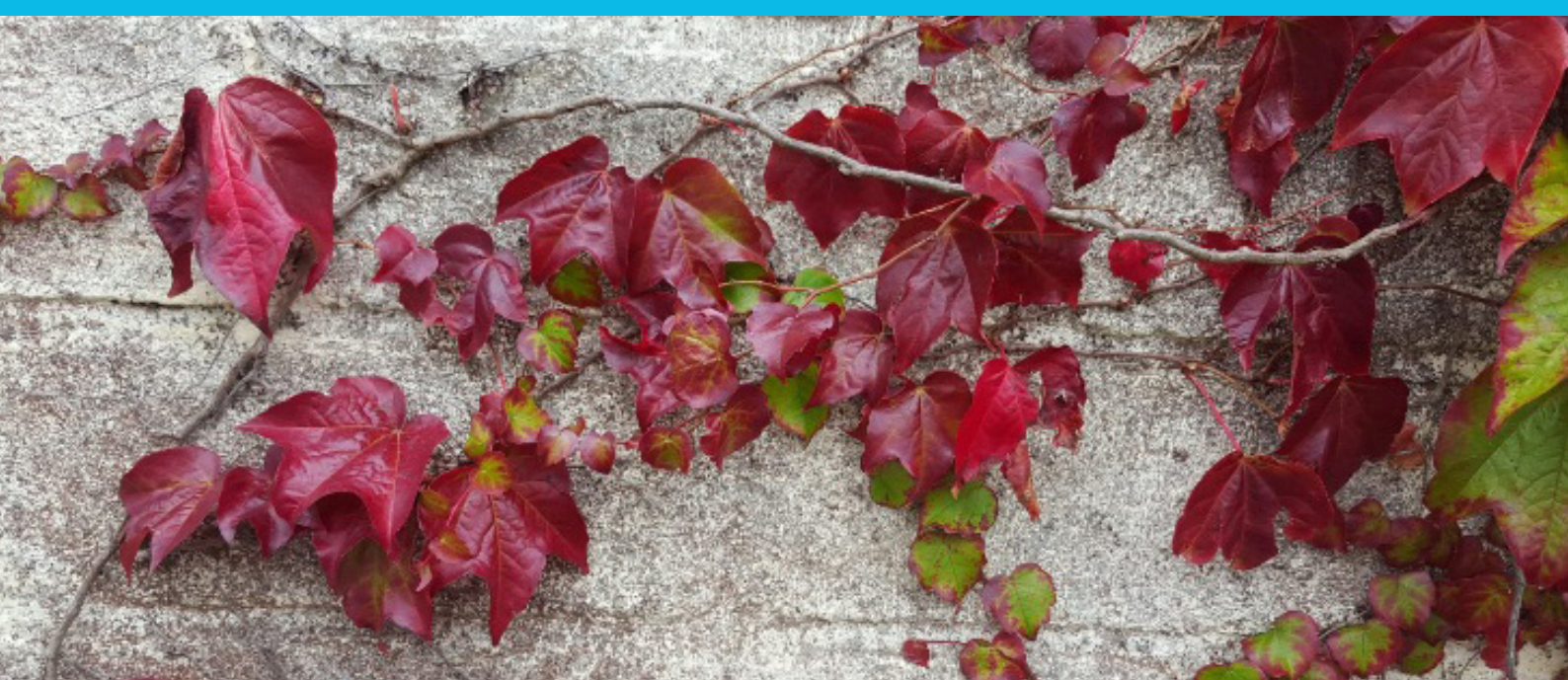




Autumn 2024

# Social Work & the Law 15<sup>th</sup> Year Edition

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## INTRODUCTION

Welcome to this special 15 Year Anniversary edition of Social Work and the Law. In this edition, we look back on the first article written about our Social Work Service 15 years ago and also reflect on the work which has led the service where it is today.

In this edition we also provide helpful tips for social workers about the use of client authority forms and appearing in Court via AVL. We explore legal changes and interesting cases in relation to the recent cosmetic surgery review and abuse cases against deceased perpetrators. We learn more about entitlements to compensation for people injured on public transport across Australia and gain a better understanding of the factors that a court will consider in determining a minor's capacity to refuse treatment.

We hope you enjoy this edition.

Alexis, Catherine, Christine and Olga

**Slater  
Gordon**  
Lawyers

# Witness etiquette and giving evidence via audio-visual link (AVL)

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The basic principles of courtroom etiquette apply to all people appearing in court, whether as a lawyer, barrister, witness or observer. That is, respectful behaviour is expected from any persons inside the courtroom.

### General Procedures when Attending Court and Giving Evidence

There are established procedures and protocols which must be observed in court, which are generally intended to show respect for the court and the authority of the decisions that the court makes, as well as enabling court processes to run smoothly. When attending court, you should dress appropriately, turn off your mobile phone, not eat or drink, sit quietly, and not interrupt the proceedings. It is also usually not permitted to take photographs or make audio recordings of the proceedings.

At the start of a hearing, the judge will enter the courtroom, at which point everybody inside the courtroom must stand, bow to the judge and should remain standing until one of the judge's staff confirms that you may sit down.

If appearing in court to give evidence as a witness, you will be called to the stand and will swear an oath or affirmation that the evidence you give will be the truth, the whole truth and nothing but the truth. Following this, lawyers for each party will take turns asking questions of the witness and testing their evidence. Depending on the nature of the evidence that is being given, a witness may sometimes be allowed to refer to notes, records or other files that might assist them in the process. Witnesses who would like to refer to notes need to ask permission of the judge to do so.

