Under the oak tree: Institutional reform in the deep north

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Strong institutions are a prerequisite to good governance and a critical aspect of the rule of law. The independence of a legally qualified judiciary and the transparency and accountability of government are the cumulative result of many centuries of progress. Recent reforms to the legislature, the judiciary, and the Executive in Queensland place these important principles under threat. This article places these reforms in their historical context to illustrate that they weaken the institutions of the state in a manner inconsistent with the course of history.

I. Introduction

The institutions of government were in a fairly dire state in the Middle Ages. In 12th-century France, King Louis IX, embodying all powers of government, is said to have dispensed justice from under an old oak tree. That was only one illustration of the deficiencies that abounded in the institutions of the state. Since then, considerable progress has been made in the demarcation of powers and the implementation of transparency and accountability measures in each arm of government and the democratic processes that assure them. Much of that progress has been undone in the last two years in Queensland.

In the 16th century, the House of Tudor sourced its mandate to rule directly from God and so accountability in lawmaking, much less consultation with experts, was considered entirely dispensable. Secrecy was regarded as the king's prerogative until proliferating corruption cultivated the first principles of open government during the Enlightenment. Despite public access to government documents being granted in Sweden as early as 1766, the common law world did not start to achieve such transparency until the end of World War II. Political appointments were often purchased, or votes procured through considerable and targeted financial outlay until caps were first imposed on campaign expenditure in 1883. In Queensland, where the legacy of corruption is particularly raw, a body dedicated to the investigation of misconduct in public office was established in 1989 and whistleblower protections legislated five years later. Various committees were established for consultation purposes in the late 20th century and 21st century, including the Sentencing Advisory Council in 2010, to provide expert advice to ensure the coercive power of the state was used in a considered and just manner (see below, Part II). The administration of government and the scrutiny, accountability and transparency of the legislative and electoral processes had benefited greatly from hundreds of years of progress.

The situation was not a great deal better in the courts. As trial by ordeal and trial by combat were gradually abandoned after the Norman invasion of 1066, the King assumed responsibility for dispensing justice. The workload was progressively shared with his stewards, then the clergy, and some knights, until it was first entrusted to the legally trained in 1268. The use of lay judges in magistrates courts commenced in 1285, and Justices of the Peace, first established in 1327, accumulated powers over the centuries that ensued until the spread of legal education allowed for their duties to be sharply curtailed in the 19th century. The growing recognition of the importance of

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separating the powers of the judiciary and the Executive was confirmed in Australia in 1901, and in the 1990s the High Court extended a similar protection to State courts (see below, Part III).

In the executive branch, powers were once absolute and unchecked. Medieval governments obtained and used information as they saw fit. Law enforcement was a private pursuit until the establishment of quasi-professional police in 1749 created a basis for structural accountability measures to develop. The right to privacy from governments was not recognised until 1961 in the United States and even later in other common law jurisdictions. However, between 1970 and 2007, most of the common law world recognised constitutional torts against or other forms of civil liability in police officers for excessive force, making them personally accountable in the same way as surgeons or lawyers. Although common in earlier ages, in more recent times the employment of extreme emergency police powers has been unnecessary and seen as a threat to libertarian principles (see below, Part IV).

A series of reforms implemented in Queensland since 3 April 2012 has undone the better part of these developments. On 14 November 2012, the Queensland Attorney-General, Jarrod Bleijie, lamented the excessive scrutiny in government and announced a review to transparency laws. On 3 April 2013, he foreshadowed legislation to curtail the powers of the Queensland Crime and Misconduct Commission (CMC) to investigate, and of whistleblowers to report, internal corruption. On 11 July 2012, he introduced legislation that would abolish the Sentencing Advisory Council. From June 2013, he reintroduced Justices of the Peace to the Bench as a cost-cutting measure. In August 2013, the government introduced a raft of extraordinary police powers in anticipation of the 2014 G20 Conference. On 17 October 2013, Mr Bleijie rushed through legislation that removed the power to indefinitely detain persons perceived to be a threat to the community from the courts, and conferred it on himself.[1] On 19 November 2013, the Premier introduced legislation granting police officers immunity from civil suit, weakening independent accountability. On the same day, Mr Bleijie presented a Bill which would permit the release of large amounts of personal data to ASIO without any immediate purpose. On 21 November 2013, he introduced a Bill that would remove all caps on political donations and campaign expenditure. There are, no doubt, more reforms to come.

Strong institutions are a prerequisite to good governance and a critical aspect of the rule of law.[2] The maintenance of the rule of law is crucial "to constrain abuses which occur even in the most well-intentioned and compassionate of governments".[3] The independence of a legally qualified judiciary and the transparency and accountability of government are the cumulative result of many centuries of progress. Those important principles are under threat. As Dixon J said in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187: "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power."

This article traverses the background relevant to each of the reforms implemented by Mr Bleijie to illustrate that they weaken the institutions of the state in a manner inconsistent with the course of history, and constitute the gradual executive encroachment onto the territory of our other democratic institutions against which Dixon J warned.

II. Reforms in the Legislature

A. Transparency: CMC and the right to information

For the longest of times, kings and governments disclosed only what they wished. The public depended on illegal leaks for its information, dating back to King Midas' barber, in legend said to have leaked that the King had donkey ears. Before the ready availability of publishing and printing

[1] That power was later held to be unconstitutional: *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

[2] See, eg Fremont-Barnes G, *Encyclopedia of the Age of Political Revolutions and New Ideologies, 1760-1815: A-L* (Greenwood Publishing Group, 2007) p 646; North D, *Understanding the Process of Economic Change* (Princeton University Press, 2005).

