

STEP AUSTRALIA *NEWSLETTER*

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A MESSAGE FROM THE STEP AUSTRALIA CHAIR

Welcome to this edition of the quarterly *STEP Australia Newsletter*. I would like to start by complimenting and offering my thanks to the Newsletter Committee for their efforts in collating this publication. Your tireless work speaks for itself and is greatly appreciated.

What a busy few months STEP has had in Australia. Our first ever National Incapacity Conference was an exceptional success. The feedback has been totally amazing and a credit to all involved. The event attracted delegates and speakers from across Australia and abroad and was a fantastic networking and learning event. A huge thank you to the organising committee, presenters and everyone who gave their time and expertise in delivering such an amazing event. The success has unquestionably validated and built an amazing platform for the continuance of this biannual event. Make sure you note in your diaries the date for next year's STEP Australia National Trusts and Estates Conference, which will be held in Melbourne in early May 2024. Work is already well underway for what promises to be another sensational event.

A big congratulations again to the recipients of the inaugural STEP Australia Excellence Awards: Bryan Mitchell TEP, winner of the 2023 STEP Australia Masters, and Natalie Silvester TEP, winner of the 2023 STEP Australia Excellence Award. Both are truly exceptional and inspirational practitioners. This annual event will now coincide with the STEP Australia Conference and continue to recognise outstanding and leading TEPs across Australia. The quality of all nominations this year was exceptional, and I would encourage everyone to consider nominations for next year.

Finally, congratulations to our newly appointed STEP Australia Board members Angela Rae (Queensland) and Loreena Gillon TEP (Western Australia). Our thanks go to outgoing Board member Jeff Otto KC TEP for his contributions to the Board. It has been a pleasure working with him. ■



With best wishes,

Ian Raspin TEP
STEP Australia Chair



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Is there a place for trauma-informed legal practice in estate law?

KATIE CALDOW, PARTNER, SOUTHSIDE LEGAL

Trust and estate practitioners commonly service clients who are dealing with stressful and traumatic life experiences. These can include recent diagnosis of a terminal condition causing a need to 'get their affairs in order'; the sudden death of a loved one (which could include having witnessed a fatal accident or its aftermath); having previously suffered a traumatic event at the hands of a deceased testator; or having simply been exposed to one or more traumatic events over their lifetime.

Given this exposure to clients who have experienced trauma, this article introduces to STEP Australia members (to the extent they are not otherwise already informed) the issues of trauma and 'vicarious trauma' in legal practice. Presented here is the concept of becoming 'trauma informed' to allow for the delivery of 'trauma-informed legal practice' within members' roles and, more broadly, their organisations.

The topics of trauma, vicarious trauma and trauma-informed legal practice are multifactorial and it is not possible to offer a comprehensive discussion in this article. The intent is simply to raise an idea or start a conversation upon which members can build through further education and discussion. That education and discussion should focus on whether a trauma-informed approach to members' practices can positively impact their own experience and that of their clients in the delivery of legal services in this area.

It is posited that embracing trauma-informed legal practice would have such an impact.

UNDERSTANDING TRAUMA

Although there is no strict universal definition of trauma, for the purposes of this article, the Australian Institute of Health and Welfare proffers a helpful definition of trauma:¹

'Any event that involves exposure to actual or threatened death, serious injury, or sexual violence has the potential to be traumatic. The trauma experienced can be physical and/or mental and not everyone will respond in the same way... Research suggests that the most common traumatic events experienced by Australians [include]:'

- *Experiencing an unexpected death of a close loved one.*
- *Witnessing a person critically injured or killed, or finding a body.'*



Relevantly, the sudden death of a loved one (a recognised trauma)² is perhaps one of the most common life events precipitating the engagement of an estate practitioner.

There is also a distinction (albeit subtle) between trauma as an event and trauma as an experience in response to the event. An understanding of both concepts is integral to properly understanding trauma. As Randall and Haskell explain:

*'It is important to note that potentially trauma-inducing events are mediated by a range of factors, including a person's previous experiences, psychological makeup and capacities. This means that an event which may be traumatic to one person might not necessarily be so to another. Trauma is measured [sic] and assessed not only in relation to the severity and nature of the triggering event(s), but also, and perhaps most crucially, in relation to the person's perception and experience of these events.'*³

The varying subjective trauma experience of unexpectedly losing a loved one presents a helpful example of understanding how a common trauma event can manifest itself differently among individuals.