### Appearing as a Witness by Audio-visual Link (AVL)

Normally, witnesses and parties to a proceeding will attend in person. In exceptional circumstances, the court allow people to attend via AVL. If any party or witness cannot appear in person, they must make an application to the court in advance and clearly outline the reasons why an in-person appearance is not possible.

The most common situations in which a witness may be allowed to attend by AVL is if the witness is overseas, interstate, or is unable to attend due to significant ill-health or other hardship. Work commitments or holiday travel are generally not considered to be legitimate reasons to apply to appear by AVL. The court has discretion to decide whether a witness or party is given permission to appear by AVL, so an application for AVL might be either approved or denied.

In determining whether permission is to be granted, the court must give consideration to the overarching obligations and duties of the court process, for example whether any delay or injustice might occur for either of the parties if an appearance via AVL is or is not allowed. Importantly, should permission be granted to appear via AVL, the expectations of observing court etiquette mentioned above still apply in the same way as a person attending court in person, except that the witness does not need to stand when the judge enters the courtroom.

### Case example: *Wang v Yu (No 2)* [2024] NSWSC 4

The ongoing obligations with respect to court etiquette and behaviour have recently been highlighted in the ruling handed down by Meek J in *Wang v Yu (No 2)* [2024] NSWSC4.

In summary, Dr Wang, a party to these proceedings, was granted permission to appear by AVL on account of serious ill-health, requiring urgent treatment, which prevented her being present in court. On the morning of the hearing, after Dr Wang had joined the

AVL, it appeared that she was driving her car and had joined by phone. There had been no prior indication to the court that Dr Wang would be delayed for the start of the day's proceedings, and no request had been made for even a brief opportunity to pull over the car and proceed with the hearing whilst the car was parked.

His Honour Meek J was critical of Dr Wang's behaviour, and his comments serve as a reminder to all parties appearing in a court that "the usual court etiquette, protocols, procedures and restrictions which apply to in-person hearings apply to a virtual hearing, whether virtual in whole (with all participants joining remotely) or virtual in part (with some participants in person and others joining remotely)". His Honour went on to say that "parties, legal representatives or any other persons given leave to appear by AVL should understand that the appearance is to be done in a way consistent with the appropriate decorum and solemnity of the occasion that would apply as if the person appearing were physically present in the courtroom".

In conclusion, regardless of whether a court appearance is made in-person or via AVL, if a person has to appear before a court, the normal rules of behaviour apply, and are not changed or minimised if that person is not physically in the courtroom.



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## Abuse Cases Involving a Deceased Perpetrator

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Six years have now passed since the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) handed down its Final Report. The Royal Commission made many recommendations that would see Australia's states and territories make changes to the law to allow survivors of abuse to pursue justice. One crucial recommendation included the removal of the statutory limitation period (usually, 3 years) in which personal injury claims for compensation could be made for survivors of child sexual abuse. This recommendation was implemented in every Australian jurisdiction, meaning there was no longer a time limit for survivors of child sex abuse to bring an action for compensation (and for varying degrees of child physical abuse, in all jurisdictions except Western Australia where the limitation for physical child abuse still remains). This enabled survivors, often decades later, to access justice where this had previously not been possible.

The Royal Commission also recommended that a 'stay of proceedings' remain an exercisable option by the Courts in response to abuse claims. A stay of proceedings is an order by the Court that the survivor's proceedings be permanently stopped, usually as a result of the defendant institution being faced with such significant prejudice that it cannot receive a fair trial.

Increasingly, institutions and some Australian government departments have applied to the Court for permanent stays of proceedings brought against them by survivors of abuse. They alleged that a fair trial was not possible as a result of missing or deceased witnesses, missing records

and, commonly, the death of the alleged perpetrator of abuse. In many cases where the alleged perpetrator of abuse had died, permanent stays were granted by the Courts on the basis that the institution was prejudiced as it could not put the survivor's allegations of abuse to the alleged perpetrator. Sadly, these successful stay applications stopped survivors from achieving justice they had often been waiting decades to achieve and were often used as threats and tools by institutions to negotiate lower out-of-Court settlements. A landmark recent case has made room for significant potential changes in this area.

#### GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore

GLJ (a pseudonym) commenced proceedings against the Catholic Diocese of Lismore in the New South Wales Supreme Court for abuse that was perpetrated against her as a child. The Diocese applied for a permanent stay of those proceedings on several bases, including that the perpetrator had died prior to the complaint being brought. The stay was dismissed in the first instance on the basis that a fair trial did not need to be perfect, however, the Diocese appealed to the Court of Appeal, which granted the permanent stay as it considered the Diocese was "utterly in the dark" without the perpetrator being available to give evidence.

GLJ then applied for and was granted special leave to appeal to the High Court of Australia, essentially seeking to have the Court of Appeal's permanent stay set aside.

Ultimately, the High Court found that the Court of Appeal was incorrect to conclude that a fair trial of GLJ's claim would not be possible and allowed GLJ's appeal (on a 3:2 majority). The High Court found the removal of the limitation period that would have otherwise precluded GLJ from bringing her claim created a "new legal context". This new legal world meant, in summary, that the Diocese was not in an unfair position as a result of the death of the alleged perpetrator (amongst other matters).

#### Beyond GLJ

Gathering evidence about deceased perpetrators is usually not made more difficult by the perpetrator having died. This is because the defendant is usually an institution that was responsible for the perpetrator at the time of the alleged abuse and the institution holds evidence in respect to the deceased perpetrator. Of course, however, the more time that has elapsed since the alleged abuse occurred, the higher the chance of records going missing or being destroyed.

