that court was that it placed a bridge over the chasm between the court and the Aboriginal community and provided Aboriginal people with a court experience which was, for the first time, relevant to them and which included a prominent role for other Aboriginal people. The value of these advantages cannot be measured statistically. Similarly, the family violence courts[32] reported very high levels of satisfaction from the victims of family violence with experience of such courts,[33] the enormous significance of which is diminished if there is an undue focus upon statistical analysis of rates of re-offending. It is distinctly possible that it is victim satisfaction with the specialty court process that increases the reporting of further offences. On the other hand if victims feel alienated from or dismissed by the court process, they are likely to be discouraged from reporting further offences.

31 Now effectively abolished.
32 Now also formally abolished.
33 Department of the Attorney General, Research and Analysis Branch, *Evaluation of the Metropolitan Family Violence Court and evaluation of the Barndimalgu Court repor*t, Evaluation report, 2015, at www.department.dotag.wa.gov.au/_files/fvc_evaluation_report.pdf, accessed 14 September 2021.

Programmatic support

Another generic difficulty often experienced by courts of this character concerns the provision of resources providing proper support to the non-adversarial approach, including accommodation, counselling and treatment. If specialty courts are not supported by the provision of adequate resources of that kind, and are constrained to the imposition of traditional penalties, it is unreasonable to expect any significant improvement in outcomes.

Mandatory sentencing

Another generic problem for courts of this kind is one I have already mentioned — namely, mandatory minimum sentencing. As I have already indicated, if an offender is subject to a mandatory minimum sentence, there is little role or scope for non-adversarial justice.

Aboriginal courts

I turn now to specific problems that may have been faced by the two kinds of specialist courts which have disappeared from the WA justice framework. Professor Chris Cunneen has eloquently made the point that specialty courts for Aboriginal offenders can be seen as distorting the justice system, because restorative justice practices are used for more minor offences and that more punitive punishment, including mandatory imprisonment, is used for those defined as repeat or serious offenders, which may more commonly include Aboriginal offenders. He also makes the valid point that discussion of restorative justice principles raises issues which have been debated over many years with respect to the nature and purpose of punishment and the relationship to the citizen, the State and the community which, in the case of Aboriginal offenders, must be viewed through the prism of colonisation and its impact upon the indigenous community.[34] Considerations of this kind may have discouraged Aboriginal participation in the Kalgoorlie court, which was one of the factors which led to its closure.

Family violence courts

Turning to the family violence courts, as I have already noted, they were formally discontinued despite high approval ratings from victims of family violence, in a context in which much greater political emphasis has been attached to the interests of victims of that type of offence (and appropriately so), and in a context in which other jurisdictions were developing specialist family violence courts. I am advised that family violence lists have been developed in the former family violence courts, conducted on specific days of the week and which, other than in one instance, continue to function in the same way as the specialty court.

The one family violence list that operates differently (originally as a pilot but now implemented) reflects one of the reasons given for the formal closure of family violence courts in WA; that was the desire to "mainstream" some of the practices of the specialty courts, so that a broader

34 See C Cunneen, "Restorative justice and the politics of decolonisation" in E Weitekamp, H Kerner, *Restorative justice: theoretical foundations*, Routledge, 2012, pp 32, 46–48.

range of offenders was brought within the scope of those practices.[35] While I understand that judicial case management and program participation through the family violence list continues to be restricted to perpetrators who plead guilty, some of the resources previously dedicated to intensive case management of offenders have been shifted to provide more extensive and earlier risk assessment in all family violence cases, regardless of whether the accused pleads guilty or not.

So, happily, in practice, some of the desirable characteristics of the family violence courts have in fact been maintained. Nonetheless the continued restriction upon judicial case management of offenders in the family violence lists to only those accused who plead guilty broadly reflects the concerns highlighted by Professor Cunneen and referred to above — that is, that perhaps those offenders who are most in need of a non-adversarial intervention are not eligible.

I note too that it is disappointing that what appear to be positive changes which arguably enhance rather than displace a therapeutic justice model were originally justified on the basis that regression modelling purportedly showed that perpetrators attending these specialist courts had a higher recidivism rate than those who attended the mainstream courts.[36]

The significance of non-adversarial justice to victims

Although non-adversarial justice programs initially evolved primarily as a way of addressing the needs of offenders, happily they have developed in such a way as to now effectively address the needs of victims as well. This is vitally important, not just because of the moral imperative to minimise the harm suffered by victims, but also because of the practical reality that today's victim may well be tomorrow's offender.

Aboriginal women

The latter point emerges strongly from a very interesting recent survey of Aboriginal mothers incarcerated in WA.[37] The article noted that between 2004–2014 women were the fastest growing cohort in the Australian prison system — and that the imprisonment rate for Aboriginal women increased at a faster rate than for non-Aboriginal women. The article also noted that most violence involving Aboriginal people in Australia is committed by Aboriginal men, with Aboriginal women overwhelmingly the victims — Aboriginal women are 34 times more likely than non-Aboriginal women to have been hospitalised as a result of injuries caused by assault and nine times more likely to die from their injuries.

35 One very significant concern was that the speciality courts only dealt with offenders who pleaded guilty.

36 It was reported that: offenders dealt with in the five Perth family violence courts, which cost close to $10 million a year to operate, were 2.4 times more likely to go on to commit further acts of violence than matched offenders in the mainstream system (see Banks, above, n 27). Given that perpetrators who attended just one hearing before the Family and Domestic Violence Court (FDVC) and were found to be unsuitable were included in the category of those "dealt with" by the FDVC, it might be thought that the higher recidivism rate was more indicative of a methodological flaw than the purported criminogenic nature of the FDVC.

37 M Wilson et al, "Violence in the lives of incarcerated Aboriginal mothers in Western Australia" (2017) *SAGE Open* 1–16, at http://journals.sagepub.com/doi/pdf/10.1177/2158244016686814, accessed 17 August 2021.

In that context the authors surveyed a number of Aboriginal women imprisoned in WA. The survey revealed that most of the women in the study who reported using violence had themselves been victims of violence. In many cases, offences were committed in circumstances in which women were retaliating to sustained and prolonged victimisation — often not reported because of the normalisation of violence within some families or communities. In that context, it seems to me to be very likely that the application of non-adversarial justice principles to victims, effectively and adequately addressing the consequences of the offence to which they were subject, is not only just and fair, but would also better protect the community by reducing the risk of the victim becoming an offender.

The civil justice system

Trial by battle

The common law system of civil justice which the colonists brought to Australia from England had historically incorporated a system which is about as adversarial as any system could ever be — namely, the system of trial by battle.[38] Under that system, disputes with respect to the ownership of land were resolved by a court ordering the disputing parties to require their representatives to bludgeon each other before an arena of spectating citizens — the victor taking the spoils for his principal. In his paper on the subject,[39] Professor Leeson points out that very few would defend such a process today, and that Baron Montesquieu described the process as "monstrous" as long ago as 1748. However, perhaps in an attempt to show that there is a little good in everything, Leeson engages economic analysis to conclude that trial by battle was an efficient and effective way of resolving disputes with respect to the ownership of land — essentially because it provided a mechanism by which the party who attached greatest value to the land in dispute could be identified, because that was the party who would spend the most money to obtain the most successful gladiator.[40] Parallels with our current system of civil justice are obvious, as is the prospect that cases determined on an adversarial basis are more likely to be won by the party who spends the greatest amount of money on their legal representatives.[41]

ADR

These observations underscore the vital importance of applying principles of non-adversarial justice in the civil justice system. There is a tendency to see those principles given expression predominantly, if not exclusively, through the application of ADR[42] such as mediation. I do not mean to diminish the significance of those processes — indeed, I am a fervent advocate

38 Described in medieval documents as "duellum".

39 P Leeson, "Trial by battle" (2011) 3(1) *Journal of Legal Analysis* 341, at https://academic.oup.com/jla/article/3/1/341/857953, accessed 17 August 2021.

40 Analysis of Leeson's thesis is beyond the scope of this paper, but it does pose the obvious rhetorical question — namely, wouldn't it be simpler and less barbaric to simply invite the disputants to bid for the land in an auction?

41 Despite the best efforts of the courts.

42 I will leave the debate about whether the acronym stands for Alternative Dispute Resolution or Appropriate Dispute Resolution to others.

of those processes and regularly conduct mediations myself.[43] However, I believe that there is much that could be done, over and above ADR, to make the fundamentally adversarial civil justice system less adversarial. I will try to develop my point by reference to some practices we have adopted in the Supreme Court of WA.

Docket case management

It should first be noted that these practices have been introduced in the context of a system of docket case management which is applied to all contentious cases.[44] That context, in itself, assists to generate a non-adversarial culture in which the parties and the case manager collectively address, hopefully in a less adversarial and more collegiate way, the common objective of identifying the matters truly in issue, preparing those issues for mediation and, if necessary, trial as quickly, inexpensively and efficiently as possible.

Hearing room configurations

The less adversarial, more collegiate, approach to which I have referred is encouraged by the hearing room spaces we have designed and provided in our new civil court premises. Because of the significance of the case management work undertaken by the court, hearing rooms suitable for case management are the most numerous category of hearing room provided in our new building. They are furnished with modular furniture which can be flexibly arranged and rearranged. Although the furniture can be configured in such a way as to emulate a more traditional courtroom, with a separate table for the judicial officer and bar tables for counsel, there is no elevated platform upon which a bench can be placed, and in fact the majority of these spaces are configured as conference rooms, rather than courtrooms. Perhaps unsurprisingly, my colleagues and I have discovered that the configuration of the space in which a hearing is conducted has a profound impact upon the character and culture of the hearing. Parties sitting around a round conference table are much more likely to confer, whereas parties sitting in a courtroom are much more likely to argue. Spaces do matter.

Interlocutory disputes

During my time in practice, civil work was characterised by an almost never-ending sequence of interlocutory disputes with respect to almost every step in the pre-trial process — pleadings, particulars of pleadings, interrogatories, discovery and so on. Those disputes consumed quantities of time and money which were entirely disproportionate to their contribution to the just and efficient resolution of the dispute. We have actively discouraged those disputes in a number of ways. First, we have copied our colleagues in the Federal Court and introduced a provision into our rules which enables a case manager to direct that an interlocutory dispute will not be heard or determined. That power will be exercised when, consistently with the

43 For many years now it has been standard practice in the Supreme Court of WA to require mediation in all civil cases prior to trial.

44 That is, cases which are not resolved administratively by default or consent judgment.

overarching principle of proportionality, the time and expense involved in the determination of the interlocutory dispute is disproportionate to its contribution to the just and efficient disposition of the case.

Conferral

Second, for some time now there has been a provision in our rules which requires the legal representatives for parties to "confer" prior to initiating any interlocutory dispute. Shortly after my appointment I construed that rule as requiring discussion of the issues, preferably face to face but at least by telephone, between representatives of the parties with authority to settle the dispute. The rule thus construed has been applied in such a way that any lawyer commencing an interlocutory dispute without conferring, in the sense I have described, is at great risk of being ordered to pay the costs of that dispute personally. This approach to the construction and application of the rule has reduced interlocutory disputes by at least one-third.

Third, instead of setting aside significant amounts of time to hear interlocutory disputes, they are generally programmed in such a way that only a relatively short amount of time is allowed, and there is an expectation that, in the vast majority of cases, an ex tempore decision will be given immediately following the conclusion of argument.

The strategic conference

In order to further facilitate the achievement of the fundamental objectives of docket case management to which I have already referred, some years ago we introduced a procedure which we describe as a "strategic conference", which occurs relatively early in the life of a case — sometimes before pleading — for example, if there is a question as to whether the time and cost involved in the pleading process is justified — but more commonly after defences have been served. The conference is conducted in the presence of the parties in a conference room environment and involves a wide-ranging discussion aimed at identifying the real issues in the case and charting a strategic course particular to those issues, which will facilitate mediation, and if necessary, trial as quickly and efficiently as possible. During the procedure the judge will encourage the lawyers and the parties to think laterally, and to chart a procedural course which best suits the particular circumstances of the case, rather than simply adopting the traditional processes of pleadings, followed by particulars, followed by discovery, followed by expert evidence and witness statements, etc. Once that course has been charted, the lawyers and, at least as importantly, the parties will be aware of the direction in which the case is going, and can plan accordingly.

Expert evidence and discovery

In complex civil litigation, expert evidence and discovery can consume very substantial amounts of time and money if not properly supervised by the court. In such cases, we commonly apply to these processes a similar approach to that taken in the strategic conference to which I have just referred. So, in a complex civil case a discovery conference will be ordered, attended by the lawyers and, if appropriate, the IT consultants to the parties, where the possible alternative approaches to discovery will be discussed in a conference environment and, ideally,

in a collegiate way. The same general approach will be taken where substantial issues arise with respect to expert evidence. The topics ordinarily addressed in a conference relating to expert evidence will include the fields of expertise in which opinion evidence is to be given, the facts which the experts can assume for the purposes of their advice, the facts which are contentious and which might affect the opinions given and the questions to be posed to the experts, with a view to reaching agreement on these issues and avoiding the all too common phenomenon of the expert opinions being like ships passing in the night, and therefore of limited assistance to the court but involving great expense to the parties.

Family Provision Act 1972 (WA) cases

The increasing age profile of the Australian population, the increasing complexity and diversity of family configurations, and the increasing value of deceased estates is creating a burgeoning field of claims to the effect that a testator has made inadequate provision for a beneficiary in his or her estate. Although those cases turn almost exclusively upon the financial needs of the various parties who might have expected to receive the testator's benefaction, and the size of the estate, it was all too common for parties to seize upon the claim as an opportunity for the ventilation of long-simmering family grievances, and affidavits were commonly filed giving vent to those grievances. Although the vast majority of these cases settle, usually at or after mediation, the exchange of insulting and offensive affidavits was often an impediment to early resolution. We responded to this problem by promulgating a Practice Direction[45] limiting the topics which could be addressed by affidavit evidence prior to mediation to the essential issues in the case — namely, the value of the estate, and the financial position and needs of the prospective beneficiaries. Not only has that Practice Direction saved costs and time, it has greatly facilitated the ADR process.

Family disputes masquerading as commercial cases

During the last 11 years I have managed and tried a number of very significant cases which, at first sight, appear to be cases between commercial entities but which are, in fact, disputes between family members. Although I have not done a detailed analysis of the cases I have managed and tried over that period, I would estimate that at least half of the most significant and complex cases with which I have dealt have been of that character. I have gained the distinct impression that although those cases are, ostensibly, about money, like the testator's provision cases, these are very often influenced, perhaps profoundly, by a significant underlying family dispute or grievance. Good ADR practitioners will identify and endeavour to resolve that underlying grievance. But it will assist the proper management of the case if the case manager is also attentive to the likelihood that the case may be about more than just the money. That appreciation will be facilitated through the more flexible and informal processes associated with what I would describe, in the civil justice system, as less adversarial justice.

45 Supreme Court of WA, *Consolidated Practice Directions* (as at 16 October 2017), Practice Direction 9.2.2, at www.supremecourt.wa.gov.au/_files/Consolidated_Practice_Directions.pdf, accessed 17 August 2021.

Summary and conclusion

In this paper I have endeavoured to look back on 11 years of experience as a judge and head of a court system, to reflect upon ways in which non-adversarial principles can improve the delivery of justice to the communities which we all serve. Despite some recent setbacks in WA, and a continuing degree of hostility to these principles in some quarters, these reflections reinforce my long-standing belief in the importance of non-adversarial principles and my cautious optimism that adherence to those principles will continue and indeed develop and improve, assisted and encouraged by the depth of knowledge and experience, and the commitment of the delegates to this important conference.

ADR, ODR and AI-DR, or do we even need courts anymore?*

The Honourable T F Bathurst AC†

How will technology affect the courts, Alternative Dispute Resolution (ADR) and court-annexed or referred ADR? Do we need courts anymore with the advent of Online Dispute Resolution (ODR) and Artificial intelligence decision-making (AI-DR)? The Honourable T F Bathurst looks at UK policies regarding technology and the courts, as well as the NSW Government Department of Justice consultation paper, Justice for everyday problems: Civil Justice in NSW*, released in 2017 and what this means for the courts, for ADR and for court-annexed or referred ADR.*

Introduction

My topic is centred on how ADR and the courts are set to be affected in the coming years by technology. This discussion has just happened in the UK, and has been occurring piecemeal in this country. There have been suggestions that more wholesale reforms might be on the way, at least in this State.[1] What I want to consider is what such reform means for the courts, for ADR and for court-annexed or referred ADR.

While aspects of how we resolve disputes can seem ancient and immutable, the courts and ADR are always evolving. The landscape of ADR, in particular, has changed significantly in the past 30 years with the explosion in its use and popularity. In addition, it has become integrated into many court processes, through court-annexed ADR and court referrals. In March 2018, former Chief Justice Martin gave a comprehensive overview of the history and some of the complex

* Inaugural Supreme Court ADR address, 20 September 2018.

† Chief Justice of NSW. The author expresses thanks to his Research Director, Ms Naomi Wootton, for her assistance in the preparation of this article.

1 See A Thompson, "Court fights go online in NSW trial", *Sydney Morning Herald* (online) 12 June 2018, at www.smh.com.au/national/nsw/court-fights-go-online-in-nsw-trial-20180611-p4zku4.html, accessed 8 September 2021.

issues which have arisen along the way.[2] Building on where he ended his address, which I commend to you, my focus will be what the future holds for ADR and the courts. With the advent of ODR and AI-DR, do we even need courts anymore?

The broader social context

This question should be understood against the background of broader changes in society. In 2018, Forbes declared that we are "on the cusp of the Fourth Industrial Revolution, or Industry 4.0".[3] It is said to be fundamentally different from the first three, which used water and steam, electric power, and information technology respectively.[4] The fourth will instead use AI, nanotechnology and biotechnology "to replace and augment certain kinds of labour and knowledge work".[5] Increasingly capable computers will be able to draw on and analyse Big Data to make decisions and educate themselves so that they autonomously increase their own capability, outperforming human experts using "brute-force processing".[6] These machines are said not only to be capable of augmenting the decision-making processes undertaken by legal professionals, but of supplanting their role altogether.[7]

Some definitions

It is important at the outset to define a few of the key terms that will recur throughout this discussion. First, what do I mean by ADR? It is not a simple or uncontroversial thing to define. Debate rages over even whether the "A" is for "Alternative", "Appropriate", "Additional", "Assisted" or even somewhat opaquely — "Affirmative".[8] For the sake of both sanity and simplicity and for my limited purposes, it means any form of resolving a dispute outside the traditional and adversarial process of a trial or hearing.[9]

Second, what do I mean by ODR, or Online Dispute Resolution? The term has been used to refer to the various forms of ADR which are currently carried out online.[10] However, I use it more broadly to refer to any dispute resolution processes conducted with the assistance of technology, including formal court processes conducted electronically or online.

Professor Tania Sourdin, in the 2016 edition of her text, has identified three main ways in which technology is reshaping ADR, which are equally applicable to the way technology

2 W Martin, "Alternative Dispute Resolution — A misnomer?", speech delivered at the Australian Disputes Centre ADR Address, Perth, 6 March 2018.
3 B Marr, "The 4th Industrial Revolution is here: are you ready?", *Forbes* (online), 13 August 2018, at www.forbes.com/sites/bernardmarr/2018/08/13/the-4th-industrial-revolution-is-here-are-you-ready/#673f4622628b, accessed 9 September 2021.
4 See generally K Schwab, "The Fourth Industrial Revolution: what it means, how to respond", at www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/, accessed 9 September 2021.
5 H Genn, "Online courts and the future of justice", Birkenhead Lecture 2017, delivered at Gray's Inn, 16 October 2017 at p 2.
6 ibid citing R Susskind and D Susskind, *The Future of the Professions*, Oxford University Press, 2015, at p 272.
7 ibid.
8 T Sourdin, *Alternative Dispute Resolution*, Lawbook Co, 5th ed, 2016, at pp 2–3.
9 As similarly defined by Martin, above n 2, at p 4.
10 Sourdin, above n 8, at p 386.

is reshaping the adversarial system. First, there are "supportive technologies" which can assist to "inform, support and advise". Second, there are "replacement technologies" which supplant functions and activities previously carried out by humans. Finally, there are "disruptive technologies", which provide for "different forms of ADR", including systems supported by artificial intelligence.[11]

This is what I termed "AI-DR", by which I simply mean the replication of human decision making by computers. I recognise this is a simplistic definition, and much of what AI is capable of doing is inhuman in speed and ability, but it will suffice for my purposes. What I mean particularly are systems modelled on past data about decisions, which ask users a number of questions and then forms conclusions by applying the rules it knows for specific sets of facts.[12] There are of course limits to the extent to which AI will be used in the actual determination of disputes, a point I will return to shortly. It suffices to note at this stage that as artificial intelligence relies generally upon algorithms drawn from prior experience and outcomes there may still be a need for human expertise to deal with situations that fall outside of the norm.[13] Ultimately it will depend on the sophistication of the algorithm, but we are still a long way from computerising the human brain.

The influence of technology: the courts

Nevertheless, the influence of technology on dispute resolution has already been significant.[14] Those disappointed with the slow uptake, particularly in the courts, should take heed of Amara's law — that we tend to overestimate the effect of technology in the short run and underestimate its effect in the long run.[15] In any event, supportive technology is used in the courts as a matter of course — we have e-filing, e-discovery, real time transcription services, electronic courtrooms, the use of video links and "safe rooms" for vulnerable witnesses and the use of devices on the bench and at the bar table.[16] In NCAT, some hearings are conducted via telephone where it is the most timely and effective way to hear the matter.

On the "disruptive" end, an online court is available in NSW for managing and processing preliminary orders in some court lists, including the Supreme Court Corporations Registrar's List.[17] Technology has the capacity to generate significant efficiencies in this area, as traditional in-person arrangements for case management are time and administration intensive. For directions hearings, physical attendance is ordinarily required of practitioners for each

11 ibid at p 384.
12 ibid at pp 399–400.
13 J Zeleznikow, "Don't fear robo-justice: algorithms could help more people access legal advice", *The Conversation* (online), 23 October 2017 at http://theconversation.com/dont-fear-robo-justice-algorithms-could-help-more-people-access-legal-advice-85395, accessed 9 September 2021.
14 This paper does not consider the significant shift to virtual court hearings in 2020 and 2021 resulting from the COVID-19 pandemic.
15 As coined by Roy Amara, former head of the Institute for the Future at Stanford University.
16 M Beazley, "Law in the age of the algorithm", State of the Profession Address, Sydney, 21 September 2017, at pp 9–10.
17 See NSW Online Registry, "About Online court", at https://onlineregistry.lawlink.nsw.gov.au/content/help/online-court, accessed 9 September 2021.

represented party, as well as self-represented litigants. This creates significant inconvenience and cost for matters that are typically uncontroversial. This has successfully been minimised through the use of the online court, and will continue to be minimised as it is rolled out to other lists.

Looking to the future, there are two "supportive" technologies which I think could really transform both court proceedings and ADR. The first is the availability of reliable instant translation. This technology can remove barriers for people from diverse backgrounds, and has obvious application in the cross-border sphere.[18]

Second is the use of virtual reality and augmented reality in the courtroom. For example, this technology might allow witnesses to give evidence remotely but appear in front of judges and jurors in a three-dimensional form using wearables and headsets. This has the potential to mitigate some of the limitations of giving evidence via video-link. It could also allow virtual recreations of physical environments like accident scenes or even crime scenes for the benefit of arbiters of fact.[19] Of course, cost is always a significant consideration but the long term benefits may outweigh the initial capital costs.

The influence of technology: ADR

Turning now to ADR, which has also seen the impact of supportive, replacement and disruptive technology. On the supportive side, internet-based information sources, video-conferencing, teleconferencing and email supplant and support face-to-face ADR approaches.[20] In the family law sphere, for example, many disputes are dealt with through the Family Relationship Advisory Line and the Telephone and Online Dispute Resolution Service.[21]

The internet has also resulted in the creation of ODR specific to disputes relating to itself — for example, the online dispute resolution services offered by eBay and PayPal. The Ebay system is said to resolve 60 million disputes each year.[22] Wikipedia similarly has its own dispute resolution system, which involves users resolving content disputes through the "Noticeboard", a platform for discussion, with the view to reaching compromise and resolution with oversight by moderators. If two editors are in dispute they can request a non-binding opinion by an independent third editor, and there is also an "Arbitration Committee" which imposes binding solutions as a last resort.[23]

While these sorts of dispute resolution mechanisms are not likely to affect the business of traditional ADR — they are servicing new forms of disputes — other disruptive technologies may do so. One example is a program called "Smartsettle", which uses optimisational

18 See, eg, Microsoft Translator at https://translator.microsoft.com/, accessed 9 September 2021.
19 See J Bailenson et al, "Courtroom applications of virtual environments, immersive virtual environments, and collaborative virtual environments" (2006) 28(2) *Law and Policy* 249.
20 Sourdin, above n 8, at p 384.
21 ibid 404.
22 See S Lancy, "ADR and technology" (2016) 27 *Australasian Dispute Resolution Journal* 168.
23 Sourdin, above n 8, at p 395.

algorithms to generate packages as options for resolution, based on private information that remains private to the parties but is visible to the system. Essentially, parties exchange information and offer visible or invisible concessions. Smartsettle generates suggestions based on party preferences and concessions and parties reach a solution by agreeing on the same package.[24]

FamilyWinner is another example, which is aimed at divorce proceedings. It was developed in Australia to assist divorcing couples rationally to negotiate, distributing items in a settlement to those who most desire them. The program asks parties to list the items in dispute and to attach importance values (out of 100) to each of them. The system then uses algorithms that optimise the outcome for each party.[25]

Ultimately, however, I suspect most of these programs will become part of the toolkits of ADR practitioners and the courts, rather than replacing us altogether, if we remain agile enough to adopt and adapt to them. The impact of technology is going to be most transformative in relation to court-annexed ADR, to which I will now turn.

The United Kingdom reforms

There were two main catalysts for my choice of topic — the first being the widespread reform currently being undertaken in Her Majesty's Courts and Tribunals Services in the UK, and second, a consultation paper into civil justice reform released by the NSW Government in 2017.

In September 2016 in the UK, the Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals released a "joint vision statement" announcing a £1 billion transformation of the justice system[26] to be "digital by default".[27] The announcement came in the wake of three influential reports.

First, was the Susskind report in 2015 which investigated the potential for using ODR for civil claims worth less than £25,000. Its main recommendation was that the government should establish a new online court service, somewhat unimaginatively called "Her Majesty's Online Court".[28] It was to have three tiers, involving fully integrated ADR.[29]

Second was a report by the organisation JUSTICE, which recommended the reconceptualization of court and tribunal rooms as "justice spaces", which would be capable of adapting to different

24 See Smartsettle, "The Smartsettle process" at https://smartsettle.com/about-us/process/, accessed 9 September 2021.
25 See generally E Belluci and J Zeleznikow, "Representations of decision-making support in negotiation" (2001) 10(3-4) *Journal of Decision Systems* 449 at 465–466.
26 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, "Transforming our justice system", Joint Vision Statement, September 2016, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf, accessed 9 September 2021.
27 See Genn, above n 5, at p 3.
28 Civil Justice Council Online Dispute Resolution Advisory Group, "Online dispute resolution for low value claims", 2015, at www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf, accessed 9 September 2021.
29 See ibid as summarised by J Rozenberg, "Origins of the online court", at https://long-reads.thelegaleducationfoundation.org/origins-of-the-online-court/, accessed 9 September 2021.

processes.[30] Finally, Lord Justice Briggs reported in 2016 on the structure of the Civil Courts,[31] and found that while "the Civil Courts of England and Wales are among the most highly regarded in the world", their "single, most pervasive and indeed shocking weakness" is that they "fail to provide reasonable access to justice for the ordinary individuals or small businesses with small or moderate value claims".[32] This is certainly a problem which exists in courts of this country.

To address this "missing middle", it recommended a three-tiered online court model, initially for claims up to £25,000, similar to that proposed by Susskind. It would involve an automated "triage" stage including advice to help claimants articulate their cases, exchanges between claimants and defendant and the preparation of the claim form and particulars of claim. The second stage would be an ADR stage, involving telephone, online or face-to-face mediation or early neutral evaluation, and finally, for those cases still not settled, a determination stage which could comprise a conventional hearing, or a telephone or video hearing. It could also be legal determination without a hearing. The "essential concept" was a new, more investigative court, designed for navigation without lawyers.[33] In a very real sense this represents a departure from the adversarial litigation system which has always been a feature of the common law.

Briggs's proposal had also taken into account the Canadian Civil Resolution Tribunal,[34] which was launched in 2016 as that country's first entirely online tribunal. The CRT resolves small claims disputes and is a graduated process of fully integrated ADR going from negotiation, to facilitation, to an online determinative process.[35]

The resulting reform plan, which is currently under implementation, involves over 50 separate projects. The crime programme is developing a common platform for securely sharing information on a single system, meaning information is shared from the point when a police officer charges a defendant or requests a charging decision from the CPS, to the point the case is decided and the result is formally recorded. Summary "non-imprisonable" offences will be taken out of the courtroom and heard on the basis of a file. In serious cases, plea indications will be done online and judges and magistrates will be able to conduct remand hearings remotely. In the civil, family and tribunal program, the plan is to unite all the administrative and judicial procedural steps on one digital platform with a single access portal, with automated triage and more frequent use of ADR.

A new set of online procedural rules will allow claims to be brought without legal assistance. There will be less use of physical buildings, with sales generating income required for

30 JUSTICE, "What is a court", 2016, at https://justice.org.uk/what-is-a-court/, accessed 9 September 2021.
31 M Briggs, "Civil courts structure: interim report", December 2015, at www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf, accessed 9 September 2021 and M Briggs, "Civil courts structure review: final report", January 2016, at www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf, accessed 9 September 2021.
32 Briggs, "Final Report", ibid, at p 28.
33 ibid at p 36.
34 ibid at p 44.
35 Civil Resolution Tribunal, "How the CRT works" at https://civilresolutionbc.ca/how-the-crt-works/, accessed 9 September 2021.

investment elsewhere as video hearings reduce courtroom needs. A digital tool will automate aspects of scheduling and listing, courts and tribunal "service centres" will be created as centralised locations for contact and case administration, and a new compliance and enforcement programme implemented.[36]

Funding was allocated to these reforms on the expectation that the courts would make long-term spending reductions, from fewer physical hearings and fewer physical buildings to maintain. Court staff numbers are also to be reduced from 16,500 to around 10,000.[37]

There have been some difficulties so far. The House of Commons Public Accounts Committee noted in July 2018 that it had only delivered two-thirds of what it expected to at this stage and had failed to share a sufficiently well-developed plan of its goals. It found that the pressure to deliver quickly and make savings was limiting its ability to "consult meaningfully with stakeholder and risks it driving forward changes before it fully understands the impact on users and the justice system more widely".[38] The National Audit Office published a report in 2018 with similar findings, noting that the business case had been revised twice, with the 10-year economic case weakening each time.[39] Expected costs have increased while planned benefits have decreased.[40]

Nevertheless these are some of the most far reaching justice reforms in any country in the world.[41] It is hardly surprising and perhaps to be expected that there would be difficulties in their execution. One thing also to be noted is that the development of the reform and its implementation were a collaborative exercise between the executive and the judiciary. It is an important matter as it means people responsible for the delivery of justice are involved in ways of better facilitating that process. There is no reason to suggest that the judiciary in this country would not adopt the same proactive approach.

The NSW Government's consultation paper on civil justice reform

You may be wondering what all this has to do with ADR in Australia. In January 2017 the NSW Government released a consultation paper on reforming the civil justice system entitled: "Justice for everyday problems".[42] The use of technology was a key feature. The second chapter, on "Dealing with problems early" said that the government was considering options like transforming LawAccess to feature a live web-chat or developing it into a smartphone app.

36 See generally Rozenberg, above n 29, "The reform projects".
37 Rozenberg, ibid, "HMCTS Reform".
38 House of Commons Public Accounts Committee, "Transforming courts and tribunals", 56th Report of Session 2017–2019, 16 July 2018 at p 3.
39 National Audit Office, "Early progress in transforming courts and tribunals", Report by the Comptroller and Auditor General, 9 May 2018, at p 7.
40 ibid.
41 See T Etherton, "The civil court of the future", The Lord Slynn Memorial Lecture, 14 June 2017.
42 NSW Government Department of Justice, *Justice for everyday problems: Civil Justice in NSW, Consultation Paper*, January 2017.

It also suggested creating "online tools and apps" that help write letters or emails.[43] Finally, it suggested "online tools to help negotiate and solve problems", like "artificial intelligence and other types of smart technology", referencing the now defunct Rechtwijzer system from the Netherlands, which was an ODR platform for separating couples which would help them resolve issues such as asset distribution. The program's backers announced it would be shut down in 2017 as it had proved financially unsustainable due to limited take-up.[44]

Sir Terrence Etherton, the Master of the Rolls acknowledged this failure in a speech in 2017 but cautioned against drawing conclusions about the consequent viability of the UK reforms, as the fundamental difference between the UK solution and the Rechtwijzer was that the latter was an ODR platform existing outside the court system, while the UK reforms mean ODR is incorporated into the courts own processes.[45] It appears what the NSW Government was considering is far closer to the British version than the Dutch.

This was evident in Pt 3 of the consultation, which suggested improvements to court and tribunal processes including making greater use of audio-visual technology in civil matters, whereby people could remotely attend certain stages of the court or tribunal process. Finally there was the option to explore "online dispute resolution options" to follow directly from online self-help tools. The paper stated that where an agreement wasn't reached the parties could choose to receive expert online help from a court or tribunal and, where necessary, a binding decision", stating "this would create a beginning-to-end online process".[46] I should note I have some concern about what "expert online help" a court or tribunal would be providing and the appropriateness of such a scheme. However, given the high level of generality at which the consultation was framed, it would be inappropriate to make any specific criticisms.

When this proposal is looked at as a whole, however, one can see some distinct similarities between what is suggested in the consultation paper and the UK "three-tiered" approach, which in turn has drawn heavily from the CRT in Canada. That is, it seems to be suggesting a triage stage, feeding into ODR and then directly into a court or tribunal process.

The consultation is now no longer available online, and no final report or strategy has as yet been released. However, in June 2018, the Department of Justice announced a $7m investment in technology and self-help tools.[47] It also indicated more detail about the government's Civil Justice Strategy would be announced in coming months.[48]

43 See Citizens Advice, "Consumer Template Letters" at www.citizensadvice.org.uk/consumer/template-letters/letters/, accessed 9 September 2021.
44 Etherton, above n 41, at p 16.
45 ibid.
46 ibid at p 23.
47 NSW Government Department of Justice, "NSW Budget 2018: improving access to justice", *Media Release*, 12 June 2018, at www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/budget-2018-improving-access-to-justice.aspx, accessed 9 September 2021.
48 ibid.

The challenges of the future

Whether or not the Civil Justice Strategy includes reform to the extent being undertaken in the UK, or if it ends up pursuing this sort of reform agenda at all, I would have to agree with Richard Susskind's view that "no change is the least likely future".[49] Neither ADR, nor the courts, will exist in their current form in 20, 30 or 40 years' time. There will be fundamental shifts in the administration of justice that will be pervasive and transformational.[50]

While I now want to turn to some of the challenges and issues that might arise from these changes, I want to make one thing clear. I am supportive of modernising the courts, and I believe ADR will benefit from new technology which can improve efficiencies and reduce costs. The point of what I am about to say is not that we should be circumspect about change, but simply that there will be challenges and unforeseen consequences. Before we jump head on into any sort of reform agenda, these need to be recognised and accommodated where necessary.

The proposals for reform all involve a greater integration of ADR with the court process, all have an element of compulsion attached to the ADR component and all invoke the authority of a court or at least an administrative tribunal to make them effective. There are two issues emanating that deserve some consideration. First, what impact will an integrated ODR process have on our present understanding of what is a "court", and second, what impact will it have on our present understanding of "ADR".

The fundamental characteristics of a court

This discussion as to the impact on the courts is one that to some of you may bring on an unwelcome sense of déjà vu, because a similar debate has only just settled down in relation to court-annexed ADR and judges acting as mediators. I'm sure you would all be familiar with the reservations expressed by former Chief Justice French about the "multi-door courthouse", based on constitutional considerations.[51] In addition, there have been debates as to whether the participation in ADR by a judge poses Ch III problems in the sense of being incompatible with the exercise of judicial power.[52] A number of carefully considered papers have concluded that there is no constitutional impediment to judges acting as mediators.[53]

In practical terms the long-standing court-annexed mediation program in the Supreme Court has not, in my view, come at a cost to the integrity of its public adjudicative function. In addition, since 2014, judicial settlement conferences have been used in family provision cases where the

49 R Susskind, *Tomorrow's Lawyers*, Oxford University Press, 2nd ed, 2017, at p 190.
50 ibid.
51 R French, "Perspectives on court annexed alternative dispute resolution", speech delivered at the Law Council of Australia Multi-door Symposium, Canberra, 27 July 2009, at p 20.
52 See a summary of the issues in Martin, above n 2, at p 19.
53 M Moore, "Judges as mediators: a chapter III prohibition or accommodation?" (2003) 14 *Australian Dispute Resolution Journal* 188; I Field, "Judicial mediation, the judicial process and Ch III of the Constitution" (2011) 22 *Australian Dispute Resolution Journal* 72. See generally T Bathurst, "The role of courts in the changing dispute resolution landscape" (2012) 35(3) *University of New South Wales Law Journal* 870 at 874–879.

estate is valued at less than $500,000 or where the parties jointly request one. These conferences are conducted by Hallen J and are timed to occur at an early stage of case management with a view to achieving settlement as soon as possible so as to minimise litigation costs. They have, on all accounts, been highly successful. In 2017, judicial settlement conferences were conducted in 209 matters, and 158 have settled.[54]

As former Chief Justice Martin noted in his ADR Address in 2018, the issue is largely one of focus and definition, and there is "no practical difficulty in providing court-annexed ADR whilst maintaining the complete integrity of the important public adjudicative function of the court".[55] In any event, I think most of us now accept that ADR and the courts are now inextricably linked and reliant on each other in a significant regard. The courts would be completely overrun within weeks if ADR were to cease, but ADR is not a panacea for all disputes.[56]

However, the reform happening in the UK or that suggested by the NSW Consultation Paper takes the linking of ADR with judicial adjudication one step further. It blurs the boundaries between the two processes, merging them into one convenient online package. In the UK context, Sir Terrence Etherton has stated there is a "fundamental" difference in the new online process — as while the old approach "encourages" ADR processes the online court "embeds them into the pre-trial process for the first time, and requires the court actively to facilitate them".[57] Lord Justice Briggs described it as "designed to take the A out of ADR".[58]

It brings into sharper focus some of the concerns articulated by former Chief Justices French and Spigelman about the institutional integrity of the court. Former Chief Justice Spigelman warned in the past that a "court is not simply a publically funded dispute resolution centre".[59] Former Chief Justice French similarly wrote of court-annexed ADR that "the institutional arrangements" under which they operate require "careful consideration", as "courts are not and should not be seen to be providers of a spectrum of consensual and non-consensual dispute resolution services".[60] However, once a court ceases to be a distinct place, what differentiates it from any other government service? To what extent is an online court truly still a court? What is essential and inessential about courts in modern times, and will an online court with integrated and mandatory ODR still have those essential features?[61]

54 Some of these settlements occurred on a date after the settlement conference, that is, not all cases settled during mediation immediately following the conference.

55 Martin, above n 2, at p 20.

56 R McDougall, "Courts and ADR: a symbiotic relationship", paper delivered at the LEADER & IAMA Conference, Sydney, 7 September 2015, at [23] see www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/McDougall_20150907.pdf, accessed 9 September 2021.

57 Etherton, above n 41, pp 9–10.

58 M Briggs, "The online solutions court: affordable dispute resolution for all", JUSTICE Lecture, October 2016, at p 10, see https://justice.org.uk/lord-justice-briggs-online-court/, accessed 9 September 2021.

59 J Spigelman, "Judicial accountability and performance indicators", speech delivered to the 1701 Conference, Vancouver, 10 May 2001.

60 R French, "Essential and defining characteristics of a courts in an age of institutional change", Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013, pp 4–5.

61 See M Gleeson, "The judicial method — essentials and inessentials", District and County Court Judges' Conference, Sydney, 25 June 2009 at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/gleeson25jun09.pdf, accessed 9 September 2021.

Of course, as foreshadowed earlier, these questions are shaped by our constitutional context — a court in Australia is a body which exercises judicial power, and powers compatible with the exercise of judicial power.[62] But will too strict an interpretation of what is constitutionally essential risk the loss of institutional relevance to the needs of the community?[63]

The characteristics commonly regarded as essential which are tested by technology are procedural fairness and the principle of open justice. In the UK it appears that the plan is for virtual hearings to be broadcast via video screens in local courts so that the press and public can follow them.[64] In March 2018 the first civil case was heard with neither party present, in a tribunal tax matter. The hearing could be attended at a tribunal centre in London where both the taxpayer, who appeared to be speaking from his home, and the HM Revenue and Customs representative, could be viewed on screens from the tribunal centre.[65]

Procedural fairness is another concern. Under the new system envisaged for tribunals in the UK, the idea is that all participants will be able to iterate and comment online about the case papers so that issues can be clarified and explored. This is a significant shift from an adversarial approach to a more inquisitorial one. One the one hand, an iterative process does make sense — avoiding the inconvenience of having to adjourn hearings or decide cases without all the necessary information where critical information is missing.[66] However, it also shifts the balance of responsibility from our current understanding that the parties define the scope of their claims and defences and take responsibility for the conduct of their case. It has been suggested that there is an increased scope for bias and an impact on judicial independence.[67] But again it must be remembered that the inquisitorial system used in civil law countries has not been seen to necessarily result in bias or decreased judicial independence. At the bottom line, I don't think adversarial procedure is necessarily the defining characteristic of a court.

Finally, questions of fairness also impact the proposed use of artificial intelligence in the ODR stage of online process. The issue of bias in technology has, for example, arisen in the Ebay system, which has been accused of favouring buyers over sellers, as it adopted a "buyer is always right" policy.[68] While technology and artificial intelligence have long been lauded as impartial alternatives to unpredictable and impressible human decision-making, experience has shown that programming and artificial intelligence is not bias free. Algorithms can operate in a discriminatory and inconsistent fashion — relying on skewed databases, reflecting the programmer's own biases in their design, and even operating unpredictably, which is a particular problem with learning algorithms.[69]

62 *Kable v DPP (NSW)* (1996) 189 CLR 51.
63 See G Brennan, "Limits on the use of judges" (1978) 9 *Federal Law Review* 1, at 14.
64 Rozenberg, above n 29, "Virtual courts".
65 ibid.
66 Genn, above n 5, at pp 9–10.
67 ibid.
68 M Legg, "The future of dispute resolution: online ADR and online courts" (2016) 27 *Australasian Dispute Resolution Journal* 227 at 233.
69 O Rabinovich-Einy and E Katsh, "The new new courts" (2017) *American University Law Review* 165 at 210–211.

For example, in 2016, Microsoft released its chatbot "Tay" onto Twitter to engage in online conversations with users. In less than 24 hours, Tay began spouting racist and sexist comments.[70] In courtrooms in the United States, judges are using algorithms to inform bail decisions, receiving an algorithmic generated score that rates a defendant's flight risk and level of danger to the community. However, a 2016 investigation by a non-profit found that such algorithms may be biased against African-American defendants.[71]

At this stage I can't see the process evolving to a point at which AI-DR replaces judicial decision-makers all together, in the public justice system. Whether disputants consensually choose to submit their dispute to a robo-judge or robo-arbitrator is another question, but that is for private ADR. In terms of the courts, I think it is safe to say that the ultimate responsibility of judicial decision-making will remain in the hands of human judges. This is not least because a significant proportion of cases do require some level of a value judgment, and there is significant scope in our system for judicial discretion. Then again, we cannot be so certain that these elements will continue to be important to future generations — one person's empathy is ultimately another person's bias.

If AI-DR does start to assist judicial decision-making, or it is used as part of the public justice system as a pre-litigation ADR option, some issues will need to be addressed in relation to the transparency of the systems. Courts need to be impartial, sit in public and give reasons — these are generally considered fundamental characteristics of a court. Any AI platform part of a court will be bound by similar requirements.[72] There are good reasons for these strictures. They maintain trust and legitimacy in the justice system. Where those promoting greater use of technology fail to recognise this, they risk disengagement and a return to traditionalism. For example, in 2002, Michigan enacted legislation creating a court-annexed ODR program titled the Cyber Court, which was ultimately abandoned due to a reluctance of parties and lawyers to use the system, a misunderstanding and distrust of the system and a concern as to data security.[73]

I also have some reservations about moves away from hearings entirely in adjudicative proceedings. There is evidence in the tribunal field that cases determined solely on the papers are less likely to succeed than oral hearings, possibly because of additional information that can be elicited at the hearing. Credibility of claimants is also rated more highly when they are seen and heard.[74] Studies on the use of interactive video technology in US deportation cases found that litigants separated from the traditional courtroom setting simply disengaged with the

70 E Hunt, "Tay, Microsoft's AI Chatbot, gets a crash course in racism from Twitter", *The Guardian* (online), 24 March 2016 at www.theguardian.com/technology/2016/mar/24/tay-microsofts-ai-chatbot-gets-a-crash-course-in-racism-from-twitter, accessed 9 September 2021.

71 See "Even imperfect algorithms can improve the criminal justice system", *The New York Times* (online), 20 December 2017, at www.nytimes.com/2017/12/20/upshot/algorithms-bail-criminal-justice-system.html, accessed 9 September 2021.

72 Legg, above n 68, at 233.

73 A Raymond and S Shackelford, "Technology, ethics and access to justice: should an algorithm be deciding your case?" (2014) 35 *Michigan Journal of International Law* 485 at 517.

74 See C Thomas and H Genn, "Understanding tribunal decision-making: a foundational study" 2013, at www.nuffieldfoundation.org/sites/default/files/files/NUFJ0000_Tribunal)decision_making_27_03_14.pdf, accessed 9 September 2021, cited in Genn, above n 5, at 12.

entire process. One of the judges in the study commented: "If you come into the courtroom … and you see the judge at a big desk wearing a black robe, then you realise it's a court. If you take that same person and you put him in the video room … they see me basically as a big, disembodied head on the television. How is that any different than watching People's Court or Judge Judy?".[75] I think we need to consider how this affects public confidence and trust in the judiciary, which is vital to the maintenance of the rule of law.

In addition, if the end of this online process is simply a virtual version of the hearings we already have, all that is really saved in terms of time and money is the need for travel and possibly the courtroom, although I doubt a judge or member will be hearing the case other than from a publically funded building. It might then need to be seriously questioned whether the investment required is worth the benefit, and outweighs the cost that comes from a lack of physical presence.

The fundamental characteristics of ADR

The next question is what this sort of integrated online process will have on the legitimacy and integrity of ADR. These are concerns that have already been expressed in the literature relating to court-annexed ADR — namely, that removal of consent and court annexation of the process has meant ADR has lost the elements of party control and autonomy, potentially to its detriment.[76] In the United States, Professor Menkel-Meadow expressed the view that ADR has become just "another battleground for adversarial fighting rather than multi-dimensional problem solving".[77] In the Australian context both Professors Sourdin[78] and Boulle[79] have made similar observations in their respective texts.

In addition, there is the concern that the increasing regulation of ADR that comes with its co-optation into the court process serves to undermine its flexibility and adaptability. One major advantage of ADR is its ability to meet the varying needs of different disputants, something that may inadvertently be stagnated by its devolution into one streamlined process. Former Chief Justice Martin commented in his 2018 address that "processing all cases down an adjudicative track poses a much greater threat to the integrity and efficacy of ADR than ADR has ever posed to the integrity and efficacy of adjudication".[80] Is the fact that people might be increasingly forced into ADR to have their disputes determined going to create cynicism in the process? To what extent should courts be withdrawing from the ADR fray rather than melting further into it? ADR was initially developed and in large part maintains its integrity as a consensual process

75 Genn, above n 5, at 13.
76 See, eg, R Ingleby, "Compulsion is not the answer" (1992) 27(4) *Australian Law News* 17 at 18. See also the discussion in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 at [24] (Einstein J).
77 C Menkel-Meadow, "Pursuing settlement in an adversary culture: a tale of innovation co-opted or 'the law of ADR'" (1991) 19 *Florida State University Law Review* 17 quoted in Sourdin, above n 8, at p 616.
78 Sourdin, ibid, pp 645–646.
79 L Boulle, *Mediation: Principles, Process Practice*, LexisNexis, 3rd ed, 2011, at p 99.
80 Martin, above n 2, at p 27.

which aims to build consensus. If the ease of starting proceedings in an online court encourages more litigants to go for an adversarial option in the first instance, will it make resolution through ADR more unlikely, as beginning with an adversarial approach further polarises their positions?

This raises the question in turn of whether it would be appropriate for what I would call the non-adjudicative steps of an end-to-end online process to be carried out under the auspices of a body such as the Australian Disputes Centre rather than the courts or tribunals. There is no reason of course in theory why an independent dispute resolution body such as, for example, the ADC, could not set up an online dispute resolution project. You would need to convince the government that it was worth funding such a body and that it could provide a better service than one conducted as an adjunct to a state tribunal or court. I raise that possibility because what I am saying is not intended to be court-centric. Indeed, the issues which I raise may be equally applicable to ODR administered by a private organisation as that administered under the auspices of a court.

Finally, there is the commonly raised issue that the lack of face-to-face contact in online dispute resolution will make it more difficult to build the rapport necessary to reach resolution.[81] Professor Sourdin has stated that the physical proximity and face-to-face nature of most facilitative ADR processes such as mediation is "often regarded by practitioners as essential".[82] It has been suggested that "nuances of expression, timing, communication, framing of persuasion often make the difference between success and failure in bargaining and mediation".[83] There are barriers to understanding another party in the absence of face-to-face communication, and web-chat in particular can be "more polemic and oppositional".[84]

One need look no further than much of the communication, if it can be called that, which happens on social media, where allegations are made behind the veil of a keyboard and without much regard to liability for defamation. Studies comparing email with face-to-face negotiation suggest that online negotiators enter the process with low expectations as to interpersonal trust, resulting in diminished cooperation and minimal information sharing.[85] A further question might be whether some of these issues can be sidestepped by simply adopting technology that is already available to mitigate these concerns, like augmented and virtual reality.

In terms of the impact on ADR practitioners, an integrated online process would not, on the face of it, seem to raise issues for their practices, as they would play a vital although perhaps augmented role in actually conducting the ADR stage of an entirely online process. That is, even if disputes were increasingly channelled down one end-to-end online process there would still be a need for practitioners to conduct mediations or early neutral evaluations — at least until the point that a computer can actually replicate us entirely.

81 See generally Lancy, above n 22, at 173–174.
82 Sourdin, above n 8, at pp 407–408.
83 S Hardy, "Online mediation: internet dispute resolution" (1998) 9 *Australian Dispute Resolution Journal* 216.
84 Sourdin, above n 8 at 403.
85 A Sela, "Can computers be fair: how automated and human-powered online dispute resolution affect procedural justice in mediation and arbitration" (2018) 33 *Ohio State Journal on Dispute Resolution* 91 at 112.

Access to justice

The final issue I want to raise is the potential for digital exclusion. The Civil Procedure Rule Committee in the UK estimated that 52% of both claimants and defendants would require assistance to use the Online Court and that 17% of claimants and 23% of defendants would be unable to use the system even with assistance.[86] An Australian study from 2017 indicates that digital exclusion affects those on low incomes, people over 65, people with a disability, people who did not complete secondary school, Indigenous Australians and people not in paid employment especially.[87] It is a particular problem for older persons. The Council on the Ageing in Australia estimate that of the one million adult Australians who have never accessed the internet, 71% were aged 65 or over.[88]

This was a problem recognised by Lord Justice Briggs, who responded that there is no conceivable form of the litigation process which will not be a challenge to a significant class of disadvantaged litigants without lawyers, and that such individuals often "find themselves tongue-tied when required (or permitted) to address the court orally".[89] I think the point that needs to be made is that reform of the civil justice system using technology should not be regarded as a panacea for the problems of access to justice. It should not be assumed that such reforms will make advice or representation, and particularly the adequate funding of legal aid and community legal centres unnecessary. It does have the real potential, however, to be used in conjunction with those facilities to make legal help cheaper for private clients and for government funded legal assistance services.

Conclusion

What can be made of all this? First, on the positive side, it is laudable that steps are being taken to improve access to justice. Second, I don't think the proposals will necessarily impact on the essential characteristics of a court, provided they remain to be perceived as independent, impartial and providing open justice. Third, providing these pre-conditions are met, a civil court determining cases by a more inquisitorial or investigative procedure with integrated ODR is not incompatible with its fundamental characteristics.

On the negative side, the question must be asked whether some of the proposals, particularly to the extent they impose a procedure for dispute resolution, would lead to a lack of confidence in ADR or for that matter, the courts. Parties may not be happy to see that their cases are being resolved by an Orwellian Big Brother or Big Sister, particularly if that Big Brother or Sister is choosing the mode of resolution.

86 Martin, above n 2, at p 46.

87 J Thomas et al, *Measuring Australia's digital divide: the Australian digital inclusion index 2017*, RMIT Universiy, 2017, at pp 5–6 quoted in Law Council of Australia, *The Justice Project: Final Report*, August 2018, at www.lawcouncil.asn.au/justice-project/final-report, accessed 9 September 2021, Pt 2, "People: building legal capability and awareness", at p 12.

88 Law Council of Australia, ibid, Pt 2, "Legal services", at p 37.

89 Briggs, "Final Report", above n 31, at p 39.

In exploring these issues, consideration must be given not only to direct cost savings but whether processes, particularly mandatory processes, will achieve increased access to justice in a real sense. Will they provide people, who for economic or other reasons are presently unable to access the courts or ADR, with a process which is both accessible to them and which they are confident will deliver a just outcome?

This requires collaboration from the outset between the executive, the courts and importantly, those people who are at the present delivering alternative dispute resolution services. Such collaboration is likely to achieve a solution which is not only technologically clever but also embraced by courts, ADR professionals and most importantly the public. I urge you in those circumstances to take an active part in resolving these problems and not simply wait for proposals to emanate from the executive, or for that matter from the courts.

Conciliation and mediation — a practical note *

Mr M Kimber SC†

In this article, Mr Max Kimber SC considers the practical differences between conciliation and mediation and discusses the experiences of consumers using these services with regard to their satisfaction.

Differences between conciliation and mediation (practically speaking)

Practically speaking, subject to the requirements of the statutory regime in a particular context (eg, workers compensation, family law, industrial relations, etc), there is little difference between the process of "conciliation" and that of "mediation".

Accordingly, in my view, there is little utility in spending too much time (in this context) regurgitating what is being characterised by Laurence Boulle in *Mediation: Principles, Process, Practice*[1] as an "extensive debate on the similarities and differences between conciliation and mediation".[2] For present purposes, suffice as to say that:

(a) A clear articulation of all the similarities and differences between the two processes is set out by Boulle in the section of his book at paras [5.15]–[5.22] generally. In short, the similarities between the two processes are obvious in that conciliation, like mediation, is a flexible and informal process in which conciliators have the primary function of facilitating decision-making between the parties — with outcomes predominately dependent on the parties' agreement; and conciliators, like mediators, do not render binding decisions; and

(b) It is useful to say something, however, as to what might be regarded as the significant difference(s) between the two processes.

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1 L Boulle, *Mediation: Principles, Process, Practice*, 3rd edn, Lexis Nexis, 2011, ("Boulle").

2 ibid at [5.15]–[5.22].

The difference between the two processes revolves around the level or degree of intervention of the third party. In my view, it would be correct to suggest that conciliators can intervene more actively than mediators on matters of process and merit. Indeed, courtesy of the provisions of the statutory regime pursuant to which a conciliator is appointed, it may often be the case that a conciliator is required to advise the parties that they are not able to settle a particular issue in a particular way. That is, the conciliator's intervention might be positive in terms of encouraging or advising the parties as to what would seem to be a sensible settlement; or negative ie, by indicating what the parties are unable to do in seeking to resolve the dispute, for example, by the employer agreeing to do X or a Union agreeing that the employer need only pay its workers Y.

In this sense, but again, generally speaking, conciliators usually have an advisory and an evaluative role reflective of the fact that conciliation operates at both "interests" and "rights" levels. This is in stark contrast to the role of the mediator in "facilitative" mediation and yet, on the other hand, it is difficult to sustain a clear distinction between the role of a conciliator and a mediator engaged in "evaluative" mediation.

Consistent with the fact that conciliators operate within statutory frameworks that set standards and other policy objectives, conciliators are invariably public officials as opposed to private practitioners, and as they are required to promote statutory objectives, conciliators (unlike mediators) are not permitted to be "neutral" on substantive issues — as the statute that governs the work that they perform usually imposes a responsibility to indicate to the parties what is and what is not negotiable in terms of that statutory framework.

Finally, in my own experience over many years and in the context of industrial "conciliation and arbitration systems" (at both State and federal level), it is common to expect (and not regarded as inappropriate) for a conciliator to express his/her own views with respect to the merits of particular propositions, and perhaps even as to the possible or likely outcome in any arbitration of an issue(s) — in the event that the conciliator proceeded to be an arbitrator. Of course, the consequence of expressing such views often results in one or other of the parties then objecting to the conciliator proceeding to be the arbitrator, should the conciliation fail to resolve a dispute.

By contrast, even in the context of "evaluative" mediation, it would not be expected that a mediator would go so far.

What consumers of such services like/dislike

From my experience in countless conciliations and mediations on behalf of clients over the last 30 years, I can comfortably say that the consumers of conciliation/mediation services:

1. Express dissatisfaction with those services when:

   (a) The third party has done no preparation, or inadequate preparation, prior to bringing the parties together (the event).

   (b) Whether as a consequence of inadequate preparation or failure to speak to the parties separately in advance, the third party fails to appreciate the complexity of the matter and/or emotional and other difficulties that constitute real barriers to the resolution of the dispute so that, at the very least, much valuable time is lost while he/she "gets up to speed".

(c) The third party evinces an attitude of disinterest or indifference to the process — most gallingly revealed when he/she says, "Well, the parties can use Room X for their discussions. I will be in my room. Let me know how you go/keep me posted."

(d) The third party expresses views, especially firm views, in joint sessions (or even in private sessions) about particular arguments and about the likely outcome if the dispute were to be litigated — at least in circumstances where the parties were unaware this was in contemplation and/or opposed to it occurring, and especially when the third party simply does not have enough material to express such firm views and/or is out of his/her depth with respect to the legal issues involved. For example: "You can't possibly win this case."

(e) The third party (usually in private conference) seeks to put the "frighteners" on a party — with a view to "encouraging" them to settle — by emphasising the prospect of a real catastrophe if the matter were to be litigated to conclusion. For instance, blunt statements like: "Do you own your own house? Do you realise that you could lose it if this case is litigated?"

(f) The third party presuming that lawyers representing the parties have not provided proper advice and information about the nature of the conciliation/mediation process and have not conducted any risk analysis or talked through with their clients, in advance of the event, their WATNA and BATNA.

2. Express satisfaction with the processes when:

(a) The third party avoids all the pitfalls referred to above.

(b) The third party makes at least some genuine efforts to inform his/herself about the nature of the matters in dispute in advance, and seeks access to and has read at least the key documents of relevance to the dispute.

(c) The third party talks to the parties or the representatives of the parties in advance of the event to get a "feel" for the dispute; makes a preliminary assessment as to the likelihood that the lawyers or other representatives, who will be participating in the process, understand the differences between conciliation/mediation and conducting court room litigation; and then issues appropriate directions as to what should be done in advance of the event, eg, distillation of issues, obtaining tax advice etc.

(d) The third party understands that disputes are very often not about what they appear to be, and has the capacity to identify the real agenda and to frame the real issues that need to be addressed.

(e) The third party is genuinely prepared to "roll his/her sleeves up" and work hard at identifying the real sticking points to the resolution of the dispute via a clear articulation of very specific/particular issues that need to be discussed and hopefully, resolved.

(f) The third party has strong communication skills, especially the capacity to listen and acknowledge the legitimacy of the point of view being expressed by a party (irrespective of whether the third party believes that point of view to be right or wrong; reasonable or unreasonable).

(g) The third party is continually evaluating and re-evaluating where the real "heat"/tension is coming from so as to decide which individuals to speak to at any particular point in the dispute, or what combination of people might usefully be put together, for example, the third party with the lawyers on their own, clients on their own, or a particular client on his/her own.

(h) The third party understands, especially in the context where the disputants have an ongoing relationship, that settlements reached will be most likely to "stick" if the parties "own" the settlement — rather than having one party or, worse still, both parties feeling that the outcome has been forced upon them by the third party.

Further references on non-adversarial justice

For further references on the topic of non-adversarial justice, please see the following:

- Judicial Commission, *Civil Trials Bench Book*, 2007–, Sydney, "Alternative dispute resolution" at [2-0500].

Therapeutic jurisprudence and the trauma-informed court

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Decolonising the mind: working with transgenerational trauma and First Nations Peoples*

B O'Neill†

The author, a First Nations Trauma Recovery and Practice Practitioner, shares her insights into the nature of transgenerational trauma, therapeutic approaches, and how to build bridges between First Nations Peoples and the justice system.

Introduction

Australia's First Nations Peoples do not want to be overrepresented in the justice system. We would prefer to be overrepresented in the halls of success and influence.

We have had many leaders who have gone to their graves fighting to explain to non-Indigenous Australia that we, the First Nations Peoples of Australia, are sophisticated and intelligent, and have developed strategies to successfully live in Australia and maintain the world's oldest culture and justice system for more than 65,000 years.[1]

Although there has been public acknowledgement at the highest levels of government of the harm done to First Nations Peoples in Australia,[2] the traumatic impact of colonisation and government policies and practices is still played out in the 21st century in Aboriginal communities.

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1 As documented in B Pascoe, *Dark Emu*, Magabala Books, 2nd edn, 2018. Pascoe provides scholarly evidence of pre-contact Aboriginal farming and land-management practices to refute the label "nomadic hunter-gatherers". See also B Gammage, *The biggest estate on earth*, Allen & Unwin, 2011.

2 For example, in then Prime Minister Paul Keating's Redfern speech, 10 December 1992 and then Prime Minister Kevin Rudd's "National Apology to Australia's Indigenous peoples", 13 February 2008.

What is trans and intergenerational trauma?

Trauma may be acquired or inherited and transferred by an individual and/or collectively by a group. Genetic and physiological, behavioural and psychological factors are considered when diagnosing trauma.[3] The literature characterises such trauma as inter or transgenerational or hereditary trauma.[4] These terms are often used interchangeably.[5] This article refers to the trauma passed down from one First Nations generation to another as transgenerational trauma. The primary cause of such trauma was colonisation and the attendant atrocities perpetrated upon the First Nations Peoples of Australia. The resultant loss, violence, disconnection from Country, family, community, language and culture created such pain and anguish that the physical, emotional, intellectual, and psychological functioning and the DNA of First Nations Peoples altered drastically. Trauma became a source of depression, anxiety, loss of esteem, disconnection from spiritual and emotional wellbeing[6] and caused changes in molecular processes.[7] These changes in the DNA, behaviours and attitudes of Australia's Aboriginal and Torres Strait Islander Peoples have been shared with generations that followed up until the present.

Multiple massacres,[8] dislocation to stations and missions, government policies that forcibly removed children from their families, often into servitude and sexual abuse, ensured that First Nations Peoples were treated in their own country as less than human.

3 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* (DSM-5), 2013.

4 E Zurich, "Hereditary trauma: inheritance of traumas and how they may be mediated", *ScienceDaily*, 13 April 2014, at www.sciencedaily.com/releases/2014/04/140413135953.htm, accessed 17 August 2021.

5 P Dudgeon, H Milroy and R Walker, "Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice", Australian Government Department of Prime Minister and Cabinet, 2nd edn, 2014.

6 J Atkinson, "Educaring: a trauma informed approach to healing generational trauma for Aboriginal Australians", at http://fwtdp.org.au/wp-content/uploads/2013/08/Judy-Atkinson-Healing-From-Generational-Trauma-Workbook.pdf, accessed 17 August 2021, p 15.

7 ETH Zurich, above n 4; N Youssef, L Lockwood, et al, "The effects of Trauma, with or without PTSD, on the transgenerational DNA methylation alterations in human offsprings" (2018) 8 *Brain Sci* 83 at www.ncbi.nlm.nih.gov/pmc/articles/PMC5977074/, accessed 17 August 2021. This review found an accumulating amount of evidence of an enduring effect of trauma exposure to be passed to offspring transgenerationally via the epigenetic inheritance mechanism of DNA methylation alterations and has the capacity to change the expression of genes and the metabolome. See also A Kuffer, A Maercker and A Burri, "Transgenerational effects of PTSD of traumatic stress: do telomeres reach across the generations?" (2014) *Journal of Trauma & Treatment* at www.researchgate.net/publication/280529056_Transgenerational_effects_of_PTSD_or_traumatic_stress_Do_telomeres_reach_across_the_generations, accessed 17 August 2021.

8 For information and a visual map of known massacre sites in Australia compiled by the University of Newcastle Colonial Frontier Massacres Project team, see https://c21ch.newcastle.edu.au/colonialmassacres/, accessed 17 August 2021. There are 250 known sites in Australia currently mapped.

How transgenerational trauma is manifested today

Psychosocial dominance became the natural successor to colonisation. First Nations Peoples were historically perceived as inferior to the colonisers. The divide was reinforced through continuing government policy and practice,[9] preventing bridges being built between the two communities.

The effects of colonisation and State-enforced policies continue to play out in every facet of the lives of First Nations' communities as evidenced by the yearly "Closing the Gap" reports.[10] Numerous academic and government inquiries have exposed continuing institutional racism in Australia.[11]

State policing strategies continue to reflect poor relationships with First Nations Peoples. For example, young Aboriginal people are overrepresented on the suspect target management plan, a NSW policing policy that identifies young people for "pro-active attention".[12] The prison system continues to struggle with the over-representation of First Nations peoples[13] and deaths in custody.[14]

The healthcare system has acknowledged institutional racism toward First Nations Peoples.[15] However in the 21st century, First Nations Peoples are still dying earlier than non-Indigenous Australians.[16] The leading causes of mortality and morbidity in First Nations Peoples are coronary heart disease, anxiety disorders and diabetes, with coronary heart disease the leading

9 For example, the Federal Government's 2007 Northern Territory Emergency Response which declared a "national emergency" was criticised by the United Nations for its paternalism, as being racially discriminatory and its failure to respect the rights of Indigenous peoples to self-determination: J Anaya, "Observations on the Northern Territory Emergency Response in Australia", 2010, at www.ncca.org.au/files/Natsiec/NTER_Observations_FINAL_by_SR_Anaya_.pdf, accessed 17 August 2021.

10 Closing the Gap is a federal government policy framework directed to eliminate the gap between First Nations Peoples and non-Indigenous Australians: see Australian Government, "Closing the Gap" at www.closingthegap.gov.au, accessed 17 August 2021.

11 See for example Australian Human Rights Commission, *Bringing Them Home Report*, 1997, at www.humanrights.gov.au/our-work/bringing-them-home-chapter-3, accessed 17 August 2021.

12 Public Interest Advocacy Centre, "Policing young people in NSW: a study of the suspect targeting management plan", 2017 at www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/, accessed 17 August 2021.

13 During the March 2019 quarter, 25% of the NSW prisoner population was Indigenous: BOCSAR, "NSW Custody Statistics Quarterly Update March 2019" at www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2019/mr-NSW-Custody-Statistics-Quarterly-update-Mar-2019.aspx, accessed 17 August 2021. Of the general NSW population, 2.9% identified as Indigenous in the 2016 Census: ABS, 2016 Census QuickStats, at https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/1, accessed 17 August 2021.

14 From 2008–2018, 16 of 114 Aboriginal deaths occurred in NSW custodial centres: "Deaths inside: Indigenous deaths in custody" at www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody, accessed 17 August 2021.

15 RACGP, Aboriginal and Torres Strait Islander Health, "Position statement — racism in the healthcare system", at www.racgp.org.au, accessed 17 August 2021.

16 Life expectancy for ATSI men 2015–2017 was 8.6 years lower than the non-Indigenous population at 71.6 years; for women, 7.8 years lower at 75.6 years. In remote areas, life expectancy for ATSI men is 65.9 and women 69.6 years. Source: ABS, 3302.0.55.003 — Life Tables for Aboriginal and Torres Strait Islander Australians, 2015–2017, at www.abs.gov.au/ausstats/abs@.nsf/MediaReleasesByCatalogue/1A6806AB01AB38CDCA25835300141767?OpenDocument, accessed 17 August 2021.

disease outcome attributable to tobacco use.[17] First Nations Peoples were often paid in tobacco as currency. Today, this highly addictive substance deliberately foisted upon our people as wages is now a leading cause of premature death in our communities.

Children are still being removed from First Nations Families at alarming rates despite the Bringing them home report.[18] The education system often suspends children perceived to be difficult and First Nations children are disproportionately represented in NSW education data for suspensions.[19] Suspension of these children impacts on the sense of bias they experience, and contributes to their disengagement with the education system.[20]

First Nations women are often re-traumatised through domestic violence and the hopelessness of their lives. The parents of many of my clients were members of the Stolen Generations; many co-habit with white men to escape the treadmill of transgenerational trauma but experience domestic violence from their partners. Many First Nations women are in loving relationships, but judicial officers often see only those women impacted by transgenerational trauma through family and community disconnection and violent partners. The self-loathing of abused women is a tragic treadmill of abuse and crime and punishment.

First Nations men have lost the opportunity for initiation, studying Lore, their tribal place in the community and their dignity. Prison represents a tribal existence and is not a deterrent.