Grief is understood to be a normal human response, often an initially very intense (and at times overwhelming) experience, but one which usually decreases in intensity over time and does not significantly impair function in the long term. However, grief can progress to a (now) recognised psychiatric diagnosis. To that end, it is acknowledged that the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* recently included Prolonged Grief Disorder as an official diagnosis.⁴

Additionally, although not all estate matters will involve facts and circumstances relating to a traumatic event, there is a likelihood that any client has otherwise experienced trauma in their lifetime. This is supported by the Australian Productivity Commission's estimation (based on Australian Bureau of Statistics data) that 75 per cent of Australian adults have experienced a traumatic event at some point in their life.⁵

UNDERSTANDING VICARIOUS TRAUMA

Vicarious trauma also does not have a strict universal definition. It is considered to be '[s]ituationally inherent in

‘Given we can be dealing with people whose lives (and potentially behaviours) have been impacted by traumatic events it is imperative that we understand trauma ...’

exposure to traumatic material over time,⁶ distinct from burnout and has been described as:⁷

‘... a common, long-term response to working with traumatized populations, and as part of a continuum of helper reactions ranging from vicarious growth and resilience to vicarious traumatization and impairment.’

Lawyers are at-risk people when it comes to vicarious trauma. This is particularly so for lawyers practising in the areas of criminal, family and personal injury law. However, other practice areas, including estate law, are not immune from the risks and it is therefore important to be educated about vicarious trauma, the risks posed and signs to look out for (within yourself and others) that may be indicative of vicarious trauma.

It would be remiss to not also acknowledge the increasing legislative focus on the duties of employers to ensure a proactive approach to the management of psychosocial hazards in the workplace.⁸ Vicarious trauma is a psychosocial hazard.

TRAUMA-INFORMED LEGAL PRACTICE

A fundamental aspect of our role as trust and estate practitioners is the ability to effectively communicate with our clients. This includes the ability to understand and appropriately respond to client behaviours.

Given we can be dealing with people whose lives (and potentially behaviours) have been impacted by traumatic events it is imperative that we understand trauma and approach our role as legal practitioners in a way that is trauma informed.

That begs the question: what is trauma-informed legal practice?

‘Becoming trauma informed entails becoming more astutely aware of the ways in which people who are traumatized have their life trajectories shaped by the experience and its effects, and developing policies and practices which reflect this understanding.’⁹

According to a 2016 publication by Blue Knot Foundation, there are several principles underpinning successful trauma-informed legal practice, which can be distilled as follows:¹⁰

‘...’

- basic knowledge of the impacts of stress on the brain and body;
- consistent emphasis on safety, trustworthiness, choice, collaboration and empowerment (emphasis on doing “with” rather than “for” or “to”);
- consistent emphasis on the way in which a service is provided (i.e. the “how” as much as the “what”; the context in which services are delivered, not just what the service is);
- consistent emphasis on what may have happened to a client, rather than what is “wrong” with client/s;
- recognition that “difficult” behaviour may be the product of coping mechanisms and attempted self-protection in light of prior adverse experiences. If not seen through the lens of trauma, client behaviour is often and inappropriately labelled as pathological, when [it] should instead be viewed as adaptations a person has had to make in order to cope with life’s circumstances;
- a strengths-based approach which acknowledges people’s skills, notwithstanding the enormity and effects of overwhelming experiences with which they may be struggling (recognizing and promoting resilience is also a fundamental component of effective trauma-informed work).¹

CONCLUSION

Given the exposure of STEP members to client traumas, practitioners are likely to benefit from engaging in trauma-informed legal practice. This will, by necessity, ensure a greater understanding of trauma and a more intentional approach to interactions with clients to improve their legal experience and ability to fully engage with it. Ideally, trauma-informed legal practice will also improve interactions among all members of the profession and those working with us in our organisations to help better identify and mitigate the risks of vicarious trauma and improve overall practitioner wellbeing. ■