The Abuse Law landscape is evolving at a rapid pace, with new judgments being handed down by different Courts across Australia that reshape and refine the law. The High Court's decision in GLJ is a positive step forward for survivors of abuse, however, some advocates are calling on governments to go further with legislation that will minimise the opportunities in which permanent stays can be granted to institutions involved in claims of child sexual and physical abuse.

There are two further permanent stays currently on appeal before the High Court (Willmot v. The State of Queensland and RC v. The Salvation Army (Western Australia) Property Trust). The High Court's Bench has changed since GLJ was handed down and it remains to be seen what the new makeup of judges will decide in these further appeals.



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## Cosmetic Surgery Reforms

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In recent years, there have been many concerning reports of significant patient harm within the largely unregulated cosmetic surgery industry. In a previous edition of Social Work and the Law, we examined this issue. Increased media attention in this area, and some high profile cases, led to AHPRA and the Medical Board of Australia announcing a review in November 2021 into cosmetic surgery checks and balances. This followed growing concerns that the regulatory framework at that time was unsatisfactory and could not keep up with the exponential growth of the industry. In September 2022, Australian Health Ministers agreed to a number of urgent reforms, which have since been introduced, to ensure consumers receive quality care and are able to make informed decisions.

#### 1. Title protection

On 13 September 2023, legislation was passed to protect the title of 'surgeon' in Australia. Previously, medical practitioners were able to refer to themselves as a cosmetic surgeon without any surgical training. Now, medical practitioners can only use the title of 'surgeon' or 'cosmetic surgeon' if they have trained and obtained a specialist registration in surgery, obstetrics and gynaecology, or ophthalmology. Medical practitioners may offer surgical services, such as specialist GPs in rural and regional areas, but they can no longer use the title of surgeon. Penalties for inappropriately using the title of surgeon include a warning, followed by disciplinary action and even criminal prosecution, carrying a maximum penalty of \$60,000 and/or 3 years imprisonment. As a result of this legislative change, patients can better understand a medical practitioner's level of skills and qualifications when deciding who will perform their cosmetic surgery.

#### 2. Area of Practice endorsement

On 1 July 2023 an Area of Practice endorsement in cosmetic surgery was implemented, setting out the minimum training necessary to safely perform complex cosmetic procedures. The Health Practitioner Regulation National Law provides for the endorsement of registration for an area of practice. Medical practitioners can be endorsed for registration in the area of cosmetic surgery under section 15 if they:

- + Hold registration as a medical practitioner in Australia;
- + Provide evidence of having been awarded an approved qualification for endorsement for cosmetic surgery or equivalent;
- + Meet the Board's registration standard for recency of practice in cosmetic surgery;
- + Meet the Board's registration standard for professional indemnity insurance.

If a medical practitioner does not meet the standards, the Board can refuse their endorsement, refuse to renew their endorsement or impose conditions on their endorsement. It will be clear on the public register if a doctor is not endorsed for registration in cosmetic surgery, to help patients determine who is appropriately trained and qualified to perform their cosmetic surgery.

#### 3. Licensing standards

From 1 September 2023, there has been a new licensing framework which applies to every service in Australia where cosmetic surgery is performed. The National Safety and Quality Cosmetic Surgery Standards provide a framework for the implementation of safety and quality processes and systems in these facilities. The aim is to mitigate risk to patients by ensuring cosmetic surgery is performed in a facility that is licensed and required to meet national safety and quality standards.

There are seven standards with the desired patient outcomes as follows:

- 1. Clinical governance:** I am confident the Service is well run and that I will receive safe, high-quality clinical care.

2. **Partnering with consumers:** I am a partner in how services are delivered to me and my opinion is valued in designing and delivering services.
3. **Preventing and controlling infections:** My risk of getting or spreading infection is assessed and minimised.
4. **Medication safety:** My risks from adverse events involving medicines are assessed and minimised. I am supported to understand and make decisions about my medicines.
5. **Comprehensive care:** My clinical care is safe, of high-quality and is tailored to meet my needs and preferences.
6. **Communicating for safety:** The people involved in my care communicate with each other about my care, so I receive the clinical care I need.
7. **Recognising and responding to acute deterioration:** If my health deteriorates, I know I will receive the clinical care I need, in a timely way.

Accreditation will provide confidence to patients as to the safety and quality of the facility in which they are undergoing cosmetic surgery.

#### 4. Advertising guidelines

New cosmetic surgery advertising guidelines, implemented by the Medical Board of Australia, apply from 1 July 2023. These guidelines describe responsible practice by medical practitioners when advertising cosmetic surgery across all mediums including television, radio, newspapers, billboards and signage, websites and social media. Penalties for inappropriate advertising can include prosecution and disciplinary action.

Some examples of the new regulations include: that the medical practitioner must provide information regarding their qualifications, type of medical registration and registration number; can only refer to themselves as a specialist if they hold the relevant specialist registration; they must provide accurate, realistic and educative information about risks or potential risks of cosmetic surgery; and they must not use terminology, images or videos which trivialise cosmetic surgery, or minimise the risks or invasiveness of cosmetic surgery among a number of other important changes.

#### The Cases of Dr Leslie Blackstock

In March 2023 five cases were heard in the New South Wales District Court, regarding patients who had undergone cosmetic surgeries performed by Dr Leslie Blackstock between 2012 and 2017. Dr Blackstock was a registered medical practitioner with specialist registration as a general practitioner. He operated under the title of 'cosmetic surgeon' but had no formal surgical training.

