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paying for **baby**
court values an **unexpected ‘blessing’**

- **kids and negligence**
- should lawyers be sued?
- **alternatives** for drug offenders
- shared parenting: **a 50:50 split?**
- children in detention
- **all about** computer crime
- and much more
Welcome

Welcome to the final edition of The Verdict for 2003. Our first year of publication has proven to be a roaring success. We now have more than 200 high schools, TAFEs and private colleges in Queensland — including hundreds of teachers and thousands of students — keeping up to date with legal issues online through The Verdict and the Queensland Law Society website.

Our feature article, ‘Paying for Baby – Cattanach v Melchior’, discusses a case that is on the cutting edge of the law. Kylie Burns, a solicitor of the Supreme Court of Queensland and lecturer at the School of Law, Griffith University, shows us that “the law is not just a sterile thing devoid of moral choices”. Sometimes the courts, ultimately judges, have to make hard decisions about moral questions and society’s values. This ‘novel’ case will go some way toward helping you understand that judges often have a ‘difficult tightrope to walk’ when faced with the responsibility of answering the ‘deeper’ questions.

Congratulations to Hayden Whitaker, from Browns Plains State High School, who was the winner of our Legal Lingo Labyrinth find-a-word competition. And to all other competition entrants, what a great effort, keep up the good work! We hope that you enjoy your prizes and will look forward to more challenging competitions and prizes in The Verdict next year.

In our new ‘Students making news’ section, Sam Polson from Brisbane Boys College (BBC) tells us about the college’s inaugural “Unlocking the Law” day. Sam says that the day was a great success and that it really helped BBC students, giving them direction, valuable information and links to research for an independent study which has now been successfully completed by all of the Legal Studies students.

Students, did you win a mooting competition? Did you attend a student legal conference? Did you win a legal essay competition? We want to hear about it! We invite all students to submit articles to the ‘Students making news’ section of The Verdict. Let other Queensland Legal Studies students know what you are doing in your school.

The QLS would like to take this opportunity to say congratulations to all of the graduating year 12s in Queensland. The hard work is over (for now). Best of luck for the future in whatever endeavours you choose. Just remember, if you have chosen to enter the legal profession, you can contact the QLS for all of your professional needs.

To all of our readers, have a safe and joyful Christmas season and enjoy your holidays. We look forward to bringing you volumes of quality, up-to-date legal information in 2004.

Enjoy your ‘law zone’ – The Verdict is your link to current law and legal issues.

Yvette Holmes
Schools & Community Education Officer
Queensland Law Society

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Novel new cases in negligence often require courts to make hard decisions about moral questions and society’s values. They often require courts to work out a monetary value for things which have no intrinsic financial worth. These cases are on the cutting edge of the law and they challenge the courts, showing us that ‘the law’ is not just a sterile thing devoid of moral choices. Often, they also show us that judges are human beings who bring their own religious, ethical and moral values to their decision-making.

Cattanach v Melchior, a recent decision of the High Court of Australia, is such a case. The case concerned whether a doctor was required to pay damages for the costs of raising a child born after a failed sterilisation of his mother. Deeper questions arose in the case about the value of human life, the role of parents, the effect of litigation on children, whether judges should reflect their own religious and moral values in their decision-making, and whether society can afford to provide compensation in such cases.

A child is born
In 1992, Dr Cattanach performed a tubal ligation sterilisation procedure in a Queensland public hospital on Mrs Melchior, who had decided she did not want any more children.

Tubal ligation involves placing clips on each fallopian tube so that the ova cannot meet sperm and result in the conception of a child. Mrs Melchior told Dr Cattanach that she believed that her right ovary and fallopian tube had been removed when she was 15 during an appendectomy. As it turned out, the right fallopian tube was still present, but Dr Cattanach clipped only the left fallopian tube. In 1997, at the age of 44, Mrs Melchior gave birth to a son, Jordan.

In the Queensland Supreme Court, and the Queensland Court of Appeal, Dr Cattanach (and the state of Queensland, which operated the relevant hospital) was found to have been negligent. He was not found liable for performing the sterilisation surgery negligently. However he was found negligent for failing to advise Mrs Melchior that she should take steps to check that she no longer had a functioning right fallopian tube, and that if she was wrong about that there was a risk she could conceive a child. Mrs Melchior recovered damages for her own loss relating to the pregnancy and birth, including pain and suffering during and following the pregnancy, and loss of earnings. Mr Melchior recovered a small amount for loss of consortium as a result of his wife’s pregnancy and childbirth. Loss of consortium is a claim made by a spouse for the loss of domestic services, companionship and sexual relationship suffered when their husband or wife is injured. Neither of these awards for damages were the subject of the High Court Appeal.

A claim for Jordan in the High Court
The most contentious aspect of the case was the claim by the Melchiors for the costs of raising Jordan. The Melchiors’ claim was very modest and resulted in an award to them in the Queensland courts of $105,249.33. This represented the costs of raising Jordan to the age of 18 and included the costs of food, clothing, medical and pharmaceutical needs, child care, travel to and from school, birthday and Christmas presents, and entertainment.

The High Court allowed Dr Cattanach and the state of Queensland special leave to appeal this issue only. They argued that Australian law should not allow a right to recover damages for a child’s upbringing. Subsidiary to this, they argued that, if the law recognised...
The majority judges also said that damages for the costs of upbringing could not be discounted by a sum that represented the joys and benefits of a child.

The minority judges relied very much on ‘policy’ arguments against recovery. Policy arguments were said to lead to a conclusion that the claim for upbringing was repellant to the principles underlying the moral and ethical fibre of Australian law and ought not to be allowed.

Gleeson CJ, also in the minority, relied on a more principled basis to reject the claim. He characterised the claim for Jordan’s upbringing costs as a claim for pure economic loss. Pure economic loss claims are claims for loss of money only, where there has been no personal injury or property damage suffered by the plaintiff leading to the loss. Australian courts are very reluctant to allow recovery for this type of claim and only allow them in very specific and controlled circumstances.

In addition, he considered that allowing damages in this area would be inconsistent with other existing principles of law which recognised the ‘family as the natural and fundamental group unit of society’.

‘Every child is a blessing’ and other moral arguments
A number of policy or moral arguments have traditionally been advanced to reject claims which represent the costs of raising a child born following a failed sterilisation. Many of these were supported by the minority judges and rejected by the majority judges. They included:

- Every child is a blessing. This includes arguments that human life is sacred and cannot be valued in money, and that the preservation of family relationships is crucial to the well-being of society. It is argued that to allow claims such as that in Cattanach treats children as though they were commodities, and attempts to place a value upon them as if they were a consumer item such as a DVD player. This argument is often associated with deep religious and Christian values.

This argument was rejected by the majority judges, who distinguished the life of the child from the loss being claimed (the costs associated with raising the child), cautioned against the courts relying on religious values in determining the law, and noted that judges often have to decide on a monetary value for losses that are difficult to place a cash value on (for example, the pain and suffering of people who have been injured).

- Children will be psychologically damaged and family relationships harmed if a child becomes aware that its parents have brought a legal action claiming that the child was unwanted and a ‘loss’. Accordingly, such actions should not be allowed. This argument was rejected by the majority judges as being purely speculative and without evidence, and on the basis that in modern times it is difficult to accept that children would not realise that such cases were brought purely for financial compensation for negligent conduct.

- There should be a distinction between the birth of a healthy child and a disabled child. Damages may be allowed for the extra costs of raising a disabled child. The majority judges rejected this argument on the basis that it was an arbitrary and outdated distinction, and rested on outmoded beliefs about the value of the life of the able-bodied versus the life of the disabled.
Should judges rely on their own moral and social values?

Several months prior to his appointment to the High Court in February 2003, Justice Heydon gave a speech criticising judges who sought to undermine the rule of law by, amongst other things, relying on their perceptions of social and community values. He said:

“When judges detect particular community values, whether in the Australian community or the ‘international community’, as supporting their reasoning, they may sometimes become confused between the values which they think the community actually holds and the values which they think the community should hold … This suggests that the soignee, fastidious, civilised, cultured and cultivated patricians of the progressive judiciary – our new philosopher-kings and enlightened despots – are in truth applying the values which they hold.” 3

Somewhat ironically, in one of his first decisions as a High Court judge, in Cattanach v Melchior 4 Justice Heydon relied extensively in his decision on his analysis of community values. This included values in relation to the intrinsic worth of human life, the preservation of the family unit, the encouragement of secrecy that children are unplanned to avoid psychological damage to them and the discouragement of parents bringing unseemly actions disparaging the worth of their children and exaggerating their loss.

The question of whether judges do, can or should refer to social and community values (sometimes called ‘policy’ concerns) in determining the law is an ongoing debate in the law. Many argue that this is not a judge’s role and that it is the role of judges to refer only to general principles based on legal values. 4 5 However, in novel and new cases where there is no settled legal precedent or legal rule, judges will always have a choice in their decision.

How that choice is made will often, if not always, come down to a question of a judge’s preference for one set of competing social or policy values over another. As Justice Kirby argued in Cattanach, “the common law does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in society”. 5

As Justice Kirby notes, despite the High Court in previous cases cautioning against reliance on policy in determining negligence cases, all members of the High Court in Cattanach discuss policy issues as relevant to determining what legal rule should be adopted. 7

However, as he cautions, it is not consistent with the rule of law for judges to “adopt arbitrary departures from basic doctrine. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or ‘moral’ assessments concealed in an inarticulate premise dressed up, and described as legal principle or policy”. 8

In other words, judges should be forthright in identifying those policy matters or values on which they rely as opposed to covertly hiding those values by calling them a legal principle or a legal policy.

Conclusion

Cattanach v Melchior clearly demonstrates that many of the cases that come before the High Court are difficult and novel cases, where there is no clear or compelling legal rule or precedent. These cases invite, and even require, judges to balance competing social and moral values.

This is a difficult tightrope to walk – judges are required not to apply their own values but to make some assessment of what enduring community values require. Often, judges are required to make this assessment with little evidence of what those values are, and where there are clearly competing values. It is, however, important that judges are explicit in their reasoning about how they determine and apply such values. The values are at least then open to be understood and debated as opposed to hidden in the language of legal principles and legal rules.

Postscript

Following media coverage, lobbying by the medical and insurance professions, and political and community debate of the High Court’s decision in Cattanach v Melchior, the Queensland Attorney-General announced that Queensland would legislate to disallow claims for the costs of raising healthy children born after negligent failed sterilisation. The amendment, the Justice and Other Legislation (Miscellaneous Provisions) Bill 2003, was introduced into the Queensland Parliament on August 21.

notes

2. This was discovered when expert witnesses for both the plaintiff and the defendant attended the caesarean birth of Mrs Melchior’s child, Jordan.
5. Cattanach v Melchior, at <106>.
7. Cattanach v Melchior, at <121-122>.
8. Cattanach v Melchior, at <137>.
contributory negligence
and infants

by Anthony Wright

Anthony Wright, LLB, BBus (Accounting) began working with McInnes Wilson Lawyers in January 2000 and was admitted as a solicitor of the Supreme Court of Queensland and the High Court of Australia in 2002. Anthony works within the area of insurance litigation, specifically dealing with claims involving CTP insurance, general insurance, public liability, product liability and all matters of personal injury liability. He has also worked in general litigation, including construction disputes within building contracts, defamation and class actions. He is completing a Master of Laws in Commercial Law at QUT. Anthony also has a keen interest in sports law, the management of professional sports people and entertainers, and contractual issues in sports and entertainment agreements.

To what degree are infants responsible for their actions? It has generally been held in various jurisdictions throughout Australia and also the High Court that a minor’s duty of care for themselves is nil until about five years of age.

So there is usually no reduction applicable for contributory negligence concerning personal injury claims when the plaintiff is yet to attain the age of five. The most important factor in assessing the appropriate reduction, if any, for contributory negligence matters involving minors is the child’s proportionate state of understanding and knowledge.

A similar process will also apply to claims involving persons without capacity. Here we look at decisions from various jurisdictions and the comparative reductions for contributory negligence dependent upon the infant’s age and understanding.

Review of the common law

While it is generally accepted that a minor who is aged five or below will not be held contributory negligent, there are a number of old cases from England which have held that minors who are aged between three and four have had their claims reduced for their own negligence.

In contrast, decisions from Australian courts have been reluctant to hold minors guilty of contributory negligence until at least the age of five. The youngest children in Australian courts found guilty of contributory negligence have been in Joseph v Swallow & Anell Pty Ltd (1933) 49 CLR 578, where a child aged five years and nine months was held guilty of contributory negligence for running across the street in front of an oncoming vehicle.

Also, in Bullock v Miller (1987) 5 MVR 55, a child aged five and a half had his damages reduced by 10 percent for riding his bike onto the road without paying due care and attention. And in Griffiths v Doolan [1959] Qd R 304, a child of five and a half ran in front a truck and was held 10 percent responsible.

In comparison to Joseph, Bullock and Griffiths (supra), the decision of Beasley v Marshall (1977) 17 SASR 456 found that a child aged four years eight months was not negligent when he attempted to cross the roadway and was struck by a vehicle.

McHale v Watson is the primary authority for contributory negligence and minors in Australian courts. In McHale v Watson, the proceedings arose from an incident in which the defendant, who was aged 12 years and two months, threw a metal object which struck the plaintiff in the eye, causing severe injury.

The plaintiff sued for trespass and negligence. Factually, it was held by the trial judge that the defendant did not intentionally throw the object directly at the plaintiff, rather it was thrown at a nearby pole which caused the object to ricochet at a tangent into the plaintiff’s eye. It was held by the High Court, affirming the decision of Windeyer J in the Victorian Supreme Court, that the defendant was not negligent. McTeirnan ACJ said at paragraph 16 that:

“It was right for the trial judge to take into account Barry’s (the defendant’s) age in considering whether he did foresee or ought to have foreseen that the so-called dart might not stick in the post but be deflected from it towards Susan (the plaintiff) who was in the area of danger in the event of such occurrence.”