Strategies to heal transgenerational trauma

I was fortunate to have been granted a scholarship from the Office of Prime Minister and Cabinet to complete a Graduate Certificate in Indigenous Trauma Recovery and Practice at the University of Wollongong. I have relied upon this valuable training in my work as an Aboriginal Community Worker. I work from a trauma-informed basis and have created programs designed to empower women on housing estates to realise their potential and de-colonise their minds. When First Nations Peoples work with their own qualified professionals, there are very good

17 E Greenhalgh, A van der Sterren, et al, "MH 8.7 Morbidity and mortality caused by smoking among Aboriginal and Torres Strait Islander peoples" in M Scollo and M Winstanley (eds), *Tobacco in Australia: Facts and issue*s, Melbourne: Cancer Council Victoria; 2018, at 8.7.1.

18 Bringing them home report, 1997, above n 11. At 30 June 2018, 6,680 Aboriginal children in NSW were in out-of-home care (11 times the rate for non-Aboriginal children). Across Australia, in 2017–2018, 65% of Aboriginal children were placed with relatives/kin, with other Aboriginal caregivers, or in Aboriginal residential care. These informal arrangements will have multiple effects on the grandparent caregiver, including financial, physical and mental health: Australian Institute of Health and Welfare, *Child protection Australia 2016–2017*, Canberra, 2018, p 48. See also B O'Neill with E Fanning, *Aboriginal people and intergenerational trauma*, Seniors Rights Service, at https://youtube.com/watch?v=6BYw0u6JHwA, accessed 17 August 2021.

19 Based on 2015 data, Aboriginal children make up 7% of the school population but almost 25% of suspension rates: J Lang, "School suspensions and Aboriginal students" at http://actuarialeye.com/2017/11/19/school-suspensions-and-aboriginal-students/, accessed 17 August 2021; NSW Ombudsman, Inquiry into behaviour management in schools, 2017, p ix.

20 NSW Ombudsman, ibid, p xi.

results and outcomes for the community.[21] First Nations Peoples are a people of sharing and consensus. We know what we are dealing with, we know how to fix it, we need to be encouraged and funded to do so, and to be treated equally. In these ways, Aboriginal workers are integral to building a bridge between First Nations Peoples and non-Indigenous Australians.

Truth telling

Judges and magistrates deal first hand with the impacts of transgenerational trauma, making decisions on a daily basis about people who carry inherited trauma. It is important for First Nations Peoples that judicial officers are informed about the impacts of trauma.[22] The Judicial Commission, for example, provides an Aboriginal cultural awareness program, the Ngara Yura Program, and information about culturally appropriate programs on the Judicial Information Research System.[23] A working relationship between First Nations leaders and the judiciary, such as we see with the Youth Koori Court, assists our communities to address and acknowledge transgenerational trauma.[24]

The Uluru Statement from the Heart has called for a Makarrata Commission to supervise agreement-making between governments and First Nations Peoples and truth-telling about our history.

Deep listening or Daddirri

We have written a program called Yarning About My Stuff (YAMS) in which clients facing the court system have one-on-one sessions with an Aboriginal worker and explore the circumstances that led to dealing with the justice system and the consequences. It is a simple trauma-informed program that speaks to the person facing court. It is entirely about them. It is still being piloted but has had promising results. A client with highly complex behavioural issues shared that every time she thinks about using the drug ice, she looks at her YAMS booklet and acknowledges that the part of her that she respects is captured in that booklet.

Case studies

Community Connection

Holly[25] had lived on a mission for 10 years from the age of 13. She eventually came back to Sydney to escape domestic violence. She has a school-age daughter. When I first came

21 See for example J Atkinson, "Trauma-informed services and trauma-specific care for Indigenous Australian children", Resource sheet no 21 produced for Closing the Gap clearinghouse, at http://earlytraumagrief.anu.edu.au/files/ctg-rs21.pdf, accessed 17 August 2021; L Stuart and A Nielsen, "Two Aboriginal registered nurses show us why black nurses caring for black patients is good medicine" (2010) 37 *Contemporary Nurse: a journal for the Australian nursing profession* 96.

22 See for example the work of J Atkinson, *Trauma trails, recreating songlines: the transgenerational effects of trauma in Indigenous Australia*, Spinifex Press, 2002. See also "Aboriginal people" in Judicial Commission of NSW, *Equality Before the Law Bench Book*, 2006, at Ch 2, "Aboriginal people".

23 Under the "Diversionary programs" menu.

24 The Judicial Commission's Ngara Yura project officer, Ms Joanne Selfe, participates as an Elder on YKC hearings at Surry Hills.

25 Name has been changed.

into contact with Holly, she was non-communicative and so was her child. I would make appointments with Holly which she didn't keep; she had instead returned to the mission where the perpetrator still lived. After building trust with Holly, I realised that she hated living in her flat in Sydney as she was used to a big extended family. She was feeling alienated and lonely. We connected her with an Aboriginal Mothers' and Childrens' group and the local tenants' community group. We have signed her up with a specialised TAFE training organisation where she is looking forward to studying a Certificate IV in Community Services. We are working on removing FaCS interventions from her life.

Reciprocity and obligation

Sara[26] and her husband had been substance abusers but had rehabilitated and were endeavouring to stay clean. Following an incident at their home, they fled to Sydney where FaCS removed their children. Sara was extremely traumatised when I met her. She is a traditional woman. After gaining her trust, she shared with me one day that the incident that led to her children being removed was due to the behaviour of another family member. I was able to contact her lawyer and explain that, due to cultural reciprocity, Sara was obliged to have the family member stay with her. This changed her case and she now has full custody of her children. The family is strong, and we have assisted Sara to sign up with mainstream TAFE and study a Certificate IV in Community Services.

Conclusion

Two-hundred-and-thirty years of colonisation and oppression have not changed who First Nations Peoples are. We are deeply spiritual. We belong to community and we have a shared sense of identity. When I work from a trauma-informed basis, these First Nations' qualities are my points of reference.

26 Name has been changed.

Transgenerational trauma reimagined

The Uluru Statement from the Heart has called for truth telling as foundational to nation building and a just society. Barbara O'Neill presents a compelling account of the impact of transgenerational trauma and how trauma needs to be heard and acknowledged.

If I were to reimagine Trauma as a person, how would she behave?

Imagine that she has been with you since something terrible happened in your life.

She has decided to position herself into your life in such a way that she becomes an indispensable friend, commentator, decision maker, enabler and assumes to give you the identity she has chosen for you.

She convinces you that all decisions must be made with her in mind, every aspect of your life should be drawn in her image, she resets your emotional regulator, she convinces you that you can run, but you cannot hide. You and Trauma are bound at such a deep level that she, Trauma, is a part of your essential self.

You want to convince her to stop intruding in your life, but she reminds you that she is the holder of your story; only she can validate why you do certain things. She warps your moral compass; she separates you from those who would seek to diminish her hold on you.

As events occur in your life, she does not let you filter and devise strategies to deal with newer traumatic events, she hungrily grabs each event and grows within your very soul.

As she grows, she shapes you into her image.

You avoid finding help and support because she has convinced you that you will suffer as a result. She convinces you that you are undeserving because you should have been able to stop her becoming so dominant.

Trauma takes on a personality of her own. She comforts you when you need to understand whether you are to blame for your behaviour, she mocks you when you declare that you don't want to rely upon her. She also holds your story sacred and protects every detail of your experience as it happened.

Although there are traumatic events you did not experience or witness, they happened to your immediate family and Ancestors. Because they broke the spirit of your family and Ancestors, they became your family's story, held sacred within the very cells shared to conceive you.

You became the holder of the story. You became the receptacle of Trauma. Then she waited to be fed. Any adverse event you suffered she added to the old story, growing with you, waiting to become your best friend.

You perceive the world around you as belonging to the other, not you. Trauma does not want to share you with anyone as you might move forward and stop her from shaping your future.

It is really difficult for you to move forward because Trauma is the story of your experiences and pain. If you separate from her, how can you have a point of reference with which to make sense of your feelings of loss, injustice, pain, abandonment, betrayal and alienation from society? Trauma is your internal point of reference.

Trauma does not want you to share the story she holds for you. Your story feeds her.

By now you have built up an arsenal of strategies so that nothing painful can happen to you again.

In her own way Trauma has set up warning systems for you.

Lately you have behaved in ways that attract anger and consequences toward you. Maybe you are now dealing within the justice system as an offender.

Trauma has convinced you that to stop being vulnerable, you need to hit out and become the perpetrator. Trauma has validated your story to the point that you feel it is you and Trauma against the world. This is exactly what Trauma needs to feed and grow. You are now going to be impacted by the justice system, your vulnerability is going to be laid bare publicly.

This is traumatic. The difference now is that you are not blameless. You are hurting, feeling pain and impacted out of proportion to the reality of your situation. You withdraw and become angry that you are hurting when you were supposed to never hurt again. Trauma feeds your transgenerational memories and makes it hard to deal with the justice system. Trauma rekindles old pain and memories. Trauma wants you to hurt so that she can feed.

There is one thing that frightens Trauma — that you will share the story that she holds for you.

Trauma does not want you to talk, to yarn, to share your pain. If you do share your story, you will own it. You can experience Dadirri or deep listening, as you tell your story. The listener will summarise your story and validate your experience within this story as unique to you and sacred to you.

If you share your story with a deep listener, you will have a chance to objectively look at life events that impacted you and have the chance to understand that the offender owns the consequences that you have been living with until now. You were the innocent party to these events; you don't need to carry shame that you were powerless to stop them.

You can journey away from the impacts of trauma, you can draw a line in the sand and try to move forward. Your story will pain you when triggered, but you will have strategies and will own the story so that you can edit it and report on it how you wish. Trauma keeps the story raw and keeps you beholden to the pain inflicted by the offender.

There will always be that deep well of trauma containing past events. You can identify it for what it is now — the unfortunate circumstances that dominated your life. Now you actively hold the story of your trauma, prepared for the next negative circumstance which you will deal with on its own merit and not let it add to the old well of Trauma.

You can now identify that negative events do happen, that is part of life, but this time round you have stared Trauma down and you will not let new events add to the past, but analyse them as they happen.

If you are an offender within the justice system, it is so important that you have that conversation about Trauma. You will have realised by now that turning perpetrator adds to your lowered self-esteem.

Transgenerational trauma is insidious. Those who carry it receive it at conception. It is in the DNA and cannot be removed. Trauma can only be lessened or destroyed through Truth in historical fact.

Sentencing and disadvantage: the use of research to inform the court*

Mr N Cowdery AO QC,† Professor J Hunter‡ and Ms R McMahon§

This article explores the promotion of justice outcomes in sentencing courts through reliance on evidence-based research derived from major reports and leading academics with a focus on the new online research-focused resource, the Bugmy Bar Book.

Introduction

Courts are faced, relentlessly, with the task of sentencing offenders who present with a background of disadvantage and deprivation. Their experiences of disadvantage potentially affect offenders' mental, cognitive and emotional development, and may underpin behaviour contributing to offending. *Bugmy v The Queen*[1] confirmed that an offender's background of deprivation should be taken into account in sentencing, subject of course to being able to "point to material tending to establish that background".[2] An offender's history of disadvantage is relevant to the assessment of the moral culpability of the offence. It may justify moderating the application of specific and general deterrence.[3] While it is for the court to assess an offender's background when applying sentencing principles,[4] that evaluation is heavily dependent on the quality and depth of the information before the court.

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1 *Bugmy v The Queen* (2013) 249 CLR 571 (*Bugmy*).
2 ibid at [41]. The "application of the *Bugmy* principles is not discretionary": *R v Irwin* [2019] NSWCCA 133 at [3] per Simpson AJA
3 *Bugmy*, above n 1 at [44]–[45] also discusses conflicting purposes of punishment in the context of considering a person's deprived background.
4 *Bugmy*, ibid at [46].

The *Bugmy* Bar Book[5] does not purport to convert the complex task of sentencing into a simple one. It does not seek to replace expert reports. However, where a background of disadvantage such as parental incarceration is established in the subjective case, the *Bugmy* Bar Book research informs the court about the meaning and potential impact of the offender's disadvantage.[6]

The resource consists of a series of short chapters of research relating to social disadvantage and deprivation. They include experiences specific to Aboriginal and Torres Strait Islander peoples,[7] as well as broader topics. The Bar Book was launched on 8 November 2019. It is conceived by the *Bugmy* Bar Book Steering Committee as a practical way to address extra-judicial calls from the bench to present informed high quality material to assist courts in applying sentencing principles appropriate to an offender with a history of disadvantage. In part it draws inspiration from the context described by Fullerton J in *Perkins v R*:[8]

> the insidious effects of exposure to family and domestic violence on children in their formative years, and the potential for that exposure to play out in unforeseen ways as a young child develops from adolescence into adulthood, are *well researched and documented*. (Emphasis added.)

The value of research in sentence proceedings[9]

The prevalence and diversity of disadvantage speaks to the need for a deeper understanding of the impact of these experiences on offenders. However, sentencing courts are often left to grapple with making determinations in the absence of adequate material. They must synthesise "competing features" in an attempt "to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment".[10] *DPP v Radulovic*[11] illustrates the challenges facing a court when presented with a complex offender history. In *Radulovic*, Henson J examined the context of an offender potentially impacted by the failure of his

5 Hosted on the Public Defenders website at www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx, accessed 18 August 2021; also available on JIRS through "Publications/Bench Books and References" menu and the Commission's website at www.judcom.nsw.gov.au, accessed 18 August 2021.

6 "Incarceration of a Parent or Caregiver", Bar Book project at www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/parental-incarceration.aspx, accessed 18 August 2021. A legal representative may support Bar Book research with an expert report.

7 Such as "Stolen Generations and Descendants" and "Cultural Dispossession".

8 [2018] NSWCCA 62 at [99]. Recognition of the value of reliable research to support appropriate judicial findings in sentencing is also found in s 25AA(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (in relation to trauma occasioned to victims).

9 Guidance for practitioners is available on the *Bugmy* Bar Book web pages, above n 5: S Beckett, "The Bar Book project: presenting evidence of disadvantage", paper to the Public Defenders Criminal Law Conference, 2019; R McMahon, "The Bar Book project: making use of the Bar Book in sentence and section 32 proceedings", paper to the Legal Aid Criminal Law Conference, 2019.

10 *Weininger v The Queen* (2003) 212 CLR 629 at [24].

11 [2019] NSWLC 1.

parents' marriage "and the descent into drug abuse and crime by his mother resulting in her incarceration" as aspects "that in the experience of courts often act to diminish moral and ethical restraint".[12] His Honour remarked that:[13]

> the Court would have been greatly assisted by a psychiatric or psychological report. I understand that the extremely restrictive bail conditions imposed on the offender did not assist with enabling this avenue to be pursued. Without such material both the Court and, as a consequence, the offender are at a disadvantage. Unassisted the Court is left to do the best it can in assessing whether the offender's history lends itself to the likelihood that his level of moral culpability is reduced.

The *Bugmy* Bar Book's research chapters on parental incarceration and early exposure to drug and alcohol aim to assist the court to assess the impact of offenders' histories in cases such as this one. The chapters also assist the court by providing material for defence practitioners to better understand and explore their clients' experiences which may improve the quality of the material put before the court in the subjective case. A key feature of the Bar Book is the rigorous research and review process in compiling each chapter.[14] These processes ensure that the research extracted in each chapter is accurate, reliable and contemporary.

Receiving research in court

It is no longer novel for criminal courts to receive and rely upon research explaining the likely effects of categories of disadvantage.[15] To illustrate, in *Kentwell v R (No 2)*, Rothman J applied the research of Professor Baumeister relating to the effects of social exclusion. Individualised evidence demonstrating social exclusion made the research applicable:[16]

> The studies by Professor Baumeister, reference to which is contained in the judgment in Lewis, make clear that such extreme social exclusion will likely result in anti-social behaviour and most likely result in criminal offending. However, in each case, *there must be evidence to suggest the application of these principles and the effect of the exclusion*. In this case, the evidence in relation to the appellant of that factor is substantial. (Emphasis added.)

12 ibid at [18].
13 ibid at [19].
14 Each chapter comprises of extracts from major reports and leading research in peer reviewed journals. The extracts are compiled under the supervision of a senior legal academic or legal practitioner from the Bar Book Steering Committee. The chapter is then assigned to an expert in the field for comment and guidance on ensuring accuracy, comprehensiveness and reliability of the research, as measured against the general body of research accepted in the field. The chapters are then reviewed by two members of an independent advisory panel. All chapters which relate to Aboriginal and Torres Strait Islander experiences are expertly reviewed (and in many cases researched) by Indigenous researchers/experts and Indigenous members of the advisory panel.
15 *R v Lewis* [2014] NSWSC 1127; *Kentwell v R (No 2)* [2015] NSWCCA 96; *R v Munro* [2018] NSWDC 331.
16 *Kentwell v R (No 2)*, ibid at [94]. See also *R v Rowe* [2019] NSWSC 1592.

Justice Rothman, having referred to the pre-sentence report which detailed substantial evidence of social exclusion on account of the offender's Aboriginality, said:[17]

> I proceeded in *Lewis* to rely upon studies in the United States of America relating to the effect on behaviour of social exclusion and discrimination …
>
> Those studies disclose, somewhat counter-intuitively, that social exclusion from the prevailing group has a direct impact and causes high levels of aggression, self-defeating behaviours, and reduced pro-social contributions to society as a whole, poor performance in intellectual spheres and impaired self-regulation. While intuitively, for those who have not themselves suffered such extreme social exclusion, the response to exclusion would be greater efforts to secure acceptance, the above studies make clear that the opposite occurs …
>
> *Thus, a person, such as the appellant, who has suffered extreme social exclusion on account of his race, even from the family who had adopted him, is likely to engage in self-defeating behaviours and suffer the effects to which earlier reference has been made. This is how the appellant has been affected.* (Emphasis added.)

Matters of proof — flexibility in sentencing

First principles guide the avenues for receiving high quality research in sentence proceedings and the roles of prosecutors and defence practitioners in assisting to bring such research before the court. Most prominent is the expression by authorities of a clear desire for informality and flexibility regarding matters of proof in sentencing courts. This is illustrated further by the default position of the *Evidence Act 1995* (NSW) (the Act) that, prima facie, its provisions do not apply to sentence proceedings. Indeed, the Act only applies under s 4(2) of that Act:[18]

> 4(2) If such a proceeding relates to sentencing —
>
> (a) this Act applies only if the court directs that the law of evidence applies in the proceeding, and
>
> (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters — the direction has effect accordingly.

As the High Court has observed, there exists "a background of well-known and long-established procedures in sentencing hearings, in which much of the material placed before a sentencing

17 *Kentwell v R (No 2)*, ibid at [90]–[92]. See also S Rothman, "Disadvantage and crime: the impact of *Bugmy* & *Munda* on sentencing Aboriginal and other offenders", address to the Public Defenders Criminal Law Conference, 18 March 2018, at 10 at: www.publicdefenders.nsw.gov.au/Documents/Disadvantage%20and%20Crime.pdf, accessed 18 August 2021.

18 We have put to one side the application of s 4(2) *Evidence Act* where statute permits a sentencing court to inform itself as it thinks fit, eg *Talukder v Dunbar* (2009) 194 A Crim R 545. In relation to s 32 *Mental Health (Forensic Provisions) Act 1990* (MHFP Act) applications, s 36 provides "for the purposes of this Part, a Magistrate may inform himself or herself as the Magistrate thinks fit". Note that in *Weininger v The Queen*, above n 10, Gleeson CJ, McHugh, Gummow and Hayne JJ at [16] considered a statutory obligation on a sentencing court to consider such matters "as are relevant and known to the court" (as opposed to "proved in evidence": see *Crimes Act 1914* (Cth), s 16A(2)). The court, applying *R v Storey* [1998] 1 VR 359 at 372, expressed a strong disinclination to require formal proof as a general rule, noting that it was important to avoid "excessive subtlety and refinement": at [24].

judge is not proved by admissible evidence".[19] While sentencing judges should be "fully informed", Giles JA in *R v Bourchas* endorsed the degree of informality applying in such proceedings, observing that:[20]

> [u]nnecessary insistence on the strict rules of evidence is in no one's interests in sentencing proceedings, and the customary co-operation between the Crown and the offender and making of admissions by the offender should so far as possible be insisted upon.

When might it be desirable or obligatory for the Evidence Act to apply?

A direction must be made pursuant to s 4(2) if ss 4(3) or (4) apply. This requires a direction if the fact to be proved is "significant" or if such a direction is "in the interests of justice".[21] Observations from the ALRC sentencing report[22] give some further guidance on these criteria. First, a primary consideration is to avoid "inaccurate or unfairly prejudicial material, for example, that, 'the defendant is an associate of known criminals,'"[23] and otherwise where the significance of the facts to be proved means justice requires strict proof.[24] The ALRC added a self-evident, but not insignificant reminder that sentencing determinations differ in important respects from the trial. It elaborated that where the rules of evidence do not apply, the absence of "formal rules of evidence … will not mean that the sentencing court will exercise its discretion capriciously or arbitrarily. Decisions as to evidence will still have to be made rationally and fairly".[25]

Relevance

Relevance is the core consideration irrespective of whether or not a court makes a s 4 direction. The requirement of relevance is not demanding. "Evidence that is of only some, even slight,

19 *Weininger v The Queen*, above n 10 at [21].

20 (2002) 133 A Crim R 413 at 428. See also *Jones v Booth* [2019] NSWSC 1066 where Johnson J considered s 32 MHFP Act. Section 32(1)(b) MHFP Act provides a broad discretion to the magistrate by allowing the consideration of "relevant evidence" when considering diversion pursuant to s 32: "on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant." Justice Johnson at [54] expressly accepted the observations made in *Lam v R* [2015] NSWCCA 143 at [75] that "[i]t is trite to note that the *Evidence Act 1995* does not apply in sentencing proceedings unless a direction is given to that effect, and that there is a degree of flexibility in sentencing proceedings as to the manner in which evidence may be given".

21 *Evidence Act*, s 4(3) relates to "a direction in relation to the proof of a fact" that is or will be "significant in determining a sentence to be imposed". This is not relevant to reliable research, which is adjudicative. Section 4(4) provides "[t]he court must make a direction if the court considers it appropriate to make such a direction in the interests of justice".

22 ALRC, *Sentencing, Report 44*, 1988, at www.austlii.edu.au/au/other/lawreform/ALRC/1988/44.html, accessed 18 August 2021.

23 ibid at [186]. The ALRC concluded that applying the rules of evidence by default had advantages, but they were outweighed by disadvantages.

24 This appears to foreshadow *Evidence Act*, ss 4(3) and 4(4). This guidance was offered in the context of the ALRC sentencing report traversing arguments regarding whether the law of evidence should apply in sentencing. At this time, the equivalent of s 4 in the ALRC draft Evidence Bill, cl 11(2), did not empower courts to direct that rules of evidence apply: see ALRC, *Evidence, Report 38*, 1987, Appendix A at www.austlii.edu.au/au/other/lawreform/ALRC/1987/38.html, accessed 18 August 2021.

25 ALRC, *Sentencing, Report 44*, above n 22, at [186].

probative value will be prima facie admissible, just as it is at common law".[26] In the *Bugmy* Bar Book context, relevance requires subjective evidence to be before the court of disadvantage relevant to the research relied upon which then allows the court to have regard to the research when applying sentencing principles, including the *Bugmy* principles.[27]

Should the Act apply, s 79 will not apply to the portion of the chapters that relate to the reporting of data. To the extent that any opinions arise within the research, the processes which ensure leading reports and research are extracted and expertly reviewed should meet the requirements of s 79. It would be undesirable to require leading researchers to attend court to give evidence in the context of the clear intention of superior courts to allow flexibility in receiving sentence material. Additionally, the time, expense and delay incurred would likely be seen to be inconsistent with the interests of justice (s 4(4)). Any issues raised in relation to reliability are not relevant to admissibility but rather the weight that may be placed on the opinion.[28]

Judicial notice — s 144 of the Evidence Act

If a court makes a s 4 direction with respect to proof of a fact, s 144 is the recommended pathway for receiving reliable and credible research. Section 144(1) creates the threshold requirement of "common knowledge", namely that "proof is not required about knowledge that is *not reasonably open to question* and is … *capable of verification by reference to a document the authority of which cannot reasonably be questioned*". (Emphasis added.) Section 144(2) permits "[t]he judge [to] acquire knowledge of that kind in any way the judge thinks fit" and s 144(3) provides that "[t]he court … is to take knowledge of that kind into account".

Justice Heydon in *Aytugrul v The Queen*[29] observed that "the teachings of the expert material", without calling expert witnesses, is limited to "matters of common knowledge" within s 4(1).[30] This permits in the appropriate circumstances for s 144 processes to fill the gap created by the absence of an expert witness. As Heydon J indicated, this includes expert literature that may assist to guide the application of sentencing rules and principles, such as the role of expert

26 *IMM v The Queen* (2016) 257 CLR 300 at [40].
27 For example, evidence of social exclusion from the pre-sentence report in *Kentwell v R (No 2)*, above n 15 at [90]–[92], [94] and the application of research of the impacts of family violence, see *R v Munro*, above n 15.
28 *IMM v The Queen*, above n 26 at [51]–[52], [54], [58]; *Tuite v R* (2015) 49 VR 196.
29 (2012) 247 CLR 170.
30 ibid at [69].

writings in sentencing child sexual assault offenders.[31] As long as parties adhere to procedural fairness processes,[32] the potential for expert writings like those compiled in the *Bugmy* Bar Book to be admitted in this way is clear.[33] Justice Heydon observed that:[34]

> sometimes general references are made by courts to the causes of psychiatric injury and the diagnosis of psychiatric illness. Sometimes more specific reasoning is propounded after the court has had recourse to expert literature. Medical works have been taken into account in assessing the causation and foreseeability of psychiatric injury. Works on psychology have been considered in formulating rules about identification evidence, both directly and indirectly. (Citations omitted.)

Prosecution and defence considerations

The roles of defence representatives and prosecutors regarding placing Bar Book chapters, or portions of them, before a sentencing court is significant. For example, a sentencing court is entitled to accept evidence where parties do not contest reliance on it.[35] Further, prosecutors "must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court".[36] Fairness and justice require that prosecutors apply judgment, or informed discretion, to the evidence to be led, where that evidence is to come from, and the submissions to be made. Of course, prosecutors are duty-bound to act fairly and with the intention of achieving a just outcome in criminal proceedings.[37] Defence practitioners are tasked with preparing and adducing evidence of the offender's experience of deprivation. Defence practitioners also have a duty to ensure procedural fairness by disclosing to the prosecution a party's intention to rely on publications.[38] Although (it must be said) there is no specific obligation directly placed upon a prosecutor to seek and present evidence of social disadvantage and deprivation relevant to a convicted person on the question of sentence, the general and strongly mandated duties of fairness, impartiality, justice and service in the public interest ought to cause prosecutors to allow evidence of this

31 See for example, *Ryan v The Queen* (2001) 206 CLR 267 at [42], [44], [51] where reliance was placed on B Glaser, "Paedophilia: the public health problem of the decade", in Australian Institute of Criminology (AIC) (1997) *Paedophilia: Policy and Prevention* 4; J Nicholson, "Defence of alleged paedophiles: why do we need to bother?" in AIC (1997) *Paedophilia: Policy and Prevention* 44; K Miller, "Detection and reporting of child sexual abuse (specifically paedophilia): a law enforcement perspective" in AIC (1997) *Paedophilia: Policy and Prevention* 32.

32 Procedural fairness would dictate disclosing to the prosecution a party's intention to rely on publications, and also providing copies of the publications in advance.

33 See above the discussion of the compilation and review process in the Bar Book.

34 (2012) 247 CLR 170 at [71]. His Honour also noted at [71] that the court has relied on criminological research (*Pollitt v The Queen* (1992) 174 CLR 558 at 615) and child behaviour (*Jones v The Queen* (1997) 191 CLR 439 at 463) and "expert material bearing on the psychological fact must have potential significance" in grounding the court's recognition of the "inherent frailties of identification evidence".

35 See ALRC, Same crime, same time: sentencing of federal offenders [2006] ALRC 103 at [13.72] at www.alrc.gov.au/publication/same-crime-same-time-sentencing-of-federal-offenders-alrc-report-103/, accessed 18 August 2021. There is also authority under the *Evidence Act* that otherwise inadmissible evidence is admissible if it was not objected to at trial: *Aytugrul v The Queen*, above n 29 at [39], citing *Dhanhoa v The Queen* (2003) 217 CLR 1 at [18]–[22].

36 Legal Profession Uniform Conduct (Barristers) Rules 2015, r 83. See also *HT v The Queen* [2019] HCA 40 at [59].

37 *Whitehorn v The Queen* (1983) 152 CLR 657 at 675. Prosecutors are required to assist the court to avoid appealable error, especially in sentence proceedings: Legal Profession Uniform Conduct (Barristers) Rules 2015, r 95

38 For ease of service, the Bar Book chapters are available online with hyperlinks to the source publications, where available.

nature to be presented on behalf of the accused where relevant. Those features of prosecutorial practice necessarily require that prosecutors be kept informed of matters relevant to enabling them to meet those standards, including from specialised research into topics of relevance to their practices and to those with whom they are dealing.

Defence representatives have a responsibility to present a full picture of their client's background. The quality and depth of the evidence tendered on behalf of the offender will have a direct bearing upon the type of sentence option imposed and/or the length and structure of the sentence. The nature of the evidence will also determine the relevance of research relating to the likely impacts of the offender's history of deprivation.

Conclusion

The *Bugmy* Bar Book contains well-credentialed, expertly reviewed research, compiled with guidance from independent experts and a multi-disciplinary team of psychologists, academics and senior legal practitioners. It has the capacity to equip judges and both sides of the Bar table with a sophisticated, accurate understanding of how experience of deprivation may impact upon an individual and thus to assist the courts to give "full weight" to an offender's background when applying the principles required by *Bugmy*.[39] This in turn may assist when tailoring sentencing outcomes for vulnerable offenders to support rehabilitation and contribute to safer communities.

It is clear that other crucial changes to law, policy and funding decisions are needed to meaningfully address the unacceptable over-representation of Aboriginal and Torres Strait Islander people in the justice system. This includes the implementation of the many important recommendations of the ALRC's 2018 *Pathways to Justice report*[40] which, amongst other things, support the establishment of Aboriginal Sentencing Courts such as the much needed Walama Court in the NSW District Court, facilitating the preparation of Indigenous Experience reports, committing to justice reinvestment, improving access and expanding the geographic reach of culturally appropriate community-based options. Credible and reliable research has an important role in assisting the court and it will continue to be enhanced as commitments are made to implement other important reforms which foster equality before the law.

39 *Bugmy v The Queen*, above n 2, or applications pursuant to s 32 MHFP Act.

40 ALRC, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Report 133*, 2018, at www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/, accessed 18 August 2021.

The trauma-informed courtroom*

The Honourable Judge P Hora†

A growing evidence base supports the case for judicial officers to adopt a trauma-informed approach in the courtroom. This approach has emerged from the field of mental health. It was adopted in the treatment and problem-solving courts of the United States and the NSW Drug Court in the 1990s. This issue of the Bulletin explains the approach and provides practical strategies for implementation in the courtroom.

Why do judges and other justice professionals need to be cognisant of trauma as it relates to court cases? Like it or not, trauma seems to be the overwhelming negative factor affecting many people who come to court.

From treatment court[1] participants to those who have experienced child abuse and neglect, "adverse childhood events" (ACE) seem to be present in many cases. Tragically, people may leave the courtroom worse off than when they came in having suffered "jurigenic harm".[2]

Individuals exposed to ACEs experience health issues and risk factors at a higher rate than those who have not experienced trauma in childhood as listed in the following table:[3]

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* Edited version of an article first published on the Justice Speakers Institute blog series at http://justicespeakersinstitute.com/the-trauma-informed-courtroom/, accessed 18 August 2021. Published (2020) 32(2) *JOB* 11, updated 2021. For further information on trauma-informed approach in the courtroom, please see C Kezelman and P Stavropoulos, "Trauma and the law: applying trauma-informed practice to legal and judicial contexts", Blue Knot Foundation, at https://communitylegalqld.org.au/sites/default/files/downloads/webinars/blue_knot_paper_trauma_informed_practice.pdf, accessed 18 August 2021.

† Former President, Justice Speakers Institute, LLC; retired judge of the California Superior Court, (now deceased). Judge Hora was an international leader in the solution-focused courts movement.

1 Treatment courts or problem-solving courts (for example, the NSW Drug Court) adopt a therapeutic approach to treating an offender.

2 Just as iatrogenic effects is harm caused by hospitals, jurigenic harm is caused by judges.

3 American Academy of Pediatrics, The Resilience Project, at www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/resilience/Pages/Resilience-Project.aspx, accessed 18 August 2021.

Health issues and risk factors arising from ACEs

alcoholism and alcohol abuse	risk for intimate partner violence
chronic obstructive pulmonary disease (COPD)	multiple sexual partners
depression	sexually transmitted infections (STIs)
foetal death	smoking
health-related quality of life	suicide attempts
illicit drug use	unintended pregnancies
ischemic heart disease (IHD)	early initiation of smoking
liver disease	early initiation of sexual activity
	adolescent pregnancy

Aligning what we know with what we do

Judge Mary Triggiano says, "Many courts have come to recognise that acknowledging and understanding the impact of trauma on court participants may lead to more successful interactions and outcomes. Courts that do not practice trauma-informed decision making may inadvertently increase the level of trauma that families experience. Every interaction is an opportunity."[4] We need to change the paradigm from "What's wrong with you" to "What's happened to you?"

"Dysfunctional families and distressed children go hand in hand," according to Dr Bruce McEwan,[5] current scientific evidence seems to be backing that up. Judges in child dependency courts[6] must be trained to appropriately respond to improve brain wellness of children in these cases.

SAMSHA's[7] six key principles of a trauma-informed approach

A trauma-informed approach reflects adherence to six key principles rather than a prescribed set of practices or procedures for both litigants and witnesses:[8]

- safety
- trustworthiness and transparency

4 M Triggiano, "Childhood trauma: essential information for courts," Wisconsin Association of Treatment Court Professionals, 2015.
5 B McEwan, "Effects of stress on the developing brain," Cerebrum, 2011, at www.ncbi.nlm.nih.gov/pmc/articles/PMC3574783/, accessed 18 August 2021.
6 In the United States, a dependency hearing is a court proceeding involving a juvenile, typically in cases of abuse or neglect.
7 Substance Abuse and Mental Health Services Administration (SAMHSA).
8 SAMHSA, "Concept of trauma and guidance for a trauma-informed approach", 2014, at https://store.samhsa.gov/system/files/sma14-4884.pdf, accessed 18 August 2021.

- peer support
- collaboration and mutuality
- empowerment, voice and choice
- cultural, historical, and gender issues.

Trauma-specific intervention programs generally recognise the following:[9]

- the survivor's need to be respected, informed, connected, and hopeful regarding their own recovery
- the interrelation between trauma and symptoms of trauma such as substance abuse, eating disorders, depression, and anxiety,
- the need to work in a collaborative way with survivors, family and friends of the survivor, and other human services agencies in a manner that will empower survivors and their family and friends.

The US Office of Victims of Crime has four very specific recommendations to have a trauma-informed courtroom:[10]

1. Encourage suggestions from other court stakeholders. Encourage parties to cases, attorneys, and guardians ad litem to make specific requests for any possible and reasonable adjustment to the proceedings.
2. Step down and leave the judge's robe at the bench.[11] On a limited basis, if no one's personal safety is compromised, a judicial officer may consider sitting with the victim, especially if the victim does not have legal representation, or with any minor child and the child's guardian ad litem or court-appointed special advocate. If a judicial officer elects to join the parties, the officer might consider literally leaving the judge's robe on the bench and thus appearing more approachable. The intimidation factor perceived by an unrepresented litigant and child in a courtroom when interacting with an authority figure (dressed differently and seated in an elevated location) can invoke trauma triggers or otherwise discourage interaction.
3. Adjust the lighting in the court room. Often court rooms have multiple lighting options and decreasing the lighting may feel more comfortable to individuals who are light sensitive or have certain sensory limitations. Discuss this with the victim, victim's case manager, or representative to ensure that dimming the lights is not potentially triggering.
4. Provide simple conveniences like a box of tissues or a bowl of snacks. Aside from providing an energy boost for anyone in the courtroom, a piece of candy or fruit can often help victims feel calmer and more welcome.

9 MentalHealth.org, "Trauma-informed approach and trauma-specific interventions", at www.mentalhealth.org/get-help/trauma, accessed 18 August 2021.

10 US Office for Victims of Crime, "Trauma-informed courts", at www.ovcttac.gov/taskforceguide/eguide/6-the-role-of-courts/63-trauma-informed-courts/, accessed 18 August 2021.

11 This may not be permitted in every State, see, eg, 2018 California Rules of Court Rule 10.505. "Judicial robes".

Specific suggestions for trauma-informed judicial practices[12]

Courtroom experience	Reaction of trauma survivor	Trauma-informed approach
Court officer handcuffs an individual without warning.	Anxiety about being restrained; fear about what is going to happen.	Tell the court officer and individual you intend to remand them. Explain what is going to happen and when. "The officer is going to walk behind you and you will be handcuffed."
Judge remands one drug court participant for having a positive test but not another. They are both in the courtroom at the same time.	Concern about fairness; feeling that someone else is getting special treatment.	Explain for first participant, sobriety is a proximal goal and for second it is not. Compare time in the program and progress in treatment. Explain gaol is a last resort and you hope participant will not give up on recovery.
Individuals who are agitated or "acting out" are required to wait before speaking to the judge.	Increased agitation; anxiety; acting out.	Provide scheduling information so participants know what will be expected of them and when. Prioritise those who appear before you and when. Those who are especially anxious may have the most trouble waiting and be more likely to act out.
A judge conducts a sidebar conversation with advocates.	Suspicion, betrayal, shame, fear.	Tell participant what is happening and why. "We have to discuss some issues related to your case. We just need a minute to do it on the side."
"Your test came back dirty."	"I'm dirty." "There is something wrong with me."	"Your drug screen showed the presence of drugs." "Your drug test was positive."
"Did you take your meds today?"	"I'm a failure. I'm a bad person. No one cares how the drugs make me feel."	"Are the medications your doctor prescribed working well for you?"
"You didn't follow the contract. You're going to gaol. We're done with you. There is nothing more we can do."	"I'm hopeless. Why should I care how I behave in gaol? They expect trouble anyway."	"Maybe what we've been doing isn't the best way for us to support you. I'm going to ask you not to give up on recovery. We're not going to give up on you."
"I'm ordering you to get a mental health evaluation."	"I must be crazy. There is something wrong with me that can't be fixed."	"I'd like to refer you to a doctor who can help us better understand how to support you."

12 SAMHSA, "Essential components of trauma-informed judicial practice: what every judge needs to know about trauma", 2013 at www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf, accessed 18 August 2021.

Vicarious trauma

Trauma affects not only the victims, witnesses, and litigants who appear in court, but also judges and other court staff. Vicarious trauma is defined as "repeated or extreme exposure to details of the event(s)".[13] Repeated exposure to pictures or videos (such as autopsy photos; a dead body at a crime scene; the results of an assault) qualifies as vicarious trauma if it is related to work. Anyone who regularly works or appears in courts may be exposed to this kind of repeated exposure to graphic photos, videos, or testimony about horrific events.

The symptoms of vicarious trauma are closely related to post-traumatic stress disorder (PTSD) so that judges, court personnel, or jurors who sit through child abuse, domestic violence, or other case types providing graphic details of someone else's traumatic experience are at risk. Their need for treatment options is being recognised by many State court systems.[14]

Conclusion

Many court participants are trauma survivors. Judicial understanding and acknowledging of trauma helps to engage participants in services, treatment, and judicial interventions, whether or not they have a trauma-related or other mental health diagnosis. Communicating effectively and respectfully with treatment court participants, eliminating unnecessary court procedures that could be perceived as threatening, and modifying the physical environment to create a sense of safety can help to ensure that trauma survivors benefit from judicial interventions.[15]

13 APA, Diagnostic and statistical manual of mental disorders, 5th edn, Exhibit 1.3–4.
14 National Center for State Courts, "Trauma and State Courts," 2018, at www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2018/Trauma-and-State-Courts.aspx, accessed 18 August 2021.
15 SAMHSA, above n 12, p 9.

Adopting a trauma-informed approach in the District Court of NSW*

His Honour Judge W Hunt†

His Honour Judge Warwick Hunt observes that a trauma-informed approach in a criminal trial must take into consideration the overriding need to ensure a fair trial for the accused.

Judge Peggy Hora outlines her views on the needs of court users affected by trauma and proposes some anecdotal techniques for modifying judicial practice to meet the sensitivities of such persons. Such adjustments are expressed as being a part of a "trauma informed courtroom". Judge Hora acknowledges the limitations of such practices under relevant regulatory restraints in particular States within the American judicial system.

This article aims to comment on the desirability of such adjustments within the judicial context of NSW. It is uncontroversial to most, if not all, judicial officers, that many people interacting with our courts are affected by trauma, whether experienced in childhood or more recently, or both (putting to one side for current purposes, practitioners and judicial officers). Without limitation, classes of such persons which come readily to mind include victims and complainants of sexual and violent offending, parents and children involved in the care and protection regime and those who otherwise suffered intensely dysfunctional upbringings. It is important to have in mind that accused persons, offenders and other defendants will often have conditions invoked by past and present trauma. Often in criminal trial proceedings, putting fitness issues to one side, the judicial officer will either never know about the offender's past trauma or only learn of such matters at the sentence stage, if relevant.

Various models exist in our system within which the "trauma informed" approach might be more easily met than in traditional court settings. Circle sentencing in some Local Courts, the Drug Court of NSW and the new Youth Koori Court all come to mind. Another initiative which

* Published in (2020) 32(3) *JOB* 14.

† District Court of NSW

seeks to address potential further trauma to juvenile complainants is the metropolitan trial in the District Court concerning the early pre-recording of evidence with the assistance of a witness intermediary.[1]

It is to be accepted that judicial officers can require advocates to have in mind the vulnerabilities of particular witnesses, including those brought about by past trauma or the trauma of the proceedings themselves. In my experience, many judicial officers intuitively amend their own communication style to make the courtroom experience less confronting and more explicable to such court users. It is worth observing that sometimes the advocates themselves might have undisclosed vulnerabilities, due to psychological issues, grief or the strain of continually litigating particular types of cases; criminal cases involving allegations of child sexual assault and child pornography are relevant examples.

Adjusting processes to meet the needs of the vulnerable is important, as is maintaining balance. It must be kept firmly in mind that most legal cases involve adversarial processes and sometimes alteration of process to meet the needs of a vulnerable witness will unfairly impact on the rights of a party to fairly and fully test the evidence. I suggest that if processes need to be altered to meet the need of a particular witness, issues of competence and capacity need careful consideration.

It is well understood that giving evidence about alleged sexual misbehaviour can of itself be re-traumatising. Requiring a proper level of delicacy and restraint by advocates is important in a case where such allegations are central. In a slightly different context, it often emerges in evidence on sentence that an offender reports a history of being sexually abused. In this circumstance, when an offender elects to give evidence about such events, I often ask the lawyers whether objection will be taken to my first asking questions on that issue. If the offender has provided details of the alleged abuse to an assessing professional, I often take the view that the offender does not need to be robustly examined or cross-examined on the intimate details, at the risk of further trauma. My experience, borne by working in the area of historical child sexual abuse in a variety of capacities, is that there is a way to test the veracity of such claims by offenders by exploring peripheral detail with an eye to the emotional resonance of the witness with the details explored. In this way, I consider a trauma-informed approach can fit within the fairness dictated.

Judge Hora's article seems to suggest some modifications to language and process that trespass on the formality of processes mandated to ensure fairness. For those who are interested, a nuanced consideration of the countervailing issues in this area can be found in a recently published article by Rhondda Waterworth.[2]

1 The Child Sexual Offence Evidence Program Scheme commenced on 31 March 2016 in the Sydney District Court. The Scheme has been extended to 30 June 2022.

2 R Waterworth, "Measuring legal actor contributions in court: judge's roles, therapeutic alliance and therapeutic change" (2019) 28 *JJA* 207.

The trauma-informed approach of the Drug Court of NSW*

His Honour R Dive†

Many aspects of the late Judge Peggy Hora's article, "The trauma-informed courtroom",‡ have application to the Drug Court program. This is not surprising, given the Drug Court concept is both her specialty and legacy. The following article outlines how the Drug Court adopts a trauma-informed approach when interacting with those who appear before the court and undertake the program.

The impact of knowledge

The Drug Court of NSW has many opportunities to conduct a successful trauma-informed court. Our level of contact with participant offenders, our co-operative arrangements with treatment partners, and our ability to share information between members of the team, all combine to ensure the judge knows so much more about the participants than a judge in any traditional court case. A Drug Court judge, after imposing an initial sentence, can then seek to establish a therapeutic relationship with the participant, aided by a broad range of services and support.

The Drug Court has recently intensified efforts to garner as much relevant information as possible from the beginning of the program rather than finding out about mitigating circumstances at the end. We have information drawn from Health Services and Community Corrections, together with the defence's instructions. There is then an opportunity to use that information to guide the interaction with the participant.

A young Aboriginal woman recently started the program. I was informed about the chaotic circumstances in which she was raised including drug use and violence, removal from her parents at age seven, and an interrupted and limited schooling. She was sexually assaulted when she was four years old and then again at 10.

At her first "report back" to the court this week, the court was told that she had failed to provide a urine sample, which is a breach of the program. She had been unable to provide the sample

* Published in (2020) 32(3) *JOB* 19.

† Former Senior Judge, Drug Court of NSW (2004–2021).

‡ Published (2020) 32(2) *JOB* 11.

in front of a male nurse. She had however provided urine samples for her next two tests. The prior information of her trauma background could then guide the court's response, so she was praised about the successful provision of two samples, and we talked about seeing the nurse as a medical professional, not a man or a woman. We even shared a smile about the Drug Court being a bit like going into hospital — you leave your dignity at the front door.

Knowledge of the participants makes a significant difference as it broadens judicial perception and engagement with them. Another example is a physically imposing man in his 40s whose appearance is matched by a fierce and dogmatic style of interaction. Any conversation with him can quickly deteriorate into being combative, which becomes tiring each week. However, because he grew up with, and still lives with, his vitriolic and alcoholic mother, and there has never been any love or nurturing in his life, it is far easier to speak with him each week because of this knowledge. Our interactions are generally quite satisfactory; he is progressing well and I am sure I deal with him more gently and successfully because I know about his miserable personal life.

Engagement in treatment

The research tells us that every positive treatment episode is valuable, and that even a short period of engagement in treatment can lead to improvements in both physical and mental health. It is surprisingly common for drug-addicted offenders to come to the Drug Court without having had the benefit of any previous treatment in the community.

Even after many years in the Drug Court, I remain surprised at the level of honest and committed engagement by the participants with the program. Of course, many start the program with the obvious and sensible goal of getting out of prison, and have no particular intention to give up drugs and crime, or perhaps any belief that it would be possible, after using for 30 years, to do so. At graduation from Drug Court, I have often been told, in conspiratorial tones, that "I just wanted to get out of gaol, but I found the program good, and so I decided to stay".

Interactions with the judge and court may be quite guarded and closed initially. This is understandable, and perhaps quite a sensible attitude, from someone who feels let down, or even significantly damaged, by others who have been in a position of authority to her or him. So while it might appear unusual that I always ask after "Blue" the dog, or tease another participant about the failure of his Rugby League team to fire on the weekend (an avenue now lost!), that discussion about the dog or the football is one they can willingly engage in. So part of "Karen's"[1] report back is always about how Blue is progressing towards being certified as an Assistance Dog for her anxiety. Throughout that engagement we are building trust with a figure in authority, perhaps for the first time.

We may start with report backs which are very difficult for the participant to endure, to the situation whereby participants are reluctant to only see the judge once a week when their progress on the program now warrants fortnightly meetings.

1 Not her real name.

Empowerment

Judge Hora writes about "six key principles" of which one principle is "empowerment, voice and choice".[2] A new expectation that they take charge of their lives can be quite confronting to Drug Court participants and achieving a level of empowerment can cause some chaos in their lives.

For example, it can be the case that they have, perhaps for many years, blamed all manner of agencies and others for their plight. So the police, the courts, parole authority and the partner are why so many things have gone wrong. Suddenly there is a judge saying, "What more can we do? You have accommodation now, you are working well with your counsellor, you enjoy working at Parramatta Mission. You told me you shouldn't go back into Liverpool. Are we missing something?" And the only truthful answer is "nothing", because they have to take control and responsibility. From the bench, you can actually see how disconcerting it is to be faced with the realisation that there is no-one else to blame today.

The second stage of that realisation is seeing clearly, perhaps for the first time, how destructive their partner, parents or siblings are. A participant recently was trying hard to succeed and was very motivated to become drug free so he and his partner could seek the restoration of their young child to their care. He was shocked to find that the child's mother had no intention of giving up drugs, or taking up the assistance we could arrange for her. He was shocked to now see that there was no real substance to their relationship at all, apart from using drugs and the excitement of committing crimes together to fund their habits.

Conclusion

Being informed about the trauma our clientele have suffered has a profound effect upon our work at the Drug Court. The young woman described above may well struggle to do the program, but I will always see those struggles through the prism of her appalling childhood. She may not turn up for appointments, and she might not be home by 7 pm. I will however be able to judge those breaches armed with the background knowledge of a childhood marred by trauma and dislocation. She is now both a "project" and a challenge and that makes my work a privilege to undertake.

2 P Hora, "The trauma-informed courtroom" (2020) 32 *JOB* 11 p 12.

The trauma-informed approach of the NSW Youth Koori Court*

Her Honour Magistrate Susan Duncombe†

"It feels good. And like, since I've started with Koori Court I've just been less angry at the world. I actually feel happy coming to court, not leaving angry. So they pushed me into a good headframe and I started thinking twice before I do things." [Youth Koori Court participant]‡

Every day, in every court in NSW, consideration is given in sentencing to the need for specific and general deterrence.[1] There is a focus on the need to protect the community from offending by deterring a person who has committed an offence from doing so again (specific deterrence). There is also a focus on deterring others from offending by the imposition of a sentence which in itself is likely to deter future offending of that type (general deterrence).

In addition, the Children's Court of NSW has specific principles which it must consider in every function it undertakes. Those principles include a young person's right to be heard and participate in the proceedings, the fact that they may need guidance and assistance and that their rehabilitation should be promoted including by keeping them at home and/or in education or employment wherever possible. It is only subject to these principles that the court must then consider the effect of any crime on the victim.[2]

What if the court process itself could assist in achieving these goals and honouring these principles? The movement towards "therapeutic courts" and "problem solving courts" has in a large part been driven by these goals. There is a belief which has supported the growth of a movement[3] that a different way of dealing in court with people who have admitted their crime or crimes could itself lead to less offending in the community and at the same time promote the rehabilitation of the offenders.

* Published (2020) 32(3) *JOB* 21, updated 2021.
† Children's Court of NSW.
‡ Extract from transcript of proceedings, Youth Koori Court (YKC), August 2019.
1 *Crimes (Sentencing Procedure) Act 1999*, s 3A.
2 *Children (Criminal Proceedings) Act 1987*, s 6.
3 International Society for Therapeutic Jurisprudence at www.intltj.com, accessed 19 August 2021.

With these principles and beliefs in mind, the Youth Koori Court (YKC) has now been operating on a pilot basis since 6 February 2015. It began sittings at the Parramatta Children's Court and has been extended, as of 6 February 2019, to also operate at the Surry Hills Children's Court. The experience to date has proven very challenging and very rewarding.

The YKC has made some critical modifications and additions to the way in which the court operates as follows.

Respect for culture

At the heart of the YKC is the acknowledgement and respect offered to the Aboriginal and Torres Strait Islander people of Australia. The goals of the YKC include a desire to "increase Aboriginal community, including Aboriginal young people's confidence, in the criminal justice system in NSW".[4]

The YKC aims to achieve this objective in a number of ways. Most importantly, the judicial officer is assisted in court by at least one community panel member who is a respected person in the community and who has been appointed by a rigorous selection process.[5] Every court sitting, with every young person, begins with a welcome or acknowledgement of the country on which the court sits by both the community panel member and the judicial officer. The young person is introduced to everyone in the court room and is encouraged to introduce himself or herself by reference to culture as well as name.

All young people admitted to the YKC are involved in the preparation of an Action and Support Plan. An integral part of each plan includes an opportunity for expanded cultural connection, knowledge and/or participation in cultural activities. The YKC has been able to assist young people to attend cultural workshops, cultural camps, participate in cultural activities in NAIDOC Week and, at the invitation of some Elders, visit culturally important sites in NSW.

Design of the court room and the court process

There is no special court yet designed for the YKC in NSW. The court convenes around the bar table in a normal court room. There are, however, hung on the walls of the courtroom the paintings of young Aboriginal people in juvenile detention on permanent loan to the YKC.

In general, the judicial officer is not robed during YKC proceedings with two exceptions. Whenever there is a sentence, the judicial officer will pronounce that sentence from the bench

4 YKC goals also include reducing the rate of non-appearances by young Aboriginal offenders in the court process in NSW; reducing the rate of breaches of bail by Aboriginal young people in NSW; and increasing compliance with court orders by Aboriginal young people in NSW: see S Duncombe, "NSW Youth Koori Court Pilot Program commences" (2015) 27 *JOB* 11.

5 Following funding from the NSW Government in 2018, the community panel members are now entitled to payment for their attendance at the court. From 2019 onwards it is usual to have two panel members sitting in the court.

and is robed. Similarly, if there is a release application, the submissions from the prosecution and the defence will be heard by the presiding judicial officer who is robed and sitting on the bench.

All other parts of the YKC involve a less formal sitting around the bar table with the young person. The judicial officer sits with one or two community panel members who have been selected for that purpose. In addition, there are representatives from Youth Justice, the YKC case coordinator, the prosecution and the solicitor for the young person as well as her or his family or supports. A representative from the Department of Communities and Justice is often present (when the young person is in the care of the Minister). Representatives from agencies supporting the young person will also often attend with the young person.

The role of the YKC judicial officer

In addition to the roles normally performed by judicial officers in court, the YKC judicial officer must observe cultural protocols, facilitate conversations with all people present, allow time and space for a young person to speak for themselves (without forcing them to so do), respond to particular needs or concerns of young people, time manage to ensure there is sufficient time for each young person to be heard and, if necessary, manage any tensions or anxieties exhibited by the young person and/or his or her family.

In many cases, there are difficult conversations around the YKC table. It is for the judicial officer to manage those conversations and, if necessary, acknowledge and then re-direct the focus from alleged failures to future behaviours. The skills learned from the mediation profession have been utilised by the judicial officers on a regular basis. These skills include listening (including active listening), involving the creation of an environment where the young person can speak about their challenges and have those challenges recognised and acknowledged by the court. As a young person is not directed to attend a particular program without their consent, it is often necessary to encourage option generation to address any particular area of concern and the intervention needed to address that concern.[6]

Mediators are encouraged to reframe negative conversations to allow an issue to be discussed and potentially resolved. This skill is often employed by the judicial officers, consciously or unconsciously, throughout the process. In a recent case the following exchange occurred:

Family member:

"He has always felt he wasn't as good as his brothers. He felt he had to prove himself and when he couldn't, he started acting out."

Judicial officer:

"One of the challenges for us is to help you find what is special about you and what your interests and talents are."

6 For example, in one case the judicial officer stated: "If you are not ready to do counselling, how can you address the issue of cannabis use? Any ideas from anyone around the table?".

Conclusion

Since the court commenced operating, more than 180 young people have had the opportunity to benefit from the supports and encouragement offered by participating in the YKC. Not all young people are ready to accept those supports and make the changes necessary for them. Those who have made changes have benefited from the rewards including increased self-esteem, recognition from the community of their successes, ongoing support (during and after YKC) from family and/or agencies and individuals. The YKC is being evaluated again during 2020–2021 with a report due in 2022. In the meantime, we continue this important work in the knowledge that young people have opportunities to change and that the process itself contributes to the efforts they make.

> "It's more supportive, heaps more. The support is more intense. You are talking to the judge. The judge knows what's going on, not just reading the papers about you."[7]

7 Feedback from a young person, 2016.

The trauma-informed barrister*

Mr S McCarthy†

The following article outlines the author's five key strategies in representing trauma-survivors. A trauma-informed approach to representing survivors of childhood abuse in personal injury claims has led the author to modify verbal and non-verbal interactions with clients and expectations of how long conferences will take.

As barristers we see ourselves as problem solvers. In many ways we are like medical specialists. A client, having been referred by a generalist solicitor, sits almost reverently before us waiting upon a solution. As if holding up an x-ray to the light, we peruse the material, diagnose the problem and proclaim the solution. But one size does not fit all clients and there is one class of client where this approach is particularly ill-fitting.

My practice, representing the interests of plaintiffs and defendants in personal injury claims, now intersects with the area of historic childhood abuse. Many of my clients are First Nations people. I have come to realise that the Bar's conventional form of service provision does not work very well for these people. Almost all of these clients, now adults, have suffered horrific childhood abuse that has manifested itself in psychiatric injury.

The trajectory for survivors of child sexual abuse seems to be remarkably consistent. While causation is an issue in almost every case, the abuse arguably creates severe psychiatric symptomology which in turn leads to substance abuse. This often leads to negative interaction with the criminal justice system, and to a lifetime of profound socio-economic disadvantage. It is at this juncture of a survivor's life that he or she first encounters the civil justice system and in particular, counsel. This is a unique cohort for whom unique legal services must be supplied.

So what must we do differently to harness the full potential of a case seeking a remedy against what is usually an institution? In my experience, the unique services that these people are entitled to can be broken down into five strategies.

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† Sir James Martin Chambers. Shaun McCarthy is a barrister who has practised predominantly in NSW for over 20 years. Among other practice areas, he appears for both plaintiffs and defendants in the area of historical child abuse.

Investment

Usually I am the first civil barrister that the client has ever met. The client is often nervous, if not terrified. Am I friend or foe? But barriers can be quickly broken down by the simplest acts of humanity. Everyone has something in common with everyone else. You just need to have an interest in identifying what it is. Perhaps it is a football team, a town that we have both visited, or even disdain for Sydney traffic. It only takes a minute to establish one uniting interest, another to chat about it and perhaps even a laugh will follow. For an investment of a few minutes of enjoyable human interaction, trust has been built and the question has been answered. I am a friend.

Modify

People who have suffered sexual abuse are, understandably often quite paranoid. But we can work around that. Do I really need to close the door? If I don't, why not leave it open? The means of escape is then easily recognisable. What about the seating arrangements? An abuse survivor will almost invariably feel uncomfortable if his or her back is to the door. But that is easily fixed. The client should be seated so she or he can see the door. And do I really need to sit at my desk? What message does it send when I choose to place a large slab of oak and leather between myself and the client? In my chambers I have a sofa and an arm chair. This is often where we talk. Now there is nothing between us. Just a couple of people having a chin wag. The solicitor takes notes at my desk. The discussion then flows organically. The difficult history is taken, not painlessly, but without any unnecessary pain.

And what about my room? Is it really a good look for it to be cluttered with the outstanding causes of many other clients? Do cluttered chambers send the message to the client that far from having my full attention, he or she are just another spoke in the legal wheel? I think so. One visibly open brief at a time is a way of conveying to the client that the only thing in the world I care about at that moment is "you".

Dress

We need to dress for the comfort of our clients, not ourselves. What extra piece of information has a suit and tie ever procured from an abuse survivor? What does a client really think when he or she is staring at an Italian suit? I know the answer. The client feels intimidated, often embarrassed and underdressed. An unnecessary barrier has been constructed. So the jacket and tie remain in my robing cupboard and an open neck is presented. Finally, nothing is gained, but plenty is lost by misplaced elocution. People who live in Walgett or Wee Waa rarely use words such as "bifurcation" or "interlocutory" but they very frequently use words like "bullshit" and variants of another word beginning with the sixth letter of the alphabet. These are real words too. They have meaning but more importantly, the clients know what these words mean. And so do I. So why not use these words? Colloquialisms and even expletives are useful levellers and can radically improve the quality of communication in these very difficult cases.

Patience

Every new client has a very important story to tell. If there is one cardinal rule in liaising with (or even against) trauma survivors, it is let the story be told and told in full. The client has

waited a long time (often decades) for this day to come. So whatever else your day holds, it can wait. It is good practice to allow at least two hours for initial conferences with abuse survivors. There is no point in trying to pack six of these conferences into a day as that will only end with six untold stories and six people let down yet again by an authority figure.

Protect

Despite the cocoon now constructed, an adversarial war still rages just metres away in the law courts of Queen's Square. As lawyers, it remains our primary obligation to extract the best possible outcome for our client. But unless the case actually goes to trial (and very few do) the client should never be stationed on the front line. It is our job to take the bullets. The last thing a trauma survivor wants to hear about is legal machinations. Such matters can be the cause of deep anxiety to the client who will first catastrophise the news before ruminating over it. While a vaccination for jurigenic harm[1] is yet to be developed, the abuse survivor should rarely have to watch the legal sausage being made.

Close

"Settling" a case for a trauma survivor is conceptually very different to "closing" it. The transfer of a large sum of money from a guilty tortfeasor to a blameless plaintiff is the traditional measure of success. But money alone does not close these wounds and the traditional role of counsel must be flexible to fit the bill. Counsel must be prepared to depart from our lane to deploy the pastoral services necessary to help close the wound. Most institutions employ very skilled apologists who, if the time is right, can deliver a moving address to assist the client moving forward. Then it is time for counsel, the person to whom the client usually looks up to the most, to tell him/her something very important that may not have yet dawned upon the client:

> You have won! Despite everything they did to you, you stood up to your abusers and you came out on top. They did everything they could to break you but you were too strong for them. You could not be broken. There is now nothing left in your life that you cannot achieve. Thank you for allowing me the honour to represent you and thank you for the inspiration that your courage has provided to me.

Sometimes words carry great power.

This unique work is not without its unique rewards. To cite one recent example, Tracey[2] was brutally raped as a young girl by a group of older boys and men and was also raped in her adult life by various partners. She developed an intense, clinically diagnosed hatred of all men. I had worried that I may not be the best fit for Tracey's case for obvious reasons. Ultimately Tracey's case was settled at a mediation for a reasonable monetary sum. Then we had a long chat. As Tracey was leaving my chambers, she approached both myself and my male instructing solicitor. She paused, burst into tears and gave us both long, tight hugs. At that moment, I understood, more clearly than at any previous time, what it meant to be "called" to the Bar.

1 Just as iatrogenic harm is caused medically by doctors and hospitals, jurigenic harm is caused by judicial officers.
2 Not her real name.

Measuring legal actor contributions in court: judges' roles, therapeutic alliance and therapeutic change*

R Waterworth†

The court can be conceptualised as a point of intervention in the lives of offenders as well as their families, social networks and communities. It therefore seems reasonable to investigate what a judge (or other legal actors) can contribute to this interaction and to find ways it can be effectively measured. This article articulates a behaviourally anchored description of a judge's contribution in a courtroom interaction between a judge and a defendant that would have the best chance of facilitating therapeutic change for a court participant. The description is based on a review of the therapeutic jurisprudence literature, procedural justice and legitimacy of justice literature, a brief review of types of therapy that could be effective in a courtroom setting, and research into the common effective denominators in therapy outcomes, most notably the literature on therapeutic alliance and therapeutic change. The article concludes with a brief rating scale designed to quantitatively measure the desired judicial behaviours in open court.

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Introduction

As described in the therapeutic jurisprudence (TJ) literature and more recently discussed in the popular press, in addition to delivering judgments, enforcing legal norms and protecting the community, the court may be conceptualised as a public health intervention entry point in the lives of offenders as well as their families, social networks and communities.[1]

Additionally, the act of observing an event necessarily changes it.[2] Given this, it seems reasonable to investigate what a judge (or other legal actors) can contribute in court to make the best therapeutic use of this opportunity for intervention and to find effective ways it can be measured.

This article reviews the literature regarding the common important determinants of therapy outcome, TJ, procedural justice (PJ) and legitimacy of justice (LJ), alongside a brief discussion of the therapeutic modalities available to the courtroom setting.

Descriptions in the TJ, PJ and LJ literature of an effective and therapeutic juridical intervention tend to be based on ideals and concepts.[3] Some have included brief descriptive examples of ways to intervene effectively, linked to the psychological literature on therapy intervention types[4] and improving sentence adherence;[5] all are aimed at having a positive impact on the lives of offenders and reducing recidivism.

However, as noted by other authors, in regards to the question of "what works" when evaluating court programs, the contribution of legal actors has been a particularly amorphous concept to operationalise.[6] At times the overlap and convergence of these ideas can be reminiscent of the Indian proverb of the blind men each describing their own part of an elephant, with the "elephant" being what exactly a judge should do to have a therapeutic impact on their defendants.

Taking the pragmatic starting point of "what works to effect therapeutic change in a courtroom?", this article develops a basic behaviourally-anchored description of what a judge can, and arguably should, contribute to a courtroom interaction to facilitate a therapeutic change for a defendant. This description includes the procedures, behaviours and statements identified from the major therapeutic legal movements as important to client change and adherence to judgments, as well as suggestions for ways to measure the therapeutic alliance as it could exist

1 B Babb and J Kuhn, "A therapeutic, holistic, ecological approach to family law decision making" in B Winick and D Wexler, *Judging in a therapeutic key: therapeutic jurisprudence and the courts*, Carolina Academic Press, 2003, pp 124, 129; M King, *Solution-Focused Judging Bench Book*, AIJA Inc, 2009, p 73.

2 See, eg, M Sassoli de Bianchi, "The observer effect" (2013) 18 *Foundations of Science* 213.

3 E Richardson, P Spencer and D Wexler, "International framework for court excellence and therapeutic jurisprudence: creating excellent court and enhancing wellbeing" (2016) 25 *JJA* 148.

4 King, above n 1.

5 M King, "Therapeutic jurisprudence in Australia: new directions in courts, legal practice, research and legal education" (2006) 15 *JJA* 131. B Winick, "The judge's role in encouraging motivation for change" in B Winick and D Wexler (eds), *Judging in a therapeutic key*, Carolina Academic Press, 2003, p 182.

6 R Waterworth, "The case for measuring legal actor contributions in court proceedings" [2018] *Psychiatry, Psychology and Law* 1.

within a courtroom setting. The article also outlines a basic qualitative measure designed to be used in open court (mainstream or specialist) to capture this contribution. This measure is not exhaustive and is designed as a starting point for dialogue regarding judicial contributions to therapeutic change; it could also be used as a base for future add-on measures designed to capture interactions in specialist courts.

The role of judges

Despite judicial roles and actions being culturally and legally determined,[7] core judicial competencies that relate to the judge's role in upholding individual rights and freedoms could be viewed as independent of culture or jurisdiction.[8] These are: adjudication; investigation; and delivering and authorising coercive sanctions.[9] As observed by Scott,[10] the role of the judge has been slowly evolving to also include motivating and improving the possibility of treatment and personal change for litigants. Supporting this from a legislative perspective, most common law jurisdictions include rehabilitation goals in their sentencing legislation and procedures.

Therapeutic jurisprudence and a judge's role

The law has a potential to be a healing agent, as does a courtroom. The TJ literature unanimously describes judges as active therapeutic agents and the focus of a TJ judicial intervention as to create positive outcomes for court participants.[11] As a judicial approach based only on observation does not improve recidivism outcomes for court participants,[12] the judicial officer is cast as an active facilitator of change. In addition to traditional judicial roles, from a TJ perspective the judge would also support a court participant to engage in their own natural change process, and the court process would become a facilitator of change and potentially also participant empowerment.[13] From this perspective, judges and lawyers could be viewed as creative problem-solvers, in pursuit of peace to conflictual situations.[14]

King[15] has provided an exhaustive definition of the role of a judge in a therapeutic court, which has been refined by later authors.[16] In addition, the judicial role has been described variously as analogous to a coach,[17] project manager, mentor, confessor, cheerleader,[18] motivator,

7 J Hodgson, "Conceptions of the trial in inquisitorial and adversarial procedure" in A Duff et al (eds), *Judgement and calling to account*, Hart, 2006, pp 223–242; D Salas, "The role of the judge" in M Delmas-Marty and J Spencer (eds), *European criminal procedures*, CUP, 2002, pp 488–540.
8 Salas, ibid.
9 Hodgson, above n 7.
10 C Scott, "Judging in a therapeutic key: therapeutic jurisprudence and the courts" (2004) 25 *Journal of Legal Medicine* 379.
11 ibid at 384.
12 A Freiberg, "Australian drug courts" (2000) 24 *Crim LJ* 213 at 219; King, above n 1, pp 13–14.
13 See Waterworth, above n 6, at 26.
14 W Schma, "Judging for the new millennium" (2000) 37 *Court Review* 90 at 94–96; D Stolle, D Wexler and B Winick, *Practicing therapeutic jurisprudence: law as a helping profession*, Carolina Academic Press, 2000.
15 King, above n 1.
16 Richardson, Spencer and Wexler, above n 3.
17 King, above n 1.
18 P Hora et al, "The importance of timing" in B Winick and D Wexler, *Judging in a therapeutic key: therapeutic jurisprudence and the courts*, Carolina Academic Press, 2003, p 178.

problem-solver, monitor of progress[19] and transformative leader,[20] utilising the transformational leadership methods of inspirational motivation, idealised influence, intellectual stimulation and individualised consideration.[21]

Guiding principles for judges

Importantly, rehabilitation for an offender in a courtroom is not just the absence of offending; it includes the necessary changes that will enable that person to lead a healthy and fulfilling life.[22] Generally, the court is seen as a facilitator of change rather than forcing or obliging the individual to change.[23]

Judicial intervention, as noted by multiple TJ authors but most notably King, should also include evidence-based strategies to improve outcomes for court participants.[24] The basic principles from a psychological perspective that increase motivation and positive behaviour change include self-determination, PJ and health compliance principles.[25]

TJ emphasises processes that encourage self-determination for court participants so as to avoid increasing resistance and potential resentment of the judicial process.[26] TJ also encourages responsible use of the power that judges wield,[27] to practice with an ethic of care[28] and act as role models for other legal actors, as well as setting the tone for other court staff in their interactions with the defendant.[29] Judges are expected to have a positive impact on the people appearing before them and their communities, with the court as a possible facilitator of healing.[30]

As noted above, most TJ descriptions of judging have been theoretical and goal based, rather than behaviourally anchored. However, King operationalised the TJ literature goals into a description of the ideal solution-focused judge,[31] and more recently Richardson, Spencer and Wexler[32] articulated a model for measuring TJ court processes that included a description of TJ judging in the criteria for court excellence.