The surgeries in question, which included breast augmentation surgeries, a breast implant replacement surgery and a labioplasty, were performed at Dr Blackstock's consulting rooms at a house in Penrith NSW. The surgeries were performed under sedation or twilight anaesthesia, as opposed to general anaesthetic, and the patients reported being aware of much of the surgery and being sat up and shown the results part way through the surgery. This was an unlicensed facility, without the appropriate surgical supports in place such as an anaesthetist. Medico-legal experts commented that during the surgeries there were significant breaches in the sterility of the surgical environment. The experts further opined that Dr Blackstock was not suitably qualified to carry out the surgeries, lacked the appropriate training and expertise, and his surgical technique was inadequate.

Default judgements were entered in favour of the patient in all cases, as Dr Blackstock failed to appear to defend the claims.<sup>5</sup>

#### Conclusion

These cases highlight the importance of the changes which have now come into effect. As a medical practitioner registered in general practice, without surgical training or qualifications, Dr Blackstock would no longer be able to use the title of 'cosmetic surgeon', nor would he be eligible for endorsement in the area of cosmetic surgery.

The facility in which he operated is in clear breach of the new National Safety and Quality Cosmetic Surgery Standards.

With greater transparency around the skills and qualifications of medical practitioners and the safety and quality of the facilities in which they operate, patients will be empowered to make well-informed decisions regarding their cosmetic surgery, in a way that Dr Blackstock's patients were not.

<sup>1</sup> Health Practitioner Regulation National Law Act 2009; Health Practitioner Regulation National Law (Surgeons) Amendment Act 2023 (Qld)

<sup>2</sup> Medical Board of Australia, 'Registration Standard: Endorsement of registration of registered medical practitioners for the approved area of cosmetic surgery', 1 July 2023.

<sup>3</sup> Health Practitioner Regulation National Law s15

<sup>4</sup> Australian Commission on Safety and Quality in Health Care. National Safety and Quality Cosmetic Surgery Standards. Sydney: ACSQHC; 2023

<sup>5</sup> *Hammond v Blackstock* [2023] NSWDC 51; *Clark v Blackstock* [2023] NSWDC 60; *Kelly v Blackstock* [2023] NSWDC 48; *Stevens v Blackstock* [2023] NSWDC 49; *Archer v Blackstock* [2023] NSWDC 50



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## How do I know if a client authority to release information is valid?

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In today's digital world, privacy and the protection of our personal information has become increasingly important, particularly in regard to medical information and the way in which this information is obtained. As a result, it has become crucial to understand the concepts of privacy and how integral it is to ensure we have valid third-party authorities before disclosing clinical documentation and information.

Privacy in law refers to the collection, storage, access and use of medical records and other health information. It is governed by both Federal and State laws:

- + **Federal Law** - Privacy Act 1988 (Cth), Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth) and Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth).
- + **ACT** - Information Privacy Act 2014 and ACT - Health Records (Privacy and Access) Act 1997 (ACT)
- + **NSW** - The Privacy and Personal Information Protection Act 1998 (PIPP Act) and NSW - The Health Records Information Privacy Act 2002 (HRIP Act)
- + **NT** - The Information Act 2002
- + **QLD** - The Information Privacy Act 2009 (Qld) (IP Act)
- + **TAS** - Personal Information Protection Act 2004
- + **VIC** - Health Records Act 2001 (Victoria), VIC - Privacy and Data Protection Act 2014 (Victoria) and VIC - Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2016 (Vic)

- + NB: Western Australia and South Australia do not have specific privacy legislation.

There are 13 Australian Privacy Principles (APPs), which are covered under five broad parts, which are as follows:

1. Consideration of personal information privacy;
2. Collection of personal information;
3. Dealing with personal information;
4. Integrity of personal information; and
5. Access to, and correction of, personal information

### Collection of Personal Information

In order to exercise best practice in the collection and release of personal information, an agency, entity or organisation may only solicit and collect personal information that is reasonably necessary for or directly related to one, or more of its functions or activities. In addition, collection of sensitive information may only occur if the individual consents to that sensitive information being collected, unless an exception applies.

Information collected must be collected from the individual concerned, unless it is unreasonable or impractical to do so. The individual must give consent voluntarily and have the capacity to understand and communicate this consent. There are exceptions to these requirements, which include:

- + Collecting sensitive information as required or authorised by law;
- + Collecting sensitive information where a permitted general situation exists;
- + Collecting sensitive information where a permitted health situation exists;
- + Collecting sensitive information for an enforcement related activity; and
- + Collection of sensitive information by a non-profit organisation, for example a religious organisation<sup>1</sup>.

### Use or Disclosure of Personal Information

An entity can only use or disclose personal information for the purpose for which it was collected, which is known as the primary purpose, or for a secondary purpose if an exception applies.

The term 'disclose' is not defined in the *Privacy Act 1988 (Cth)*. An APP entity discloses personal information where it makes it accessible to others outside the entity and releases the subsequent handling of the information from its control. It is imperative that disclosure of personal and medical information is done so in accordance with the APP's, as once information is disclosed the state of mind or intentions of the recipient does not affect the act of disclosure, it instead focuses on the act of the disclosing party.