The High Court also said that a child is only expected to conform to the standard appropriate for children of the same age, intelligence and experience. If that child is unlikely or unable to understand the likely consequences of their actions, negligence cannot be attributed to that child at all.

Furthermore, McTeirnan ACJ, held the
view that in cases dealing with children they are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience. 6

Practically, the application of McHale v Watson is quite broad. The difficulty arises dependent on the facts of each individual case – does the particular child have the age, experience and capacity to appreciate and understand the consequences of their actions? The following decisions aim to shed more light on certain cases and the degree each minor was held somewhat liable for their actions.

In Goode v Thompson & Anor [2001] QSC 287 Ambrose J held a 12-year-old boy 20 percent responsible for the severe injuries he sustained when he failed to keep a proper lookout while crossing the road in front of the defendant’s motor vehicle. Ambrose J followed the previous decision of the NSW Court of Appeal in Gunning v Fellows (1997) 25 MVR 97. In that case, another 12-year-old boy sped down a driveway on his pushbike and out on to the roadway, colliding with the defendant’s vehicle. The child was held 25 percent responsible by way of contributory negligence by the trial judge at first instance. On appeal, this apportionment was upheld. 8

As stated above, the factual circumstances of each individual case will dictate the apportionment of liability between the minor plaintiff and the defendant. In Mye v Peters [1967] 2 NSW 578, a minor aged five years and eight months was held not to be contributory negligent when he was hit by a vehicle after he had alighted from a school bus and darted across the road. However, in Rowes Bus Service Pty Ltd Cowan; Sufong v Cowan (1999) 29 MVR 430, a 17-year-old schoolgirl who moved out from behind a parked bus and was struck by an oncoming car had her damages reduced by 40 percent for contributory negligence.

The NSW Supreme Court decision in Madigan v Hughes & Ors [1999] NSWSC 183 focused on the negligence attributable to a young boy who was 11 years and eight months old when a traffic accident occurred. The infant plaintiff sustained severe injuries when he rode his bike across a t-intersection and was struck by an oncoming vehicle. The child had failed to give way to his right and had contravened the usual traffic laws. Abadee J stated that: “The standard of care when an infant or child is involved in an accident is an objective one to be measured in accordance with the principles laid down by the High Court in McHale v Watson and…” 9

Important factors were relevant to establish the degree of responsibility on the plaintiff’s part. It was held by the court that the infant plaintiff was in fact quite an experienced rider, his family...
were all regular and competent bike riders, he had specific knowledge of the road rules, he knew of bicycle safety and that his younger brother, with whom the plaintiff was riding with at the time, ‘yelled out’ at him to stop before proceeding through the intersection at a speed of about 20 km/h without giving way. The plaintiff had also, only three weeks before the accident, completed a bike safety course at school. Taking these factors into consideration, Abadee J held that the infant plaintiff was guilty of contributory negligence and damages were accordingly reduced by 40 percent.

Also in the NSW Supreme Court, via Dunford J, in Ryan v Pledge [2001] NSWSC 259, an infant plaintiff was apportioned with 10 percent of the negligence following a motor vehicle accident. The plaintiff, who was aged nine and a half, had stepped out into the path of the defendant’s vehicle from a nature strip dividing a highway and service road. Dunford J made an important point: “The plaintiff was 9½ years old…and should have been aware of the need to be careful when, and to look both ways before, crossing a road, and indeed she had been taught to do so.”

**Has the defendant breached the duty of care owed to the infant?**

Further to the decisions referred to above, there have been instances when the plaintiff has failed to establish that the defendant has breached their duty of care. It does not follow that if an infant is struck by a motor vehicle, the infant will automatically recover from the insurer of the defendant with some reduction for contributory negligence.

It is imperative, firstly, to consider whether the defendant has breached any duty of care owed to the minor plaintiff at all.

The High Court in [Derrick v Cheung](#) dismissed the plaintiff’s claim in its entirety on the basis that the defendant was driving at a speed which was safe, in the circumstances, and that the accident was an unavoidable one. The plaintiff, who was aged 21 months at the time of the accident, suddenly emerged from between two parked vehicles. The defendant was travelling at 10 to 15 km/h less than the speed limit and, as soon as the defendant noticed the infant on the roadway, she braked. The car skidded into the plaintiff despite the defendant’s attempts to avoid the collision. The High Court found that, even if the defendant had been travelling at a slightly lesser speed, the collision was an unavoidable one. The defendant had not breached any duty of care it owed to the infant plaintiff.

The decision of [Derrick v Cheung](#) (supra) is not dissimilar to that in the Tasmanian Supreme Court finding in [Johnson v Johnson](#) (unreported, Underwood J, June 8, 1997). In that case a seven and a half year old boy was struck by a motorist when he rode his bike onto a roadway. The minor was held to be a ‘skilled’ rider. The crucial finding was that the defendant had not driven in an unsafe and negligent manner in the circumstances. He was driving below the speed limit when the child sped out onto the road on his bike.

**Conclusion**

It can be seen from the various common law decisions above that, dependent upon the factual matrix surrounding each particular case, the finding of contributory negligence of an infant takes into account the understanding and knowledge expected of an infant of the same age. Other factors to also consider, particularly in motor vehicle cases, is the child’s previous interaction with road rules and the depth of the child’s knowledge. It is not implicit that the knowledge of one child is the same as another child of the same age. Contributing factors will also be the child’s education, family background and general knowledge.

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**Notes**

2. supra No 1 at para 12 McTiernan ACJ; and American Restatement of the Law of Tort para 283.
3. In [Cass v Edinburgh & District Tramways Co Ltd](#) 1909 SC 1068 a boy of three years and eight months was struck by a tram car and held to be guilty of contributory negligence.
4. supra No 1.
6. supra No 1 at para 7 McTiernan ACJ.
7. see para 28 at page 9.
8. Beasley JA at 100.
10. supra No 9 at para 90.
11. see para 48 of the judgment.
12. [2001] HCA 48. 13. see para 4 of the judgment; the infant plaintiff’s movement out onto the road was a ‘darting one’.
14. see para 5 of the judgment.
feathering their own nests

should lawyers be sued?

by Winnie Ma

Have you ever watched TV shows such as Ally McBeal, The Practice, Law & Order, CSI, or even Judge Judy? What about movies such as Philadelphia, The Firm, Devil’s Advocate, Red China and Primal Fear?

Most people have seen lawyers arguing in courts – that is, acting as an advocate or performing advocacy work. For many people, this seems to be the most challenging and rewarding aspect of being a lawyer. But what happens if the lawyer stuffs up and the client loses the case as a result? Can the client sue the lawyer for bad performance in court?

Advocates’ immunity

For more than two centuries, the short answer has been ‘no’. Lawyers have enjoyed immunity from suit – that is, immunity from litigation for professional negligence. Lawyers are immune from liability in negligence for their conduct in court and certain conduct out of court that is connected with the court work.

However, in July 2000 the highest court in England (the House of Lords) removed advocates’ immunity in Hall v Simons (Arthur JS Hall v Simons [2000] WLR 543). Will the High Court of Australia do the same in the future? Hopefully you can start crystal-gazing after reading this article.

Overview of the issues

1 Reasons for advocates’ immunity – why do we have it?
2 Scope of advocates’ immunity – who and what does it protect?
3 The continuing debate on advocates’ immunity – should we keep it or remove it?

Before we start, we need to answer some preliminary questions.

Why should we learn about advocates’ immunity?

Whether or not we want to study law or become lawyers, we should all know something about advocates’ immunity.

• As the potential clients, we should know our rights so that we don’t let our lawyers rip us off.
• As conscientious citizens, we should be interested in maintaining the integrity and quality of our legal system.
• The law on advocates’ immunity may soon change in Australia. So why don’t you show off by leading the debate?

What does the word ‘negligence’ mean?

The ‘tort of negligence’ means, if you owe someone a duty to use reasonable skill and care, and you fail to do so, then you will be liable for the loss or damage suffered by that person as a result of your negligence.

In our context, lawyers may be negligent in giving the wrong advice, raising the wrong arguments in court, or otherwise not doing their job properly. Without advocates’ immunity, these lawyers can be sued by their clients in negligence.

But who does the immunity protect – barristers, solicitors, or both?

How do barristers and solicitors differ?

‘Lawyers’ is the generic term covering barristers and solicitors. In Queensland, we have a ‘divided profession’. This means that the legal profession is divided functionally, with separate admission requirements, separate records, and separate codes of conduct.

Barristers have been touted as the ‘gladiators of the court room’. They
present their clients’ cases in court, although they usually deal with their clients through their instructing solicitors. Barristers can also write opinions on any legal matter.

Solicitors, on the other hand, interview and advise their clients. They gather evidence and prepare briefs for their barristers. However, they can also appear in courts to present certain cases. In this sense, solicitors also act as ‘advocates’. Therefore, advocates’ immunity also protects solicitors to the extent of their advocacy work.

How do civil proceedings and criminal proceedings differ?

The table below summarises the main differences between these types of proceedings.

In *Hall v Simons*, all judges in the House of Lords decided to remove advocates’ immunity in relation to civil proceedings. However, only four out of the seven judges were in favour of removing the immunity in relation to criminal proceedings.

The rise and fall of the immunity

- Back in 1860, the immunity was unrestricted.¹
- However, since the 1930s, there have been a series of negligence cases extending liabilities to professionals.² These cases queried why lawyers, as compared to other professions, were the only privileged group immune from litigation for negligence.
- In 1967, an English case called *Rondel v Worsley*³ tested the scope of the immunity.
- Twenty years later, the High Court of Australia confirmed and adopted the English approach in *Giannarelli v Wraith*.⁴ The immunity was held to cover both work done inside the courtroom, as well as work done outside the courtroom which is intimately connected with the court work.

• However, in 2000, the English House of Lords in *Hall v Simons* decided that the immunity should go away.

Arguments for the immunity

Most of the reasons for the immunity are based on public policy.

1 Cab-rank principle

According to Lord Denning (who is one of the most famous and respected judges in England):

“A barrister cannot pick or choose his clients… Provided that he is paid a proper fee… he must accept the brief and do all he honourably can on behalf of his client.”⁵

2 Witness analogy

Advocates’ immunity is consistent with the immunities enjoyed by other participants in the court process such as witnesses and judges.

3 Divided loyalty

Lawyers owe a dual duty – to their clients and to the court. However, their duty to the court is paramount in order to ensure the proper administration of justice. Again in Lord Denning’s words:

“A barrister owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth… He must produce all the relevant authorities even those that are against him.”⁶

4 Re-litigation of collateral proceedings

It is contrary to public interest for the courts to re-try cases which have already been decided by another court. People should use the appeal process instead of suing their lawyers.

5 Other reasons

In the past, the dignity of the Bar, difficulty of advocacy, and the assumption that barristers cannot sue for their fees have also been used to justify advocates’ immunity.

Arguments against the immunity

Changes in social, economic and professional circumstances demand reconsidering the justifications for the immunity.

The cab-rank principle has been rejected because, in practice, this principle doesn’t require barristers to undertake work which they wouldn’t otherwise accept. In any event, this principle can’t justify depriving all clients of a remedy for negligence.

The witness analogy doesn’t apply because lawyers differ from witnesses. For instance, lawyers are the only people involved in the court process who have undertaken a duty of care to their clients.

With respect to divided loyalty, *Hall v Simons* decided that lawyers shouldn’t be unique among professionals. Comparison was made with doctors, who often engage in activities requiring delicate judgment and divided loyalty.

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<table>
<thead>
<tr>
<th>Criminal</th>
<th>Civil</th>
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<tr>
<td>Terminology</td>
<td>The accused is ‘prosecuted’, ‘convicted’ and ‘punished’ for his/her crime.</td>
</tr>
<tr>
<td>Standard of proof</td>
<td>‘Beyond reasonable doubt’</td>
</tr>
<tr>
<td>Consequences</td>
<td>Imprisonment etc</td>
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Thus the question should be, whether removing the immunity would undermine lawyers’ duty to the court. If not, then the immunity shouldn’t stay.

The law already has rules for preventing re-litigation or collateral challenge. In any event, floodgate litigation after abolishing the immunity appears unlikely in light of the English and American experiences.

Furthermore, there are benefits from abolishing the immunity. First, justice and fairness – it will end an exception to the general rule that there should be a remedy for a wrong. Second, lawyers’ exposure to incompetence may improve the standard of legal services and thereby strengthen the legal profession. Third, the removal of immunity may enhance public confidence in the legal system. This is because immunity creates the impression that the law allows lawyers to feather their own nests. According to Justice Wilson in Giannarelli v Wraith:

“Barristers with the connivance of the judges have built for themselves an ivory tower and have lived in it ever since at the expense of their clients.”

Lawyers aren’t that popular after all.

**Scope of the immunity**

The above debate shows that we need to weigh up the risks and benefits of removing the immunity. It also explains why the immunity does not (and cannot) cover everything that lawyers do. So what does the immunity cover?

- It covers ‘in-court work’ – that is, participation in court proceedings. Examples include the opening and closing speeches, examination and cross-examination of witnesses.
- It also covers ‘out-of-court work’ – that is, work which is ‘intimately connected’ with in-court work, for example, the drafting of court documents, selection of witnesses and parties, gathering of evidence, and choice of causes of action and defences.

Since advocacy work is often done inside the court, it remains controversial as to how much and what type of work done outside the court is covered by the immunity. Some judges don’t like the ‘intimate connection’ test and may strike out the ‘out-of-court work’ altogether. For instance, Justice Kirby has said:

“I would confine the scope of the immunity… in respect of in-court conduct during proceedings before a court… The ‘intimate connection’ test is impermissibly vague… it extends immunity to situations where it is clearly as unjust as it is unjustifiable.”