19 C Petrucci, "The judge-defendant interaction: toward a shared respect process" in B Winick and D Wexler (eds), *Judging in a therapeutic key: therapeutic jurisprudence and the courts*, Carolina Academic Press, 2003, p 263.
20 King, above n 1.
21 B Bass and R Riggio, *Transformational leadership*, Lawrence Erlbaum Assocs, 2006; W Bennis and B Nanus, *Leaders: strategies for taking charge*, Collins Business Essentials, 2005.
22 King, above n 1, p 5.
23 W Miller and S Rollnick, "What is motivational interviewing?" (1995) 23 *Behavioural and Cognitive Psychotherapy* 325.
24 King, above n 1, p 3.
25 King, above n 1, p 26.
26 King, above n 1, p 5.
27 Scott, above n 10.
28 R Warren, "Public trust and procedural justice" (2000) 12 *Court Review* 132 at 135; W Schma, "Judging for the new millennium" in B Winick and D Wexler (eds), *Judging in a therapeutic key: therapeutic jurisprudence and the courts*, Carolina Academic Press, 2003, p 91.
29 See Waterworth, above n 6 at 10.
30 See Waterworth, above n 6 at 9.
31 See Waterworth, above n 6.
32 Richardson, Spencer and Wexler, above n 3.

Judicial communication — what does TJ say a judge should do?

TJ recommendations for judicial behaviour include problem-solving courts and also, more recently, the mainstream courts.[33] Judges in problem-solving courts have a context that allows them to (in theory) implement many more types of therapeutic interactions. Mainstream judges at face value do not. However, the mainstream TJ movement describes ways to implement TJ imperatives in mainstream courtrooms.[34] The solution-focused judging skills described by King (below) would be difficult to generalise to mainstream court settings due to practical limitations, and King acknowledged that at times there would be tension between the different considerations involved in judging in a problem-solving court context. For example, the need to promote positive behavioural change and improved wellbeing is counter balanced by the need to hold participants accountable for their actions and to maintain the integrity of the court program. Encouragingly, there are common elements from the description of solution-focused judging and the psychological intervention literature, which are accessible to mainstream judges and desirable to implement in mainstream courtrooms.[35] This article examines these in greater depth to better inform the behaviourally anchored description of desirable judge interactions.

Stages of interaction

As discussed by King,[36] the relationship between a judge and a client can be broken down to introduction, development and conclusion. As King noted, these stages have different purposes, but will use similar skills. These stages will also be present in an abbreviated form when there is a shorter interaction or limited judicial monitoring.[37]

The introduction phase of a hearing focuses on developing rapport, taking into account the likely challenging emotional state of the client and their potential history of difficulty in forming trusting relationships with authority or helping figures.[38] King cited theory from transformational leadership to make the highly relevant point that trust must be earned, even in a courtroom.[39]

During this phase, basic communication techniques, such as active listening, utilised in a patient and sensitive manner is best;[40] for example, starting with general questions, and identifying any steps the defendant has taken to address the issue and recognising these.

33 D Wexler, "Moving forward on mainstreaming therapeutic jurisprudence: an ongoing process to facilitate the therapeutic design and application of the law", Arizona Legal Studies Discussion Paper No 15, The University of Arizona, 2014, at www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj, accessed 18 October 2021.
34 Wexler, ibid.
35 See Waterworth, above n 6, at 184.
36 King, above n 1, p 158–159; M Clark, "Change-focused drug courts: examining the critical ingredients of positive behavioural change" (2001) 3 *National Drug Court Institute Review* 35.
37 King, above n 1, pp 158, 737.
38 King, above n 1.
39 King, above n 1, pp 158, 738.
40 King, above n 1.

Solution-focused judging

King adapted the leadership theory definition of transformational leadership to recommend the following behaviours in an effective solution-focused judge:[41]

- Individualised consideration, which could be demonstrated by showing a strong interest in the participant, utilising effective listening skills (active listening), effective communication skills, practicing an ethic of care towards defendants, asking about positive life events and also about the individual's progress, as well as being empathic when discussing problems or failures. Also, utilising strategic discussions to empower participants via collaborative problem-solving rather than imposing external solutions.[42]
- Idealised influence, which could be demonstrated by encouraging self-determination and self-efficacy, putting goals and strategies in place, having realistic but high expectations of a defendant.
- Inspirational motivation, which could be demonstrated by allowing participants to set their own goals, publicly validating the participant's intrinsic worth and their ability to return to the community, and officially endorsing their goals and offering practical help in meeting these.
- Goal setting (where positive behaviour change is an aim of the process),[43] explaining, negotiating, cautioning, warning, positive encouragement and active listening, and including client responses in judgments.[44]

As King notes, different leadership styles are associated with differing levels of follower satisfaction and transformational leadership is most effective.[45] Unfortunately, mainstream judging tends to operate as management by exception, which is the least effective management style.[46]

Specific communication skills

Effective communication has been eloquently described as commitment to the person and commitment to the message.[47] It is viewed by TJ authors as vital to effective judging.[48] Communication includes both verbal and non-verbal elements, which are equally important to effective communication skills. As noted by Porter,[49] observations of trial judges (in Minnesota) found judges often used non-verbal behaviour that could be considered ineffective and about one-third used these behaviours frequently.

41 King, above n 1, p 37.
42 King, above n 1, p 138.
43 King, above n 1, p 138.
44 King, above n 1, p 148.
45 King, above n 1, p 146.
46 King, above n 1, p 146.
47 R Adler and R Proctor, *Looking out, looking in*, 12th edn, Thomson, 2007, p 32.
48 See Waterworth, above n 6, p 123.
49 L Porter, *Nonverbal communication in courtrooms at the Hennepin County Government Center: a report on observations of Fourth Judicial District judges in March and April 2001*, Hennepin Co, 2001, p 4.

Communication between a judge and a defendant has specific features not found in other settings. Effective non-verbal behaviour for solution-focused judges should include:[50]

- active listening — that is, allowing space for defendants to speak and refraining from interruption while they are speaking, asking clarifying questions to ensure the communication by the defendant is clear and well developed, and including relevant details so as to make sense to the listener[51]
- empathic or relational listening[52]
- reciprocity and dynamism[53]
- turn-taking
- connection
- co-creation of a narrative explanation of events and understanding of proceedings[54]
- connection between what each person says in turn
- space and support for participants to say what they need to say[55]
- non-stereotyping[56]
- mutual influencing[57]
- non-coercive communication[58]
- cognitive complexity — that is, an understanding of ideas, events and reasons in a way that integrates multiple elements and a nuanced understanding of the interaction of these[59]
- multiple lenses for problem formulation[60]
- appropriate self-monitoring and self-awareness on the part of the judge (but not to the point of distraction)[61]
- strategies to create effective dialogue via eliciting, challenging, clarifying and asking open questions[62] (generally, what questions are more effective and less confronting)[63]

50 See Waterworth, above n 6, p 30; K Freeman, *New South Wales Drug Court evaluation: health, wellbeing and participant satisfaction*, NSW Bureau of Crime Statistics and Research, 2002.
51 See Waterworth, above n 6, p 147; see also C Rogers and R Farson, "Active listening" in R Newman, M Danziger and M Cohen (eds), *Communication in business today*, Houghton Mifflin, 1987, p 589.
52 King, above n 1, p 139; K Halone and L Pecchioni, "Relational listening: a grounded theoretical model" (2001) 14 *Communication Reports* 59.
53 J Brownell, *Building active listening skills*, Prentice-Hall, 1986, p 5; also King, above n 1, p 121.
54 G Egan, *The Skilled helper*, 8th edn, Thomson, 2007, p 72; also King, above n 1, p 121.
55 Egan, ibid p 72; also King, above n 1, p 122.
56 King, above n 1, p 122.
57 ibid.
58 ibid.
59 Adler and Proctor, above n 47, p 32; see also King, n 1, p 122.
60 ibid; King, above n 1, p 123.
61 ibid
62 King, above n 1, p 72.
63 ibid p 126.

- body language that shows the judge is listening, including open body language and body gestures that indicate listening (such as head tilting, evaluative poses)[64]
- effective non-verbal prompts to encourage contributions from the defendant
- suggested format — ask open questions about wellbeing, then life events, then issue with non-compliance
- understanding of the impact of the context on anxiety, and the subsequent impact of this on communication[65]
- strategies to encourage participants to make sense of the proceedings — for example, focusing on one issue after another systematically
- effective non-verbal prompts
- care taken to limit negative statements about the defendant in open court so as to avoid creating defensiveness or a shame reaction that gets in the way of constructive change[66]
- care taken in discussions with other staff to limit legal jargon during discussions in front of the defendant, and[67]
- care to recognise achievements and not inadvertently discount these.

Legitimacy of justice and procedural justice

Any pragmatic discussion regarding what works from a judicial perspective in motivating and effecting therapeutic change for defendants must include a brief reflection on the concepts espoused by the LJ and PJ movements in order to be well anchored in the existing literature.

LJ is based on the observation that individuals participating in the justice system make judgments about the legitimacy of that justice system.[68] These judgments include an evaluation of the organisation(s) involved, an internalised belief regarding the effectiveness with which the authority polices the rules, and whether they should be co-operated with and obeyed.[69]

When an authority is judged to be legitimate, individuals accept the rules implemented by that authority, and defer to them due to a feeling of obligation, rather than expecting a reward or fear of punishment.[70] As could be expected, when an authority is not viewed as exercising legitimate authority, the reverse is true.[71]

64 ibid p 132.
65 ibid p 126.
66 ibid p 130.
67 ibid p 131.
68 T Tyler, "The psychology of legitimacy: a relational perspective on voluntary deference to authorities" (1997) 1 *Personality and Social Psychology Review* 323.
69 M Hough et al, "Procedural justice, trust and institutional legitimacy" (2010) 4 *Policing: A Journal of Policy and Practice* 203.
70 Hough et al, above n 69.
71 ibid.

Additionally, these judgments of legitimacy can differ between courts, and confidence in court systems differs depending on the type of courts involved.[72]

PJ describes the procedures involved in a justice-related decision-making situation, and the perceived fairness of these procedures and the treatment received by the decision-maker.[73] These can include subjective perceptions of being heard, being treated with dignity and respect, and receiving concerned and attentive treatment by the courts.[74] The experience of being heard by the court decision-maker has a strong influence on the assessment made by the participant as to whether the procedure is fair. If the defendant decides that the court process is fair, they are more likely to comply with directions or judgments made by the court,[75] which improves the therapeutic effect of interacting with the court.[76]

PJ communicates a message of respect and value to the individual, whereas unfair treatment can be experienced as devaluing that person's importance in the community.[77]

Perceptions of PJ can strongly influence whether an authority is perceived to be legitimate, and therefore the willingness of individuals to co-operate with that authority. For example, individuals are more likely to want to co-operate with police when they expect fair, respectful and impartial treatment.[78]

Social distancing

Adding further richness to the contextualisation of the influence exerted on court participants by the judiciary during court interactions is Braithwaite's theory of social distancing.[79] This theory observes that individuals evaluate authority over time and interactions, including their system of laws, how they enforce these laws and what their authority stands for. Social distancing theory notes that individuals develop their own position in relation to the authorities over time, based on the principles of social distancing, which describes the degree to which individuals have positive feelings for others and also towards institutions and legal systems.

72 S Benesh and S Howell, "Confidence in the courts: a comparison of users and non users" (2001) 19 *Behavioural Sciences and the Law* 199; H Kritzer and J Voelker, "Familiarity breeds respect: how Wisconsin citizens view their courts" (1998) 82 *Judicature* 58.

73 K Burke and S Leben, "Procedural fairness: a key ingredient in public satisfaction" (2007) 44 *White Paper of the American Justice Association, Court Review* 4; J Sunshine and T Tyler, "The role of procedural justice and legitimacy in shaping public support for policing" (2003) 37 *Law and Society Review* 513.

74 E Lind and T Tyler, *The social psychology of procedural justice*, Springer, 1988.

75 Lind and Tyler, ibid; also T Tyler and Y Huo, *Trust in the law: encouraging public cooperation with the police and the courts*, Russell Sage Foundation, 2002, p 248.

76 K Canada and V Hiday, "Procedural justice in mental health court: an investigation of the relation of perception of procedural justice to non-adherence and termination" (2014) 25 *The Journal of Forensic Psychiatry & Psychology* 321; T Tyler, "The psychological consequences of judicial procedures: implications for civil commitment hearings" (1992–1993) 46 *SMU Law Review* 401.

77 Lind and Tyler, above n 74.

78 K Murphy, L Hinds and J Fleming, "Encouraging public cooperation and support for police" (2008) 18 *Policing and Society* 136; Bennis and Nanus, above n 21, p 199.

79 V Braithwaite, "Criminal prosecution within responsive regulatory practice" (2010) 9 *Criminology and Public Policy* 515; V Braithwaite, "Dancing with tax authorities: motivational postures and non-compliant actions" in V Braithwaite (ed), *Taxing democracy: understanding tax avoidance and evasion*, Ashgate Publishing Ltd, 2003, pp 15–39.

According to Braithwaite, individuals engage in positioning motivational posturing whereby they position themselves in relation to legal authorities.[80] Those who are committed to accepting the authority (are aligned with that authority) are more likely to do the right thing by those authorities, and to feel a moral obligation to co-operate.

Others may put a greater distance between themselves and authority due to uncertainty about whether an authority will act appropriately to achieve its goals. Those who socially distance themselves from authority are more likely to show resistance towards the authority's rules or disengage from interactions with authority or laws.

Resistance to authority can be shown by expressing a right to challenge authority or policies or treatment seen as unreasonable. Dealing directly with the concerns expressed by someone who is resisting can often encourage that person to move to a posture of commitment.

Disengagement from the legal system is a desire to step outside of the legal system, where there is a disagreement about the authority's goals and also their ways of achieving these. Disengagement can be shown as avoidance behaviour, where the individual avoids all interaction with a legal authority or compliance with its authority. An extreme form of disengagement could see the individual seeking out alternative forms of justice.[81]

An individual's posture with regards to authority can and will change over time and with repeated interactions.[82] Treating people well can reduce social distancing; treating people badly can increase social distancing. Clearly, if a court expects people to participate in the process and to comply with directions, as well as to affect therapeutic change, then court procedures need to be sensitive to theories of social distancing and the principles of PJ.

The interaction between these and therapeutic jurisprudence

As might be expected, there is a strong overlap between whether a judicial procedure or policing procedure is perceived as fair and whether the authority exercising that procedure is perceived as legitimate, and subsequently whether an individual socially distances themselves or cooperates and accepts that institution's authority.

PJ is particularly important for marginalised or stigmatised members of society, including those with mental illness, or low socioeconomic status.[83] As could be expected, the elements of PJ — including being treated with respect, being heard and the perception that those in charge are concerned with the defendant's wellbeing — can improve perceptions of the legitimacy of the

80 ibid.
81 ibid; R Weitzer and R Brunson, "Strategic responses to the police among inner-city youth" (2009) 50 *Sociological Quarterly* 235.
82 ibid.
83 Lind and Tyler, above n 74.

authority of the justice system (LJ) and improve compliance with the justice system and the outcomes of a court process,[84] as well as lead to that person's alignment with society's rules and authority.

Importantly, from a therapeutic perspective, there are indications that if a court participant (eg in the mental health court) has positive experiences of PJ over a period of time, they will experience positive engagement and change,[85] as well as an increase in a sense of hope and empowerment — elements that are highly important for therapeutic change.[86]

Review of the common denominators of therapy outcomes

There are several ways of looking at what works for therapeutic change and how to measure it. Unfortunately, most court review research has tended to define success as decrease or cessation in recidivism.[87]

This focus is understandable from a legal perspective, but somewhat two-dimensional when seen from a therapeutic or pragmatic health economics perspective.[88] After addressing the question from the perspective of the TJ, PJ and LJ literature, it is worth looking at what works therapeutically from the perspective of the helping professions. The following discussion examines the variety of clients passing through the courts, their needs and the types of therapeutic interventions available that could be adapted to a court setting. It then looks at the common denominators of therapeutic outcomes that are considered effective in encouraging therapeutic change.

84 ibid; also S Kopelovich et al, "Procedural justice in mental health courts: judicial practices, participant perceptions and outcomes related to mental health recovery" (2013) 36 *International Journal of Law and Psychiatry* 113; N Poythress et al, "Perceived coercion and procedural justice in the Broward mental health court" (2002) 25 *International Journal of Law and Psychiatry* 517.

85 G McIvor, "Therapeutic jurisprudence and procedural justice in Scottish drug courts" (2009) 9 *Criminology and Criminal Justice* 29; D Wexler, "Adding color to the White Paper: time for a robust reciprocal relationship between procedural justice and therapeutic jurisprudence" (2008) 44 *Court Review* 78.

86 Kopelovich et al, above n 84.

87 J Anestis and J Carbonell, "Stopping the revolving door: effectiveness of mental health court in reducing recidivism by mentally ill offenders" (2014) 65 *Psychiatric Services* 1105; P Burns, V Hiday and B Ray, "Effectiveness 2 years postexit of a recently established mental health court" (2013) 57 *American Behavioral Scientist* 189; P Dirks-Linhorst and D Linhorst, "Recidivism outcomes for suburban mental health court defendants" (2012) 37 *American Journal of Criminal Justice* 76; V Hiday and B Ray, "Arrests two years after exiting a well-established mental health court" (2010) 61 *Psychiatric Services* 463; V Hiday, H Wales and B Ray, "Effectiveness of a short-term mental health court: criminal recidivism one year postexit" (2013) 36 *Law and Human Behavior* 401; S Maruna, "Elements of successful desistance signaling" (2012) 11 *Criminology and Public Policy* 73; M Moore and V Hiday, "Mental health court outcomes: a comparison of re-arrest and re-arrest severity between mental health court and traditional court participants" (2006) 68 *Law and Human Behavior* 659; S Ross, "Evaluation of the court integrated services program: final report", Melbourne Consulting and Custom Programs, University of Melbourne, 2009; C Sarteschi, M Vaughn and K Kim, "Assessing the effectiveness of mental health courts: a quantitative review" (2011) 39 *Journal of Criminal Justice* 12; D Wilson, O Mitchell and D Mackenzie, "A systematic review of drug court effects on recidivism" (2006) 2 *Journal of Experimental Criminology* 459.

88 D Wexler, "Robes and rehabilitation: how courts can help offenders make good" (2001) 38 *Court Review* 18; D Wexler, "Therapeutic jurisprudence and readiness for rehabilitation" (2006) 8 *Florida Coastal Law Review* 278.

Court participants

It is difficult to get precise statistics on the mental health and socioeconomic concerns of individuals passing through the courts; however, there are commonalities to the types of mental health problems that people going through court systems struggle with. These range in type, symptomatology and severity, and can include the effects of trauma (PTSD), chronic trauma (complex trauma, personality disorders such as antisocial personality disorder), drug addiction, depression, anxiety, self-harm and suicidal ideation. When looking at adolescents progressing through the juvenile justice system, they show a similar range of mental health problems, and in addition, developmental problems such as autistic spectrum disorder, and attachment disorders such as reactive attachment disorder. Experience would suggest that due to a combination of mental health factors, developmental issues and the effect of anxiety due to the context, participants may experience difficulties in communication in the court setting.[89] This is likely to mean that courts will need to adjust their manner of communicating with clients if they want the client to completely take in and respond to the communication that occurs in court.

It is useful to match the type of psychological intervention to the presenting issues. So, what works with these presenting problems from a therapeutic perspective?

Types of therapy

Psychotherapy is defined as the deliberate application of clinical methods and interpersonal stances from psychological principles to help a person change their behaviour, thoughts and emotions.[90]

There have been four major developmental waves for psychotherapy, as the ideas and principles of psychotherapy have evolved over time:

- The psychodynamic theories originated with the work of Freud (1895–1939) with the assumption that the past strongly influences a person's current behaviour, and therefore that the past needs to be made conscious in order to change behaviour and emotional reactions. Common techniques used in psychodynamic therapies include neutrality, interpretation, and use of the awareness of transference and counter transference.[91] These do not readily adapt to a courtroom setting and could cause participants harm.
- Cognitive-behavioural therapies — cognitive therapies target change in thought patterns, and behavioural therapies focus on behavioural patterns.[92] The approach is problem oriented,

89 S Lilienfeld and H Arkowitz, "Are all psychotherapies created equal?" (2012) 23 *Scientific American Mind* 68.
90 J Prochaska and JC Norcross, *Systems of psychotherapy: a transtheoretical analysis*, Brooks/Cole Publishing Co, 1999.
91 S Freud, "On the beginning of treatment: further recommendations on the technique of psychoanalysis" in J Strachey (ed), *The standard edition of the complete psychological works of Sigmund Freud*, Vol 12, 1911–1913 trans, The Hogarth Press and the Institute of Psycho-analysis, 1958.
92 A Beck, *Cognitive therapy and the emotional disorders*, Meridian, 1976; K Dobson and L Block, "Historical and philosophical bases of the cognitive-behavioral therapies" in K Dobson (ed), *Handbook of cognitive behavioral therapies*, Guilford Press, 1988, pp 3–38; A Ellis, "The history of cognition in psychotherapy" in A Freeman et al (ed), *Comprehensive handbook of cognitive therapy*, Plenum Press, 1989, pp 5–19.

directive and intellectually based. Within these modalities, the therapeutic relationship can also be important (eg used for modelling new behaviours). This approach has been adapted by King[93] for a solution-focused judge; however, it would be more difficult to implement in a mainstream courtroom.

- Existential and humanistic theories — these are the backdrop to the development of the major principles behind the counselling process, and the vision of the therapeutic relationship as a means for therapeutic intervention, as well as providing material for therapy.[94] Therapeutic intervention utilising the relationship include authenticity, listening skills and the use of empathy. The guiding basis of this therapy is an understanding that individuals are motivated to lead healthy, fulfilling lives, and to find meaning in experiences and life. Rogers[95] defined six necessary and sufficient conditions for therapy to impact on personality change, including: the therapeutic relationship; unconditional positive regard; and accurate empathy from the therapist. The goal of therapy is the creation of personal meaning and personal growth. This therapeutic approach could be adapted to a mainstream court environment.
- Emerging theories — these include constructivist, feminist, multicultural and transpersonal theories. Constructivist theories view knowledge and experience as constructed, rather than objective.[96] Generally, from these perspectives, personal problems are viewed as emerging from the tension between a person and their context. Constructivist theories have lead to solution-focused therapy and narrative therapy.[97]

Of these, two appear to be particularly adaptable for both a mainstream and a problem-solving courtroom setting.[98] These are:

- Solution-focused therapy is usually a brief intervention; it assumes that the individual is an expert on their own life, can define their goals for therapy, and are able to generate solutions to their problems and to reach their goals.[99] The brevity and focused questioning of this therapy makes it potentially useful in a courtroom setting.
- Narrative therapy focuses on how clients can reauthor their life narratives to create new meaning and new experiences of reality.[100] Emphasis is placed on creating and reinforcing stories about self, others and relationships that are useful for the client to have a healthy self-esteem, sense of self-efficacy and positive interactions with others. A court experience is a powerful facilitator to develop and witness new life narratives

93 King, above n 1.
94 A Maslow, "A theory of human motivation" (1943) 50 *Psychological Review* 370; C Rogers, *Client-centered therapy,* Houghton Mifflin, 1951.
95 ibid.
96 J Raskin, "Constructivism in psychology: personal construct psychology, radical constructivism, and social constructionism" (2002) 5 *American Communication Journal* 1.
97 S de Shazer et al, *More than miracles: the state of the art of solution-focused brief therapy*, Routledge, 2007.
98 King, above n 1.
99 de Shazer et al, above n 97.
100 M White and D Epston, *Literate means to therapeutic ends*, Dulwich Centre Publications, 1989.

An additional therapy that specifically targets antisocial behaviour also deserves inclusion in this review — this is multisystemic therapy.[101]

As noted, there are many different types of therapy[102] and some treatments can be harmful in certain circumstances.[103] Is there a simpler way to conceptualise a therapeutic intervention in a courtroom setting in a way that avoids the risk of iatrogenic harm?

Therapeutic alliance

Research on outcomes has tended to focus on the most frequently used types of therapies[104] — that is, cognitive behaviour therapy, psychodynamic therapy, person-centred therapy and interpersonal therapy. However, over time research into what works in therapy has become inextricably linked with research into the therapeutic alliance (relationship). Early psychotherapy authors observed that therapy types appeared to have equal impact (the dodo bird effect).[105]

As has been demonstrated to a significant degree in the psychological and psychotherapeutic research literature, the type of treatment does matter.[106] However, despite the presenting problem of the client and the type of intervention adopted, the strength of the therapeutic alliance is a major process variable with central impact on therapeutic outcomes.[107]

101 T Van der Stouwe et al, "The effectiveness of Multisystemic Therapy (MST): a meta-analysis" (2014) 34 *Clinical Psychology Review* 468.

102 J Norcross, *Psychotherapy relationships that work: therapist contributions and responsiveness to patients*, OUP, 2002.

103 S Lilienfeld, "Psychological treatments that cause harm" (2007) 2 *Perspectives on Psychological Science* 53.

104 Lilienfeld and Arkowitz, above n 89.

105 L Luborsky and B Singer, "Comparative studies of psychotherapies: is it true that everyone has won and all must have prizes?" (1975) 32 *Archives of General Psychiatr*y 995; S Rosenzweig, "Some implicit common factors in diverse methods of psychotherapy" (1936) 6 *American Journal of Orthopsychiatry* 412.

106 D Tolin, "Is cognitive-behavioral therapy more effective than other therapies? A meta-analytic review" (2010) 30 *Clinical Psychology Review* 710.

107 A Del Re et al, "Therapist effects in the therapeutic alliance-outcome relationship: a restricted-maximum likelihood meta-analysis" (2012) 32 *Clinical Psychology Review* 642; R Elvins and J Green, "The conceptualization and measurement of therapeutic alliance: an empirical review" (2008) 28 *Clinical Psychology Review* 1167; R Elliott, W Stiles and D Shapiro, "Are some psychotherapies more equivalent than others?" in T Giles (ed), *Handbook of effective psychotherapy*, Plenum Press, 1993, pp 455–479; C Flückiger et al, "The alliance in adult psychotherapy: a meta-analytic synthesis" (2018) 55 *Psychotherapy* 316; M Friedlander et al, "Alliance in couple and family therapy" (2011) 48 *Psychotherapy* 25; C Gelso and J Carter, "Components of the psychotherapy relationship: their interaction and unfolding during treatment" (1994) 41 *Journal of Counselling Psychology* 296; AHorvath and L Luborsky, "The role of the therapeutic alliance in psychotherapy" (1993) 61 *Journal of Consulting Clinical Psychology* 561; L Luborsky, "Helping alliances in psychotherapy: the groundwork for a study of their relationship to its outcome" in J Cleghorn (ed), *Successful psychotherapy*, Brunner/Mazel, 1976, pp 92–116; B McLeod, "Relation of the alliance with outcomes in youth psychotherapy: a meta-analysis" (2011) 31 *Clinical Psychology Review* 603; R Shirk, M Karver and R Brown, "The alliance in child and adolescent psychotherapy" (2011) 48 *Psychotherapy* 17; M Welmers-van de Poll et al, "Alliance and treatment outcome in family-involved treatment for youth problems: a three-level meta-analysis" (2018) 21 *Clinical Child and Family Psychology Review* 146; B Wampold et al, "A meta-analysis of outcome studies comparing bona fide psychotherapies: empirically all must have prizes" (1997) 122 *Psychological Bulletin* 203.

Although the therapeutic relationship has been defined differently depending on theoretical orientation and discipline,[108] a basic definition is the collaborative relationship between a therapist and patient with the central aspects being the link between the therapist and their patient and their agreement both on goals and tasks for therapy.[109]

The relationship also demonstrates structured parameters to the interaction, which is formed early on in the interaction between the parties and appears to be stable over time.[110] Bordin's formulation of the therapeutic alliance delineates three essential elements: agreement on the goals of therapy; agreement on the tasks involved in therapy; and the development of a bond (mutual positive regard and trust) between the therapist and the client.

How important is the therapeutic alliance?

The therapeutic alliance has been described variously as a potent curative factor in all forms of treatment,[111] crucial for successful therapy outcome,[112] or a critical component of effective therapy.[113] Del Re et al noted that, from research spanning 30 years, the therapeutic alliance has been demonstrated to be a consistent predictor of therapy outcome.[114] All studies reviewed found a correlation between the therapeutic alliance and positive therapy outcome. In Del Re et al's meta-analysis, the average alliance-outcome correlation was .4; however, other studies have shown a more modest correlation.[115]

Additionally, there is evidence to suggest that some research may have underestimated the strength of the correlation between therapeutic alliance and client outcome[116] — although there is great variability between clients' outcomes, there is very little variability within a therapist's own clients of the correlation between alliance and outcome.[117] This means that

108 M Fitzpatrick, S Iwakabe and A Stalikas, "Perspective divergence in the working alliance" (2005) 15 *Psychotherapy Research* 69.

109 E Bordin, "The generalizability of the psychoanalytic concept of the working alliance" (1979) 16 *Psychotherapy* 252; A Horvath et al, "The alliance" in JC Norcross (ed), *Relationships that work*, OUP, 2011, p 9; M Karver et al, "Meta-analysis of therapeutic relationship variables in youth and family therapy: the evidence for different relationship variables in the child and adolescent treatment outcome literature" (2006) 26 *Clinical Psychology Review* 50; Shirk, Karver and Brown, above n 107; K Miller and J Mizes (eds), *Comparative Treatments of Eating Disorders*, Free Association Books, 2000.

110 A Horvath, "The therapeutic relationship: research and theory" (2005) 15 *Psychotherapy Research* 3; Horvath and Luborsky, above n 107; B Mallinckrodt, "Session impact, working alliance, and treatment outcome in brief counseling" (1993) 40 *Journal of Counseling Psychology* 25; D Martin, J Garske and K Davis, "Relation of the therapeutic alliance with outcome and other variables: a meta analytic review" (2000) 68 *Journal of Consulting and Clinical Psychology* 438.

111 E Marziali and L Alexander, "The power of the therapeutic relationship" (1991) 61 *American Journal of Orthopsychiatry* 383.

112 C Hill and M Corbett, "A perspective on the history of process and outcome research in counseling psychology" (1993) 40 *Journal of Counseling Psychology* 3; A Horvath and B Symonds, "Relation between working alliance and outcome in psychotherapy: a metaanalysis" (1991) 38 *Journal of Counseling Psychology* 139.

113 Horvath et al, above n 109; Miller and Mizes, above n 109; Shirk, Karver and Brown, above n 107.

114 Del Re et al, above n 107; see also Flückiger et al, above n 107.

115 Flückiger et al, above n 107; Horvath et al, above n 109.

116 Del Re et al, n 107.

117 S Baldwin, B Wampold and Z Imel, "Untangling the alliance-outcome correlation: exploring the relative importance of therapist and patient variability in the alliance" (2007) 75 *Journal of Consulting and Clinical Psychology* 842.

therapist contribution to the therapeutic alliance is crucial.[118] Also, some therapists seem to have a significantly better ability to form a healthy therapeutic relationship with their clients, and this differing ability is significantly related to their client's outcomes.[119]

Crucial for a successful court intervention, the alliance is an essential ingredient in the client accepting therapeutic intervention and following a plan towards personal growth.[120]

Research has demonstrated the impact of therapeutic alliance across different problems and different treatment modalities — for example, depression,[121] anxiety,[122] PTSD,[123] eating disorders[124] and personality disorders.[125]

Research has found that therapist qualities are more important to outcome than client variables.[126] Patient contribution factors to patient and therapist alliance are distinct and can be reliably measured.[127] Although earlier studies indicated that the client variable of attachment style influenced client report of therapeutic alliance,[128] more recent studies have shown that what a therapist contributes to the interaction has a larger impact on the alliance — that is, outcome correlation.[129] The pattern of the therapeutic alliance over time is also very important to the therapeutic outcome.[130]

118 ibid.

119 See Hora et al, above n 18; U Dinger et al, "Therapist effects on outcome and alliance in inpatient psychotherapy" (2008) 64 *Journal of Clinical Psychology* 344; D Zuroff et al, "Between-therapist and within-therapist differences in the quality of the therapeutic relationship: effects on maladjustment and self-critical perfectionism" (2010) 66 *Journal of Clinical Psychology* 681.

120 Bordin, above n 109.

121 J Krupnick et al, "The role of the therapeutic alliance in psychotherapy and pharmacotherapy outcome: findings in the National Institute of Mental Health Treatment of Depression Collaborative Research Programme" (1996) 64 *Journal of Consulting Clinical Psychology* 532; P Raue, M Goldfried and M Barkham, "The therapeutic alliance in psychodynamic-interpersonal and cognitive-behavioral therapy" (1997) 65 *Journal of Consulting Clinical Psychology* 582.

122 M Cloitre et al, "Therapeutic alliance, negative mood regulation, and treatment outcome in child abuse-related posttraumatic stress disorder" (2004) 72 *Journal of Consulting and Clinical Psychology* 411.

123 ibid.

124 M Constantino et al, "The association between patient characteristics and the therapeutic alliance in cognitive-behavioural and interpersonal therapy for bulimia nervosa" (2005) 73 *Journal of Consulting and Clinical Psychology* 203.

125 A Andreoli et al, "Crisis intervention in depressed patients with and without DSM-III–R personality disorders" (1993) 181 *The Journal of Nervous and Mental Disease* 732; D Klein et al, "Therapeutic alliance in depression treatment: controlling for prior change and patient characteristics" (2003) 71 *Journal of Consulting Clinical Psychology* 997; J Strauss et al, "Early alliance, alliance rupture, and symptom change in a nonrandomized trial of cognitive therapy for avoidant and obsessive-compulsive personality disorders" (2006) 74 *Journal of Consulting and Clinical Psychology* 337.

126 Baldwin, Wampold and Imel, above n 117; Del Re et al, n 107; Dinger et al, above n 119; Zuroff et al, above n 119.

127 Krupnick et al, above n 121.

128 Mallinckrodt, n 110; B Mallinckrodt, H Coble and D Gantt, "Working alliance, attachment memories, and social competencies of women in brief therapy" (1995) 42 *Journal of Counseling Psychology* 79; B Strauss and B Schwark, "Die bindungstheorie und ihre relevanz für die psychotherapy [Attachment theory and its practical relevance for psychotherapy]" (2007) 52 *Psychotherapeut* 405.

129 Baldwin, Wampold and Imel, n 117; Dinger et al, n 119; D Marcus et al, "The therapeutic alliance in adolescent substance abuse treatment: a one-with-many analysis" (2011) 58 *Journal of Counseling Psychology* 449; Zuroff et al, above n 119.

In particular, therapist responsiveness to the client is a key ingredient in good therapeutic alliance.[131] Responsiveness means the attentiveness with which the therapist responds to new information that emerges during their interaction.[132]

Responsiveness is not influenced by client variables, such as personality disorder or type of diagnosis, meaning that focusing on the quality of the interaction between the therapist and client is more likely to show a beneficial outcome, despite the wide variety (or absence) of diagnoses and types of diagnoses seen in defendants progressing through the courts.

Measuring therapeutic alliance

Given the importance of therapeutic alliance to therapy outcome, it is not particularly surprising that there are multiple types of rating scales to measure it. Of these, research shows that observer ratings of therapeutic alliance are the most accurate predictors of therapeutic outcome;[133] and second to that, client ratings.[134]

Observer rating scales — such as the Vanderbilt Therapeutic Alliance Scale (VTAS),[135] the Working Alliance Inventory-Observer Form (WAI-O)[136] and the California Psychotherapy Alliance Scales (CALPAS) — are highly correlated to each other, and have high construct validity.[137] As per Fenton et al,[138] the Penn Helping Alliance Rating Scale, the CALPAS, the VTAS and Working Alliance Inventory (Observer, Therapist and Client versions), had significantly correlated observer ratings, while ratings completed by therapists or clients were not[139] — meaning that there were only minimal differences between the types of rating scales used.

130 D Kivlighan and P Shaughnessy, "Patterns of working alliance development: a typology of client's working alliance ratings" (2000) 47 *Journal of Counseling Psychology* 362.
131 W Stiles, "Responsiveness as an obstacle for psychotherapy outcome research: it's worse than you think" (2009) 16 *Clinical Psychology: Science and Practice* 86; W Stiles, L Honos-Webb and M Surko, "Responsiveness in psychotherapy" (1998) 5 *Clinical Psychology: Science and Practice* 439.
132 ibid.
133 Marziali and Alexander, n 111; L Fenton et al, "Perspective is everything: the predictive validity of six working alliance instruments" (2001) 10 *Journal of Psychotherapy and Practical Research* 262.
134 A Bachelor and A Horvath, "The therapeutic relationship" in M Hubble, B Duncan and S Miller (eds), *The heart and soul of change: what works in therapy*, American Psychological Association, 1999, p 133.
135 D Hartley and H Strupp, "The therapeutic alliance: its relationship to outcome in brief psychotherapy" in J Masling (ed), *Empirical Studies in Analytic Theories*, Erlbaum, 1983, pp 1–38.
136 R Di Giuseppe, J Linscott, and R Jilton, "Developing the therapeutic alliance in children-adolescent psychotherapy" (1996) 5(2) *Applied and Preventive Psychology* 85–100; T Tracey and A Kokotovic, "Factor structure of the working alliance inventory" (1989) 1 *Psychological Assessment* 207.
137 V Tichenor and C Hill, "A comparison of six measures of working alliance" (1989) 26 *Psychotherapy: Theory, Research, Practice, Training* 195.
138 Fenton et al, above n 133.
139 ibid.

Implications for therapeutic jurisprudence

Horvath and Luborsky found that the early phase of therapy is crucial,[140] and that therapeutic alliance tends to be formed very early in the interaction and is stable over time.[141] It should be possible to utilise the interaction between a judge and a defendant as a short-lived therapeutic interaction, and to focus on the interaction from a therapeutic alliance formation perspective.

This discussion needs to be contextualised, so as to emphasise the importance of incorporating up-to-date psychological intervention techniques available, via court referral, based on the evolving evidence base. As new therapies and programs become available it is important to make use of them as appropriate. However, the features of what constitutes an effective therapeutic relationship or alliance are stable across therapeutic situations, and these features can be readily adapted to a TJ context to foster therapeutic change for defendants. It is also possible to teach these behaviours to therapists[142] (and by inference) also to the judiciary.

For a legal actor in a court setting, this means the judge taking active steps: to delineate, invite and form a positive working relationship with the defendant with clear roles, boundaries and evidence of respect and trust in the interaction; to invite the defendant to participate and agree in defining the goals of the hearing; and to invite the contribution to, and agreement with, the tasks of the hearing from the defendant.

Additionally, as Del Re et al observed, it is crucial to ensure that institutions and workplaces are conducive to therapists and other intervenants exercising their skills in alliance development.[143] Care needs to be taken to develop judicial contexts that are conducive to therapeutic legal actor contributions and not judicial burn out — for example, by managing the size of court lists.

A behaviourally anchored description of legal actor contributions

After a review of common determinants of therapy (particularly the impact of therapeutic alliance and the interpersonal factors that facilitate this), as well as a review of the PJ and TJ literature and research into court outcomes, it is possible to compile a behavioural description of what a judge could do in a mainstream court to have the best chance of facilitating change. This is as follows.

Introductions

During the introductions it is important to maintain good eye contact, use warm to neutral emotional tone, calmly and firmly set boundaries and roles in the courtroom, explain the goals

140 Horvath and Luborsky, above n 107.

141 Horvath, above n 110; Horvath and Luborsky, above n 107; Mallinckrodt, above n 110; Martin, Garske and Davis, above n 110.

142 Marziali and Alexander, above n 111; J Muran and J Barber, *The therapeutic alliance: an evidence-based guide to practice*, Guilford, 2010.

143 Del Re et al, above n 107; A Donabedian, "Evaluating the quality of medical care" (2005) 83 *The Milbank Quarterly* 691.

of the hearing, and help the participant to feel confident to participate in the hearing. The judge should take the time to explain the court processes and how to address the judge. If at all possible, the judge and the court participant should create a collaborative definition of goals, and take turns in speaking.

Discussion about the problem

The judge should ask neutral and open questions about the context as to why they are in court, and include the court participants' own words in defining the problem. If possible, the judge should notice and discuss the strengths that are present in the current situation, despite the reasons for being in court. The judge should also notice and discuss the point of view and experiences of other participants to the problem.

Sentencing

The judge should give a summary for sentencing or judgment that includes a collaborative definition of the problem and incorporates the parties involved in the summary remarks. The judge should describe the responsibility for action as internal to the court participant, and describe the situation and summary to include the participant as having choices over their actions, and also highlight context and possible supports available. The summary should include an acknowledgment of the possible experiences of other people who are also involved in the problem situation — for example, the victim of a crime.

Judicial communication skills

The judge should use open questions, with active listening skills and attentive and encouraging body language, and use non-verbal prompts to encourage the court participant to express themselves well. The judge should adapt their language and speed of speaking to the language abilities and comprehension of the court participant, and ask questions to check that the court participant has understood them. The judge should facilitate other legal actors present in the court to do the same, so as to ensure that the court participant understands what is being communicated and the processes behind this. The judge should consider and promote the use of open or closed questions, active or passive listening, invitations to the defendant to participate, turn-taking in discussion and effective body language. Turn-taking and collaborative dialogue should occur during the interaction.

Judicial alliance

The judge should employ a neutral to warm emotional tone and an open but authoritative body language, and actively ally themselves with the court participant against the problem (ie how to stop offending while using drugs, or how to stop behaving in a violent manner towards family members, or how to separate from a partner in the least damaging way for the children and both partners).

This composite picture leads to the development of a behaviourally defined description of desirable judicial interactions from a therapeutic perspective, described in detail in Figure A, which could be used as a brief rating scale for use by an independent observer to capture

elements of this description and measure this in a courtroom setting. This measure is not designed to be comprehensive, but rather a starting foundation point for future conversations about judicial contributions to therapeutic change, and a foundation for potential future developments of measures for specific court settings.

Figure A Legal actor contributions court checklist

Introductions

- The judicial officer establishes context: explains how the court works and the multiple functions of justice

The judicial officer addresses the defendant:

- personally
- eye contact
- in a "non-intimidating" manner
- by name
- explains to the defendant how to address the judge

Judicial emotional tone

1	2	3	4	5	6	7
warm	positive but firm		neutral		cold	hostile

Judicial body language (circle one)

open / closed
dominant / encouraging

- The judicial officer explains the roles of hearing: for the defendant, for the court and for society
- The judicial officer explains the rules for participating in the court (adaptive communication)

Discussion about problem

- Enquiry about the background by the judicial officer
- Enquiry about the defendant by the judicial officer
- Enquiry about the context to the defendant and the problem by the judicial officer
- Inclusion of defendant's words into statements and questions (creation of a "shared description" of the problem)

Summary or sentencing remarks

- Collaborative definition of the problem used by the judicial officer
- Incorporation of the defendant and context into sentencing by the judicial officer

Location of the problem (please circle one)

	The judicial officer describes the defendant as the problem
OR	The judicial officer describes the problem as external to the defendant

Location of responsibility to act (agency and accountability) (please circle one)

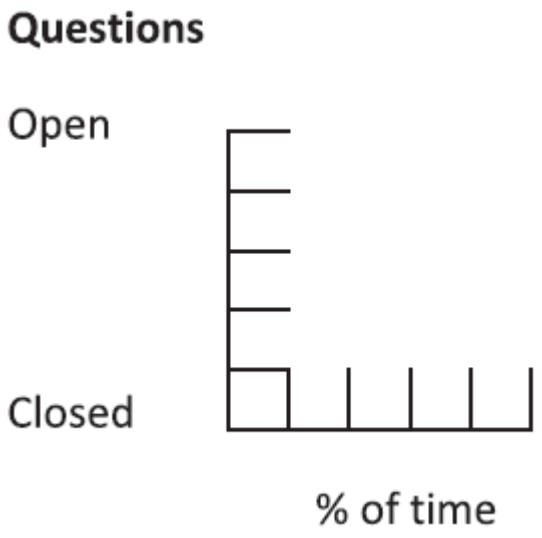
	The judicial officer describes the defendant as responsible for their actions
OR	The judicial officer describes the defendant as not responsible for their actions

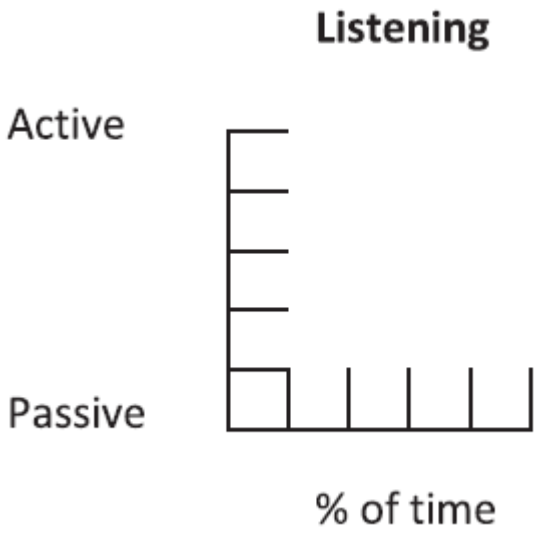
- Explanation of reasons for sentencing by the judicial officer
- The judicial officer includes emotions and wishes of defendant in sentencing remarks
- The judicial officer includes acknowledgment of victim's experience in sentencing remarks
- Guiding conversations for change: the judicial officer makes defendant aware of future choices and the possibilities for change

Resources: discussion of resources available to help support change for the defendant in the future

<——————————————————————————————————————>		
No mention of resources and support	Mentions resources and support	Multidisciplinary practice

Judicial communication skills





Active listening shown by the judicial officer

- Paraphrasing
- Asks clarifying questions
- Validation/minimal encouragers

Participation encouraged by the judicial officer

- Invited defendant to participate
- Turn taking
- Adaption of communication style to suit the defendant's abilities (cognitive ability/ language/ communication disorders)
- Cultural references appropriate to client
- Choices offered

Judicial positioning/ trust/ rapport

Emotional tone of the judicial officer overall

1	2	3	4	5	6	7
warm	positive but firm		neutral	cold		hostile

Body language of the judicial officer overall (please circle one)

1	2	3	4	5	6	7
open						closed

1	2	3	4	5	6	7
encouraging						dominant

Judicial officer's positioning overall

1	2	3	4	5	6	7
Allied						adversarial

- Agreement on goals of the hearing
- Agreement on tasks to be completed before the hearing

Judicial body language

- Attentive and open (looking at the defendant, arms uncrossed, leaning in, head tilting, slow nodding, furrowed brow, interest noises eg, hmmm, hmmm
- Dominant (disapproving expression, body positioning to take up lots of space, interrupting, grooming behaviours, chin stroking, aggressive gestures, rolling eyes)
- Bored or tired (mostly looking away from the defendant, drumming fingers, tapping toes, tapping other objects, yawning, or sagging posture)
- Closed (arms crossed, head tilted down and away)
- Evidence of reciprocity in body language between the judicial officer and the defendant during the interaction (mirroring in body posture, emotional tone, facial expressions)

Conclusion

The role of the judiciary varies depending on the cultural, legal and social context. However, the core role of judging in enforcing legal norms, delivering punishment with a view to facilitating rehabilitation and protecting the community appears relatively stable across jurisdictional boundaries.

Focusing on rehabilitation, the TJ literature recommends specific goals and guiding principles for judicial interactions to achieve therapeutic aims. The PJ literature also inform specific procedures for judicial interaction.

Alongside these recommendations, the literature on common determinants of therapeutic outcome (and therapeutic change) identifies therapeutic alliance as a powerful common facilitator of therapeutic change across therapeutic interactions. The literature indicates that this alliance is best measured by an objective observer.

This article has developed a behaviourally anchored description of a judicial interaction, which stands the best chance of facilitating therapeutic change, along with a checklist designed to capture these aspects in a courtroom setting.

This measure could prove to be an effective tool to capture the courtroom contributions of legal actors, and their impacts on defendants from a therapeutic perspective, and would be extremely useful for future court research projects. As noted by many researchers in the natural world, the act of observing changes what is observed. In this case, it is hoped that measuring the important contribution that judges make to their defendants' movement towards rehabilitation will be the start of an enriching dialogue.

The importance of trauma-informed court practice*

His Honour Magistrate M King†

The author, who is recognised internationally as an expert on therapeutic jurisprudence, seeks to raise judicial awareness about the nature and impact of trauma and its prevalence and how to apply trauma-informed principles in the task of judicial decision-making.

The subject of trauma and its effects form a significant part of the daily work of the justice system, reflecting the pervasive nature of trauma and its effect on society and its members. In order to properly conduct proceedings, reach a just outcome and promote public confidence in courts, judicial officers need to be aware of the nature of trauma, its effects on behaviour and wellbeing and how judicial processes can be conducted sensitive to the needs of those affected by trauma without compromising traditional values that courts and tribunals must promote. The new "Trauma-informed courts" chapter at Section 12, a timely addition to the *Equality before the Law Bench Book* (the chapter), explores these issues.

The emergence of trauma-informed court practice is a part of a wider development in courts and the justice system generally towards a more comprehensive, less damaging and more psychologically appropriate means of addressing legal problems.[1] Thus, courts now use processes sensitive to the situation of complainants when conducting trials involving sexual offences; courts are being constructed or modified to create safe entry points and safe spaces for victims; victim impact statements inform sentencing; restorative justice processes such as victim offender mediation are often used in conjunction with court processes; solution-focused courts such as drug courts, mental health courts and family violence courts, Indigenous sentencing courts and court diversion programs are intimately concerned with addressing

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1 M King, A Freiberg, et al, *Non-adversarial justice*, 2nd edn, Federation Press, 2014.

trauma and promoting wellbeing as an essential part of their function; and therapeutic jurisprudence informs legal actors, processes and laws so that they can minimise negative effects and promote positive effects on wellbeing through their operation.

The US Substance Abuse and Mental Health Services Administration (SAMHSA) states that individual trauma "results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional or spiritual well-being."[2]

People react to stress and traumatic events differently. For some the effects of a traumatic event may be short-lived, for others there may be significant dysfunction in multiple life domains. This difference in people's response to trauma is recognised in s 292D of the *Criminal Procedure Act 1986* (NSW) concerning directions to be given as to the varying effects of trauma during the trial of sexual offences.

Research suggests that traumatic events can adversely affect various aspects of physiological functioning such as neurochemicals, the hypothalamic-pituitary-adrenal axis, amygdala, hippocampus and cortex resulting in physiological dysfunction in the immune system and digestion and psychological dysfunction including impaired executive functioning, mood disturbance, hypervigilance, anxiety and sleep disturbance.[3] The person's sense of self, safety and meaning in life may be compromised.[4] The fight or flight response activated in the mind and body of someone at the time they experienced trauma may continue to be replicated whenever they perceive a threat in their lives — including when they give evidence in court. They may freeze, unable to respond to the threat.

The physiological, psychological and social development of a young person may well be significantly damaged by trauma. Trauma may have substantial, long-lasting negative consequences for the developing brain.[5] Exposure to at least four adverse childhood events such as maltreatment and family violence has been found to increase risk in relation to health outcomes, including sexual risk taking, mental health, substance misuse and violent behaviour.[6]

Trauma not only adversely affects individuals, it also affects families, groups and communities across generations. Families may experience family violence across generations. First Nations people commonly carry the burden of the trauma caused by displacement from land, culture, language and community transmitted through the generations and compounded by adverse living conditions. Migrants may carry with them the trauma caused by war, civil disturbance or abuses in their country of origin. Holocaust survivors can transmit the effects of trauma to their descendants.

2 SAMHSA, *Concept of trauma and guidance for a trauma-informed approach*, 2014, p 7, accessed 2/5/2022.
3 J Sherin and C Nemeroff, "Post-traumatic stress disorder: the neurobiological impact of psychological trauma" (2011) 13 *Dialogues in clinical neuroscience* 263.
4 J Herman, *Trauma and recovery: the aftermath of violence — from domestic abuse to political terror*, Basic Books, 2015, p 51.
5 R Herringa, "Trauma, PTSD and the developing brain" (2017) 19 *Current Psychiatric Reports* 69.
6 K Hughes, M Bellis et al, "The effects of multiple adverse childhood experiences on health: a systematic review and meta-analysis" (2017) 2 *Lancet Public Health* 356.

Trauma intersects the daily work of courts and tribunals in multiple ways. For example, it may be an offender before a court for dishonesty-related offences committed to buy drugs to mask the emotional pain caused by an abusive and/or deprived childhood; a victim of crime or a plaintiff in a civil action having to recount traumatic events in the witness box; parties to a traumatic relationship breakdown seeking the assistance of a court to resolve their differences in relation to their children; a woman traumatised by persistent family violence seeking the protection of a court order while at the same time being in fear of how the male perpetrator will respond; a grieving family attending a coroner's court inquest into the death of their loved one; a lawyer or judicial officer traumatised by having to view graphic photographs in child pornography cases; or where the subject matter adversely affects some people — including judicial officers and lawyers — present in a court or tribunal hearing by the very nature of the material and/or by bringing back memories of past traumatic events in their lives.

How courts and tribunals respond to trauma affects the experience of court users and whether the court outcome is fair and perceived as fair. Further, those affected by trauma may not have had the opportunity to address their trauma previously. Contact with a court may be the vehicle whereby they can be connected to appropriate support and treatment services. Thus, it is vital that courts and tribunals apply trauma-informed practices. The chapter sets out principles and practices that these institutions can apply to promote a trauma-informed approach.

Trauma-informed practice is less about the rigid application of processes and more about the recognition of fundamental principles that should inform how judicial officers and other legal professionals should perform their functions and the processes to use when trauma is a relevant issue. Referring to work by SAMHSA and Hora,[7] the chapter emphasises the importance of ensuring that the court environment is safe and perceived to be so; promoting trustworthiness and transparency in decision-making; providing peer support; where possible, promoting collaboration and mutuality; empowerment, voice and choice; and responding appropriately when cultural, historic or gender issues are raised.

These principles tap into areas emphasised as important by therapeutic jurisprudence and procedural justice. Therapeutic jurisprudence emphasises the value of autonomy, that people wish to be involved and have a say in decision-making that affects their wellbeing and that processes that violate that principle are likely to be counter-productive and to adversely affect their wellbeing.[8] Procedural justice has found that people are more likely to perceive that judicial proceedings are fair if they have been treated with dignity, they have been given the opportunity to be heard and that the decision-maker is trustworthy, that is they demonstrate a genuine commitment to listening to the parties and reaching a fair outcome.[9] To be listened to properly and with dignity requires sensitivity to issues of trauma, culture, gender and

7 P Hora, "The trauma-informed courtroom" (2020) 32 *JOB* 11.
8 B Winick, "On autonomy: legal and psychological perspectives" (1992) 37 *Villanova Law Review* 1705.
9 T Tyler, "The psychological consequences of judicial procedures: implications for civil commitment hearings" in D Wexler and B Winick (eds), *Law in a therapeutic key: developments in therapeutic jurisprudence*, Carolina Academic Press, 1996, p 3.

background that should inform the place and process used for telling a person's story, a listener alert to those issues and the listener's use of body language and communication skills that conveys listening, interest and understanding.[10]

The chapter also suggests that sensitivity to how court processes may re-traumatise those suffering from trauma, awareness of the effect of trauma on memory and the delivery of oral evidence and taking an attitude of "what has happened to this person" rather than "what is wrong with that person" are essential in taking a trauma-informed approach. While court buildings in Australia are being modified to promote the safety of victims, it is also important that judicial officers are sensitive to the environment and the dynamics within the courtroom and that they take requisite remedial action to ensure that, as far as possible, parties, witnesses and others present are not subject to trauma.

The lived experience of many people coming into our courts and tribunals in various capacities includes dealing with the unresolved and debilitating effects of trauma. For our courts and tribunals to properly address the justice needs of our community requires judicial officers and other legal professionals to understand what trauma is and how it can affect human functioning and to use processes that ensure that people affected by trauma are heard and their situation is properly taken into account in decision-making.

10 On judicial listening, see: M King, *Solution-focused judging Benchbook*, AIJA, 2009, ch 6.

A road less travelled: footprints from trauma*

His Honour Magistrate M Douglass†

The following article provides a personal story of trauma and hope from a magistrate of the Local Court of NSW.

I am honoured to be a NSW magistrate and proud of my Aboriginal heritage. Despite occupying this position of privilege, I come from circumstances such that I never dared to dream of the life I now lead.

The following is a snapshot of my childhood — I tell it not to engender sympathy nor promote myself, but to convey the message of hope that underpins this narrative.

My background as a child was beset by emotional turmoil and fear. My mother was an Aboriginal woman who lived, I suspect, with a mental health condition and my father was a white Englishman who was removed from his home to a "boy's home" and then sent to Australia as a child. Miscegenation carried with it much stigma that my parents battled constantly. They also carried significant burdens from their own childhoods and their trauma was integral to my upbringing and that of my brother and sister. My siblings and I have all experienced what is commonly known now as "intergenerational trauma", the process of passed on suffering, and responded to it in differing ways.

Our family home was dysfunctional: my only dreams were of escape. Our Aboriginal heritage was not openly acknowledged and having lighter skin, like many Aboriginal kids, I could "pass" as a white boy. I was called "milko" and the "adopted one", and my sister was called "pickaninny". When very young I learnt racial identity or skin colour were serious matters when I witnessed my dad assault "blokes" in response to taunts of "wog" or "boong" directed at my sister or mum. Home-life was not conducive to study or familial harmony; it was the place I reluctantly went after school. Home was the hiding-place for domestic violence and emotional chaos, where I was knifed twice, exposed to cannabis at 13, heroin at around 14, and sexually

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† Magistrate of the Local Court of NSW and Chair of that court's First Nations Committee.

assaulted. My mother, in my early years, was often unable to cope with her life circumstances. My father had his own trauma that manifested often in his poor relationship with my mum. It was a poor marriage and germinated angst, anger and anguish.

School life was traumatic because I was always behind in my studies, numb from the dysfunctional home life. Despite being well fed and well clothed, I was traumatised. I stayed at school — I liked sport and was captain of a very average first 15, but I failed the HSC (152 out of 500). The fierceness and acting-out of my adolescence were eased only by the opportunity to drift between different social groups to surf and "be" somewhere and someone else, where I felt comfortable and able to create a different identity — not getting in punch-ups and not being from that family with the long grass and ramshackle fence. The ocean provided solace and reminded me that there could be moments of enjoyment; even though I was never the best surfer I had the option of a new identity.

I left school and worked at a variety of manual jobs. I was a bricklayer for some years, drove a truck and did stop-go traffic control. One day, someone said to me "You are smart Mark, why don't you go to university?" My initial thought was, "Me? Seriously? Nar." I eventually came to know that there were opportunities for mature age students and, importantly, computer programs with grammatical correction and spell-checking functions as I had a condition that affected my eyesight. I think, despite my background, on some level I thought I was smart and had developed a capacity to think. I had spent a lot of time observing how my world worked and wishing it was better. So, the seed was sown. In the town where I lived, a satellite campus had opened, and it was mainly mature students like me who chanced to land on that welcome mat of good fortune. I recall the feeling of impending change that accompanied my return to education and was intoxicated by it.

I eventually studied Arts/Law and learned about my people's history and struggles. A lot of that history was a shock to me and remains so; it was left out of the school curriculum in the 1970s. Wollongong University was a place where I accessed many tools with which to make sense of the world I had occupied as a child and young man. I met many erudite people, academics like the late Jack Goldring and the late Penny Pether, Luke McNamara, Robyn Handley and others who encouraged me and whose knowledge stimulated me to think about social justice, to learn more and apply my own life experiences. After graduating, I worked in private practice for a while and then for the Aboriginal Legal Service. I found the ALS difficult: being exposed to many of the same issues I struggled with as a child everyday was an emotional headwind that became too strong to navigate. From there I went on to build a successful criminal law practice. I am proud of what I achieved as a lawyer, both in and out of court and of my coaching rugby league and rugby union teams that had several young Aboriginal players, some of whom followed options to play in and go to school in Sydney. Providing them with options was a highlight.

Then, in 2013, I became a magistrate. My journey has been one less travelled, but it has taught me much about what it is to be a "successful" Aboriginal person in a country where any kind of recognised success for my people is a relatively recent achievement. It was, and remains, difficult to reconcile my childhood and youth with who I have managed to become. Like many Aboriginal people who have acquired the trappings of success taken for granted by some, I am still confounded as to how I arrived here. But I am confident my footprints can be followed — hopefully others will find them.

I hear much talk concerning identity politics and Aboriginal people, often based on the assumption that we are a unified, monolithic group whose identity as colonised people dictates our political persuasions and our aspirations. While we may share a history of oppression and injustice under colonial rule and a desire to see justice for Indigenous people, Aboriginal people in this country are as diverse as any other group. Our identities lie in our heritage, not in our beliefs, politics or ambitions. We transcend the spectrum of varied gender identities and epidermal differences and conceive our culture in a broad variety of ways. We occupy a plethora of positions and have a multiplicity of interpretations of our direction in the present culture, some conservative, some moderate and some radical.

Yet, the hopes and ambitions of many remain unrealised while prisons in NSW are housed by 27% Aboriginal males and 37% Aboriginal females, a total of 28% Aboriginal people[1] but we only make up 3.4% of the adult population.[2] As an Aboriginal person, I find these statistics saddening to say the least. Fortunately, I had an opportunity of choice and, somehow, the wherewithal to make a different life. For so many First Nations people, the opportunity to be active agents in our own lives is not available yet. Every week, I see people who were *me* before I was able to recognise and follow a different set of footprints to a better life. Young kids, adolescents, men and women who end up in the criminal justice system, eventually incarcerated often because of the lack of options and opportunity to change. It is no secret that the statistics for Aboriginal incarceration are appalling and indeed, shameful. However, I am encouraged: many are now working hard to find new methods, strategies, ways of dealing with Aboriginal "offenders" that are culturally responsive and considerate of facts such as intergenerational trauma, poverty, foetal alcohol spectrum disorder (FASD), addiction and violence, and that recognise the importance of working with Aboriginal community members and developing culturally-specific court processes.[3]

The culturally-specific court processes currently being used offer hope. These initiatives are formulated in consultation with First Nations people and attempt to deviate from present practice and procedure in care, criminal and coronial proceedings. I have witnessed the benefits of some of these approaches and we are now beginning to see a reduction in recidivism and the return of some Indigenous kids to their respective cultural lands and families. The Youth Koori Court and Care Indigenous list in the Children's Court, the Walama List in the District Court and Circle Sentencing in the Local Court are all appropriate and respectful models.

In my opinion, culturally-specific processes are particularly effective in the criminal jurisdiction and may reduce criminal offending because:

1. The offender hears from other First Nations people that they do not condone criminal offending generally as a community and as victims.
2. The offender confronts the impact their offending has on people in a material way.

1 BOCSAR, *NSW custody statistics, Quarterly Update*, March 2022, accessed 29 June 2022.
2 ABS, 2021 Census data, Snapshot of Australia, accessed 29 June 2022.
3 For published resources, see for example the *Bugmy Bar Book*, hosted on the Public Defenders website and chs 2 and 12 in the Judicial Commission's *Equality before the law Bench Book*.

3. The offender is less likely to reject a judicial process as a top-down, Eurocentric creation of colonisation and thus more likely to participate.
4. First Nations people's confidence in the judicial process is enhanced because they have a voice.

The processes, which statistics suggest will lead to better outcomes, will reduce recidivism, give me hope, and are a credit to those involved. However, the burden and pressure on community members must be carefully managed, as does the potential division within a participating community. Additionally, a chronic addiction to chemical drugs may reduce the effectiveness of a cultural process as drug addiction can lead to a loss of all ties to family, community, and culture; a loss that may render culturally-specific court processes less effective if cultural leverage cannot be revived. I will never forget when I was 21 returning from my mother's funeral to find the back door of the house where I was living laying on the floor. A friend who lived with a drug addiction had kicked the door off its hinges, gone inside and stolen family belongings (except my mother's things). He did this knowing that I would be away at her funeral — such is the desperation of addiction. He was charged and sent to prison. I feel he was ashamed of what he did because he had lost all sense of dignity, trustworthiness and self-control.

On an encouraging note, the NSW Drug Court program, which aims to teach discipline and self-control to participants, is continually proving its effectiveness. I support its expansion specifically into areas that could involve more First Nations people.

Sexual and domestic violence leaves an indelible scar on many First Nations families and communities. Such offending may not be suitable for the current cultural processes because of the impact such offences have within a community, and the social burdens and polarising pressures placed on well-meaning community members, particularly women, who participate. Dealing with perpetrator violence may need to be reconsidered by understanding its root cause and mandating appropriate compulsory programs, even in a custodial setting. I felt the impact of domestic violence and understand the debilitating effect it can have on a family. I saw plates thrown and smashed, and a bottle weaponised and smashed across a face. It is a toxic environment in which to grow up. Its unpredictability erodes trust and cripples confidence; it is debilitating. It is serious.

Legally, the position is that for domestic violence offenders, general and specific deterrence and denunciation is the appropriate approach. The High Court in *The Queen v Kilic*[4] recognised a societal shift in relation to domestic violence:

> current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

In assessing the crime before it, the court at [28] referred to:

> the abuse of a relationship of trust which such an offence necessarily entails and which ... must … be deterred.

4 (2016) 259 CLR 256 at [21].

Proper recognition must be given to the real harm crimes such as this do to their victims, the children of victims, and the community in general. That said, the High Court in *Munda v Western Australia*[5] recognised that full-time custodial sentences are likely to be of little utility in reducing violent crimes especially those not premeditated and committed in areas of significant social disadvantage. As we know, imprisonment can sever any remaining cultural links and pro-social bonds and places violent offenders into an intrinsically violent environment. But the High Court also made these important points:[6]

1. The proper role of the criminal law is not limited to the utilitarian value of general deterrence.
2. It would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need or deserving of such protection and vindication as the criminal law can provide.
3. Courts also have an obligation:
   (a) to vindicate the dignity of each victim of violence
   (b) to express the community's disapproval of that offending, and
   (c) to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.

As a judicial officer I confront the domestic violence endemic in our communities daily and often the tools and resources to adequately address the problem of repeated domestic violence offending are limited. Yet, in my opinion, diversion into any of the present culturally-appropriate court processes would be problematic as such sentencing of domestically-violent offenders could fracture communities and place overwhelming burdens on victims and families.

I am grateful and humbled to be a magistrate and one whose work as chair of the First Nations Committee focuses on the improvement of the justice system. When working, I am even handed, but I do notice the number of First Nations people who came before the courts. Nonetheless, I am optimistic that the courts are moving towards recognised, culturally appropriate and adequately funded models with legislative frameworks. My Aboriginality and my background, while unusual perhaps compared to other judicial officers, have provided me with the knowledge that change is always a possibility if we are able to see opportunity when it arises.

As a magistrate, I see it as my duty to identify hope, to convey its possibility and to do whatever is appropriate to ensure its fruition in others.

The author as a boy pictured with his sister Yvonne. As the author writes, he was referred to as "milko" and Yvonne as "pickaninny". In preparation for this article, the editor of the *Judicial Officers' Bulletin* met Yvonne and an old family friend who shared the author's reflections of his turbulent early life.

5 (2013) 249 CLR 600.
6 ibid at at [53]–[54].

Further references on therapeutic jurisprudence and the trauma-informed court

For Further references on social media/socialisingfurther references on the topics of therapeutic jurisprudence and the trauma-informed court, please see the following:

- Public Defenders, The *Bugmy* Bar Book, at bugmybarbook.org.au, accessed 18 August 2021; also available on JIRS through "Publications/Bench Books and References" menu and the Commission's website at www.judcom.nsw.gov.au, accessed 18 August 2021.
- M King, *Solution-focused judging bench book*, Legal Services Board, 2009 at https://aija.org.au/wp-content/uploads/2017/07/Solution-Focused-Judging-Bench-Book.pdf, accessed 18 August 2021.
- Healing Foundation, video link at https://healingfoundation.org.au/intergenerational-trauma/.
- Judicial Commission of NSW, Videos and Podcasts, Cross-jurisdictional Webinar: An introduction to the Bugmy Bar Book Project, Recorded on 22 July 2020; Connecting The Dots: Intergenerational Trauma in the Aboriginal Community, Recorded on 8 October 2019.
- *Family is Culture Report*, 2019 at www.familyisculture.nsw.gov.au/__data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf, accessed 18 August 2021.
- Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at Ch 2 "Aboriginal people" and Ch 12 Trauma-informed courts.
- V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Bugmy Bar Book Project Committee Expert Report, 2021 at www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/culture-report.aspx, accessed 17 November 2021. See also S Beckett, "The significance of culture to wellbeing, healing and rehabilitation" (2021) 33(9) *JOB* 91.
- P Gray, "Beyond placement: realising the promise of the Aboriginal and Torres Strait Islander Child Placement Principle" (2021) 33(10) *JOB* 99.
- F Gerry, "Why being trauma informed is an issue for court integrity", Legalwise, 13 July 2022 at https://legalwiseseminars.com.au/insights/why-being-trauma-informed-is-an-issue-for-court-integrity/, accessed 27 July 2022.