[3] Jowell J, "The Rule of Law Today" in Jowell J and Oliver D (eds), *The Changing Constitution* (Oxford University Press, 6th ed, 2007) p 25.

facilities, the focus was on control of seditious and treasonous movements that could threaten the central government.[4] Even after they became accountable to the people, governments were shielded by the doctrine of state secrecy until the first principles of open government emerged with the Enlightenment in the 18th century. Sweden was the first to give public access to government documents with its *Freedom of the Press Act 1766*.

Notwithstanding the English flirtation with republican government, and a general curbing of monarchical power through the *Bill of Rights 1689*[5] and the *Act of Settlement 1701*,[6] the ability of the English people to hold their governments to account remained limited. Despite constitutional and political upheaval, William III was "no honorary president of a republic … but a real working, governing king".[7] His government, and successive governments, though "dissimilar in other respects, shared a considerable disinclination to encourage the free flow of information".[8] This may explain why transparency of government action did not catch on in the common law world until much later. In the United Kingdom, successive Official Secrets Acts dating back to 1889 prohibited the publication of state secrets and official information.[9] In the United States, the *Housekeeping Statute 1789* conferred on the government "general authority to operate their agencies" including to withhold records.[10]

Rhetoric about open government had commenced by 1913, when US President Woodrow Wilson declared that "government ought to be all outside and no inside … there ought to be no place where anything can be done that everybody does not know about".[11] Nevertheless, governments were slow to cede their monopoly on information. Public opacity prevailed until the end of World War II, when the United States enacted legislation that allowed for public access to documents; although it retained a discretion to restrict access "for good cause found" or "in the public interest".[12] Two decades later the United States introduced freedom of information legislation reaching for the first time the modern administrative law watermark.[13] Equivalent laws were passed in Scandinavia in the 1970s, in Australia in 1982,[14] and then in Canada,[15] New Zealand,[16] the United Kingdom,[17] Ireland,[18] and India.[19] By 2006, nearly 70 countries had some form of right to information legislation promoting transparency in the government.[20] Queensland enacted its freedom of information legislation in 1992.[21]

[4] Birkinshaw P, *Freedom of Information: The Law, the Practice and the Ideal* (4th ed, Cambridge University Press, 2010) p 69.

[5] 1 William & Mary Sess 2 c 2.

[6] 12 and 13 Will 3 c 2.

[7] Maitland F, *Constitutional History of England* (1965) p 388.

[8] MacDonald J, Crail R and Jones C, *The Law of Freedom of Information* (Oxford University Press, 2009) p 31 [3.13].

[9] *Official Secrets Act 1889* (52 & 53 Vict c 52); *Official Secrets Act 1911* (1 & 2 Geo 5 c 28); *Official Secrets Act 1920* (10 & 11 Geo 5 c 75); *Official Secrets Act 1939* (2 & 3 Geo 6 c 121); *Official Secrets Act 1989* (1989 c 6).

[10] 5 USC s 301.

[11] Wilson W, *The New Freedom* (1913) pp 113-114, 130 ("Government must, if it is to be pure and correct in its processes, be absolutely public in everything that affects it").

[12] *Administrative Procedure Act 1946* (5 USC s 551). See also Relyea H and Kolakowski M, "Access to Government Information in the United States", CRS Report for Congress, 13 June 2007.

[13] *Freedom of Information Act 2000* (5 USC s 552).

[14] See Australian Law Reform Commission (ALRC), *Open government: a review of the federal Freedom of Information Act 1982*, Report No 77, Ch 3.

[15] *Access to Information Act 1985* (Can).

[16] *Official Information Act 1982* (NZ).

[17] *Freedom of Information Act 2000* (UK).

[18] *Freedom of Information Act 1997* (Ire).

[19] *Right to Information Act 2005* (Ind).

[20] Siraj M, "Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective" (2010) 2 *Journal of Alternative Perspectives on Social Sciences* 211 at 223

[21] *Freedom of Information Act 1992* (Qld).

In Queensland, the memory of corruption and the need for transparency are particularly acute. The Fitzgerald Inquiry, completed in 1989, revealed endemic corruption and resulted in the conviction and incarceration of the Police Commissioner and four former Ministers. It succinctly noted the importance of open government: "information is the lynch-pin of the political process. Knowledge is quite literally power".[22] Former Premier Joh Bjelke-Petersen's trial for perjury ended in a hung jury, later revealed to be attributable to the foreman, a member of the youth branch of the premier's party and affiliated with the "Friends of Joh" movement. The predecessor to the CMC was established that year to perform the function of investigating misconduct in public office. Whistleblower and public sector ethics legislation was introduced in 1994.[23]

In 2009, the passage of the *Right to Information Act 2009* (Qld) made more information publicly available by default. In introducing the Act, then Premier, Anna Bligh said:[24]

> Public release of information about government policies and decisions enables informed debate, scrutiny and public participation. Without information, people cannot exercise their rights and responsibilities or make informed choices. Increased openness and transparency also means the government can be held to account for its actions. For this reason, the right to information is a powerful means of promoting trust and integrity in government.

More recently, the focus has shifted to restricting information in the name of national security.[25] The release via WikiLeaks of embarrassing diplomatic cables, intelligence reports, and first-hand incident reports from military personnel,[26] as well as the 2013 release of operational details concerning the US National Security Agency's mass surveillance of US citizens and foreign nations[27] have in large part illustrated the importance of transparency and accountability to responsible government. The uncertain future of both Julian Assange and Edward Snowden and the inhumane treatment of and crushing sentence imposed on Chelsea (formerly Bradley) Manning add to that concern.[28] In 2013, the Commonwealth continued the trend of fine-tuning and enhancing whistleblower protections.[29]

The laws on disclosure of government information are complex: there are 506 secrecy provisions in 176 pieces of legislation including 358 distinct criminal offences,[30] in addition to common law and equitable duties. It is the subject of ongoing controversy, debate and legislative change.[31] However, it is trite to say that open and transparent government is an essential element of democracy. The United Nations in its first session recognised freedom of information as "a fundamental human right and …

[22] Fitzgerald GE (Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council* (Brisbane, 1989) p 126 (Fitzgerald Report); Sir Francis Bacon is said to have first expressed that "knowledge is power" ("scientia potential est"): Bacon F, *Meditationes Sacrae* (1597).