### Third Party Authority – Release of Information Forms

A Release of Information form, or a Third-Party Authority, is routinely used to ensure that a client or patient has given their consent for information about them to be disclosed to another party. For any personal and medical information to be disclosed in accordance with the APPs, a third party authority must be *valid*. To ensure the validity of the document, it should always include the following:

- + The correct details of the individual's full name, address and date of birth (this personal information should be sighted rather than copied);
- + The identity of the person being asked to release sensitive health information is specified;
- + The details of the purpose for which the individual's sensitive medical information is to be disclosed;
- + It is contemporaneously dated by the individual at the time of signing; and
- + It has not been expressly revoked by the individual.

If any of the above circumstances change, the individual should sign a new authority and, if required, the details should be updated and confirmed. Likewise, if an old authority has been received, a new authority should be requested to ensure that the client or patient is aware and continues to consent to the disclosure of information being sought.

Using an Authority that is not valid amounts to an unauthorised disclosure of personal information and could potentially result in significant consequences. The most recent cases of data breaches and non-compliance with the APP's has been by well-known companies such as Medibank and Optus. Currently the Office of the Australian Information Commissioner (OAIC) is investigating the conduct of these companies and their practices in the collection, storage, access and use of personal information.

As Social Workers, you may collect and document a broad range of personal, and at times, sensitive information as part of your role. It is, therefore, important that the collection and documentation of clinical records is focused on the purpose of your contact with your client and that any disclosure of information to other parties is done in accordance with Commonwealth and State legislation which governs the Australian Privacy Principles.

<sup>1</sup> See Australian Privacy Principles Guidelines Chapter 3: APP 3 Collection of solicited personal information for further information.



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## Claims for Public Transport Accident Injuries

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In Australia, a person injured whilst travelling on public transport can lodge a claim for compensation. This includes injuries sustained in accidents that involve trains, trams, buses, taxis and even ferries. Many people may be unaware that if they are injured in a public transport accident, they may have similar entitlements as those injured in accidents involving private vehicles. The entitlements available to the injured person depend on the State or Territory they were injured in; and whether entitlements will be funded by a motor accident insurer or through Public Liability insurance. The focus of this article is on entitlements funded by a motor accident insurer.

### Victoria

In Victoria, a person injured on a bus, tram or train may be entitled to claim compensation from the Transport Accident Commission (the TAC). There are two elements to the TAC scheme, fault and no-fault, which provide an injured person with benefits and compensation.

Under the No-Fault element, the TAC can pay for the accident-related reasonable medical treatment, care and support expenses regardless of who is at fault for the accident. The TAC can also pay for Loss of Earnings benefits (LOE) and Loss of Earnings Capacity benefits (LOEC) if a person is partially or fully incapacitated to work. An injured person can claim impairment lump sum compensation if their injuries are assessed by independent medico-legal examiners at 10% or more Whole Person Impairment as a result of the accident.

Under the Fault element, when a person sustains a serious injury due to negligence on part of another motorist, a claim for damages and economic loss can be made. Damages are compensation for the pain and

suffering and loss of enjoyment of life as well as past and future loss of income.

#### ACT

Similar to Victoria, a person injured on public transport in the ACT can claim medical expenses and loss of income and an impairment lump sum compensation payment. The difference with the lump sum compensation is the threshold.

To be eligible for a lump sum, the permanent impairment threshold must be more than 5% Whole Person Impairment. A lump sum compensation payment is also available under the Motor Accident Injuries scheme for people who were injured by someone else's negligence in the accident and meet at least one threshold category: have a whole person impairment of at least 10 per cent; or is a child still receiving treatment and care benefits four years and six months after the accident; or is an adult still receiving income replacement benefits four years and six months after the accident and is assessed with a significant occupational impact.

#### NSW

Similar to Victoria, if you are injured on public transport in NSW a claim may be made for statutory benefits including medical expenses and loss of income regardless of fault for the first 52 weeks of injury. After 52 weeks, statutory benefits cease for those mostly at fault (greater than 61% contributorily negligent) and for those with a 'threshold injury' (previously known as minor injury). A threshold injury is a soft tissue injury or minor psychological or psychiatric injury – defined as a psychological or psychiatric injury that is not a recognised psychiatric illness.

A person may also claim damages provided they do not have a threshold injury and can prove someone else was at fault in the use or operation of a vehicle. Lump sum compensation can be claimed for pain and suffering (provided 'whole person impairment' is assessed at greater than 10%) and loss of income. Please note that Sydney's Ferry Services are a form of public transport and a claim for compensation for injuries sustained would be made via a Public Liability claim, although damages are then assessed under the Motor Vehicle Accident Legislation.

#### Northern Territory

The Northern Territory has a No-Fault Scheme. Therefore, if a person is injured on public transport in the Northern Territory, regardless of fault, they may claim medical expenses, loss of income if they are incapacitated to work as result of their injuries and a lump sum impairment compensation payment. A claim for compensation for pain and suffering is not available.

#### Queensland

If a person is injured on public transport in Queensland, claims for compensation can only be made to the Motor Accident Insurance Commission if they can prove that the accident was the fault of another party (completely or partly). The compensation benefits available includes medical expenses, rehabilitation, loss of past and future income and a damages compensation lump sum payment for pain and suffering.

Please note that Brisbane's City Cat and Ferry Services are forms of public transport, however, any claim for compensation for injuries sustained would be made via a Public Liability claim.

#### South Australia

South Australia also has a fault-based scheme where a claim for compensation benefits can only be made if the accident was wholly or partially the fault of another party. However, people who are seriously injured may be eligible for funding for treatment, care and support benefits through The Lifetime Support Scheme regardless of who was at fault for the accident. Legislation defines a motor vehicle as "a vehicle that is built to be propelled by a motor that forms part of the vehicle" accident injuries involving buses trams and trains would meet this definition.