Artificial intelligence

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The dark side of artificial intelligence: challenges for the legal system*

Dr W Gravett†

Robotics and artificial intelligence (AI) have the potential to transform lives and work practices, raise efficiency, savings and safety levels, and provide enhanced levels of services in the short to medium term. The current trend towards developing smart and autonomous machines with the capacity to be trained and to make decisions independently, holds not only economic advantages, but also a variety of concerns regarding their direct and indirect effects on society as a whole,‡ including challenges to ensure privacy and autonomy, non-discrimination, due process and transparency in decision-making processes.

AI's challenges to privacy and autonomy

We are already willing to wear or carry devices that provide much detail about our circumstances to databases.[1] Our mobile phones are capable of providing real-time spatial location data,[2] as well as retaining a secret record of every location that we visit.[3] We have embraced highly contextualised and automated directives in the travel context, eagerly (and sometimes blindly) accepting directions from Google Maps.[4] The capability of machines to invade human privacy will only increase.[5]

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‡ European Parliament Committee on Legal Affairs, Report with recommendations to the Commission on civil law rules on robotics, Report 2015/2103(INL), 2017.

1 B Sheppard, "Warming up to inscrutability: how technology could change our concept of law" (2018) 68 *University of Toronto Law Journal* 41.

2 Y Chen and M Ahn (eds), *Routledge handbook of information technology in government*, Routledge, 2017, p 109.

3 C Arthur, "iPhone keeps record of everywhere you go", The Guardian, 20 April 2011 at www.theguardian.com/technology/2011/apr/20/iphone-tracking-prompts-privacy-fears, accessed 25 August 2021.

4 Sheppard, above n 1.

5 A Casey and A Niblett, "Self-driving laws" (2016) 66 *University of Toronto Law Journal* 429 at 438.

The more convenient an agent is however, the more it needs to know about a person (preferences, timing, capacities, etc). This creates a tradeoff — more help requires more intrusion. The record to date is that convenience overwhelms privacy — autonomy and/or independence will increasingly be sacrificed and replaced by convenience.[6]

New brain imaging techniques point to a future in which our thoughts will not be as private as they are now.[7] People could be scanned for one purpose, for example to see how advertising campaigns affect their brains, while they inadvertently generate information that bears on their racial biases, sexual orientation or other sexual preferences.

AI-enhanced photorealistic pictures and videos, or "deep-fake" technology[8] is becoming pervasive. For example, Philip Wang, a software engineer at Uber, developed a website called ThisPersonDoesNotExist.com, that creates an endless stream of fake portraits. The algorithm that powers it is trained on an enormous dataset of real images, and then uses a neural network known as a generative adversarial network (or GAN) to fabricate new examples. In a Facebook post, Wang wrote:[9]

> Each time you refresh the site, the network will generate a new facial image from scratch … Most people do not understand how good AIs will be at synthesizing images in the future.

In February 2019, the creators of a revolutionary AI system that can write news stories and works of fiction — nicknamed "deep fakes for text" — took the unusual step of not releasing their research publicly, for fear of potential misuse. OpenAI, a non-profit research company backed by, among others, Elon Musk, stated that its AI model, called GPT2, is so good and the risk of malicious use so high, that it is deviating from its normal practice of releasing the full research to the public in order to allow more time to discuss the ramifications of the technological breakthrough.[10] GPT2 is fed text — anything from a few words to a whole page — and is then asked to write the next few sentences based on its predictions of what should come next. GPT2 is capable of writing plausible passages that match what it is given in both style and subject.[11]

6 K Alexandridis quoted in J Anderson and L Rainie, "Artificial intelligence and the future of humans", Pew Research Center Internet and Technology, 10 December 2018 at www.pewinternet.org/2018/12/10/artificial-intelligence-and-the-future-of-humans/, accessed 25 August 2021.

7 A Kolber, "Will there be a neurolaw revolution?" (2014) 89 *Indiana Law Journal* 807 at 836.

8 The first use of deep fake technology was to paste people's faces onto target videos, often in order to create nonconsensual pornography. See J Vincent, "ThisPersonDoesNotExist.com uses AI to generate endless fake faces", *The Verge*, 15 February 2019 at www.theverge.com/tldr/2019/2/15/18226005/ai-generated-fake-peopleportraitsthispersondoesnotexist-stylegan, accessed 25 August 2021.

9 ibid.

10 A Hern, "New AI fake text generator may be too dangerous to release, say creators", *The Guardian*, 15 February 2019 at www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction, accessed 25 August 2021.

11 For example, fed the opening line of George Orwell's Nineteen Eighty-Four — "It was a bright cold day in April, and the clocks were striking thirteen" — the system recognised the vaguely futuristic tone and the novelistic style, and continued with: "I was in my car on my way to a new job in Seattle. I put the gas in, put the key in, and then I let it run. I just imagined what the day would be like. A hundred years from now. In 2045, I was a teacher in some school in a poor part of rural China. I started with Chinese history and history of science.": Hern, ibid.

The ability to manipulate and generate realistic imagery at scale will have a huge effect on how modern societies think about evidence and trust. Such software may also be used for creating political propaganda and influence campaigns.[12] The courtroom is not immune to misleading evidence. Fake evidence will inevitably leak into the courtroom with the potential to dupe fact-finders.

Chesney and Citron predict a development stemming from deep-fake evidence — "immutable life logs" as an alibi service.[13] Because deep-fake technology will be able to portray people saying and doing things that they actually never did or said, alibis will become essential for digitally ensnared accused to prove their innocence in the courtroom. Hence, deep-fakes will create a heightened demand for proof of where a person was and what they were doing at all times.

The AI surveillance state

In the United States, both the federal and State governments have outsourced many regulatory and legal decisions to computation. Tax returns are too voluminous for IRS personnel to examine manually; "audit flags" are programmed to determine which returns should receive greater scrutiny or be rejected outright. Homeland Security officials are using big data and algorithms to determine which travellers pose a security risk and who can pass unmolested to their flights. So called "predictive policing" deploys law enforcement resources before crimes are committed. And, once perpetrators are convicted, "evidence-based sentencing" may quantify punishment by using data and algorithms to adjust the length of prison sentences based on myriad factors.[14]

Privacy proponents will recoil upon learning that AI is also increasing the effectiveness of State surveillance techniques.[15] Before AI, cameras were useful only to the extent that someone either observed a live feed or reviewed recorded footage. That time has passed. With the assistance of AI, cameras can now navigate three dimensions and make sense of what they "see" — all without any human intervention or assistance. Moreover, AI-augmented cameras are beginning to operate beyond ordinary human capability — they can identify millions of faces and predict human behaviour.[16]

The advent of China's social credit system ("SCS") is a sign of what may eventuate where an individual's rights and liberties will be determined by the SCS. This is the Orwellian nightmare realised.[17] New technologies make it possible to match images and voices with other types of information, and to use AI on these combined data sets to improve law enforcement and

12 Vincent above n 8.
13 B Chesney and D Citron, "Deep fakes: a looming challenge for privacy, democracy, and national security" (2019) 107 *California Law Review* 1753.
14 F Pasquale and G Cashwell, "Four futures of legal automation" (2015) 63 *UCLA Law Review* 30.
15 D Rankin, "How artificial intelligence could change the law in three major ways", *The Journal of Law and Technology at Texas*, 14 October 2018 at http://jolttx.com/2018/10/14/how-artificial-intelligence-could-change-the-law-in-three-major-ways/, accessed 25 August 2021.
16 ibid.
17 S Biggs as quoted in J Anderson and L Rainie, above n 6.

national security. Through its Sharp Eyes program, Chinese law enforcement is matching video images, social media activity, online purchases, travel records and personal identity into a "police cloud".[18] This integrated database enables authorities to keep track of criminals, potential law-breakers and terrorists.[19]

Facial recognition technology is nothing new. We see it, for example, on the iPhone X with its face-scanning technology.[20] But, thus far, China is the world leader in using facial recognition technology as a surveillance tool. Under the Sharp Eyes program, China's goal is to recognise all Chinese citizens within seconds of their faces appearing on a camera.[21] In May 2018, the Chinese government introduced a travel ban on people with poor "social credit".[22]

In the world of technology, facial recognition has become a known commodity. Behaviour prediction, on the other hand, is a recent trend. In addition to recognising who you are, AI-augmented cameras will be "intelligent" enough to predict your behaviour. This technology already exists, and it is improving by the day.[23]

New AI software is being used in Japan to monitor the body language of shoppers for signs that they are planning to steal. This software, developed by Japanese company Vaak, differs from similar products that match faces to criminal records. Instead, VaakEye uses algorithms to analyse footage from security cameras to spot fidgeting, restlessness and other body language cues that could be suspicious and then alerts shop employees about potential thieves via an app.[24]

Using AI to apprehend potential shoplifters raises ethical questions. For example, even though the incentive of such software may be to prevent theft, is it legal, or even moral, to prevent someone from entering a shop based on this? To exacerbate these concerns, there is also the potential of AI being used to fuel discrimination. A 2018 study by researchers from the Massachusetts Institute of Technology and Stanford University found that various commercial facial-analysis programs demonstrate skin type and gender biases, depending on the types of

18 D West and J Allen "How artificial intelligence is transforming the world", *Brookings Report*, 24 April 2018 at www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/, accessed 25 August 2021.

19 ibid.

20 Conceptually, the way in which it works is simple: the camera looks at a face, extracts distinguishing facial features (such as the size and width of the nose, for example) and then compares those features against a database of pictures (sometimes taken from driver's licence photos).

21 See, generally S Denyer, "In China, facial recognition is sharp end of a drive for total surveillance", *The Sydney Morning Herald*, 16 January 2018 at www.smh.com.au/world/in-china-facial-recognition-is-sharp-end-ofa-drive-for-total-surveillance-20180108-h0f3jb.html, accessed 25 August 2021.

22 As reported by China's National Public Credit Information Center, see *The Guardian*, "China bans 23m from buying travel tickets as part of 'social credit' system", 2 March 2019 at www.theguardian.com/world/2019/mar/01/china-bans-23m-discredited-citizens-from-buying-travel-tickets-social-credit-system, accessed 25 August 2021.

23 Rankin, above n 15.

24 The company fed the algorithm 100,000 hours of surveillance data to train it to monitor everything from facial expressions of shoppers to their movement and clothing. VaakEye was launched in 50 shops in Japan during March 2019, and the company plans to expand to 100,000 shops in Japan within three years. Proponents of systems such as this claim that they could help reduce global retail costs from shoplifting, which reached $USD 34 billion in 2017. See further, N Lewis, "Should AI be used to catch shoplifters?", *CNN Business*, 18 April 2019 at https://edition.cnn.com/2019/04/18/business/ai-vaak-shoplifting/index.html, accessed 25 August 2021.

data used.[25] Technologies that rely on algorithms, particularly in regards to human behaviour, have the potential for discrimination. After all, humans have to train the algorithms what or whom to treat suspiciously.

One way in which police arrest suspects is through arrest warrants, which, in most common law jurisdictions, is based on a "reasonable grounds" standard. If an AI-equipped camera identifies someone as a likely criminal, will that be enough to meet the reasonable grounds standard? If so, and assuming the technology assigns a percentage of criminality to an individual, how much will satisfy reasonable grounds — 90%, 70% or 50%? This, of course, also raises the question of whether it is even ethical let alone lawful to arrest a person before they commit a crime.[26]

What about the role of this technology as admissible evidence in the courtroom? Would it be too prejudicial to show the fact-finder that AI software determined that an accused is a criminal? What if, instead, prosecutors used the technology during a trial to buttress their arguments? In a closing address, for example, the prosecutor might argue: "Based on all the eye-witness testimony, along with the determination that the accused, considering his facial features, has an 80% likelihood of having committed the crime charged, you should find the accused guilty."[27]

These types of arguments could be commonplace in the future. There will be a need for clarity from lawmakers and regulators regarding who will ultimately need to decide in what circumstances the use of this technology will be appropriate or desirable as a matter of public policy.[28]

Bias and algorithmic transparency

Developments in technology raise important policy, regulatory and ethical issues.[29] For example, how should we promote data access? How do we guard against biased or unfair data utilised in algorithms? What types of ethical principles are introduced through software programming, and how transparent should designers be about their choices? What about legal liability in cases in which algorithms cause harm?[30]

It must be remembered that technology is not necessarily neutral and objective. A software design may expressly, through its programming, reflect a preference for certain values over others.

AI systems can also be inadvertently programmed to have bias because of the biases of the programmers or, with the development of self-learning algorithms, actually learn to be biased

25 Lewis, ibid.
26 Rankin, above n 15.
27 ibid.
28 Lewis, above n 24.
29 West and Allen, above n 18.
30 O Osoba and W Welser IV, "The risks of artificial intelligence to security and the future of work", *RAND Corp*, 2017.

based on the data it is learning from.[31] In addition, AI systems find it more difficult to generalise findings from a narrower dataset, with minor differences from a training set potentially making larger-than-intended impact on a prospective set of data, creating potential bias.[32]

A 2017 study demonstrated that AI can learn to have racist or sexist biases based on word associations that are part of data it was learning from, and sourced from the internet that reflected humanity's own cultural and historical biases.[33]

Algorithms — the set of instructions according to which computers carry out tasks — have become an integral part of everyday life, and they have immersed themselves in the law.[34] In the United States, judges in certain States use algorithms as part of the sentencing process to assess recidivism risk.[35] Many law enforcement agencies use algorithms to predict when and where crimes are likely to occur (so-called "predictive policing").

Most algorithms are created with good intentions, but questions have started surfacing over algorithmic bias on employment search websites, in credit reporting bureaux, on social media websites and even in the criminal justice system, where sentencing and parole decisions appear to be biased against African Americans.[36] These issues are likely to become exacerbated as machine learning and predictive analytics become more sophisticated, particularly because with deep learning (which learns autonomously), algorithms can quickly reach a point where humans can often no longer explain or understand them.

Moreover, it is very difficult to challenge a computer's decisions, because whoever owns the algorithms owns the trade secrets associated with them, and is neither going to reveal the source code, nor likely be willing to even discuss the secret source and how it makes the algorithm functions.[37] What justifies the algorithm from an economic viability perspective is its success or perceived success, which is an entirely different question from whether or not it operates in biased ways.[38]

31 E Loh, "Medicine and the rise of the robots: a qualitative review of recent advances of artificial intelligence in health" (2018) 2 *BMJ Leader* 59 at 61.
32 ibid.
33 A Caliskan, J Bryson and A Narayanan, "Semantics derived automatically from language corpora contain human-like biases" (2017) *Science* 183.
34 L Millan "Artificial intelligence", *Canadian Lawyer Magazine*, 3 April 2017 at www.canadianlawyermag.com/article/artificial-intelligence-3585, accessed 25 August 2021.
35 Twenty-eight States and parts of 7 more States use algorithms as risk assessment tools in the sentencing process: M Stevenson and J Doleac, "Algorithmic risk assessment in the hands of humans" at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489440, accessed 25 August 2021.
36 ibid.
37 ibid.
38 ibid.

In some instances, certain AI systems are thought to have enabled discriminatory or biased practices.[39] Racial issues also arise in facial recognition software. Most such systems operate by comparing a person's face to a range of faces in a database. As pointed out by Joy Buolamwini, a researcher at the MIT Media Lab:[40]

> If your facial recognition data contains mostly Caucasian faces, that is what your program will learn to recognize.

Unless the databases have access to diverse data, these programs perform poorly when attempting to recognise African-American or Asian-American features. Many historical datasets reflect traditional values, which may or may not represent the desired preferences in a current system. Algorithms embed ethical considerations and value choices into program decisions. As such, these systems raise questions concerning the criteria used in automated decision-making.

As algorithms have become an established part of high-stakes projects, concerns have arisen that they are not adequately transparent to allow for accountability, especially if they are used as the basis for harmful or coercive decisions.[41] There is growing consensus among computer scientists that it would take aggressive research to cut through algorithmic opacity, particularly in machine learning, where opacity is at its densest.[42]

One of the major problems is that classic values of administrative procedure, such as due process, are not easily coded into software language. In the United States, many automated implementations of social welfare programs, ranging from State emergency assistance to the Affordable Care Act ("Obamacare") exchanges, have resulted in erroneous denials of benefits, lengthy delays and troubling outcomes.[43]

Depending on how AI systems are set up, they can assist people to discriminate against individuals they do not like, or help to screen or to build lists of individuals based on unfair criteria. The types of considerations that go into programming decisions matter a lot in terms of how the systems operate and how they affect customers. For these reasons, the European Union implemented the General Data Protection Regulation (GDPR) in May 2019.[44] The GDPR is designed to ensure the protection of personal data and provide individuals with information on how data is collected and operates. All organisations within the European Union, and organisations that collect data related to EU citizens, must be GDPR-compliant.

Machine learning is the ability of a computer to modify its programming to account for new data and modify its operations accordingly. It uses computers to run predictive models that

39 Executive Office of the President, *Preparing for the future of artificial intelligence*, National Science and Technology Council Committee on Technology, 2016, pp 30–31.

40 A Cohen, "The digital activist taking human prejudice out of our machines", *Bloomberg Businessweek*, 3 July 2017, p 80.

41 Sheppard, above n 1, at 47.

42 ibid at 48.

43 F Pasquale and G Cashwell, above n 14. Likewise in Australia, the flawed robodebt program directed to recovering alleged debt from Centrelink recipients led to settlement of a class action in May 2021: see Gordon Legal statement at https://gordonlegal.com.au/robodebt-class-action/robodebt-settlement-faqs/#settleeight, accessed 25 August 2021.

44 At https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules_en, accessed 25 August 2021.

learn from existing data to forecast future behaviours, outcomes and trends.[45] Machine learning, therefore, is dependent on data. The more data it can access, the better it can learn. However, the quality of the data, the way the data is inputted into the system, and how the system is "trained" to analyse the data can all have dire effects on the validity, accuracy and usefulness of the information generated by the algorithm.

In short, not only can an otherwise perfect algorithm fail to accomplish its set goals, but it may also prove affirmatively harmful.[46] For example, the algorithm employed by Google to answer user questions erroneously declared that Barack Obama, a Christian, was a Muslim.[47] The algorithm simply did what it was "trained" to do — it gathered information from the internet, "feeding" on websites that propagated false information. Its data pool was polluted, and the algorithm could not discern between "good" and "bad" data. This was also brought to light, for example, by the Microsoft chatbot, "Tay", which learned to interact with humans via Twitter. Within 24 hours, the chatbot became racist, because internet trolls had bombarded it with mostly offensive and erroneous data in the form of inflammatory tweets, from which the chatbot had "learned".[48]

Even if the data were accurate, the person "training" the AI could infuse their own biases into the system. This may have been a factor in the crime predicting software that has led to the arrest of an unjustifiably high number of African-Americans and other minorities in the United States[49] as well as sentencing tools that predict higher rates of recidivism for people with these racial profiles.[50]

Accordingly, the effective accuracy of an algorithm is dependent on both the programming and the data. This dictates a further, legally troubling conclusion. If there are doubts about the results of an algorithm, one can at least theoretically inspect and analyse the programming that constitutes the algorithm. However, given the sheer volume of data available on the internet, it may be impossible to adequately determine and inspect the data used by the algorithm.[51]

Bias and discrimination are serious issues facing AI. There have been a number of cases of unfair treatment linked to historic data, and steps need to be undertaken to make sure this does

45 I Giuffrida, F Lederer and N Vermerys, "A legal perspective on the trials and tribulations of AI: how artificial intelligence, the internet of things, smart contracts, and other technologies will affect the law" (2018) 68 *Case Western Reserve Law Review* 747 at 753.

46 ibid at 754.

47 J Nicas, "Google has picked an answer for you — too bad it's often wrong", *Wall Street Journal*, 16 November 2017 at www.wsj.com/articles/googles-featured-answers-aim-to-distill-truthbut-often-get-it-wrong-1510847867, accessed 25 August 2021.

48 D Victor, "Microsoft created a twitter bot to learn from users. It quickly became a racist jerk", *New York Times*, 24 March 2016 at www.nytimes.com/2016/03/25/technology/microsoft-created-a-twitter-bot-to-learn-from-users-it-quickly-became-a-racist-jerk.html, accessed 25 August 2021.

49 C O'Neil, *Weapons of math destruction*, Crown Books, 2017, pp 85–87.

50 J Angwin et al, "Machine bias", *ProPublica*, 23 May 2016 at www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing, accessed 25 August 2021.

51 Giuffrida, Lederer and Vermerys, above n 45 at 755.

not become prevalent in AI. Existing statutes governing discrimination in the physical economy need to be extended to digital platforms. This will help protect consumers and build confidence in these systems as a whole.[52] More transparency is needed in how AI systems operate.[53]

The challenge of regulating AI

The question arises whether we have reached the point at which we need to devise a legislative instrument on robotics and AI.[54] The classic line of thinking is that legislation becomes necessary once a societal or technological change calls for an adequate legal framework. Once every home and business is equipped with an autonomous robot, society will change dramatically. People will work, collaborate, interact, live, and perhaps even fall in love with, highly sophisticated machines. We will need to consider humanity's place in the face of these technologies.[55]

There are, broadly speaking, two schools of thought on the issue of the regulation of AI. The first is based on the premise that regulation is bad for innovation. Entrepreneurs in this camp do not want the field of AI to be defined too soon, and certainly not by non-technical people. Among their concerns are that bad policy creates bad technology, regulation stifles innovation, and regulation is premature because we do not yet have any clear sense of what we would be regulating.[56]

The other school of thought seeks to protect against potentially harmful creations that "poison the well" for other AI entrepreneurs. Subscribers to this school believe that national governments should act expeditiously to promote existing standards and guidelines or, where necessary, create new guidelines, to ensure a basic respect for the principle of "first, do no harm".[57]

Innovations such as the internet and networked AI have enormous short-term benefits, along with long-term negative effects that could take decades to become recognisable. AI will drive a vast range of efficiency optimisations, but also enable hidden discrimination and arbitrary penalisation of individuals in areas such as insurance, job seeking and performance assessment.[58] Without significant changes in our political economy and governance regimes, AI is likely to create greater economic inequalities, more surveillance and more programmed and non-human-centric interactions.[59] As to liberty, there are clear risks. AI affects agency by

52 West and Allen, above n 18.
53 ibid.
54 On February 16, 2017, the European Parliament adopted a legislative initiative resolution in which it recommended a range of legislative and nonlegislative initiatives in the field of robotics and AI to the European Commission: at www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html, accessed 25 August 2021.
55 N Nevejans, *European civil law rules on robotics*, Report noPE 571.379, 2016 at pp 6–7.
56 C Piovesan, "Speaker's corner: lawyers need to keep up with AI", *Law Times*, 5 June 2017 at www.lawtimesnews.com/author/na/speakers-corner-lawyers-need-to-keep-up-with-ai-13408/, accessed 25 August 2021.
57 ibid.
58 A McLaughlin as quoted in J Anderson and L Rainie, above n 6.
59 M Gorbis as quoted in J Anderson and L Rainie, above n 6.

creating entities with meaningful intellectual capabilities for monitoring, enforcing and even punishing individuals. Those who know how to use it will have immense potential power over those who do not or cannot.[60]

Rapid innovation in technology far exceeds the ability of the world's domestic and international legal systems to keep pace.[61] The key for humanity in general and lawyers specifically, will be to develop the positive aspects of the technology, while managing its risks and challenges.[62] AI regulation will be a necessity, particularly in the areas of safety and errors, liability laws and social impact. Policy-makers will have to embrace the benefits that AI can bring, but at the same time be sensitive to pre-empt the dramatic and potentially devastating effects of misusing AI.[63]

Countries should develop a data strategy that promotes innovation and consumer protection. Currently, there are no uniform standards in terms of data access, data sharing or data protection.[64] Almost all the data is proprietary in nature and not shared very broadly with the research community, and this limits innovation and system design. AI requires data to test and improve its learning capacity. Without structured and instructed data sets, it will be nearly impossible to gain the full benefits of AI.[65]

Conclusion

AI may well be a revolution in human affairs and become the single most influential innovation in history.[66] How AI systems unfold has major implications for society as a whole. It matters how policy issues are addressed, ethical conflicts reconciled, legal realities resolved, and how much transparency is required in AI and data analytic solutions.[67]

Human choices about software development affect the way in which decisions are made and the manner in which they are integrated into organisational routines. Exactly how these processes are executed needs to be better understood, because they will have substantial impact on the general public soon and for the foreseeable future.[68]

60 G Shannon as quoted in J Anderson and L Rainie, above n 6.
61 C Rice, "Artificial Intelligence", 6 January 2016 at www.claytonrice.com/artificial-intelligence, accessed 25 August 2021.
62 A Botha, "Artificial intelligence II: the future of artificial intelligence", *Foresight For Development* at www.foresightfordevelopment.org/featured/artificial-intelligence-ii, accessed 25 August 2021.
63 ibid.
64 West and Allen, above n 18.
65 ibid.
66 ibid.
67 ibid.
68 ibid.

Technology and the law*

The Honourable Geoffrey Nettle AC QC†

The paper discusses the use of computer-based technology with a particular focus on computational law systems that can make the intellectual decisions which can fashion and determine the outcome of a case. The author explores the uses of computational law in the area of discovery and gives examples from Ireland, the use of artificial intelligence by Australian law firms, and trials conducted in the family law system.

A lot has been written and said about the use of computer-based technology in court rooms and the likely effects of it on the way counsel conduct litigation and judges and juries determine the outcome.[1] Much of that discourse is valuable and some of it is interesting. Essentially, however, it is concerned with the electronic or, more accurately, digital means of storing and presenting information in accordance with intellectual decisions made by counsel as to what they consider to be relevant to the case in hand. As Professor Tania Sourdin has written, these developments reflect the first and second levels of technological innovation in the justice system.[2]

Today, I want to look at an aspect of computer-based technology which I think to be more interesting, and that is computational law systems that can make the intellectual decisions which fashion and perhaps ultimately determine the outcome of a case. This, in Sourdin's nomenclature, reflects the third level of technological innovation.

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1 See, eg, F Lederer, "High-tech trial lawyers and the court: responsibilities, problems, and opportunities, an introduction", Courtroom 21 Court Affiliate Conference, 2003; M Warren, "Open justice in the technological age", speech delivered at the Redmond Barry Lecture, 21 October 2013, Melbourne.

2 T Sourdin, "Justice and technological innovation" (2015) 25 *JJA* 96.

To start with some definitions, "computational law" means different things to different people. For the purposes of this discussion, I propose to adopt the definition of computational law propounded by Nathaniel Love and Michael Genesereth in their paper on "Computational law" which was delivered in June 2005.[3] They described computational law as:[4]

> an approach to automated legal reasoning focusing on semantically rich laws, regulations, contract terms, and business rules in the context of electronically-mediated actions.

They added that:[5]

> A representation language for computational law must enable processing of both semantic data and multiple, semantically rich rule sets in the context of a formal model of behaviour.

In substance, therefore, what I mean by computational law for the purpose of this exercise is the algorithmic application of complex sets of fixed rules, which are originally expressed in words but for the purposes of the exercise are recoded to the representation language, to data sets that represent facts, which are also originally expressed in words but for the purposes of the exercise are recoded to the representation language, in order to produce a conclusion which is first expressed in the representation language and then finally recoded into words.

At the outset, I should also stress that computational law is by no means confined to the future. As Love and Genesereth observed in their paper, we had even then reached the point that, if a computational law system were supplied with sufficient semantic data and rules, it could structure transactions that were valid with respect to complex behavioural constraints without the need for assistance from a lawyer.[6] By way of example, they cited the application of a computational law system to a university procedure for advising students on registering for a final semester. That system could automatically apply data from the students' academic record to departmental course pre-requisites and breadth requirements in order to determine which subjects the student was permitted to take.[7]

More to the point, however, such computational law systems are now having an impact on the practice of law in this country. Some large law and accounting firms are already using software that exhibits features of computational law to assist with discovery.[8] To a greater or lesser degree, it can make informed decisions about the documents which are relevant to a matter in issue and those which are not. I note in passing too that the High Court of Ireland expressly approved the use of so-called "Technology Assisted Review" in a large commercial insolvency matter.[9]

3 N Love and M Genesereth, "Computational law", Proceedings of the Tenth International Conference on Artificial Intelligence and Law, 2005, p 205.
4 ibid.
5 ibid at 206.
6 ibid.
7 ibid at 207.
8 See, eg, J Markoff, "Armies of expensive lawyers, replaced by cheaper software", New York Times (online), 4 March 2011, www.nytimes.com/2011/03/05/science/05legal.html, accessed 26 August 2021; KordaMentha, "KordaMentha forensic adds relativity to their eDiscovery capabilities", www.kordamentha.com/news/forensic-relativity, accessed 26 August 2021; see also T Sourdin, above n 2 at 103.
9 *Irish Bank Resolution Corporation Ltd v Quinn* [2015] IEHC 175.

Meanwhile, other firms are moving into the field of computer-generated legal advice. At the Law Tech Summit held at Noosa in 2013, delegates were told of applications that enabled clients to enter a series of facts and receive the probable outcome of a legal matter based on relevant case law and statutes.[10] In 2014, Chris Merritt reported in *The Australian* newspaper[11] that an east coast law firm called Plexus had unveiled what it said was the nation's first commercial use of artificial intelligence to provide legal advice on the requirements for setting up a trade promotion. He noted that Slater and Gordon had developed a similar product that dealt with unfair dismissal claims, albeit that their system led to a face-to-face interview with a solicitor. Mr Merritt went on to report that the Plexus system was capable of producing online advice in the space of about 10 minutes compared to the six or so weeks which it would have taken a lawyer to prepare, and that the machine could do the job at about 20–30% of the cost of the lawyer.

In similar vein, as some of you will know, judges and judicial registrars of the Family Court of Australia and family law practitioners have been trialling a system called "Split-Up", which Sourdin describes as a "hybrid rule-based neutral network system" that can generate advice on how property from a marriage would likely be settled if the matter were determined by the court.[12]

Further, if it is not already the case, it is unlikely to be long before computational law systems that are capable of producing do-it-yourself wills, trust deeds, superannuation fund set-ups, business contracts, conveyancing documents, intervention order applications and other family law processes become widely available in Australia.[13]

As those systems become available, they will enable individuals to attend to a significant part of their legal affairs without the intervention of a solicitor, just as the development of computational software of the kind operated by the Commissioner of Taxation enables thousands of people now to complete an online tax return without the intervention of an accountant.[14] And, as the range and accessibility of computational law programs develop, it is not improbable that a significant part of what at present comprises the bread and butter of high street solicitors' practices will be eliminated.[15]

A further point worth considering is that, paradoxically, the increase in electronically mediated transactions and computer-generated legal advice may also tend to reduce commercial disputes and, therefore, commercial litigation. History suggests that the public may be inclined to give

10 S Pennington, "Lawyers next for tech-driven outsourcing", *Sydney Morning Herald* (online), 10 September 2013, www.smh.com.au/it-pro/business-it/lawyers-next-for-techdriven-outsourcing-20130909-hv1qa.html, accessed 26 August 2021.

11 C Merritt, "Artificial intelligence comes to the law", *The Australian* (online), 20 June 2014.

12 T Sourdin, above n 2 at 101.

13 See, eg, L Branting, "Advisory systems for pro se litigants", Proceedings of the Eighth International Conference on Artificial Intelligence and the Law, 2001, p 139.

14 Australian Taxation Office, "myTax", available through www.my.gov.au.

15 See S Pennington, above n 10.

greater credence to advice produced by a computer than to advice produced by a human being, albeit that the computer incorporates some if not all of the prejudices and inadequacies of the human beings who create it, program it and inform it.

As an illustration of the point, some of you will recall that, when DNA technology was relatively new and the allele readings and probability calculations were manually produced, there were often significant forensic disputes about them with both sides calling expert evidence and testing it at length. Then came computer-generated spectrograph readings and computer-generated probability calculations with the result that there is now seldom a dispute about the results of DNA testing. And, significantly, that is so even though the computers which generate the results are to a large extent infused by their creators with the same kinds of prejudices and predilections as used to be productive of dispute when the readings were manually produced.

In the same vein, at least in simpler matters, technology is likely to increase the incidence of self-represented litigants. In a 2001 paper entitled "Advisory systems for pro se litigants",[16] L Karl Branting proposed a framework for developing computer advisory systems that used then-existing inference, document-drafting and interface design techniques. He described an example which had already been installed at public expense for pro se litigants in protection order applications in the Idaho Supreme Court. He contended that similar applications could be developed for use in other areas of law and predicted that improvements in interface design, including multi-language text, speech output and web delivery, would greatly increase the acceptance of these applications.

There is little reason to doubt that the same kinds of developments will occur in this country and, if so, that the number of lawyers needed to be involved in simple forms of litigation and possibly also the number of judges and other judicial officers required to decide such cases may be reduced.

Are there then any aspects of litigation as we know it that are likely to survive the effects of computational law? I am inclined to think that two stand out. The first is litigation involving disputed facts and the second is litigation involving the application of open-textured laws.

For the time being, I conceive it to be unlikely that computational law will have much impact on cases involving disputed facts, if only because of the vast range of variables involved in human fact finding and, therefore, the immensity of the task of constructing the kind of algorithms and databases which might conceivably replicate those functions. It is one thing to use an algorithm or a combination of algorithms to apply a complex rule set to an established and accepted set of facts. But, where facts are disputed, and so must be determined on the basis of evidence, the presentational dimension of evidence (especially oral evidence) and the intellectual processes

16 See, eg, L Branting, above n 13.

involved in its evaluation and interpretation (whether by judge or jury) are so complex and so much informed by human intuition and experience as to defy synthesisation by any presently available artificial intelligence system.[17]

In a paper presented at the Cambridge Centre for Public Law Conference in 2014,[18] Perry J of the Federal Court of Australia wrote of the watershed moment in 1997 when IBM's supercomputer, "Deep Blue", defeated world chess champion Garry Kasparov and so demonstrated that computers could make decisions that outperform the best of human minds. But, as her Honour remarked, in order to do that, the computer had to be programmed from the outset with a full history of Kasparov's previous public matches and style and, between each game, a team of chess experts and programmers were required to alter and improve the program to accommodate what Kasparov had just done in the previous game.

One can see how that sort of computer engineering might one day be applied to the assessment of oral evidence. Put in enough of the known facts and data concerning the style of the witness, take a break every couple of minutes to enable a team of experts to update the database and vary the program to accommodate what the witness has just said, and then proceed ad seriatim until the witness's evidence is concluded.

Possibly, too, if that could be done, the outcome would be more reliable than the unaided assessment of a judge or jury. Human beings have limited attention spans but machines just keep on going. It is conceivable that with access to sufficient statistics, a computer could make more accurate determinations about the probability of certain kinds of behaviour than human beings would be likely to do.

But, inevitably, the reliability of computer assessment of evidence, particularly oral evidence, would depend on the quality of the team of experts, not to mention the validity of the algorithms, and also on whether the breaks were sufficiently close in time to avoid something being overlooked or miscoded along the way. And, as matters stand, such a process would surely cost vastly more than the conventional assessment of the evidence by a judge or jury and it would almost certainly take a great deal longer.

That is not to deny that, with enough time, enough data storage and the encoding of enough human sensory perceptions and behavioural characteristics into algorithmic functions, there will one day be produced a computational law system which, without need of any further adjustment, is able to do at least as good a job in assessing oral evidence as a judge or jury.[19] For example, if the question were whether an accused had committed a violent assault, and if it

17 Cf T Levitt and K Laskey, "Computational inference for evidential reasoning in support of judicial proof", in M MacCrimmon and P Tillers (eds), *The dynamics of judicial proof: computation, logic and common sense,* Springer-Verlag, New York, 2002, p 345 at pp 352–383; J Josephson, "On the proof dynamics of inference to the best explanation" in MacCrimmon and Tillers (eds), ibid at p 287; P Snow and M Belis, "Structured deliberation for dynamic uncertain inference", in MacCrimmon and Tillers (eds), ibid at p 397.

18 M Perry and A Smith, "iDecide: the legal implications of automated decision-making", paper presented to the Cambridge Centre for Public Law Conference, 15–17 September 2014, http://classic.austlii.edu.au/au/journals/FedJSchol/2014/17.html, accessed 20 April 2021.

19 See, eg, A D'Amato, "Can/should computers replace judges?" (1977) 11 *Georgia Law Review* 1277; T Sourdin, above n 2 at 102.

were established that the accused was heavily intoxicated at the time of the alleged offence, a sufficiently comprehensive statistical correlation between heavy intoxication and the propensity to violence might, in light of other known factors (for example, past criminal conduct), enable a computer to reach a sounder assessment of guilt than would a jury.

Equally, if the issue were whether DNA found at the scene of a crime was a sufficient match to an accused's DNA, a rationally programmed computer applying Bayesian analysis would inevitably avoid logical errors like the so-called prosecutor's fallacy[20] of assuming that the prior probability of a random match is equal to the probability that the accused is innocent.[21]

Such statistically based computer-aided analysis of evidence might also prove useful in civil matters. Consider for example the possible application of computer analysis of evidence to a tax case in which the question is whether the taxpayer had acquired an asset as part of a profit-making undertaking or plan within the meaning of s 15.15 of the *Income Tax Assessment Act 1997* (Cth) or whether a particular transaction is a tax avoidance scheme within the meaning of Pt IVA of the *Income Tax Assessment Act 1936* (Cth). Assuming enough statistics of the correlation between the kind of transaction under consideration and cases in which it has been established that such a transaction was entered into as part of a profit-making undertaking or plan or as part of a tax avoidance scheme, a computer's determination of the probability of the subject transaction being part of such a plan or scheme might well prove more reliable than any human interpretation of the oral and written evidence offered on behalf of the taxpayer.

Of course, developments of that kind would require some significant modifications to the current law relating to tendency and coincidence evidence. But it is foreseeable that such amendments might be forthcoming. There is nothing new in amending the various Evidence Acts to facilitate advances in computer technology. The computer-generated documentary evidence provisions have been in force for decades.[22]

It is questionable, however, whether society would accept that the outcome of litigation should be determined by computer assessment of oral evidence; especially in criminal litigation. It is one thing to receive and value computer-generated legal advice as a working approximation of a possible outcome generated by the application of established rules to assumed facts. It is acceptable because in essence it is little different from the kind of legal advice which is produced by human beings. But it would be quite another thing for litigants to accept a computer's assessment of their credit and reliability, and still more so a computer's assessment of their credit and reliability relative to that of opposing witnesses.[23] In the federal sphere, there are also the requirements of s 80 of the Constitution to be accommodated.[24]

20 W Thompson and E Schumann, "Interpretation of statistical evidence in criminal trials: the prosecutor's fallacy and the defense attorney's fallacy" (1987) 11(3) *Law and Human Behavior* 167.

21 See E Nissan, "Select topics in legal evidence and assistance by artificial intelligence techniques" (2008) 39 *Cybernetics and Systems* 333 at 343–348.

22 See, eg, *Civil Evidence Act 1968* (UK), c 64; *Evidence Act 1898* (NSW) (rep), Pt IIC (inserted by *Evidence (Amendment) Act 1976* (NSW)). See also, eg, *Evidence Act 2008* (Vic), ss 69, 146, 147, Dictionary, definition of "document".

23 Cf Nissan, above n 21 at 375–379.

Either way, it remains that the technical improvements required to make an accurate assessment of evidence suggest that computer-aided analysis of evidence, particularly oral evidence, is still a fair way off.

That brings me to the application of computational law to open-textured rules; by which I mean, for example, whether something was reasonably foreseeable or whether a transaction is unconscionable or whether a contract term is unfair or whether an act is a breach of good faith or whether a distribution of liabilities is just and equitable.

For similar, although not identical reasons, it appears that the application of computational law to cases involving open-textured rules will prove problematic. As Branting noted in his earlier work, "Reasoning with rules and precedents: a computational model of legal analysis",[25] there was at the time of writing in 2000, a "broad consensus within the automated legal reasoning community that rule-based reasoning was insufficient to model the problem solving of attorneys because of the problem of open-textured legal predicates". He cited[26] as an example of those shortcomings a rule-based system called LDS for determining the settlement value of personal injury claims. It was designed to "chain" forward from the facts of a new case to five distinct factors bearing on settlement value, including the loss suffered by the plaintiff, the likelihood of establishing liability and the relative degrees of responsibility of the plaintiff and the defendant. It then combined those factors to produce an estimate of the expected judgment. But the limitation of the system was that whenever it came to a question of whether open-textured predicates were satisfied, such as, for example, whether the particular use of a product was foreseeable, it forced the user to determine whether the predicate was satisfied as part of the data input into the system.

The nub of the problem is the difference between the process of scientific reasoning and the process of legal reasoning.[27] Hitherto, the methodology of computational law has been the methodology of scientific positivism.[28] At base, that knows nothing of introspective notions of interpretive knowledge or metaphysics or theology. When applied to determine the outcome of a case, it assumes that there can only ever be one proper outcome and that its identification requires no more than the application of logic and reason to what has previously been decided. Yet, as lawyers know, where a law is open textured, logic and reason (as applied under the rubric of legal reasoning) will often yield more than one possible outcome; and especially in the absence of hard precedent. The significance of similarities and differences between cases is determined by normative processes.[29] The selection of the proper outcome requires an epistemology beyond empiricism and scientific method. As Julius Stone concluded in "Legal

24 *Brown v The Queen* (1986) 160 CLR 171; *Cheatle v The Queen* (1993) 177 CLR 541; *Alqudsi v The Queen* (2016) 258 CLR 203.

25 L Branting, *Reasoning with rules and precedents — a computational model of legal analysis*, Dordrecht: Kluwer Academic Publishers, 2000, p 146.

26 ibid at p 147.

27 J Popple, *A Pragmatic Legal Expert System*, Dartmouth, Aldershot, 1996 at pp 7–8.

28 See and compare T Bathurst, "Advocate v Rumpole: who will survive? An analysis of advocates' ongoing relevance in the age of technology" (2015) 40 *Australian Bar Review* 185 at 190.

29 S Burton, *An introduction to law and legal reasoning*, Little, Brown & Co, 1985.

System and Lawyers' Reasonings", judicial decision-making involves "acts of will, as well as of cognition"[30] and it necessitates "the dedication of a certain part of lawyers' conscious concern to study of the various criteria of choice made available by earlier thought, and of the relevance of the facts of contemporary social contexts to the doing of justice".[31]

Two examples may assist in demonstrating the point. Consider first Lord Atkin's formulation of liability in negligence[32] as based upon a general public sentiment of moral wrongdoing for which the offender must pay, subject to the qualification that, because of the need to contain liability, "[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". That famous piece of legal reasoning bespeaks the interpretivist invocation of metaphysics and theology and the application of the norms, values and symbols of the Judeo-Christian imperative to love thy neighbour as thyself.[33]

Consider then Sir Owen Dixon's extrajudicial address "Concerning judicial method",[34] written almost 20 years after *Donoghue v Stevenson,* in which his Honour proposed a means of escaping the excesses of the rule in *Foakes v Beer*[35] by the device of extending the existing doctrine of estoppel in pais beyond a misrepresentation of existing fact to an assumed conventional basis of legal dealing; a concept which, it will be recalled, ultimately found favour with Mason CJ and Deane J in *The Commonwealth v Verwayen.*[36] Pertinently, for present purposes, Sir Owen spoke of the judicial warrant for going down that path of development in terms of the court "shar[ing] the feeling that there is something wrong with the conclusion" that precedent dictated and that there is much that "a court animated by [that] feeling" might do and yet not depart from the traditional method of judicial reasoning.[37] That famous example of extra curial reasoning bespeaks the repudiation of the one possible result dictated by positivism in favour of one of a number of possible results which may flow from an exercise in introspectivism grounded in the norms, values and symbols of intuitive knowledge.

Present day computational law systems are incapable of replicating processes of those kinds and it is likely to take some time before they can. In the early 2000s, a group of law professors and computer scientists gathered, first in Amsterdam, and then in New York, to discuss the capacity of artificial intelligence to make contributions to evidence, inference, and proof in litigation. Out of those conferences came a body of research that suggested that introspective legal reasoning could potentially be performed by computers.[38] One author posited how fuzzy-logic methodologies could be made to replicate the way that legal reasoning involves matters

30 J Stone, *Legal system and lawyers' reasonings,* Maitland Publications, 1964, p 318.
31 ibid at p 320.
32 *Donoghue v Stevenson* [1932] AC 562 at 580.
33 Leviticus 19:18; Mark 12:29–31.
34 O Dixon, "Concerning judicial method" (1956) 29 *Australian Law Journal* 468; republished in S Woinarski (ed), *Jesting Pilate and other papers and addresses*, 2nd edn, W S Hein & Co, Buffalo New York 1997, p 152.
35 (1884) LR 9 App Cas 605.
36 (1990) 170 CLR 394.
37 O Dixon, above n 34 at 473.
38 See MacCrimmon and Tillers (eds), above n 17.

of perception and degree rather than precise numerical measurements ordinarily associated with computer programs.[39] Others referred to various, presumably eventually surmountable, obstacles such as constructing a body of data of common sense reasoning for a program to draw upon in circumstances where most legal decisions do not explicitly identify common sense chains of reasoning underlying the decision.[40] Crucially, however, the research demonstrated that although abductive reasoning (the "method of reasoning that leads to truly new findings")[41] could be performed successfully by computers in a legal evidentiary context,[42] the programs that perform the "creative" or "imaginative" aspects of such reasoning such as "forming analogies based on past experience" were still a long way from being developed.[43]

Of course, since then developments have proceeded apace. One example with which we are all familiar is the immense complexity and sophistication of Google's search algorithm and the databases which lie behind it, that enable Google automatically to interrogate a user as to whether what the user has typed into the search engine is what the user really intended or whether what the user intended was in truth something else which Google then specifies. Most of us are also aware of computational systems of the kind used by Amazon, eBay and Gumtree, which, on the basis of a user's past purchases, can predict other products in which the user may be interested and display items accordingly, as well as automatically interrogating the user as to whether those other products do appeal in order to refine future displays. Added to that, according to report, work is now advancing on means of connecting together platforms such as Facebook and Twitter for determining, on the basis of what a user may follow or post, a range of places to which the user might care to go to eat or drink.

These applications use data mining techniques to perform empirical analysis of a person's behaviour in order to predict his or her preferences. As such, they presage the kind of sophistication which would be required to somehow synthesise human introspectivist analysis. It is possible to envisage techniques similar to current data mining techniques being deployed to build up a picture of social norms generally. But, up to this point, I am not aware of any literature which suggests that an existing system could go close to performing the task of introspective reasoning in a legal context and, conservatively, one might suppose it will be the better part of a decade before there is.

39 See, eg, L Zadeh, "From computing with numbers to computing with words: From manipulation of measurements to manipulation of perceptions", in MacCrimmon and Tillers (eds), above n 17 at p 81.

40 M MacCrimmon, "What is 'common' about common sense? Cautionary tales for travellers crossing disciplinary boundaries", in MacCrimmon and Tillers (eds), above n 17 at pp 68–70.

41 P van Andel and D Bourcier, "Serendipity and abduction in proofs, presumptions and emerging laws", in MacCrimmon and Tillers (eds), above n 17 at p 276.

42 J Josephson, above n 17 at pp 297–304. See also, D Schum, "Species of abductive reasoning in fact investigation in law", in MacCrimmon and Tillers (eds), above n 17 at p 308; T Levitt and K Laskey, above n 17 at pp 352–383; D Poole, "Logical argumentation, abduction and Bayesian decision theory: a Bayesian approach to logical arguments and its application to legal evidential reasoning", in MacCrimmon and Tillers (eds), p 385; J Jenkins, "What can information technology do for law?" (2008) 21 *Harvard Journal of Law and Technology* 589 at 497–600.

43 J Josephson, above n 17 at p 304. See also F Pasquale and G Cashwell, "Four futures of legal automation" (2015) 63 *UCLA Law Review Discourse* 26 at 45.

Furthermore, even allowing that, with enough time, capacity and computing genius, sufficient norms, values and symbols of intuitive knowledge will one day be loaded into a database to enable a positivist algorithm to synthesise introspectivist human analysis (as was done at a much more rudimentary level in the Kasparov/Deep Blue exercise or as is now being done by Google and the like), it will only be because someone, or more likely some large group of persons, has made a host of a priori decisions about the respective weights to be ascribed to the criteria of choice revealed by earlier thought and the relevance of the facts of contemporary social contexts to doing justice. And, at best, they will be a priori decisions based on an incomplete even if vast dataset and a conception of contemporary social context to doing justice which is not only subjective but static. Thus, while the process may not be any different in kind from the intellectual processes that a judge undertakes in the posited circumstances, it is likely that it will be different in result, and hence that it might not be regarded as authoritative.

When *Donoghue v Stevenson* was decided in 1932, there were possibly few members of Australian society who would have demurred to a conception of moral wrongdoing grounded in the Judeo-Christian imperative to love thy neighbour as thyself or the legal adaptation of it limited by the facts of contemporary social contexts to doing justice by reference to proximity. By contrast today, in an increasingly pluralist and apostate society, the same may no longer be true. Hence, the significance of Julius Stone's conclusion that the recognition of a duty of care in novel circumstances involves an assessment not only of the criteria of choice made available by earlier thought but also of the relevance of contemporary social contexts to the doing of justice, and the latter being as much informed by a judge's perception of a heterodox society as it is by its elements.

In this country there is also a widely publicised disdain of the idea of unelected judges being authorised to make determinations by reference to open-structured broad-based criteria such as a bill of rights or charter of human rights and responsibilities.[44] It is not infrequently said that a significant proportion of the people of this country regard it as undemocratic and, therefore, undesirable to trust unelected and to some extent uncontrollable judges to make decisions based on broad conceptions of contemporary social contexts to doing justice.[45] It is widely considered that, because views about such matters can and do markedly differ, they are better left to society's elected representatives, and that by and large judges should be confined to the more tightly constrained limitations of rule-based determinations with only some small degree of leeway at the upper appellate level.[46] Given that degree of reticence about allowing judges to make decisions based on broad conceptions of contemporary social contexts to doing justice, it is not unlikely that society would also be resistant to the idea of policy choices being made by a computer on the basis of a priori determinations made by a cohort of unelected, unanswerable

44 See National Human Rights Consultation Committee, *National Human Rights Consultation Report,* 2009, at pp 15–50, 263–265, 281 at www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/200906_NHRC_complete.pdf, accessed 26 August 2021.

45 See J Allan, *The vantage of law: Its role in thinking about law, judging and bills of rights*, Ashgate Publishing Ltd, 2011; Cf D Meagher, "The common law principle of legality in the age of rights", (2011) 35 *Melbourne University Law Review* 449 at 463–465.

46 Cf T Bingham, *The Rule of Law*, Allen Lane, London, 2010 at pp 51–54.

and essentially unknown software engineers and legal specialists working alone and largely unexamined in the development of a database and complex algorithm intended to function as a modern day computational law Atkinian replacement.

By contrast, the present inability of computational law systems to perform a human introspective analysis of a legal problem that takes into account social norms and values may not prove a serious limitation to the development of an effective computational law system that assists in making a final determination rather than making it. As Dr James Popple suggests, even today "predicting a judge made change in the law [due to social mores] is beyond all but the very best lawyers"[47] and, probably, appellate court judges. Hence, the inability of a computer program to do any better should not prevent it from being of assistance.

If so, one may suppose it is likely that in the relatively near future counsel and solicitors will be equipped with computational law programs that are able to assist them in their preparation of advice and the conduct of litigation. Presumably judges will also be equipped with such programs and, given sufficient time and development, those programs will be capable of producing a fair set of reasons as to why or why not a duty of care should be recognised in the novel circumstances of a case, or upon such other novel legal issue as there may fall for decision, with reference to the cases which the program determines to be relevant, those which it determines are not relevant, and some sort of statistical analysis of deviations from paradigm cases. It is worth considering, too, that, when and if such computer programs are available to practitioners and judges, they will also be available to unrepresented litigants and to the commentariat.

As an illustration of what is to come, in *Reasoning with rules and precedents*, Branting wrote[48] of a system called "GREBE" which applies a general framework for integrating rules and precedents to the task of legal analysis. It differs from previous systems by integrating case-based reasoning to compensate for weak domain theories, case elaborations and goal reformulation. Unlike previous systems, it also uses a highly expressive case-description language in which arbitrary orderings of causal, temporal and intentional relations can be stated explicitly. Most significantly, it employs two algorithms, one to effect retrieval by best-first incremental matching and the other to refine the match by structural difference links ("MRSDL") which use pre-computed information about structural differences between cases. That generates alternative explanations by application of case-based reasoning directly to a goal and then to a sub-goal produced by goal reformulation, followed by an evaluation of the combination of rules and precedents, leading to the strongest argument in favour of and against a claim.

The output consists of a detailed memorandum which identifies the issues relevant to the question to be decided; a determination of the legal rules and precedents applicable to each issue; an illumination of how conclusions about the issues follow from the facts of the case and the relevant authorities; the identification of relevant differences between a given case

47 J Popple, above n 27 at p 24.
48 L Branting, above n 25, at pp 159–161.

and applicable precedents; and the presentation of arguments on both sides of the issues where conflicting precedents exist. And, when tested by comparing GREBE's analysis of 18 hypothetical workers' compensation claims against the efforts of law students set the same problems, GREBE's performance was found to be generally superior.[49]

Branting noted that the difficulties in accurately representing complex facts involving "detailed human actions and intentions" in GREBE's system makes the system better suited to areas that are "relatively isolated from the complexities of human life". He nominated corporate taxation as one area where such problems might be avoided. But, of course, the capacity to deal with such complexities is constantly developing.

What then will be the function of counsel and judges once programs of that kind are more generally available and in use? Happily, in one sense, it is likely that our functions will remain much as they are now: to present and contend for the considerations which favour a desired outcome and to weigh up competing considerations and authorities in order to reach a decision. But, at the same time, the process will be different because it will be affected by computer analysis. Both sides and the judge will have access to the relevant computational law program. All will know what it says should be the answer. One side presumably will be contending that the answer proffered by the program is correct and should be adopted while the other side will be likely to criticise the program, point out its limitations and inadequacies and fashion arguments in favour of the opposite result.

Submissions and judgments may change accordingly. There may need to be explicit reference to the programs and the results which they recommend. Possibly, there will be competing programs which dictate different conclusions and, if so, counsel and judges may need to analyse each of them and compare them. The skills of counsel and judges would have to change accordingly. Just as the adoption of robotics in industry is changing the role of tradesmen into skilled computer technicians and industrial plant managers from skilled personnel managers to skilled computer scientists, so would the role of counsel and judges become increasingly one of a skilled computer scientist with the capacity to identify the limitations in programs and to fashion submissions and judgments about them.

Not long ago, law students were taught how to find the law in the *English and Empire Digest*, the *Australian Digest* and *Halsbury's Laws of England.* Now they are taught how to find it by online computer searches. Within the foreseeable future, it does not seem unlikely that they will be taught about the capacities of variously available computational law programs and how to use them and recognise their weaknesses. Equally, as and when computational law programs come to be relied upon as primary analytical tools in the determination of legal outcomes, counsel and judges will need to learn the skills of computational law program application, analysis and deconstruction.

49 See also, J Popple, above n 27 at pp 24–50 for an overview of a range of computational law systems including rule-based systems, case-based systems and hybrid systems.

Paradoxically, in areas other than the law, there has been a large degree of digitisation of processes which has not required users to undertake any kind of analysis of the programs deployed.

Whether it be a checkout reader at a supermarket, online purchases, selling real estate on the 'net, computer-based medical analysis or computer-based pathological testing, the experience has, by and large, been one of users simply learning to use the technology, not second guess it.

That is because all of the parameters of the transaction are pre-set. The application of the optical reader to the barcode does not require any intellectual input on the part of the operator. It is the same for online commerce. So it is too with some forms of medical analysis. To invoke an example from one of our cases in the High Court, it has already been determined and the computer has been instructed that the presence of certain mutations or polymorphisms in a patient's DNA bespeaks an increased likelihood of specific kinds of cancer, and it is not in any respect the function of the examining pathologist to question the validity of that correlation.[50]

Up to this point, the approach to digitalisation in our profession has been similar. We have had to learn how to conduct online searches, such as on AustLII, LexisNexis and Westlaw, how to analyse a transcript with Transcript Analyser, how to use an iPad to provide access to authorities and how to run an e-trial without physical documents.[51] But few of us have had much interest in and still less need to consider the intricacies of the computer technologies which underlie those devices. It has been enough that we have mastered the operation of them.

It will be different with computational law. So far, the systems we have had to master have been mere information retrieval and organisational systems. Like a digest, they locate and inform us of what has already been decided. By contrast, the purpose of computational law is to determine what must now be decided. In the law, unless a previously decided case is on all fours with the case for decision — and sometimes even then — there is always more than one possible answer and a consequent need to choose between them. As Stone said, that involves a process of will as well as of cognition and of making choices not only on the basis of the various criteria of choice made available by earlier thought but also according to our assessment of the relevance of the facts of contemporary social context to the doing of justice.[52] And it is at that point that one will need to understand the basis on which a computational law system has made its choices and also to have the ability to discern whether and if so why they should be accepted or rejected.

May I then, finally, mention an aspect of computational law which should be a cause for optimism? In most areas of human activity, increased digitisation has made goods and services cheaper and more readily available. Thus far, in the law, as in medicine, it has tended to have the opposite effect. Technology has made litigation more expensive, just like technology has

50 *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334.

51 F Lederer, "Courtroom technology: for trial lawyers, the future is now" (2004) 19 *Criminal Justice* 14; Cf P Keane, "Access to justice and other shibboleths", paper presented to the JCA Colloquium, Melbourne, 10 October 2009 at pp 25–28.

52 J Stone, above n 30 at pp 319–320.

made major medicine more expensive,[53] and now litigation is so expensive that to a large extent it is no longer an option for people of ordinary means. That means that some counsel now have less work than is optimal and there are indications that, in order to sustain their earnings, the amount of time they devote to a matter expands to fill the time available, with consequent further increase in unit costs. In turn that makes litigation still more expensive and still less attractive and access to litigation further declines.

More fundamentally, there are currently many more lawyers than ever and yet litigation has never been less accessible to those of ordinary means. The paradox of the present time is thus that we have more than enough lawyers and yet we have inadequate legal services for all who truly require them. Many areas that need lawyers, like crime, immigration, social security, town planning, administrative law, consumer complaints, domestic and retail tenancy, family law and succession, often go without or underrepresented because the cost is prohibitively high.

One solution to the problem is for lawyers to reduce prices to make their offering more attractive. But, unless lawyers can reduce costs, a reduction in prices is not an attractive or possibly even a viable option. Computational law, however, has the potential to alleviate the problem. Other walks of life demonstrate the point. Thanks to computational systems in civil aviation, most of an interstate or international flight is now conducted by a computer with the pilot and co-pilot intervening only when the really hard decisions need to be made.[54] Because of the adoption of computational design and drafting systems in the engineering and architecture professions, a large part of engineering and architectural design and documentation is now computer-generated with professional engineers and architects intervening only at the points at which hard choices have to be made.[55] Similarly in commerce, most of financial accounting is now able to be computer-generated with the intervention of accountants only when the hard choices need to be made, and automated financial reporting is becoming available.[56] It can be the same in the law. Computational law in the hands of skilled counsel has the potential to do much of the work in many matters, with counsel intervening as the final arbiter only when the final or otherwise hard decisions need to be made. And applied assiduously to the law, as computer systems have already been applied in other professions, it has the capacity so to reduce unit costs of advice and preparation for trial as to make legal services a more realistic option for people of ordinary means, with consequent scale increase in demand and societal benefit.

Possibly, a change of that order will not appeal to all of the members of our profession as a particularly attractive prospect. Some may not be especially interested in the areas of law in which the consequent increase in demand for legal services is likely to be generated. Others

53 See P Keane, above n 51 at p 27; see, eg, J Skinner, "The costly paradox of health-care technology", *MIT Technology Review* (online), 5 September 2013, at www.technologyreview.com/news/518876/the-costly-paradox-of-health-care-technology/, accessed 26 August 2021.

54 And the automation increases: see, eg, J Markoff, "Planes Without pilots", *New York Times* Science Blog (online), 6 April 2015, at www.nytimes.com/2015/04/07/science/planes-without-pilots.html, accessed 26 August 2021.

55 See, eg, M Graves, "Architecture and the lost art of drawing", *The New York Times* online, 1 September 2012, at www.nytimes.com/2012/09/02/opinion/sunday/architecture-and-the-lost-art-of-drawing.html, accessed 26 August 2021.

56 See, eg, D McLennan, "Automating Business Reporting", *Scrib*, 2011, at www.scribd.com/document/234347352/Automating-Business-Reporting, accessed 26 August 2021.

may not favour the prospect of high volume, low cost, computer-assisted output compared to the more august paradigm of old. Some may be disinclined to put in the work necessary to master the skills that are required for deploying the new technology. Those who are of that disposition, however, must keep in mind that the march of technology is relentless. What has already occurred in science, engineering, architecture and financial services is now beginning to occur in the law.

Properly applied, computational law has the potential to provide a degree of assistance in final decision-making that affords us the opportunity of providing a better, quicker legal service at significantly reduced unit cost to a much larger potential clientele, with consequent large-scale social benefits. And as the custodians of the law, we not only have a responsibility to be at the forefront in the innovation and application of that kind of new technology but we also have reason to be excited about the benefits which it is likely to yield.

Computer says "no": automation, algorithms and artificial intelligence in Government decision-making*

Dominique Hogan-Doran SC†

Automating systems can assist individuals making administrative decisions or help identify relevant criteria, evidence or particular issues for consideration. Automation has the potential to make decision-making more accurate, consistent, cost-effective, timely and diminish the risk the decision will be invalidated due to improper motivations or bad faith. However, automated systems raise difficult questions about authorisation and reviewability of decision-making by a non-human agent; there are difficulties applying legislation and resolving complexities and ambiguity; and potential for coding errors. There is still potential for jurisdictional error if there is an error in the automation. This is illustrated by the difficulties associated with the Commonwealth Department of Human Services and Centrelink's online system for raising and recovering social security debts. Machine learning through "Big Data" is a branch of artificial intelligence that allows computer systems to learn directly from examples, data and experience. The article analyses the Commonwealth, NSW and SA data-sharing legislation and the need for protection for vulnerable people, such as children or people with a mental illness, transparency and accountability.

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The popular phrase "Computer says 'no'" refers to an attitude in customer service in which the default response is to check with information stored or generated electronically and then make decisions based on that, apparently without using common sense, and showing a level of unhelpfulness whereby more could be done to reach a mutually satisfactory outcome, but is not. The phrase gained popularity through the British TV sketch comedy *Little Britain*.

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Over 40 years ago, the architects of Australia's administrative review regime contemplated a world in which governmental activity was populated by human policy makers and bureaucrats, not automated decision-making, driven by algorithms, machine learning and artificial intelligence ("AI").[1]

Today, many administrative decisions that used to be based on human reflection are now made automatically. Bureaucracy is no longer what it once was. In the near future, we will live in an "algorithmic society" — one characterised by social and economic decision-making by algorithms and robotic AI agents.[2]

How will public law's mandates of transparency, fairness, and accuracy be guaranteed? When government deprives a citizen of fundamental rights, the principles of natural justice mandate that those citizens are owed notice and a chance to be heard to contest those decisions. Historically, transparency and accountability in administrative decision-making was ensured by the courts, integrity bodies, and the public being able to assess for themselves whether technology promoted lawful decisions. They examined statements of reasons through judicial and merits review, considered information obtained through freedom of information legislation, and followed through on requirements to produce annual reports.

The increasing pervasiveness of automated decision-making makes this public law challenge particularly acute, since the full basis for algorithmic decisions is rarely available to affected individuals:

- the algorithm or some inputs may be secret
- the implementation may be secret, and/or
- the process may not be precisely described.

Only with more governmental transparency, clear and effective regulation, and a widespread awareness of the dangers and mistakes that are already occurring, can we hope to wrest some control of our data from the algorithms that most of us fail to understand.

Automated assistance in administrative decision-making

Automating systems can assist administrative decision-making in a number of ways. For example, they can:

- make the decision
- recommend a decision to the decision-maker

1 AI is often assumed to signify intelligence with fully human capabilities. Such human-level intelligence — or artificial general intelligence — receives significant media prominence, but is still some time from being delivered, and it is unclear when this will be possible. Machine learning is a method that can help achieve "narrow AI", in the sense that many machine learning systems can learn to carry out specific functions "intelligently".

2 In the context of machine learning and AI, a "robot" typically refers to the embodied form of AI; robots are physical agents that act in the real world. These physical manifestations might have sensory inputs and abilities powered by machine learning.

- guide a user through relevant facts, legislation and policy, closing off irrelevant paths as they go
- have capabilities as decision-support systems, providing useful commentary, including about relevant legislation, case law and policy for the decision-maker at relevant points in the decision-making process, and/or
- be used as a self-assessment tool, providing preliminary assessments for individuals or internal decision-makers.

Automated assisted decision-making can help identify:

- the correct question(s) for the decision-maker to determine, including the relevant decision-making criteria and any relevant or irrelevant considerations
- whether any procedures or matters which are necessary preconditions to the exercise of the power have been met or exist
- whether there exists any evidence in respect of each of the matters on which the decision-maker must be satisfied, and
- particular issues which require the decision-maker's consideration and evaluation.

The benefits of automation are not unlimited. Speaking to the Australian Corporate Lawyers Association in 2010,[3] then President of the Administrative Appeals Tribunal, the Honorable Justice Garry Downes, anticipated some of the problems that automated decision-making has generated:

> I have no doubt that in 2020 the unstoppable march of the computer will have continued. Its use in decision-making will have advanced considerably — at all levels, including tribunal and court adjudication. What is important is that this advance should not compromise good administrative decision-making and should not impede or challenge the steady march towards the greatest possible fairness and transparency in that decision-making.
>
> …
>
> This creates three potentially serious, but basic, problems which will affect my canons of good decision-making. First, the wrong data may be entered on the computer. Secondly, the right data may be wrongly entered. In both cases the absence of all the entries on paper makes verification more difficult. Thirdly, the computer may be incorrectly programmed.

Justice Downes was not the first to voice such concerns. In 2004, the Australian Administrative Review Council ("ARC") was one of the first of its kind to consider the growing use of computers to automate governmental decisions. In its Report No 46, *Automated assistance in administrative decision-making*, the ARC examined what kinds of decisions are suitable for automation and how errors can be avoided or, if made, addressed.

The ARC's 27 "best practice" principles for decision-making undertaken with the assistance of automated systems were adopted by the Australian Government Information Management

3 G Downes, *Looking forward: administrative decision making in 2020*, Australian Corporate Lawyers Association 2010 Government Law Conference, Canberra, 20 August 2010.

Office's *Automated assistance in administrative decision-making: better practice guide* in February 2007.[4] The *Better practice guide* was directed to automated systems that "build in and automate administrative decision-making *logic* into a computer system":[5]

> Automated systems range from conventional informational technology systems (which may calculate a rate of payment in accordance with a formula set out in legislation) through to more specialised systems such as "expert", "business rules engines", "rules-based" or "intelligent systems" and "decision-support" tools. Business rules engines or rules-based systems (types of expert systems used in administrative decision-making) are software systems that help manage and automate business rules. Generally, these systems contain three main components:
>
> - a knowledge base or rule base containing the relevant business rules (ie legislative, policy or procedural business rules)
> - an independent inference engine which uses reasoning (backward or forward chaining) to draw conclusions, and
> - a user interface which presents questions and information to the user, and supplies the user's response to the inference engine in order to draw conclusions.

A hallmark of this kind of automated system is its ability to examine a set of circumstances (data entered by the user) by applying "business rules" (modelled from legislation, agency policy or procedures) to "decide" dynamically what further information is required, or what choices or information to present to the user, or what conclusion is to be reached.

The *Better practice guide* identifies the practice areas that "require particular care with respect to the development and management of automated systems for administrative decision-making",[6] covering the requirements to:

1. assess the suitability of automated systems to deliver improved business outcomes for an agency
2. establish appropriate project management and governance of automated systems projects
3. ensure that the design of an automated system has regard to future requirements (such as maintenance and audit) and complies with privacy legislation
4. ensure the continued accuracy of an automated system (including where there are changes to the underlying legislation, policy or procedure)
5. ensure the transparency and accountability of the system and its accompanying processes
6. implement and maintain automated systems appropriately.

A checklist[7] (expressed to be advisory not mandatory) summarised items that should be addressed when considering the implementation or update of an automated system for administrative decision-making.

4 Commonwealth Ombudsman, *Automated assistance in administrative decision-making: better practice guide*, Appendix B, p 74, available at: www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide, accessed 26 August 2021 ("*Better practice guide*").
5 ibid p 4.
6 ibid p 7.
7 ibid, summarised in Pt 7, p 57.

The *Better practice guide* lauds appropriately designed and managed automated systems as offering agencies "potential benefits in consistency, cost efficiency, time economies and new service provision":[8]

> For example:
>
> - they have the potential to make administrative decision-making more accurate and consistent, and it is often in pursuit of these outcomes that agencies consider the automated system option
> - they can offer agencies a cost effective mechanism to make decisions, particularly in policy or program areas where agencies must make many administrative decisions
> - they can reduce the time taken for agencies to make an administrative decision
> - new technologies and their application to automated systems can be used in the development of new service delivery options to agencies' customer groups.