[23] *Public Sector Ethics Act 1994* (Qld); *Whistleblowers Protection Act 1994* (Qld).

[24] Queensland, *Parliamentary Debates*, 19 May 2009, p 308 (Anna Bligh).

[25] Though this is not entirely new, see the celebrated "Pentagon Papers" case: *New York Times Co. v United States* 403 US 713 (1971).

[26] Bellia P, "WikiLeaks and the institutional framework for national security disclosures" (2012) 121 Yale LJ 1448 at 1451-2.

[27] See, eg Greenwald G and MacAskill E, "NSA Prism program taps into data of Apple, Google and others", *The Guardian*, 7 June 2013.

[28] See generally Stone G, "WikiLeaks and the First Amendment" (2012) 64 *Federal Communications Law Journal* 477; Davidson S, "Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks" (2011) 34 *Hastings Communications and Entertainment Law Journal* 27; Gespass D, "Bradley Manning Case: Executive Power vs. Citizens' Rights" (2012) 69 *National Lawyers Guild Review* 186.

[29] *Public Interest Disclosure Act 2013* (Cth).

[30] ALRC, *Secrecy Laws and Open Government in Australia*, Report No 112 (11 March 2010) p 22.

[31] See, eg *Public Interest Disclosure Act 2013* (Cth); *Public Interest (Consequential Amendments) Act 2013* (Cth); *Kline v Official Secretary of the Governor-General* (2013) (2013) 88 ALJR 161 (scope of FOI obligations of Office of Governor-General). See also the recent restriction of immigration information to a weekly asylum seeker briefing: "First boat arrives as government says it will hold weekly asylum seeker boat briefings with media", *ABC News*, 23 September 2013.

the touchstone of all the freedoms to which the United Nations is consecrated".[32] That right has been reinforced by the UN Special Rapporteur on Freedom of Opinion and Expression, emphasising that "everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information".[33] The right has been endorsed by the Commonwealth Heads of Government Meeting in 1999 and recognised by the apex courts of Japan, India and Sri Lanka.[34] The limits of justifiable government secrecy are by now well recognised: "Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not."[35] Queensland's problems with opacity and corruption appeared to be behind it, and the commitment to transparent government well entrenched.

Then, between November 2012 and April 2013, Mr Bleijie promoted reforms that would wind back two critical aspects of transparency that have been achieved over the course of centuries: the ability of citizens to access information and the ability of whistleblowers to release it.

(1) Right to information

On 14 November 2012, the Housing Minister resigned following allegations of misconduct including the use of personal email to avoid disclosure obligations under the *Right to Information Act*.[36] Prompted by a concern that this was an overreaction representative of too much scrutiny in politics, the Attorney-General announced a review of the right to information legislation, commenting that "[i]f this is the public scrutiny that people [are] under … people are not going to be interested in becoming politicians anymore".[37] However, he said that the larger question would have to be addressed first: there "can't be any fundamental changes to the [*Right to Information Act*] until we work out what we're doing with the whole 'open government'".[38] Four days later, the Premier backed away from Mr Bleijie's statements, reassuring the public that the government had "no intention of winding back or scrapping the [*Right to Information Act*]".[39] The ability of citizens to access public documents is safe for the time being.

This stance is to be viewed against more recent reforms, introduced on 30 April 2013, requiring greater transparency from unions. That legislation raised the maximum penalty for the offence of not acting honestly, in good faith, in the best interests of the organisation and for a proper purpose, from $440 to $340,010 or five years' imprisonment.[40] Unlike the equivalent offences for directors of a corporation and those in public office, that offence requires no proof of intentional dishonesty.[41] The changes were apparently prompted by the corruption in the grant of mining leases in New South Wales

[32] UN General Assembly Resolution 59(I), 1st session of the UN General Assembly, 1946.

[33] UN Doc E/CN 4/1999/64, para 12.

[34] "Commonwealth Functional Co-operation", in Commonwealth Heads of Government Meeting Communiqué, Doc 99/68, 15 November 1999, par 20.

[35] *Bennett v President, Human Rights & Equal Opportunity Commission* (2003) 134 FCR 334 at [98]-[99].

[36] Sandy A, "Attorney-General considering change to Right To Information law to keep politicians safe", *Courier Mail*, 16 November 2012; Vogler S, "Bruce Flegg quits as Queensland Government's Housing Minister – and Premier says he felt he had to go", *Courier Mail*, 14 November 2012.

[37] Sandy, n 36.

[38] Sandy A, "Newman insists Queensland's Right to Information laws stay strong so policy is kept an open secret", *Courier Mail*, 20 November 2012.

[39] Sandy, n 38.

[40] *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Act 2013* (Qld); see in particular amendment to *Industrial Relations Act 1999* (Qld), s 527.