#### Tasmania

Tasmania has a No-Fault Scheme. An injured person may claim medical expenses as well as loss of income if they are incapacitated to

work due to their accident injuries. They will not, however, be able to claim any 'quality of life payment' lump sum compensation. A claim for damages can be pursued in some circumstances if an injury was caused, or contributed to, by the fault of another driver.

#### Western Australia

If a person is injured on a bus in Western Australia, a claim for benefits can only be made to the Insurance Commission of Western Australia if the accident was the fault of another party, such as the bus driver or another registered driver. The benefits that are available include compensation for the cost of medical treatment, loss of income and a compensation lump sum payment for pain and suffering. Injuries sustained by persons on WA trains or ferries must be pursued through a Public Liability insurer. There are no trams in WA.

<sup>1</sup> Motor Accident Injuries Act 2019 (ACT)

<sup>2</sup> Motor Accident Injuries Act 2017 (NSW)

<sup>3</sup> Motor Accidents (Compensation) Act 1979 (NT)

<sup>4</sup> Motor Accident Insurance Act 1994 (QLD)

<sup>5</sup> Motor Vehicles Act 1959 (SA)

<sup>6</sup> Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013 (SA)

<sup>7</sup> Motor Accidents (Liabilities and Compensation) Act 1973 (TAS)

<sup>8</sup> Transport Accident Act 1986 (VIC)

<sup>9</sup> Motor Vehicle (Catastrophic Injuries) Act 2016 (WA)



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## The Refusal of Medical Treatment by a Minor

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Having the ability to provide full and informed consent for medical treatment is essential for upholding bodily autonomy, integrity and achieving optimal health outcomes. However, health professionals may encounter situations where they are required to make an assessment as to whether a minor has the capacity to consent to or refuse medical treatment. An interesting recent case explores the factors that a court will consider in determining a minor's capacity to refuse treatment.

#### Gillick Competency

In Australia, typically a minor may legally provide consent to medical treatment or intervention on their own behalf, if a medical professional assesses that the minor is a 'mature minor'. The common law position relating to a minor's capacity to consent to medical treatment was determined in the case of Gillick<sup>1</sup> in the House of Lords in England. The decision in Gillick determined that parental authority over a minor diminishes as the minor becomes increasingly mature.<sup>2</sup> This decision was upheld in the High Court of Australia in *Marion's Case*,<sup>3</sup> where it was stated that in determining whether the minor has the capacity to consent to medical treatment the minor must have "sufficient understanding and intelligence to enable him or her to understand fully what is proposed".<sup>4</sup> If a medical professional arrives at such a conclusion, the minor is referred to as being 'Gillick competent' or a 'mature minor' and can provide their own consent without the need for consent from a parent or guardian.

If a minor is not considered to be 'Gillick competent', the minor does not have the legal capacity to consent to medical intervention. In these circumstances, the responsibility for consent to medical treatment generally lays with the minor's parents or guardians.

It is prudent to note that South Australia and New South Wales have legislation providing some guidance in relation to a minor's consent and a parent or guardian's prior consent to medical intervention. Medical practitioners have used this in their defence when a claim of assault or battery is made when the consent to treatment was provided by a minor. Other states rely on the common law to determine these issues.<sup>5</sup>

#### Can a Gillick Competent Minor Refuse All Medical Treatment?

Whilst we know that a Gillick Competent minor is able to give consent to medical treatment, The question arises as to whether a minor is within their rights to refuse all medical treatment if they are considered 'Gillick competent'. This particular question was considered in the very recent case of *H v AC*,<sup>6</sup> in the Supreme Court of New South Wales in February this year.

#### *H v AC* [2024] NSWSC 40

AC had been diagnosed with bone cancer at the age of 16 and had undergone chemotherapy treatment. Following this treatment, a scan was performed which demonstrated that the size of AC's tumour had significantly decreased. AC and her family were devout Christians and following receipt of the scan results, AC now aged 17, believed that she had been cured by God, subsequently, refusing further medical treatment. AC's treating doctor opined that, without further treatment, relapse of the cancer was inevitable, and this opinion was uncontested.<sup>7</sup>

The Court considered AC to be 'Gillick competent',<sup>8</sup> however, after giving consideration to factors such as the sanctity of life, the minor's religious beliefs and bodily integrity, the effects of the proposed ongoing treatment of the cancer and her quality of life, the Court held that that the treatment was in AC's best interests, authorising and directing that the recommended treatment be administered.<sup>9</sup>

The Court considered that religious beliefs should not be discounted or disregarded, even if such beliefs are not held by the broader community. However, to give weight to a religious belief does not mean it is to be treated as determinative.<sup>10</sup>

The best interests of the minor are considered to be paramount, and the significance, consequences and outcomes of the proposed treatment are relevant factors to be considered in the context of whether a minor has the capacity to refuse treatment.<sup>11</sup> Further, much weight is also given to whether the minor's life is at risk or there is a real danger the minor will be left with severe permanent injuries if left untreated.<sup>12</sup>

#### Conclusion

In any case involving a minor and medical treatment, the courts may exercise their *parens patriae* jurisdiction which allows a Court to make orders for the protection of children and people who are otherwise determined not to be able to look after themselves. This jurisdiction allows a Court to override a 'Gillick competent' minor's refusal for medical treatment. Unlike minors, adults with capacity continue to have the right to refuse treatment, other than palliative care, regardless of the outcome.