¹ ‘Mental Health Services in Australia: Stress and trauma’, Australian Institute of Health and Welfare (online, 7 July 2022), bit.ly/3pYxyEE

² S. Katz and D. Haldar, ‘The Pedagogy of Trauma-Informed Lawyering’, (2016) 22 Clinical I Rev 359 at 361, citing S. D. Solomon and J. R. T. Davidson, ‘Trauma: Prevalence, impairment, service use, and cost’, 58 J. Clinical Psychiatry (Suppl. 9) 5–11, 7 (1997)

³ M. Randall and L. Haskell, ‘Trauma-Informed Approaches to Law: Why restorative justice must understand trauma and psychological coping’, *The Dalhousie Law Journal* (fall 2013), p.507

⁴ ‘The DSM-5 Adds a New Diagnosis: Prolonged grief disorder’, *Advisory Board* (web daily briefing, 23 March 2022 updated 18 March 2023), bit.ly/3NWPesw

⁵ Australian Productivity Commission, *Inquiry Report – The State of Australia’s Mental Health*, Vol 1, No 95, 30 June 2020, p.124, bit.ly/43yTXGD

⁶ L. A. Pearlman and J. Carangi, ‘Living and Working Self-Reflectively to Address Vicarious Trauma’, in Courtois & Ford, p.205 as cited in C. Kezelman, P. Stavropoulos et al, *Trauma and the Law: Applying trauma-informed practice to legal and judicial contexts* (2016), p.16

⁷ Above, note 2, at 368, citing M. R. Eeves, ‘What is Vicarious Trauma?’, in G. Quintangong & M. R. Eeves, eds., *Vicarious Trauma and Disaster Mental Health: Understanding risks and promoting resilience*, 9, 10 (2015)

⁸ See, e.g., ss.55A–55D which were inserted into the *Work Health and Safety Regulation 2011* (Qld) and the *Code of Practice* that came into effect on 1 April 2023, *Managing the Risk of Psychosocial Hazards at Work Code of Practice 2022*

⁹ Above, note 3, p.501

¹⁰ C. Kezelman and P. Stavropoulos, *Trauma and the Law: Applying trauma-informed practice to legal and judicial contexts* (Blue Knot Foundation, 2016), p.5

Advocating for the incapacitated client

KAREN WILLIAMS, PRINCIPAL, AGED AND DISABILITY ADVOCACY AUSTRALIA

For many, this title raises some ethical conundrums. However, it is an area of professional service that is becoming increasingly necessary to explore, due to some key challenges and opportunities facing us in Australia. These challenges include:

- an ageing population;
- increased rates of dementia, with it becoming the second-highest cause of burden of disease among people over 65;
- upcoming changes to the *Aged Care Act 1997*, with an opportunity to make it more rights focused;
- increased understanding of elder abuse;
- potential changes to legislation around harmonising enduring power of attorney (EPA) laws; and
- reforms to the primary health sector in response to declining numbers of general practitioners.

QUESTIONED CAPACITY

More people may be regarded as lacking capacity than those who actually do lack capacity. Many people may only have mild cognitive impairment related to a natural ageing process. This may be sometimes combined with other short-term impacts on their capacity, such as infections (that may cause delirium), depression or grief.

People's communication or speech may be impacted by conditions such as a stroke, and their ability to understand or comprehend may not be impacted, although to a casual observer it may appear so. Many people who experience some of these situations may start to have their ability to make their own decisions questioned.

They may find themselves subject to further assessment or, more egregiously, be considered to be lacking in capacity, such that their attorney and/or guardian begins to manage their affairs prematurely.

As STEP members, you may have developed long-term relationships with your older clients and become aware of any current long- or short-term



health conditions. You are also more likely to know about other trusted professionals who are involved, and whether your client has recorded their views and preferences in various documents.

Knowing your client's financial preferences is also key for the purpose of continuing investments and any gifting (or non-gifting preferences). This might be information that you as a financial advisor or accountant hold. Discussing with your client how you might share this key information with your client's subsequent

decision makers may be a key piece of advocacy in advancing your client's interests in the longer term. It may also be key information for a court or tribunal to have in determining various matters, including possible compensation for elder financial abuse.