[41] Compare *Corporations Act 2001* (Cth), s 184; *Criminal Code* (Qld), s 92A.

involving a former union official.[42] Significantly, however, that inquiry also recommended the prosecution of senior government Ministers for conspiracy to defraud and misconduct in public office.[43]

(2) Whistleblower protection

On 3 April 2013, Mr Bleijie foreshadowed changes to make it more difficult for whistleblowers to invoke the powers of the CMC. Those reforms would remove the protection of anonymity, force complainants to sign a statutory declaration, raise the standard for "official misconduct" and allow the prosecution of persons making complaints found to be frivolous or vexatious.[44] This is justified on the basis that if "someone has such an allegation against someone then they should put it in writing, they should stand by the allegation".[45] It would also make it an offence to disclose the allegation to the media until a public investigation occurs or the Supreme Court orders otherwise.[46] In response to widespread criticism, Mr Bleijie urged "genuine whistleblowers … not to be worried".[47]

It is, of course, in the very nature of complaints of corruption that the complainant has little to gain and much to lose. That is all the more so if the independence of the CMC is itself called into question.[48] It would be unusual and impractical for a whistleblower to have assembled concrete evidence before making such a complaint. That is why the CMC exists. The incentives for insiders to bring corruption to light, and in turn the disincentives for senior officials to engage in corrupt activities, is markedly decreased if the threat of prosecution awaits the complainant at the threshold.

B. Accountability: Councils and committees

Accountability in lawmaking has developed gradually and over a very long period of time. The limitation of regal power through the *Charter of Liberties* in 1100 and the *Magna Carta* in 1215 could not prevent the rise, in 17th century Europe, of the divine right of kings, which dictated that the king drew his right to rule directly from God and could not be subject to the will of the people or the aristocracy. James I of England and Louis XIV of France brought it to the fore in their jurisdictions, and while their Majesties did not succumb until the later years of their life – to tertian ague and gangrene respectively – James II and Louis XVI, who were to follow them, would not be so fortunate.

Patrick Birkinshaw locates the beginning of the English Revolution in 1640 on a small shift in emphasis within the House of Commons:

> The English Revolution began in a constitutional, if not material, sense when the Commons insisted on being informed of who advised the Crown so that they could be made accountable for any "unlawful, injurious or hateful" advice and policies. Unlike the barons of previous centuries, who were content to bloody the King's nose on individual occasions by punishing his high advisers, the Commons was embarking on a process that would lead to oversight of public administration.[49]

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[42] Queensland, *Parliamentary Debates*, Second Reading Speech for Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill, 30 April 2013, p 1303 (Jarrod Bleijie).

[43] See Independent Commission Against Corruption (NSW), *Investigation into the Conduct of Ian MacDonald, Edward Obeid Snr, Moses Obeid and Others*, Report (July 2013).

[44] Bleijie J and Newman C, "Government to consider CMC report findings", Media Statements, 3 April 2013. See also *Review of the Crime and Misconduct Act 2001 (Qld)*, Ch 11, Recommendations 3A (raising threshold of misconduct), 3B (statutory declaration), 3D (prosecution).

[45] Remeikis A, "Moonlight rising: Fitzgerald whistleblower questions reforms", *Brisbane Times*, 5 July 2013.

[46] *Review of the Crime and Misconduct Act 2001 (Qld)*, n 44, Recommendation 8. See also Thomas H, "Law reform would muzzle media", *The Australian*, 4 July 2013.

[47] "Bleijie urges calm on CMC changes", *Sky News*, 4 July 2013.

[48] Consider the report tabled in Parliament revealing questionable interactions between the CMC Chairman and the Attorney-General: Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 2013, p 4152 (Anna Palaszczuk); Ryan B, "CMC row intensifies after secret documents tabled in Qld Parliament", *ABC News*, 21 November 2013. See also the criticism of the government's reaction to the alleged impropriety, dismissing the entire PCMC and extending the CMC Chairman's term: "Campbell Newman government sacks parliamentary committee", *The Guardian*, 22 November 2013.

[49] Birkinshaw, n 4, p 72.

Over the course of the following centuries, more power was delegated to a legislature elected by the people. In turn, constitutional constraints were imposed on those legislatures. Those took the form of express inalienable rights or freedoms with which the Parliament could not interfere, or limits to legislative power implied from the concept of responsible and representative government. The accountability of Ministers to the Parliament has been considered by the High Court to be critical to the operation of otherwise broad, discretionary powers.[50] Along similar lines, governments established committees to consult those whom important legislative decisions affect so that changes to laws affecting people's lives might be properly considered and appropriately informed.

On the scale of things affecting people's lives, sentencing is fairly important. It is the most coercive exercise of state power known to the law. Changes in maximum or minimum penalties which seem small from a policy point of view control the exercise of discretion which will add or subtract painful months or years in isolation for the individual. One piece of unjust legislation can cause hundreds of cases of injustice. The careful calibration of, including the involvement of the community in, sentencing policy is therefore critical. Chief Justice of New South Wales, the Hon J J Spigelman, observed: "The participation by members of the public in the process of the administration of justice … constitutes a crucial mechanism for ensuring that trust in the administration of justice remains at a high level."[51]

The Queensland Law Reform Commission (QLRC) was established in 1968 and conducts detailed reviews of particular areas referred to it by the Attorney-General. However, its resources are allocated to specific, targeted areas from time to time. In recognition of the need for ongoing advice on sentencing policy, the Sentencing Advisory Council was established on 26 November 2010.[52] It followed the establishment of equivalent bodies in New South Wales in 2003, then Victoria and other States. Such organisations also exist in the United Kingdom and in most US States. It was a measure which would "help bridge any gap between community expectations, the courts and government on the complex issue of sentencing criminal offenders".[53] It "provide[d] greater clarity, greater transparency and a more robust foundation" for the crucial exercise of sentencing; a body with a "broad range of membership, including community representation", it would "stimulate balanced public debate" with a view to "enhancing confidence in Queensland's sentencing regime".[54] The full chain of accountability, not only in general democracy but in individual lawmaking – from the sovereign, to the Executive, to the legislature, to the advisory agencies, to the people – was finally complete.[55]

Then, on 11 July 2012, Mr Bleijie introduced a Bill that passed through the Parliament and abolished the Sentencing Advisory Council.[56] The only explanation given was that its "function effectively duplicate[d] the law review functions of the QLRC" and its abolition would "enable a more efficient use of public resources".[57] Of course, the reporting and advisory role of the QLRC is restricted to matters referred to it by the Attorney-General. No referral in relation to sentencing has been made or foreshadowed.