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Shauna has over 10 years of experience in the legal industry, beginning her career as a legal assistant/paralegal before being admitted as a lawyer in 2021. Shauna has experience in Medical Negligence Law, Motor Vehicle Accident, Public Liability and Work Injury claims, prosecuted in the District Court of NSW, the Supreme Court of NSW and the NSW Court of Appeal. Shauna is a member of the Law Society of New South Wales.

Please note: this article was written in 2009.

## Do you know a good lawyer?

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"Do you know a good lawyer?" Why does this question have social workers running to the ethical hills to hide? What is wrong with this question? Why is it perfectly acceptable to ask "Do you know a good doctor/medical specialist/private practice psychologist or social worker?" Or to provide an answer to this question if your patient/client asks you. What's the difference? All provide a service and all expect to be and do get paid for their service. Why are lawyers considered the pariahs in our society?

These are the questions I have been asking myself since commencing work in May 2009 at Slater & Gordon Lawyers as the Manager of Social Work Services. All the lawyers who work here have a genuine concern for the welfare of their clients. They see it as their role and, in fact their duty, to ensure that people are fully informed about their rights and entitlements under the numerous legal and insurance schemes in each State and to assist them to obtain their maximum entitlements under these schemes.

Which patient doesn't experience acute financial distress when they are suddenly injured or ill? Many of these people experience chronic financial problems as it can take weeks, months or years to recover physically and psychologically or never recover at all. Patients and their families can be faced with accumulating debt; financial inability to obtain equipment, treatment or care that they need; or, homelessness as they can no longer meet their mortgage repayments or their housing no longer meets their physical needs, however, they cannot afford to pay for alternative accommodation.

Why then is it that many social workers appear to consider it 'unethical' to link a person in with a lawyer who is a specialist in their area of law: motor vehicle accident schemes; WorkCover schemes; medical negligence; public liability; superannuation; or, asbestos claims? While the lawyers of my firm respect my profession's ethical concerns, they don't understand them. They wonder: 'Why wouldn't social workers want their patients to obtain access to the best possible legal services?' The longer I am working here the harder it is for me to explain these ethical concerns as they are making less and less sense to me.

After working for 21 years in hospitals in Melbourne I thought I had become a bit of an 'expert' on the TAC (Transport Accident Commission – the Victorian scheme that covers people injured in

<sup>1</sup> Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

<sup>2</sup> Ibid.

<sup>3</sup> Secretary, Department of Health and Community Services v JWB ('Marion's Case') (1992) 106 ALR 385, 395.

<sup>4</sup> Motor Accident Insurance Act 1994 (QLD)

<sup>5</sup> Ibid.

<sup>6</sup> H v AC [2024] NSWSC 40.

<sup>7</sup> Bill Madden, 'Consent: Treatment refusal by 17 year old', (Blog Post, 5 February 2024) <https://billmaddens.wordpress.com/2024/02/05/consent-treatment-refusal-by-17-year-old/>.

<sup>8</sup> H v AC [2024] NSWSC 40, 228.

<sup>9</sup> Ibid, 231.

<sup>10</sup> Ibid, 91 and 92.

<sup>11</sup> Pip Trowse, Refusal of Medical Treatment – A Child's Prerogative? (2010) Vol 10 No 2 Queensland University of Technology Law & Justice, 208.

<sup>12</sup> Ibid.

motor vehicle accidents). I was shocked to find out how much more I didn't know and have learnt just in the couple of months I have been here. I have been reviewing ex-patients in my head and worrying about all of the entitlements they may have missed out on because they did not want to see a lawyer. I know we cannot force patients to seek legal advice, however, if social workers are better informed about why patients should seek appropriate legal advice and engage a lawyer with specialist knowledge, social workers can then educate their patients on why it is in their best interests to do so.

I believe part of my role at Slater & Gordon is to raise social workers' awareness of this issue. I have been attending social work meetings to discuss my new position and the services I can provide. I have also been discussing the importance of identifying legal issues as part of a psychosocial assessment and providing patients with correct information to make informed choices to access legal assistance. I have, therefore, been encouraging the social workers to access the free education sessions our firm's lawyers can provide on a range of different legal areas to assist this process.

I have had very positive responses from social workers and everyone seems very excited about my job. Not just excited for me but for the social work profession as well. Social Workers are feeling very encouraged that the profession is getting respect and recognition from a law firm. I am being described as a 'pioneer' by some of them, which is rather daunting. If this position is successful, however, it will create new opportunities for employment of other social workers nationwide.

The other part of my role is to provide a direct social work service to the clients of the firm. The firm is committed to providing a more comprehensive service to its clients at no additional cost. This is the reason they employed a social worker. I have been focussed on educating the lawyers about social work so that they can make appropriate client referrals to me. There are obviously limits to my role as, at present, I am providing a service mainly to clients in Victoria, even though Slater & Gordon is a national organisation. I anticipate that I can provide assessment and either service information provision or referral to appropriate organisations and short-term counselling. The referrals I have received so far fit with this model. Unexpectedly, I have also been able to provide support to some clients and their families going to court. I attended with the intention to merely observe the process for my own learning, however, for those that were highly anxious was able to sit with them, talk through their fears, distract them and support them while lawyers were negotiating in other rooms. So far, I have visited one client at home, had telephone contact with a few others and provided resource and service information to some of the lawyers to pass on to their clients. Hospital social workers can also refer the firm's clients to me at the point of discharge from their organisation if there are outstanding issues to handover. As lawyers and social workers alike become cognisant with my role, I look forward to the expansion of direct service provision to clients.