LEGAL ETHICAL DUTIES

Although, as a lawyer, you may find yourself at the point of questioning the capacity of your client to provide you with competent instructions, it is also important to consider other ethical duties:

- duty to the court; and
- duty to act in the best interests of your client.

The importance of these duties will vary depending on the individual case and circumstances. The level of complexity of the legal task will also impact the threshold level of capacity required to provide instructions. In examining whether a potential client can provide instructions it is necessary not

to set the bar 'too high' nor be overly paternalistic.¹

For example, the Law Council of Australia, in its recently published guide on responding to elder financial abuse,² shows how it is necessary to consider how to assist clients when there are concerns about their capacity and the voluntariness of the transaction or advice that they are seeking. A proactive attitude is still required to take

'Assessment of capacity can bring about unintended negative consequences for clients that range from coercive treatments to removal of a person from their home ...'

steps to leave your client in a less vulnerable situation.

Alternatively, the role of the lawyer in Canada and the US is more confidently stated. Although they may note that the person has displayed some indications that capacity may be an issue, the lawyer is encouraged to 'maintain normal client lawyer relationships'.

That is, there is no encouragement here to just stop engagement with a client whose capacity may only merely be questioned (either on a temporary or permanent basis).³

This Canadian and American approach moves away from the constant need to assess capacity for various decisions. Assessment of capacity can bring about unintended negative consequences for clients that range from coercive treatments to removal of a person from their home into institutional care in a residential aged-care facility.⁴ Increasingly, assessing capacity when it is necessary is done in a functional way, depending on the actual decision to be made and not determined by a diagnosis alone.⁵

Although this is not an entire solution to responding to the legal needs of clients, both New South Wales and Queensland provide for separate representation of 'subject persons' in their respective jurisdictions. These roles are defined in legislation (and in the case of New South Wales, in practice directions as well).

In Queensland, along with ensuring that the tribunal is aware of the client's will and preference, the representative is to also have regard to safeguarding the client's interests and promoting any opportunities that are available. In a ten-year review of over 200 published New South Wales Civil and Administrative Tribunal (NCAT) cases in the Guardianship Division, 15 per cent of subject persons were represented by a separate representative and 5 per cent were represented by their own lawyer. In more than 50 per cent of matters, people who were the subject person of an NCAT application attended without representation.

BEST INTERESTS

Within many of the guardianship regimes across Australia (apart from the human rights-based jurisdictions of the Australian Capital Territory, Queensland and Victoria), decision makers and the community more broadly are encouraged to rely on the 'best interests' principle. This principle had previously been found wanting by Brennan J in his dissenting judgment in *Marion's Case*. This dissenting judgement notes that those who assert 'best interests' are often doing so based on their own value judgements, which are neither disclosed nor scrutinised. In raising a decision as being in the 'best interests' of the particular person, it also serves to close down debate and analysis. Inherent in the 'best interests' methodology is that in the risk of raising a

'This client group will only grow over time and as professionals we need to adapt the way we provide our services'

different option or pathway it is to then be viewed as providing perhaps second- or third-best options, which is another way of stifling discussion and debate. This also prevents the person concerned from being considered in a conversation about themselves and what they might want or hope for.

SUPPORTED DECISION MAKING

Australia is a signatory to the UN *Convention on the Rights of Persons with Disabilities* (CRPD). Unlike our aged and disability care systems, disability as a concept is not constrained by age. Article 12 of the CRPD states persons with disabilities have the right to equal recognition of their legal capacity as persons before the law on the same basis as others. In exercising their legal capacity, persons with a disability have the right to the support that they require.⁶ Essentially, the CRPD calls for inclusion and participation in decisions that impact the lives of people with a disability, rather than such individuals being excluded by a substitute decision-making process that can occur without consultation with the person impacted by the decision.