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[50] See, eg *Plaintiff S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636 at [55] (Gummow, Hayne, Crennan and Bell JJ); *Plaintiff M79/2012 v Minister for Immigration & Citizenship* (2013) 87 ALJR 682 at [40] (French CJ, Crennan and Bell JJ).

[51] Spigelman JJ, "Free, strong societies arise from participatory legal systems", *Sydney Morning Herald*, 16 May 2005; see also *Markarian v The Queen* (2005) 228 CLR 357 at [82] per McHugh J: "Public responses to sentencing … have a legitimate impact on the democratic legislative process."

[52] *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld); Proclamation (Subordinate Legislation 2010 No 330).

[53] Explanatory Memorandum, *Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010* (Qld), 1.

[54] Queensland, *Parliamentary Debates*, 3 August 2010, p 2308 (Cameron Dick).

[55] On the importance of the function of sentencing advisory councils, see Abadee A, "The Role of Sentencing Advisory Councils" (Paper prepared for the National Judicial College of Australia's National Sentencing Conference, Canberra, 10-12 February 2006).

[56] *Criminal Law Amendment Act 2012* (Qld), s 17.

[57] Explanatory Memorandum, *Criminal Law Amendment Bill 2012* (Qld), 3.

At the second reading, Mr Bleijie added that the Bill "signifies our intention to be tough on crime and to strive to ensure that adequate punishments are being handed down by the courts".[58] Plainly enough, that is to say, where there is an intention to be tough on crime, there is no need for serious consultation or consideration – much less an independent body to give frank and fearless advice. The same Bill that introduced that measure also significantly raised the minimum non-parole periods and maximum sentences for certain offences against police officers.[59]

The abolition of the Sentencing Advisory Council is one particularly visible aspect of a broader tendency against consultation with qualified bodies. Bills have frequently been declared "urgent" and rushed through Parliament with Standing and Sessional Orders suspended.[60] The bipartisan committee system recommended by the Fitzgerald Inquiry[61] and designed to scrutinise proposed legislation, has been frequently bypassed.[62] When they are consulted, committees are often required to review and report within an impracticably short time-frame,[63] and only 51% of recommended legislative amendments have been adopted.[64] This "indecent haste"[65] has not only created drafting errors affecting the operation of the laws,[66] but prevents proper scrutiny of laws which forms an essential part of the democratic process. While the government insists that the committee system is "running as intended",[67] some committee members have questioned the wisdom of its continued running at all, given the generous entitlements granted to committee chairs and members.[68]

To be clear, the annual figure saved by cutting the Advisory Council's budget is $1.3 million.[69] That is only slightly more than the amount spent on pot plants in the same year ($909,725).[70] It is less than double the cost of a piece of public art, in the shape of an egg, placed on an offshoot to a 56 km walking track in the Sunshine Coast hinterland in August 2012 ($700,000). The egg, somewhat like the Sentencing Council and other consultative committees in Queensland, "will essentially disappear once it has been grown over by strangler fig".[71]

[58] Queensland, *Parliamentary Debates*, 2 August 2012, p 1469 (Jarrod Bleijie).

[59] *Criminal Law Amendment Act 2012* (Qld), ss 3, 7.

[60] For example, during the week of 14 October 2013 the government declared five Bills "urgent": *Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013*; *Criminal Law Amendment (Public Interest Declarations) Amendment Bill 2013*; *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2013*; *Vicious Lawless Association Disestablishment Bill 2013*; *Tattoo Parlours Bill 2013*.

[61] Fitzgerald Report, n 22, p 371, Recommendation No A10(i). The current bipartisan committee system was introduced in August 2011: *Parliament of Queensland (Reform and Modernisation) Amendment Act 2011* (Qld).

[62] Of the 118 Bills introduced by the Newman government, 16 have not been considered by the Committee: Howells M, "KAP calls to abolish Qld parliamentary committees", *ABC News*, 28 October 2013.

[63] See, eg Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 2013, p 3989 (Jarrod Bleijie, moving that the Legal Affairs and Constitutional Safety Committee report to the House on the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill* within 36 hours).

[64] Howells, n 62.

[65] Sweetman T, "The Newman Government's indecent haste is reminiscent of the Joh Bjelke-Petersen years", *The Courier Mail*, 22 November 2013.

[66] The *Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Bill 2013* was introduced on 17 October 2013. The *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Legislation Amendment Act 2013* (Qld) was assented on 20 June 2013.

[67] Dorsett J and Howells M, "Deputy Premier Jeff Seeney says Qld's parliamentary committee system 'running as intended'", *ABC News*, 29 October 2013.

[68] Howells, n 62. Committee chairs are paid an extra $21,168, and members $8,217 per annum.

[69] Sentencing Advisory Council, "About Us", 10, http://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0008/134567/AboutUs.pdf viewed 25 October 2013.

[70] Ironside R, "Public servants told to BYO tea and coffee to cut costs", *Courier Mail*, 18 May 2012.