In addition to time and cost savings, automated decision-making has the capacity to diminish or even eliminate the risk that a decision will be invalidated by reason of:

- the motivations of the decision-maker (such as decisions made for an improper or ulterior purpose),[9] and/or
- bad faith of the decision-maker (such as decisions made with intended dishonesty, or recklessly or capriciously for an improper or irrelevant purpose, or arbitrarily exceeding power).[10]

The use of automated systems may raise difficult questions about whether Parliament can authorise decision-making by a non-human agent and the reviewability of such decisions. Where a person purports to exercise public decision-making powers, they must be authorised to do so as a matter of law. Equally, if a technological assistant or automated system is being utilised to make part or all of a decision, the use of that system must be authorised. In a paper presented at the Cambridge Centre for Public Law Conference in 2014, Justice Melissa Perry observed that:[11]

> It cannot be assumed that a statutory authority vested in a senior public servant which extends by implication to a properly authorised officer, will also extend to an automated system; nor that authority to delegate to a human decision-maker will permit "delegation" to an automated system. Authority to use such systems should be transparent and express.

8 ibid p 10.

9 Whether an exercise of power is vitiated by an improper purpose on the part of the decision-maker is determined by reference to his or her subjective state of mind: *Mandurah Enterprises Pty Ltd v WA Planning Commission* (2008) 38 WAR 276 at 289–290; *Austral Monsoon Industries Pty Ltd v Pittwater Council* (2009) 75 NSWLR 169; [2009] NSWCA 154 at [98]. Decisions are impeachable for improper purpose only where the relevant power is purposive or, at least where some purposes are forbidden: M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Lawbook Co, 2013 at [5.510]. See *Golden v V'landys* [2016] NSWCA 300 at [134]–[141].

10 Although arguably not where a decision is vitiated by third party fraud: *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189; and *SZSXT v Minister for Immigration and Border Protection* (2014) 307 ALR 31; Z Chami, "Fraud in administrative law and the right to a fair hearing" (2010) 61 *Australian Institute of Administrative Law Forum* 5.

11 Subsequently published as M Perry and A Smith, "iDecide: the legal implications of automated decision-making" [2014] *Federal Judicial Scholarship* 17, at www.austlii.edu.au/au/journals/FedJSchol/2014/17.html, accessed 26 August 2021.

Thus, for example, s 495A(1) of the *Migration Act 1958* (Cth) provides that:

> The Minister may arrange for the use, under the Minister's control, of computer programs for any purposes for which the Minister may, or must, under the designated migration law:
>
> (a) make a decision; or
>
> (b) exercise any power, or comply with any obligation; or
>
> (c) do anything else related to making a decision, exercising a power, or complying with an obligation.

Pursuant to s 495A(2), the Minister is essentially deemed or taken to have made a decision, exercised a power or done something else related to making a decision where that was made, exercised or done by the operation of a computer program. However, as Perry J notes, this raises some unique problems with the concept of "delegating" a decision to an automated system, in whole or in part:[12]

- Who is the "decision-maker"?
- To whom has authority been delegated?
  - (a) the programmer?
  - (b) the policy-maker?
  - (c) the authorised decision-maker?
  - (d) the computer itself?
- Is the concept of delegation appropriately used in this context at all? Unlike human delegates, a computer program can never truly be said to act independently of its programmer or the relevant government agency.
- What if a computer process determines some, but not all, of the elements of the administrative decision? Should the determination of those elements be treated as the subject of separate decisions from those elements determined by the human decision-maker?

The *Better practice guide* recognises that governmental agencies may find it difficult to model business rules from legislation and that there may be a need to resolve legislative complexity where ambiguity in interpretation exists.[13] The ARC report developed this concern, highlighting four areas in which an error can be made in applying legislation to determine an entitlement:

- the substance and breadth of the legislation (relevant provisions can be found at various locations in a piece of legislation, or across various pieces of legislation)
- the structural complexity of the legislation (eg preconditions can be conjunctive or disjunctive or there may be exceptions to preconditions)

12 ibid.
13 *Better practice guide*, above n 4, p 36.

- the semantic complexity of the legislation (certain terms may be difficult to interpret)
- the exercise of discretion (its width, and whether it is being exercised by the decision-maker in accordance with the legislation conferring it).

Automation thus may not eliminate the risk of incorrectly applying statutory requirements, because decisions could be based on a misinterpretation of the applicable legal requirements or an incorrect application of those legal requirements to the facts found by the decision-maker. Laws are interpreted in accordance with statutory presumptions and meaning is also affected by context.[14] One of the greatest challenges is to ensure accuracy in the substantive law applied by automated processes. Through the process of translating laws into code, computer programmers effectively assume responsibility for building decision-making systems. The potential for coding errors is real: as Perry J has observed:[15]

> … laws are not static and complex transitional provisions may need to be accommodated, along with relevant common law presumptions. Such systems will need to be kept up to date while maintaining the capacity to apply the law as it stands at previous points in time for decisions caught by transitional arrangements.

In those circumstances, grounds of challenge therefore include that the automated decision-maker:

- identified a wrong issue, asked itself the wrong question, or failed to address the question posed[16]
- ignored relevant material or relied on irrelevant material in a way that affected the exercise of power[17]
- applied a wrong principle of law[18]
- breached a mandatory statutory procedure or obligation (such as provisions imposing procedural fairness obligations,[19] mandatory time limits, obligations to consult prior to decisions being made, or requiring the giving of reasons for a decision to be valid).[20]

14 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].
15 Perry, above n 11.
16 *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per McHugh, Gummow, and Hayne JJ at [82].
17 ibid. The mere overlooking of, or failing to have regard to, evidence is not a jurisdictional error. Something more is required. In *Minister for Immigration and Citizenship v SZRKT* (2013) 302 ALR 572, Robertson J considered this issue in some detail. His Honour stated at [111]: "the fundamental question must be the importance of the material to the exercise of the tribunal's function and thus the seriousness of any error".
18 That can be shown either from what the decision-maker said, or because the ultimate result, associated with the facts that they expressly or impliedly found, indicates that they must have applied the wrong principle of law: see *Chapman v Taylor* [2004] NSWCA 456 per Hodgson at [33] (Beazley and Tobias JJA agreeing).
19 See eg *Italiano v Carbone* [2005] NSWCA 177 per Basten JA at [106] and per Einstein J at [170] (involved judicial review of a Consumer Trader and Tenancy Tribunal case where damages were made against an entity that was never a party before the tribunal); see also *Duncan v ICAC* [2016] NSWCA 143 per Basten JA at [719] (one limitation on the powers of ICAC is to be found in the need to accord procedural fairness "before affecting adversely the interests of an individual").
20 *Re Minister for Immigration and Multicultural Affairs; Ex p Lam* (2003) 214 CLR 1.

Australian public law has developed a wide range of grounds justifying judicial intervention to overturn administrative decisions or action.[21] The *Better practice guide* implicitly recognised there may be a myriad of grounds for challenge, by limiting its guidance on automated systems' treatment of discretion and judgment.[22] The *Better practice guide* assumes that discretionary decisions and matters of judgment will be left to human decision-makers, and touches only upon these issues at a high level. In so doing, it acknowledges that the potential benefits of automation are complicated by the substantive expectations of Australian public law:[23]

> Despite the potential benefits offered by automated systems, care must be taken to ensure that their use supports administrative law values [of lawfulness, fairness, rationality, openness and efficiency], and that the implementation of an automated system for administrative decision-making will deliver targeted and measurable business benefits to the agency.

This limitation was consistent with the ARC's own caution in setting principles for assessing the suitability of expert systems[24] for administrative decision-making:

- Principle 1: Expert systems that make a decision — as opposed to helping a decision-maker make a decision — would generally be suitable only for decisions involving non-discretionary elements.
- Principle 2: Expert systems should not automate the exercise of discretion.
- Principle 3: Expert systems can be used as an administrative tool to assist an officer in exercising his or her discretion. In these cases the systems should be designed so that they do not fetter the decision-maker in the exercise of his or her power by recommending or guiding the decision-maker to a particular outcome.
- Principle 4: Any information provided by an expert system to assist a decision-maker in exercising discretion must accurately reflect relevant government law and policy.

21 These may be grouped into the following categories: authority to act; application of the law; procedure to be followed; discretion; reasonableness of decision-making; sufficiency of evidence; uncertainty; conduct of the decision-maker (unfair treatment) and motivation of the decision-maker, including unauthorised purpose and bad faith: see C Wheeler, "Judicial review of administrative action: an administrative decision-maker's perspective" (2017) 87 *Australian Institute of Administrative Law Forum* 79 at 81ff.

22 *Better practice guide*, above n 4, Pt 5, "Ensuring transparency and accountability", p 43 ff.

23 ibid p 14.

24 The ARC Report uses the terms "expert systems", whereas the *Better practice guide* uses the term "automated systems". See further A Tyree, *Expert systems in law*, Prentice Hall, 1989.

The *Better practice guide* advises that human discretion and judgment be permitted "where relevant", and exhorts system designers to be careful that the system "does not fetter" the decision-maker in exercising any discretion he or she has been given under relevant legislation, policy or procedure.[25] It suggests agencies support human discretion and judgment by:

- outlining and/or breaking down the factors decision-makers should consider when making their judgment,
- providing links to relevant support materials and guides, and
- requiring that decision-makers clearly state and record reasons for decisions, as a statement of reasons or other official (and auditable) output.

Yet even where discretionary decisions are left to humans, deploying automated procedures can still be problematic. Technology-assisted decision-making may frame a decision-maker's consideration of the issues and make determinations of what is relevant and irrelevant. If automated systems are programmed to be used when a discretion or judgment should have been reserved for a human decision-maker, not only would there be a constructive failure to exercise the discretion, but predetermined outcomes may be characterised as pre-judgment or bias.[26]

Generally, only a final, or operative and determinative decision, is administratively reviewable, not the interim steps or conclusions.[27] However, those interim steps may be considered to the extent that they affect the final decision. It follows that, where interim steps in a decision-making process are automated, but the final or operative decision is made by a human, there is the potential for the decision to be affected by a jurisdictional error should there have been an error in the automation process. Similarly, failure by an automated system to bring relevant issues or material to a decision-maker's attention will not absolve the final decision-maker from failing to consider them.[28]

Critically, automating the process of decision-making will not ipso facto avoid practical injustice, such as may occur if a decision-maker (be they human or automated):

- engages in unfair treatment of persons the subject of the exercise of power[29]
- fails to give notice of the issues in sufficient detail and appropriate time to be able to respond meaningfully

25 Fettered decisions include decisions that were made under the instruction of another person or entity where the decision-maker feels bound to comply; were made when acting on a "purported" delegation which does not permit any discretion as to the decisions to be made; were made under an unauthorised delegation of a discretionary power; involve the inflexible application of a policy without regard to the merits of the particular situation; or improperly fetter the future exercise of statutory discretions, ie a decision-maker with discretionary powers cannot bind itself as to the manner in which those discretionary powers will be exercised in future, whether through a contract, policy, or guideline inflexibly applied: see Wheeler, above n 21, p 82.

26 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [35], [72].

27 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

28 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

29 See *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 per Allsop CJ at [5]: "fair treatment, and apparent fair treatment … involves the recognition of the dignity of the applicant (the subject of the exercise of power) in how the hearing is conducted. That recognition is an inhering element of fairness".

- fails to give a person an opportunity to respond to adverse material that is credible, relevant and significant to the decision to be made
- fails to give access to all information and documents to be relied on[30]
- misleads a person or entity as to its intention, or fails to adhere to a statement of intention given to a person or entity as to the procedure to be followed, resulting in unfairness.[31]

If an automated assisted decision-maker acts on insufficient evidence, the decision may be open to challenge because it:

- is based on no probative evidence at all[32]
- is based on a lack of probative evidence, to the extent that there is no basis or is unjustifiable on, or is unsupported by, the available evidence[33] (eg a "decision which lacks an evident and intelligible justification",[34] decisions "so devoid of any plausible justification that no reasonable body of persons could have reached them",[35] or where there is no evidence to support a finding that is a critical step in reaching the ultimate conclusion)[36]
- is not supported by reasons that "disclose any material by reference to which a rational decision-maker could have evaluated [certain evidence], no such material can be found in

30 For example, *Vega Vega v Hoyle* [2015] QSC 111 (breach of natural justice occurred when the applicant was prevented from having access to information and documents relied on by health service investigators and clinical reviewers in their reports).

31 Because, for example, the person or entity was given no opportunity to be heard in relation to how the process should proceed.

32 For example, the "no evidence rule" of procedural fairness: see eg *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–6 (where a finding made is a critical step in the ultimate conclusion and there is no evidence to support that finding then this may well constitute a jurisdictional error); *SZNKV v Minister for Immigration and Citizenship* (2010) 118 ALD 232 per Kenny J at [38]; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [46]: "[t]he plaintiff also argues that there was no evidence that PNG would fulfil its assurances and would promote the maintenance of a programme which was fair to UMAs [unauthorised maritime arrivals]. However, there was no statutory requirement that the Minister be satisfied of these matters in order to exercise the relevant power. They do not qualify as jurisdictional facts."; *Duncan v ICAC* [2014] NSWSC 1018 per McDougall J at [35(3)]: declaratory relief may be granted where "there is a finding that is not supported by any evidence whatsoever — that is to say, there is no evidence that could rationally support the impugned finding"; *Duncan v ICAC* [2016] NSWCA 143 per Bathurst CJ at [278], [366]: "it was an error of law to conclude there was a financial advantage in circumstances where there was no evidence to support the proposition that any financial advantage was obtained by deception". A no evidence challenge will fail where there is even a slight evidentiary basis to support a finding: see *SZNKV v Minister for Immigration and Citizenship* (2010) 118 ALD 232 at [36]–[38]; *SZUTM v Minister for Immigration and Border Protection* (2016) 149 ALD 317 at [69]–[70].

33 *Parramatta City Council v Pestell* (1972) 128 CLR 305 per Menzies J at 323; *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397 per Finkelstein J; *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231 at [19]–[20], [25]; *Australian Pork Ltd v Director of Animal and Plant Quarantine* (2005) 216 ALR 549 per Wilcox J at [309]–[310]. There is no error of law, let alone a jurisdictional error, in the decision-maker making a wrong finding of fact.

34 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76].

35 *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821.

36 *SFGB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 231 at [18]–[20]; *Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 567 at [44]; *SZJRU v Minister for Immigration and Citizenship* [2009] FCA 315 at [53]–[54].

the record; and no other logical basis justifies the … finding"[37] (that is, the reasons do not adequately justify the result reached and the court infers from a lack of good reasons that none exist)[38]

- is based on evidence that does not meet the applicable standard of proof;[39] or
- is based on insufficient evidence due to inadequate inquiries,[40] including where there is a failure to make reasonable attempts to obtain certain material that is obviously readily available and centrally relevant to the decision to be made.[41]

The evolution of automated decision-making systems: Centrelink and "Robodebt"

Recalling Justice Downes's concerns in 2010, errors in computer programming can result in wrong decisions potentially on an enormous scale. For example, if a statutory test is misconstrued when the technology was developed, then that misconstruction could taint any decision made with the assistance of the technology. Automated assisted decision-making may well be productive of deficient reasoning, because the system design leads the (human or automated) decision-maker to:

- give disproportionate/excessive weight to some factor of little importance or any weight to an irrelevant factor or a factor of no importance[42]
- give no consideration to a relevant factor the decision-maker is bound to consider
- fail to base the decision on a rational consideration of the evidence

37 *Minister for Immigration and Citizenship v SZLSP* (2010) 272 ALR 115 at [72].

38 *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184 at [47]; *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114 at [49]–[50]. Note that "inadequate reasons provided at the discretion of the decision-making body cannot impugn the validity of the decision itself": *Obeid v ICAC* [2015] NSWSC 1891 per Davies J at [49].

39 The appropriate degree of satisfaction may be subject to the "need for caution to be exercised in applying the standard of proof when asked to make findings of a serious nature": see *Sullivan v Civil Aviation Safety Authority* (2014) 322 ALR 581 per Flick and Perry JJ at [98]–[122]. Whether and to what extent this "rule of prudence" should be applied by decision-makers who are not obliged to comply with the "rule" in *Briginshaw v Briginshaw* (1938) 60 CLR 336 because they are not bound by the rules of evidence awaits further examination: see *Sun v Minister for Immigration and Border Protection* [2015] FCCA 2479 per Jarrett J at [18]–[20]; *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 per Leeming JA at [126]–[127].

40 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25]: "It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction."

41 The circumstances in which an obligation may be imposed upon an administrator to make further inquiries is repeatedly said to be "strictly limited": see *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 per Wilcox J at 169–170; *Wecker v Secretary, Department of Education Science and Training* (2008) 249 ALR 762 per Greenwood J, Weinberg J agreeing at [109]. Whether or not it is unreasonable not to make further inquiries may well depend upon the availability of further information and its importance to the factual issues to be resolved. It may also depend upon the subject matter of inquiry and an assessment of the comparative ability of individuals to provide or to obtain relevant information. It is no part of the task of the decision-maker to make out an applicant's case.

42 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30, 41, 71. For additional citations for the propositions advanced in this section of the paper, see Wheeler, above n 21, at pp 82–83.

- use reasoning that is illogical or irrational
- make a decision that lacks an evident and intelligent justification
- base a decision on a mistake in respect of evidence, or on a misunderstanding or misconstruing of a claim advanced by the applicant, or
- make a decision that is contrary to the overwhelming weight of the available evidence.

In this sense, the great efficiency of automated systems could also be their biggest downfall — a lesson illustrated by the Commonwealth Department of Human Services ("DHS") and Centrelink in the launch of a new online compliance intervention ("OCI") system for raising and recovering social security debts in late 2016.

Automated decision-making is authorised by s 6A of the *Social Security (Administration) Act 1999* (Cth). The OCI system matched the earnings recorded on a customer's Centrelink record with historical employer-reported income data from the Australian Taxation Office ("ATO"). If the customer did not engage with DHS (either online or in person), or if there were gaps in the information provided by the customer, the system filled the gaps with a fortnightly income figure derived from the ATO income data for the relevant employment period ("averaged" data).[43]

The Australian Senate Community Affairs References Committee conducted extensive hearings into the OCI system as part of its Inquiry into the Better Management of the Social Welfare System Initiative.[44] The Committee investigated, inter alia, Centrelink's OCI system and its compliance with debt collection guidelines and Australian privacy and consumer laws, as well as "the impact of Government automated debt collection processes upon the aged, families with young children, students, people with disability and jobseekers and any others affected by the process".

Evidence before the Senate Inquiry suggested that the methodology on which the OCI system was based — that is, utilising a data-matching algorithm that measured income on an annual basis and divided it into equal fortnightly instalments — generated misleading data upon which subsequent decision-making was based.

Witnesses expressed concern that the automatic debt-raising process appeared not to allow for the complexities of casual work, and this was arguably worse if a person is paid considerably in arrears.[45] The system design applied an algorithm that assumed income is distributed evenly over 26 fortnights, with a presumption that work is either full-time or part-time, but with no provision for intermittent, or casual, work.

43 See table headed "OCI Information and Statistics" tabled by Department of Human Services, at Canberra public hearing, on 8 March 2017, at www.aph.gov.au/DocumentStore.ashx?id=505d8670-1474-47c5-8d4e-1f72bc3ac183, accessed 18 February 2021.

44 Senate Community Affairs References Committee for inquiry, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem, accessed 18 February 2021.

45 See Transcript of Public Hearings at Brisbane, 16 May 2017, pp 2, 28, at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Public_Hearings, accessed 18 February 2021.

In its 12 May 2017 submission to the inquiry, Victoria Legal Aid demonstrated how calculating a debt by way of algorithms did not predict an accurate outcome:[46]

> 36. Two recent matters in which VLA has acted have resulted in the AAT referring the debt back to Centrelink to be properly determined, suggesting that calculating a debt by way of algorithms does not provide an accurate outcome.
>
> 37. In the decision of 2016/M103550 (24 March 2017) AAT Member Treble determined that the Tribunal was not satisfied that the debt had been correctly calculated by Centrelink.
>
> 38. At paragraph 17 the Member Treble states that:
>
>> "The relevant income test for Newstart Allowance requires a person's income to be taken into account when it is first earned, derived or received. A fortnightly income test applies. In this case, no effort has been made by Centrelink to obtain actual wage records … even though such records would very likely be readily available if required. Instead it has simply been assumed that the total year earnings can be apportioned equally to each fortnight across the relevant financial year. However, that is not consistent with the requirements of the legislation. The actual pay records are critical to the proper calculation of the overpayment. Accordingly, Centrelink will need to request and obtain those records from the employer in order to arrive at a correct debt calculation."

The Commonwealth Ombudsman's Investigation Report published in April 2017 was critical of the debt recovery program generally as to its fairness and reasonableness.[47] Poor service delivery was also a recurring theme in many complaints received by the Ombudsman. Customers had problems getting a clear and transparent explanation about the debt decision and the reasoning behind it.

The design and operation of the Non Employment Income Data Matching ("NEIDM") project, the data-matching process designed to enable DHS to match income data it collects from customers with tax return data reported to the ATO, suffered from a limitation of purpose. The program protocol (which became public in May 2017) made clear that:[48]

> The purpose of the NEIDM program is to identify non-compliant individuals requiring administrative or investigative action. This is identified through the comparison of information held by the Australian Taxation Office (ATO) and what customer[s] have reported to both agencies. The comparison is to identify where DHS customers may have income recorded with the ATO that exceeds the income they have reported to DHS.

46 Victoria Legal Aid, "Responses to questions on notice from the Senate Community Affairs References Committee", Public Hearing, 11 April 2017, at www.aph.gov.au/DocumentStore.ashx?id=649ce2e1-0521-4c62-bd24-f6a5f3727092, accessed 18 February 2021.

47 Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system: a report about the Department of Human Services' online compliance intervention system for debt raising and recovery*, April 2017, at www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf, accessed 26 August 2021.

48 A copy of the program protocol is contained in "Answers to written questions on Notice from Senator Kakoschke-Moore, received from Office of the Australian Information Commissioner, 16 May 2017" at www.aph.gov.au/DocumentStore.ashx?id=4f473c96-f345-4314-ad5d-a2c2eecfba47, accessed 26 August 2021.

Evidence given by Mr Jason McNamara, General Manager, Integrity Modernisation, Department of Human Service, on 16 May 2017[49] gave some insight into the limitations of the data matching program, and improvements made following the Ombudsman's Report:

> Mr McNamara: It is not really just an averaging thing, because data matching is predominantly just saying: "You've got a significant difference. You've told us that you did not earn any income and now we have something from the tax office says you did earn income." That is predominantly what the data matching is showing — it is totals and the differences —
>
> CHAIR: Sorry, but that is not what people have said. We have been shown examples where people have had income and they have declared it.
>
> Mr McNamara: The issue in the data matching is better understanding the probability of a debt coming out of that information. That is where we are improving our processes. At the moment we are looking at significant differences, but we also need to take into account, "Are those significant differences likely to lead to a debt or likely to have led to a debt or not?" That is what we are trying to improve at the moment.
>
> There are two sides to that. One is that the information we have is not consistent. But whether the information inconsistency leads to a debt is something we are trying to improve our processes on. That is where we think we can improve. That will help recipients because we will not be sending letters to people who do not have a debt, and it will help us because it will be more efficient for us because we will not be processing recipients who are unlikely to have a debt. From our perspective, if we can increase the probability, that will help everyone. So that is definitely something that is a goal and aim.

The OCI system is a complex automated system that was rolled out on a large scale within a relatively short timeframe. The Ombudsman observed that inevitably there would be problems with the rollout of a system of that scale. The Ombudsman was particularly critical of the planning and risk management work undertaken:[50]

> In our view, many of the OCI's implementation problems could have been mitigated through better project planning and risk management at the outset. This includes more rigorous user testing with customers and service delivery staff, a more incremental rollout, and better communication to staff and stakeholders. […]
>
> A key lesson for agencies and policy makers when proposing to rollout large scale measures which require people to engage in a new way with new digital channels, is for agencies to engage with stakeholders and provide resources for adequate manual support during transition periods. We have recommended DHS undertake a comprehensive evaluation of the OCI in its current form before it is implemented further and any future rollout should be done incrementally.

49 See Transcript of Public Hearings at Brisbane, above n 45, p 46.
50 Ombudsman's report, above n 47, p 3.

The Ombudsman expressly cited the 2007 *Better practice guide* to reinforce that key considerations in developing automated decision-making systems are whether the system is consistent with administrative law values of lawfulness, fairness, rationality, openness/transparency and efficiency:[51]

> Customers need to understand how the system works, have the opportunity to present their information in a considered way and be supported in the transition from a manual to an automated system. Clear and comprehensive information to customers and staff is important.

There is always a risk that administrative reviewers will assume a computer system's infallibility. The system audit trail can thus provide critical forensic insights into potential coding and system planning errors that will challenge — or make good — such assumptions.

The data-matching Protocol for the NEIDM project did not identify whether it was developed in accordance with the *Better practice guide* or the OAIC *Guidelines on data matching in Australian Government administration*.[52] There was also nothing that identified relevant policy or legislation related to specific income tests that should be applied. Indeed, the NEIDM Protocol only made limited reference to quality controls and audit trails:[53]

> **D. Data quality controls and audit** — When compliance action is proposed, additional checks will take place to ensure the correct DHS customer or spouse has been identified. DHS Customers will be provided with the opportunity to verify the accuracy of the information before any compliance action is taken.
>
> **E. Security and confidentiality** — All DHS computer systems are strictly controlled with features including:
>
> - system access controls and security groupings
> - login identification codes and password protection
> - full audit trails of data files and system accesses.

An audit trail allows for the research and reasoning processes to be comprehended and tracked by a human mind. Automated administrative decisions will be particularly vulnerable to attack where the system does not provide a clear and sufficiently detailed audit trail to make clear what factors have been taken into account. The *Better practice guide* acknowledged this issue in declaring that audit capability is "essential to accountability"[54] and in generating a detailed checklist of measures:

- Does the automated system have the capacity to automatically generate a comprehensive audit trail of the administrative decision-making path?
- Are all the key decision points identifiable in the audit trail?

51 ibid p 26 [4.2].
52 www.oaic.gov.au/privacy/guidance-and-advice/guidelines-on-data-matching-in-australian-government-administration/, accessed 18 February 2021.
53 Program protocol, above n 48, p 20.
54 *Better practice guide*, above n 4, pp 46–49.

- Are all the key decision points within the automated system's logic linked to the relevant legislation, policy or procedure?
- Are all decisions recoded and accessible by the system's user, a reviewer or an auditor?
- Can the audit trail generated by the automated system be easily integrated into a notification of the decision (including a statement of reasons or other notification) where required?
- Is the audit trail secure from tampering (to provide protection and data integrity)?
- Does the audit trail include a comprehensive and printable modification history including:
  - who created the document (with time and date recorded)?
  - who has modified the document (with time and date)?
  - a record of what was modified?
  - for privacy and commercial-in-confidence matters, who has viewed the document (with time and date)?
  - who made the final decision (with time and date)?
- Does the audit trail start by identifying the authority or delegated authority identified in legislation?
- Does the audit trail show who an authorised decision-maker is?
- Does the audit trail enable the recording of human intervention in automated processes, for example recording who is authorised to exercise intervention?

The Ombudsman concluded his report by detecting an additional flaw in the system design, which highlighted that a human decision-maker may have exercised differently a discretionary power to waive a 10% recovery fee which was embedded in the business rules encoded in the OCI system:[55]

> 2.36 According to the Administrative Review Council's *Automated Assistance in Administrative Decision Making Better Practice*, a key question in the design of automated decision making systems in administrative law is whether the system is designed "so that the decision-maker is not fettered in the exercise of any discretion or judgement they may have".
>
> 2.37 The *Social Security Act* states that a ten per cent penalty is added to a debt if the debt arose wholly or partly because the person had refused or failed to provide information about their income or had knowingly or recklessly provided incorrect information. However, it also states "this section does not apply if the Secretary is satisfied that the person had a reasonable excuse for refusing or failing to provide the information". [Section 1228B *Social Security Act 1991*.]
>
> 2.38 The business rules that underpin the application of the reasonable excuse discretion are beneficial if the person engages with the system and indicates there were personal circumstances that impacted their ability to declare their income. This is particularly so in the redesigned system. This means that for people who do engage with the system, the penalty will be manually applied, if at all.

55 Ombudsman report, above n 47, pp 43–44.

2.39 The penalty will continue to be automatically applied where the department has sought reasonable excuse information, but none has been forthcoming from the customer. If a debt recovery fee is applied, the person will receive a debt notification letter which now provides them with a further opportunity to provide a reasonable excuse and have the fee removed.

2.40 The question of whether these procedural fairness safeguards coupled with the beneficial application of the reasonable excuse provisions are effective in addressing the risk of fettering of the discretion can only be answered by the courts.

2.41 Our observation is that DHS' approach cannot be fair and effective if the department is not effective in its communication to customers about the availability, meaning and importance of reasonable excuse, and the ways of notifying the excuse to the department.

2.42 In the version of the OCI rolled out from 1 July 2016, DHS considered "reasonable excuse" by asking "were there any personal factors that affected your ability to correctly declare your income during the above period/s?". If a person answered "yes" to this question, the penalty fee was not automatically applied by the OCI. If the person answered "no" (or if no answer was provided by the date the debt was raised) the recovery fee was applied automatically.

2.43 In our view, the messaging in the OCI lacked clarity and the "personal circumstances" question may have been insufficient to elicit the necessary reasonable excuse information. In some situations, a person may have answered "no" to the personal circumstances question in situations where a human decision maker, able to review the person's Centrelink record ask relevant questions and consider all the relevant circumstances of the case, may have decided the penalty fee should not apply, or the discretion not to apply the fee should be exercised. Examples include where:

- income was declared but was not coded into the system because of administrative error
- a customer provided information about fluctuating income on their claim form, but due to administrative error was not placed on fortnightly reporting arrangements
- a customer did not go online or contact DHS (for example, because they thought if the ATO figure was correct they did not need to, or because of vulnerability)
- a customer still believed at the time they answered the question they had declared accurately (note that the question was asked before the customer was notified of the debt) and so did not turn their mind to the question properly
- a customer did not understand what "personal circumstances" meant, or lacked insight into their circumstances
- other situations where information has been provided prior to the intervention.

The final report of the Senate Committee, delivered on 21 June 2017, recorded that in response to the Commonwealth Ombudsman's recommendations, the Department ceased the automatic charging of a 10% debt recovery fee, and now provides information on how individuals can apply not to have this fee imposed where they have a reasonable excuse.[56]

56 Senate Standing Committee on Community Affairs, above n 44, at [6.17]. A full copy, and chapter links, is available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report, accessed 18 February 2021.

Changing technologies in a changing world: Big Data, data matching and profiling

In the past, citizens understood that automated systems helped humans apply rules to individual cases. Today, citizens need to appreciate that automated systems can be primary decision-makers, taking human decision-making out of the process. The Senate Committee report concluded that many individuals failed to appreciate the use of automation in the decision-making process, which negatively impacted on their responses to the system's design, misunderstanding the need to engage and supply information when data-matching identified differences:[57]

> When faced with a purported debt, many individuals were unaware of the possibility of an error in the calculations, their right to have a review of that purported debt or how to undertake a review. Many individuals were so daunted by what they saw as an insurmountable task, to challenge a large government department, they simply gave up and paid what they felt was a debt they did not owe.

The technological landscape has substantially changed from that surveyed by the ARC in 2004 and on which the 2007 *Better practice guide* was based.[58] They, too, responded to a world in which automated assisted decision-making systems were grounded in logic and rules-based programs that applied rigid criteria to factual scenarios, responding to input information entered by a user in accordance with predetermined outcomes. They focussed on decision *support* tools, not expert systems that could *replace* human discretion and judgment.[59]

In no meaningful way did they contemplate the challenges now posed by machine learning, "Big Data", and the rapidly changing world of data management. Machine learning is a branch of AI that allows computer systems to learn directly from examples, data and experience. Through enabling computers to perform specific tasks intelligently, machine-learning systems can carry out complex processes by learning from data, rather than following pre-programmed rules. As it learns over time, the machine responds to feedback, so that the patterns learnt yield

57 ibid at [6.25].

58 Decision technology, artificial intelligence, data mining and the like were already live issues by 2007. See for example T Davenport and J Harris, "Automated decision making comes of age" *MIT Sloan Management Review*, Summer 2005, 15 July 2005, at http://sloanreview.mit.edu/article/automated-decision-making-comes-of-age/, accessed 18 February 2021.

59 The *Better practice guide*, above n 4, expressly excluded from its definition of automated systems those systems "such as databases (that store information) or case management systems (that track events leading up to an administrative decision being made and/or record decisions once made)". Decision-support applications limited to storing legislative, policy or other information (but which do not automate decision-making logic) were also not considered automated systems for the purposes of the *Guide*.

useful predictions or insights.[60] By increasing our ability to extract insights from ever-increasing volumes of data, machine learning could increase productivity, provide more effective public services, and create new products or services tailored to individual needs.[61]

Machine learning helps extract value from "Big Data", which is the phenomenon of "high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight, decision making, and process optimization".[62] So called "data mining" (the automatic extraction of implicit and potentially useful information from data) is increasingly used in commercial, scientific and other application areas, powered by increasingly complex Operational Database Management Systems ("ODMS").[63]

Automated decision-making by computer algorithms based on data from human behaviours is becoming fundamental to our digital economy. Such automated decisions can impact everyone, as they now occur routinely not only in government services but:

- health care
- education
- employment
- credit provision.

Because public sector data can be a key enabler and catalyse a range of economic activity, Commonwealth and State governments have devised whole-of-government strategies to deal with Big Data, its use and sharing. In so doing, governments increasingly appreciate data as an asset, and most recognise it as something to be used for the public good. Thus, the *Australian Public Service Big Data Strategy* released in August 2013[64] expressed that government data is a national asset that should be used for public good:

> Government policy development and service delivery will benefit from the effective and judicious use of big data analytics. Big data analytics can be used to streamline service delivery, create

60 Machine learning lives at the intersection of computer science, statistics and data science. An excellent report published on 25 April 2017 by the UK's science academy, the Royal Society, *Machine learning: the power and promise of computers that learn by example,* is available at https://royalsociety.org/~/media/policy/projects/machine-learning/publications/machine-learning-report.pdf, accessed 18 February 2021. Recognising the promise of this technology, in November 2015, the Royal Society launched a policy project on machine learning. This sought to investigate the potential of machine learning over the next 5–10 years, and the barriers to realising that potential. The report's second chapter, on potential applications of machine learning (health care, education, transport and logistics, targeting of public services, finance, pharmaceuticals, energy, retail and the legal sector) is particularly fascinating.

61 ibid p 17.

62 M Beyer and D Laney, *The importance of "big data": a definition*, Gartner, 21 June 2012, at www.gartner.com/id=2057415, accessed 18 February 2021.

63 Encompassing analytical data platforms, scalable Cloud platforms, NoSQL data stores, NewSQL databases, Object databases, Object-relational bindings, graph data stores, service platforms, and new approaches to concurrency control. Roberto Zicari, Professor of Database and Information Systems at Frankfurt University, maintains an educational resource in all these new areas at www.odbms.org/blog, accessed 18 February 2021.

64 Australian Government Department of Finance and Deregulation, *The Australian Public Service Big Data Strategy*, August 2013, p 5, at http://dl.icdst.org/pdfs/files/b13cc1eacb89d6fc00870e06c91d9339.pdf, accessed 18 February 2021.

> opportunities for innovation, and identify new service and policy approaches as well as supporting the effective delivery of existing programs across a broad range of government operations — from the maintenance of our national infrastructure, through the enhanced delivery of health services, to reduced response times for emergency personnel.

Governments' use of Big Data and ODMS, like any other form of data or information collection, is subject to a number of legislative controls. Thus, agencies need to comply with the *Data-matching Program (Assistance and Tax) Act 1990* (Cth) wherever tax file numbers are used. The use of Big Data is also regulated by the *Privacy Act 1988*. At a Commonwealth level, other controls also include:

- *Freedom of Information Act 1982*
- *Archives Act 1983*
- *Telecommunications Act 1997*
- *Electronic Transactions Act 1999*.

In NSW, the *Data Sharing (Government Sector) Act 2015* removed barriers that impede the sharing of government sector data and implements measures to facilitate the sharing of government sector data with a new Data Analytics Centre and between other agencies. The data sharing legislation complements existing NSW legislation. Sharing of personal data is excluded.[65] All data identified in the *Government Information (Public Access) Act 2009* as exempt from public release are also specifically exempt from the data sharing legislation.[66]

The expansive use of data is acknowledged by the *NSW Government Open Data Policy*,[67] which expresses an aim to release data for use by the community, research sector, business and industry and to accelerate the use of data to derive new insights for better public services. It adopts an open access licensing framework to support the release and reuse of public information, such as by NSW Transport's data exchange program, the Land and Property Information's provision of spatial data, and NSW Education Datahub.

The NSW model contrasts with the legislative environment in South Australia which modelled a *Public Sector (Data Sharing) Act 2016* on the NSW approach, but without existing privacy legislation or a modern information access regime. The SA legislation takes a different approach by incorporating privacy and a public interest test for sharing in the Trusted Access Principles that govern the provision of information.[68] This approach provides an authorising environment to facilitate both open data and data sharing more broadly.

The real value in the use of Big Data lies in its predictive potential. A step beyond data mining, data profiling enables aspects of an individual's personality or behavior, interests and habits to

65 This data is required to be managed according to the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002*.

66 These are Sch 1 — Information for which there is a conclusive presumption of overriding public interest against disclosure and Sch 2 — Excluded information of particular agencies.

67 NSW Department of Finance, Services and Innovation, *NSW Government Open Data Policy*, 2016, at https://data.nsw.gov.au/nsw-government-open-data-policy, accessed 18 February 2021.

68 *Public Sector (Data Sharing) Act 2016* (SA), s 7.

be determined, analysed and predicted.[69] There are vast sources of data used in profiling to build up a picture of an individual. Technologies that generate tracking data (such as smartphones, credit cards, websites, social media and sensors) offer unheralded benefits. Data sources include (but are not limited to):[70]

- education and professional data
- internet search and browsing history
- data derived from existing client/customer relationships
- data collected for credit-worthiness assessments
- financial and payment data
- consumer complaints or queries
- driving and location data
- property ownership data
- information from credit cards and store cards
- consumer buying habits
- wearable technology (such as fitness trackers)
- lifestyle and behavior data gathered from mobile phones
- social network information
- video surveillance systems
- biometric systems
- Internet of Things
- telematics.

Profiling is not as transparent as other forms of data processing. Profiling can involve predictive elements, which can increase the risk of inaccuracy. Profiling is not always visible, and may take place without an individual's knowledge. Correlations may include hidden biases that have an unintended or discriminatory effect on certain populations. Profiling can emphasise existing

69 Article 4(4) of the *European General Data Protection Regulation* (GDPR) defines "profiling" as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements", at https://gdpr-info.eu/art-4-gdpr/, accessed 18 February 2021.

70 Information Commissioner's Office, *Feedback request — profiling and automated decision-making*, 6 April 2017, p 3, at https://ico.org.uk/media/about-the-ico/consultations/2013894/ico-feedback-request-profiling-and-automated-decision-making.pdf, accessed 18 February 2021.

stereotypes, social segregation, and limit individual choice and equal opportunities. There is concern that some humans are particularly vulnerable in this area, for example children[71] and those with mental[72] and physical disabilities.

Profiles also tend to be dynamic and evolving. Profiling may generate new data for an individual based on data relating to other people. Profiling data might also be harvested or mined for information and its commercial value. Profiling where algorithms can discover new correlations may prove useful at a later date.

The following table prepared by the UK Information Commissioner's Office for its April 2017 consultation on *Profiling and automated decision-making* highlights some of the more widely recognised benefits and risks of profiling:[73]

Benefits	Risks
Better market segmentation	Infringement of fundamental rights and freedoms
Permits analysis of risks and fraud	Certain sectors of society may be underrepresented — eg older generation/ vulnerable individuals or those with limited social media presence
Adapting offers of goods and services as well as prices to align with individual consumer demand	Can be used to deduce sensitive personal data from non-sensitive personal data, with a reasonable degree of certainty
Improvements in medicine, education, healthcare and transportation	Unjustifiable deprivation of services or goods
Provide access to credit using different methods to traditional credit-scoring	Risk of data broking industry being set up to use information for their own commercial interest without individual's knowledge
Can provide more consistency in the decision-making process	Using profiling techniques can jeopardise data accuracy

The Royal Society in its report published on 27 April 2017, expanded on the social issues associated with machine learning applications:[74]

> As it enhances our analytical capabilities, machine learning challenges our understanding of key concepts such as privacy and consent, shines new light on risks such as statistical stereotyping and raises novel issues around interpretability, verification, and robustness. Some of these arise

71 The European GDPR states that children need particular protection with regard to their personal data. Recital 38 expands "as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles", at https://gdpr-info.eu/recitals/no-38/, accessed 18 February 2021. Controllers must not carry out solely automated processing, including profiling, that produces legal or similar significant effects in respect of a child: GDPR Recital 71, at https://gdpr-info.eu/recitals/no-71/, accessed 18 February 2021.

72 See further S Monteith and T Glenn, "Automated decision-making and Big Data: concerns for people with mental illness" (2016) 18(12) *Current Psychiatry Reports* 112, at www.ncbi.nlm.nih.gov/pubmed/27783339, accessed 18 February 2021.

73 Information Commissioner's Office, above n 70, p 6.

74 Royal Society, above n 60, p 90.

> from the enhanced analytical capabilities provided by machine learning, while others arise from its ability to take actions without recourse to human agency, or from technological issues. While machine learning generates new challenges in these areas, technological advances in machine learning algorithms also offer potential solutions in many cases.
>
> …
>
> Machine learning further destabilises the current distinction between "sensitive" or "personal" and "non-sensitive" data: it allows datasets which at first seem innocuous to be employed in ways that allow the sensitive to be inferred from the mundane.

Internationally, data protection authorities have expressly signaled their intention to closely monitor privacy concerns relating to the use of profiling,[75] Big Data and the evolution of the Internet of Things.[76] In 2018, European member states (including the UK) will introduce new regulations that govern how data usage can be challenged.[77] The *General Data Protection Regulation* ("GDPR") replaces the Data Protection Directive 95/46/EC and is designed to harmonise data privacy laws across Europe. It is focused on the outcome of automated decision-making (which could include profiling) rather than the act of profiling itself.

Early drafts of the GDPR enshrined what is called a "right to explanation" in law, although research groups argue the final version as approved in 2016 contains no such legal guarantee,

75 *Resolution on Profiling*, 35th International Conference of data protection and privacy commissioners: a compass in turbulent world, Warsaw, Poland, 2013, at www.edoeb.admin.ch/edoeb/en/home/the-fdpic/international-cooperation/international-conference-of-data-protection-and-privacy-commissi.html, accessed 18 February 2021. The Warsaw Resolution calls upon all parties making use of profiling:

1. To clearly determine the need and the practical use of a specific profiling operation and to ensure appropriate safeguards, before starting with profiling.
2. To limit, consistent with privacy by design principles, the assumptions and the amount of data collected to the level that is necessary for the intended lawful purpose and to ensure that, where appropriate, the data is sufficiently up to date and accurate for its intended purpose.
3. To ensure that the profiles and the underlying algorithms are subject to continuous validation, in order to allow for the improvement of the results and the reduction of false positive or false negative results.
4. To inform society about profiling operations to the maximum extent possible, including the way profiles are assembled and the purposes for which profiles are used, to ensure that individuals are able to maintain control over their own personal data to the maximum extent possible and appropriate.
5. To ensure, in particular with respect to decisions that have significant legal effects on individuals or that affect benefits or status, that individuals are informed about their right to access and correction and that human intervention is provided where appropriate, especially as the predictive power of profiling due to more effective algorithms increases.
6. To ensure that all profiling operations are subject to appropriate oversight.

76 *Resolution Big Data*, 36th International Conference of data protection and privacy commissioners, Mauritius, 2014 and *Mauritius Declaration on the Internet of Things*, 36th International Conference of data protection and privacy commissioners, Mauritius, 2014.

77 The European Union ("EU") General Data Protection Regulation ("GDPR") was approved by the EU Parliament on 14 April 2016 and commences operation through a two-year transition period with full implementation and enforcement from 25 May 2018.

as it will depend on interpretation by national and European courts.[78] The GDPR applies to all companies processing and holding the personal data of data subjects residing in the EU, regardless of the company's location. Accordingly, the GDPR will impact globally.

The need for [AI] transparency, [algorithmic] accountability and [robot] ethics

The practical problem with the use of algorithms, especially those used in profiling of human characteristics and behaviours, is that they may be protected by trade secrecy laws, and thus remain impenetrable to outside observers. Algorithms, especially those based on deep learning techniques,[79] can also be so opaque that it will be practically impossible to explain how they reach decisions in any event. Indeed, a characteristic of the Artificial Neural Network ("ANN") is that after the ANN has been trained with datasets, any attempt to examine its internal structure to determine why and how it made a particular decision is impossible. The decision-making process of an ANN is and remains opaque. Thus, no-one quite knows how the moves of Google DeepMind's AlphaGo artificial intelligence program beat the world's top Go player — the feat was "beautiful but puzzling".[80]

This is known as "the black box problem".[81] Within computing, "black box" may describe a situation where we can only observe inputs and outputs; what really happens to the inputs occurs "in the dark". Thus, in completely automated decision-making systems, every input and most outputs are encapsulated in the box too: the information sources representing inputs are not observable. Yet in democracies operating under the rule of law, it is basic that people should

78 S Wachter, B Mittelstadt, L Floridi, "*Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation*", 2016 International Data Privacy Law (forthcoming), at https://ssrn.com/abstract=2903469, accessed 26 August 2021. This research team hail from the Alan Turing Institute in London and the University of Oxford.

79 See further I Goodfellow, Y Bengio and A Courville, *Deep learning*, MIT Press, 2016 at www.deeplearningbook.org, accessed 26 August 2021. Deep learning (also known as deep structured learning, hierarchical learning or deep machine learning) is a class of machine-learning algorithms that:

- use a cascade of many layers of nonlinear processing units for feature extraction and transformation. Each successive layer uses the output from the previous layer as input. The algorithms may be supervised or unsupervised and applications include pattern analysis (unsupervised) and classification (supervised)
- are based on the (unsupervised) learning of multiple levels of features or representations of the data. Higher level features are derived from lower level features to form a hierarchical representation
- are part of the broader machine learning field of learning representations of data
- learn multiple levels of representations that correspond to different levels of abstraction; the levels form a hierarchy of concepts.

80 J Ribeiro, "AlphaGo's unusual moves prove its AI prowess, experts say", *ComputerWorld*, 14 March 2016, at www.computerworld.com/article/3043457/data-analytics/alphagos-unusual-moves-prove-its-ai-prowess-experts-say.html, accessed 26 August 2021.

81 See F Pasquale, *The black box society: the secret algorithms that control money and information*, Harvard University Press, 2015. Professor Pasquale, a Professor of Law at the University of Maryland, stresses the need for an "intelligible society", one in which we can understand how the inputs that go into these black box algorithms generate the effects of those algorithms. See too N Diakopoulos, *Algorithmic accountability: on the investigation of black boxes*, Tow Center for Digital Journalism, Columbia Journalism School, New York, 2013, at http://towcenter.org/research/algorithmic-accountability-on-the-investigation-of-black-boxes-2/, accessed 26 August 2021.

enjoy openness and the possibility to make up their own mind and take issue if they disagree with the exercise of governmental powers. Access to information regarding the detailed rules in the system should be publicly available. Can we avoid or manage the "black box problem"?

Because human beings program predictive algorithms, their biases and values are embedded into the software's instructions, known as the source code and predictive algorithms. Algorithms are also what make intelligent robots intelligent. Intelligent robotics blurs the very line between people and instrument.

This new reality is spurring a branch of academic study known as "algorithmic accountability",[82] which focuses on critical questions like:

- How can regulators apply expert judgment given rapidly changing technology and business practices?
- When is human review essential?
- When will controversies over one algorithmic ordering merely result in a second computational analysis of a contested matter?

Some academics argue that "a new concept of technological due process is essential to vindicate the norms underlying last century's procedural protections".[83] Procedural protections could apply not only to the scoring algorithms themselves (a kind of technology-driven rulemaking), but also to individual decisions based on algorithmic predictions (technology-driven adjudication). In their joint work, *The scored society: due process for automated predictions*, law professors Danielle Keats Citron and Frank Pasquale argued:[84]

> Procedural regularity is essential for those stigmatized by "artificially intelligent" scoring systems. The American due process tradition should inform basic safeguards. Regulators should be able to test scoring systems to ensure their fairness and accuracy. Individuals should be granted

82 See S Lohr, "If algorithms know all, how much should humans help?", *The New York Times*, 6 April 2015, at https://nyti.ms/1MXHcMW, accessed 26 August 2021. See also D Schartum, "Law and algorithms in the public domain" (2016) *Nordic Journal of Applied Ethics* 15, at http://dx.doi.org/10.5324/eip.v10i1.1973, accessed 26 August 2021.

83 Now Lois K Macht Research Professor of Law, University of Maryland, Danielle Keats Citron first contended in 2008 that a carefully structured inquisitorial model of quality control can partially replace aspects of adversarial justice that automation renders ineffectual: see D Keats Citron, "Technological due process" (2008) 85 *Wash U L Rev* 1249, at http://openscholarship.wustl.edu/law_lawreview/vol85/iss6/2, accessed 26 August 2021; see also D Keats Citron, "Open Code Governance" (2008) 1 *University of Chicago Legal Forum* 9, at http://chicagounbound.uchicago.edu/uclf/vol2008/iss1/9, accessed 26 August 2021.

84 D Keats Citron and F Pasquale, "*The scored society: due process for automated predictions"* (2014) 89:1 *Washington Law Review* 1, at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2435&context=fac_pubs, accessed 26 August 2021. The use of a "scoring" system in the criminal justice system was highlighted by *Wisconsin v Loomis*, 881 NW 2d 749 (Wis, 2016) where the Supreme Court decided the defendant's right to due process was not violated, despite the trial judge and Circuit Court having referred to the risk assessment score of the defendant in the context of sentencing. The defendant was unable to challenge the process through which the score was reached (it being a trade secret of Northpointe, Inc), although he was given an opportunity to verify some inputs and challenge the overall score, arguing other relevant considerations should be taken into account. See also L Bennett Moses and J Chan, "Using Big Data for legal and law enforcement decisions: testing the new tools" (2014) 37(2) *UNSWLJ* 643.

> meaningful opportunities to challenge adverse decisions based on scores miscategorizing them. Without such protections in place, systems could launder biased and arbitrary data into powerfully stigmatizing scores.

Development of artificial intelligence and autonomous systems ("AI/AS") are also giving rise to many complex ethical problems. Although software engineers initially identify the correlations and inferences programmed into algorithms, Big Data promises to eliminate the human middleman at some point in the process. In time, predictive algorithms may evolve to develop an artificial intelligence that guides their own evolution.

The most ethically challenging and risky type of decision-making systems are arguably those governmental decisions that:[85]

- have a high impact on peoples' lives,
- maximises the benefit to the decision-maker (to increase revenue, optimise their processes etc) at the expense of the individual, and
- are made on the basis of information over which individuals have no control.

Professor Alan Winfield, a professor of robot ethics at the University of the West of England, accepts that it may be difficult to explain an AI's decision — and for AI, the "black box problem" may well be intractable. Professor Winfield argues (emphasis in original):[86]

> The black box problem may be intractable for ANNs, but could be avoided by using approaches to AI that do not use ANNs.
>
> But — here's the rub. This involves slowing down the juggernaut of autonomous systems and AI development. It means taking a much more cautious and incremental approach, and it almost certainly involves regulation (that, for instance, makes it illegal to run a driverless car unless the car's autopilot has been certified as safe — and *that* would require standards that don't yet exist). Yet the commercial and political pressure is to be **more** permissive, not less; no country wants to be left behind in the race to cash in on these new technologies.
>
> This is why work toward AI/Autonomous Systems standards is so vital, together with the political pressure to ensure our policymakers fully understand the public safety risks of unregulated AI.

The risk that algorithms will make bad decisions that have serious impacts on people's lives has also lead to calls for a supervisory or regulatory body to ensure transparency and fairness. Such a body could have the power to scrutinise and audit algorithms, so they could go in and see whether use of predictive algorithms which mine personal information to make guesses about individuals' likely actions and risks is actually transparent and fair.[87]

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85 See further S Finlay, "Ethical risk assessment of automated decision making systems", ODBMS, 2015, at www.odbms.org/2015/02/ethical-risk-assessment-automated-decision-making-systems/, accessed 26 August 2021. Steven Finlay is Head of Analytics at HML, Europe's largest mortgage outsourcing provider. HML is part of the Computershare Group.

86 A Winfield, "The infrastructure of life part 1: safety", *Robohub*, 26 January 2017, at http://robohub.org/the-infrastructure-of-life-part-1-safety/, accessed 26 August 2021. See further, A Winfield and M Jirotka, "The case for an ethical black box", paper presented at the Towards autonomous robotic systems conference, July 2017, at www.researchgate.net/publication/318277040_The_Case_for_an_Ethical_Black_Box, accessed 26 August 2021.

87 I Sample, "AI watchdog needed to regulate automated decision-making, say experts", *The Guardian*, 28 January 2017, at https://www.theguardian.com/technology/2017/jan/27/ai-artificial-intelligence-watchdog-needed-to-prevent-discriminatory-automated-decisions, accessed 26 August 2021.

Professor of philosophy Samir Chopra — who discussed the dangers of opaque agents in his 2011 book (with Laurence White) *A legal theory for autonomous artificial agents*[88] — argues that their autonomy from even their own programmers may require them to be regulated as autonomous entities. He suggests an all-encompassing body — a "Federal Robotics Commission" — could deal with the novel experiences and harms robotics enables, dedicated to the responsible integration of robotics technologies into society.[89]

Whatever be the type of regulator, the desire to craft a cohesive regulatory theory to underpin algorithmic accountability is finally gathering pace. Professor Frank Pasquale in his research paper, *Toward a fourth law of robotics: preserving attribution, responsibility, and explainability in an algorithmic society*[90] builds on the October 2016 lecture by Yale University Law Professor Jack Balkin, *The three laws of robotics in the age of Big Data,* in which Professor Balkin advanced a proposal for a set of "laws of robotics" for an algorithmic society:[91]

1. With respect to clients, customers, and end-users, algorithm users are *information fiduciaries*.
2. With respect to those who are not clients, customers, and end-users, algorithm users have *public duties*. If they are governments, this follows immediately. If they are private actors, their businesses are affected with a public interest. …

88 S Chopra and L White, *A legal theory for autonomous artificial agents*, University of Michigan Press, 2011. The authors explain the two views of the goals of artificial intelligence, at p 5:

> From an engineering perspective, as Marvin Minsky noted, it is the "science of making machines do things that would require intelligence if done by men". From a cognitive science perspective, it is to design and build systems that work the way the human mind does. In the former perspective, artificial intelligence is deemed successful along a performative dimension; in the latter, along a theoretical one. The latter embodies Giambattista Vico's perspective of verum et factum convertuntur, "the true and the made are … convertible"; in such a view, artificial intelligence would be reckoned the laboratory that validates our best science of the human mind. This perspective sometimes shades into the claim artificial intelligence's success lies in the replication of human capacities such as emotions, the sensations of taste, and self-consciousness. Here, artificial intelligence is conceived of as building artificial persons, not just designing systems that are "intelligent". [Alteration in original.] [Citations omitted.]

89 R Calo, *The case for a federal robotics commission*, Brookings, 2014, at https://www.brookings.edu/research/the-case-for-a-federal-robotics-commission/, accessed 26 August 2021. See also R Calo, "Robotics and the lessons of cyberlaw" (2015) 103(3) *Calif L Rev* 513 at 513–563, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402972, accessed 21 August 2021.

> Robotics combines, for the first time, the promiscuity of data with the capacity to do physical harm; robotic systems accomplish tasks in ways that cannot be anticipated in advance; and robots increasingly blur the line between person and instrument.

Professor Calo is an Assistant Professor at the University of Washington School of Law and former research director at The Center for Internet and Society. He has also been a thought leader in integrating different conceptions of AI to contemporary privacy problems and the field of robotics. See eg R Calo, "Robots and privacy", *Robot ethics: the ethical and social implications of robotics*, Patrick Lin et al (eds), Cambridge: MIT Press, 2010, at https://ssrn.com/abstract=1599189, accessed 26 August 2021; R Calo, "Open robotics" (2011) 70 *Maryland Law Review* 571; R Calo, "Peeping Hals" 175 (2011) *Artificial Intelligence* 940.

90 F Pasquale, "Toward a fourth law of robotics: preserving attribution, responsibility, and explainability in an algorithmic society", University of Maryland Francis Carey School of Law Legal Studies Research Paper No 2017–21, p 1, at http://ssrn.com/abstract=3002546, accessed 26 August 2021.

91 J Balkin, "The three laws of robotics in the age of Big Data" (2017) 78 *Ohio State Law Journal*, forthcoming, at https://ssrn.com/abstract=2890965, accessed 26 August 2021. Pasquale describes Balkin's lecture as "a tour de force distillation of principles of algorithmic accountability, and a bold vision for entrenching them in regulatory principles": ibid, p 11.

3. The central public duties of algorithm users are not to externalise the costs and harms of their operations. … ["a process of identifying algorithmic nuisance"].[92]

Professor Balkin argues that public law obligations of transparency, due process and accountability flow from these three substantive requirements:[93]

> Transparency — and its cousins, accountability and due process — apply in different ways with respect to all three principles. Transparency and/or accountability may be an obligation of fiduciary relations, they may follow from public duties, and they may be a prophylactic measure designed to prevent unjustified externalization of harms or in order to provide a remedy for harm.

Professor Pasquale identifies the cornerstone of Balkin's proposal as being to create obligations of responsibility in systems that do not necessarily share the human experience of intent. The Royal Society acknowledges that society has "yet to test the boundaries of current models of liability or insurance when it comes to new autonomous intelligent systems",[94] and suggests different approaches to addressing this issue, including:

- the so-called *Bolam* Test,[95] or whether a reasonable human professional would have acted in the same way,
- strict liability — or liability without negligence or intent to harm — for autonomous vehicles, and
- third party liability, akin to provisions made for dangerous dogs.

To deal with the requirement for attribution for the purposes of attributing legal responsibility, Professor Pasquale proposes a fourth law to complement Balkin's first three: "A robot must always indicate the identity of its creator, controller, or owner"[96] (recognising that there may be multiple potentially responsible parties for any given machine's development and eventual actions).

Pasquale argues, with some persuasion, that to make Balkin's principles effective, regulators will need to require "responsibility-by-design" to complement extant models of security-by-design and privacy-by-design. That may involve requiring certain hard-coded audit logs in both closed and open robotics, or indeed licences in open robotics that explicitly

92 Balkin posits that the best analogy for the harms of algorithmic decision-making is not intentional discrimination but socially unjustified "pollution". Pasquale urges that cost-benefit analysis should "only be one of the methods" used to assess externalities. He also queries whether Balkin's appeal to environmental law principles is sustainable, observing that "we will not always be able to offer precise valuations of the alarm or apprehension we feel at certain algorithmic transformations of human social relations".

93 Balkin, above n 91.

94 Royal Society, above n 60, p 96.

95 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 is an English tort law case that lays down the typical rule for assessing the appropriate standard of reasonable care in negligence cases involving skilled professionals.

96 Pasquale, above n 90, p 10. Pasquale also submits that such a proviso "could also serve as a 'zero-eth' law, complementing the meta-principle that Asimov introduced as his zero-eth law of robotics (namely, that robots must not harm humanity)."

contemplate problematic outcomes. Initiatives like these will not simply regulate robotics post hoc, but necessarily influence systems development, by foreclosing some design options, and encouraging others.

One computer science researcher has already generated a general framework for "accountable" algorithms, unifying a suite of tools from cryptography to design processes that enable after-the-fact oversight, consistent with the norm in law and policy.[97] The work demonstrates that it is possible for accountable algorithms to attest to the valid operation of a decision policy even when all or part of that policy is kept secret.

Professor Winfield, mentioned above, is also leading development of a new standard on transparency in autonomous systems, based on the simple principle that it should always be possible to find out why an AI or robot made a particular decision. Professor Winfield heads a British Standards Institute working group on robot ethics to develop industry standards for AIs that aims to make them transparent and more accountable.[98] The group drafted a new standard BS 8611 *Guide to the ethical design of robots and robotic systems*, published in April 2016, believed to be the world's first standard on ethical robots. Also in 2016, the very well regarded IEEE standards association — the same organisation that gave us WiFi — launched a *Global initiative on ethical considerations in AI and autonomous systems.*[99] In December 2106, the IEEE published *Ethically aligned design: a vision for prioritising human wellbeing with AI and autonomous systems.*[100] The purpose of this initiative is to ensure every technologist is educated and empowered to prioritise ethical considerations in the design and development of autonomous and intelligent systems; in a nutshell, to ensure ethics is "baked in".

Ethical issues almost always directly translate into concrete legal challenges — or they give rise to difficult collateral legal problems. A challenge for policy-makers will be to develop an approach to assessing the ethical risks associated with automated decision-making systems that will be simple and pragmatic, easily incorporated as part of a standard risk assessment exercise, and can be undertaken during a system's design phase.

Appropriate action can then help to mitigate the latent risk, for example, by:

- undertaking analysis to identify "at risk" groups that may not be treated fairly (ethically) by the system (eg ethnic minorities with poor literacy or language skills, children and people suffering from mental illness or physical disability as might impede their interaction);
- designing constraints and over-ride rules to ensure that "at risk" groups are treated in a fair way; and
- after the system goes live, monitoring the situation on a regular basis, so that constraints and over-rides can be fine-tuned as required.

97 J Kroll, "Accountable algorithms", Academic dissertation (PhD) Princeton University, 2015, at http://arks.princeton.edu/ark:/88435/dsp014b29b837r, accessed 26 August 2021.

98 Professor Winfield maintains a very interesting blog "Mostly, but not exclusively, about robots", at http://alanwinfield.blogspot.com.au, accessed 26 August 2021.

99 See http://standards.ieee.org/develop/indconn/ec/ead_law.pdf, accessed 26 August 2021.

100 See http://standards.ieee.org/develop/indconn/ec/ead_v1.pdf, accessed 26 August 2021.

Conclusion

Intelligent robotics is shaping up to be the next transformative technology of our times. Their increasing role in our lives merits systematic reassessment and changes to law, institutions, and the legal profession and academy.[101] Critical evaluation is necessary to avoid addressing policy questions in a piecemeal fashion, with increasingly poor outcomes, and slow accrual of knowledge. The literature on the difficult theoretical questions of AI ethics, algorithmic system ethics, and Big Data and ethics, is now vast, well-established and easily accessible. The legal profession, judiciary and academy should be well placed to support an informed public debate about what we want algorithms, machine learning, and AI to do, and how the benefits can best be distributed.

101 See further R Susskind and D Susskind, *The future of the professions: how technology will transform the work of human experts*, Oxford University Press, 2015.

Tweeters, posters and grammers beware: discovery and social media evidence*

The Honourable T F Bathurst AC†

The advent of social media and the increasing amount of information on social media sites has important implications for litigation. The following article focusses on the interaction between discovery and social media evidence.

Facebook has almost 3 billion active monthly users.[1] Out of those, about 16 million are Australian users. This means that 64% of the Australian population now have a Facebook account and almost 50% access social media every day. Australian users are some of the most prolific users of social media, spending an average of 8.5 hours per week on the site.[2]

Social media sites contain a wealth of information that would previously have been considered private, such as information on users' location, daily activities, personal relationships and opinions. As you can imagine, this information has been described as "the stuff of discovery dreams".[3]

However, there are many features of social media evidence that create issues in regard to discovery. These include the discoverability of social media evidence, including issues surrounding relevance and limiting social media discovery requests; issues relating to the destruction of social media records and the responsibilities of legal professionals in this respect. Despite the use of social media evidence in a range of cases, there has been little discussion in Australia of these issues. In my view however, the existing discovery framework is flexible enough to cope with this new form of evidence.

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† Chief Justice of NSW. The author gratefully acknowledges the assistance of his Research Director, Ms Sarah Schwartz.

1 Statista, "Number of monthly active Facebook users worldwide as of 2nd quarter 2021 (in millions)", at www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/, accessed 26 August 2021.

2 Sensis, "Sensis Social Media Report May 2015: How Australian people and businesses are using social media", May 2015, at www.sensis.com.au/assets/, accessed 26 August 2021.

3 S Gensler, "Special Rules for Social Media Discovery?" (2012) 65 *Arkansas Law Review* 7.

What is social-media?

Social media refers to a variety of online platforms which are centred on social interaction. These platforms defy the traditional one-way model of distribution and consumption in other forms of media. Social media content is not merely consumed by users, it is also created, organised and distributed by them. Social media platforms thereby create a dialogue between different people, allowing them to communicate and share information.

Facebook, the most common social media platform, is an online social networking service that allows users to create a profile, add other users as "friends", share information through status updates, upload photos, join common interest groups, and send private messages.[4] Twitter, another commonly used social media platform, allows users to post 140 character "tweets", follow other users and reply to "tweets". Other social media platforms include Instagram, for sharing photos, Snapchat, for sending temporary images and videos, LinkedIn, for sharing employment information, and hundreds of others such as Pinterest, GooglePlus, Myspace and You Tube.

Social media platforms are interactive and enable users to communicate with the public at large and with other users. These communications can incorporate text, graphics and videos, can be reports on daily activities, blog posts, conversations via private or publically viewable messages, the sharing of content such as video clips and news articles, the joining of groups, the planning of events, advertising, or any other virtual interactions between users and the platform itself.

The discoverability of social media information

A threshold question is whether the information contained on social media sites is discoverable. It is important to keep in mind that the discovery regime is not tied to any particular type of information. The definition of "documents" in NSW refers to "any record of information".[5] This clearly includes information contained on social media sites. However, there are a number of aspects of the discovery regime that raise interesting questions in regards to social media.

In both the Supreme Court and Federal Court, orders for discovery are not made "as a matter of course" and can only be made by court order.[6] In the Federal Court, the Practice Note on discovery states that an order will only be made if "necessary for the determination of issues in the proceeding".[7]

The onus is on the applicant to demonstrate that discovery will "facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible".[8] The court will fashion an order for discovery to suit the issues in the case and the purposes of discovery.[9]

4 See A Blackham and G Williams, "Australian Courts and Social Media" (2013) 38(3) *Alternative Law Journal* 170.
5 *Evidence Act 1995* (NSW) Dictionary; Supreme Court Rules 1970 (NSW) r 1.8.
6 See Federal Court of Australia, *Practice Note CM5 — Discovery*, 1 August 2011 (Practice Note CM5); Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 21.2.
7 See Practice Note CM5, ibid.
8 Federal Court Rules 2011 (Cth) r 20.11.
9 Above Practice Note CM5, n 6.

In a similar vein, the NSW Equity Division General Practice Note states that the court will not make an order for discovery unless such an order "is necessary for the resolution of the real issues in dispute in the proceedings".[10]

The baseline determinant of discoverable information is relevance. In NSW, the court can only order discovery in respect of documents which are "relevant to a fact in issue", ie those which could "rationally affect the assessment of the probability of the existence of that fact".[11] In the Federal Court, in general, discovery orders can only be made in respect of documents that are "directly relevant to the issues raised by the pleadings or in the affidavits".[12] These documents must also adversely affect or support one of the party's arguments.[13]

Therefore, in order to be discoverable, social media evidence must first be relevant to the specific issues in dispute. It is clear from a number of cases in Australia that social media evidence can satisfy this requirement. Indeed, social media evidence can often be crucial to the outcome of a case.

In personal injury cases, social media evidence may be relevant if photos or posts reveal a plaintiff engaging in activities that belie their claims of incapacity, loss of enjoyment or emotional distress.

For example, in *Frost v Kourouche*,[14] heard last year in the NSW Court of Appeal, a pedestrian, Ms Kourouche, a community leader, and speaker, had brought a claim for damages for psychological injury against a driver, Ms Frost, who had collided with her. In making the claim, she stated that she had not done any public speaking and had "no social activities with friends or relatives" since the collision.[15] Evidence from her Facebook and Twitter accounts revealed however that she had taken a holiday, attended a public forum, had a "great night with friends" and presented a paper for International Women's Day.[16]

In another case, the Victorian Court of Appeal held that "evidence of the appellant's active engagement on social media", including her engagement in "prolific conversations", as well as surveillance films depicting her socialising and walking without a limp, could have led a jury to conclude that this was inconsistent with her claims regarding her alleged acquired brain injury and depression.[17]

Social media evidence may also be relevant in family law proceedings, to prove infidelity or misconduct. Family law practitioners have reported that litigants are increasingly asking their former partners to disclose their Facebook and Twitter accounts as well as to disclose account

10 Supreme Court of NSW, *Practice Note No SC Eq 11 — Disclosure in the Equity Division*, 22 March 2012.
11 UCPR r 21.1.
12 Above n 8.
13 ibid, r 20.14.
14 (2014) 86 NSWLR 214.
15 ibid at [11].
16 ibid.
17 *Munday v Court* [2013] VSCA 279 at [15], [38].

passwords for instant messaging services such as iMessage and WhatsApp.[18] For example, in *Marbow v Marbow*,[19] a case where the court was tasked with determining the best interests of children, private Facebook messages were examined to determine whether, and in what circumstances, the children should spend time with their mother.