**Where is Australia heading?**

Apart from England, the United States and Canada have also abolished or limited advocates’ immunity. The High Court of Australia doesn’t have to follow Hall v Simons, but it may choose to do so.

Boland v Yates Property Corporations Pty Ltd (1999) 167 ALR 575 is the latest High Court case which examined whether immunity should continue without deciding the question. Although this case predates Hall v Simons, Justice Kirby foreshadowed most of the arguments against the immunity raised by the House of Lords. In addition, he also pondered whether the immunity should be confined to criminal proceedings.

Several Australian cases after Hall v Simons also confirm that, until the High Court reconsider issues, the Australian law will remain the same as that laid down in Giannarelli v Wraith.

For the moment, we can at least be confident that the Australian courts will not expand advocate’s immunity any further. The immunity, if any, must exist for the benefit of the public and not for the lawyers. In light of the following warning by Sir Gerard Brennan (the former High Court Chief Justice) in Giannarelli v Wraith, lawyers will no longer be able to feather their own nests under the guise of advocates’ immunity – assuming they have even been doing so.

“If lawyers generally were to fail to adhere to the standards of advocacy which the courts expect and on which they rely, there would be no justification for the immunity. That hasn’t happened. Hopefully it never will.”

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**Notes**

1. Swinfen v Lord Chensford (1860) 157 ER 1436.
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just treatment?

diverting drug-related offenders from the CJS

by Melissa Bull

In recent decades rates of imprisonment have increased throughout the industrialised world, and one of the characteristics of this increase is the large proportion of people whose imprisonment is linked to their use of illicit drugs.

While the nature of the relationship between drug use and crime remains a topic of hot debate,\(^1\) it is apparent that punitive responses alone have been unsuccessful in reducing illegal drug use and associated crime. Moreover, they impact in negative ways on the lives of offenders who have drug problems.

With significant numbers of drug-related crimes and disillusionment with traditional criminal justice approaches to drug-using offenders, there has been renewed interest in Australia, and elsewhere in the world, in programs that divert drug-dependent offenders from the criminal justice system into education and treatment programs. This trend is based on the view that these types of intervention are more effective than punishment in achieving behavioural change.\(^2\)

In response to this problem, the Council of Australian Governments (COAG) introduced a new strategy in April 1999, a key component of which was early intervention and prevention through a nationally consistent diversion initiative.\(^3\) The strategy, known as the Illicit Drug Diversion Initiative, was to provide a basis for implementation of the diversion approach that would facilitate national action and cooperation while providing states with the flexibility to respond to local priorities and conditions.\(^4\)

Since the announcement of the national framework, states have implemented a range of diversionary programs to suit their local priorities and conditions. So despite COAG’s desire for consistency, diversionary programs available in this country differ significantly across jurisdictions.

A recent national evaluation found that, while the programs implemented under this initiative were consistent with the principles outlined in the national diversion framework, they varied considerably in regard to:

- whether they are police-based or court-based programs
- their eligibility criteria
- the range of illicit substances covered
- whether police have discretion to divert
- the nature and range of interventions offered
- the referral processes and mechanisms
- the penalties for non-compliance.\(^5\)

Diversion programs in Queensland

In Queensland, three types of diversionary programs are available: the Police Diversion Program, the Illicit Drugs Court Diversion Program and a trial drug treatment court program.

In the Police Diversion Program, people who admit to committing a “minor drugs offence”, as defined in legislation, a key component of which was early intervention and prevention through a nationally consistent diversion initiative.\(^3\) The strategy, known as the Illicit Drug Diversion Initiative, was to provide a basis for implementation of the diversion approach that would facilitate national action and cooperation while providing states with the flexibility to respond to local priorities and conditions.\(^4\)

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In the Police Diversion Program, people who admit to committing a “minor drugs offence”, as defined in legislation, who have no history of violence and who have not previously been offered diversion, can be directed to attend a one to two-hour assessment and education session with an accredited provider. If the person accepts the offer of diversion, they are not charged with the drug offence. If they do not attend the assessment and education session, a charge for contravening the direction of a police officer may be raised against them.

The Illicit Drugs Court Diversion Program is aimed at diverting all eligible offenders who appear in the Brisbane Magistrates and Brisbane Children’s
Court charged with possession of a small amount of an illicit drug for personal use. Offenders are directed by the court to attend a standardised assessment and education session at an authorised service provider.

Diverted offenders who are identified as dependent on an illicit drug are also offered referral to an authorised provider of outpatient treatment programs. The Court Diversion Program operates under the legislative frameworks described in the Penalties and Sentences Act 1992 (QLD) and the Juvenile Justice Act 1992 (QLD).

A trial drug treatment court program is also available in some areas of the state. It was established under the Drug Rehabilitation (Court Diversion) Act 2000 (QLD). Intensive Drug Rehabilitation Orders (IDROs) are issued to eligible offenders who are:

- aged 17 or over
- charged with offences relevant to the program
- free of any outstanding charges for disqualifying offences, such as offences involving sexual or other types of physical violence
- not presently serving a prison term
- drug-dependent, and able to prove that dependency influenced commission of the offence
- likely to be imprisoned for the offences
- willing to plead guilty to the offences
- suitable for intensive drug rehabilitation.

An IDRO involves taking part in a designated treatment rehabilitation program. Breach of conditions of an order will result in sanctioning and/or termination of the IDRO whereby the offender is sentenced for the original offence/s. Initially pilot courts were established at the Beenleigh, Ipswich and Southport Magistrates Courts. In November, 2002, the trial was expanded to Cairns and Townsville Magistrates Courts.

**Equity and access**

The literature reviewing programs that divert drug-related offenders from the criminal justice system reports relatively consistent findings in relation to the strengths and weaknesses of these types of intervention. In summary, offenders are able to reduce their illicit drug use and offending behaviour while engaged in a program. These programs have other positive effects for both offenders and the community. It is apparent, however, that some groups (white men around 30) fare better than others.

Notable groups who do not appear to respond well to diversion – do not accept/follow up on assessment, or are not retained in treatment – include: women, young people, people from particular cultural/ethnic backgrounds, indigenous people, and those with mental health problems. This is not surprising; traditionally these groups have not been well managed in either the criminal justice or the alcohol and other drug treatment sectors.

While there is some speculation as to why programs fail to successfully engage these groups, the diversion literature offers few suggestions as to how these groups might be served better. A brief overview of the literature described the following trends.

**Women**

Green et al note that women are more likely than men to experience circumstances that interfere with their ability to successfully navigate the drug treatment process. Standard interventions have been criticised as male-oriented. Barriers that women face in relation to accessing treatment include: childcare responsibilities, poverty, stigma and inconsistency between women’s gender roles and drug use.

Research has found that women entering treatment appear to have less social support and more family responsibilities than men. Women were also more likely to face employment problems, family issues and social and psychiatric difficulties. In general, authors recommend that specialised gender-specific programs are needed to address the needs of women, and often these needs include the needs of their families.

**Young people**

Young offenders have consistently been identified as being at high risk of failure in diversion programs. This research is focused on drug courts. Unlike older offenders, young people are removed from drug court programs for not showing up for treatment or meetings, rather than drug use relapse.

Cooper et al argue that this is because cognitively young people think differently than adults, they have limited coping skills, and may have re-occurring mental disorders which may not become clear until they are well into treatment or when the use of drugs has stopped.

Young people need to be motivated to change — they need to recognise that positive developments will occur in their lives when they do not use drugs; they have not yet developed a view of the future and punishment doesn’t work well as a motivator.

**People from diverse cultural backgrounds**

In many jurisdictions, the proportion of cultural and ethnic minorities in drug court programs exceeds their percentage in the population. Finn suggests that limited success with cultural and minority groups in treatment programs may be a result of tension between clients and staff arising in relation to language difficulties and different or conflicting cultural norms.

In response to this problem, researchers note the importance of multilingual staffing and cultural sensitivity — often in conjunction with sensitivity to other client characteristics requiring specialist attention.

**Indigenous people**

While indigenous people often experience problems similar to those faced by people from diverse cultural backgrounds, described above, a number of authors have suggested that particular issues arise for these people as a result of a history of colonisation and associated patterns of dependency.
People with mental health problems
Research conducted in the United States, United Kingdom and Australia has found that the odds of having a substance misuse disorder are significantly higher amongst psychiatric patients than the general population, and likewise the odds ratio of having a psychiatric disorder is significantly higher amongst patients with substance misuse disorders.17
Weave et al argue that patients experiencing both mental health and drug problems have complex needs, and highlight the significance of interagency collaboration and training for staff so they will be equipped to manage such cases.18

Conclusion
There are currently diversion programs for drug offenders being run in every state in this country for cannabis and other drug offences. These programs operate at both the police and non-police (that is, between charging and jailing) levels.
Diversion programs in Australia range from well-developed and documented schemes supported by legislation through to informal local arrangements between police, alcohol and drug workers and the courts. Offenders targeted by these programs include: those facing use and possession charges; those whose use has led to offences while intoxicated, and those who have committed offences in order to support their drug-taking.
Research shows, however, that these programs have not been able to engage all offenders. Women, young people, people from diverse ethnic and cultural backgrounds, indigenous people and those experiencing mental illness tend not to access or be retained in treatment. As program retention is positively correlated with reductions in drug use and drug-related crime, the development of effective programs must address the specific needs of these groups.

Notes
4 ibid
15 M. Brady, 1996, ibid.
17 M. Brady, 1996, ibid.
young people & the law

the law for young people by age

YFS Youth Legal Service

Youth & Family Service (YFS) was established in 1983 essentially servicing juvenile justice and youth homelessness needs in Logan City. This article is the second in a series of articles on young people and the law by the YFS Youth Legal Service.

Important

This page is most relevant to young people who live in or visit Queensland.

This information was correct as of June 2003, BUT laws change all the time and you should always check with a solicitor first. Check the YFS website to see if this information is current.

Disclaimer

Information contained in this publication should not be regarded as a substitute for professional advice and no responsibility is accepted for any errors or omissions or any loss or damage resulting from reliance on this. Please see a solicitor first.

More information

If you want more information on these and other laws, talk to a solicitor or try these web sites.

www.yfs.org.au/legal
www.yac.net.au
www.legalaid.qld.gov.au
www.hreoic.gov.au
www.consumer.qld.gov.au

Solicitors

The solicitor’s role is to do the best job for their client. They should also respect the wishes of the young person. Check these out for FREE legal help.

Community Legal Centres offer free legal assistance where available. To find out your closest legal service, you can phone:

Logan Youth Legal Service
3208 8199
Aboriginal & Torres Strait Islander Legal Service
1800 012 25
Youth Advocacy Centre
3857 1155
Legal Aid Office
1300 651 188
Youth Legal Advocate
1300 651 188
Aboriginal & Torres Strait Islander
1300 650 143
Private solicitors
Some solicitors can apply for Legal Aid and this may be free.

Smoking

It is an offence to sell cigarettes to someone under 18. If you are over 18, it is an offence to give a cigarette to someone who is under 18. It will not be an offence for a parent or guardian to give their children cigarettes. If the police or a health service employee watch you buy cigarettes, they can ask you for your name, age and address. It is an offence not to give your correct details.

Alcohol

If you are under 18, it is against the law for a licenced premises to sell you alcohol. It is an offence for you to pretend to be 18 to buy alcohol. It is also an offence to drink alcohol in a licensed place if you are under 18. It is an offence for any person, at any age, to drink alcohol in a public place (eg. street, footpath, park, mall or shopping centre). It is also illegal to carry alcohol in public if you are under 18. It is not against the law for anybody to drink in a private place, even if you are under 18.

Graffiti

It is an offence to put graffiti onto anything which does not belong to you, unless you have the permission of the owner. If the graffiti involves obscene or indecent language or drawings, you may get a tougher sentence. If the graffiti is on a school or other place used for education (university, TAFE) you may also get a tougher sentence. If you are in possession of a “graffiti instrument” (eg. spray can, pen etc) without lawful excuse, and there is suspicion that the instrument has been used or will be used for unlawful graffiti, you may be charged for “Possession of a graffiti instrument”.

Marriage

If you are over 16, you may be able to get married if you have your parents’ permission. You can get married without your parents permission when you turn 18.

Criminal charges

You can be charged for criminal offences when you turn 10. If you are between 10 and 16, you can be charged and taken to childrens’ court and if you are found guilty you can receive a sentence. You can be held in a youth detention centre if the charges are serious enough. If you are over 17, then you can be charged as an adult. If you are found guilty, you will receive an adult sentence and may end up in an adults’ jail if you persist in offending or if the charges are serious enough.

School

You must attend school until you are 15. Sometimes you can leave earlier if you have permission from the Department of Education.

Tattoos

It is illegal to tattoo someone if they are under 18.
the international crime court

what it means to Australia

by Mary Hiscock

For several hundred years, it has been a basic rule of our legal system that "all crime is local". For another country to seek to punish conduct not performed within its borders has been seen as an unacceptable attempt to undermine the sovereignty and authority of the country of residence of the person accused. The era of colonial power was perhaps an exception to this, but justified on the basis that the colonial power included all its empire within its own territory.

It was not always so. When the Christian church held sway across Europe, the canon law was supranational, and breaches of canon law were tried in church courts, and subject to appeal outside the country of origin. Much of our modern criminal procedure came from church law, but the Reformation in the 16th Century removed the widespread ambit of this kind of international criminal law.

The one crime of universal jurisdiction after that was piracy – armed robbery on the high seas. Any country could try – and usually execute – a person accused of piracy. But developments culminating in this new century have brought in a new era of international criminal law and procedure.