[71] Pfeiffer E, "Government billed more than $700,000 for sculpture to be grown over by foliage", *Yahoo News*, 28 August 2012. This is not to discount the value of public art generally: see, eg Selwood S, *The Benefits of Public Art: The Polemics of Permanent Art in Public Places* (Policy Study Institute, 1995); Roberts M, Marsh C and Salter M, *Public Art in Private Places: Commercial Benefits and Public Policy* (University of Westminster Press, 1993).

C. Democracy: Electoral reform

In the Middle Ages, democracy was for sale.[72] The first electoral fraud case in the 15th century found Thomas Long to have bribed the Corporation of Westbury £4 for victory in an election.[73] Such incidents prompted legislation in 1696 forbidding any "present, gift, reward or entertainment" to voters.[74] By all accounts, the Act failed miserably: seats remained available on the open market, and the prices rose from £400 in 1698 to £650 in 1727, to the £2,000 paid by Lord Tynley in 1761.[75] As late as the early 19th century, records suggest that office could be obtained for around £6,000.[76]

If seats were not directly purchased, votes were. By the 17th and 18th centuries, democratic politics had developed a feudal pattern, with the lords of the county canvassing those of the hundreds, who would canvass those of the manors, and so forth down the chain to the commoners in the village. In politically significant borough elections, "the electors would expect to be both canvassed and entertained".[77] In 1768, the Earls of Halifax, Northampton and Spencer spent over £100,000 each in a joust for power that came to be known as the "Spendthrift Election". Lord Halifax is said to have succumbed to bankruptcy, and Lord Northampton to have cut down his trees and sold his furniture in the race, and left for Switzerland after his loss, never to return.[78]

It was not always money at play – in 1784, the Whig vote benefited considerably from the use of "women of rank and remarkable fashion".[79] The eventual introduction of legislation to prevent such practices appears to have been motivated by the concern for inflation rather than influence, as Lord Mahon lamented:[80] "The necessity of such a bill must strike every gentleman, for at present there was scarcely a fortune that could support the expense of a contest at an election."

The first serious attempts to curb corruption in 1868[81] were swiftly followed by the first caps on campaign expenditure in 1883.[82] Those restrictions had an "immediate and dramatic effect" to the immense and continuing benefit of the integrity of the electoral process.[83]

In more recent times, the finance of politics has come to flow the other way. The corollary of the need for significant expenditure was that individuals and organisations came to bear significant influence over politics by the donation of considerable sums. In early US elections following independence in 1776, only those with the means to finance their own elections would stand for office. However, campaign finance was born in the early 19th century when politicians began to accept contributions directly in return for the appointment of the donor to various positions of power. With industrial growth in the late 19th century and 20th century, corporations became the principal source of contributions and the expression of interests through lobbying became a somewhat more subtle, but nonetheless powerful, aspect of politics and policy.[84]

[72] Distortion of the electoral process is of course much older, eg Julius Caesar's stacking of the senate in 48BC: Blanton R and Fargher L, *Collective Action in the Formation of Pre-Modern States* (Springer, 2008) 101.

[73] Wall A, "The Money of Politics: Financing American and British Elections" (1997) 5 *Tulane Journal of International and Comparative Law* 489 at 502.

[74] *Election Act of 1696* (7 & 8 Will III, c 4).

[75] Cannon J, *Parliamentary Reform 1640-1832* (Cambridge University Press, 1973) p 35.

[76] Cannon, n 75.

[77] Jennings I, *Party Politics I: Appeal to the People* (Cambridge University Press, 2003) pp 113-114.

[78] Grego J, *A history of parliamentary elections and electioneering in the old days* (Chatto & Windus, 1886) p 228.

[79] Wheatley H, *The Historical And The Posthumous Memoirs Of Sir Nathaniel William Wraxall 1772 to 1784* (Kessinger Publishing, 2005) p 271.

[80] Cannon, n 75, p 35.

[81] *Parliamentary Elections Act 1868* (31 & 32 Vict c 125).

[82] *Corrupt and Illegal Practices Prevention Act 1883* (46 & 47 Vict c 51) (£710 for the first 2,000 voters in electorate, £40 for every additional 1,000 voters).

[83] Wall, n 73 at 503.

[84] Wall, n 73 at 491.

Regulation of political donations has intermittently been in the US legislative focus, but it has been hampered by the notoriously strong constitutional protection of free speech. In 1907, public concern regarding the translation of corporate interests to political donations prompted the introduction of an expenditure cap[85] in primary elections that was held to be beyond power in 1921.[86] Other regulation followed in the 1940s[87] and substantial reforms were implemented following the Watergate scandal in 1974.[88] However, the limits on expenditure and donations were struck down by the Supreme Court two years later.[89] Further amendments prohibiting corporate and union donations were struck down in 2010.[90] Unsurprisingly, with these developments, US elections are an expensive business: $6 billion compared with $91 million in the United Kingdom.[91] The importance of large political donations and their influence over policy is an ongoing source of controversy: candidates know, it is said, that "big money talks – and that early money screams".[92]

The freedom of political communication implied from the Australian *Constitution* is significantly more limited than that in the United States. Statutes have been held unconstitutional for prohibiting electoral advertising,[93] or selectively restricting donations without a legitimate purpose.[94] However, there is no suggestion that restrictions on political donations generally impermissibly burden the freedom. The purposes of such legislation to "safeguard the integrity of the political process by reducing pressure on political parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence … are not doubted".[95]

Early expenditure restrictions in Australia were modelled on the 19th-century UK provisions and applied only to promotions on individual candidates, and were regularly bypassed by party politics.[96] The laws and their State counterparts were routinely disregarded: the monetary limits were revised only once in almost 80 years and, when acted on by the Tasmanian Court of Disputed Returns in 1979, they were immediately repealed.[97] The first serious campaign finance regulation came into force shortly afterwards in New South Wales in 1981[98] and at the federal level based on committee recommendations in 1983.[99] Other States followed in subsequent years.[100] In 2011, Queensland capped donations at $5,300 per donor per year to a political party and $2,200 to a candidate,[101] in line

[85] *Tillman Act of 1907* (34 Stat 864).