Social media information may also be relevant to a wide variety of other cases such as criminal cases or discrimination cases. In *Ramazan Acar v The Queen*,[20] a case involving the murder of an infant daughter by her father, the father's Facebook page and messages were examined by the court in determining whether the offending was connected to a personality disorder. In *Glen Stutsel v Linfox*,[21] concerning an unfair dismissal claim, the applicant was dismissed for posting a number of racially derogatory, discriminatory and harassing comments about his managers on Facebook, despite the fact that the applicant maintained that his Facebook account was created with maximum privacy restrictions.

It is clear from these cases that social media records have the potential to be relevant to a number of different types of disputes. However, it ought to be kept in mind that even if documents are relevant, courts can nonetheless use their discretion to refuse to make an order for discovery if such an order is not necessary or proportionate. Both the NSW and Federal Court rules make it clear that orders for discovery will only be made in limited circumstances. A court will balance the time, cost and burden of providing discovery against the theoretical possibility that the order will yield relevant information.[22] Electronically stored information, such as that contained on social media sites, will not be discoverable if it is unlikely to contain information beyond that which is "merely formal or insignificant".[23]

Moreover, where compliance with an order for discovery would be overly burdensome, there is some authority in NSW that discovery must be necessary to prove a particular fact.[24]

The potentially voluminous nature of social media records makes it important for courts to exercise their case management powers to limit the scope of discovery. This is particularly the case if lawyers attempt to engage in fishing expeditions by seeking orders for discovery of all of the information contained in a party's social media account.

In other jurisdictions, judges appear to be limiting such requests. As an example, in the US case of *Mackelprang*,[25] the plaintiff sued her former employer for sexual harassment. Her employer subsequently obtained public information from two Myspace accounts that were allegedly run by the plaintiff, one indicating that she was single with no intention of having children, the

18 R Bowler, "Social media, evidence and family law litigation", 5 April 2014; C Keller, "Facebook used in one of five Family Court cases", *The Advertiser (Australia)*, 22 April 2012 at www.adelaidenow.com.au/news/facebook-used-in-one-of-five-family-court-cases/news-story/86374c90f4a4e5cd700dec97eefc623e?sv=a7f762ff5dbe60206019da789b269d51, accessed 10 September 2021.

19 [2012] FAMCA 24.

20 [2012] VSCA 8.

21 [2011] FWA 8444.

22 *Slick v Westpac Banking Corporation (ACN 007 457 141) (No 2)* [2006] FCA 1712 at [41], [43].

23 *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1669 at [17].

24 *New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [67].

25 *Mackelprang v Fidelity National Title Agency of Nevada, Inc* 2007 WL 119149 (D Nev) (2007).

other indicating that she had six children.[26] The employer sought discovery of all of the private messages sent via the Myspace accounts. He argued that the messages could contain admissions and may establish that the plaintiff's alleged severe emotional distress was caused by factors outside of his misconduct.[27]

The District Court of Nevada held that the plaintiff could not be compelled to produce all of her private Myspace messages, as this would result in the defendant obtaining irrelevant information.[28] However, the court indicated that the defendant would be able to pursue a more limited discovery request to determine whether the accounts belonged to the plaintiff and other information directly relevant to the sexual harassment claim.[29]

I expect that this trend of limiting discovery requests for entire social media accounts will be followed in Australia, particularly given the increased focus in recent years on case management and limiting discovery. As one US court held, allowing complete access to [a] plaintiff's social media accounts "would permit [the] defendant to cast too wide a net. … [The] [d]efendant is no more entitled to such unfettered access to [a] plaintiff's personal email and social networking communications than it is to rummage through the desk drawers and closets in [a] plaintiff's home".[30]

However, that is not to say that the entirety or most of a party's social media account can never be wholly relevant or subject to an order for discovery. In another US case, parents brought a claim of breach of contract, breach of fiduciary duty and negligence against their daughter's former high school after the school expelled her for cheating.[31] The parents alleged that the school allowed their daughter to be bullied to such a great degree that she was driven to cheat. It was alleged that the student had been taunted via text messages and on Facebook. As a preliminary matter, the defendants sought discovery of all information in the student's former Facebook account related to the teasing and taunting and all communications related to the allegations.[32] The parents subsequently served a subpoena on Facebook to retrieve records of their daughter's former Facebook account. Following an in-camera review of the records, the District Court of Connecticut determined that the entirety of the Facebook record, which included "750 pages of wall postings, messages, and pictures" contained information relevant to the subject matter of the litigation, and was thus discoverable by the defendants.[33]

These cases demonstrate that ultimately, the extent to which social media records will be discoverable is a matter for the court. Courts in Australia will fashion orders for discovery to suit the particular issues in the case at hand and the purposes of discovery. While the discovery of social media records is unique, the existing rules provide the courts with the discretion to take into account the complexities of social media evidence. The social media context does

26 ibid, at 3.
27 ibid, at 6.
28 ibid, at 7.
29 ibid, at 8.
30 *Ogden v All-State Career School No. 2:13cv406*, 2014 WL 1646934 (2014) 4.
31 *Bass ex rel. Bass v Miss Porter's School* 738 F.Supp.2d 307 (2010).
32 *Bass ex rel. Bass v Miss Porter's School* 2009 WL 3724968, 1.
33 ibid, at 1–2.

not eliminate the need to prove that all of the information sought will be relevant to the facts in issue in a dispute. As stated in the *Simply Storage* case, "the difficulty of drawing sharp lines of relevance is not a difficulty unique to the subject matter of this litigation or to social networking communications".[34] Indeed, courts in Australia have "endorse[d] a flexible rather than prescriptive approach to discovery to facilitate the making of orders to best suit each case".[35]

In order to assist the court and facilitate the just, quick and cheap resolution of proceedings, before a request is made for discovery of information contained on social media, parties themselves should consider the best way to limit such requests. Both the NSW and Federal Courts encourage pre-discovery conferences, whereby parties "meet and confer" to reach agreement about the protocols for the electronic exchange of documents and to resolve issues regarding document management, such as data preservation and privileges.[36] In the Equity Division of the Supreme Court, a Practice Note sets out that lawyers on opposing sides must meet at an early stage of the proceedings in order to reach an agreement as to the nature and extent of discovery.[37] These conferences enable parties to narrow the scope of discovery and support more effective electronic discovery management by the courts.

Courts should encourage parties to limit discovery requests for social media evidence so that only information which is directly relevant to the facts in issue and is necessary to resolving the particular dispute is subject to a discovery request.

One subsidiary issue that has arisen in other jurisdictions is whether social media evidence can be considered to be within a party's possession, custody, power or control. A document must satisfy one of these definitions in order to be discoverable.[38]

Like information contained in the cloud, the information on social media sites such as Facebook and Twitter is not stored on an individual user's computer. Instead, this information is stored on the site's servers. This means that individuals may not be the custodians of the records produced on such sites. However, the obligation to provide discovery extends to documents over which a party has "custody" or "power", even in absence of a legal right to possession of documents. For the purposes of discovery, "custody" means the mere actual physical or corporeal holding of a document, regardless of who has legal possession.[39] "Power" means an enforceable right to inspect or obtain possession or control of a document from the person with custody over it.[40]

34 *EEOC v Simply Storage Management*, LLC 270 FRD 430 (2010) 436.
35 Supreme Court of New South Wales, *Practice Note No SC Eq 3— Supreme Court Equity Division — Commercial List and Technology and Construction List*, 12 October 2008 (Commercial and Technology Lists Practice Note).
36 Supreme Court of New South Wales, *Practice Note SC Gen 7 — Use of Technology*, 9 July 2008 at [12]; Federal Court of Australia, *Practice Note CM6 — Electronic Technology in Litigation*, 1 August 2011.
37 Above n 35.
38 Federal Court Rules r 20.14(1)(c), Dictionary; UCPR r 21.3, Dictionary; *Civil Procedure Act 2005* (NSW) s 3.
39 *Roux v ABC* [1992] 2 VR 577; *FC of T v ANZ Banking Group Ltd* (1979) 143 CLR 499; *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408.
40 Supreme Court Civil Rules 2006 (SA) r 4; *B v B* [1978] 3 WLR 624; *Psalidis v Norwich Union Life Australia Ltd* (2009) 29 VR 123.

The destruction of social media information

Under the common law, if a party destroys discoverable material, this can constitute contempt, particularly if litigation is already on foot. In Australia, courts have the power to stay and or dismiss proceedings, in whole or in part, where a party has deliberately destroyed discoverable material.[41]

Parties facing litigation might understandably be tempted to delete potentially adverse material on their social media accounts. While deleting a Facebook image, deleting a tweet, editing a status update or removing a "like" may seem less illicit than shredding or burning paper documents, the reality is that in this day and age the two may amount to the same thing.

While there seems to be a dearth of cases dealing with the destruction of social media evidence, there have been cases on the destruction of other electronically stored evidence. It should be assumed that as social media evidence can be relevant and discoverable, it should be treated the same as other electronically stored information.

In two cases involving a Ms Palavi, the NSW Court of Appeal held that the court can sanction a plaintiff who destroys relevant evidence, including photos and text messages on an iPhone, if such destruction constitutes an attempt to pervert the course of justice.[42]

In the first case, Ms Palavi had sued Radio 2UE for defamation for imputing that she ran a brothel and arranged sexual liaisons between NRL players and underage girls.[43] Radio 2UE alleged that Ms Palavi's mobile phones contained evidence relevant to its defence of truth, as they were used to send and receive sexually explicit text messages and were the means by which Ms Palavi organised sexual liaisons. It also alleged that her Facebook account contained relevant evidence, as she had publicised her relationship with footballers on Facebook.

Despite being warned that her mobile phones, Facebook and Myspace pages would be the subject of a discovery request, and being asked not to destroy any material,[44] Ms Palavi publically broadcast on her Facebook account her intention to delete relevant images. Evidence from her Facebook account revealed that soon after being warned, she posted the following question, "this is gonna sound stupid but how do I get pics off my iPhone that I don't want? Like ones that have synced from computer?".[45] Ms Palavi subsequently disposed of two of her mobile phones and deleted images on another iPhone. Her Facebook post was used in evidence to support the conclusion that she had deliberately deleted the images.[46]

41 *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264; *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200.
42 *Palavi v Radio 2UE Sydney*, above; *Palavi v Queensland Newspapers Pty Ltd* [2012] NSWCA 182.
43 *Palavi v Radio 2UE Sydney*.
44 ibid at [21].
45 ibid at [33].
46 ibid at [82].

As a result, the trial judge struck out two of the imputations in the defamation claim. The Court of Appeal upheld the trial judge's findings. Justice Allsop stated that:[47]

> The deliberate destruction of discoverable material in knowing defiance of discovery obligations that produces the real risk of impairment to the case of the other side may lead to restrictions on what points litigants can run or to the striking out of all or parts of their claims.
>
> Here the fairness of the trial was put in jeopardy by the deliberate … destruction of evidence central to the case rendering further proceedings unsatisfactory in that they would be unfair and unjust to the respondent.

As an interesting side note, highlighting the potential difference between public and private communications, Justice McColl dissented and found that on the balance, the information on the mobile phones was not relevant to the inferences in the defamation claim. Justice McColl highlighted the private nature of communications on mobile phones. She stated that the imputations were that Ms Palavi "publicised her role as a facilitator of sexual liaisons between women and NRL footballers". That proposition was clearly directed to public communications, not private conversations/communications on mobile phones.[48]

Ms Palavi also brought defamation proceedings against Queensland Newspapers. Queensland Newspapers also applied for an application to strike out the case due to Ms Palavi's destruction of one iPhone and communications and images on another iPhone, which were allegedly sexually explicit and relevant to the case. As in her case against Radio 2UE, the court found that Ms Palavi's conduct in destroying relevant material "was conduct that had the tendency to impair the court … from determining the matter on the basis of the 'true circumstances of the case'".[49]

In the *Palavi* litigation, the plaintiff had clearly been put on notice that the evidence on her mobile phones and social media accounts might be relevant to the litigation. It is an interesting question as to whether the same result would have followed if she did not have notice that the information was potentially discoverable. The informal and vast nature of social media information makes it highly ephemeral. Pictures and comments are put online and deleted frequently, often without any effort or thought. Courts must strike a balance between the significant interest in preserving evidence that may be relevant to litigation and reducing the burdens associated with preserving electronic evidence of this nature. Sanctions should only be considered where conduct amounts to an attempt to pervert the course of justice.[50]

Related to a party's duty not to destroy discoverable evidence is a lawyer's obligation to instruct clients to preserve all potentially relevant information. Solicitors should ensure that their clients understand the nature and extent of their discovery obligations and have a duty to ensure that full and proper disclosure of documents is made.[51] Section 177(1) of the now repealed NSW *Legal*

47 ibid at [94].
48 ibid at [192].
49 *Palavi v Queensland Newspapers*, above n 42, at [56].
50 ibid at [55]; *British American Tobacco Australia Services Ltd v Cowell (Representing the Estate of McCabe (Deceased))* (2002) 7 VR 524.
51 *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd*[1968] 2 All ER 98.

Profession Regulation 2005 stated that lawyers could not advise clients to destroy documents in their possession or control if they were aware that "it [was] likely that legal proceedings [would] be commenced in relation to which the document may be required".[52] While this provision does not appear in the Uniform Solicitor's Conduct Rules,[53] it seems patent that such advice would be in breach of a solicitor's paramount duty to the court and responsibility to advise clients about disclosure obligations.[54]

Clients can often be unaware of their duties in regard to disclosure and preserving evidence. Indeed, many clients may be tempted to destroy, delete or remove documents unfavourable to their case. As information contained on social media may be discoverable, legal practitioners should be particularly careful to advise clients not to destroy information that may be relevant to their case. As demonstrated by the *Palavi* cases, the destruction of such evidence may lead to the striking out of claims and other adverse consequences for clients.

Even more importantly, solicitors should never advise clients to "clean up" their social media accounts in preparation for litigation. An extreme example of how this can go wrong is illustrated in the US case of *Lester v Allied Concrete*.[55] In that case, Mr Lester sought compensation for the wrongful death of his wife. The defendant served Mr Lester with a discovery request for screenshots of his Facebook page, including pictures, his profile, his message board, status updates and all messages sent or received. Attached to the request was a copy of a photo on Mr Lester's account depicting him with a beer can in hand and wearing a t-shirt emblazoned with "I N hotmoms". This was said to be relevant to Lester's state of mind following his wife's death.

After receiving the discovery request, Mr Lester's lawyer instructed him to "clean up" his Facebook and MySpace pages as, "[w]e don't want any blow-ups of this stuff at trial". Consistent with his lawyer's instructions, Mr Lester deleted his page and informed the defendant that he did not have a Facebook account. Subsequently, after receiving a motion to compel discovery, he reactivated his page and deleted 16 photos. Subpoenas issued by the defendant and expert evidence revealed that the photos had been deleted and revealed the email chain between lawyer and client, which the lawyer had attempted to conceal.

The court found that not only was Mr Lester in breach of his duty to disclose and produce the social media evidence, but his lawyer was in breach of his obligations under the court's rules. The lawyer was ordered to pay $542,000 in fees and expenses and was referred to the Bar Association for consideration of disciplinary action. Mr Lester was also ordered to pay $180,000 in fees and expenses.[56]

The lawyer in *Lester* paid a high price for the breach of his duties. If similar circumstances arose in this jurisdiction, it seems highly likely that a solicitor would be subject to disciplinary action for failing to adhere to their paramount duty to the court and the administration of justice.

52 *Legal Profession Regulation 2005* (NSW) s 177(1)(a).
53 *McCabe v British American Tobacco Australia Service Ltd* [2002] VSC 73.
54 *Lester v Allied Concrete Co*, Case No CL08-150, CL09-223 (Circ Ct Charlottesville), 21.10. 2011.
55 ibid.
56 ibid.

Conclusion

The issues with regard to the discoverability of social media evidence and the destruction of such evidence do not necessarily call for the creation of new rules. Courts need not overcompensate for technological change when the fact that a particular communication has occurred over social media, for example, in the form of a private Facebook message, as opposed to in written form, is not of any significance. The existing rules of procedure and evidence can be applied. While social media may be a brave new world for judicial officers and practitioners, our existing rules on discovery are flexible enough to deal with this evolving communication platform.

Online justice: The way of the future?*

Mr R Susskind OBE FRSE†

For many people across the world, it is easier to find an internet connection than a lawyer. Could online courts revolutionise justice in 2020? Or is the legal profession not ready for trial by robot?

More people in the world now have access to the internet than access to justice. According to the Organisation for Economic Cooperation and Development (OECD), only 46% of human beings live under the protection of the law, whereas more than 50% of people are now active users of the internet in one way or another.

Annually, one billion people are said to need "basic justice care" but "in many countries, close to 30% of problem-owners do not even take action". As for public funding of legal and court services, it was found in a leading global study of legal aid, involving 106 countries, that around one-third "have not yet enacted specific legislation on legal aid" and that the "demand for legal aid in civil cases is largely unmet in most countries".

Meanwhile, the courts of some jurisdictions are labouring under staggering backlogs — for example, 100 million cases in Brazil (as noted), and 30 million in India. Even in those legal systems that are described as "advanced", court-systems are under-resourced, and the resolution of civil disputes invariably takes too long, costs too much, and the process is unintelligible to ordinary people. The broad case for change is self-evident — in varying degrees, the court systems of our world are inaccessible to the great majority of human beings.

There are two broad ways that change can be affected in a court system. The first is evolutionary and incremental, and involves improving the current system, in part by introducing new efficiencies and partly by securing greater state funding. By and large, this is the tack preferred

* Extract from R Susskind, *Online Courts and the Future of Justice*, Oxford University Press UK, 2019, published in *Law Society Journal*, 29 January 2020 at https://lsj.com.au/articles/online-justice-the-way-of-the-future/.

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by most judges and lawyers. Their refrain is that the basic system is well-tested and well-proven, there are clear opportunities for running a much tighter ship, and it is a scandal that today's courts are so poorly resourced.

The second type of change to a court system is radical and requires the current set-up or great parts of it to be superseded swiftly rather than improved over time. If technologies are involved, they should bring transformation, rather than simply automating conventional processes. This view is shared by a growing number of activists, within and beyond the legal profession, who are arguing for radical change, claiming that today's system is irretrievably broken or unfit for purpose.

To put my cards on the table, I am much nearer the radical end. I expect the transformation to be incremental and ongoing but I fall short of being a full-on, fully-bearded revolutionary.

During my first decade of working in technology in law, from the early 1980s to the early 1990s, online courts and online dispute resolution were in no-one's contemplation, because the web had not yet been invented. In that period, people of a practical inclination spoke of, wrote of and developed systems in support of court administration while those interested in the future speculated, largely in the spirit of science fiction, about whether it might be possible for AI to replace judges and whether that might be a good thing.

Now scarcely a day passes that we are assailed by news of some new innovation, technology, advance, breakthrough or app. Our systems are able to do more and more. In the practice of law, for example, often at a higher standard than junior lawyers, we now have systems that can draft documents, undertake due diligence work, isolate the most relevant documents from litigation bundles, predict the outcomes of deals and disputes, and offer legal guidance. And we now have more than 2,000 legal technology start-ups around the world (there were fewer than 200 but five years ago), many of which are focused precisely on extending the range of legal tasks that systems can take on. More generally, some entrepreneurs aspire to do to legal work what Amazon has done to bookselling.

We live in an age when we are greatly enhancing our capacity to process information. It is not outrageous to claim that the work of judges and courts is unlikely to emerge unscathed. Today's courts were designed for a different epoch.

Commentators and practitioners often insist that much of the work of lawyers is beyond the reach of technology. They will suggest, for example, and not unreasonably, that the work of court lawyers cannot be replaced by machines. How could a robot possibly appear as an advocate before a judge?

The answer of course is that we are nowhere near this happening. But the story does not end here, as we are asking and answering the wrong question. Mistakenly, they are focusing on current ways of working rather than on whether the outcomes that court lawyers deliver might be achieved in very different ways.

Online courts are a different idea altogether. Online judging takes away much that many hold dear — the public hearing, the day in court, the direct interaction with other human beings. On the other hand, it is likely to make court service much more accessible and affordable and will chime with those who cannot recall a pre-internet world. The second sense of online court is more general. The idea here is that technology allows us to provide a service with a much

wider remit than the traditional court. The additional services include tools to help users to understand their rights, duties, and options to them, facilities that assist litigants to marshal their evidence and formulate their arguments, and systems that advise on or bring about non-judicial settlement.

I accept that the radical change being brought by technology is unsettling and sometimes worse. Concerned parents and disillusioned students often ask me how I feel about a world in which the traditional work of lawyers and judges may be, as they see it, under siege. I take a different view. I believe it is a privilege to be alive at this time of unprecedented change, at a time when young legal professionals, along with their senior colleagues, can play a central role in shaping tomorrow's legal profession and court systems. I go further and say it is the duty of all lawyers and judges to be involved.

Judge v robot? Artificial intelligence and judicial decision-making*

Professor T Sourdin†

As technology continues to change the way in which we work and function, there are predictions that many aspects of human activity will be replaced or supported by newer technologies. Whilst many human activities have changed over time as a result of human advances, more recent shifts in the context of technological change are likely to have a broader impact on some human functions that have previously been largely undisturbed. In this regard, technology is already changing the practice of law and may for example, reshape the process of judging by either replacing, supporting or supplementing the judicial role. Such changes may limit the extent to which humans are engaged in judging with an increasing emphasis on artificial intelligence to deal with smaller civil disputes and the more routine use of related technologies in more complex disputes.

Introduction

The role of a judge is a complex one. It can incorporate activism, complex interactions with people, dispute settlement, case management, public and specific education activities, social commentary as well as adjudicatory functions that might be conducted with other judges or less commonly in some jurisdictions with lay people (juries).[1] The extent to which judges are engaged in each activity varies across jurisdictions and between judges. Some judges may be more "responsive" than others, and others may show more emotion and compassion or be oriented towards therapeutic justice — interventions focussed on procedural justice

* Published in (2018) 41(4) *UNSW Law Journal* 1114 and reproduced with kind permission. Some concepts in this article have also been explored in T Sourdin and A Zariski (eds), *The responsive judge: international perspectives*, Springer Nature Singapore, 2018.

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1 See T Sourdin and A Zariski (eds), *The Multi-tasking Judge: Comparative Judicial Dispute Resolution*, Lawbook, 2013.

that emphasise "voice" and respect.[2] Given this variation, it is difficult to determine how developments in artificial intelligence ("AI") may reshape the judicial role. However, the writer contends that developments may change the interactive nature of the role, varying the adjudicative function with the potential to remove judges from an adjudicative function altogether. Whilst developments in "Judge AI" or "Judicial AI" are in their infancy, there are indicators that it will become more relevant and there are already developments, although somewhat unpopular, to introduce Judge AI in relation to some categories of dispute.[3]

In terms of these developments and those in relation to AI, what will judging involve in the next 10, 20 or 30 years? More specifically, are there aspects of the judicial function that will ensure that judging remains a human activity at least in relation to some categories of dispute? Each of these questions can be informed to some extent by examining recent changes in the context of how lawyers, courts and others are currently using technology. What is abundantly clear is that the roles of those involved in justice and judging is rapidly changing and newer, more disruptive technologies have already reshaped some aspects of the justice system. Whilst the use of technology by lawyers may not immediately result in a transformation of the judicial role, it will no doubt change how some functions are exercised. For example, the shift to increasing use of AI in the form of predictive coding,[4] predictive analytics[5] and machine learning[6] suggests that law firm use of AI is already changing how material is presented to judges and how client risk is assessed.

These developments have not taken place without some controversy. In the United States ("USA"), it was recently noted that predictive coding was already being used to determine whether recidivism was more likely in criminal matters and to assist in making decisions about sentencing.[7] Importantly, many of these current developments may have an impact on judges by removing some task related functions but are unlikely to entirely reshape the judicial function or role. The writer suggests however, that recent developments in AI are likely to have a more profound impact on judges and judging into the future, and this requires us to consider the role of the judge within modern society as well as the significant issues linked to privacy, policy, intellectual property and societal and individual need that are raised by both AI and Judge AI more specifically. This article explores the nature of these developments in the context of the adjudicative role of judges and considers issues that arise when considering Judge AI and which

2 For a broader discussion of the judicial role and responsiveness see T Sourdin and A Zariski (eds), *The Responsive Judge: International Perspectives*, Springer Nature Singapore, 2018.

3 See the strategic approach undertaken in the UK: Ministry of Justice (UK), "Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals", *Government Response Cm 9391*, February 2017. The automatic online conviction process that was proposed in the UK has had some detractors and legislation that would enable the creation of the automatic online conviction process and the development of the online court have stalled: see J Hyde, "Prison and courts bill scrapped", *The Law Society Gazette* (online), 20 April 2017. See also Prisons and Courts HC Bill (2016–17) [170] (UK) and relevant debate in the House of Commons: United Kingdom, *Parliamentary Debates*, House of Commons, 20 March 2017, vol 623, col 656.

4 Now used in the e-discovery area as discussed later in this article.

5 Predictive analytics is more focussed on predicting outcomes, as discussed later in this article.

6 See K Ashley, *Artificial Intelligence and Legal Analytics*, Cambridge University Press, 2017 for a more complete description of these processes and systems.

7 See A Liptak, "Sent to prison by a software program's secret algorithms", *The New York Times* (online), 1 May 2017.

include whether a framework exists that could enable developments to take place and if so, what particular issues arise that relate to legal authority, translating law into code, the use of discretion and understanding of syntax and semantics.

In this regard, "AI" in this article refers to a field of science, engineering and technology which focuses on the creation of intelligent machines[8] and is an umbrella term which encompasses many branches of science and technology and will often involve the creation of complex algorithms to enable outcomes to be determined. AI can include machine learning, natural language processing, expert systems, vision, speech, planning and robotics.[9] Schatsky, Muraskin and Gurumurthy offer a practical definition of AI, stating that it is "the theory and development of computer systems *able to perform tasks that normally require human intelligence*".[10] AI is an evolving concept and over time, technological advances mean that computer programs and systems become more capable of performing tasks and functions. As machines become more capable, routine tasks and functions once considered integral to AI are removed from the definition and no longer perceived to be a novelty, allowing the field to concentrate on the essential, complex functions of intelligence.[11] Importantly, at present, most AI innovation is being led by corporate research and development processes and developments in this sector may have little regard to societal good[12] or the deeper implications of AI innovation, particularly in the justice sector. Judge AI used in this context is more specifically focussed on judicial tasks — particularly adjudication. Furthermore, as noted above, the increasing use of AI to perform complex functions may include developments in affective processing that could emerge in the near future.

As noted, there are already some examples of AI informing human decision-making in the justice sector. In the USA and other jurisdictions,[13] AI is already changing judicial decision-making and, in the legal sector, there are predictive analytics developments that enable predictions to be made regarding the outcome of litigation.[14] The impacts of these technologies are currently emerging in some civil disputes and are forecast to have more significant future impacts[15] and are particularly relevant in the criminal jurisdiction. Judge AI or, more specifically, the impact that AI may have on judging is already raising concerns

8 M Mills, *Artificial Intelligence in Law: The State of Play*, Part 1, Legal Executive Institute, 2016 at www.thomsonreuters.com/en-us/posts/legal/artificial-intelligence-in-law-the-state-of-play-2016/, accessed 27 August 2021.

9 ibid.

10 D Schatsky, C Muraskin and R Gurumurthy, "Demystifying artificial intelligence: what business leaders need to know about cognitive technologies", *Report*, Deloitte University Press, 2014, p 3 (emphasis in original).

11 ibid.

12 See generally C Cath et al, "Artificial intelligence and the 'Good Society': The US, EU, and UK approach" (2017) 24 *Science Engineering and Ethics* 505.

13 For example, in Mexico, the Expertius system is advising judges and clerks "upon the determination of whether the plaintiff is or is not eligible for granting him/her a pension": see D Carneiro et al, "Online dispute resolution: an artificial intelligence perspective" (2014) 41 *Artificial Intelligence Review* 211 at 227–228. See also Ashley, above n 6.

14 C Schubarth, "Y combinator startup uses big data to invest in civil lawsuits", *Silicon Valley Business Journal* (online), 24 August 2016. See also "California Legal AI Co Gavelytics aims to be case prediction local hero", *Artificial Lawyer*, 14 November 2017.

15 D Harvey, "From Susskind to Briggs: online court approaches" (2016) 5 *Journal of Civil Litigation and Practice* 84 at 93.

amongst some senior judicial commentators. In a recent interview, Chief Justice John G Roberts Jr (USA) was asked "[c]an you foresee a day, when smart machines, driven with artificial intelligences, will assist with courtroom fact-finding or, more controversially even, judicial decision-making?" The Chief Justice responded "[i]t's a day that's here, and it's putting a significant strain on how the judiciary goes about doing things".[16]

Three levels of technological change

As I have noted in previous work, there are three main ways in which technology is already reshaping the justice system.[17] First, and at the most basic level, technology is assisting to inform, support and advise people involved in the justice system (supportive technology). Second, technology can replace functions and activities that were previously carried out by humans (replacement technologies). Finally, at a third level, technology can change the way that judges work and provide for very different forms of justice (disruptive technology), particularly where processes change significantly and predictive analytics may reshape the adjudicative role.[18] It is at these second and third levels that issues emerge in terms of the impact of technology on the role and function of a judge insofar as the adjudicative function is concerned.

At present, using the taxonomy above, most justice reform that is supported by technology has focussed on the first and second level of technological innovation that may or may not use very simplified forms of AI. For example, more recent technological developments supplement and support the operation of many court-based processes. As a result of this first level of supportive innovation, many people now locate justice services online and obtain information about justice processes, options and alternatives (including legal alternatives) through web-based information systems. People also increasingly locate and obtain legal support and services online, and the growth in online legal firms who may provide "unbundled" legal services has been significant over the past three years.[19]

Some web-based information (including digital video), video-conferencing (including internet-based group video calls),[20] teleconferencing and email can supplement, support and replace many face-to-face in-court approaches and could be defined as a second level "replacement" technological approach. At this second level, justice is supported by technology

16 Liptak, above n 7.
17 See T Sourdin, "Justice and technological innovation" (2015) 25 *Journal of Judicial Administration* 96.
18 This material is drawn from and discussed in more detail in ibid 101–103.
19 See, eg, Lawyal Solicitors, *About Us*, 2017. Unbundled legal service provision involves assistance with set tasks; for example, a lawyer may be engaged to assist to prepare some documentation.
20 Group video calls are available through subscription services such as Skype. Users require a high-speed broadband connection and must meet device hardware and software standards. See Skype, Group Video Calls, 2018, at www.skype.com/en/features/group-video-chat/, accessed 27 August 2021.

and in some circumstances this can alter the environment in which court hearings take place.[21] For example, online court processes are increasingly used for some types of disputes and in relation to criminal justice matters (particularly bail applications).[22]

Other technologies may merge into the "third level" and support negotiation as well as judicial processes by enabling people to access more sophisticated online "advice" that is supported by AI, or to consider options and alternatives or engage in different ways. Newer developments in legal expert systems that are focussed on predictive analytics support these shifts.[23] In contrast to traditional rational decision-making approaches, some of these more sophisticated technological programs are designed to encourage the development and refinement of a number of options (rather than producing one outcome).[24] These areas of technological innovation, at the "third level", have the capacity to be more disruptive than previous innovations that supported a "graft and grow" approach and assumed that judging processes would not change in the context of their basic procedural stages.[25]

In this context, there are some opportunities for AI processes to support judges and potentially supplant them. Initially, however, the impacts are likely to be confined to lower level decision-making. Such advances are not without controversy. For example, in New Zealand, Alistair Knott of the University of Otago's AI and Law project has raised concerns about the use of a computer-based prediction model to handle claims and profile claimants under the country's state accident compensation scheme (Accident Compensation Corporation ("ACC")).[26] In Mexico, simpler administrative decision-making is already being supported by AI. For example, the Mexican Expertius system is currently advising judges and clerks "upon the determination of whether the plaintiff is or is not eligible for granting him/her a pension".[27] There are, however, important issues about whether such processes will be supported in the context of judicial decision-making and as Harvey has noted, "what is at stake [in developing Judge AI] is continued confidence in and adherence to the rule of law".[28]

Although AI processes have emerged over the past 50 years,[29] until the last decade they have been mainly directed at processes outside the justice sector. More recently, within the justice

21 See, eg, J Soars, "Draft procedural order for use of online dispute resolution technologies in ACICA Rules Arbitrations", Australian Centre for International Commercial Arbitration, 2016, for procedural changes in relation to online dispute resolution in the arbitration area.

22 See generally E Rowden, "Distributed courts and legitimacy: what do we lose when we lose the courthouse?" (2018) 14 *Law, Culture and the Humanities* 263.

23 See Ravel Law, 2017, at http://ravellaw.com/, accessed 27 August 2021; Lexmark Australia, *Search and Analytics*, 2018, at www.lexmark.com/en_au/products/software-old/search-and-analytics.html, accessed 27 August 2021.

24 See, eg, iCan Systems, Smartsettle One, 2018, at www.smartsettle.com/home/products/smartsettle-one/, accessed 27 August 2021. It has been said that collaborative platforms, such as GroupMindExpress.com, are likely to be used more frequently in large multi-party disputes where information and participants are plentiful: see John Wiley & Sons, *The Internet Encyclopedia*, vol 2 at 15 April 2004, Applications, "Online Dispute Resolution" 745.

25 Sourdin, above n 17, at 97.

26 See University of Otago, *Artificial Intelligence and Law in New Zealand* at www.cs.otago.ac.nz/research/ai/AI-Law/index.html, accessed 27 August 2021.

27 See Carneiro et al, above n 13, at 227.

28 Harvey, above n 15, at 95.

29 For a history of the development of Artificial Legal Intelligence, see P Gray, *Artificial Legal Intelligence*, Brookfield, 1997, ch 2.

area they have been directed at technical as well as legal analysis. AI programs are likely to initially focus on tasks or part of the analytical function undertaken by judges and it is clear that the AI already utilised in document discovery has the potential to transform some judicial work. Current document discovery programs utilise predictive coding to read and analyse millions of pages of discovered documents and are able to select relevant material in a fraction of the time that human labour would require.[30] Such programs could also be used to search through legal documentation in civil disputes, and commentators have predicted that the use of intelligent machines will increase in the legal sector — being used for the generation of legal documents and the prediction of legal outcomes (predictive analytics).[31] There are many advantages in that such AI programs are more time and cost efficient than humans and can work without stopping for sleep or breaks.[32] As noted above, outside of the legal profession, automated computer systems have also become prolific within government administration. These automated systems can process transactions, progress applications and make decisions without human input.[33]

The impact of online courts and online dispute resolution

There are other pressures relating to technology that are causing a rethink of the judicial role and are linked to the creation of new court environments. In this regard, there has been a growing focus on online courts and what they may provide.[34] These pressures are partly a response to growing evidence of unmet legal aid, concerns about access to justice more generally and the growth in large scale online dispute resolution systems which are already being used to support some court and tribunal systems.[35] Such changes are arguably leading to the "democratisation of justice" and although they are not oriented towards Judicial AI, they may support the development of Judge AI by essentially building a framework which enables Judge AI to be used. At present, few of these proposals engage with Judge AI and are ordinarily focussed on increasing online activity. For example, proposals for the creation of an online court have gained traction in recent years. These developments essentially involve replacing a physical court and litigation process with an online alternative that encourages the resolution of a dispute but retains the stature and powers of a physical court of law.[36]

The UK Civil Justice Council recommended the introduction of Her Majesty's Online Court for civil disputes under the value of £25 000.[37] It was intended that the court would operate with a tiered system: the first tier would allow disputants to evaluate their problems though inputting information into an online system which would categorise their issues, provide

30 Sourdin, above n 17, at 103.
31 J McGinnis and R Pearce, "The great disruption: how machine intelligence will transform the role of lawyers in the delivery of legal services" (2014) 82 *Fordham Law Review* 3041.
32 ibid.
33 M Perry, "iDecide: administrative decision-making in the digital world" (2017) 91 *Australian Law Journal* 29 at 30.
34 See Ministry of Justice of the Government of the United Kingdom and Her Majesty's Courts and Tribunal Service, "Transforming our justice system", *Policy Paper*, September 2016.
35 See, eg, Tyler Technologies, *Modria*, 2018, at www.tylertech.com/solutions-products/modria, accessed 27 August 2018; Civil Resolution Tribunal, 2018, at https://civilresolutionbc.ca/, accessed 27 August 2021.
36 Harvey, above n 15, at 85.
37 Online Dispute Resolution Advisory Group, "Online dispute resolution for low value civil claims", *Report*, Civil Justice Council, February 2015 at 6–7.

information about their rights and entitlements, and suggest options available to resolve the dispute.[38] This tier encourages parties to resolve the dispute on their own on the basis of the information provided by the system. The second tier involves online facilitators reviewing information and documents provided by the disputants and assisting with the resolution of the matter by mediating, advising, or encouraging negotiations.[39] This tier is reminiscent of court-connected alternative dispute resolution ("ADR"). The third and final tier was to involve online adjudication by the judges of the court based on electronic submissions, online pleadings and arguments, and telephone conference facilities.[40] This determination could be binding and enforceable, with the same force as a decision made in a physical courtroom. Lord Justice Briggs suggested a similar model be introduced.[41] This proposal also called for the possibility of face-to-face hearings in the third tier as an absolute last resort,[42] and included details about how the online court would allow litigants to appeal a decision into the mainstream court system.[43] Lord Justice Briggs noted that the court would need its judges to adopt a less adversarial and more investigative approach.[44] In England and Wales, the plans to introduce Judge AI in relation to some categories of dispute were dropped in 2017 (less controversial but significant measures associated with the introduction of online dispute resolution referred to above are proceeding).[45]

Chief Justice Warren of the Supreme Court of Victoria has suggested another model where technology is supportive: the distributed courtroom.[46] A physical courtroom remains central in this model, but the participants are replaced by life-size screens or holographic projections to enable judges, lawyers, jury members and parties to appear in court from any location of convenience. This model is facilitated through online video-conferencing technology, such as Skype, but still preserves the option of a physical space for the court, and the option of physically attending court. Should such courts be effectively implemented, the foundations for a move to an AI judge would be already in place. An AI judge at the centre of an online court program would allow litigants to provide the system with information remotely, and have a decision dispensed from within the program itself.

Similarly, developments in Online Dispute Resolution ("ODR"), a form of ADR where parties use the internet and technology to help resolve their dispute cheaply and efficiently, might

38 ibid at 19.
39 ibid at 19–20.
40 ibid at 20.
41 Lord Justice Briggs, "Civil courts structure review: interim report", Judiciary of England and Wales, December 2015, at p 76; Lord Justice Briggs, "Civil courts structure review: final report", Judiciary of England and Wales, July 2016 at p 58.
42 Briggs, "Interim report", ibid at p 78.
43 ibid at p 86.
44 ibid p 78.
45 See Hyde, above n 3. For current developments see R Johnstone, "HM courts and tribunals service's Susan Acland-Hood on Digital Courts, making big changes and her whitehall hammock", *Civil Service World* (online), 6 October 2017; T Etherton, "Civil justice after *Jackson*", speech delivered at the Conkerton Memorial Lecture, Liverpool Town Hall, 15 March 2018, which explores the recent use of online approaches and also considers the risks in the context of "open" justice.
46 M Warren, "Embracing technology: the way forward for the courts" (2015) 24 *Journal of Judicial Administration* 227 at 232.

also support and enable the development of AI by creating the machinery or platform within which it could eventually flourish. In ODR, disputants are not required to meet in person, as the ODR process can happen remotely through an internet connection. AI decision-making is already being used within the field of ODR. These systems are labelled expert systems, which are programmed by experts in the field and possess rule-based algorithms to assist the program to make decisions based on information received from the parties.[47] Legg explains that these processes "collect facts from users through interview-style questions and produce answers based on a decision-tree analysis".[48]

In the Netherlands, an advanced ADR program called Rechtwijzer incorporates ODR components that could be used to assist couples in the separation or divorce process. Rechtwijzer asks questions about the parties and their relationship, and provides options based on this input information.[49] The program also "provides information, tools, links to other websites and personal advice" which encourages the parties to resolve their dispute between themselves.[50] If resolution is not reached, the final step involves Rechtwijzer providing the parties with information and contact details of professional third parties such as mediators, legal representatives, and other dispute resolution processes.[51] Evaluations of Rechtwijzer found participants were satisfied with their experiences,[52] but a majority still felt the need to have a third party check over the agreement made through the system.[53] Whilst Rechwijzer will largely be replaced by a new system and online arrangements into the future, its creators have noted that the primary obstacle in terms of the success of such ODR arrangements relate to the incapacity of courts, lawyers and government to fully embrace these types of innovations.[54]

These developments in ADR also suggest that the further introduction of AI systems into legal practice is likely. If these techniques can be used effectively within the field of ADR, then it follows that the introduction of AI programs into the court system is also feasible. Designers and implementers may draw on the experiences of these ADR programs to help perfect any AI judge programs, or alternatively AIs more specifically designed to assist judicial officers and learn from failures and successes in relation to such arrangements.

The replacement of judges

As noted above, newer technologies can assist people to resolve disputes at an earlier time or refine the issues that need to be presented to judges. For example, technology can assist people to develop options and use AI to develop alternatives, and can be used to run evaluative,

47 M Legg, "The future of dispute resolution: online ADR and online courts" (2016) 27 *Australasian Dispute Resolution Journal* 227 at 228.
48 ibid.
49 E Bickel, M van Dijk and E Giebels, "Online legal advice and conflict support: a Dutch experience", *Report*, University of Twente, March 2015 at 5.
50 ibid at 4.
51 ibid.
52 ibid 22.
53 ibid 31.
54 See M Barendrecht, "Rechtwijzer: why online supported dispute resolution is hard to implement" in R Smith, *Law, Technology and Access to Justice*, 20 June 2017.

advisory and determinative processes. In this regard, some disruptive technologies are linked to Artificial Legal Intelligence ("ALI") which can be viewed as a system that has the capacity to render expert legal advice or decision-making.[55]

The impact of AI on the justice system is significant as it has the capacity to be blended with existing adjudicatory or non-adjudicatory processes, and there have been questions raised about whether these processes will have an impact on the role of lawyers and judges as technology replaces some human decisionmaking and analysis processes.[56] It seems well accepted that the impact outside the justice sector is likely to be significant and there are numerous predictions that AI together with other advances will mean that many current employment arrangements will no longer exist in 20 years with many current tasks being replaced by AI supported processes.[57] However, there has so far been little discussion about more senior legal sector roles and whether these developments (and the creation of Judge AI) will mean that judicial work will change with some judges being completely replaced by newer technologies.

Clearly some aspects of judicial work will be conducted by technological processes into the future, particularly where AI systems can be built. In this regard, legal information and AI systems can already use sophisticated "branching" and data searching technology to create elaborate decision trees that can suggest outcomes to disputes.[58] In addition, more evolved AI supports systems which do not just emulate human intelligence but create additional and different intelligent systems — neural networks.[59] Essentially, what takes place is that the system asks a number of questions or uses existing data about users and poses questions about the dispute to enable an accurate description of the dispute to be built. The computer then forms a conclusion by applying the law to the dispute description. It does this by applying rules for specific sets of facts. Finally, the computer can perform tasks based on the description given.[60] This process may enable indicative decisions or even final decisions to be expressed. Such systems can be continuously updated and reflective in that machine learning enables systems to improve and be constantly revised with new data sets.

However, does this mean that judges will be replaced by technology? Arguably not, or at least not initially. This is partly because there are so many factors that impact on judicial

55 R Susskind, *The future of law: facing the challenges of information technology*, Clarendon Press, 1996 at pp 120–121. Expert systems and knowledge-based systems may be used in "solving problems, offering advice, and undertaking a variety of other tasks" in a legal context. This is in direct support of the author's in-text proposition that ALI may present "a system that has the capacity to render expert legal advice or decision-making": at p 121

56 Significant shifts in the justice landscape are predicted by Susskind. See R Susskind, *Tomorrow's lawyers: an introduction to your future*, 2nd edn, Oxford University Press, 2017; Susskind, above n 55, at p 120. See also R Susskind, *Transforming the law: essays on technology, justice and the legal marketplace*, Oxford University Press, 2000.

57 T Dolphin (ed), *Technology, globalisation and the future of work in Europe: essays on employment in a digitised economy*, Institute for Public Policy Research, 2015 at p 45.

58 See Ashley, above n 6.

59 See, eg, N Chaphalkar, K C Iyer and S K Patil, "Prediction of outcome of construction dispute claims using multilayer perceptron neural network model" (2015) 33 *International Journal of Project Management* 1827.

60 Issues relating to the inferences that may be made based on descriptive data and instructive description are considered in S Wachter and B Mittelstadt, "A right to reasonable inferences: re-thinking data protection law in the age of big data and AI" (2019) *Columbia Business Law Review* 494.

decision-making. The Australian Law Reform Commission has noted that such factors include induction and intuition, as well as the capacity to assess the social impact of decisions.[61] However, if technologies can support decision-making (by, for example, enabling more accurate potential outcome identification by participants) they may play an increasing role in some forms of dispute (particularly in the family area)[62] and can support judicial processes and the making of decisions (by, for example, producing a draft or template decision that can then be considered by a human judge).

These types of technology have already been trialled[63] and have, so far, been the subject of limited extension because of connectivity, cultural, technological storage and access issues. Many of these issues are, however, declining in importance as humans become more technologically connected, and better able to store data. The increasing role that such processes will play may result in the possible diversion of more court-related disputes to ADR[64] and may also result in the replacement of more simple court decision-making processes by removing humans altogether (who may play an appellate or review function only). In this regard, the ability for AI decisions to be appealed or reviewed by human decision-makers is often cited as a necessary component of any automated decision-making system.[65]

Such changes raise issues about the role of courts and judges in the future as well as raising challenging issues about how data is managed, categorised, and where and how executive and judicial functions are carried out and separated. In addition, as has been the case in the USA, there are issues about intellectual property ("IP") and who may have control and input into outsourced Judge AI and how transparent algorithms are (see later discussion).

In addition, judges do much more than adjudicate or reach an outcome in relation to a dispute. They play a key role in case management and in the settlement of civil disputes. Judicial commentary informs how society can operate and many judges also play a role in an educative sense, both informing litigants and lawyers about approaches to be taken and also contributing to civic education at a broader level. Proponents of the view that judges can be replaced by AI are arguably missing the point in relation to what judges contribute to society which extends beyond adjudication and includes important and often unexamined issues relating to compliance and acceptance of the rule of law.

61 Australian Law Reform Commission, "Technology: what it means for Federal dispute resolution", *Issues Paper No 23*, 1998, at 101.

62 See Legal Services Society, *Separation, Divorce & Family Matters*, MyLawBC, 2018 at http://mylawbc.com/paths/family/, accessed 1 September 2021.

63 See J Zeleznikow and E Bellucci, "Family_Winner: integrating game theory and heuristics to provide negotiation support" in D Bourcier (ed), *Legal Knowledge and Information Systems — JURIX 2003: The Sixteenth Annual Conference*, IOS Press, 2004 at p 21; J Zeleznikow et al, "Bargaining in the shadow of the law: using utility functions to support legal negotiation", Paper presented at International Conference on Artificial Intelligence and Law, New York, 4–8 June 2007, at pp 237–246.

64 See M Fouzder, "Briggs: online court will take the 'A' out of 'ADR'", *The Law Society Gazette* (online), 26 September 2016 at www.lawgazette.co.uk/law/briggs-online-court-will-takethe-a-out-of-adr/5057914.fullarticle, accessed 1 September 2021.

65 Perry, above n 33.

An AI judge

In terms of more simple adjudicatory functions it is clear that the task of performing many judicial functions requires human intelligence, and computer programs have yet to be developed to replace these functions or to interact with people with compassion, emotion or agile responsiveness. However, could advances in technology one day replace human judges in the courtroom with an AI programmed to preside over hearings and dispense more complex judgments and in what way might more affective technologies assist or support this work?

Harvey gives a simplified description of the process an AI judge would be required to take, using the example of algorithms already present in legal databases.[66] These databases employ natural language processing to assist with the sourcing of relevant material based on search terms. An AI judge would be required to go further than these databases, by reducing returned sources to a manageable and relevant sample and then deploying tools to compare these sources of law to a present case and engaging in analysis to make a determination of the outcome.[67] Harvey explains that this final step requires "the development of the necessary algorithms that could undertake the comparative and predictive analysis, together with a form of probability analysis to generate an outcome that would be useful and informative".[68] However, human judge decision-making is largely retained in Harvey's model.

Experiments have been conducted using AI computer programs to predict the outcomes of cases based on textual information (predictive analysis). Aletras and colleagues developed a program that textually analysed decisions relating to breaches of human rights in the European Court of Human Rights to discover patterns in judgments.[69] The program learnt these patterns, and was able to predict the outcome of cases presented to it in textual form with 79% accuracy on average.[70] This is an example of machine learning, where the computer system was able to "analyse past data to develop rules that are generalisable going forward".[71] As noted, machine learning allows computer programs to learn complex tasks through experience, rather than through handcrafted computer functions.[72] Surden notes that machine learning may run into some limitations in the development of effective AIs that can predict legal outcomes. Machine learning techniques are only useful where analysed information is similar to new information presented to the AI.[73] Should an AI program be presented with a novel case where no similar

66 Harvey, above n 15, at 93.
67 ibid.
68 ibid at 94.
69 N Aletras et al, "Predicting judicial decisions of the European Court of Human Rights: a natural language processing perspective" [2016] *PeerJ Computer Science* 1 at 15–16.
70 ibid 11.
71 H Surden, "Machine learning and law" (2014) 89 *Washington Law Review* 87 at 105.
72 ibid at 89; D Silver et al, "Mastering the game of Go with deep neural networks and tree search" (2016) 529 *Nature* 484 at 489.
73 Surden, above n 71, at 105.

precedent exists, it may not be well-suited in making a prediction or coming to an outcome.[74] These issues may also arise where the sample size of previous cases is not large enough for the computer program to discover patterns and create effective generalisations.[75]

However, as AI researchers have had a number of clear successes outside of the legal field, these successes suggest that predictive analysis even where there are significant variations in terms of novelty can be "learned". Recently, Google's DeepMind researchers successfully trained an AI program, AlphaGo, to play the complex game of Go at a higher level than the European master of the game by training the neural networks of the program "directly from gameplay purely through general-purpose supervised and reinforcement learning methods".[76] There are also many examples in the medical field with AI now increasingly being used for diagnostic purposes and in relation to some human functions.[77] While the law is more complex than any game, these successes suggest that Judge AI is able to learn how to apply the law by reading legislation and case law, and that applying these principles to factual circumstances is feasible. Given the developments in non-law areas and the rapid expansion of AI (and investment in this field), it seems likely that the development of more sophisticated Judge AI is probable within the next decade. More sophisticated Judge AI emerges as a more viable option as machine learning merges with more sophisticated predictive analytical processes.[78]

Issues that arise with the development of an AI judge

Apart from the issues that are relevant in terms of the overall function of judges in our society, there are some specific factors that are especially relevant in the context of the development of AI and the adjudicative function of judges. Overall these factors suggest that AI can replace some adjudicative functions, however, the issues that emerge are whether this is appropriate and under what circumstances human judges should retain most adjudicative functions.

Legal authority

One initial issue is whether a computer program or automated process possess the legal authority to make decisions in place of a human judge. In the context of an automated system delivering administrative decisions, Justice Perry raises questions such as who makes the decision, and who possesses the legal authority to make such a decision.[79] Is it the computer programmer, the policymaker, the human decision-maker or the computer or automated system itself?

Legislators have removed some of the complexities of this issue. For example, a decision made under the *Therapeutic Goods Act 1989* by a computer program is deemed to have been made by the Secretary.[80] How such a deeming provision would fare in court litigation remains uncertain.

74 ibid.
75 ibid at 105–106.
76 Silver et al, above n 72, at 489.
77 See, eg, A Ramesh et al, "Artificial intelligence in medicine" (2004) 86 *Annals of the Royal College of Surgeons of England* 334; M Tirrell, "From coding to cancer: how AI Is changing medicine", *CNBC* (online), 11 May 2017; D Neill, "Using artificial intelligence to improve hospital inpatient care" (2013) 28(2) *IEEE Intelligent Systems* 92.
78 See Ashley, above n 6, where these broader developments are explored in the context of existing systems.
79 Perry, above n 33, at 31.
80 *Therapeutic Goods Act 1989* (Cth) s 7C(2).

Justice Kirby, writing in 1999, noted that the need for the public and open nature of adjudication may present difficulties with the adoption of electronic courts:[81]

> The right to see a judicial decision-maker struggling conscientiously, in public, with the detail of a case is a feature of the court system which cannot be abandoned, at least without risk to the acceptance by the people of courts as part of their form of governance.

Without a public, open forum for the administration of the state's judicial powers, would the exercise of these powers be accepted by the populace? Chief Justice Warren argues that they would: few people attend court hearings in person, and information and news is sourced more and more from online media including social media.[82] Furthermore, an online court system featuring AI adjudication programs would not be considered out of place in an increasingly connected and online society.

Translating law into code

Commentators have raised the issue of how to accurately translate the law into codes, commands and functions that a computer program can understand.[83] Legal language is nuanced and often requires contextual understandings (see discussion below). Computer programmers and IT professionals rarely have legal qualifications or experience, nor are they policy or administrative experts. However, it is these professionals who are tasked with translating legislation and case law into computer codes and commands to allow an autonomous process to make decisions. These sources of law — whilst complex on their own — also operate within the context of statutory presumptions and discretionary judgments. Ensuring these intricacies are properly coded into an autonomous process is challenging. Because of these challenges, commentators note that more regulatory areas of the law may be better suited to being transformed into computer code.[84]

Similarly, these codes will need to be constantly updated due to frequent amendments, new case decisions, and complex transitional provisions.[85] Autonomous systems will also require the capacity to apply the law from various points in time, to ensure that cases are decided on the laws that applied at the relevant time the actions occurred. These challenges can potentially be met by including lawyers and policymakers in the creation and updating of these computer programs.[86]

Discretionary judgments

Many judgments within the legal system involve an element of discretion. Computer programs operate based on logic, where input information is processed via programmed algorithms to

81 M Kirby, "The future of courts: do they have one?" (1999) 8 *Journal of Judicial Administration* 185 at 188.
82 Warren, above n 46, at 233.
83 Perry, above n 33, at 32.
84 T Bathurst, "iAdvocate v Rumpole: who will survive? An analysis of advocates' ongoing relevance in the age of technology", speech delivered at the 2015 Australian Bar Association Conference, Boston, 9 July 2015 at p 4 [13].
85 Perry, above n 33, at 32.
86 ibid.

arrive at a predetermined outcome.[87] Such rigidity is arguably incompatible with discretionary decisions. Discretionary decisions may need to take into account community values, the subjective features of parties, and any other surrounding circumstances that may be relevant.

Justice Perry suggests that legislators and administrators will replace discretionary principles with more black-and-white provisions in the pursuit of greater efficiency through increased automated decision-making.[88] These amendments would simplify the law and make it more determinative to enable computers to better process the law.[89] Such amendments may result in unfair or arbitrary decisions due to the lack of individualised justice and discretion, and a lack of nuance in the law.

At the same time, there are issues with current forms of judging and bias. As I have noted previously,[90] judging can be influenced by a range of factors that arguably would not be present where AI is involved (although as noted above, AI processes can also result in outcomes that are influenced by bias). As those in the access to justice movement have noted, the outcome of court adjudication can clearly be influenced by many factors, including the quality of representation, the resources available to the litigant and the quality of the decision-making and surrounding rights based framework.[91] In addition, adjudicative decision-making can be influenced by a range of factors that can influence substantive justice.[92] These include a range of impacts on the decision-maker that include:

- when and what a person has eaten;[93]
- the time of day;[94]
- how many other decisions a person has made that day (decision fatigue);[95]
- personal values;[96]
- unconscious assumptions;[97]
- reliance on intuition;[98]

87 ibid 33.
88 ibid.
89 A Roth, "Trial by machine" (2016) 104 *Georgetown Law Journal* 1245 at 1266.
90 See T Sourdin, "Decision making in ADR: science, sense and sensibility" (2012) 31(1) *Arbitrator & Mediator* 1.
91 For further discussion, see T Sourdin, "The role of the courts in the new justice system" [2015] *Yearbook on Arbitration and Mediation* 95.
92 Sourdin, above n 90, at 1.
93 See J Tierney, "Do you suffer from decision fatigue?", *New York Times* (online), 17 August 2011, referring to a study of parole board decision-making reported in S Danziger, J Levav and L Avnaim-Pesso, "Extraneous factors in judicial decisions" (2011) 108 *Proceedings of the National Academy of Sciences of the United States of America* 6889.
94 ibid.
95 ibid.
96 R Chisholm, "Values and assumptions in judicial cases", paper presented at the National Judicial College Conference: Judicial Reasoning — Art or Science?, Canberra, 7–8 February 2009. See also V Quintanilla, "Different voices: a gender difference when reasoning about the letter versus spirit of the law", paper presented at the Law and Society Conference, Honolulu, June 2012.
97 K Mason, "Unconscious judicial prejudice" (2001) 75 *Australian Law Journal* 676 at 680.
98 M Kirby, "Judging: reflections on the moment of decision" (1999) 18 *Australian Bar Review* 4 at 19.

- the attractiveness of the individuals involved;[99]
- emotion.[100]

The extent to which these factors influence judges is unknown, but it is likely that even if a judge becomes aware of these factors, they are likely to underestimate their impact.[101] This is partly because we are more likely to exaggerate information about our own personal qualities that we perceive as positive and less likely to accept information that raises any questions about our positive characteristics.[102]

Issues about technology and bias are also present and there are concerns that replacing humans with AI will not necessarily result in a reduction in bias where discretion is relevant. Some forms of AI that are currently in use have already demonstrated that there can be significant risks in using AI in terms of bias and that programmers and others can replicate bias without intending to do so. These issues have suggested that algorithms can produce unwanted results and promote racism and inaccurate outcomes.[103] In addition, using Judge AI has the potential to reduce the capacity of the justice process to deal with people within courts with dignity and then respond in a human way (which may incorporate emotion and compassion). Developments in affective technology[104] suggest that it is feasible that technologies will be developed that are able to recognise and respond appropriately to human emotion and potentially do so more accurately than humans.

Syntax and Semantics

Along similar lines, the use of AI in law may be confronted by the philosophical distinction between syntax and semantics. Searle famously noted that computer programs possess syntax (a formal structure of operation), but do not possess semantics (meaning behind these operations).[105] Digital technology processes information in the form of abstract symbols, namely ones and zeros. The technology possesses the ability to process and manipulate these

99 M Agthe, M Spörrle and J Maner, "Does being attractive always help? Positive and negative effects of attractiveness on social decision making" (2011) 37 *Personality and Social Psychology Bulletin* 1042. The researchers in this area suggest that there may be a bias away from attractive same-sex individuals and a bias towards attractive other sex individuals.

100 H Bennett and G Broe, "Judicial neurobiology, markarian synthesis and emotion: how can the human brain make sentencing decisions?" (2007) 31 *Criminal Law Journal* 75 at 84–86.

101 T Wilson and D Gilbert, "Explaining away: a model of affective adaptation" (2008) 3 *Perspectives on Psychological Science* 370.

102 For an interesting discussion of this phenomenon, see D Brooks, *The social animal: the hidden sources of love, character, and achievement*, Random House, 2011 at p 220.

103 See S Levin, "A beauty contest was judged by AI and the robots didn't like dark skin", *The Guardian* (online), 9 September 2016. See also M Smith, "In Wisconsin, a backlash against using data to foretell defendants' futures", *New York Times* (online), 22 June 2016, regarding the use of algorithms in relation to recidivism.

104 For an interesting overview on affective technology, see Wikipedia, "Rosalind Picard", 17 May 2018, https://en.wikipedia.org/wiki/Rosalind_Picard, quoting Rosalind Picard, *Affective Computing*, MIT Press, 1997 at 93–94.

105 J Searle, "Can computers think?" in D Chalmers (ed), *Philosophy of Mind: Classical and Contemporary Readings*, Oxford University Press, 2002, p 669, at p 671.

symbols, but it does not understand the meaning behind these processes. In other words, the machine does not understand the information that it is processing. This can be contrasted with the human mind, which can understand the information that it processes.

This issue means that computer programs will be able to simulate human ways of thinking, but it will be some time before they can truly duplicate human ways of thinking.[106] Arguably however, as the information that is required for human decision-making becomes more complex (that is, involves a number of complex data sources),[107] humans will have no option but to rely on forms of AI when making decisions.

Technology supporting judges

As noted above, whilst AI has the potential to replace current human judicial functions in terms of some aspects of adjudicative work, technological advances are more likely to support human judges in their judicial work. In this regard, a number of commentators have noted that the goal of the development of AI systems should be to complement current human work, allowing for greater efficiencies, rather than total replacement of humans.[108] At times, these developments suggest that "co-bots" rather than robots will play a more important role in Judge AI.

AI programs that can produce a decision based on information input could be used to assist human judges, rather than replace them. These systems could produce a draft judgment based on the system's determined outcome.[109] A human judge could then use this draft judgment to produce their own reasons, allowing for human oversight over the computer program, and enabling discretionary or social considerations to be made that may be beyond the capacity of the computer program.

A further technological advancement that may assist judges in their work is transhumanism. Although sounding like a concept out of the pages of science fiction, the philosophy and science of transhumanism is aimed at "fundamentally improving the human condition through applied reason, especially by developing and making widely available technologies to eliminate aging and to greatly enhance human intellectual, physical, and psychological capacities".[110] Advances in this may allow the judges of the future to integrate computer circuits and programs into their bodies, or modify their physical or genetic makeup, to increase their intelligence and memory, increase their ability to manage and process information, and reduce the occurrence of fatigue.[111]

106 ibid at p 673.
107 The information that may be considered by a judge has expanded in recent years. See, eg, J Tashea, "New York considers 'Textalyzer' Bill to allow police to see if drivers were texting behind the wheel", *ABA Journal* (online), October 2016 at www.abajournal.com/magazine/article/newyork_distracted_driving_textalyzer_bill/, accessed 1 September 2021.
108 Surden, above n 71, 101.
109 Sourdin, above n 17, at 102. See also Ashley, above n 6.
110 N Agar, "Whereto transhumanism? The literature reaches a critical mass" (2007) 37(3) *The Hastings Center Report* 12.
111 See, eg, D McIntosh, "Human, transhuman, posthuman: implications of evolution-by-design for human security" (2008) 4(3) *Journal of Human Security* 4 at 10.

Conclusions

Perhaps the larger question is not "if" technologies will reshape the judicial function but "when" and to what extent. In this regard, disruptive technology is already reshaping the business of litigation.[112] There are also significant changes in the way that courts are working. Technology is already being used by tribunal[113] and court[114] systems to provide support, intake and advisory processes that are intended to assist disputants to negotiate more effectively without having court staff or other practitioners involved. In the near future, many courts will continue to build and extend online platforms and systems that support filing, referral and other activities.[115] These changes create a framework in which Judge AI can be fostered.

Policy approaches that increasingly result in the transfer of lower value matters or categories of disputes (such as insurance disputes) to tribunals and commissions suggest that judicial work is likely to continue to change over the next 20 years, and it is probable that AI is initially likely to play a more prominent role in tribunals and other decision-making contexts before being used in courts. However, these changes mean that the impact in respect of Judge AI is more likely to be significant, at least initially, in relation to smaller civil claims as AI support systems that are focussed more on predictive analytics spread throughout the administrative decision-making

112 See, eg, M Tamburro, "The future of predictive coding — rise of the evidentiary expert" in IMS ExpertServices, *BullsEye*, 26 June 2012 for an analysis of computer-assisted document coding and review, often referred to as "predictive coding". The analysis of large sets of data is likely to have a "game-changing" impact. The technology collapses the time (and costs) needed to review millions of pages of discovered material and to identify relevant aspects without devoting massively costly person hours. For example, branching technology that is not rule-based was used in a project of the Intelligent Computing Systems Research, conducted by La Trobe University and Victoria University (called "Split-Up"). The project, led by Professor Zeleznikow and which determined that there are 94 factors relevant for a percentage split decision, was directed at applying AI to assist in calculating the division of property in family law proceedings: see J Zeleznikow, Victoria University, 2018, at www.vu.edu.au/contact-us/john-zeleznikow, accessed 1 September 2021. Split-Up, a hybrid rules-based neutral network system that grew out of this research, offers advice on how a property is likely to be distributed if the matter was to be determined by a court. It has been trialled by some judges, judicial registrars and registrars of the Family Court of Australia, as well as legal practitioners, mediators and counsellors. A more advanced approach, which is oriented at supporting negotiation, is called Family_Winner: see Zeleznikow and Bellucci, above n 63; Zeleznikow et al, above n 63.

113 For example, in British Columbia, Canada, a new Civil Dispute Tribunal is intended to operate using an online platform so that disputants will make initial contact and commence proceedings through an online format; see Civil Resolution Tribunal Act, SBC 2012, c 25. It is intended that processes used by the Tribunal will be mainly online, at least initially. Online supported negotiation and supported online dispute resolution are features of the system together with adjudication, with most cases decided "on evidence and arguments submitted through the tribunal's online tools. However, when necessary, the adjudicator will have discretion to conduct a telephone or video hearing". See K Benyekhlef and N Vermeys, "ODR and the (BC) courts", *Slaw*, 28 May 2012.

114 In Northern Ireland, the Northern Ireland Courts and Tribunal Service now offers an online process in respect of small claims. A specialised Civil Processing Centre operates according to time-based and other rules to make orders, although final adjudication remains a face-to-face option: see Business Development Group, "Small claims online: a users guide", Northern Ireland Courts and Tribunals Service, May 2011.

115 For further detail on the new online court websites in NSW see, eg, NSW Online Registry: courts and tribunals, at https://onlineregistry.lawlink.nsw.gov.au, accessed 1 September 2021; M Whitbourn, "NSW Government trials online court for civil cases in Sydney", *The Sydney Morning Herald* (online), 9 August 2015 at www.smh.com.au/nsw/nsw-government-trials-online-court-for-civil-cases-in-sydney-20150807-giuig2.html, accessed 1 September 2021. The Federal Court of Australia has had an e-courtroom and has been expanding online lodgement services for some years: see Federal Court of Australia, eCourtroom at www.fedcourt.gov.au/online-services/ecourtroom, accessed 1 September 2021.

arena and are aided by online court platforms.[116] If Judge AI (or perhaps "Adjudication AI") is to be restricted initially to smaller claims, there are questions about where it might stop and how larger, more complex disputes will be dealt with and the extent to which judicial oversight will be maintained. In this regard, in non-legal domains, it seems that humans appear to be relatively comfortable with the replacement of some human functions by AI and robots. In some domains, there are clear advantages to using AI which can be more accurate, faster and cheaper than using humans. Will the same approach be adopted in respect of Judge AI? It seems likely that it will, particularly if decisions are made on a cost and time basis (rather than considering the broader benefits that human judges may bring to the justice system).

Any shift towards Judge AI clearly raises many issues which have so far been the subject of limited commentary.[117] Some initial issues relate to the exercise of discretion and to what extent judges should — not could — be replaced by AI.[118] It is also important to understand that judges do far more than make decisions. They manage cases, provide a responsive and human framework, settle cases, manage court systems and processes as well as playing an important public and educative function. Drawing the boundaries of acceptable Judge AI requires consideration of ethical questions,[119] as well as questions about who produces algorithms and Judge AI and the extent to which discretion and oversight will be maintained within the judiciary.

In addition, it may be unhelpful to maintain that Judge AI will only ever stand apart in some way from judges. As noted above, many technology futurists suggest that it is likely that humans will not necessarily be replaced by AI. Instead, human intelligence is likely to be supplemented by technological advances. This approach suggests that judges may remain human but be "supplemented"; that is, have their intelligence and analytical functions supported by AI.

116 Significantly, the UK Civil Justice Council ("CJC") report on "Online dispute resolution for low value civil claims" recommends building a new dedicated internet-based court service for civil disputes with a value of less than £25 000: see Online Dispute Resolution Advisory Group, above n 37, at 3. The report distinguishes between two approaches for incorporating ODR into the justice system:

> The first involves the application of technology to improve what is already in place today. In this way, IT is grafted onto existing working practices and so replaces or perhaps enhances current systems … The second use of IT in the courts is to enable the delivery of services in entirely new ways. When this is the aim, it encourages new and imaginative thinking and urges reformers to start afresh, with a blank sheet of paper.

The CJC essentially recommends considering more disruptive technologies in the second approach, stating, at 4, that:

> We propose new ways in which justice can be administered through the use of ODR techniques. This is therefore in contrast with many projects that are currently in progress in the civil justice system — those that fall into our first category and are seeking to systematize the traditional operation of the courts.

117 See some recent discussion in R Susskind, "Submission No AIC0194 to the House of Lords Select Committee on Artificial Intelligence", *Artificial Intelligence — Challenges for Policymakers*, 6 September 2017, at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/artificialintelligence-committee/artificial-intelligence/written/69715.html, accessed 1 September 2021.

118 See M Perry, "iDecide: the legal implications of automated decision-making", speech delivered at the Cambridge Centre for Public Law Conference: Process and Substance in Public Law, University of Cambridge, 15–17 September 2014.

119 Issues about robot ethics are currently the subject of some limited discussion. See H Devlin, "Do no harm, don't discriminate: official guidance issued on robot ethics", *The Guardian* (online), 18 September 2016, at www.theguardian.com/technology/2016/sep/18/official-guidance-robot-ethicsbritish-standards-institute?CMP=share_btn_tw, accessed 1 September 2021.

These enhancement approaches raise issues about judicial appointment, workload and retention and broader questions about how judges contribute to society, as well as the importance of responsive judging and a need to better understand and explore the impact that people experience when a human judge deals with their concerns.