The new era of international criminal law

Australia has played a leadership role in the creation and development of an international system of criminal law. In 1949 and in 1977, the United Nations made a series of treaties (known as the Geneva Conventions) on appropriate standards of conduct for countries at war, including the treatment of prisoners of war, soldiers and civilians.

These treaties gave effect to what had been long understood between states, although perhaps more often honoured in the breach than in the observance. Some relate to international armed conflicts, others to non-international conflicts. Australia has included war crimes as an offence under the Criminal Code (Cth) 1995.

After World War II, trials were held in Nuremberg and Tokyo (and in other locations) of those accused of war crimes. Those convicted were executed or imprisoned for long periods.

These trials were controversial in that the only persons accused came from defeated enemy countries and they were tried by the victorious Allies. It was also argued that the conduct of those accused was considered in their own countries at the time the relevant acts were committed to be lawful and within the policy of the government; and that the conduct was made criminal only retrospectively. But the tribunals declared that those guilty of war crimes could not shelter behind any defence of legality or orders from superiors. They had to take individual responsibility for their own actions. They had breached a higher law – one customarily accepted for centuries.

What was missing in the international system was a permanent court in which persons accused of these crimes could be prosecuted.

The International Court of Justice is concerned only with civil matters between states. The post-World War II courts in Tokyo and Nuremberg were created specially for a limited purpose, and similar specific courts were set up by resolution of the UN Security Council in 1993 and 1994 to deal with war crimes in the former Yugoslavia and in Rwanda respectively.

Australia has the necessary legal machinery to participate in these specific tribunals in legislation of the Federal Parliament, the International War Crimes Tribunals Act of 1995.
Australians have been involved in the tribunals at The Hague and in Arusha, as judges (former Governor-General Sir Ninian Stephen), as prosecutors, and in the administration of the system. Australian students have also been involved in this work as interns at the court in The Hague.

The emergence of the International Criminal Court

In 1998, the countries of the world met at a diplomatic conference in Rome for five weeks to discuss the establishment of an international criminal court. The first attempt to create such a tribunal had been made by Gustave Moynier, one of the founders of the International Red Cross, in 1872. The International Red Cross, which has a special responsibility for international humanitarian law, had been urging the establishment of this court for 130 years.

In Rome, Australia played a prominent role in chairing a group of countries, the ‘Group of Like-Minded Countries’, that were anxious to see the court set up on a permanent and practical basis. There were more than 60 states in the group, and they came from every legal tradition, and every ethnic and religious grouping of legal systems.

The text of the statute to establish the International Criminal Court (ICC) and the elements of crimes to be prosecuted were agreed at the conclusion of the conference. The Australian Government committed itself to support, and the Joint Standing Committee on Treaties of the Australian Parliament, also recommended Australia’s participation in its report in May 2002.

The International Criminal Court Act 2002 was then passed to provide the appropriate relationship for Australian participation in the court, in the creation of procedural and evidentiary rules, and the administrative infrastructure of the ICC.

The Australian defence forces chiefs have remained strong supporters of the ICC. Australian forces are instructed in detail in the obligations that they have, wherever they are, to conform to international law in their conduct. They would be liable to prosecution under Australian law for any breach, even if there were no ICC.

Australia has a very strong system of military law and justice that applies to the defence forces wherever they are, together with the legal system that applies to all in Australia.

Opposition to the ICC

The United States

The United States has refused to participate in the operations of the ICC, and has withdrawn its signature of the statute and the approval given to it by President Clinton. It has also refused to allow its defence forces to serve as UN ‘peacemakers’, unless there is an agreement that no member of the US forces would be liable to prosecution before the ICC. On June 30, 2002, the UN Security Council resolution to extend the mandate of the peacekeeping mission to Bosnia and Herzegovina was vetoed by the US. There was considerable opposition amongst Security Council members to the stance of the US but, given the intransigence of the US, some compromise had to be found.

The Security Council convened an open meeting for members, and it was resolved that no action (including investigation and prosecution) could be commenced against any member of the peacekeeping force (from a state not party to the ICC statute) for a period of one year, unless the Security Council agreed otherwise.

The US is now negotiating a series of bilateral treaties with states where US forces are based to ensure that those states will not seek to use the ICC against US forces. There is also a widely-held view that the resolution of the Security Council is beyond its powers.

Australia

In Australia, comments have been published suggesting that the ICC’s foundation is “fundamentally flawed”, and asking why should we “be subject to an inferior system of justice?”

Others have suggested that “we should want nothing to do with any court on which we may find people serving who have never heard of the rules of law and would not like it if they did”, and that “the highest court of Appeal in Australia should be an Australian court, not a foreign court in a foreign land, with the power to charge our brave soldiers with genocide just for doing their duty”.

The coalition party members in government were deeply divided between those who saw the ICC as being in line with Australian internationalist views held since Federation, and those who saw Australian troops as potential victims of a politicised court. Federal Cabinet finally decided – for the third time in five years – to support the ICC, but only after a public and lengthy wrangle.

The Government also sent an accompanying stipulation with its formal instruments of ratification of the
So what is all the fuss about?

If a person is suspected of a crime in Australia, Australian law provides the law that lays down the essentials of the crime (in statute and case law), the process of investigation, how decisions to prosecute are made, the rules of criminal procedure (including appeals, a right to representation in serious crime, and the law of evidence), the range of permissible punishments, and the person or persons to exercise the judicial function, either alone or with a jury.

In the case of the ICC, so far there is a court and a statute that has specified the kind of crimes to be tried (war crimes and crimes against humanity), their elements, and the maximum penalty of life imprisonment. The remaining architecture of the system, including the personnel, is still being decided by those states which are parties to the statute.

The capacity to participate in these discussions was a powerful argument for Australia to support the ICC during its initial stages – settling procedures and appointing judges and prosecutors.

What are the safeguards against abuse?

The way that the court will work has been settled, including the fundamental principles subscribed to by the parties to the ICC statute.

First, the ICC will not have jurisdiction over any matter that occurred before it came into existence on July 1, 2002. This means that there can be no dredging back into history to find a claim arising from past hostilities. Because the ICC is a permanent tribunal, there will not be the same problems that have occurred with the tribunals set up for Yugoslavia and Bosnia in trying to collect evidence and arrest suspected war criminals.

Subject to this, any person in the world may be subject to the ICC, whether their countries are parties to the ICC statute or not.

Secondly, the ICC has a deterrent role. It seeks to introduce a culture of accountability for actions, rather than one of impunity. It represents a condemnation of the horrendous crimes of genocide and other crimes against humanity and, as such, affirms principles of law and morality espoused for many generations. It provides an effective and just way to punish such crimes, wherever and whenever in the future they occur.

Thirdly, and most importantly, the jurisdiction of the ICC is complementary to that of national domestic law. The ICC can try an Australian only if Australia is "unwilling or unable" to prosecute crimes of serious international concern. If Australia is investigating or prosecuting a crime under our own law, the ICC is conclusively prevented from pursuing it.

All the crimes that are defined within the ICC statute are crimes within Australian law. The standing and strength of the Australian legal system is such that it is extremely unlikely that any issue of bringing an Australian before the ICC could arise.

Finally, the decision to prosecute under the statute is not one subject to political control. Decisions to prosecute are to be made by the Prosecutor’s Office of the ICC, and are not subject to the control of any of the countries that are parties to the statute.

The one modification of this principle is that the Security Council of the UN can vote to restrain the investigation or prosecution of a person for one year, when the matter can be returned to the Security Council and it can make a similar decision. The rationale for this is that there may be a situation where, for example, in order to achieve peace, the Security Council might offer amnesty to a dictator for past crimes against humanity. The larger objective of peace could be achieved, although one person allegedly guilty of war crimes might go free. This was a compromise struck during the discussions in Rome before the final text of the statute was agreed.

Conclusion

The ICC “is a momentous step forward for international justice”. It can help to reduce the misery and the horror of the atrocities that have been perpetrated in our world. It removes the situation where countries have stood by in the face of genocide unable to intervene except by diplomatic means or by armed intervention. No one can feel safely above the law now.

Queensland Police Museum

The Queensland Police Museum runs a popular education program that caters for years 5 to 12 and is closely tied to the current curricula. The majority of their school aged visitors are in years 10 to 12 and are completing study in Forensic Science, Multi-strand Science and Legal Studies. The lure of Forensic Science to students is strong, hopefully not just because of the type of evidence usually associated with this type of scientific investigation, but because it represents an interesting police activity and is often at the forefront of technological advancement. The Police Museum is open Monday to Friday 9am - 4.00pm. Group visits can be booked for between 30 January and 15 December. Informative talks are given to groups visiting on Tuesdays and Thursdays at 10.30am, 1.00pm and 2.30pm, and on Wednesdays at 9.00am, 10.30am, 1.00pm and 2.30pm.

Bookings are essential. Education kits are posted, faxed or emailed to schools after a booking has been made. Groups are booked in for periods of 75 minutes.

Please contact Police Museum staff for information and bookings on 3364 4013 or fax 3236 0954.
The Federal Government recently announced that it was considering ‘shared parenting’ schemes for children of separated couples. This means that, when parents separate, the children would spend equal amounts of time with each parent.

The media release

On June 24, the Federal Attorney-General and Minister for Children and Youth Affairs announced that:

“The Government has today announced an inquiry into child custody arrangements in the event of family separation... The committee will be asked to look at what other factors should be taken into account in deciding the respective time each parent should spend with the child post-separation, having regard to the fact that the best interests of the child are the paramount consideration. In particular, the Committee will examine whether there should be a presumption that a child will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted...”

When announcing the inquiry in Parliament, the Prime Minister, Mr Howard, mentioned that it was regrettable that many young boys were growing up without proper male role models. Other sources say that shared parenting will allow divorcing men to “receive fairer treatment”.

Current law

Whenever parents separate, the Family Law Act 1975 (Cth) applies to the arrangements that they make for their children. The Act applies to all children, whether their parents were married, de facto partners or had never lived together.

Under the Family Law Act, each parent has responsibility for their children. They are expected to care for their children and make all necessary decisions for their welfare.

This can only be changed by court order. When parents separate, they each still have equal responsibilities toward each child, even if the child lives with only one parent.

Many parents make informal arrangements for their children, without written agreements or going to court. If parents can agree, they can make whatever appropriate arrangements they wish about the care of their children.

If they wish, the parents may make a formal agreement called a ‘parenting plan’. The parenting plan is a written agreement between the parents of a child and relates to:

“(a) the person or persons with whom a child is to live;
(b) contact between a child and another person or other persons;
(c) maintenance of a child;
(d) any other aspect of parental responsibility for a child.”

A parenting plan may be registered in the Family Court or Federal Magistrates Court. If they wish, parents may revoke their parenting plan by making a new agreement in writing. A court may also change a parenting plan.

Where parents can’t agree on arrangements for children, they may seek court orders called ‘parenting orders’. (People who are not a child’s parents may also seek parenting orders, for example, grandparents who want a contact order). These orders may be made by the Family Court, Federal Magistrates Court or state magistrates courts. In Western Australia, parenting orders are made by the Family Court of Western Australia (a state family court).
There are four types of parenting orders – residence, contact, maintenance and specific issues.13

A residence order decides with whom a child is to live.14 (‘custody order’ was an old name for a similar type of order). A contact order, formerly called an access order, regulates who a child should regularly visit or contact.15 A maintenance order forces someone to pay money for the maintenance of a child.16 Child maintenance orders are rarely made by the courts, as most child maintenance matters are now dealt with by the Commonwealth Government Child Support Agency. The final type of order, a specific issues order, is an order about “any other aspect of parental responsibility for a child”.17 They range from small matters such as exchanging school reports to major matters like deciding who can make long-term decisions for a child (for example, religion, schooling, health care, etc).

The child’s best interests are the ‘paramount consideration’ when the court is making parenting orders.18 This recognises the vulnerability of children and the importance of protecting them. However, the child’s best interests are not the only consideration. A parent’s or other person’s interest may also be relevant.19 However, if there is any conflict between the child’s best interests and another person’s interests, the child’s interests must always prevail.

In deciding what is in the child’s best interests, the court must consider a list of factors including:

- the child’s wishes
- the nature of the relationship of the child with parents and others
- the likely effect of changes in the child’s circumstances
- the practical difficulty and expense of a child having contact with a parent;
- the capacity of parents to provide for the needs of the child
- the child’s maturity, sex and background
- the need to protect the child from physical or psychological harm
- the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents
- any family violence
- any family violence order
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child
- any other fact or circumstance that the court thinks is relevant.20

A court hears the evidence of parents, psychologists and other witnesses before deciding what will be best for a child. What is best for the child is not necessarily what the child wants.21

Often one parent is better able to care for the child. Commonly, the children will live with that parent and visit the other parent. Contact will vary with the circumstances of the family. A court will try to maintain contact between the child and both parents, unless there are reasons to prevent contact.22

For school-age children, a common order would be for a child to have contact with the non-residential parent every second weekend and half the school holidays.

The provisions of the Family Law Act 1975 are gender neutral. There is no presumption in favour of children living with their mother. Unfortunately, because of child-rearing patterns in our society, many men either don’t have skills to care for children or do not seek residence orders (and may not want to live with their children). However, where men seek residence orders, they are often successful.

In 2000, in contested residence applications children were ordered to live with their father in 40 percent of cases.23 In many more cases, frequent contact between the father and child was ordered.

Use of shared care orders

Under the current law, courts may order shared care. The usual arrangement for shared parenting is that children live for a week or fortnight in turn with each parent. They have two homes, one with each parent. The children may keep clothes and possessions at each home, or take items with them from home to home. Wherever the children are living, they usually attend the same school.