[86] *Newberry v United States* 256 US 232 (1921).

[87] *Labor Management Relations Act of 1947*, 29 USC s 401-531 ("Taft-Hartley Act").

[88] In particular, 1974 amendments to the *Federal Election Campaign Act 1971*, Pub L 92-225, 86 Stat 3, enacted 7 February 1972, 2 USC s 431.

[89] *Buckley v Valeo*, 424 US 1 (1976).

[90] *Citizens United v Federal Election Commission*, 558 US 310 (2010).

[91] Thompson N, "International campaign finance: How do countries compare?", CNN, 5 March 2012.

[92] Wall, n 73 at 494.

[93] *Broadcasting Act 1942* (Cth), s 95B in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[94] *Election Funding, Expenditure and Disclosures Act 1981* (NSW), ss 96D, 95G(6) in *Unions NSW v New South Wales* (2013) 88 ALJR 227.

[95] *Unions NSW v New South Wales* (2013) 88 ALJR 227 at [49] per French CJ, Hayne, Crennan, Kiefel and Bell JJ citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 144 (Mason CJ), 154-155 (Brennan J), 188-189 (Dawson J).

[96] Orr G, "The Currency of Democracy: Campaign Finance Law in Australia" (2003) 26 UNSWLJ 1 at 5-6. See *Commonwealth Electoral Act 1902* (Cth,) Pt XIV; *Commonwealth Electoral Act 1918-1980* (Cth), Pt XVI.

[97] Cass D and Burrows S, "Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits" (2000) 22 Syd LR 477 at 491-492.

[98] *Election Funding Act 1981* (NSW).

[99] *Commonwealth Electoral Legislation Amendment Act 1983* (Cth). Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (1983).

[100] See, eg *Electoral Act 1992* (Qld), s 126A; *Electoral Act 1992* (ACT), Pt XIV; *Electoral Act 2002* (Vic), Pt XII.

[101] *Electoral Reform and Accountability Amendment Act 2011* (Qld), Pt 11, Div 6.

with the caps in New South Wales at the time.[102] By now it has become clear that the democratic function is worth insulating from the excessive financial influence of stakeholders. Of the 176 countries for which data is available, 105 have statutory restrictions for either expenditure or donations; 52 have both.[103] With the notable exceptions of central Europe and Scandinavia,[104] those that have neither are situated in sub-Saharan Africa, South America or elsewhere in the developing world.

Then, on 21 November 2013, Mr Bleijie introduced legislation to allow Queensland to join that category. The amendments remove all caps on political donations (*Electoral Reform Amendment Bill 2013* (Qld), cl 50) and campaign expenditure (cl 59), and simultaneously increase the disclosure threshold by a factor of 12, from $1,000 to $12,400 (cll 24, 52-58). These limits on donations were considered to "unnecessarily restrict[] participation in the political process".[105] Public funding, on the other hand, is substantially curtailed. It is reverted to a stated dollar amount per vote as a cost-cutting measure, meaning that "[f]or some seats in Queensland there will be considerably less money".[106] The minimum for entitlement to that funding is also increased from 4% to 10% of the primary vote (cll 36, 37), plainly to the detriment of minor parties, or, as Mr Bleijie puts it, to save public moneys from going to "candidates with no realistic hope of being elected".[107] The amendments undoubtedly favour the conservative and conventionally more affluent side of politics. This is of particular significance in a State where the political interests of minority groups is already compromised by the abolition of the upper house. It also comes in a State where the distortion of the electoral process is not a distant memory – Bjelke-Petersen held office for 19 years with the assistance of a gerrymander, never having won more than 39% of the vote.[108]

III. Reforms in the judiciary

A. A qualified judiciary: Justices of the Peace in the Queensland Civil and Administrative Tribunal

Justice has not always been dispensed by the legally qualified. The law was a largely private institution under Anglo-Saxon law until the 10th century, where those aggrieved by the murder of a nobleman would charge 300 gold pieces of the offender for his crime, or place him into slavery to repay it.[109] Criminal justice was outsourced to God in the Middle Ages – from before the Norman invasion of 1066, alleged criminals would undergo trial by ordeal to determine whose side he was on, and even after its abolition in 1216, sexual crimes were dealt with by ecclesiastical courts throughout the 14th and 15th centuries.[110] Trial by combat, brought to England by the Normans,[111] gradually disappeared during the 16th century but was not finally abolished in England until 1819.[112] Curiously, this did not stop Leon Humphreys from claiming a right under the *European Convention of Human*

[102] *Election Funding, Expenditure and Disclosures Act 1981* (NSW), Pt 6, Div 2A.

[103] Institute for Democracy and Electoral Assistance, Political Finance Database, http://www.idea.int/political-finance/question.cfm?id=284.

[104] Germany, Czech Republic, Austria, Switzerland, Denmark, Sweden, Norway.

[105] Explanatory Notes, *Electoral Reform Amendment Bill 2013* (Qld), 1.

[106] Queensland, *Parliamentary Debates*, 21 November 2013, p 4228 (Jarrod Bleijie).

[107] Queensland, *Parliamentary Debates*, 21 November 2013, p 4227 (Jarrod Bleijie).

[108] Macintyre S, *A Concise History of Australia* (Cambridge University Press, 2009) p 239.

[109] Reynolds M, *Using the Private Sector to Deter Crime*, NCPA Policy Report No 181 (1994), p 3.