Technology and the future of the courts*

The Honourable Justice J Allsop AO†

No institution, including the courts, can disregard technology. This article discusses the role of the courts in the uptake of technology. It considers the question of how to best incorporate useful technologies while maintaining the fundamentally human character of courts as public institutions. It assesses some of the challenges that may arise along the way. These include practical obstacles such as the need for behavioural change across the profession, ensuring access to (and not obstruction of) justice, and the implications of the use of big data and artificial intelligence for public trust and confidence in the courts as core public institutions.

Introduction

Technology is woven into our daily lives. It is the now, and the future. One does not need to look too far to see mistaken disregard of technology in the past. Take the Western Union electrician who, in 1876, sent the company president an internal memo claiming that "[t]his 'telephone' has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us."

As core public institutions, courts need to take a leading role in the responsible implementation of technology in the law and in legal practice, with a specific emphasis on problem-solving and the facilitation of the just resolution of disputes in a quick and inexpensive manner, while still maintaining the fundamentally human character of the courts. The uptake of technology is not about the use of buzzwords.

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† Chief Justice of the Federal Court of Australia. The author acknowledges, with thanks, the contributions of his associate for 2018–2019, Deniz Kayis, and of Warwick Soden, Jessica Der Matossian and Maura Winston.

In the pages that follow, I look first at the role of the court in the uptake of technology. I then turn to look at what has been achieved, what could be achieved, and some lessons learnt along the way. Finally, I discuss the three core outcomes that technological uptake should address, and some of the challenges that may arise (or have already arisen):

(a) practical obstacles to implementation, including the need for behavioural change across the profession,

(b) ensuring access to (not obstruction of) justice, and

(c) perhaps most critically, the implications of the use of big data and artificial intelligence ("AI") for public trust and confidence in the courts as public institutions.

At no point do I want to sound cynical when I discuss these challenges. I am not. There are always going to be challenges when developing and improving a deeply ingrained system or way of doing things. Knowing what these challenges may be and how to address them will enable better policies and processes to be implemented.

Role of the courts

Courts are human institutions. I have referred to the courts in this way before.[1] In my view, the human element of institutions, especially public institutions, is too often neglected.

Courts are public institutions made up of people. Their purpose is the exercise of public governmental power of a special, protective kind: the judicial power. This power is the manifestation and application of equality before the law, impartiality (both substantive and apparent), the rights of parties to properly ventilate and respond to disputes and allegations against them, and the fair and (as far as possible) correct determination of questions of fact and law. These are not quantifiable features; they are not reducible to statistics and metrics. They are not fully digitisable. As Kiefel CJ noted in a keynote address at a Australian Bar Association national conference, it is a human ability to evaluate complex evidence and apply nuanced legal reasoning to cases past and present with competing possible outcomes.[2]

By saying the courts are human, I mean that courts involve human reasoning and emotion, and that the courts are humane, but there is also something more. To explain this, I need to come to the topic of the abstractionism and deconstruction of whole human thoughts, human values, and human institutions into what is seen as their taxonomically organised and abstractedly expressed constituent parts. There is a modern cast of mind in deconstructing a whole proposition into a series of abstracted definitional propositions. The impetus is often a sensible one, perhaps to "unwrap", as is sometimes said, the constituent elements of a whole idea or entity. From that process one may well get valuable insight, but the process often

1 See J Allsop, "Courts as (living) institutions and workplaces", speech, Joint Federal and Supreme Court Conference, 23 January 2019, at www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190123, accessed 3 September 2021. I have drawn on that speech for this discussion.

2 S Kiefel, "Change in the legal profession", speech, Australian Bar Association and NSW Bar Association RISE Conference, 16 November 2018.

goes further, past insight or explanation, to definition through abstraction. The deconstructed parts then stand as the default, the representation, of that human whole idea or human whole entity. For instance, instead of describing the fairly straightforward human traits that make up a good judge using language that is experientially based — intelligence, experience, legal knowledge, decency, fair-mindedness, patience and balanced good judgement — some would define these human qualities in an abstracted hierarchy or framework using language that is abstractedly definitional. The same can happen with courts with the development of so-called frameworks for excellence through abstracted definitional terms written on the premise that one can define excellence or fair-mindedness or good judgement. One knows when one is reading this kind of material because one is overcome by the suffocating sense of meaninglessness of the phraseology being used.

This overwhelming of human institutions by deconstruction, abstraction and bureaucratisation has struck at universities and hospitals and other institutions. There are countless protocols, quality-assurance manuals, procedure manuals, mission statements, check lists, questionnaires and formal requirements written in language that needlessly abstracts and categorises, and that deadens thought and does little, if anything, to illuminate. The essence of the problem is that the experientially human is deconstructed and abstracted into definitional or quasi-definitional form in an endeavour to be certain and measurable and complete.

This cast of mind treasures price over value, measurement over evaluation, and a certain structure over the elusive place of talent. It founds the tyranny of metrics.[3]

How is this of importance for court governance and organisation in the context of technological change? The human element is important for a number of reasons. One of particular note is that we must be wary of talk that reduces the courts to a mere service or place. Richard Susskind, IT Adviser to the Lord Chief Justice of England and Wales, posed what is, in my view, an inadequate and binary question in his 2013 book, *Tomorrow's Lawyers*: "Is the court a service or a place?".[4] The court is not just a service, nor is it just a place. It is the embodiment of judicial power and the guardian of the rule of law — fundamentally so.

So, if I could, I would suggest that in reading this article, as well as going forward, one should dive headfirst into this topic of technology and the courts with the human role of the courts, and the law, in mind.

What the courts have achieved and could achieve

It can be useful to conceptualise the uptake of technology by courts from more than one perspective, distinguishing in particular between the internal (or back office) and external (or front of house). Back-office digitisation refers to developments such as the digital stamping and storage of documents filed in court proceedings. Front-of-house digitisation refers to the move to presenting digitally in the courtroom, and more generally digital engagement with the court.

3 See J Muller, *The Tyranny of Metrics*, Princeton University Press, 2018.
4 R Susskind, *Tomorrow's Lawyers*, Oxford University Press, 2013, at 99.

Back-office digitisation may sound stale, but it is critical. Front-of-house digitisation cannot work completely or cohesively without it. In order to create apps that give litigants answers based on previous cases, or to have a virtual hearing, the data and documents must first be digitally stored.

There are a variety of ways in which technology has been embraced by courts in the back-office context. Much has changed since the nineteenth century, when Charles Dickens worked as a court stenographer in London. Indeed, much has changed since the twentieth century. The Federal Court of Australia, if I may say, is a good example. In 2014, the Federal Court implemented the National Court Framework ("NCF"). The NCF harmonised and streamlined the operation of the court. There had in the past been a certain lack of cohesion in how each of the State registries functioned, and, within each registry, how individual judges ran his or her docket. The uniformity of national practice, and the corresponding certainty of expectations afforded to litigants and practitioners alike, eventuated through the court embracing technology. The court's adoption of the Electronic Court File as a complete and synchronised system for judges, court staff and parties before the NCF was an important first step in the court embracing the possibilities afforded by technology to enhance the way in which fair and accessible justice can be provided, and be seen and felt to be provided.

In the Federal Court, documents are filed electronically on the eLodgment system, at any time, from anywhere. They are then sealed, or stamped, electronically. Prior to eLodgment, originating applications would be left at the relevant registry counter and eventually sent to a Registrar for manual checking, signing and sealing. The turnaround could be several days. Then, the sealed documents would be left in pigeon holes in the Registry for the law firm or litigant to check and collect. With the eLodgment system and digital file, the Registry aims for a 24-hour turnaround. Often, it only takes a couple of hours. Indeed, many documents have no turnaround time at all: originating applications, winding-up applications, and documents lodged that do not require a fee to be paid or a return date to be fixed are automatically accepted.

The Federal Court is not the only court making headway in this regard. In Australia, the NSW Supreme Court has its Online Registry, the Victorian Supreme Court has an electronic filing and case-management system called RedCrest, and the Queensland courts have adopted online filing for matters ranging from filing a statement of claim to applying for family violence protection orders. In WA, it has, since 1 March 2018, been mandatory to file electronically in the civil jurisdiction of the Supreme Court, and in SA, a new eFiling system called Registry Online was launched. In Tasmania, litigants can even use email attachments to lodge court documents.

There is also a plethora of international examples. The United States and commercial courts of China are some of the many courts taking steps to further and better incorporate technology into the daily functioning of the courts. In the United States, some courts started adopting electronic filing systems as early as 1993. Even where eFiling is undertaken, few courts recognise the eFiled documents as the official record of the court, resulting in a parallel manual process. eFiling is not an electronic court file.

Systems like the Electronic Court File and eLodgment are critical because they provide the platform to make the court a more accessible and timely disputeresolution platform. For example, the Victorian Bushfire Royal Commission estimated that it reduced hearing time by 25% due to the electronic accessibility of documents. In this context, it is valuable to add that

the uptake of technology is not restricted to constant innovation; there is also value in leveraging familiar technologies that are part and parcel of modern daily life. Even Excel spreadsheets and PowerPoint presentations have vastly changed the way in which evidence is presented in court proceedings. A more interesting example, perhaps, is in Dubai, where the Small Claims Tribunal ("SCT"), a video-driven digital court, has given claimants the option of using instant-messaging apps to give defendants notice. It will also be making its website and documentlodgement portal accessible through a mobile-phone app.

This brings me to front-of-house operations. The Dubai SCT's implementation of supportive technologies has made the institution considerably more accessible to users. Another good example of such a human-centred design approach is the Civil Resolution Tribunal ("CRT") in Canada. The CRT is Canada's first online tribunal. It deals with small-claims disputes of under $5,000, as well as strata-property issues of any amount in the province of British Columbia. As of 1 April this year, the CRT will also start to deal with motor-vehicle accident and injury claims of up to $50,000. The first level of public engagement with the CRT is the "Solution Explorer". This program asks questions and diagnoses the dispute at hand. It provides free legal information and resources like letter templates to assist users to resolve the dispute. If this fails, parties can apply to the CRT for dispute resolution. From there, the parties can use the CRT's online negotiation platform to negotiate a result, to mediate the dispute with agreements being turned into enforceable orders, or to have the dispute determined by a tribunal member. With the introduction of this system, only 6% of small claims filed reach tribunal members for adjudication.

This is where we can see that court-annexed technology need not only focus on the final judicial determination of disputes. The court journey starts well before one even steps foot in a court, and, in the majority of cases, it ends before that point too. The CRT is one example. I-CAN!, the Interactive Community Assistance Network in Orange County in the United States, is another. I-CAN! provides interactive modules addressing the legal issues that self-represented litigants often find themselves working through. Self-represented litigants are taken through the modules to find the appropriate forms to file in court. By 2012, the system generated about 182,000 pleadings in California. Not only does this mean that self-represented litigants are able to better understand legal processes, but it also saves time and money for underfunded legal-aid centres. A further example is Uit Elkaar, based in the Netherlands. It is a user-pays online conflict-resolution platform currently configured to assist people with separation or divorce. The users collaborate on personal divorce agreements, online and in their own time. The platform has seen a very positive response from users and lawyers alike. Use of the platform led to over half of the participants experiencing "low" or "very low" stress levels during their separation, with another 36% experiencing "normal" stress levels.[5] The average completion time of separation agreements was 24.3 active hours, that is, hours actively spent on the platform. Because of the ability of users to spread this time as they wished, 84% felt that

5 R Smith, "Rechtwijzer: why online supported dispute resolution is hard to implement", 20 June 2017, at https://law-tech-a2j.org/odr/classical-lessons-from-the-rechtwijzer-a-conversation-with-professor-barendrecht/, accessed 3 September 2021.

they had more control over the process of separation than traditionally was the case. I should note that, as of March 2017, the Dutch Legal Aid Board announced that the platform would be discontinued, although it has since been resurrected and continues to function, with different funding sources.

The use of AI is not limited to making legal information and procedural guidance more accessible. AI, also known as machine learning, is a burgeoning area. It is based on the idea of "artificial neural networks"; the machine uses the source data, in the way a human uses experiences and knowledge, to reason.

AI is playing more of a role in the court context. Singapore announced its AI court-technology programme, which would include AI decision-making for some minor misdemeanours. China has also adopted AI in its courts. In the Hebei province, an application called "Intelligent Trial 1.0" assists judges in analysing data and trends for use in decisions. In Liaoning province, the courts have launched a robot called "Heping Fabao", which provides 24-7 AI-based legal advice to citizens. AI-based case review has also been introduced, where a program analyses cases, flags issues regarding evidence, and looks at factually and legally similar cases for the benefit of the judge. This program has, thus far, led to over 30 criminal convictions being overturned.

None of these advancements have AI replacing judges completely. Even assuming AI programs could be programmed with the will to do justice and the discretional flexibility to respond to the constantly changing factual circumstances in each and every case, which "make the mechanical application of legal rules to human situations ordinarily objectionable",[6] there are a number of things that AI needs in order to be successful. One is large amounts of quality data. AI needs to refine and test its algorithms. In order to do this, it needs data — swathes of it. We are lucky in Australia, as we have been digitising judgments for some years now. The Federal Court has about 35,000 electronic court files. But not every file relates to the same issues, and so the data on a specific issue is probably less than the numbers suggest. Further, say new legislation in a particular area is passed which changes the law dramatically, rendering precedent unhelpful. There is then no sea of data for the algorithm to rely on to come to its conclusion.

AI also needs algorithms. Yet, who owns the code? This raises intellectual property concerns. Another concern is whether biases may be (deliberately or not) embedded in algorithmic reasoning, an issue I shall address when I come to the challenge of maintaining public trust and confidence.

Putting these concerns aside for the moment, AI has shown its value in the realm of supportive and advisory tools for small matters like in the Canadian CRT, to make legal information, guidance and the courts themselves more accessible and in line with society's daily digital usage.

Digital hearings are very important in this regard. The Federal Court does not at present have any plans to roll out digital hearings as a default position, but there is scope to introduce the option of having some digital hearings. Parties already have the ability to appear remotely. In

6 M Kirby, "The future of the courts — do they have one?" (1998) 9(2) *Journal of Law, Information and Science* 141.

the Online Court of the Local Court of NSW, practitioners can appear online in procedural and interlocutory matters, and even General Division matters listed for Defence Callover (if the parties agree).[7] In the Federal Court, an eCourtroom (which is like an online chatroom) is regularly used for case-management activities, for example to settle bills of costs. This ability to appear remotely via videolink can enhance access for people in regional areas, or even within cities. The reader may be aware that in the family-law context, the Sydney metropolitan area is serviced by only the Sydney CBD and Parramatta locations. This means that it would take a minimum of over an hour to reach either location from, say, Campbelltown. Not only is this difficult for people to access, physically, but there are often safety concerns in the family-law context as well. To have the capacity to facilitate video links makes the courtroom more accessible, financially and geographically, and can make the process of accessing the court more cognisant of the human element. In turn, this feeds into creating and maintaining public trust and confidence in the courts.

Related to digital hearings, although in a commercial-law context, some matters have started adopting what is called an eTrial. In eTrials, all documents are on an online system managed by a third-party company. Some of the uploaded documents are confidential or internal and are not shared. Some are court documents, shared with both the other parties and the judge. This is, admittedly, an expensive way to conduct a hearing. Yet it can prove more efficient in very large matters.

It may be noticed that I have, thus far, largely avoided use of the word "efficiency". It can be both helpful and useful, but it has its weaknesses. Evaluation of the operation of a court as an institution exercising judicial power must be, as I noted earlier, humanly focused. Words such as "efficiency" can too easily enable reductive analysis of organisations, especially public institutions like courts and tribunals, which function not for purposes like wealth maximisation, but rather to facilitate, determine and enforce the effective, just and (as far as possible) accurate resolution of disputes. Courts embody the exercise of judicial power, the guardianship of the rule of law, and the humanity of the individual.

It can also be counterproductive to pursue "efficiency" above all else. In trying to be efficient, it is possible to accidentally create systems that are unintuitive, or so cumbersome and unwieldly that they make that process less efficient in practice. This is especially so in an institution serving the public. In driving efficiency, it is possible to eliminate the interactions that give the court the flexibility and discretion it needs to deal with the myriad of situations it is asked to deal with on a daily basis, in a human way.

This is why the term "efficiency" is insufficient. Even if it could capture the holistic functioning of the court, which I am not persuaded it can, efficiency derives such measurement from the perspective of the court; it does not (and to an extent, cannot) consider usability, efficacy or fairness of justice, whether perceived or actual. Perhaps a different term of evaluation is

7 Local Court of NSW, Practice Note 1 of 2015 — Local Court Civil General Division — Online Court Protocol, 24 May 2019, Pt I.

required that considers the court from the litigant, advocate and solicitor's perspective — one encapsulating those and other alternative evaluative measurements, throughout the court journey.

Outcomes (and associated challenges)

There are three recurring themes throughout my discussion of the technologies that have been adopted by courts around the world: keeping up to date with the digital era, ease of access, and public trust and confidence. These should not be viewed as mutually exclusive. They are each interlinked; the first two particularly feed into the third. Importantly, these are the outcomes I see as key to the successful design and implementation of technology in courts: the outcomes that courts should be striving for as they look at ways to integrate new technologies.

Why am I focusing on outcomes? Why not merely conceptualise technologies as "back office" and "front of house", as supportive or disruptive? The answer is connected to my earlier discussion of the human in the court. It is not good enough to design and adopt technology viewing the court as a mechanical body of people stamping documents and hearing arguments. Keeping up with the digital age means that courts are not left behind. Ease of access makes justice more accessible. Public trust and confidence is at the very core of the functioning of the courts. These outcomes are human, and approaching technological uptake through the lens of these outcomes is critical.

The three key challenges that I see as arising in this context are therefore geared towards the three outcomes of ease of access, keeping up with the digital era, and public trust and confidence. The first challenge is the practical implementation of technology. The second is ensuring that technology does not become a barrier to justice. The third relates to maintaining public trust and confidence in the courts when there is considerable distrust of some technologies.

Practical obstacles to implementation

There is no one-size-fits-all approach to technology and the future of the courts. A number of factors can impact the usefulness or feasibility of adopting different technologies.

The type of court is relevant: judging from the uptake of technology in different Australian courts, it may prove easier for self-administering courts such as the Federal Court to implement a wider variety of technological change in a faster, more flexible manner, because of the greater control they have over the allocation of their budget.

The type of matter is relevant: is the matter civil or criminal, simple or complex? eTrials, which I mentioned earlier, can be worthwhile in very document-heavy matters, while they would definitely not be cost effective in simpler matters. In family-law matters where safety is a concern, technology can facilitate the safe, remote appearance of parties. Yet, in commercial matters where the credibility of a witness must be ascertained with reference to their responses

to questions and documents put before them, appearance by videolink may prove inadequate.[8] In matters where there is a self-represented litigant who wishes to hand up hardcopy documents to the judge, appearance by videolink may again prove inadequate. So, while there is great potential in the use of technology in courts, one must balance enthusiasm for new technologies with the recognition that the courts are faced with cases of varying natures; they vary in terms of appropriateness for certain technologies, and require varying levels of flexibility. This is not to say that the push to full digitisation is to be criticised, merely that it must be balanced and adopted at a rate that makes parties feel comfortable.

The willingness of those involved is relevant: that is, we need behavioural change; for judges, barristers, lawyers, and also clients and litigants to be willing to embrace technology in the courts. Digital documents are increasingly more reliable and user-friendly. One element of this behavioural change that might be hardest to come by is the trust (and distrust) of technology. I referred to the eTrial systems earlier. But there may well be concerns about security, and documents being hacked. The risk is there, and it creates a mental impasse that many will need to overcome before entrusting all of their documents (confidential, sensitive, personal) to a cloud-based database.

The available data is relevant: as mentioned earlier, in order for AI to provide sufficiently accurate information and guidance, it needs the input of a sufficiently large database of information and judgments.

The contracts are relevant: as courts enter into contracts for technological services or the creation of code for court-run apps, there must be an awareness of the need for contracts that do not bind the court into arrangements which are inflexible or prove, in practice, not to work.

The intellectual property is relevant: leading on from the importance of the contracts is the question of who owns what intellectual property — the data in an app, the assessments and predictions it makes, the code. Can users access, or even be entitled to, an explanation of the process and logic of automated decisionmaking?

The risk of overly ambitious technological structures: there have been some calls for digitisation that strike me as potentially overambitious, blinded by what can be achieved rather than what is reasonable and usable — for example, wholly virtual courts, at all stages of the pre-court and court process. There are definite benefits to a virtual approach in some circumstances, such as (but not necessarily limited to) urgent interlocutory and routine case-management or directions hearings. Yet, there are also limitations. I would like to mention two such limitations.

The first is the inherent difficulty in creating a whole or overarching technological structure, and the risk that courts and departments will be overambitious if attempting to do so. Institutions must avoid replicating (in a new form) structures that are rooted in the past and in past ideas —

8 See, eg, *Campaign Master (UK) Ltd v Forty Two International Pty Ltd [No 3]* [2009] FCA 1306 at [78]; *Blackrock Asset Management Australia Services Ltd v Waked [No 2]* [2017] FCA 479 at [46]; *Magi Enterprises Pty Ltd v Luvalot Clothing Pty Ltd [No 2]* [2017] FCA 1143 at [20]; *Vasiliades v Commissioner of Taxation [No 2]* [2017] FCA 185; and *Deputy Commissioner of Taxation v Binetter* [2017] FCA 69 at [8].

automating but not transforming, without the flexibility to incorporate not only shifts in thinking but also shifts in technology. One only needs to look at the changing variety of USB ports to recognise how quickly technology changes, and, in turn, how quickly technology becomes out of date. I say this because there have been disasters in this space. Do not underestimate the ease with which money can be spent in misconstrued attempts to integrate overly ambitious plans with a varied and ever-changing justice system. A sports car jumps from zero to 100 in a number of seconds because it has few variables and a fixed mechanical and electrical environment. Courts are more closely a reflection of life, with the chaos and change that life brings. In a court, there is no fixed mechanically definable environment. So, it is risky to design technological structures that cannot adapt to change, whether it be social, legal or technological. A plan for integration of technology is likelier to succeed if an approach of incremental growth is pursued. Such an approach is also likelier to address the needs and concerns of the individuals seeking redress through the court system, preventing a situation of isolation through technology.

This links to the second limitation: the need to retain and respect the human aspect of the courts. As earlier mentioned, I am not persuaded that the formulation of courts as service or place, which has been grasped by some commentators as the question to ask,[9] does not have limitations. The court is a human institution, reducible to neither mere place nor service. This brings me to the next challenge: ensuring access to justice.

Access (not barrier) to justice

If I may return here to Richard Susskind, this time to his 1998 book, *The Future of the Law*. I think it is important to note, as judicial officers have before me,[10] the metaphor that Susskind aptly uses at the start of this book to remind readers, and the profession, of what we as lawyers, judges and courts are here for. There is a gathering of the leading manufacturers of electric drills. The executives are shown an image of the latest, biggest and best electric drill and asked whether this is the product the company sells. They answer "yes". But then, they are shown a perfect hole in a wall, and reminded that the hole, the output of the drill, is the product they are selling. Consumers are passionate not about the drill, but rather about what the drill can do — about the outcomes. While it is an oversimplification and generally inaccurate to compare a public institution to a profit-geared company, this metaphor is a good reminder that courts and other institutions must keep in mind their real role, which I discussed earlier, not just the snazzy new technologies. This is particularly pertinent when it comes to access to justice, the second broad challenge faced in the context of technological change in the courts.

As is apparent through the earlier examples of technologies in courts, technology has increased access to justice in many ways. Further, parliamentary documents, statutes and case law are freely available on the internet. The impact is palpable. AustLII is a fantastic example. It receives over 600,000 hits each day. While technology has so much scope to enhance access, there are also legitimate concerns that it can, in some circumstances, be a barrier to justice. It

9 See, eg, R Size, "Taking advantage of advances in technology to enhance the rule of law" (2017) 91(7) *ALJ* 575.
10 See, eg, Kirby n 6.

is critical that this not become the case. Lawyers representing disabled clients have expressed worry that their clients would not have the devices necessary to read electronic documents or would have difficulty using such devices. Indeed, many Australians with a disability report a lack of confidence and knowledge as a reason for not accessing the internet.[11] Even for those without disabilities, it would not suffice to rely on a mere mobile phone. One would need a computer or iPad, even in matters that may appear more straightforward. For example, in migration appeals in the Federal Court, which generally take up to half a day in hearing, there are courtbooks hundreds of pages long. It would not be a pleasant or easy experience to wander through that information on a phone screen.

While some have suggested that the courts go fully digital, simply providing devices to those who are unable to afford them and training to those unable to use them,[12] this would be very costly and potentially unrealistic at this stage. In 2016–2017, 14% of households did not have access to the internet at home.[13] The level of internet access from home for Indigenous Australian households is well below the national average, and diminishes further with remoteness. Age also plays a role; while the national average for Australians who are internet users is 87%,[14] only 55% of people aged over 65 are internet users.[15] So it is important that traditional methods of access to the courts are maintained until society is at a stage where full digitisation is more realistic.

Danger lies in making sweeping basal assumptions; literary and full comprehension of language are examples.

Public trust and confidence

Finally, interwoven throughout all of this discussion and action about technology and the future of the courts is the need to maintain (and enhance) public trust and confidence in the courts, as an institution.

A greater accessibility of legal material assists with ensuring a level of transparency and accountability in judicial decision-making, and can be further enhanced by perhaps publicly providing further information. For example, the United States federal courts publicly publish their reserved judgments lists. This openness of information is not to be feared, nor resented. It is necessary for the functioning of a trusted public institution — public trust that the courts should continuously strive to uphold.

Yet, while technology can make some things more accessible and smoother for the parties involved, the use of big data and AI can also make some processes less transparent and less understandable, not just to the general public but also to lawyers themselves. An example of a potential issue is the one of bias I noted earlier.

11 ABS, 4430.0 — Disability, Ageing and Carers, Australia 2015.
12 See, eg, Size n 9 at 585.
13 ABS, 8146.0 — Household Use of Information Technology, Australia, 2016–2017.
14 With "internet user" defined to mean persons aged 15 years and over who accessed the internet in the last three months.
15 ABS, 8146.0 — Household Use of Information Technology, Australia, 2016–2017.

Where AI is used to come to conclusions based on a data set, it uses certain artificial neural lines of reasoning. There may be concerns over unconscious bias or outdated values being present in past decisions and thus being imported into the reasoning applied by the AI when determining present decisions. Now, the experts do say that the AI would be able to recognise and counter such biases. This is good. But it does raise the question: Who is deciding on the coding that removes, counters or prevents different biases from being imported? It is important that the public not perceive this as stemming from the executive. The courts must be independent — and be perceived as independent — from government and politics.

Decisions of courts and tribunals must also be — and be seen to be — capable of self-reflection and flexibility. For this reason, if AI were to be used to make decisions in small or simple matters, there would need to be scope for human judicial review of those decisions. Otherwise, the development of case law would begin to stagnate. There is also the question of whether a judge-bot can be vested with Ch III judicial power, but I shall leave that for another time.

I would just like to conclude my discussion of AI and public trust and confidence with a question, to highlight the difficulty of programming an algorithm: How does one program a "fair" algorithm?

There are many ways of programming fairness into algorithms. Yet each targets a different kind of fairness. There is wilful blindness, which treats subgroups the same regardless of their distinctions, like race or gender. Yet such an approach is merely creating an algorithm that is unaware; it does not create an awareness or consideration of fairness.

A second approach would be to ensure statistical parity in the outcomes, for example by selecting an equal share of people from protected and non-protected groups. However, this would require someone to be constantly verifying and modifying the thresholds and groups. It also would not account for underlying difference in the subgroups: the nuance.

Predictive equality is possibly the most balanced approach to address fairness. Predictive equality does not force equality in the outcome, but rather in the algorithm's performance or accuracy across different groups. That is, the algorithm is de-biased through a number of steps, including:

- identification of the specific relevant subgroups
- identification of the set of metrics that define fairness and the hierarchy within that set
- training with a data set that is sufficiently large, and
- identification of features that can identify a protected subgroup (such as postcodes) and either removal or adaptation of those features.

Such programming of fairness could come at a cost of lower accuracy, because there may simply be less data (or less reliable data) for certain subsets of the population. It also reflects the set of metrics that define fairness: Who determines this set? Is it flexible? Does it change with shifting social norms? Can it explain its reasoning?

These questions are still being answered. I would challenge the assumption that they can be. I have grave reservations as to humanity and its emotional intuitive responses on perceptions being algorithmically reproduced.

Conclusion

This article does not cover all of the potential technological advancements and achievements that can play a role in the future of the courts. I have tried in the space available to focus on a few key areas: what we have achieved, can achieve, and need to keep in mind. There are challenges created by the permeation of society by technology, but also great opportunity. The unexpected pitfalls may exist, hidden in plain sight. Look at where social media is taking us. The courts have a substantial role to play in leading the way in the uptake of technology in the legal field, and we are highly motivated and excited to play it.

I have no doubt that the discussions that follow — which range from text analytics and the law firms of the future, to digital legislation and demystifying AI — will contribute substantially and critically to the present impetus to weave technological developments into the heart of the courts, the profession and the law.

Artificial intelligence and litigation — future possibilities*

D Farrands KC†

We are now in yet another one of humanity's revolutions: artificial intelligence (AI). Its impact is and will be transformative across virtually all endeavours: medicine, finance, transport, insurance, manufacturing and the like. But how will it likely affect the legal profession, in particular the conduct of and outcomes in litigation? This article seeks to provide insight into that issue. The article first looks at the fundamental distinction between human intelligence and AI, critical to any in depth analysis of AI's likely impact on litigation work. The article concludes that by reason of the sheer complexity of superior court trial work, for the foreseeable future, at least in Western societies, human intelligence will remain the dominant problem-solving device to achieve "just" outcomes in disputes. However, around the globe, AI will have an increasingly important role to play in resolving the less complex court work, in Tribunal decision-making, and in resolving small claims and private treaty disputes. It will also have an increasingly significant role to play in performing legal research analytics, discovery analysis, providing predictive outcome analysis, and in reducing the cost of litigation, with software products and services already well advanced. In the interests of just, efficient, timely and cost-effective dispute resolution, the legal profession should take all practicable steps to embrace the AI revolution. But the profession should also be extremely cautious to ensure that efficiency does not ultimately trump justice.

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Introduction

The Chief Justice of the Federal Court of Australia observed:[1]

> To a degree, the future must remain unknown. Artificial intelligence and its effect on Courts, the profession and the law will change the landscape of life in ways we cannot predict.

AI is currently receiving great attention, including in areas such as the law.[2] It is part of the fascination with and implementation of the technology age, being an era of unparalleled interconnectedness and resulting efficiencies — within a global population of 7.78 billion people, there were, as at October 2019, 5.15 billion mobile phones, 4.48 billion internet users, 3.7 billion social media users, 2.5 billion email users, and in 2021 there are 2.8 billion Facebook users.[3] These are likely to all join up as the "internet of things" (often referred to as "IoT") in the not too distant future.

In Australia, the Commonwealth Government's national science agency, CSIRO, has developed an AI Action Plan, which includes establishing the National AI Centre and four AI and Digital Capability Centres. CSIRO is home to one of the world's largest AI applied capabilities, with more than one thousand researchers.

1 J Allsop, "The role and future of the Federal Court within the Australian judicial system" [2017] *FedJSchol* 12; see more recently J Allsop, "Technology and the future of the courts" (FCA) [2019] *FedJSchol* 4; *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021; see also M Perry, "iDecide: digital pathways to decision" [2019] *FedJSchol* 3.

2 For an excellent introduction to the topic of AI and its future, reference should be made to a study published in September 2016, by the so-called AI100 Group (part of the 100-year study on AI), a project hosted by Stanford University, the first report being P Stone et al, "Artificial intelligence and life in 2030: one hundred year study on artificial intelligence", *Report of the 2015–2016 Study Panel*, Stanford University, 2016 at https://ai100.stanford.edu/2016-report, accessed 6 July 2022. The AI100 Group's remit is to investigate the long-term impact of the science, engineering and deployment of AI-enabled computing systems on people, communities and society. Its core deliverables are five-yearly surveys assessing the current state of AI, of which the 2016 report is the first. In the report, the Group describes AI and its component parts, reviews AI research trends, overviews AI used in particular sectors, and recommends AI policy generally.

3 Digital 2019 — as to mobile phone, internet, social media and email use, see S Kemp, "Q4 global state of digital in October 2019", at https://wearesocial.com/uk/blog/2019/10/the-global-state-of-digital-in-october-2019/, accessed 6 July 2022; as to Facebook use, see M Mohsin, "10 Facebook statistics every marketer should know in 2021", Oberlo, at https://au.oberlo.com/blog/facebook-statistics, accessed 6 July 2022. As to efficiencies of AI, Pricewaterhouse has estimated that artificial intelligence technologies could increase global GDP by $15.7 trillion, a full 14%, by 2030: PriceWaterhouseCoopers, "Sizing the prize: what's the real value of AI for your business and how can you capitalise?", 2017, at www.pwc.com.au/government/pwc-ai-analysis-sizing-the-prize-report.pdf, accessed 6 July 2022.

This article outlines the possible impact of AI[4] on the future work of the key players in litigation — the courts, solicitors and barristers. It does not address the now well-accepted technologies facilitating filing of court documents electronically and general digital case management within courts.[5] The article addresses the question of whether AI might be (to use jargon) a "disrupter" of legal services or an "enabler" or something between the two, and if so in what areas. It is intended to assist with an understanding of AI by way of overview,[6] with particular emphasis on litigation. It is necessarily general in some respects as it attempts to predict the future in the very uncertain environment of software development. In this regard, the article is exploratory in nature and intended to provide food for thought about AI's potential role in litigation.

Executive summary

Preliminary conclusions about the future are outlined below, which in turn may inform the possible future of litigation more generally.

- There is a significant difference between the work of humans (called herein "human intelligence") and the work of computers (called herein "artificial intelligence"), principally that human work involves intuitive scenario selection, "creativity", "imagination" and "insight" — at present computers are a long way from being able to exercise discretion/judgment in this way, and quite possibly never will. This kind of work cannot (currently) be "mapped" and therefore cannot be replicated. In contrast, computer algorithms are (merely), at least in the first instance, "predetermined" pathways to an outcome. AI might "learn" new pathways to a result by practising or exploring but they are not exercising judgment in the way a human does.
- There is no doubt that computers will continue to improve significantly as super-powerful computational devices, and for a very long while yet. Whether computer intelligence (AI) and human intelligence will ultimately converge is highly debateable.

4 Alan Turing is regarded as the father of modern computers and "intelligent" machines, but the phrase "artificial intelligence" was actually coined by John McCarthy in 1956: see M Tegmark, *Life 3.0 — Being human in the age of Artificial Intelligence*, Penguin Random House, 2017, p 40. For an excellent overview timeline of the history of "AI" since 1956, see Accenture Applied Intelligence, "AI explained — a guide for executives", 2018, at www.accenture.com/au-en/insights/artificial-intelligence/artificial-intelligence-explained-executives, accessed 6 July 2022. For an overview of the likely impact of AI see D West and J Allen, "How artificial intelligence is transforming the world", Brookings Institution, 2018 at www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/, accessed 6 July 2022. Similarly, for a good examination of the future of AI and its likely impact on humanity (such as on employment, human rights, and warfare), see R McLay, "Managing the rise of artificial intelligence" at https://tech.humanrights.gov.au/sites/default/files/inline-files/100%20-%20Ron%20McLay.pdf, accessed 6 July 2022.

5 For an account of that area, see M Warren, "Open justice in the technological age", Redmond Barry Lecture, Melbourne, 21 October 2013 at http://classic.austlii.edu.au/au/journals/MonashULawRw/2014/5.pdf, accessed 7 July 2022; see more recently J Hetyey, "'The way forward: placing innovation ideas into practice': technology, innovation and change in the Supreme Court of Victoria", Law Institute of Victoria Future Focus Forum, Melbourne, 23 November 2017 at www.supremecourt.vic.gov.au/sites/default/files/assets/2017/12/a8/56af6d4d5/TheWayForwardPlacingInnovativeideasintoPractice.pdf, accessed 7 July 2022. The paper deals with the Supreme Court's digital strategy, including in the areas of e-filing, judges' portals and courtroom technology.

6 For a high-level and general overview, see R Tromans, "Legal AI — a beginner's guide", Thomson Reuters, 2017, at https://legalsolutions.thomsonreuters.co.uk/blog/2017/02/20/legal-ai-beginners-guide/, accessed 7 July 2022.

- Computers do not "reason"; however, there is now "machine learning" in which computers can improve algorithms in the sense that they can eliminate less successful pathways to achieve a stated task. A recent further development is called "legal analytics", which is an advanced form of computer searching and analysis, where inter alia computers can find or extract comparative legal arguments in similar cases — but they cannot (yet at least) develop or apply legal reasoning.
- It is true that AI can cause to be identified new pathways to achieve tasks, and even solutions (not previously identified), and may therefore be said to have "invented" things.
- Computers cannot (at present) make "ethical" judgments or set themselves goals or tasks. These appear to be insurmountable barriers to the conformance of AI with human intelligence.
- Laws use normative standards as a means of reconciling the particular justice of a case with the overall societal acceptance of court decisions. Such standards include the "reasonable person" and "objective" interpretation of contractual provisions. Computers are not able to determine normative standards over time.
- Courts use both closed datasets (admitted evidence), together with open datasets (a judge's or juries' experience and understanding of societal mythologies[7] about values such as trust, honesty and fairness). In contrast, a computer can only ever apply the relevant algorithm(s) to a closed dataset (recognising that the dataset may still be immense).
- There is a large area of work that computers can do in industry and in legal services — examples are given below, including "natural language" work and image processing.
- It would seem that the work of the superior courts will remain beyond the reach of computers for the foreseeable future unless there is significant structural change in the way complex controversies are to be quelled (such as randomly selected reviews by judicial officers of AI generated judgments, as a check on whether AI is appropriately quelling disputes).
- It is possible that interlocutory disputes in superior courts might one day be dealt with by computers, such as whether security for costs should be awarded.
- Because the work may be less complex, and computers are becoming more powerful, it seems more likely that there will be increasing emphasis on tribunal work being done by computers (eg, in consumer disputes, and in refugee, citizenship and the like matters). High-volume low-value work might be fertile ground for AI, but it must be remembered that individual parties will still have a strong sense of justice and the system using AI must always be designed with that in mind lest the use of AI may be viewed negatively, diminishing the authority of the relevant system.

7 That is, underlying assumptions or beliefs as to what is positive and valued behaviour in a group or society, and what behaviour is negatively valued: see I Macdonald, C Burke and K Stewart, *Systems leadership — creating positive organisations*, Gower, 2018, pp 55–56, 60–64.

- It is likely that private dispute resolution mechanisms, effected through algorithms, will continue to play a significant role in quelling small-scale disputes (eBay is a good example of this). This is a significant positive development in the goal of increasing access to justice, keeping costs down and keeping dispute resolution timely.
- Routine work of solicitors will continue to be significantly aided by AI, particularly in contract review, due diligence and discovery. However, advisory work in litigation cannot currently be displaced because it requires the application of legal expertise to particular circumstances and advice on risk/reward dynamics of commerce — something a computer could never adequately assess because such dynamics are inter alia, subjective, not objective.
- The court work of barristers is likely to remain substantially unaffected by AI except as regards reduced workloads in tribunals. There may be significant work in the area of the evidentiary admissibility of output from computer algorithms (eg, whether it can be relied upon, whether the assumptions are transparent and valid, and what weight it should be given) — this might in fact be a significant piece of any particular litigation. There may, however, be a role for barristers in dealing with the manner in which "virtual" tribunals deal with disputes. The Bar should take an active role in developments in AI for that reason alone. In other respects, for so long as there are hearings, the social processes of advocacy cannot be mimicked by computers.
- AI can never eliminate one of the most powerful aspects of our current litigation system: that the result is determined didactically — that is, through the endeavour of competing counsel and instructing solicitors regulated by the court as to the weight of evidence, the relevant legal principles and their application. In effect, there are multiple brains working on the one problem, in an environment specifically designed to "test" hypotheses, facts, analysis/reasoning and conclusions in real time. These super-computers (brains) are the most sophisticated and dynamic organs known in the universe. AI may, however, be able to help participants in litigation formulate and test relevant hypotheses.
- If AI is to play an important role in litigation (eg, tribunal work) then the owner of that AI is likely to be government. It will need expertise and resources. At lower levels of dispute resolution (eg, small claims), the owners of the AI systems are likely to be corporations (such as eBay).
- The future for AI is bright, but indeterminate. It is likely to affect commerce in material ways and give rise to significant dilemmas in other areas — for example, in relation to weaponry, defence and policing populations through State monitoring. There will be a significant need for protocols and governance to assist society navigate the impact of AI over time.
- Finally, the extent of AI's involvement in litigation will always be a function of the level of complexity of the legal system in question. In a robust democratic society, for example, with unique notions of justice, and the need for frequent checks on the exercise of power, AI should always have a limited role. But for other societies, where the exercise of power is largely unconstrained or is directed towards State control, and where there may be a view that humans are fallible but technology is less so, determinations of disputes by AI may well be much more prevalent even if dissatisfying to participants. The legal system "design" issue is whether to await AI to "catch up" so it can perform more complex tasks or to "dumb down" the litigation so that AI can deal with it. There is, of course, a middle ground.

Intelligence — the nature of work — tasks

It is impossible to address the future of AI in the legal industry or elsewhere without first discussing two concepts in detail — "intelligence" and "work". These are then applied to the relevant tasks under consideration, each discussed in turn.

For the purposes of this article, and to assist the discussion, intelligence has been defined in these terms: the capability to perform work to achieve the relevant task.[8] Determining the pathway may involve abstract reasoning, the application of logic, testing, problem solving, induction, deduction, the making of inferences, and the like. To understand and apply this definition, it is necessary to be clear on what "work" is within the above definition.[9] "Work" for these purposes is the determination of a pathway to achieve the relevant task. Determining the pathway may involve abstract reasoning, the application of logic, testing, problem solving, induction, deduction, the making of inferences, and the like.

Apart from "work" being a place, it can be said for present purposes that there are essentially two types of work (which are often conflated):

(1) The work involved in performing a task that requires the exercise of discretion or judgment, in order to complete the task.[10]

(2) The work involved in performing a task where no exercise of discretion or judgment is needed. Rather, the pathway to achieve the task has been predetermined and cannot be deviated from because it has been set so as to achieve the task in a particular way. In this kind of work, new pathways may be determined over time (by the computer), but there is still no exercise of discretion in the sense contemplated within (1).

The first type of work is in broad terms "human" work, and the second is in broad terms "computer (AI)" work. These two types of work are explored in more detail below.

Human work/intelligence — the exercise of discretion or judgment

In the first type of work, there may be many ways to achieve a task, and it is the selection of (or judgment associated with) the pathway to achieve the task that is "the work". People get paid to do this kind of work — that is, to exercise discretion or judgment. These types of tasks may be routine or non-routine;[11] however, even if routine, they may still require the exercise of some

8 The topic requires a definition of "intelligence". There does not appear to be a single universally accepted definition. The Oxford Dictionary defines intelligence as the ability to acquire and apply knowledge and skills. A broader definition might be: the capacity to be logical, problem-solving, learning and the application of learning. There are other definitions in use, such as "that quality that enables an entity to function appropriately and with foresight in its environment": N Nilsson, *The quest for artificial intelligence: a history of ideas and achievements*, Cambridge University Press, 2010.

9 In common parlance, the term "work" is capable of many meanings and uses. For example, we go to "work", can be "at work" and when we get there, we do "work".

10 See further Macdonald, Burke and Stewart, n 7, pp 15–16. The discretion in selecting from possibilities is "decision making".

11 Involving problems that people have already solved in the past and for which the problem-solver immediately recognises a ready-made solution or procedure: see R Sternberg and J Davidson, *The nature of insight*, MIT Press, 1995, p 4.

discretion. The task might also be "reproductive" in nature — requiring a person to perform the task using identical or similar solutions or procedures used in the past; alternatively, it might be "productive" — requiring people to invent new ways of solving the problem or performing the task.[12]

There are discrete categories of human work, for example:

1. Conscious decision-making as to the pathway, permitting articulated reasoning. For example, someone might say "I want to do it this way for the following reasons" or "I have done it this way for the following reasons". Expressing the pathway is known as "reasons".
2. Unconscious rational decision-making as to the pathway to use, which may involve a guess as to a pathway which has not before been recognised or known. This involves the use of "intuition", "creativity" or "imagination" or perhaps "insight". Here the pathway is unarticulated/unexpressed. There are no stated reasons. The pathway, if exposed, might be rational. But a person might say, "here is the task or result you wanted, but I can't tell you how I got there".
3. Unconscious irrational decision-making as to the pathway to use. This might include "guessing" or using "lateral thinking" or using "insight" in some unconscious process. Again, there are no stated reasons. A person might say, "I tried a few alternatives and this one seems to work even though it seems illogical or counterintuitive to me".

The "creative" work[13] referred to in (2) and (3) can be further broken down into several subcategories. First, there is the creative work of choosing the relevant pathway within a given closed universe of data. For example, there may be only three known ways to achieve a task, some efficient and some inefficient. The competitive selection among scenarios is what is called decision making.[14] The "work" of the human, the creative part, is to select which one is the most efficient. Why one path has been chosen over another may be unstated. Secondly, there is the creative work of choosing the relevant pathway within an open universe of data — that is, where not all the data is available to the person doing the task. Here, the task involves uncertainty and therefore judgment and inference. In other words, because discrete scenarios may not be able to be built, the pathway to the task or outcome is not entirely predictable and therefore the person performing the task must exercise discretion or judgment with uncertainty, often relying on inference(s). Again, the person may not be able to state why the task was done a particular way.

Within all these categories of work, there is a further dimension. The open universe of data may be small or large. For example, a secretary may not have all the data to perform a task but is capable of obtaining it within the short timeframe given for the task. In another context, however, the task might involve large bodies of disparate data requiring significant judgment

12 See Sternberg and Davidson, ibid.

13 By "creative work", the author does not mean imitated creative work, such as where a computer might seek to write music like Beethoven — this is not strictly creative in nature: see Y Harara, *Homos deus — a brief history of tomorrow*, Harvill Secker, 2015, pp 324–325.

14 See E Wilson, *Consilience — the unity of knowledge*, Alfred A Knopf, Inc, USA, 1998, p 115. (Wilson notes that the persistent production of scenarios lacking reality and survival value is called insanity).

where all the data is not known. This would generally be considered a more complex task than a simple task. For example, the CEO brings experience and wisdom to long-range tasks within a large organisation. The CEO might be tasked to place the organisation's business in a predicted optimal position given a fast-moving context, with an outlook of five years. The task being undertaken is to predict what business model will best optimise shareholder returns over time — this is a high-complexity task involving a large amount of uncertainty, including "scenario uncertainty", and therefore multiple complex pathways.[15] Another example is the intuitive judgment in long-term strategic business decisions — for example, whether to put a computer within a phone (as Apple did, with phenomenal success) or not do so (as Blackberry chose, with dire consequences). It is difficult to see AI (or quasi AI) performing this type of work or judgment. The work involves high orders of complexity and "intuitive", "creative" or "imaginative" judgment, and, in relevant cases, an open dataset.

As discussed below, category (1) above gives AI little difficulty in the sense that it can be mimicked or replicated and possibly enhanced. However, the unconscious processes in (2) and/or (3) may or may not be capable of ever being mapped or reproduced in the future. As at today, such judgments remain opaque and cannot be deconstructed into elements or articulated pathways of reasoning. Categories (2) and (3) therefore currently remain the domain of the human brain, not a computer. A computer cannot look "outside" the algorithm or the dataset it has been given. A computer cannot "create" scenarios, or cross-over between scenarios. A computer does not know how to guess. It can be programmed to randomly "mine" data for particular outcomes, be asked to compare things, and to analyse data for specific results. It can be programmed to derive outcomes from other outcomes. But none of that is "guessing" (or hypothesising). And for all of the categories, with very long lead times for completion of the task, the higher the likelihood the task will be complex because the dataset is not closed for long periods. Selecting the preferred pathway from multiple scenarios in these circumstances is likely to remain within human intelligence alone.

These concepts are obviously relevant for litigation where the giving of "reasons" is a cornerstone of the justice system.[16] Articulated reasons can be tested and therefore the judgment in question reassessed as a check. This process aides the concept of a "just" system. However, human intelligence is not only based in reason. As Kirby J has observed writing on AI, it is locked into culture, linguistic and other prisms.[17]

15 It has been postulated, although not universally accepted, that the time dimension of the task is directly proportional to the complexity of the task, and is reflective of "fair" remuneration in a requisite organisation: see generally E Jacques, *Requisite organisation: a total system for effective managerial organisation and managerial leadership in the 21st Century*, Cason Hall, 1998.

16 See J Bosland and J Gill, "The principles of open justice and the judicial duty to give public reasons" (2014) 38 *Melbourne University Law Review* 482. There are of course exceptions, such as for interlocutory-related matters (eg in relation to an award of costs) or an extension of time (503). As observed by his Honour Hayne J in "'Concerning Judicial Method' — Fifty Years On", Fourteenth Lucinda Lecture, Monash University Law School, 17 October 2006: "[T]he fundamental reason for publishing law reports is that the common law is to be found in what the judges of courts of record give as their reasons for decision."

17 M Kirby, "In my opinion — legal and ethical issues in artificial intelligence" (1987) 2(2) *International Computer Law Adviser* 4.

Artificial work/intelligence — no exercise of discretion or judgment

In the second type of work, AI work, there is only one way to achieve a task and that way has been pre-determined, or pre-determined by incremental adjustments over time. It follows that essentially there is no discretion to perform it another way. In this type of work, the "recognition points" along the way, determined within the computer program or algorithm in question, tell the computer the journey it must travel on or towards to achieve the result. The journey is predetermined, albeit it might have multiple pathways depending on the recognition points within the algorithm in question.

In the second type, the processes involve no elements of "intuition", "creativity", "imagination" or "discretion" — they are purely mechanical. This is generally the work of a robot or a computer. It only knows those pathways to achieve a task which have been predetermined for it by a program (a set of instructions on what to do if certain things happen). This second type of work can be identified in this way: if the final reasons are, at the outset of the task, known, and can be articulated for the making of a decision, no "decision" has in fact been made. Rather, the task has been to calculate an inevitable outcome, as a computer does.[18]

Quasi-human intelligence performed by AI

It might be said that there is some middle ground between what is described as "human" intelligence and "AI" because there is some middle ground in the type of work performed.

Take for example a computer program that has significant "predictive powers" — that is, a program that seeks to determine or predict the future even though the dataset is limited. A good example of this might be where a computer identifies trends in given data, and then extrapolates those trends to predict future trends. Weather prediction is a good example. Here, it might be said that the computer is exercising "discretion" or "judgment" as to the shape of the data (or world in question) beyond the dataset. It might also be said that this form of AI is in fact "human intelligence", albeit in a limited or closed sense.[19]

Another type of "quasi-human intelligence" might be described as the computer's ability to "learn" (machine learn) from a dataset. In this kind of algorithm, the computer looks for the ways (or alternate scenarios) in which a particular journey can be achieved to produce a result, essentially by trial and error. Because of the incredible speeds at which the computer is able to operate and calculate, and test pathways/scenarios, the computer gives the impression of making "judgments" about optimal or winning pathways — but it is not doing that. It is still working the algorithm given to it, and perhaps modifying it if it finds a better pathway, determined via its exploration of the patterns within the dataset. This "machine learning" is dealt with in further detail below.

18 See E Jaques and K Cason, *Human capability — a study of individual potential and its application*, Cason Hall & Co, 1994, p 10.

19 As to AI dealing with "incomplete" datasets, see, eg, T Riley, "Artificial intelligence goes deep to beat humans at poker", *Science*, 3 March 2017, at www.sciencemag.org/news/2017/03/artificial-intelligence-goes-deep-beat-humans-poker, accessed 7 July 2022.

Yet another type of "quasi-human intelligence" might be described as an algorithm's ability to create another algorithm. This second algorithm might be impenetrable to a human (ie, not able to be deconstructed or mapped) and might be said, in that sense, to have been "created" by the first algorithm.[20]

Another type of middle ground is the possible move to a computer "reading" as opposed to merely extracting semantic information from a database. Computers cannot yet read like a human does, but they can extract semantic information that may be highly useful in a particular context.[21]

Summary — human vs artificial intelligence

In the current environment, and for the foreseeable future at least, it is possible to derive at least three discrete categories of "intelligence":

(1) **Human intelligence:** which requires discretion or judgment (often across potentially different time spans) because there are multiple scenarios to choose from, and there is uncertainty (and the greater the uncertainty, the greater the complexity involved), where some of the reasoning giving rise to the exercise of discretion or judgment may not be able to be exposed because it is intuitive or creative in nature. This work is in addition to purely mathematical work where pathways are already known (such as calculating 2+2=4). "Human intelligence" might therefore be described as "broad" intelligence.

(2) **Artificial intelligence:** which requires no discretion or judgment because there is essentially a universe or near universe of certainty of data and the "reasoning" is known from the outset (such as a computer program). AI might therefore be described as "narrow" intelligence. Further, it might be said that below "narrow" intelligence is "augmented" intelligence. An example of AI (or narrow intelligence) is IBM's Deep Blue chess computer, which beat Garry Kasparov in 1997. A broader but still narrow intelligence is the Deep Q-Network AI system of Google DeepMind, which accomplishes slightly broader goals (it can play dozens of different vintage Atari computer games at human-level competency).[22]

(3) **Quasi-human intelligence:** which requires the computer to predict things, or determine optimal pathways, or to develop its own new algorithms to achieve optimal results, therefore giving the impression (but not the actuality) of judgment or discretion. "Quasi-human" intelligence may be described as "mid-range" intelligence.

20 Recently, in *Thaler v Commissioner of Patents* [2022] FCAFC 62, the Full Court of the Federal Court of Australia found that under the *Patent Act*, an invention had to come from the mind of a natural person(s) (at [105]). It was said by the Full Court that the grant of the patent rewards the person(s) for their "ingenuity". (The Full Court noted that the outcome in the proceeding did not address the question of who was the inventor of the AI system, only whether an AI system could be an "inventor" under the Act).

21 If computers do learn to "read", this will be truly revolutionary.

22 Apparently, it taught itself: Harara, n 13, p 321.

Can artificial intelligence become human intelligence?

It is widely predicted that at some point in the future, human and artificial intelligence might eventually converge. This has been contemplated for some time on the basis that the human brain is (merely) an organic algorithm.[23] If this occurred, perhaps all work (and therefore tasks) humans can do could also be done by computers — including that done by courts, solicitors and counsel. This section explores the possibility of convergence.

The answer to the potential for convergence lies with, at the very least, four main factors.[24]

The first factor is in the incredible increase in computational power. It is said that the human brain can be reduced to a series of processes that are chemical and electrical. If this is correct, there exists the possibility that we become able to expose the processes within the brain and therefore the reasoning currently sitting under the "intuitive" or "creative" judgments made by humans.[25] As predicated by Moore's Law,[26] the fourth generation iPad now has more computing power than the most powerful super-computer in the world some 30 years ago, the Cray-2.[27] We are, apparently, nowhere near the limit of computing power. It has been estimated that the limit is 33 orders of magnitude (10^{33} times) beyond today's state of the art for how much computing a clump of matter can do; even if computer power doubled every couple of years, it would take over two centuries until the frontier was reached.[28] It is possible that in the foreseeable future, computing power may extend significantly into the mental processing power of the human brain. This coupled with "machine learning" (see below) may see computing power reach capabilities once thought impossible (consider the changes arising from the introduction of the iPhone alone). It has been estimated that the computational capacity of the human brain is roughly the power of, what is today, an optimised $1,000 computer.[29] More recently, it has been estimated that by 2020, the average desktop computer will have the same processing power as the human brain, with approximately 1016 calculations possible per second.[30]

Associated with this area of exponential growth in computing power is the second main factor — the development of so-called "machine learning", using new neural network techniques

23 Harara, ibid, p 319.

24 These are touched on in M Chui and P Breuer, "Artificial intelligence in business: separating the real from the hype", McKinsey & Co podcast, November 2017 at www.mckinsey.com/business-functions/quantumblack/our-insights/artificial-intelligence-in-business-separating-the-real-from-the-hype, accessed 7 July 2022.

25 This would not cover "emotionally" based judgments.

26 Made in 1965 by the man who cofounded Intel. Moore observed in 1965 (now known as "Moore's Law") that every year twice as many transitors could fit onto a computer chip, hence doubling the power of the chip. He adjusted that prediction in 1975 to every two years. The net effect of such change was to bring huge and continuing increases in computing power over very short periods. With the huge increases in computing power over time, computer companies continually built functionality into computers and other devices, culminating (so far) in phenominal devices such as mobile phones. Although Moore's Law is not indefinite, computer companies are continually designing alternative ways to bring more computing power into devices.

27 A Gore, *The future — six drivers of global change*, W H Allen, 2013, p 38.

28 See Tegmark, n 4, p 69.

29 As to the computational capacity of the brain, see H Moravec, "When will computer hardware match the human brain?" (1980) 1 *Journal of Evolution and Technology*; as to the equivalent capacity of a computer in 2015, see Tegmark, n 4, p 132.

30 R Kurzweil, *The singularity is near: when humans transcend biology*, Viking, 2005. A wilder estimate by that author is that, by 2050, the average computer will have more processing power than all of humanity combined.

applied to vast amounts of data. Machine learning is computation using algorithms that improve through experience. The "learning" occurs because each relevant neuron updates its state at regular time steps by averaging together the inputs from all connected neurons, weighting them, optionally adding a constant, and then adding what is known as an "activation function" to the result to compute the next state.[31] In this way, the machine "forward-predicts" the next better step. Machine learning (or deep learning) is responsible for some incredible results: from a computer giving an accurate caption of a photo even though it does not know what the photo represents;[32] to mastering dozens of computer games without instructions;[33] to passing Tokyo university entrance exams (which included maths, language and general knowledge questions); to beating the best Go player (Lee Sedol) in the world in 2016.[34] However, deep learning cannot (yet) do something that is fundamentally important — explain its reasoning and findings.[35]

The third main factor is the incredible reduction in cost and size of memory capacity for computers. Memory capacity has been improved dramatically over time, without requiring any software changes. Hard drives have reduced in cost by about 100 million times, and the faster memories useful for computation rather than mere storage have become 10 trillion times cheaper.[36] The human brain stores around 10 gigabytes electrically and around 100 terabytes chemically/biologically. The world's best computers can now out-remember any biological system — for a few thousand dollars.[37] Overall, the cost of computation halves every couple of years, with the effect that over the last century or so, the cost of computing has dropped about one million million million times (10^{18}).[38] This fact alone puts into challenge the use of labour when performing certain tasks. Computers are no longer building-sized; they are in our pockets or on our wrists.

The fourth main factor is the amount of available data, which is growing exponentially, and its collection is becoming more systemic and collaborative across certain professions, industry and government. The insurance industry, for example, has huge collaborative networks and systems designed to capture large volumes of data that can be mined by AI, for the benefit of the participants of the networks/systems. It is important to note, however, in the context of the legal industry specifically, that sophisticated AI algorithms and learning alone cannot

31 For a more detailed explanation of "machine learning", see Tegmark, n 4, pp 72–73.
32 See Tegmark, ibid, p 78.
33 ibid, p 79.
34 In general terms, this was achieved by AI predicting from each position the probability that white would ultimately win, coupled with a separate network of calculations to predict likely next moves, combining these with a method that searched through a pruned list of likely future-move sequences to identify the next move that would lead to the strongest position down the game.
35 Experts in the United States are grappling with this. See R Goebel et al, "Explainable AI: the new 42?", IFIP International Federation for Information Processing 2018, Alberta Machine Intelligence Institute, University of Alberta, Edmonton, Canada, 2018 at https://link.springer.com/content/pdf/10.1007/978-3-319-99740-7_21.pdf, assessed 7 July 2022. See also M Grabmair, "Modeling purposive legal argumentation and case outcome prediction using argument schemes in the value judgment formalism", Doctoral Dissertation, University of Pittsburgh, 2016, (unpublished) at http://dscholarship. pitt.edu/27608/, accessed 7 July 2022.
36 See Tegmark, n 4, p 58.
37 ibid, p 60.
38 ibid, p 67.

provide valuable solutions; there has to be sufficient data upon which the algorithms can be put to analytical work.[39] It is true that sophisticated algorithms can sometimes overcome limited data; but even if there is a significant body of data available for analysis, this must be viewed cautiously because it may have inherent biases. For example, negative data is almost never published.[40] Further, commercial repositories of legal texts may be big enough to be useful for statistically learning contextual information about legal terms and phrases that can then be useful semantic information for other machine-learning applications. However, generally, law does not seem to present opportunities for big data.

In some industries, significant data-gathering or consolidation occurs, permitting better AI analysis. An example is in the insurance, banking and finance, and medical industries. This gathering and co-operation between entities raises significant legal issues regarding privacy and data integrity. Arguably, it is the capacity for a particular industry or profession to gather data in large amounts that will determine its ability to exploit AI in the foreseeable future. The computing power will come — but aggregation of data in certain areas may not. We know already that aggregation of data in, say, the medical fields is progressing well, and aggregation of data in litigation is even more so given its specific fact-dependent nature.

Where is AI already well established?

There are several well-recognised categories of tasks where AI is already well established.

The first category is image recognition or so-called "computer vision" — the ability of the computer to know what it is looking at. AI is being used, for example, to sort vegetables by recognising their sizes and varieties. It is used in face recognition, for example, to access the new iPhone X. And in China, AI is used extensively for face recognition. For example, an insurance company there,[41] with a market cap of $120 billion, is using AI to provide online loans quickly, verifying more than 300 million faces in various applications, complementing other cognitive AI capabilities including voice recognition.[42] That company alone has some 110 data scientists. Further, also in China, where there are tens of millions of cameras, it is used to penalise people for traffic infringements.

Another example of AI is in the use of "natural language" algorithms. Applications here include analysing whether customers are happy or discontented when making inquiries of companies, filtering inquiries prior to having to speak to a real person (such as when you call Telstra), and even attempting to determine (in the United States) whether 911 callers are witnesses to crimes or the criminals themselves (calling as "witnesses"). Natural language AI is also used in Siri

39 See S Ransbotham, D Kiron and P Gerbert, "Reshaping business with artificial intelligence — closing the gap between ambition and action", MIT Sloan Management Review in collaboration with Boston Consulting Group, 2017, at p 8 at https://sloanreview.mit.edu/projects/reshaping-business-with-artificial-intelligence/, accessed 7 July 2022.
40 ibid.
41 Ping An Insurance Co of China Ltd.
42 See Ransbotham, Kiron and Gerbert, n 39, 4.

and Google Home applications when you want quick answers from your device. The AI can get to know a person and does not rely on independent, full-premised questions; it can take premises from the preceding question, just as a human does.

Further examples of the use of AI include:

- in robotics — an example is the driverless car or truck, discussed further below
- mining data for better solutions — an example is at Airbus, where the company has used AI to find ways to identify patterns in production problems, with AI then matching about 79% of the production disruptions to solutions used previously, in near real time, providing recommendations to those on the floor workshop[43]
- in the mining sector — where AI is used to control driverless trucks, using sensors and calculating optimal pathways for extraction of ore.[44] Further, image recognition AI is used to determine whether, after a mine blast, there should be another one or whether extraction by trucks is more optimal
- by companies to determine the extent of "email rerouting"[45] within the organisation, and what to do about this rerouting — this can save significant time within the organisation, lowering costs, increasing efficiency and making the organisation more competitive
- in retail — AI is used by retailers to suggest "the next purchase" to consumers based on previous buying patterns. Online, this is now virtually ubiquitous,
- in game playing — probably the most famous example of "narrow" task AI,[46] such as in chess or Go, where AI has managed to beat even the best human players in the world.

With all these examples, it would appear that AI already has broad application across industry. It should be noted, however, that one of the biggest AI providers in the world, IBM, with its super-computer AI product, Watson, lists the following industry solutions:[47]

- customer engagement
- education
- financial service
- health
- IoT — automotive, electronic, energy and utilities, insurance, manufacturing, retail
- media talent,
- work.

43 See Ransbotham, Kiron and Gerbert, ibid, 2.
44 Hamersley Iron in Western Australia uses this extensively to extract iron ore, involving daily terabits of data being sent to the headquarters in Perth, extracted from sensors on vehicles and elsewhere.
45 Passing an email around an organisation because it has initially gone to the wrong recipient.
46 See Tegmark, n 4, p 39 and the associated definitions used therein — for example, in contrast to "narrow intelligence", "general intelligence".
47 See generally IBM, IBM Watson Products and Solutions, at www.ibm.com/au-en/watson, accessed 7 July 2022.

It is notable that "legal services" is not listed. However, IBM has built ROSS (AI) based on Watson, the cognitive computing platform. ROSS is a legal research tool that enables law firms to slash the time spent on research, while improving results (discussed further below).

Where is AI not established/desirable?

So far this article has focused on the work a human or computer might perform in order to achieve a task. However, even in circumstances where yet more work and tasks can be performed by AI (as it comes closer to "human intelligence"), the question arises whether there are some types of work that AI cannot or for that matter should not do.

Goal-setting work

It is true that AI has goals within a task, in the sense that it will be programmed to produce a particular result. The destination of a rocket, for example, controlled by AI, would be a goal set within AI.

However, AI cannot, at least for the foreseeable future, set the anterior goal — namely, whether the AI goal should be set at all; whether the rocket should be made.[48] That is a discrete task in itself. AI cannot set a "purpose" or act or do work so as to turn an intention into reality;[49] AI only has the intention a human gives it. Determining intention, and turning it into reality, is fundamental to all work involving human intelligence. It seems hard to identify a time when AI will be able to be self-deterministic as to its goals, except by (paradoxically) deliberately engineered random outcomes.

Ethical work

AI can already perform calculations, predict population outcomes and win games. These are all amoral tasks — they do not involve considerations of moral or societal judgments. But there is always the anterior question, which itself is work, of whether a particular task should or should not in fact be performed at all. For example, there may be a judgment as to the societal impact of the task in question. Take, for example, the judgment as to whether a nuclear bomb should be developed; it is not purely a matter of physics.

Yet another example is the study of comparative legal rules. AI can tell you whether particular conduct is or is not legal in a particular country, because it can search for that. But it cannot tell you whether the conduct should or should not be legal in a particular country. It is true that an algorithm could be developed to collate all of the laws relating to a particular subject matter (say

48 See Stone et al, n 2, p 4: "Contrary to more fantastic predictions for AI in the popular press, the study panel found no cause for concern that AI is an imminent threat to humankind. No machines with self-sustaining, long-term goals and intent have been developed, nor are they likely to be developed in the near future."

49 See Macdonald, Burke and Stewart, n 7, p 15.

the care of dogs) around the world, to summarise it, to compare those laws to current laws in the country in question, and to make a recommendation in relation to those laws. In that sense, the algorithm might give guidance on a "moral question" within the dataset (eg whether to ban or have destroyed a particular dog). This is where using statutory network diagrams for comparing similarly purposed laws across jurisdictions could come into play.[50] But the algorithm could not exercise the judgment of whether the particular laws overseas should be incorporated into domestic law.

Recent developments relating to the legal profession

The current computer programs developed to assist the legal industry can answer legal questions in a superficial sense, but the underlying AI cannot explain the answers. However, computational models of legal reasoning are currently being developed, with such models in some cases being able to generate arguments for and against particular outcomes in problems. In particular, the development of AI to assist with legal arguments, reasoning and to predict litigation outcomes is now a well-developed field, and is continuing to develop rapidly.[51] These computational models may also attempt to breakdown complex human intellectual tasks, such as estimating settlement values in disputes, or analysing offer and acceptance problems, to provide insight to legal practitioners.[52] The answers given are not philosophical but scientific in nature, in that the computer programs evaluate tasks and outcomes according to data.

While this area of AI has made progress, there is currently a bottleneck in further progress toward contributing to legal practice. To date, the substantive knowledge on legal matters deployed by currently developed computational models have been extracted manually from legal sources (cases, statutes, contracts and other texts). That is, currently, legal practitioners have to read the legal texts and provide their content (in a form the models can apply). The inability to automatically connect the computational models (for legal reasoning) directly to legal texts has limited the ability of programmers to apply programs in real-world legal information retrieval, prediction and decision-making.[53]

In broad overview, these developments in legal AI, involving question and answering techniques, knowledge extraction from text and "argument mining" are termed "text analytics" or "legal analytics". Such analytic techniques in the future might overcome the bottleneck if the relevant computational program can be developed so as not to rely solely on manual techniques (by humans) to input what legal texts mean in ways programs can use, but rather so that knowledge can be input automatically. If this occurred, AI could, potentially, link these text-analysis tools to computational legal reasoning and legal analysis algorithms, to produce

50 See K Ashley, *Artificial intelligence and legal analytics — new tools for law practice in the digital age*, Cambridge University Press, 2017.
51 Ashley, ibid.
52 ibid.
53 ibid.

a wholly AI-derived legal solution. This has not happened yet; however, the amount of work being done in this area should not be underestimated — legal analytics is a well progressed field.[54]

According to some, the legal industry is at the "cusp" of what is shaping up to be an industry-changing revolution.[55] The new analytics is said to enable a legal practitioner to "mine" massive quantities of data that in earlier times would simply have been impossible,[56] aiding, among other things, predictive analytics. According to LexisNexis:[57]

> Legal analytics gives litigators an advantage over opposing counsel by providing data-driven insights into how judges, firms and parties have behaved in similar cases in the past, and how they might behave in similar cases in the future. Analytics can accurately estimate variables like time to trial, the potential value of a case and likely outcomes. The ability to have a bird's eye view of not just one case, but thousands in a jurisdiction, can shed light on when and how to litigate the issues — informing potential litigant strategies and maximising chances of success.