In 2000-2001, the Family Court ordered shared residence in 2.5 percent of parenting applications.24 These statistics only include cases where a court has made an order. It does not include the many situations where parents make parenting plans or informal agreements.

Shared care is only ordered in a small minority of cases because it needs special conditions to work effectively.25 The children switch homes every week or fortnight. However, they need continuity in many areas of their lives, such as health care, schooling, friendships and possessions. To ensure that shared care works, each parent must be able to take the child to their regular school and social events.
Normally, this requires that the parents live relatively close to each other and to the school.

Parents should also be able to communicate well, so that both are aware of the children’s ongoing needs. They should be able to treat the children and each other with respect, so that the children are not distressed by parental hostility.

Where parents are unable to interact constructively, shared care is not in the best interests of their children. Unfortunately, the majority of parents who seek parenting orders are hurt, bitter and angry. They are unable to agree on the basic care arrangements for their children. They may also treat each other badly or violently. They may be unable to communicate well enough to make shared parenting work.

Presumptions of shared parenting

If there was “a presumption that a child will spend equal time with each parent” and “such a presumption could be rebutted”, that would be a fundamental shift in the law. Currently, a court considers what is best for each particular child. There is no legal presumption that one arrangement is best for all families. A presumption in favour of shared parenting means that a court would assume that shared care was best for the child until it was proved otherwise (using legally admissible evidence). A court would not be able to approach each situation with an open mind.

In an ideal world, parents would place their children's needs ahead of their own and share parenting responsibilities amicably. The Family Court has commented on the benefits of a child knowing both of his or her parents. Shared parenting gives children the chance to have close relationships with both parents. It gives each parent an equal opportunity to nurture their child.

A presumption of shared parenting shows a parent-centred approach, concerned with maintaining a perception of equal time between parents. It assumes that biological parents take equal roles in child care and ignores the reality that many parents may have little role in their child’s life. It overlooks the fact that separated people are often unable to share parenting in a way that is beneficial for the children. They may be bitter, vindictive or unable to communicate. There may be domestic violence, which makes it impossible for shared parenting to be safe. Abusive parents may use the presumption of shared care to continue to exert power over their ex-partner.

By making it a “presumption that a child will spend equal time with each parent”, it means that a parent who disagrees must prove sufficient reasons to change the arrangement. It can be hard to prove communication difficulties and even violence, especially where a parent cannot afford a lawyer.

Making shared care a presumption would stress already dysfunctional relationships. It may prove damaging to the children caught in the middle of their parent’s disputes. The current parenting order regime is more flexible and appears better able to promote the welfare of children.

notes

11. s.30 Family Court Act 1997 (WA) and s41 Family Law Act 1975.
20. Re Patrick : (An Application Concerning Contact) [2002] FamCA 383
22. R and R [Children’s Wishes] [2002] FamCA 193
25. eg see H and H (1995) FLC ¶92-599
26. see the Family Court of Australia website page “Introduction and Challenges To Be Faced, Paper delivered at the Columbus Pilot Launch and Symposium, Perth, Friday 9 November 2001
27. Re Patrick : (An Application Concerning Contact) [2002] FamCA 193
28. see comments by the Chief Justice of the Family Court, Nicholson CJ in Nicholson CJ, Managing Family Violence in a Family Court Context: Lessons Learned And Challenges To Be Faced, Paper delivered at the Columbus Pilot Launch and Symposium, Perth, Friday 9 November 2001
29. For an example see T and S [2001] FamCA 1147

Interview with Anthony Proctor, Queensland Law Society, September 2003

26
the yorta yorta native title case

survival, revival or impenetrably modern?

by Simon Young

The high Court native title decision in Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 was handed down to some page-three media attention in December 2002.

However, the decision was more significant than its initial reception might suggest. This case turned the courts’ attention from the pressing questions of ‘extinguishment’ (by pastoral lease, by freehold etc) to the fundamental issue of what the law requires of the Aboriginal community itself for the survival of its native title.

The Yorta Yorta claim covered lands in the well populated and intensively used Murray River area, and it raised for argument the significance, for native title purposes, of very early European settlement and prolonged disruption of the relevant indigenous society.

A Nicholson cartoon in The Australian newspaper at the time of the decision accurately identified the difficulty of the task before the Yorta Yorta community. A sceptical judge looks from an idealised traditional native man (complete with loincloth and fish on spear) to a modern indigenous man in shirt and tie, and asks of the latter: “Prove to me that he is you!”

After a long and tenacious battle, the Yorta Yorta failed. The fate of their claim, and the statements of the majority judges on the role of ‘tradition’ in native title doctrine, are heavy blows to the aspirations of indigenous communities most directly and severely affected by contact with non-indigenous society. And for this reason, they are heavy blows to native title claims anywhere in the populated south of the Australian continent.

The lower court decisions – squatters, petitions and cultural ‘revival’

The language of ‘tradition’ features prominently in the Australian native title legislation and case law. Most importantly, s 223(1) of the Native Title Act 1993 (Cth) defines ‘native title’ as rights and interests in relation to land and waters possessed under ‘traditional laws acknowledged and traditional customs observed’, where the relevant peoples (by those laws and customs) have a ‘connection’ with the land or waters. However there had been little attention to the precise implications of this ‘tradition’-focused approach, or to its application in the case of possible loss of ‘tradition’. Then came Yorta Yorta.

In the original trial decision, Olney J ((1999) 4(1) AILR 91) attempted to identify the relevant ‘traditional laws and customs’ of the original community – largely by reference to the writings of an early squatter who had lived in the area in the 1840s. He then reviewed the evidence relating to the years following – noting the taking up of the land for pastoral purposes, the severe dislocation of the indigenous population and considerable reduction in its numbers due to disease.

He relied particularly on a ‘petition’ to the Governor signed in 1881 by 42 Aborigines, which pointed to the ‘precariousness’ of their means of subsistence given the taking of ‘possession’ of their lands by government and settlers. It expressed a desire for ‘settling down to more orderly habits of industry’ and sought a grant of land (apparently for the purposes of cultivation and the raising of stock).
Ultimately, Olney J concluded that, before the end of the 19th century, the Yorta Yorta’s ancestors had ceased to occupy their traditional lands in accordance with their traditional laws and customs. He said the ‘tide of history’ had washed away any real acknowledgement of traditional laws and any real observance of traditional customs. And he added that, in this situation, native title could not be revived.

Despite this conclusion, which he obviously felt was the end of the story, the judge did go on to refer to some contemporary practices of the community – considering them to be essentially revivalist rather than ‘traditional’. Attempts at preservation of ‘mounds, middens and scarred trees’ were considered to be not traditional, given that these had been of purely practical value to the original inhabitants.

Contemporary conservation of food resources was similarly considered to be not traditional, apparently because an early squatter had in fact observed wasteful practices. Modern practices associated with re-burial of returned remains were also considered to be not traditional, as was the Yorta Yorta peoples’ extensive involvement in activities associated with timber and water conservation in the area.

On the first appeal, a majority of the Full Federal Court (2001) 110 FCR 244) noted the possible over-restrictiveness of Olney J’s approach. However the judges found this to be immaterial. They felt that, unless one could successfully challenge Olney J’s finding that the appellants’ ancestors had at some point ceased any real acknowledgment and observance of traditional laws and customs, and ceased to exist as a traditional indigenous community, that finding was ‘fatal’ to the claim. They said there was “more than adequate evidence” to support the finding that there was a period during which the relevant community lost its character as a traditional community.

**The High Court – society and ‘system’**

In the High Court, the Yorta Yorta sought to shift the focus in the assessment of ‘traditionality’ from the past to the present. That is, from a close historical inquiry and careful search for continuity to a focus on present law and custom, and a search simply for some historical foundation for it.

The leading High Court judgment (Gleeson CJ, Gummow and Hayne JJ) emphasised that native title arose from an ‘intersection’ of traditional laws and customs with the common law – an ‘intersection’ which occurred at the point of Britain’s acquisition of sovereignty (which here was in 1788). They explained this by saying that native title rights and interests must originate in a ‘normative system’, and that from the change in sovereignty the Aboriginal ‘normative system’ could no longer validly create new rights, duties or interests.

Accordingly, they said that the only Aboriginal rights or interests which would be recognised after the change in sovereignty were those that found their origin in pre-sovereignty law and custom.

Section 223(1) of the *Native Title Act* was read accordingly.

Of more direct importance, the judges also found in the provisions a requirement that the ‘normative system’ under which the rights and interests are claimed (the traditional laws and customs) must have had a ‘continuous existence and vitality’ since sovereignty.

Ultimately, Gleeson CJ, Gummow and Hayne JJ rejected the Yorta Yorta appeal, restating the findings below that their forebears had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. McHugh J and Callinan J, in separate judgments, agreed that the appeal should be dismissed.

It would appear that the joint judges’ reasoning leaves little room for change, adaptation or interruption in a community’s laws and customs. It was suggested at one point that ‘some’ change or interruption would ‘not necessarily be fatal’, but no workable test was stated. There was repeated reference to the ‘difficulty’ of such issues and ultimately the test offered for assessing ‘change’ was just the statute’s own phrasing.

Interruption was apparently sought to be accommodated via the brief clarification that laws and customs must continue only ‘substantially’ uninterrupted.

There are two big issues here that invite some discussion. First, is the strict ‘point of sovereignty’ approach necessary and appropriate? Is it right to absolutely restrict native title in this...
way, such that native title can never have accrued after the change in sovereignty? A more liberal approach (as in equivalent law in the US) would dissolve much of the strictness in the Australian doctrine. It would allow a more up-to-date definition of the interest and shorten any requirement of constancy and continuity in law and custom. However the ‘point of sovereignty’ approach is reasonably well entrenched in the Australian law.

The second big issue is the question of whether revival of previously ‘expired’ native title should be disallowed. In a country properly committed to the preservation of indigenous culture, should the doctrine of native title withhold entitlements from a community attempting cultural revival?

Even assuming the legal correctness of the ‘point of sovereignty’ approach and the non-acceptance of revival, some other difficulties would appear to arise from the reasoning of Gleeson CJ, Gummow and Hayne JJ. First, in the space of five paragraphs, the judgment both confirms the legal nullification of the Aboriginal ‘normative’ or ‘law-making system’ (by the acquisition of sovereignty) and demands its continued ‘existence and vitality’ since that time.

Secondly, the judges’ elaboration on the requirement that the ‘normative system’ must survive appears to have rested upon a quite static interpretation of the notion of ‘society’. Doesn’t a society naturally evolve and change?

Moreover, if the claim is to an original interest in the nature of ownership (as appeared to be the case here), should continuity in specific laws, customs and practices be of any relevance?

Gaudron and Kirby JJ, in dissent, took a broader approach to what is ‘traditional’, emphasising that a mere ‘spiritual connection’ can be enough to keep native title alive, and appeared to have a more flexible understanding than the joint majority judges of the notion of ‘society’ or ‘community’. They expressly recognised the natural evolutionary capacity of societies and communities, and noted that they could disperse and regroup without necessarily losing traditional law and custom.

Conclusion:
An acceptable doctrine?

Whether or not the approach of Gaudron and Kirby JJ (or even some more liberal version) would have produced a different result in Yor-Yor, it is clear that a restrictive and overly-particular approach to ‘traditionality’ has profound implications for native title claimants and Aboriginal communities generally.

It would appear to rest upon an understanding that Aboriginal culture is unchanging, and a disregard for the realities of indigenous survival in a modern western society. It withholds from contemporary Aboriginal communities the right to define their own identity and priorities. It builds a legal doctrine that recognises not a right to property as such, but a right to a way of life – a way of life which may be wrongly stylised and idealised by the western legal system, and which will, in any event, be unmaintainable (or irrecoverable) for many contemporary Aboriginal communities.

Accommodation of evolution in indigenous societies is crucial to the development of our native title doctrine. Loincloths and fishes on spears should be strictly optional.
immigration detention
the best interests of children?

by Dr Barbara Hocking & Scott Guy

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We are all familiar with the common meaning of the word ‘refugee’. It suggests the need to take flight for somewhere in the world more civilised than one’s homeland.

However, when we turn to the law, we confront a highly ‘technical, legal definition’, one tailored to apply, in Crock and Saul’s view, to "a much narrower range of people, excluding all but victims of rather politicised forms of persecution".¹

This is partly because the Refugee Convention is narrow in its scope. Under the 1951 Convention, a refugee is:

“Someone who is outside their home country and unable or unwilling to return because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.”

An asylum seeker is a person seeking protection as a refugee.

In accordance with the definition, under the convention Australia must protect refugees on its territory regardless of whether they entered Australia without permission.

We are doubtless more familiar with the political debates about this issue rather than the legal ones, but it is to the law that we can turn for guidance as to how human rights can be achieved for this disadvantaged and disenfranchised group of people.

The legal regime

Australia has established a mandatory detention regime based upon mode of arrival to the country. So we have a system that differentiates between people based upon how they entered the country – their mode of arrival here.

This means that asylum seekers who come here as tourists or students and claim refugee status are eligible for bridging visas. They can even get some work and some income support from the Government under the Asylum Seekers Assistance Scheme (although only when they seek asylum within 45 days of arriving here).²

The point is that those persons can wait out their processing times in the community. They have been through the required health and security checks and are hence differentiated from those who arrive without permission, who have over recent months been confusingly categorised as ‘boat people’, ‘illegal immigrants’, ‘queue jumpers’, ‘refugees’, ‘smuggled people’, ‘unlawfuls’, ‘asylum seekers’, etc, with the official government term being ‘unauthorised arrivals’.³

The possession of ‘papers’ is often cited as the justification for the differential treatment, but there have been debates about the extent to which this issue has become politicised since the sinking of the vessel, the Tampa.