One of the social workers I met with said 'Wow, lawyers with a heart!'. I can verify they do exist, at Slater & Gordon anyway.

## The Social Work Service Today

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Reading the article I wrote in 2009 was certainly a step back in time. It was truly daunting establishing a Social Work service in a law firm when it had never been done before. Thankfully the outcome has been highly successful for the service and the firm. Our team grew to three in 2011 and then to four in 2016 when we employed a social

worker in Queensland. The value of Social Work was readily recognised and respected as we assisted clients with their psychosocial issues of concern, alleviating legal team members who were not best placed to assist them.

The Social Work team provides free, primarily telephone-based assistance which means that issues such as disability, financial constraints or lack of transport do not create a barrier for clients to access our service regardless of their location in Australia. The team can assist with a broad range of issues through a variety of interventions. Since 2009 and to the end of March 2024, our team has assisted 4,650 clients either through direct contact or by providing clinical advice to our lawyers.

Through the regular analysis of our team statistics since 2011, we consistently find that the most common reason for referral continues to be financial distress. Our clients are living with not only permanent disability, chronic pain or a serious illness, but also the acute and chronic impact of a reduced weekly income.

In conjunction with this there are usually additional costs for treatment, support services, medication and travel because not even those who are covered by a scheme, such as workers' compensation, automatically gets everything funded. These issues are commonly interconnected with the other key reasons for referral: unstable housing and homelessness; emotional distress, grief and loss, mental health issues and suicide; and access to treatment, care, and support services. Of course, what the client experiences, ripples out to impact on family, other loved ones and friends.

In recent years, the term 'financial toxicity' has commonly been used in relation to people with cancer. It refers to the combined impact of indirect costs and direct out-of-pocket costs and changes in the person's financial circumstances. Speaking to hundreds of Slater and Gordon clients over the years, I have come to realise the term financial toxicity, unfortunately, applies equally to all people who experience serious injury and illness. In conjunction with this, over recent years, we have seen that financial and housing community resources are less able to respond as the needs of the general population has dramatically increased. Bulk billing GP and psychologist options have become rare for our clients to access. Of course, a lump sum payment can bring some financial relief at the resolution of the claim for an individual, but our team has a part to play until then.

Despite the limitations, our team continues to make a difference in many clients' lives. We have all experienced the difference one phone call can make with a client, whether it be providing a safe space where they feel truly heard, advocating on their behalf to insurers and service providers or preventing a client from suicide on a particular day. We can assist clients anywhere along the continuum of their claim and may have multiple contacts with them during that time. Ensuring our service remained free was critical to ensure there was no barrier to access our assistance as the clients referred did not have ready assistance from social workers elsewhere.

Our role extends beyond the individual clinical work we provide. Through the provision of education and training and consultation we continue to enhance the understanding of our lawyers and support staff about the emotional and social impact of serious injury, illness and death. This in turn contributes to improved client care across the organisation. We have also partnered with our lawyers over the years to shape broader policy debates and provide important advocacy for our clients on broader legislative reform issues. We value the opportunity to provide a Social Work perspective within the legal setting to enhance the work our firm does to address systemic disadvantage both on an individual and broader level. This reflects the goal for our team's practice to improve client outcomes through the integration of social work and the law. We recognise systemic disadvantage and apply a social justice framework within the sociolegal setting.

Over the fifteen years I have gained an enhanced understanding of the interface between law and social work and how it is critical for the two professions to work in partnership. We cannot escape the law, legislation underpins all of our social work practice, no matter what field you work in. It also underpins the issues our clients bring to us. I did not fully appreciate this while working in the health sector and hence educating social workers to demystify the law and break down

barriers to its access has never stopped being a passion of mine and for the rest of the team. We have provided a bridge for the Social Work community, demystifying the law through the provision of our highly regarded free education seminars, our e-publication Social Work and the Law and by providing an access point for their enquiries.

Accessing correct legal entitlements through the compensation process allows a person to obtain treatment and assistance they need to support their recovery. Providing social work support to clients through sociolegal collaboration assists to mitigate poverty and social marginalisation by linking people back into their communities and working towards increased financial stability during the legal process. It also serves to protect against the current and future hardships that may arise as a result of an injured person's changed circumstances.

Although it has been pleasing to see that social workers employed in not-for-profit legal settings is now commonplace, a Social Work service in a law firm remains an uncommon concept in Australia. We are an example of how collaboration between lawyers and social workers can facilitate better outcomes for our clients from both a legal and psycho-social perspective. I would like to thank Slater and Gordon for its pioneering and innovative decision to establish a Social Work Service and for its unwavering support and commitment to client care through continuing to provide this free service to its clients. I would also like to thank Alexis, Christine, Catherine, Lorraine and Maggie for contributing to the many years of success of our service and I look forward to seeing the service continue to thrive into the future.



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*Olga commenced her social work career in 1987 working in acute and rehabilitation hospital settings in Melbourne for 21 years prior to commencing at Slater and Gordon Lawyers in 2009 to establish the social work service. Her clinical work focusses on addressing the long term emotional and social impact of serious injury and illness in the compensation context. In conjunction with leading the Social Work team, Olga coordinates the highly regarded Slater and Gordon Legal Education Program for Social Workers in Victoria and Western Australia and oversees the team's national publication 'Social Work and the Law'. Olga contributed a chapter for the book 'Practical and Political Approaches to Recontextualising Social Work' focused on the establishment of the social work service, the model and reasons for its success. This was published in 2021.*

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