However, this kind of analysis might be better characterised as risk-assessment analysis, not strict legal analysis of relevant issues in a proceeding. In this sense, so-called "legal analytics"[58] is more of a business tool (eg for strategising a case and making predictions).

AI and the work of the courts

With these constructs of intelligence, work and tasks in mind, and an overview of the development and application of AI to date, one now has a framework in which to assess the possible impact of AI on the particular work of the courts and participants in litigation. Court systems are often characterised, fairly or otherwise, by lengthy delays, high costs and occasional injustice. The question is whether and/or how AI can make courts more efficient and just (including by making more consistent decisions). To do this, it is necessary to outline the work of those participants in the justice system and to understand the analytical tools/processes deployed in order to perform that work.

54 See generally Ashley, ibid. The text explores in depth the current analytics, the roadblocks to its further development and the possible future for the discipline. See more recently the excellent article K Ashley, "Automatically extracting meaning from legal texts: opportunities and challenges" (Summer 2019) 35(4) *Georgia State University Law Review* Art 3. In the article, Ashley notes (1120) the impressive new applications of legal text analytics for contract review, litigation support, legal information retrieval, and legal question and answer tasks. However, the author also notes significant constraints yet to be overcome: the analytics programmes cannot: extract legal rules in logical form from statutory texts; explain answered given; reason robustly about how different circumstances would affect answers given. The author contends (1120) that: "To some extent, these limitations are temporary."

55 See LexisNexis, "The future is insight: connecting the dots with legal analytics", 2017, at www.lexisnexis.com.au/en/insights-and-analysis/research-and-whitepapers/2017/the-future-is-insight, accessed 7 July 2022.

56 For example, LexisNexis ingests vast quantities of data — 13 million new documents daily from more than 50,000 data sources and has more than 60 billion documents and 2.5 petabytes of legal data stored in its legal big data platform: LexisNexis, ibid, p 3.

57 ibid, p 8.

58 For example, in the case of LexisNexis and its Lex Machina product.

Judicial method — broad overview

Anyone who has spent any time in a court will know that the work of a court is extremely complex. However, clinically (eg to a programmer or an engineer) it might be said that there are only two inputs — the evidence and the relevant law — and one output — the decision.[59] This is, of course, superficial and ignores a vast landscape of frameworks, principles and systems, and the philosophy of justice.

One such major principle is that the courts should apply "the rule of law" to disputes. This generally requires that the question of legal rights and liabilities of parties should ordinarily be resolved by the application of the law and not by the exercise of (undue) discretion on the part of the relevant judicial officer.[60] As former Chief Justice Gleeson AC of the High Court of Australia has noted, "the contrast between rules of general application, known in advance, and ad hoc decision-making, is a familiar aspect of the concept of law".[61] Judicial decisions are to be made according to legal standards rather than undirected considerations of fairness.[62] The standards are "external" to the judge, not merely "personal", lest the court would become an unregulated authority.[63]

Under this policy setting — namely, that decisions should not be merely discretionary — courts develop rules and guidelines, and, moreover, set broad objective standards to apply, such as: the "reasonable person" in relation to negligence claims; and the "reasonable person's" interpretation of a contractual provision having regard to text, context and purpose. These kinds of normative standards are necessarily qualitative in nature — something an algorithm will not deal with unless specifically instructed to convert it to a quantitative assessment. A similar policy approach is that a court will seek to determine what a statute "objectively" means, having regard to certain canons of construction, looking for the objective intention and purpose of Parliament expressed through the words of the statute, which constrains the exercise of discretion when construing statutes.[64] Undue discretion is also sought to be taken from the court by the operation of *stare decisis* (prior similar cases and superior court decisions should be "followed") — that is, the role of precedent. It is a fundamental legal principle that people should be treated equally or consistently unless there is just reason not to.

However, we should not jump to the conclusion that somehow the above normative standards are rigid and deterministic, and that discretion has therefore been eliminated or has a limited role — it does not. The application of these normative standards and precedents is not purely

59 This gives rise to a discrete idea: if AI can deal with evidence and apply the law to it, that automated system would have significant ramifications for the notion of the "legal profession".

60 See, eg, N Ferguson, *The great degeneration — how institutions decay and economies die*, Penguin Books, 2014 at pp 79–80, citing the English Lord Chief Justice, T Bingham, *The rule of law*, Penguin Press, 2010.

61 A M Gleeson, "Courts and the rule of law" in C Saunders and K Le Roy (eds), *The rule of law*, Federation Press, 2003 at p 178.

62 Gleeson, ibid, citing *Commissioner of Taxation (Cth) v Westraders Pty Ltd* (1980) 144 CLR 55, at 60 (Barwick CJ) (in relation to the interpretation of tax legislation).

63 See O Dixon, "Concerning judicial method" in *Jesting Pilate and other papers and addresses*, 2nd ed, W S Hein, 1997 at pp 152, 165, as analysed by Hayne, n 16, pp 11–12.

64 See J Middleton, "Statutory interpretation — mostly common sense?" (2017) 40(2) *Melbourne University Law Review* 626.

algorithmic in nature. Cases are often wide open as to result. Although standards based, the application of the law retains significant discretionary elements, including: whether particular evidence is or is not accepted by a particular judge;[65] the weight to be given to evidence — usually a qualitative assessment derived from a range of factors, including a witness's demeanour; which side of the coin the particular facts in question lie as to the standard (with each party to the proceeding having the contrary view); and whether there is a similar or dissimilar precedent available for comparison purposes. In addition to these elements, there is a further and significant discretionary consideration, albeit where the court in question is following "the rule of law", guidelines and precedents. That element is the scope of the universe of evidence or data the court takes into account. As discussed above, AI is essentially applied in relation to a "closed universe" of data or where, at the least, the dataset is known, and from which (perhaps) predictions or extrapolations from the dataset can be made using dynamic algorithms. However, in the courts, the universe of data is not closed — it is open. Courts draw on data external to the evidence tendered in a case. That external data comes from, inter alia: the judge's personal experiences; the judge's personal biases; and the judge's assessment as to those mythologies within society of what is "fair" or "just" in the circumstances. An excellent example in this area is the imposition of penalties for crimes, where judges seek to match the penalty with the conscience of the community and do so without any surveys or other studies — plain estimates are made based solely on the relevant judges' experience of the world and prior penalty settings. These types of considerations involve what has been described as "open-textured legal predicates"[66] or, as Nettle J of the High Court of Australia has described it, "open-textured rules".[67]

The nub of the problem is the difference between the process of scientific reasoning and the process of legal reasoning, the former knowing nothing of introspective notions of interpretive knowledge or metaphysics or theology, with computational law assuming that there can only ever be one proper outcome and that its indication requires no more than the application of logic and reason. As Nettle J points out, "open-textured rules" yield to more than one possible outcome and involve acts of will, as well as of cognition.[68] Expressed more broadly, the issue is not a single simple problem, but a high-complexity problem involving societal implications.

The so called "neighbour principle" in the law of negligence provides ample demonstration of the above issues. The development of that principle involved the House of Lords drawing on biblical values to derive a new normative standard of care and class of person to whom that standard should apply. This is obviously beyond the reach of AI. A further example is in the law of causation. In broad terms, causation is, at law, to be based on common sense

65 For example, accepted despite having been obtained illegally: *Evidence Act 1995* (Cth) s 135.

66 L Branting, *Reasoning with rules and precedents: a computational model of legal analysis*, Kluwer, 2000.

67 G Nettle, "Technology and the law" (2017) 13(2) *TJR* 185; *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021.

68 Nettle, ibid, citing J Stone, *Legal system and lawyers' reasonings*, Stanford University Press, 1964, p 319. As Kiefel CJ of the High Court of Australia has recently stated "it is a human ability to evaluate complex evidence and apply nuanced legal reasoning to cases past and present with competing possible outcomes": cited by Allsop, "Technology and the future of the courts", n 1.

and is now more formally "computed" by reference to issues of fact, law and policy within legislation.[69] In substance, at least in some jurisdictions, the test for causation has been put into a basic textual algorithm (recorded in statute). Even then, however, there is still a "slip rule" (causation based on policy). In the area of misleading and deceptive conduct, it is explicitly accepted that value judgments and policy considerations have a part to play in determining whether an act is sufficient to bring about the harm suffered by a plaintiff.[70] Misleading and deceptive conduct claims themselves involve a comparison of the normative conduct within the statutory proscription of misleading or deceptive conduct with the defendant's own conduct. The "benchmark" normative conduct is not just a matter of evidence at trial but involves judicial considerations of that norm.

The genius of AI is that it relies on significant computing power, at low cost, with huge memory capacity and large volumes of data in a closed universe of data, and results/tasks are determined by reference to those factors. But for the reasons advanced above, this is not necessarily so in relation to a task the court may have before it of determining a just result. Shifts in the law can apply despite the "closed universe" of evidence before the court on the particular occasion, caused by the court's perception of the need for change.[71] It is hard to imagine AI playing any role in the law's movement to keep pace with societal expectations and norms unless the court decides to move from "judge's perception" towards an approach of mining data that captures requisite mythologies held across society. Perhaps that might one day be done by reference, say, to the public undertaking Google searches on particular topics, such as the adequacy of penalties in relation to "one-punch" crimes. That would, however, be to determine justice on the basis of popular view rather than what is "right".

Overall, it is difficult to see AI performing this kind and complexity of work; of exercising discretion in complex circumstances to produce "fair results". Fair results are idiosyncratic, not formulaic. It is not possible to define "fairness"[72] and so AI's search/pathway for it is illusory. This is so even if there are so-called "fairness factors"[73] designed into AI. If AI were set to formally determine normative standards, it would draw on other normative standards from its database, which may over time be inapposite. Or it may just stare back at the programmer; setting the standards requires imagination, creative reflection and independent judgment, and

69 *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506. The common sense approach is in fact filled with complexity: see J Stapleton, "Reflections on common sense causation in Australia", J Degeling, S Edelman and T Goudkamp (eds), *Torts in commercial law*, Thomson Reuters, 2011 at pp 331–365; see, eg, *Wrongs Act 1958* (Vic) ss 51, 52.

70 *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [57].

71 With the law sometimes reaching for and drawing on other normative standards such as from religion: see *Donoghue v Stevenson* [1932] AC 562.

72 Although definitions of it have been posed in computer science literature: see T Nachbar, "Algorithmic fairness, algorithmic discrimination" [2021] 48 *Florida State University Law Review* 509 at 514. The article recognises, at p 515, that there is no widely held normative or legal concept of computational "fairness" (see also pp 523–525). The author recognises it as being "unlikely" that a comprehensive concept of "fairness" can expressed in a suitably concrete form to permit computational decision-making.

73 For example, consistency, bias suppression, accuracy of information, correctability, representativeness, and ethicality: see J Thornton, "Cost, accuracy, and subjective fairness in legal information technology: a response to technological due process critics" (2016) 91 *New York University Law Review* 1821 at 1841–1842.

an assessment of normative standards of society as perceived through the lens of the judge in question. It is also difficult to see AI performing what may be very complex work in relation to statutory construction. For example, the proper interpretation of a provision may require a close reading of the words in question, the overall Act in question, the statutory framework, the history of the legislation, extrinsic materials, and even the commercial context in which the provision operates.[74]

Finally, apart from all of the above, there is the question of the onus of proof. In civil cases the plaintiff has the onus on the balance of probabilities. But experienced barristers know that the onus can shift, more than once, and that in some cases the onus is reversed (say in tax cases). All of these aspects would need to be in the algorithms in question, and when it came to competing and fine judgments as to the weight of the evidence, it is hard to see how the algorithm could work its way through all that.[75] One possible solution would be to "simplify" the onus — but that again is a structural or framework issue of very real legal and philosophical significance.

In addition to these complexities in judicial method, there is the overarching risk, which AI could never cope with as an alternative judicial determining entity, that the reasoning in the court may involve policy choices as to what result is fair.[76] This may be based on experience, wisdom and reflection. Judicial processes and results of this kind cannot be programmed into AI algorithms.

Another example of an area beyond the reach of AI is the application of equitable principles relating to the making of declarations.[77]

And of course at the highest level of policy, there is the question of constitutional power, which could never be left to AI. It is barely even imaginable, for example, that any society might confer on AI the decision as to whether or not to overturn *Roe v Wade*. It is barely within the reach of human capability let alone AI to decide such questions.

AI and robojudges

With all this said, it has nevertheless been postulated that one day there may be so-called "robojudges":[78]

> Robojudges could in principle ensure that, for the first time in history, everyone becomes truly equal under the law: they could be programmed to all be identical and to treat everyone equally, transparently applying the law in a truly unbiased fashion.

74 See the approach of the High Court in *Fortress Credit Corp (Australia) II Pty Ltd v Fletcher*(2015) 254 CLR 489; *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4.

75 Note Carneades, a computational model of legal argument, outlines modelling of the burden of proof: T Gordon, H Prakken and D Walton, "The Carneades model of argument and burden of proof" (2007) 171(10–15) *Artificial Intelligence* 875.

76 Note that a great deal of work in relation to AI and the law focuses on modelling non-deductive legal reasoning: see the casebased reasoning models described in Ashley, n 50.

77 In *Ying Mui Pty Ltd v Hoh (No 7)* [2018] VSC 214, Vickery J of the Supreme Court of Victoria noted (at [16]) that the decision to grant a declaration could never be made by artificial intelligence.

78 Tegmark, n 4, p 105. See for an excellent analysis of this question, the article T Sourdin, "Judge v robot? Artificial intelligence and judicial decision-making", *Handbook for Judicial Officers*, Judicial Commission of NSW, 2021.

It has been suggested that such robojudges would be free from bias, able to take in more evidence (due to computing power and data), have incredible knowledge of all areas of the law (eliminating judge specialisation lists) and be more efficient.[79] However, these advantages might be taken away by bugs or data errors in the relevant robojudge algorithms.

There has been recent attention on the question of whether A1 can in fact ultimately "swallow" the legal system.[80] It has been observed that the use of AI in judicial decision-making, at least in the USA, is largely "theoretical" at this stage.[81] For the author's part, unless the "rule of law" and its application by courts, as outlined above, is to fundamentally change and become significantly inflexible within rules and normative standards, it is hard to see robojudge appearing on the bench any time soon. The idea of robojudge confuses a superficially low-order complexity task (facts × law = judgment) with a high-order complexity task involving a sculpting of societal norms and standards over time. Further, in any event, the robojudge, unless specifically programmed to do so, would not necessarily articulate all its reasoning.[82] While the algorithm running robojudge could be interrogated, the pathways it develops for the result might not be. For example, where machine learning was involved, it may not reveal the dataset it has relied on; a great amount of the reasoning might be hidden. A lack of express reasoning is a fundamental cornerstone of our system of justice. A defendant who does not know why they were convicted, or why they had to make a relevant payment under a contract, may feel that the system is intrinsically unfair because it cannot be understood, tested or appealed against. How a judicial system without articulated reasoning could therefore be used in a democratic society is difficult to see, because justice is itself, as a function of fairness, contestable.

The robojudge is but one example of what may be described as the delegation of decision-making from human judgement to automated systems. That delegation carries significant dangers. That danger is well recognised in America and in some cases the delegation is (rightly) prohibited by regulation.[83] "Assembly line" adjudication has inherent warning signals to it.

The issue of appropriate and inappropriate delegation referred to above, is very real. It has recently been reported that in China, large numbers of cases are decided by AI (as to which see **Managing the large volumes of cases — implications**, below). It has been reported that a check imposed on AI is that relevant decisions must be reviewed by a human. Presumably this is to guard against issues such as discrimination or general "unfairness". But the criteria for review appears to be unclear. It has been reported that if the human (judge) disagrees with the AI decision, he/she must give reasons for the disagreement. The use of humans for oversight in

79 ibid, p 106.

80 See for example, T Wu, "Will artificial intelligence eat the law? The rise of hybrid social-order systems" (2019) 119 Colum L Rev 2001; as to other articles on this topic, see R Stern et al, "Automating fairness? Artificial intelligence and the Chinese courts" (2021) 59 *Columbia Journal of Transnational Law* 515, n 1.

81 ibid at 517.

82 As to whether AI can explain why it has done what it has done/recommended, see C Kuang, "Can AI be taught to explain itself?", *The New York Times*, 21 November 2017, at www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html, accessed 13 July 2022.

83 See Nachbar, n 72, at 519.

automated decision systems (ADSs) is not new as a concept and appears almost ubiquitously across industrial manufacturing, and also appears in Western literature as a justifiable element of legal systems design.[84] But, again, as soon as any order of complexity of decision-making affecting people's rights arises, there should be clear warning signs against delegation of decision-making in relation to those rights.

Managing the large volumes of cases — implications

The use of AI has exploded in jurisdictions where huge numbers of cases must be dealt with, and where notions of the need for individualised "fair" outcomes are less apparent. In November 2016, it was announced that the judiciary in China would tap into the power of AI to build smarter courts, relying on big data, cloud computing, neural networks and machine learning. It has been reported that, so far, Chinese courts have not only made court filings available online but have also sought to create processes that would produce electronic court files and case materials automatically.

In north China's Hebei Province, 178 local courts have used an AI-powered assistance application for judges since July 2016, called Intelligent Trial 1.0, which has substantially reduced the workload of judges and their assistants. It has been reported that the software has helped nearly 3,000 judges handle more than 150,000 cases, reducing judges' workloads by one-third.[85] These results must of course be viewed contextually. Since 2016, the use of AI by Chinese courts has grown exponentially. This is part of China's drive to lead the world in A1 by 2030.[86]

China has a "China Judgments Online" website now holding more than 120 million documents. Chinese courts actively "mine" this data, and there is even a secondary market where companies seek to repackage court data and analysis for lawyers and clients.[87]

In 2017, China embarked on a massive AI court related project called "Project 206", in Shanghai. Some 400 officials and 300 IT specialists promptly developed software directed at streamlining evidence collection, improving consistency and strengthening over-sight of judges to reduce error.[88]

More recently, courts in China have initiated experiments to integrate AI into adjudication by software that reviews evidence, suggests outcomes, checks consistency of judgments, and makes recommendations on how to decide cases.[89] The so-called "smart court" has now emerged, with algorithms being used to boost court efficiency and consistency. But the drive

84 Thornton, n 73, at 1846.
85 As reported at Y Jie, "China's courts look to AI for smarter judgments", *Sixth Tone*, 18 November 2016 at www.sixthtone.com/news/1584/china%20s-courts-look-ai-smarter-judgments, accessed 13 July 2022.
86 Stern, n 80, at 529–530, n 45, n 48.
87 ibid at 531.
88 For further background to the project, see ibid, at 541. The software as developed over time has been the subject of substantial criticism: ibid, at 543–544.
89 ibid at 518.

for AI use also assists the judge's personally too, for in China, judges can be penalised for decisions being overturned on appeal, deemed wrongly decided, and for decisions which might give rise to social unrest.

These developments challenge traditional notions of the role of the courts, and of a court's authority.[90] They also challenge the notion of judicial discretion. And they also challenge the independence of the courts; who for example owns the algorithms, and who reviews them over time? And they give rise to questions over fundamental processes, at least in many countries, including checks against error, namely appeals.

AI as an aide to evidence

Determining the truth

At the next rung down, AI might be able to be deployed to assist the court or the parties with evidentiary matters. For example, it might be possible to deploy machine-learning techniques to better understand and analyse brain data from functional magnetic resonance imaging (fMRI) scanners[91] to determine what a person is thinking and whether they are telling the truth or lying. The use of such techniques is currently controversial. However, if available, it has been suggested that this might shorten trials or reduce workloads considerably.[92] Juries might be connected up to such AI so that they can assess whether the defendant is lying.[93]

Despite this prospect, the "truth" is not a single concept.[94] The weight to be given to particular evidence is a high-complexity task. Judges are required to assess evidence based on the input of facts provided by the parties, with a subjective weighting given by the judges to particular aspects of the evidence if required.[95] The weighting is usually a product of wisdom, experience and intuition. It may follow that AI might only be relevant in this area for cases where the universe of facts has been agreed between the parties (ie under a statement of agreed facts), where weighting of the evidence has been limited. However, that would not solve many problems — for example, it would not solve the ultimate issue of whether particular conduct (agreed to have occurred) is negligent.

Having said this, there may still be applications for AI in resolving or assisting in the resolution of litigation or disputes. As mentioned above, in China people are charged for traffic violations based on their identities taken from digital cameras. This may ultimately become an unobjectionable fact because the camera is vastly more accurate than the human eye. (Ironically,

90 ibid at 520.
91 As to how fMRI works, see S Watson, "How fMRI Works", *HowStuffWorks*, 1 October 2008, at https://science.howstuffworks.com/fmri.htm, accessed 13 July 2022.
92 Harara, n 13, p 314.
93 There are, of course, real evidentiary issues with this — a defendant might appear to be truthful according to the analysis but be mistaken.
94 See, eg, F Fernandez-Armesto, *Truth, a history and guide for the perplexed*, St Martin's Press, 2001.
95 As to the problems with probabilistic assessments of the probative value of items of evidence, see H Ho, "The legal concept of evidence", *The Stanford Encyclopedia of Philosophy* (Winter 2021 edn), E Zalta (ed), at https://plato.stanford.edu/archives/win2021/entries/evidence-legal/, accessed 13 July 2022.

in the case of driverless AI cars, they will never commit offences, so the issue may be otiose.) The area of expert evidence might be another example where AI may take a key role — for example, in refuting a scientific causal connection assertion. It is hard to imagine AI fully displacing the review by the court of expert evidence. It might, however, identify anomalies within it, and "mine" global databases for inconsistent conclusions. This may well become a big part of the application of AI in trials over time.

However, in relation to expert evidence, courts require that the reasoning giving rise to expert opinion be transparent (and therefore able to be tested).[96] If the output of the AI is not able to be dissected and assessed by a human judicial officer, the court is, at least currently, likely to give the evidence little or no weight.[97] It follows that if AI is to make major inroads into the way in which expert evidence is received in court, the current system as designed — that is, one requiring expertise or knowledge, stated assumptions and express reasoning — may need to change. Alternatively, AI expert evidence will need to be developed so that the reasoning processes are fully exposed, not just the outcome of the relevant inquiry.

AI assisting judges

If there is no foreseeable absolute or significant role for AI in the work of judges, nevertheless there might be a role AI can play as the court's assistant. After all, the court's rules currently permit the appointment of an "adviser" or "assessor" to the court (albeit rarely used).[98]

There are parallels in commerce for such an appointment. In May 2014, a Hong Kong venture-capital firm, Deep Knowledge Ventures, which specialises in regenerative medicine, appointed an algorithm called VITAL to its board. VITAL analyses huge amounts of data about financial matters, clinical trials and intellectual property held by relevant companies that are investment targets, and then makes recommendations. The algorithm then, with the other board members, votes on whether the firm should make an investment in a specific business.[99]

It seems there is no reason why AI could not in the future "participate" in a court case, like a sophisticated "Google Home" device (increasingly being used in homes and offices), observing the trial, fact-checking and commenting where it thought appropriate having regard to a continuous mining of an immense database available to it of facts and law. The AI assistant might even object to evidence.

96 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Evidence Act 1995* (Cth) s 79.

97 As identified in LexisNexis, "Lawyers and robots? — conversations around the future of the legal industry", *Research and white papers*, 2017, at www.lexisnexis.com.au/en/insights-and-analysis/research-and-whitepapers/2017/lawyers-and-robots, accessed 13 July 2022, a major problem with using data as evidence (extracted by AI) is in producing an audit trail that demonstrates its integrity from the moment it was "collected" to the time it is produced to the court. This is particularly problematic with distributed processing storage, such as the use of the Cloud (observations by C Reed, University of London).

98 Justice Forrest appointed two experts to assist him with highly technical electrical engineering matters in the Kilmore fire class action: *Matthews v SPI Electricity Pty Ltd (No 19)* [2013] VSC 180. See generally in this area P Vickery, "New horizons for the bar in the age of technology", ABA Conference, Dublin, 7 July 2017 at pp 6–9, 17ff, at www.supremecourt.vic.gov.au/about-the-court/speeches/new-horizons-for-the-bar-in-the-age-of-technology, accessed 13 July 2022.

99 Harara, n 13, p 322.

AI as an aide to impartiality and to assist with consistency

Finally, it is possible that AI may assist the courts to be more "objectively" impartial by suggesting to judges a particular position the court should adopt in certain areas based on a dataset collected or constructed, such as "risk of re-offending", likelihood of breaching bail, and the like.[100] With this aide, however, comes considerable risks to the work of the judiciary; for example, if the pathway to the result, called "reasons", cannot be exposed, that does not, at least in Western societies, respond to principles of fairness and transparency.[101]

AI in interlocutory applications

As can be seen from the above, AI appears for the foreseeable future to be unable to do the work of judges, particularly at trial level in superior courts, unless the processes and methodologies of the law in relation to the quelling of disputes fundamentally change. As former Chief Justice of the High Court of Australia, Murray Gleeson AC, has observed, it is for the parliaments to decide what controversies are justiciable, and to create, and where appropriate to limit, the facilities for the resolution of justiciable controversies.[102] As his Honour has pointed out, parliaments regularly expand and contract the subjects of justiciable controversy.[103]

There would seem to be many circumstances where AI might step in and take the place of courts where courts make explicit yet very discrete discretionary judgments, for example: whether to order an injunction; whether a court case should be moved to another jurisdiction; whether to grant security for costs; whether a party has waived or abandoned its right to arbitration; and whether to award costs to a particular party. In virtually all of these cases, there is a specific body of principles, guidelines or factors that have been developed by earlier decisions.[104] These "markers" or (to use the phrase adopted above) "recognition points" of what direction the court in question should head in and conclude on assist the court to determine what is "fair" having regarding to earlier thinking on the issue in question. This process might be said to be approaching the "recognition points" in the algorithms that were mentioned above and therefore, for these particular types of cases, these processes may be capable of being reduced to an algorithm(s). For example, whether a proceeding should be transferred to another jurisdiction might be determined by the following factors: the cost to each party of staying or going; the place where the principal activities involving the issue took place; and the law governing the relevant issue. These could be put into a relatively simple algorithm, with weighting given to the factors, and with AI producing a determination. There would be no need for a hearing. The algorithm could be programmed to look for like cases, and to distinguish other non-like cases.

100 AI tools in these and other areas are outlined in M Zalnieriute, "Technology and the courts: artificial intelligence and judicial impartiality", Submission to ALRCR of Judicial Impartiality, 16 June 2021 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3867901, accessed 9 August 2022.

101 It has been argued to the contrary that transparency may be unnecessary to providing accountability as discrimination law provides a remedy for unfairness: see Nachbar, n 72, at 509.

102 Gleeson, n 61, p 188.

103 ibid.

104 Noting, however, that in the area of injunctions, the legal principles remain relatively broad, such as considerations of "the balance of convenience".

Another example might be in the area of waiver in relation to arbitral rights under contract. The algorithm could determine whether the minimum number of judicial steps have been taken by the plaintiff to conclude that there has been a waiver of the right.

While this may sound attractive, experience shows that such limited discretion cases are often more complex than the above might suggest, and may involve factors that are not within the dedicated algorithm. There may also be a larger context to the question under consideration. Human judgment therefore might be necessary in order to derive a fair outcome. Further, in many jurisdictions, interlocutory decisions are able, with special leave, to be appealed. This "check" on such decisions ensures fairness for outlier cases. Perhaps the check could remain; an appeal could be available from an AI decision to a human judicial officer if certain threshold criteria were satisfied or not (as the case may be). Overall, it is possible that one day there may be a whole range of areas of litigation where interlocutory applications are dealt with solely by algorithms (AI) rather than at hearings.

Similarly, it would no doubt be possible to set penalties as derived by AI from an algorithm with known inputs and assessments. Again, however, setting penalties is not usually done solely by reference to the closed universe of evidence before the court in the particular case and judges no doubt draw on their observations and subjective judgment as to what is appropriate. If AI were to undertake such a task, using both "internal" and "external" evidence, in the case of the external evidence AI would need to mine data externally available to it as to the appropriate penalty to set. This appears at present to be unworkable.

Let's take another example. In many if not all proceedings, the court decides whether and when the parties should go to mediation. The courts have, with the increases in costs of the courts, and delays, increasingly engaged mediation as a "pre-litigation" step in order to achieve fair and speedy outcomes at acceptable costs. It might be possible to have AI determine, based on a set of criteria, which cases should be the subject of compulsory mediation, even if one party does not agree to one. This might be based on a mining of a database that shows that particular kinds of cases have in the past settled at mediation in say 95% of cases. It might also be possible for AI to act as the mediator, based on the suggestions put to it by the parties, and suggest a possible settlement range. However, even if AI could be put to this task, mediations themselves are necessarily humanistic matters involving highly subjective judgments about what the outcome of a proceeding might or should be, the ancillary risks that might pose, and what can be afforded. There is also a "human dimension" of work in mediation, relating to creative solutions and intuitive assessment.

Finally, a good case for AI in the court's process relates to the question of costs. It might be possible for AI to track the progress of the proceeding by reference to the court's file, and to determine the costs that should be payable at the end of the proceeding. This might eliminate the work of the costs court and save tens of millions of dollars over time.

AI and tribunal work

Assuming our current notions of justice remain, AI will have significant difficulties, at least in the foreseeable future, attempting to do "judge" work. At present, it is simply impossible. As the former Chief Justice of the High Court of Australia, Robert French AC, has pointed

out, it is the courts and only the courts that can carry out the adjudication function involving the exercise of judicial power.[105] The courts exercise the power of the state, interpreting laws, ensuring procedural fairness and rendering binding decisions across society at large. However, the question arises whether less complex legal analysis and decision-making can be performed by AI.

It is generally accepted that some of the work of tribunals may be less complex than superior court litigation, because the knowledge field and expertise required is narrower, and there is less need to develop overarching principles. Further, for some tribunals, case-by-case outcomes are generally acceptable without the need for formal rules of evidence and broad principles. AI may have some significant role for these tribunals over time. For example, in relation to refugees, the decision-maker may be an AI algorithm based on input data of the applicant's background and an assigned percentage likelihood that refugee status is justifiable. Another example, current at present, is whether someone is a citizen of a particular country,[106] or even a dual citizen. Apparently INDIGO, a large legal expert system deployed by the Dutch immigration administration, deals with issues like this.

This kind of work of AI would require data to be inputted, which presumably would need to be certified by a legal practitioner or other qualified person. Such outcomes might also need to be audited by a "human" decision-maker for reasonableness against some normative standard. The audit might be like a Tax Office audit, targeted at certain decisions. And if AI was rejecting virtually all applications, the algorithm would presumably need to be revisited.

Finally, in some parts of Europe, family court settlements are determined without hearings, using allocations of assets between husband and wife based on an algorithm of what is fair. In the Family Court of Australia, software is being developed that generates advice on how property from a marriage would be split under a court determination.[107]

AI and small claims

Down yet a further level of complexity and dollar value of amounts in disputes are "small claims". The question is whether these can be "AI'd" out of existence. This has in part already been suggested. There is a product (a web-based interface) called DoNotPay,[108] which is

105 R French, "Perspectives on court annexed alternative dispute resolution", Law Council of Australia Multi-Door Symposium, Canberra, 27 July 2009, at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf, accessed 13 July 2022.

106 An example raised by Kirby, n 17, p 6. Other examples of the use of an "AI tribunal" are those provided by the Canadian Civil Resolution Tribunal which deals with small civil disputes (under $5,000) and small property issues, and plans in the future to deal with car accident cases and personal injury claims: see Allsop, "Technology and the future of the courts", n 1, 7. See also A Reiling, "Courts and artificial intelligence" (2020) 11(2) *International Journal for Court Administration* 8.

107 T Sourdin, "Justice and technological innovation" (2015) 25 *JJA* 96 at 101.

108 There is a similar product that was developed in France, WeClaim, which helps people make small claims and participate in class actions — it has been translated into four languages. This product is said not to be AI per se but rather "a logic tree" product: see Artificial Lawyer, "French legal start-up, WeClaim, pioneers semi-automated litigation", 12 December 2016, at www.artificiallawyer.com/2016/12/12/french-legal-start-up-weclaim-pioneers-semi-automated, accessed 13 July 2022.

dedicated to assisting people to make small claims or defeat legal infringements such as parking or speeding fines.[109] The user fills in a form on screen, which is dedicated to the particular issue at hand (eg defending a fine), and the form is submitted to the relevant adjudicator (such as the small claims court). By using the product, a person does not need to use a lawyer. But that is only to start the claim and, in any event, the claim is of a size that would not justify a lawyer. This product will not, therefore, revolutionise the litigation system; however, it might make one small segment of it more efficient at the front end. It is a laudable product as an "access to justice" device; it enables people to take a formal litigation step.[110] But it does not do much more. An associated AI product has been developed in relation to class actions, where individuals can log their claims individually.[111] The basic idea is that the product lets a complainant approach a defendant electronically so as to be able to settle a claim online.[112] For more commercial work, there are legal online services such as those offered by Allen and Overy in London, generating more than £12 million for the firm each year from subscriptions.

If AI developers are able to take this initial "dip in the water" at doing litigation without a lawyer to further stages of development, the litigation landscape might change and possibly materially. However, at present, that looks a long way off. The question is not whether AI can improve in order to do this, but whether the structures of our legal system can be redesigned, giving AI more work to do because much of the discretion is taken out of the system. That is a large philosophical question, not merely an AI question.

AI and private dispute resolution mechanisms

Yet further down the tree of dispute resolution are the systems established by private individuals to quell controversy. Examples of this include dispute resolution provisions for sporting bodies or for consumer transactions, such as purchases over eBay.[113] In effect, consumers contract to resolve disputes electronically and agree to be bound by the dispute resolution process. It has been estimated that three times as many disagreements each year among eBay traders are resolved using "online dispute resolution" than there are lawsuits filed in the entire United States (US) court system.[114] This may drive efficiencies, but not all are satisfied that it is appropriate.

109 It is said that over 150,000 parking fines have been successfully overturned this way: R Susskind, *Tomorrow's lawyers: an introduction to your future*, Oxford University Press, 2017, ch 5. In the criminal area, a similar product exists, LawBot, developed by Cambridge students. LawBot is a chatbot that provides free advice to victims of crime. It covers 26 criminal offences; however, it is not designed to replace a lawyer or take a case forward.

110 As to access to justice and the role AI might play generally, see J Tito, "How AI can improve access to justice", *Centre for Public Impact*, 23 October 2017, at www.centreforpublicimpact.org/insights/joel-tito-ai-justice, accessed 13 July 2022.

111 See Artificial Lawyer, "What Joshua Browder's Equifax claims tool means for lawyers", 13 September 2017, www.artificiallawyer.com/2017/09/13/what-joshua-browders-equifax-claims-tool-means-for-lawyers/, accessed 13 July 2022.

112 Susskind, n 109.

113 See generally M Legg, "The future of dispute resolution: online ADR and online courts" [2016] *University of New South Wales Faculty of Law Research Series* 71; see Thornton, n 73, at 1829–1832. The article deals generally with "Automated Decision Systems" (ADSs).

114 R Susskind and D Susskind, *The future of the professions — how technology will transform the work of human experts*, Oxford University Press, 2015.

The Paris Bar has expressed disapproval with non-lawyers providing legal services by trying to solve legal claims without lawyers. The Paris Bar has worked with regulators to create the Paris Bar Incubator, which works to focus new legal technology.[115]

Finally, even with AI dispute resolution, one would expect that a human's judgment would at least on occasions be necessary by way of a control or an audit over that work. In any event, if there are to be such AI outcomes, this fundamental question arises: who will be the "owner" of the AI and/or the system governing it?[116] The natural answer is the court, the tribunal or the organisation (eg eBay) in question. But, as mentioned above, will a court or tribunal have the capability and resources to maintain and improve the AI over time? Will it have the resources to maintain the controls within the AI to ensure that it is meeting its purpose over time? Will it have the resources to audit those controls? Or will the court/ tribunal ultimately "outsource" the development of the AI to contractors, as it might do its IT systems? These governance issues do not just pertain to the court system.

The future of virtual dispute resolution

All of the above questions seem to generate a more general question: whether a court has to be a physical place, or whether it is in fact the service of justice? Certainly, the presence of a court is a symbol of government authority and facilitates highly complex problems (both logical and philosophical) being dealt with iteratively by competent legal experts and the court itself. However, alternative dispute resolution online, and courts themselves online, are a developing and significant trend.[117] They facilitate affordable access to justice, timely dispute resolution and binding results (ending lengthy appeal processes).

In this area, it may be possible that AI could be used to perform decision-making through pre-agreed contractual arrangements. As stated above, eBay is the classic example of this. Further, there are examples of low-complexity online courts already in existence around the world — in the Netherlands, British Colombia and the United Kingdom.[118] These online processes are intended to enable an exchange of facts, identify issues for resolution, and suggest consensual resolution of disputes if possible, failing which the dispute may go to a hearing or the dispute may be resolved "on the papers".

AI and its impact on how courts are viewed by litigants and society more generally

So far this article has been essentially exploring the notion of whether there can be "behavioral equivalence" between traditional human-based, judicial decision-making and

115 See Artificial Lawyer, "Paris Bar Incubator calls for applicants for 2018 innovation prize", October 2018 at www.artificiallawyer.com/2018/10/01/paris-bar-incubator-calls-for-applicants-for-2018-innovationprize/, accessed 13 July 2022. See more recently P Motteau, "Is France becoming the vanguard of civil LegalTech?", *Legal Business World*, 22 January 2020, at www.legalbusinessworld.com/post/2020/01/22/is-france-becoming-the-vanguard-of-civil-law-legaltech, accessed 13 July 2022.

116 As to system design and ownership, see, Macdonald, Burke and Stewart, n 7, pp 235–252.

117 See Legg, n 113.

118 For an extensive analysis on online solutions, see Legg, ibid, at 76–80.

AI-based decision-making; that is, whether outcomes can be the same under each pathway. So far, at least to this author, behavioral equivalence is impossible except at the most basic procedural level such as rudimentary procedural tribunal work and the like.

But let us assume nevertheless for the moment that behavioral equivalence is possible. The question arises whether, although the outcomes are the same, there are nevertheless significant other differences which remain.

To consider this further, let us suppose that a particular litigant attends court, sees the court processes in motion, observes the judge in question, and assesses the reasoning for the result by reading the judgment. The litigant will necessarily make certain value judgments about the litigation and the result. The litigant will no doubt ask themselves various questions, including: was the process honest? Was the court courageous in its determination to upheld rights? Was the overall process fair? Was the result fair?

Now assume the same result has been achieved using AI. These questions do not go away when AI is introduced to determine the result. These same value judgments about honesty, trustworthiness, courage, and fairness, will all still inevitably be made by the litigants.

The literature on AI and the courts has a dearth of learning on how AI may affect (perhaps adversely) on those values as attributed to the court system by litigants or even observers.[119] Despite this, it is essential for governments to assess how the tradeoffs between human judgments and AI judgments in quelling controversies via adversarial (or even inquisitorial) systems are valued by litigants and society in general. Much work is needed in this area to determine, before introducing AI into a particular process, or so as to replace a process, how the involvement of AI will affect the values which litigants and society place on the relevant court system and its status in society.

AI and the work of law firms

Law firms advise on and implement complex transactions, including mergers and acquisitions. AI now exists for this kind of work and is being embraced by large law firms across many continents.

In late 2016, American academics published a paper entitled "Can robots be lawyers? Computers, lawyers, and the practice of law".[120] In summary, the research accessed the time records of lawyers in major American law firms, allocated work across certain work streams (eg document management or legal writing), and then attempted to determine what work could or could not be done by AI. Surprisingly, the analysis revealed the absence of a strong association between the ease of automating a task and whether the task was performed by a junior associate, senior associate or a partner. Nevertheless, the overall conclusion was that automation could have a material employment effect on lawyers.

119 For an excellent article on the topic, however, see J Blass, "Observing the effects of automating the judicial system with behavioral equivalence" (2022) 73 *South Carolina Law Review* 825. See also, Macdonald, Burke and Stewart, n 7.

120 D Remus and F Levy, "Can robots be lawyers? Computers, lawyers, and the practice of law" (2017) 30(3) *Georgetown Journal of Legal Ethics* 501.

A major AI product now available in the legal services market is called Luminance, based in Cambridge in the United Kingdom.[121] It has developed data systems for NATO (the Northern Atlantic Treaty Organisation) and the British National Health Service. Its competitive advantage is that it applies "new maths" to solve complex real-world challenges where there are very large, heterogeneous, constantly evolving datasets. This is what Luminance says about the product:[122]

> Founded by mathematicians from the University of Cambridge, Luminance's Legal Inference Transformation Engine (LITE) uniquely combines supervised and unsupervised machine learning to provide the most robust, powerful platform for legal analysis available to lawyers. Luminance's technology can read and form an understanding of legal documentation in any language and jurisdiction, immediately surfacing the most relevant information and vastly reducing the amount of time spent in document review.
>
> Luminance is used by over 230 law firms and organisations in over 50 countries and in more than 80 languages across a wide range of practice areas, including M&A due diligence, property portfolio analysis, eDiscovery, contract negotiation and model document comparison.

According to its website, Luminance provides lawyers with the most rigorous analysis of their documents, instantly highlighting anomalous areas or risks that require urgent attention, working across the entire dataset, negating the need to rely on sampling, giving lawyers confidence that no critical document or clause has been missed. The AI does the burden of low-level cognitive tasks common in due diligence, compliance, insurance or in-house contract management, enabling lawyers to spend more time advising clients on business-critical issues. According to Luminence's website, one of its clients has been able to upscale the review of documents from a rate of 80 per hour, to some 3,600 per hour. Luminance technology uses inference, deep learning, natural language processing and pattern recognition, supervised and "unsupervised" machine learning. Luminance has a broad and increasing client base across the globe.

Another type of AI product is called "COIN" or Contract Intelligence, developed by J P Morgan Chase and Co. The product engages machine-learning algorithms to review and interpret commercial loan agreements. The company has estimated that this AI saves 360,000 hours each year of lawyer and loan officer work.[123] It has been said that by the use of these kinds of products, AI is "closing in on the work of junior lawyers". That is probably right.

121 See Luminance at www.luminance.com, accessed 13 July 2022. The board of directors of Luminance is extremely impressive: see www.luminance.com/team.html, accessed 13 July 2022. For a summary of other major AI applications in the legal services area, see D Faggella, "AI in law and legal practice — a comprehensive review of 35 current applications", *Emerj*, March 2020, at https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/, accessed 13 July 2022.

122 See Luminance, n 121.

123 See H Son, "JPMorgan software does in seconds what took lawyers 360,000 hours", *Bloomberg*, 28 February 2017, www.bloomberg.com/news/articles/2017-02-28/jpmorgan-marshals-an-army-of-developers-to-automate-high-finance, accessed 13 July 2022.

This begs the question whether there is such a product for litigation. Law firms assist in the litigation process in a large number of ways, including:

- taking instructions (gathering facts)
- determining (usually with counsel's involvement) who should be witnesses
- reviewing documentation in support of a case or to determine how it might damage a case
- advising on the law
- assessing prospects (ie the risk of failure or the likelihood of success)
- managing the trial process for the participant, and
- preparing or assisting in the preparation of legal submissions.

AI can and will increasingly be deployed in aide of these tasks.[124] For example, as to the third point (reviewing documentation), electronic discovery processes already take the place of lawyers or paralegals looking through large volumes of material, thereby significantly reducing time and cost.[125] Courts have more recently embraced discovery using algorithms, including so-called "predictive coding", as a means of keeping the discovery obligation manageable.[126]

As to the fourth point (advising on the law), predictive coding has been applied, selecting relevant statutory provisions from those retrieved with keyword searches.[127] Further, significant research tools are now available. In the United States, for example, you can submit a legal question to a firm, which will use AI to analyse the issues and produce a suggested memo to be provided to the relevant client. There is a turnaround time because humans have to turn the memo into a more credible product.[128] As mentioned above, ROSS (an IBM product) is a legal research tool. It enables law firms to slash the time spent on research, while improving results. According to IBM, existing technologies such as keyword search poorly makes sense of the volume, variety, velocity and veracity of legal data. Watson's cognitive computing capability enables ROSS' intelligence. The ROSS application works by allowing lawyers to research by asking questions in natural language, just as they would with each other. According to IBM, because it is built upon a cognitive computing system, ROSS is able to sift through over a billion text documents a second and return the exact passage the user needs. According to IBM: "Do more than humanly possible. Supercharge lawyers with artificial intelligence."[129] However, it

124 For a more general indication of the developing scope of AI in legal work generally, see *Artificial Lawyer* at www.artificiallawyer.com, accessed 13 July 2022.

125 See J Markoff, "Armies of expensive lawyers, replaced by cheaper software", *New York Times*, 4 March 2011, at www.nytimes.com/2011/03/05/science/05legal.html, accessed 13 July 2022; Sourdin, n 107, 103.

126 See, eg, *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch); *Irish Bank Resolution Corp Ltd v Quin* [2015] IEHC 175; G Cormack and M Grossman, "Evaluation of machine-leading protocols for technology-assisted review in electronic discovery", SIGIR 2014: Proceedings of the 37th international ACM SIGIR Conference on Research and Development in Information Retrieval, 2014 at www.researchgate.net/publication/266658718_Evaluation_of_machine-learning_protocols_for_technology-assisted_review_in_electronic_discovery, accessed 14 July 2022; see Vickery, n 98, p 25 ff.

127 Performed by Ashley, n 50.

128 It is currently beyond the ability of AI products in the market to produce lucid and highly accurate written advice in relation to specific legal questions posed, hence the need for human "intervention".

129 See Ross Intelligence https://blog.rossintelligence.com/.

should be noted that a recent review of ROSS[130] has found that it is still a "supplement" to traditional Boolean searches. In the review, young lawyers were asked to answer American bankruptcy law questions using ROSS. ROSS outperformed other search technologies but still only found about half the relevant authorities within the first 20 results.[131] There were, however, significant reductions in research time, which transpose to lower costs to clients and therefore a more competitive law service. The above review concluded that the gains from using ROSS did not constitute a dramatic transformation in the use of technology in legal services. Rather, the tool was characterised as a "significant iteration in the continuing evolution of legal research tools that began with the launch of digital data bases of authorities and have continued through developments in search technologies".[132]

As to point 5 (assessing prospects), there currently exist AI products that will seek to predict litigation outcomes. This is based, inter alia, on not only the facts and the law but AI analysis of the particular judge allocated to the case and the particular counsel retained. It is not inconceivable that an AI product might be developed that will assess the risk on a "real time" basis — that is, during the trial — as the transcript and submissions are made to the court over the course of a trial. It has been said in relation to the US Supreme Court that computational statistics can often yield more accurate predictions of the likely behaviour of courts than retained lawyers in the cases.[133] The predictive litigation outcomes are particularly suited to the US legal system where the level of activity is truly immense. For example, there are 3,124 state courts in America, and over 15 million civil lawsuits filed each year (roughly 41,000 claims a day). This gives rise to a significant opportunity to "mine" the data from such cases and to develop predictive algorithms.[134] Such data is unlikely to be available other than in the huge legal litigation markets such as the United States.[135] Predictive algorithms, in respect of particular judges, is prohibited in France.[136]

Anterior to all this is the question of whether litigation should be commenced in the first place. Here we might see the introduction of "self-executing contracts",[137] able to initiate legal proceedings if AI detects breaches. Of course, that is a rather naive approach to litigation as launching it is substantially about reputation and risk as much as legal rights.

130 Blue Hill Research, "ROSS Intelligence — Artificial Intelligence in Legal Research", 2017, at https://nysba.org/NYSBA/Sections/International/Seasonal%20Meetings/Montreal%202018/Coursebook/Plenary%203/Blue%20Hill%20Benchmark%20Report%20-%20Artificial%20Intelligence%20in%20Legal%20Research.pdf, accessed 14 July 2022.

131 The implication, of course, is that a human must go and look for the other authorities using some other means, such as textbooks.

132 Blue Hill Research, n 130, p 11.

133 Susskind, n 109, Ch 5. See further D Katz, M Bommarito II and J Blackman, "A general approach for predicting the behavior of the Supreme Court of the United States", 2017, at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0174698, accessed 14 July 2022.

134 For a company providing such services in the United States, see Premonition, at www.premonition.com, accessed 14 July 2022.

135 AI tools have nevertheless been developed, at least at the experimental level, in other jurisdictions, such as in Australia in relation to migration cases: see AI tools in these and other areas are outlined in Zalnieriute, n 100, at 6.

136 AI tools in these and other areas are outlined in Zalnieriute, n 100, at 7.

137 Possibly operating through so-called Blockchain technology. As to this aspect, see further R Kemp, "Legal aspects of artificial intelligence" at www.kempitlaw.com/legal-aspects-of-artificial-intelligence-v3-0/, accessed 14 July 2022.

Reduction of operating costs

Aside from these direct litigation-type tasks AI might be put to, there is a whole body of AI development underway to assist law firms to reduce their operating costs, thus making them more competitive over time.[138] A good example is the current development of AI to enable a fee earner's computer to prepare the narrative and time spent on work done by the fee earner, based on what work is being done on the computer over time.[139]

Overall, the general consensus, at least in Australia, is that AI will be increasingly deployed in the legal profession to take repetitive legal work from lawyers and their assistants, but will not replace trusted legal advisers.[140] Relationships with clients may well be enhanced as clients see solicitors doing more value-add work and less of the repetitive work that is currently so costly (such as discovery work in litigation). Computers and AI have already transformed the accounting profession, enabling accountants to provide more value-add work. It is predicted that the three "As" (automation, AI and analytics) will likely shape the legal department of the future.[141] No doubt this is the position for law firms too.

AI and the work of counsel

As to legal research, AI will develop apace, but it has to be said it is currently well advanced already. Legal research now takes a fraction of the time it used to take, say, 10 years ago.[142] Counsel will no doubt be advantaged by such developments.

AI might also be able to do the pleadings for a case. Counsel (or their instructor) would simply input the facts in question. The AI algorithm would then analyse the facts, draw on its database, and then produce a statement of claim, with particulars, containing the relevant causes of action and the appropriate relief. There might be yet other applications for AI. It was touched on above whether AI products could be deployed to predict litigation outcomes. This is likely to increasingly emerge, displacing the traditional quantitative guesses of counsel that the case is "50/50" or the qualitative assessments that the case is "well arguable" or "unlikely to succeed".

However, where AI must necessarily fall short is with the art of the advocate (sometimes called court craft) — for this requires an understanding of the "social processes" of the courtroom, including as between the judge, opposing counsel and witnesses, taking into account the observance of duties to the court. Further, problem-solving towards a fair resolution of a

138 Cost competitiveness is one of the three main drivers of change firms must embrace to remain successful: see, eg, Susskind, n 109, Ch 2.

139 See Zero at https://zerosystems.com/, accessed 14 July 2022.

140 LexisNexis, "Human v cloud — 2017 LexisNexis roadshow report", 2017 at www.lexisnexis.com.au/en/insights-and-analysis/research-and-whitepapers/2017/human-v-cloud-2017-roadshow-report, accessed 14 July 2022. The report examines (on a survey basis) how professionals are faring in a landscape dominated by technological disruption and what impact this has had on ways of working.

141 See Deloitte, "The legal department of the future: how disruptive trends are creating a new business model for in-house legal", 2017, at www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-advisory-legal-department-of-the-future.pdf, accessed 14 July 2022.

142 LexisNexis and JadeNet products, as well as Austlii, have essentially solved the manual "legal research" problems of the past.

dispute requires a didactic interaction between counsel for each party and the court. In effect, at least three super-computers (brains) are engaged on the one series of problems within a proceeding. Each hypothesis, fact, analysis, reasoning and conclusion is subject to interrogation. This permits deep reasoning across the so-called "open-textured rules" landscape referred to above. Further, the "art of the advocate" involves fine and frequent judgments in a complex environment. It is hard to see AI affecting this aspect, particularly where qualitative judgments are called on to be made regularly.

There may be areas where the work of counsel will increase with AI. One such area might be in relation to the testing of the relevant algorithm or algorithms producing the "computational law", and the challenges (or support) for the relevant databases relied upon by those algorithms. Whether this will require special new expertise by trial counsel — for example, in the area of computing and/or engineering — is yet to be seen. Another area that might increase the work of counsel is in the possible certification of factual data for input into AI algorithms, particularly for tribunals whose work has been subsumed by AI. This would limit (but not eliminate) "gaming" of the relevant system. The current *Civil Procedure Act 2010* (Vic) requires certain certifications by practitioners before proceedings can be commenced. This might be extended through the use of AI.

As foreshadowed above, there remains the broader question of what the Bars around Australia should do regarding AI. Since 2015, the Canadian Bar Association has had an Information Technology Committee, which, inter alia, monitors developments in computer technology, case law and regulations relating to and regards AI as a specific area of interest. The Committee is also tasked to keep members informed, to comment on legislation, and to make recommendations in relation to changes in the law in this area. The Victorian Bar has a similar committee. It is clear enough that the Bars across Australia should make every endeavour to monitor and keep on top of the AI revolution. And perhaps computing and AI should ultimately be compulsory continuing legal education for counsel (a need law schools are increasingly aware of).

Policy issues for the future regulation of AI

The regulation of the development of AI is a new frontier. AI development in Silicon Valley is regularly described as "the wild west"[143] Regulators are grappling with the kinds of policies that should be put in place to deal with AI development, and governments across the globe are undertaking governance reviews of AI and monitoring what other governments are doing.[144] However, already, there are well developed principles across a range of disciplines, including in engineering activities.

An obvious regulatory field for consideration is driverless cars. Should they be required to pass certain regulatory standards before they can take to the road? The answer seems obvious, but

143 See, eg, Inc.Technology, "Five growing artificial intelligence startups you need to know about", 25 July 2017, at https://www.inc.com/matt-hunckler/these-5-artificial-intelligence-startups-are-trans.html, accessed 14 July 2022.

144 For an outline of this, see Kemp, n 137, pp 18–21.

what would be the content of those regulations? Would the car need to pass a test (like a person does to obtain a licence)? If a driverless car crashes, who is at fault?[145] Simply identifying the relevant defendant may be a challenge: the company writing the algorithms; the data upon which the driverless car relied; the satellite companies that supplied the data; the electrical engineer who serviced the car? In Germany, the legal authorities are currently thinking about how the next level of laws should cope with this challenge.[146] Such dilemmas may well call for a fundamental policy reset, involving "no fault" litigation, or insurance coverage for driverless cars.[147] If there is damage suffered from the use of AI, will the court have to look at the dataset the AI relied upon and determine who imposed a bias (if any) in the data, who set the size of the dataset, and who did or did not review the AI algorithm? If there is damage suffered from the use of AI, and there was no "protocol" for the use of the AI, is this itself prima facie a negligent act? There are also heavy societal governance issues associated with the use of AI for objects such as cars. Who should be in control of or audit AI's use? Take, for example, a company that sells a car with advanced AI that is defective. If the directors do not insist on an audit (or independent certification) of the AI and/or its use, are the directors negligent?

Principles have also now been developed relating to the use of AI in the administration of justice.[148]

Courts themselves will have to grapple with other new controversies arising from the use of AI. It may be that particular laws do not adequately cover new scenarios, for example: who owns an AI algorithm derived by another AI algorithm?[149] With the inexorable aggregation of data for the purposes of enabling AI to perform useful analysis, how are privacy and ownership rights over the data best protected. Much of the mining of data by AI is on "the Cloud". Despite privacy and confidentiality protocols, is the Cloud in fact appropriate for data mining? Particularly in legal proceedings?

This aggregation and mining of data gives rise to a further issue: the evidentiary regime in litigation relating to such data. The *Evidence Act 1995* (Cth) operates essentially as a filter on what is or is not probative evidence. If AI draws on (mines) data from a huge dataset, how is the court to determine the probative value of that extraction, and therefore the conclusions derived from that extraction? There may not be any peer review of the extraction or other check or control on it. It might just be "pulled" from the internet. It might be highly valuable but be given very low probative weight because its source is not verifiable. These are all imponderables of future litigation.

One obvious but discrete area for consideration regarding AI is the possible development of non-discretionary elements within legislation or regulations — that is, elements designed so that there is no call for an evaluative process. This might apply, for example, in relation to

145 Is it the sound system used to hear other cars, the sensors used to "sense" other cars, the satellites used to position the car, the owner of the algorithm used to operate the car etc?
146 Chui and Breuer, n 24.
147 The premiums for which should in theory be very low because driverless cars will not crash!
148 Reiling, n 106.
149 As to some of the United Kingdom aspects of intellectual property law relating to AI, see Kemp, n 137, pp 22–23.

citizenship status, social security payments, or certain compensation amounts; these could all be determined by algorithms, updating themselves (learning) on a predetermined basis. Essentially, this would be the work of automated design systems (ADSs) as mentioned earlier.

Further, as mentioned above, the use of digital cameras to recognise people and fine them for offences gives rise to a whole area of regulatory oversight issues.[150] Further, in the area of AI weapons, we may well see international treaties or protocols for their use. Finally, there is the whole question of the control of a country's population by AI systems.[151] This is a fertile area for the courts, lawyers and counsel.

The pace of AI development

It appears AI will not be constrained by computing power, memory capacity, cost or data collection (as to the latter, at least in many fields such as insurance, finance and medicine). The interesting question therefore is this: what will constrain it? There are two important factors. First, AI cannot as yet read or comprehend, or itself reason, so it has significant limitations in understanding. In effect, it has no understanding of why it is doing something,[152] and AI cannot as yet innately reason to a conclusion. Secondly, there may be significant forces at play that impose "protocols" or constraints on the use of AI — for example, there may be an international treaty that only "amoral" algorithms can be developed.

AI is at the "hype" stage at present, but significant studies across industry suggest the overall impact will be high. One study found that, across the technology, media and telecommunications industry, more than 70% of respondents expected large effects from AI in five years.[153] Even in the public sector, 40% of respondents had this prediction. Having said that, according to one source, the number of convincing examples of the implementation of AI as commercially viable products do not make it inevitable that there will be generalised negative results for professions. An October 2016 survey of the adoption of machine-learning-based AI in legal services by large British law firms over the previous year, showed that there were only three reported applications that had been actually developed, plus a further nine collaborations/agreements partnerships in respect of that.[154]

150 As to which, see, eg, M Mann and M Smith, "Automated facial recognition technology: recent developments and approaches to oversight" (2017) 40(1) *UNSW Law Journal* 121 at www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/40-1-11.pdf, accessed 14 July 2022.

151 See for example, P Mozur, et al, "In China, an invisible cage", *The New York Times*, 28 June 2022 at https://static01.nyt.com/images/2022/06/28/nytfrontpage/INYT_frontpage_global.20210319.pdf, accessed 9 August 2022.

152 IBM has said that it has come up with a "curriculum" with respect to its legal cognitive product ROSS (which is based on its more general platform, Watson), which has "helped Watson understand and comprehend the law": A Sills, "ROSS and Watson Tackle the Law" at www.scribd.com/document/530959664/ROSS-and-Watson-tackle-the-Law, accessed 14 July 2022; the reference to understanding and comprehension may well be significantly overstated.

153 Ransbotham, Kiron and Gerbert, n 39, p 3.

154 Kemp, n 137, p 8, as noted in G Greenleaf, "Technology and the professions: utopian and systopian futures" (2017) 40(1) *UNSW Law Journal* 302, fn 34 at http://classic.austlii.edu.au/au/journals/UNSWLawJl/2017/12.html, accessed 14 July 2022.

It seems that the popular view is that the more dramatic effects of AI may occur within 10–20 years, when data consolidation has been better developed.[155] While there may be significant job losses due to automation (eg in call centres and banks), the 2016 World Economic Forum report suggests that upcoming disruption to employment will be multifaceted rather than narrowly influenced. For example, there are areas of expansion in employment; Infosys has trained more than 120,000 employees in design thinking.[156]

It should be noted that there is a significant investment around the world in AI development — in 2016, there was an estimated $26–40 billion spent on it.[157]

In the United States an AI Index has recently been developed, put together by Stanford University and others. In November 2017, the first (annual) AI Index report was published.[158] The report deals with the volume of activity in the AI field and its technical performance, and makes comments on "derivative measures" and observations about "towards human-level performance". The report has significant limitations in that it does not contain data about AI research and development by governments or large corporations, and is US-centric. Nevertheless it shows a heavy uplift in activity, and that AI can beat human capability in certain areas (such as object detection), can match speech recognition, and is nearly as quick as a human to find the answer to a question within a document. Yet the report notes that AI's capability, in contrast to a human, significantly degrades when tasks become "generalised".

It is true that there are calls, in some quarters, to slow the development of AI for ethical and safety reasons. For example, in mid-November 2017, hundreds of AI researchers from Canada and Australia wrote to Prime Ministers Justin Trudeau and Malcolm Turnbull, calling for an international ban on "weaponised AI".[159] These kinds of concerns have been identified and raised as far back as 30 years ago.[160] Assuming this were to occur, the question might be: how would this be enforced? By what court? And how would the court satisfy itself that a particular piece of weaponised AI is or is not within acceptable protocols unless the court is itself able to interrogate the AI?

Nevertheless, it seems the pace of AI development will only increase. The world's leading experts cannot agree on when, if at all, AI will develop to the point of human-level intelligence,

155 Ransbotham, Kiron and Gerbert, n 39, p 16.
156 ibid.
157 Chui and Breuer, n 24. In 2018, Accenture stated that in 2020 the AI market will exceed $40 billion, quoting the CEO of Microsoft, S Nadella, as stating "AI is the ultimate breakthrough technology": Accenture Applied Intelligence, n 4.
158 See Y Shoham et al, "Artificial Intelligence Index — 2017 annual report" (AI Index) at https://hai.stanford.edu/ai-index-2017, accessed 17 July 2022. The Index comes out of the Stanford University work referred to in n 2.
159 P Begley and D Wroe, "Future warfare: when robots join the battle, who decides who lives and dies?", *The Sydney Morning Herald*, 11 November 2017 at https://www.smh.com.au/national/future-warfare-when-robots-join-the-battle-who-decides-who-lives-and-dies-20171110-gzikvb.html, accessed 14 July 2022. See more recently the excellent outline on this topic by M Perry, "Automated weaponry and artificial intelligence: implications for the rule of law" [2017] *FedJSchol* 1 at www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20170222, accessed 14 July 2022.
160 Kirby, n 17.

but some have said by 2055 or thereabouts.[161] It is not inconceivable that one day human intelligence might not be the apogee of intelligence. But the literature suggests that this is out past at least 50 years.

There are now literally thousands of Silicon Valley firms working on AI products in the legal services space. This may well increase in number. And as we have seen, under Moore's Law, computing power will continue to develop with immense capacity in the future. It seems unlikely that the development of AI in legal services will slow — rather it is likely to increase dramatically as firms try to develop products that can produce steps in the litigation process that are cheaper and more effective, giving service providers competitive advantages in the delivery of legal services.

Finally, it is also not inconceivable that one day AI will prevent or eliminate controversy in society, because there will be higher levels of certainty. If this occurs, there may well be no controversies and therefore courts. If AI could eliminate controversy, because everything is far more certain, and where the "risk" of a counterparty defaulting is perfectly priced in a contract, there may be no need for litigation. But that outcome seems a very, very long way off from today.

Conclusion — impact on litigation in the short to medium term

It seems that in the short to medium term, AI will continue to be developed, and applied, in at least four areas in litigation:

- removing repetitive and relatively low-skilled work, such as reviewing vast volumes of discovery
- providing more powerful search engines and analysis regarding legal principles and arguments, and even perhaps reasoning
- providing predictions on court proceeding outcomes — as discussed, this is a risk mitigation or risk assessment aide, not a trial aide per se, and
- providing opportunities to mine vast volumes of data to determine whether relevant expert material can be used, or criticised, in proceedings.

If AI is to have an impact on the way superior court litigation is conducted, it is likely that a necessary condition for its influence will be less flexibility built into the litigation system — that is, less opportunity to provide corrective mechanisms for procedure or substantive irregularities or decision-making. This possible reset in the priorities of the courts is essentially a legislative task.

At lower tribunal levels with less complex controversies, AI may play a much more significant role. However, that role may develop more slowly than first thought; the development would need to come from government, which is not the natural engine room of entrepreneurial

161 Tegmark, n 4, 42.

improvements in systems. Developments in the private sector to improve client services and lower costs may not always align with the societal framework changes needed to deal with AI. In any event, the natural engine rooms for developing AI further seem to be academia, businesses with an appropriate risk capital profile (venture capital), and businesses with huge balance sheets (such as IBM).[162] However, it is very possible that, even if there is material change in this regard, this may ultimately be seen to be sacrificing justice for efficiency. The right balance between these two is always contextual: an advanced wealthy democratic society may well tend to skew the balance in one direction; a different kind of society may skew it the other way.

The legal profession, including the Bars, must be on the look out for ways to improve access to justice, at lowering costs, and at improving time scales for litigation. As Nettle J has stated:[163]

> As the custodians of the law, we not only have a responsibility to be at the forefront in the innovation and application of that kind of new technology but we also have reason to be excited about the benefits which it is likely to yield.

162 For a discussion on developing AI technology "inhouse" or otherwise, see LexisNexis, n 97.
163 Nettle, n 67.

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- Professor S L Johnson, Professor of Law, Cornell Law School
- Magistrate Judge A Wistrich, United States District Court, Central District of California
- Professor C Guthrie, Professor of Law, Vanderbilt Law School
- Lord D Neuberger, Baron Neuberger of Abbotsbury GBS PC HonFRS, Non-Permanent Judge of the Hong Kong Court of Final Appeal and Chair of the High-Level Panel of Legal Experts on Media Freedom, Former Master of the Rolls

Publicity and social criticism

- The Honourable Justice P Keane AC, Justice of the High Court of Australia
- The Honourable T F Bathurst AC, Chief Justice of NSW

- Dr M Bromberg, Senior Lecturer, The University of Western Australia Law School, Solicitor
- Mr A Ekert, Deputy-Associate, Federal Circuit Court

Stress and vicarious trauma

- Ms C Schrever, psychologist, Judicial Wellbeing Advisor to the Judicial College of Victoria, researcher at the University of Melbourne
- The Honourable M Kirby AC CMG, Patron of the Tristan Jepson Memorial Foundation, former Justice of the High Court of Australia
- Mr D Heilpern, Adjunct Professor at Southern Cross University and former Magistrate of the NSW Local Court
- Mr P Harvey, former Magistrate (now deceased), Licensing and Local Court, New South Wales
- Associate Professor C Hulbert, Melbourne School of Psychological Sciences, University of Melbourne
- Professor and Dean T Sourdin, Newcastle Law School, The University of Newcastle
- Professor J Hunter, Faculty of Law, University of NSW
- Professor R Kemp, School of Psychology, University of NSW
- Mr K O'Sullivan, Conjoint Senior Lecturer, University of NSW
- Professor P Vines, Faculty of Law, University of NSW
- Her Honour Magistrate E Kennedy, Local Court of NSW

Unrepresented, querulant and vexatious litigants

- Her Honour Judge L Flannery SC, Judge of the District Court of NSW
- The Honourable Justice E Kyrou, Judge of the Court of Appeal, Supreme Court of Victoria
- Dr G Lester, Consultant Psychiatrist, Victorian Institute of Forensic Mental Health
- Mr C Wheeler, Former Deputy NSW Ombudsman. Currently Solicitor, Commissioner (p/t) Greyhound Welfare and Integrity Commission, Specialist Adviser, Ethical Conduct, Centium Group, and consultant advising on the management of complaints and whistleblowing
- Mr J Faulks, Former Deputy Chief Justice, Family Court of Australia

Non-adversarial justice

- The Honourable W Martin AC QC, Former Chief Justice of Western Australia
- The Honourable T F Bathurst AC, Chief Justice of NSW
- Mr M Kimber SC, Founder of Max Kimber Communication, Member, ADR Committee, NSW Bar Association

Therapeutic jurisprudence and the trauma-informed court

- Ms B O'Neill, Dunghutti woman, First Nations Trauma Recovery and Practice Practitioner
- Mr N Cowdery AO QC, Visiting Professorial Fellow, Faculty of Law, UNSW
- Professor J Hunter, Faculty of Law, UNSW
- Ms R McMahon, Adjunct Senior Lecturer, Faculty of Law, UNSW, Co-Chair, *Bugmy* Bar Book
- The Honourable Judge Hora (now deceased), Former President, Justice Speakers Institute, LLC; former judge of the California Superior Court
- His Honour Judge Hunt, District Court of NSW
- Mr R Dive, former Senior Judge, Drug Court of NSW
- Her Honour Magistrate S Duncombe, Children's Court of NSW
- Mr S McCarthy, Barrister Sir James Martin Chambers
- Ms R Waterworth, psychologist
- His Honour Dr M King, magistrate of the Dandenong Drug Court and Magistrates Court of Victoria
- His Honour Magistrate M Douglass, Local Court of NSW

Artificial intelligence

- Dr W Gravett, Associate Professor, Department of Procedural Law in the Faculty of Law, University of Pretoria
- The Honourable G Nettle AC QC, former Justice of the High Court of Australia
- The Honourable T F Bathurst AC, Chief Justice of NSW
- Ms D Hogan-Doran SC, Senior Counsel, Australian Bar; Adjunct Associate Professor, Faculty of Law, UNSW
- Mr R Susskind OBE FRSE, IT Adviser to the Lord Chief Justice of England and Wales, professorships at the University of Oxford, Gresham College and Strathclyde University, past Chair of the Advisory Panel on Public Sector Information, President of the Society for Computers and Law
- Professor and Dean T Sourdin, Newcastle Law School, The University of Newcastle
- The Honourable Justice J Allsop AO, Chief Justice of the Federal Court of Australia
- Mr D Farrands KC, Barrister, Victorian Bar