B & B & Minister

The case of B & B & Minister for Immigration & Multicultural & Indigenous Affairs (2003) FamCA 451 (June 19, 2003) concerned two children, A and B, who were detained in the Woomera and, subsequently, the Baxter, Immigration Detention Centres. The children’s mother sought orders, on behalf of A and B against the Minister for Immigration for their release from the Baxter Detention Centre. The Minister responded to this application claiming that, under the Migration 1958 (Cth) and Family Law 1975 (Cth) Acts, the Family Law Court possessed no jurisdiction to make orders against a third party, even if that order was made in the “best interests” of the children.

The trial court judge, Dawe J., agreed with the Minister for Immigration, and
she ruled that the “welfare” jurisdiction of the court extended only to the making of orders for children “of a marriage”. It did not extend to orders “over a third party”, such as the Minister for Immigration. Further, Dawe J. also held that section 67ZC of the Family Law Act was a general power, enabling the court to act in the best interests of the child.

Such a power was subject to the specific provisions of the Migration Act, which required persons in detention to first seek application for their release from the Minister. In short, the Family Law Act was indeed a general statutory power which was limited by the specific provisions of the Migration Act and the restrictions imposed by the constitutional marriage power.

In addition, Dawe J. contended that the court could not make orders with respect to the “best interests” of children situated in South Australia. Prior to the enactment of s 67ZC of the Family Law Act, she asserted that the court did not possess any inherent welfare jurisdiction over South Australia. On this basis, the “welfare” jurisdiction of the Family Court should be read restrictively to exclude the Northern Territory and South Australia.

In view of this, the judge held that the court had no jurisdiction to order the Minister to release A and B.

On appeal, Nicholson CJ, and Ellis and O’Ryan JJJ of the Family Court of Australia overturned Dawe J’s decision. According to the judges, at Paragraph 206 of the judgement, “the welfare jurisdiction of the Family Court extends to all aspects of marriage, including children in immigration detention, where particular orders sought arise out of, or are sufficiently connected to, marriage”.

In this quotation, it is clear that the judges are relying on a combined reading of the incidental and marriage powers of the Constitution. Such a reading enables the court to make orders against third parties, such as the Minister, where those orders are incidentally connected to the best interests of A and B.

Nicholson CJ and O’Ryan J (with Ellis J dissenting) therefore held that the continued detention of A and B was consequently unlawful and that the Family Court was entitled to seek their release, under their welfare jurisdiction. In this regard, the trial judge, Dawe J., erred in finding that the Family Court of Australia lacked jurisdiction to hear the applications.

Further, the children did not appear to have any means of bringing an end to their detention and appeared to lack the capacity to make a request for repatriation pursuant to s 198 of the Migration Act.

What this decision achieves is to expand the jurisdiction of the Family Court to include those children held in immigration detention centres and who do not hold visas. The judgement effectively gives the United Nations Convention on the Rights of the Child (UNCROC), which is a schedule to the Family Law Reform Act, the effect of law. It acknowledges that the Family Law Reform Act 1995 is based on the Convention and that the Act enables the court to make orders against such parties as the Minister for Immigration, where these orders arise out of any children “of a married relationship”.

Previously, in B and B and the Family Law Reform Act 1995 (1997) FLC92-754 the Full Court of the Family Court did not make a definitive comment about the status of children in detention and did not express a conclusive view on the issue of whether the convention had in fact attained the status of law.

It is suggested that the present decision might bring about important changes in the way children and families are to be treated by the court. The decision has effectively incorporated the UNCROC into the Family Law Reform Act and, in particular, into the conception of the best interests and welfare of the child. Section 65E of the Family Law Act states that, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Further, the welfare jurisdiction of the court is highlighted in s 67ZH. The court, in the present judgement, has used the United Nations Convention on the Rights of the Child to interpret these terms. The convention states in article 3 (1) that in all actions concerning children, whether in public or private institutions, the welfare and best interests of the child shall be the “paramount” consideration. It is clear that the present court’s emphasis on the inherent welfare jurisdiction of the court to order the release of A and B in order to protect their best interests has its origins in the UNCROC and the enactment of the Family Law Reform Act.

The Family Court has thus confirmed that it has jurisdiction to declare orders against such third parties as the Minister for Immigration, in order to seek the release of children held in detention where this is contrary to their best interests. This decision is a significant one, as it highlights the court’s jurisdiction over any child, as well as any person, where this affects the welfare of the child. Thus, in the future, if children who do not hold visas are compulsorily held in detention centres, their interests and well-being may be subject to judicial supervision and control. The case of B and B and Minister for Immigration and Multicultural and Indigenous Affairs has now clearly established jurisdiction over children held in immigration detention centres.
The specific issue of children in detention is far from the only legal issue that arises in the context of Australian immigration policy. There are many other aspects to detention awaiting legal challenge.

Is immigration detention punishment?
The word detention is in itself usually associated with crime and punishment. Immigration detention appears as a semi-criminal form of incarceration despite the fact that those in detention have committed no wrong of that nature. Whether it is administrative or criminal is unclear. While not defined as prisons, the detention centres resemble prisons in terms of living conditions (Refugee Fact Sheet No 2: Mandatory Detention). There are echoes of this blurring of legal boundaries also in the United Kingdom’s response to refugees. A report into the UK’s system has characterised the detention of asylum-seekers as “crossing the boundary between the criminal and administrative spheres”.

This report has argued that some uses of detention blurred the criminal/administrative boundary even further, for example, when immigration officers justified administrative detention for preventative purposes if an asylum seeker had an alleged or admitted criminal history. Pointing to aspects of the policing of immigration in the UK, Weber has also urged criminologists to recognise immigration enforcement as involving “criminal-justice-like-powers” and a subject worthy of criminological analysis.

Savitri Taylor suggests that subjection of immigration detainees (who have not also been convicted of criminal offences) to detention which is “at all punitive in character” would be a breach of their human rights. There may be as yet unexplored legal challenges drawing upon Australian law here. A key possibility is this point made by Crock & Saul:

“If detention is intended to be punitive and act as a deterrent to other asylum seekers... it is also arguable that detention violates Chapter III of the Australian Constitution, since only a court is permitted to impose a penalty on a person.”

Conclusion
We commenced with the idea that the word refugee is one familiar across the world more civilised and tolerant than one’s homeland.

That there is a virtual army of people fleeing in this way may be less well known to those of us in the advanced liberal democracies. In fact, one out of every 284 people in the world is a refugee.

It may also be not well known in Australia that we receive and respond to only a small proportion of this worldwide movement. Refugee numbers in Europe and Canada are far higher.

Despite the criticism of commentators such as Albrechtsen, who have assessed the Family Court decision as one demonstrating “seizing jurisdiction” which is “judicial empire-building”, and “judicial activism” under which “international law is writ large”, the Family Court decision is one step towards a jurisprudence of children’s rights in Australia.

It causes us to reflect upon the approach of the Family Court in B & B & Minister as one that implicitly recognises the capacity of our nation to care for and protect many, particularly children, in situations that do not involve long-term incalculable periods of detention in isolated immigration detention centres.

notes

2 Ibid., p.
3 Ibid., p. xiv
7 Crock and Saul, op. cit., p. 95
8 Ibid., p. 4
9 Janet Albrechtsen, ‘Judiciary oversteps the mark on immigration’ The Australian 2 July 2003: 11
There is no accepted definition of computer crime. It can include the simple theft of the computer hardware, but more usually it means the use (or misuse) of computer software technology to elicit an undesirable result in data or processing.

Simple unlawful access to a computer system can be regarded as an offence, and the consequences may include the transfer of funds or confidential information. Sending an email to place a virus can be unlawful. Persons gaining unlawful access to computers for these purposes are typically referred to as hackers (the term cracker refers to a hacker with a malicious intent).

Also, there are other crimes that, while not specifically related to computers, can be substantially facilitated by the use of computers.

**Computer crime and the Commonwealth Criminal Code 1995**

The increase of electronic commerce has led to increased reliance on the integrity, security and reliability of computer data and electronic communication. With this has come a corresponding increase in cybercrime activities such as hacking, virus infiltration and Internet vandalism. International cybercrime now costs companies some $3 trillion a year.

The Cybercrime Act 2001 revisits the Commonwealth computer crime provisions and increases the investigative powers of the Federal Police. The explanatory memorandum says that the drafters of the Act took into consideration the draft Council of Europe Convention on Cybercrime (Convention), specifically the 25th draft released on December 22, 2000. The Council of Europe released the Final Draft on June 29, 2001.1


**Unauthorised access, modification or impairment with intent to commit a serious offence**

Section 477.1 targets those who access or modify computer data, or impair electronic communications to or from a computer without authority, with the intention of committing a serious offence defined as an offence punishable by five or more years’ imprisonment. The penalty for this offence is a maximum penalty equal to the maximum penalty for the serious offence. For example, if a person hacked into a bank computer and accessed credit card details with the intention of using the details to obtain money, the penalty would be equivalent to the fraud offence (10 years’ imprisonment).

**Unauthorised modification of data to cause impairment**

Section 477.2 provides for an offence where a person causes any unauthorised modification of data in a computer, where the person is reckless as to whether that modification will impair data. The offence covers a range of situations, including a hacker who obtains unauthorised access to a computer system and impairs data and a person who circulates a disk containing a computer virus which infects a Commonwealth computer.

**Unauthorised impairment of electronic communication**

Section 477.3 provides for an offence of causing an unauthorised impairment of electronic communications to or from a computer. The penalty for this offence is...
a maximum of 10 years’ imprisonment. This offence is designed to prohibit strategies such as “denial of service (DOS) attacks” in which, for example, a service provider is swamped with useless messages causing the service to be inoperative. This recognises the importance of Internet communications.

Unauthorised access to, or modification of, restricted data

Section 478.1 provides for the offence of causing unauthorised access, or modification of, restricted data held in a computer. The penalty is a maximum of two years’ imprisonment. The offence relates to unauthorised access or modification of data protected by a password or other security feature rather than the data itself. The offence targets hackers attempting to circumvent a password-protected computer system.

Unauthorised impairment of data held on a computer disk etc

Section 478.2 provides for the offence of causing unauthorised impairment of the reliability, security or operation of any data held on a Commonwealth computer disk, credit card or other device. The penalty is a maximum of two years’ imprisonment. This targets actions such as passing a magnet over a credit card or cutting a computer disk in half.

Possession, control and supply of data with intent to commit a computer offence

Sections 478.3-4 deal with the possession, control and supply of data or programs which are intended for use in the commission of a computer offence. The penalty for each of these offences is a maximum of three years’ imprisonment. These cover people who possess, create or trade in programs and technology designed to hack or damage other computer systems. For example, an offence is committed where a person possesses a hacking program or a disk containing a computer virus with the intention of using it to access or damage data.

Investigative powers

The Cybercrime Act enhanced the criminal investigation powers under the Crimes Act 1914 and Customs Act 1901 relating to the search, seizure and copying of electronically stored data. The large amount of data that can be stored on computers and the use of security measures, such as encryption and passwords present particular problems for investigators. The enhanced powers are designed to enable police to copy computer data and examine computer equipment and disks off-site, and to require assistance from the computer owners.

A magistrate may order a person with knowledge of a computer system to provide information or assistance. This power extends to the compulsory disclosure of passwords, keys, codes, cryptographic and steganographic methods used to protect information “as is necessary and reasonable” (ss 3E to 3S).

The provisions permit both the Defence Signals Directorate and Australian Security Intelligence Organisation (ASIS) to hack legally.

Some commentators have described the new investigative powers as draconian and dangerous. Exaggerated criticism has been made of the provisions which make it an offence to possess hacker toolkits, scanners and virus code, on the basis that these are tools of the trade for security vendors.

Telecommunications offences

Part VII B of the Crimes Act 1914 (Cth) and Parts 10.6 impact on electronic commerce by making it an offence to interfere with telecommunications, including the Internet, computer services and computer systems. These parts create offences for things that include interference with the delivery of electronic mail or tampering with data messages.

State legislative offences relating to computers

There has been no uniform approach taken in relation to offences relating to the use of computers in electronic commerce or otherwise. Every state and territory legislature has prohibited unlawful access to a computer. Only New South Wales, Queensland, Tasmania and the Australian Capital Territory have specific legislation dealing with damage to computer data. In addition, there are a range of offences relating to the misuse of computers, such as the falsification of documents, dishonest use of computers, fraudulent use of computers, obtaining property by deception and child pornography. The Northern Territory has a specific provision dealing with unlawful appropriation of access time.

Internet gambling

The Interactive Gambling Act 2001 (Cth) commenced in full in January 2002. The regulation of gambling is typically a state and territory matter. However, the Federal Parliament has power in regard to Internet activities and other communications technologies. The Act is the Government’s response to community concern about the increased availability and easy accessibility of online gambling.

The Act prohibits the provision of interactive gambling to people in Australia. The prohibition applies to casino-type gaming, betting on a sporting event after it has commenced, and scratch lotteries online. Offences apply to both Australian and overseas interactive gambling service providers. Fines of up to $1.1 million per day apply.

The Act prohibits interactive gambling services from being provided in Australia and prohibits Australian-based interactive gambling services from being provided in designated countries. A complaints-based system is established. A person may complain to the Australian Broadcasting Authority (ABA) about prohibited Internet gambling content. If hosted in Australia and the ABA considers that the complaint is warranted, it must refer the complaint to the Federal Police. For content hosted outside Australia, the ABA must also notify Internet service providers (ISPs) so that the ISPs can apply the industry
standard, such as updating Internet content filtering software.

As 99.9 per cent of the gambling sites on the internet are based offshore, the impact of the Act on access to such sites will be minimal.