THE WAY FORWARD

Working with clients whose capacity may be questioned, regained or fluctuating is ethically demanding. This client group will only grow over time and as professionals we need to adapt the way we provide our services. We need to appreciate and document the views and preferences of our clients and a brief rationale (from their perspective). We need to understand whom they view as their supporters and provide advice as to their suitability for any roles they may undertake as formal decision makers, including noting any possible conflicts of interest. We can also facilitate communication among their supporters as directed by our clients. Knowing our client's preferences well will assist us to advocate for them, whether it's sending their latest Advance Health Directive to the local hospital, or their latest EPA to their bank, or outlining their financial preferences to the separate representative at a tribunal hearing. ■

¹ *Dalle-Molle by his next friend Public Trustee v Manos & Anor*, No. SCCIV-02-874 [2004] SASC 102, para.90 ² bit.ly/43gQ9cE

³ See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (2022), pp.27–28; and American Bar Association, *Model Rules of Professional Conduct* (2023), Rule 1.14(a) ⁴ N. B. Kane, A. R. Keene, G. S. Owen, S. Y. H. Kim (2021), 'Applying Decision-making Capacity Criteria in Practice: A content analysis of court judgments', *PLoS ONE* 16(2): e0246521, bit.ly/3rggY3E ⁵ *In the matter of ICO* [2023] QMHC 1 – discussion of this approach at paras.105–106 ⁶ bit.ly/3pBNhJF

NEWS

STEP Australia National Incapacity Conference 2023

On 4–6 June 2023, STEP Australia held its first National Incapacity Conference, which was praised for delivering interesting and thought-provoking papers on everything capacity related.

STEP Australia would like to thank our presenters and conference organising committee, who provided delegates with an unparalleled opportunity to broaden their knowledge on mental capacity.

A further thank you goes to our conference sponsors, Equity Trustees (Gold and Dinner) and BNR Partners Pty Ltd (Coffee Cart). Thank you also to our trade exhibitors: The College of Law Australia, Morgans Financial Ltd, Australian Unity Trustees and TrustQuay.

A special acknowledgement is extended to the following Chairs who attended the conference: Rodney Luker TEP, STEP worldwide Deputy Chair; Yue-En Chong TEP, STEP Mental Capacity Global SIG Chair; Ian Raspin TEP, Chair of STEP Australia; and Alison Gilbert TEP, Chair of STEP New Zealand.

Pictured above (L–R): Ian Raspin TEP, Chair of STEP Australia; Jennifer Sheean TEP, Inns of Court; The Hon Chief Justice Bowskill, Chief Justice of the Supreme Court of Queensland; The Hon Justice Julie Ward, President, Court of Appeal, Supreme Court of New South Wales; Mark Streeter TEP, StreeterLaw; Bryan Mitchell TEP, Mitchells Solicitors



STEP Australia Excellence Awards 2023

The winners of the first annual STEP Australia Excellence Awards were announced at the STEP Australia National Incapacity Conference Gala Dinner on 5 June 2023.

Congratulations to Bryan Mitchell TEP of Mitchells Solicitors on being awarded the STEP Australia Masters Award 2023; and Natalie Silvester TEP of Legally Gifted Lawyers on being awarded the STEP Australia Excellence Award 2023.

Both award-winners are graduates of The College of Law Australia – Master of Laws (Applied Law) majoring in Wills and Estates.

The STEP Australia Excellence Awards recognise exceptional and outstanding Australian TEPs. Find out more by visiting www.stepaustralia.com/step-excellence-award or by scanning the QR code on the right.

Thank you to our STEP Australia National Incapacity Conference Gala Dinner sponsor, Equity Trustees.

Pictured above (L–R): Ian Raspin TEP, Chair of STEP Australia; Natalie Silvester TEP, winner of the STEP Australia Excellence Award 2023; Bryan Mitchell TEP, winner of the STEP Australia Masters Award 2023



EVENTS AND RESOURCES

STEP AUSTRALIA WEBSITE

Keep up-to-date with news, events and national initiatives by visiting the STEP Australia website.

You can find out more about STEP's advocacy work, upcoming events and conferences, industry news, the latest webinars on demand and national newsletters. You can also access our members' technical resource library and see what's happening with our international connections.



www.stepaustralia.com

WEB LINKS AND CONTACTS



View the full events programme at www.stepaustralia.com/events

We welcome all STEP members to attend events hosted by other branches.

For more information on the STEP Australia events calendar, or to register your interest to be a speaker at STEP Australia events, contact Dior Locke at dior.locke@step.org

Can't make an event? Many speakers provide a paper for members. Get in contact to find out more.

SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed about upcoming worldwide STEP events at www.step.org/events

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