Cyberstalking

Various pieces of state legislation define stalking as continued and intentional conduct directed at another person that would cause a reasonable apprehension of violence or detriment to the stalked person or another person. ‘Cyberstalking’, or stalking online, is not dealt with directly by legislation. However, elements of stalking can include use of the Internet, email or other electronic communications to harass or threaten another person. The behaviour includes posting improper messages on bulletin boards, forwarding viruses, threatening or offensive email, and electronic theft.

The Crimes Acts in most jurisdictions describe stalking in general terms, leaving it to the courts to consider specific instances such as harassment by electronic means. In Victoria and the Northern Territory, the offence of stalking specifically includes “telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person”. In 1999 the Queensland Criminal Code was amended to extend stalking to conduct utilising the telephone, fax, mail, email or other technology.

In the Australian Capital Territory stalking includes where the offender “telephones, sends electronic messages to or otherwise contacts the stalked person; sends electronic messages about the stalked person to anybody else or makes electronic messages about the stalked person available to anybody else”. However, even if the stalker can be identified, the enforcement of such laws can be problematic as the offender may not be located within the jurisdiction.

Technical responses available for the consumer include:

- blocking and filtering software can delete email or chat-room messages. The criteria used can include the name of the author, certain offensive words and so on
- sophisticated encryption programs can prevent messages being read by unauthorised people
- digital signatures and certificates can be used to authenticate the author
- using a gender-neutral name
- changing passwords regularly

Child pornography

The International Child Pornography Conference held in Austria in 1999 sought to combat child pornography and exploitation on the Internet. Initially the discussion revolved around the existing international obligations and commitments for the protection of children, including the Convention on the Rights of the Child. The conference built and acted upon commitments undertaken at the Stockholm World Congress against the Commercial Sexual Exploitation of Children (1996) and ongoing initiatives in many countries and regions.

The UNICEF-sponsored ‘Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography’ became effective in January 2002. UNICEF estimates that one million children, mainly girls, are forced into the multi-billion dollar commercial sex trade every year, including child pornography. To date there are 96 signatories and 22 parties to the Optional Protocol. The Optional Protocol requires criminalising violations of children’s rights and calls for increased public awareness and international co-operation.

International approach

Attacks against commercial websites, such as amazon.com, have drawn international attention to the dangers faced by the Internet and other computer networks. Cyber-criminals and cyber-terrorists threaten business and government interests and can cause vast damage.


The text is the first international treaty to address criminal law and procedural aspects of various types of offending behaviour directed against computer systems, networks or data. It aims to harmonise national legislation in this field, facilitate investigations and allow efficient levels of co-operation between the authorities of different nation states.

The convention includes provision for the co-ordinated criminalisation of computer hacking and hacking devices, illegal interception of data and interference with computer systems, computer-related fraud and forgery. It prohibits online child pornography, including the possession of such material after downloading, as well as the reproduction and distribution of copyright-protected material. It defines offences and addresses questions related to the liability of individual and corporate offenders, and determines minimum standards for the applicable penalties.

The convention deals with law enforcement issues, including the power to carry out computer searches and seize computer data, to require data-subjects to produce data under their control and to preserve or obtain the expeditious preservation of vulnerable data by data-subjects. These computer-specific investigative measures will also imply co-operation by telecom operators and Internet service providers, whose assistance is vital to identify computer criminals and secure evidence of their misdeeds.

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<td>1 <a href="http://conventions.coe.int/Treaties/Treaties/Html/185.htm">http://conventions.coe.int/Treaties/Treaties/Html/185.htm</a></td>
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<td>2 NSW, Crimes Act 1900, s 308; Vic, Summary Offences Act 1966, s 9A; Qld, Criminal Code 1899, s 403D(1); SA, Summary Offences Act 1953, s 44; WA, Criminal Code Act 1913, s 440A; Tas, Criminal Code 1924, s 257D; ACT, Crimes Act 1910, s 132; NT, Criminal Code Act 1983, s 276B.</td>
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<td>3 NSW, Crimes Act 1900, ss 308 and 309; Qld, Criminal Code 1899, s 403D(2)(d); Tas, Criminal Code 1924, s 257C; ACT, Crimes Act 1900, s 133.</td>
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<td>4 NSW, Crimes Act 1900, ss 308-308H; Vic, Crimes Act 1953, s 82A; Qld, ss 228 and 403C; Criminal Code 1913, ss 228 and 455C; WA, Criminal Code Act 1913, s 265; NT, Criminal Code Act 1983, ss 125A, 125B, 227-276F.</td>
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<td>5 NT, Criminal Code Act 1983, s 76E.</td>
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<td>6 NSW, Crimes Act 1900, s 562BA; SA, Criminal Law Consolidation Act 1935, s 158A; WA, Criminal Code Act 1913, s 338E; Tas, Criminal Code Act 1924, s 197.</td>
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<td>7 Vic, Crimes Act 1963, s 21A; NT, Criminal Code Act 1983, s 189.</td>
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<td>8 See Qld, Criminal Code (Qld), ss 359A-359F.</td>
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<td>9 ACT, Crimes Act 1900, s 355(f)(i), (g) and (h).</td>
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Owning a crossbow without a licence will be an offence under changes to legislation approved by the Queensland State Cabinet.

The new laws will ensure crossbow owners are licensed and registered like other firearm holders.

The reforms are in line with uniform national reforms agreed to by all states and territories.

"Crossbows are lethal weapons, as shown by a string of very serious crimes in recent years," the Premier, Mr Peter Beattie, said.

"Very serious crimes involving crossbows include the wounding of two high-school girls in New South Wales in April this year, a double murder in Brisbane in February 1997, a siege in Brisbane in October 2001, a siege in Mackay in June 2000, and the slaughter of kangaroos at Wacol in July 2001.

"It is sensible to require all crossbows to be registered, and reasonable to ask owners to prove they have genuine reasons for owning a crossbow.

"The new system will mirror the system for firearms. It will be phased in, giving crossbow owners who do not want to gain a licence a chance to dispose of or sell their weapons."

Other jurisdictions agreed at a July meeting to a national approach to crossbows. The Police Minister, Mr Tony McGrady, said Queensland had responded quickly, because the licensing was a sensible approach which would enhance community safety and ensure state laws were consistent with other states and territories."

It is estimated that there are about 5000 crossbow owners in Queensland.

"This is not a ban, but rather a reclassification of these lethal weapons to ensure they are treated like guns," Mr McGrady said.

"Crossbows will be reclassified as Category M weapons and the cost of a licence would be $10 per year.

"The penalty for owning an unlicensed crossbow will be a fine of up to $1500 or six months’ imprisonment.

"Owners of crossbows who choose not to obtain a licence will be entitled to dispose of or sell the weapon to a licensed person or a weapons dealer.

"It is planned at this stage to implement the legislation over a 12-month period and a full regulatory impact statement will be completed."

Currently, ‘mini’ crossbows are banned in Queensland, and a normal crossbow is considered a weapon if it is misused, fired across private property without the owner’s consent, or carried by someone who is alcohol or drug-affected. Mini-crossbows will continue to remain on the banned list.

Crossbows are used for hunting, sporting competitions, and by some biologists and veterinarians. The Queensland National Parks and Wildlife Service uses crossbows to capture and relocate crocodiles.

The new crossbow regime will be introduced through Police Powers and Responsibilities and Other Acts Amendment Bill 2003.
our constitutional nation

yes, states have constitutions too – kind of…

by John Pyke

John Pyke has law degrees from the University of New South Wales and the University of Sydney. He has taught constitutional law at Macquarie University and now teaches it at Queensland University of Technology. He has acted as a consultant to the former Electoral and Administrative Review Commission and has made frequent submissions to committees of the Queensland Parliament as they work on modernising the State Constitution. He is developing a web site called the Australian Constitutional Information Site, ozconsinfo.freehomepage.com, which includes a web text, under development, called Government Under a Book of Rules.

When we talk of ‘the Constitution’ in Australia, we normally think of the Commonwealth Constitution (discussed in the Spring edition of The Verdict on pages 30-32). However, each state has a constitution as well. As you will see below, the state constitutions do not have quite the same status as the Commonwealth Constitution.

History – from government by governors to ‘responsible’ government

Each of the states was founded as a British colony, and all except South Australia were, for a good deal of their early history, penal colonies. Each colony was governed at first by someone who was a governor in the full sense of the word – a British military officer or civil servant whose word was law.

As the number of colonists and especially free settlers grew, Legislative Councils were appointed to advise the governors, and Supreme Courts were created. Eventually, in the 1850s (1890 for Western Australia) a bicameral parliament (one consisting of two ‘houses’) was created in each colony.

In some cases, an Act of the British Parliament authorised the existing Legislative Council to pass an Act creating the new parliament; in others it was done directly by a British Act, and in Queensland’s case the parliament was first set up by an Order in Council signed by Queen Victoria. These Acts were the original Constitution Acts of the states.

The colonies already had governors, appointed by British documents, and Supreme Courts, established by separate Supreme Court Acts. So the 19th Century Constitution Acts were mainly about setting up the new bicameral parliaments. Each parliament had a ‘lower’ house directly elected by all the adult male voters, though for some time the members of the ‘upper’ houses (Legislative Councils) in some colonies were elected only by those who owned substantial property, and in other colonies they were nominated by the governor. Reforms to extend voting rights to women and to make the councils democratic took another century or more.

The most significant reform brought in by these original Constitution Acts was ‘responsible government’ – instead of the governor having real power to govern, the executive power was now exercised by a Cabinet consisting of a Premier and other Ministers responsible to the ‘lower’ house of the parliament. ‘Responsibility’ to the house means that, if the Ministers lost the support of the majority of the house, they had to resign and another Cabinet would be formed. Though this was not spelled out in detail in any of the Constitution Acts, they all provided that the government could not spend money unless it had been ‘appropriated’ by an Act of Parliament.

This is the ‘enforcement mechanism’ of responsible government – if someone tries to act as a Minister without the support of parliament, they will have no money to spend, and you just can’t run a government without money.

The power to amend and to restrict amendment

By the 1850s, the British Government was getting tired of having to draft Bills for the parliament every time a colony wanted a change to its constitutional arrangements, so in the new colonial constitutions the new parliaments were given power to amend their own constitutions. Queensland took advantage of this by voting to abolish its Upper House (Legislative Council) in 1922.
However, the British Government had wanted the last word on a few matters, so there were a few sections providing special amendment rules, for example that certain amendments would only be valid if signed personally by the Queen rather than by the colonial governor. The parliaments gradually got rid of all of the old “imperial veto” provisions, but then in the 20th Century they inserted their own special amendment rules about a few matters.

In Queensland, these rules were sometimes inserted by separate Acts called Constitution Amendment Acts of various years, so we ended up with a mixture of Acts – the Constitution Act 1867 and Constitution Amendment Acts dated 1890, 1896, 1922 and 1934. The overall effect is that there are now three types of amendment that cannot be done unless the majority of the voters approve the change at a referendum:

- abolition of the office of governor or repeal of certain sections relating to the Queen and the governor – Constitution Act 1867, s 53
- extension of the term of the Parliament beyond the maximum of three years (as provided originally by Constitution Act Amendment Act 1890) – Constitution Act Amendment Act 1934, s 3
- reinstatement of an “upper” house – Constitution Act Amendment Act 1934, s 4.

Otherwise, however, state constitutions are “Claytons’ constitutions” – they look like constitutions and include some of the sorts of things that are in the constitutions of the Commonwealth and other countries, but they do not have the special, difficult-to-amend, status that we normally expect a constitution to have.

State constitutions, then, are a funny mixture of things that can be amended by an ordinary Act and things that can only be amended by a special procedure – even the members of state parliaments find them confusing.

Recent developments in Queensland – a more complete, plain-language constitution

As noted above, for a long time Queensland’s constitution was spread over many separate Acts with the word “Constitution” in their title. However, after a process of review extending over about 10 years, the Queensland Parliament enacted the Constitution of Queensland 2001, which came into force on Queensland Day (June 6) 2002. As far as possible, it consolidates all the sections previously scattered about over several Acts into one document, and re-expresses many of the traditional pompous phrases in plain English.

As well as defining the Parliament and its powers, the new constitution mentions the existence of Ministers and the fact that they constitute the Cabinet. However, it still does not spell out the relation between Cabinet and Executive Council. [Cabinet is attended by all Ministers, and is where the real decisions are made, while Executive Council is usually only attended by two Ministers who present the formal documents to the Governor for signature.]

The consolidation is incomplete because the three matters listed in the above dot points cannot be amended, or even reworded, without a referendum. So the new constitution still has to be read with a few sections of the Acts of 1867, 1890, and 1934.

Current issues

The Legal Constitutional and Administrative Review Committee (LCARC) of the Parliament has continued to consider constitutional issues since the passage of the new constitution. It has produced three reports dealing with:

- whether things like the conventions of responsible government and the independence of the judiciary should be spelled out more clearly;
- whether the whole constitution, not just the three provisions listed above, should be impossible to amend by the passage of an ordinary Act, and
- what should be done to ensure that Aboriginals and Torres Strait Islanders are better represented in Parliament.

These reports are all on the Web (links to them are given in the list of readings below). Some of the recommendations will need to be approved by a referendum, and the Government has made it clear that it does not want to hold a referendum until we again vote on changing to a republic – so the final consolidation and modernisation of the state’s constitution may still be a few years away.

Limits on states’ powers imposed by the Commonwealth Constitution

When considering the state constitution (including, as you now know, the remnant sections of the three older Acts), we should not forget that the Commonwealth Constitution imposes many limits on what states can do. First, it directly prohibits state parliaments from passing some kinds of laws. Under section 90, they cannot impose customs or excise duties.

There is a reasonable argument that excise’ only means those taxes that give locally made goods a disadvantage against imports (like a tax on manufacture), but the majority of the High Court has held that the term also includes sales taxes (which affect local goods and imports in the same way) – for the latest decision see Ha v New South Wales (1997). This interpretation has imposed a very
severe limitation on the states’ ability to raise their own revenue and control their own finances. As if to rub their financial dependence in, the states (including local government) cannot tax Commonwealth property.

Under section 92, the states cannot interfere with the freedom of interstate trade or commerce, in the sense that they cannot protect their own traders from competition by traders from other states. This applies even if the state is trying to protect its own natural environment, if it happens to do so in a way that “incidentally” benefits its own traders – see Castlemaine Tooheys v South Australia (1990) where a law that encouraged the use of reusable drink containers, but also protected South Australian breweries from interstate competition, was held invalid.

Under section 117, the states cannot pass laws that discriminate against residents of other states. For a long time the High Court failed to interpret this strictly, but in Street v Queensland Bar Association (1989) the court insisted that barristers from the south should be allowed to practice in Queensland.

Furthermore, even in areas where a state law would be prima facie valid, it may be held invalid because it is inconsistent with a Commonwealth law. As the Commonwealth passes more and more laws, the area left for state regulation shrinks.

A further limit on powers arises, not from the express words of the Commonwealth Constitution, but from its structure. As we saw in the previous issue, the judicial power of the Commonwealth can only be exercised by independent courts. There is no similar separation of power in the state’s constitution (though this may change if LCARC’s recommendations, above, are put into effect). However, the High Court has recently held that the state supreme courts are part of the federal judicial system, and therefore get some protection from the Commonwealth Constitution. The parliament cannot ask a judge of the court to exercise power “in a manner which is inconsistent with the essential character of a court or with the nature of judicial power”.

State politicians and their legal advisers are fond of referring to the state as a ‘sovereign state’, and to the ‘soverignty’ of the parliament, but the parliament and the Ministers are not sovereign. There are many limits on their power. A few of them arise from the state constitution, but even more arise from the Commonwealth Constitution.

### Readings and Resources

**Historical documents**

For most of the historic documents about the foundation of the colonies and then the Commonwealth, including the Letters Patent establishing the Queensland Parliament and the Constitution Act 1867, see www.foundingdocs.gov.au/places/transcripts/ Queensland’s Constitution

The Constitution of Queensland 2001


Cabinet & Executive Council

Detailed explanations of what occurs at Cabinet meetings and Executive Council meetings can be found in the handbooks: at www2.premiers.qld.gov.au/government/gjt/cabinethandbook/html/foreword.htm

**LCARC’s recent reports**


‘Entrenchment’ of constitutional provisions


Representation of indigenous people


**Cases**

- Castlemaine Tooheys Ltd v South Australia: www.austlii.edu.au/au/cases/cth/high%5fct/1990/36.html

(All the judges say very similar things, each in their own words. You only really need to read one judgment.)


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**Rubin ‘Hurricane’ Carter honoured in Brisbane**

Rubin ‘Hurricane’ Carter visited Queensland in October, receiving an honorary doctorate from Griffith University and presenting a public lecture to almost 4000 people.

Mr Carter, who spent more than 20 years in prison for a crime he did not commit, was recognised by the university for his contribution to civil rights and social justice throughout the world.

The civil rights campaigner, whose story was immortalised in the ‘70s hit by Bob Dylan titled ‘Hurricane’ and, more recently, in the movie of the same name starring Denzel Washington, said he was very excited to receive the honorary doctorate.

“When I accept this honorary doctorate degree from this great university, I do so not with some abstract appreciation of justice but rather I do so with the profound understanding that the law is what separates civilised societies from uncivilised societies,” Mr Carter said.

“If abused, the law is the enemy of good, but when used correctly the law is a weapon against evil.”

Griffith University Vice Chancellor Professor Glyn Davis said Mr Carter had inspired the work of the Griffith University Innocence Project, which investigates claims of wrongful conviction, and other like-minded organisations around the world.

“Mr Carter has tirelessly given of himself through a deep-seated commitment to criminal and social justice,” Professor Davis said. “For him to continue to give so much, after so much was taken from him, illustrates the spirit of the man.”

The legal fraternity turned out to both the gala dinner at which Mr Carter was awarded his honorary doctorate and at the public lecture.

Among the 250 guests at the gala dinner were Justice Debra Mullins, representatives from the Supreme Court of Queensland, the Queensland Law Society and McCullough Robertson.

During his visit, Mr Carter also met with Griffith University Innocence Project students.
Year 12 legal studies students at Brisbane Boys’ College took part in their inaugural ‘Unlocking the Law’ day on Wednesday July 23.

The day, held at the College Resource Centre theatre, saw five legal professionals provide the students with an insight into their work.

Jann Taylor (pictured right), of Logan Youth Services, addressed the issues of juvenile justice and human rights. Her presentation contrasted the lives of many BBC boys with those in situations where the practical application of law is an everyday business.

Next was David Keatinge (pictured right), from the forensic unit of the Queensland Police Service, who gave a detailed and professional presentation on the use of forensic technology in the police service.

Joanne Lewis, for the Self-Health for Workers in the Queensland Sex Industry, addressed the effectiveness of prostitution laws in Queensland, and gave an inspirational first-hand account of her experiences within the industry.

The students then listened intently to Alex Poulos, from Poulos Lawyers. Mr Poulos addressed the issue of sport and environmental law, and also gave the group a brief insight into the legalities of property development and the challenges surrounding such activities.

After lunch, Rebecca Shearman, from Children By Choice, spoke to the group on the effectiveness, history and obstacles in relation to abortion law in Queensland and Australia.

The day, held by BBC and facilitated by legal studies coordinator Cheryl Dimmock, was a great success and was a huge help in giving students direction, valuable information and links to research for an independent study, which has now been successfully completed by all 79 students.

Importantly, the day also gave an insightful glimpse into many areas of law that the course would normally not deal with and provided a good opportunity for exposure to the legal world for all students involved.

Thanks must go to all speakers who made the day so successful and the college looks forward to hosting this worthwhile event again in 2004.

by Sam Polsen

Sam Polsen is the school captain of Brisbane Boys College, which is located at Toowong in Brisbane.
The Queensland Government has approved a 12-month trial of laws designed to help children who misuse volatile substances, a practice known as ‘chroming’.

The trial, expected to begin before next July, will allow police in parts of inner-Brisbane, Townsville, Cairns and Mount Isa to take people misusing volatile substances to a safe place such as a home or hospital.

The Premier, Mr Peter Beattie, and the Police Minister, Mr Tony McGrady, said State Cabinet had also approved changes to enable police to search people for items used for abusing volatile substances, and to seize the items.

“Inhaling substances like petrol, glue, chrome-based paint and nail-polish remover takes a heart-breaking toll on children and teenagers,” Mr Beattie said.

“Chroming can kill. It can cause heart failure, choking, suffocation; damage the liver, kidneys and central nervous system; and lead to memory loss, permanent hearing loss and depression.

“We are giving police more power to protect children from themselves – because, tragically, some children have no-one else to protect them.

“Currently, police can only seize items used for chroming if they are visible, even when police and community members know children are chroming.

“Giving police the ability to search for chroming items could help save young lives. This is about removing a young person from danger.

“It will mean police can step in when they see someone misusing – or high on – volatile substances, and take them to a safe place like a relative’s or friend’s home, a hospital or a rehabilitation centre.”

Mr Beattie said the Crime and Misconduct Commission would evaluate the trial, and then Cabinet would consider whether the trial should be extended statewide.

Mr McGrady plans to introduce a Bill into State Parliament in late October to provide for the trial, and the search and seizure powers.

He said guidelines would be developed by the Police Commissioner to ensure police understood the trial was designed to keep young people out of the criminal justice system.

“Let me make this clear, we are not handing out criminal records to these young people,” Mr McGrady said. “This is a protective strategy. A person will not be forced to stay at a place of safety, nor will police be able to detain them indefinitely or take them to a watchhouse.

“Keeping kids alive is our top priority – keeping them out of the criminal justice system is another priority.”

Mr McGrady said police would maintain a register of those taken to a safe place, so that patterns of abuse could be determined and the trial properly evaluated.

The safe place trial will begin before July 2004 after police guidelines are drafted and regulations are developed to set the boundaries of the trial and establish the police register.

The trial and the new search and seizure powers will be enacted via the Police Powers and Responsibilities and Other Acts Amendment Bill 2003.
The winning team from Mackay are all smiles as they take home their winning $4,000 cheque. From left are: Brittany Taylor, Bridget Griffith, Amelia Taylor, Marla Costavever, Vivenne Taylor, Natasha Salty and teacher Cheryl Bryan.

Mackay State High School is the winner of the annual QLS School Conflict Resolution & Mediation (SCRAM) Competition for 2003. Mackay’s team contested the final with West Moreton Anglican College at Law Society House and won $4,000 in prizemoney for their school.

In this year’s mediation scenario, four friends had to make a choice. Do they admit to an incident that upset members of the public on a local train and thereby cause all the students who travel on the train to get detention? Or do they admit to the incident and accept what could be a severe punishment? The student teams role-played the characters and provided mediators to resolve the conflict. Mackay will now represent Queensland against state winners from New South Wales, the ACT and Victoria at the national SCRAM final in Sydney on 31 October.

Congratulations to Hayden Whitaker from Browns Plains State High School, the winner of our find-a-word competition. Hayden navigated his way through the Legal Lingo Labyrinth with 100% accuracy, showing an impressive research ability and knowledge of legal terminology. Well done Hayden!

Hayden receives a $100 cash prize for himself and a free subscription to the QLS Schools and Higher Education Service for his school, valued at $220. All entries will receive a consolation prize.

Students can look forward to more challenging competitions and prizes in The Verdict next year.
the essential links

family law information

Courts

Family Court of Australia
www.familycourt.gov.au
Provides step-by-step guides to proceedings in the Family Court, and includes a wide range of information. Part of the site is dedicated to student resource material and information for children.

Federal Magistrates Service
www.fms.gov.au
The majority of cases heard by the Federal Magistrates Court relate to family law and child support.

Queensland Government

Department of Families
www.families.qld.gov.au/
The Department provides a range of services relating to adoptions, child care, families, domestic violence, young offenders, seniors, the homeless and people with disabilities.

Legal Aid Queensland
The Legal Aid Queensland site provides legal information summaries on a range of topics, including family law.

Commonwealth Government

Family Law Online
The site is designed to give quick and easy access to information on the Australian family law system and referral information. Topics covered include alternatives to going to court, relationships, property and getting legal help.

Families, Children and Community Statistics (Australian Bureau of Statistics)
www.abs.gov.au
Click on ‘Themes’. Then click on ‘Families, Children and Community’.

Australian Organisations

Family Law Council of Australia
152.91.15.12/www/fclHome.nsf
The Family Law Council of Australia advises and makes recommendations to the Commonwealth Attorney-General on matters relating to family law, including the operation of the Family Law Act 1975 and related legislation.

Law Council of Australia Family Law Section
www.familylawsection.org.au
The family law section of the Law Council of Australia is the professional association for practising family lawyers in Australia. The ‘Family Law and You’ section of the website provides overviews for the public on property disputes, child support, separation and divorce, parenting orders and family lawyers.

Australian Institute of Family Studies
www.aifs.org.au
The Institute is an Australian Government research and information agency established to promote the identification and understanding of factors affecting marital and family stability in Australia.

Statistics

Statistical snapshot of Family Law 2000-2001 (Family Law Council)
Family Facts and Figures (Aust Institute of Family Studies)

Journals

Family Matters (Australian Institute of Family Studies)

Family Law Portals

Weblaw

AustLII – Family Law Links
www.worldlii.org/catalog/105.html

WordLII – Family Law Links
www.worldlii.org/catalog/2406.html

Law Foundation of NSW - Family Law Guide
www3.lawfoundation.net.au/links/weblaw_family.html

Cases

Family Court of Australia Judgments

Family Court of Australia Decisions (AustLII)
www.austlii.edu.au/au/cases/cth/family_ct/

Federal Magistrates Court Service Judgments

Federal Magistrates Court of Australia Decisions (AustLII)
www.austlii.edu.au/au/cases/cth/FMCA/
**Glossary of Terms**

**Sources**
- Complete Wordfinder, Published by Reader’s Digest Association Limited, London.
- SearchSecurity.com http://searchsecurity.techtarget.com/

**Appellant**
A party who appeals against a judicial decision which is not in their favour.

**Contributory negligence**
A plea in mitigation (reduction) of damages corresponding to the blame of the plaintiff. In other words, a situation in which it is argued that the plaintiff should take some responsibility for the event or accident which led to the court action.

**Cryptography**
Defined as ‘the science and study of secret writing’, cryptography concerns the ways in which communications and data can be encoded to prevent disclosure of their contents through eavesdropping or message interception, using codes, ciphers, and other methods, so that only certain people can see the real message. – Yannan Akdeniz, Cryptography & Encryption, August, 1996

**Defendant**
A person against whom court proceedings are brought.

**Plaintiff**
A person who brings, or initiates, a court action in a civil case.

**Policy decision**
A decision or judgement of a court founded principally on considerations of public policy expressed in legislation or judicial decisions, or formulated to meet new conditions. It takes into account matters of public morals, health, safety and welfare.

**Steganography**
Pronounced STEHG-uh-NAH-gruh-fee, from Greek steganos, or ‘covered’, and graphie, or ‘writing’, is the hiding of a secret message within an ordinary message and the extraction of it at its destination. Steganography takes cryptography a step farther by hiding an encrypted message so that no one suspects it exists. Ideally, anyone scanning your data will not notice that it contains encrypted data.

**Welfare jurisdiction**
The Family Court has wide jurisdiction to make orders for the welfare of a child. Orders made by the Family Court relating to the welfare of a child are intended to safeguard and advance the physical and emotional well-being of the child. Welfare is not restricted to material well-being but includes the child’s health, spiritual well-being, and happiness.