[110] Committee on Psychiatry and Law: Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: the 30s to the 80s* (Vol IX, Publication No 98, 1977) p 840.

[111] Neilson G, *Trial by Combat* (William Hodge & Co, 1890) p 31.

[112] In *Ashford v Thornton* (1818) 106 ER 149, the Kings Bench upheld the right of a defendant, on a private appeal from an acquittal of murder, to trial by battle. The following year Parliament passed 59 Geo III, c 46, 1819, abolishing the right to trial by combat. Megarry notes that the Bill passed its first, second, and third readings in one night, in order to prevent a new case of the same kind: Megarry, *A New Miscellany-At-Law: Yet another diversion for lawyers and others* (Hart Publishing, 2005) p 66.

Rights to choose trial by combat in December 2002. Humphreys had refused to pay a £25 fine for failing to notify the Driver and Vehicle Licensing Agency that he had removed his Suzuki motorcycle from road usage, and sought to battle a "champion" nominated by the agency. The court rejected his offer to "take on a clerk from Swansea with samurai swords, Ghurka knives or heavy hammers", and fined him a further £200 (see Sapsted D, "Court refuses trial by combat", *The Telegraph*, 16 December 2002).

The early judges were predominantly clergymen, although by the mid-13th century some knights were also appointed. Neither group was required to have experience or learning in Roman or canon law, although they are said to have been somewhat familiar with the broader concepts.[113] Amateur judges charged with the administration of justice in the local hundred courts would, until 1220, be called upon if their judgment was impugned to appear in the review court to defend their judgment by judicial dual.[114] Judges with experience in legal practice were first appointed from the serjents-at-law in 1268. It was not until the emergence of His or Her Majesty's Learned Counsel that the monopoly on judicial appointment enjoyed by the serjents was disrupted.[115] Thereafter the overwhelming majority of judges have been appointed from the ranks of prominent barristers, and later, solicitors or academics of particular eminence.

Nonetheless, the use of laypersons as magistrates remained common. Magistrates' courts over which "good and lawful men" presided were established in 1285 under Edward I.[116] The first formal appointment of "conservators of the peace" in each county was introduced by Edward III in 1327 and the following year they were given the power to punish offenders.[117] By 1361, such people held court and were known as "justices of the peace" (JPs).[118] The *Justices of the Peace Act 1361* mandated that "in every county in England there shall be assigned for the keeping of the peace … 3 or 4 of the most worthy in the county, with [only] some learned in the law", though in the case of serious crime, quorum requirements mandated that they sit with a lawyer.[119] JPs gained further power over the ensuing centuries, including regulation of certain local matters and, following the Black Death epidemic in 1348, jurisdiction over labour conscription and wage regulation. Over the 14th and 15th centuries they were also delegated power to deal with trade regulation, suppression of religious dissent, and roads, bridges and rivers. Under the Marian Committal Statute of 1555,[120] JPs gained the power to issue search and arrest warrants, and to preside over pre-trial committal proceedings and grant bail.[121] These duties later extended to various roles in local government in the 18th century,[122] though the requisite qualifications did not change and JPs generally continued to possess no more than "a smattering of legal knowledge".[123]

Predictably, the application of the law and fair process by JPs was not what it was before legally qualified judges. For example, although the rule against character evidence was recognised by the

[113] Dawson J, *A History of Law Judges* (Lawbook Exchange, 1960) pp 129-131.

[114] Dawson, n 113, p 133.

[115] See Holdsworth W, "The rise of the order of Kings' Counsel and its effects on the legal profession" (1920) 36 LQR 212.

[116] *Statute of Westminster of 1285* 13 Edw I, St 1 c 30, *Justices of Nisi Prius, etc Act 1285*. See also *Statute of Winchester of 1285* 13 Edw I, St 2 (reviving jurisdiction of local courts); Tout T, *The Political History of England from the Accession of Henry III to the Death of Edward III, 1216-1377* (AMS Press, 1905) pp 153-154.

[117] *Statute of Westmisnter of 1327* 1 Edw III c 16. See also Holdsworth W, *A History of English Law* (7th ed, 1956, vol 1) p 287. Albert Carter suggests that the office "may possibly have germinated from the frank-pledge system" of King Canute II: Carter A, *Outlines of English Legal History* (Butterworth & Co, 1899) p 205. For an early study of the office see Pynson R, *The boke of Justices of peas* (1506).

[118] *Justices of the Peace Act 1361* 34 Edw 3 c 1; see also Holdsworth, n 117, pp 288-293.

[119] Dawson, n 113, p 138; see also Judge I, "1361 and all that" (2013) 87 ALJ 676.

[120] 2 & 3 Phil & Mar, c 10 (1555).

[121] Langbein J, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2010) pp 41-42, 49.

[122] Dawson, n 113, pp 139-144.

[123] McPherson B, "Early development of the Queensland Magistracy" (Paper presented to the Conference of Magistrates, Brisbane, June 1990), 2.

King's Bench as early as 1684 and had taken hold in the courts by 1715,[124] JPs commonly allowed prejudicial testimony about the accused's character and past offences until at least 1770.[125] In another case, one JP who recognised the defendant over whose trial he was presiding said, "Oh, my old Friend, where have you been all this while; what, ain't you hanged yet?"[126]

Such an unsatisfactory state of affairs was ameliorated as resources of legally trained personnel became available and the powers of JPs were gradually eroded through the 19th century. County councils were elected and JPs were no longer required to pass regulations.[127] The courts in which they were involved were remodelled to depend less on lay judges and more on those with experience.[128] Following the inheritance of the institution from England in 1788,[129] the role of JPs in Australia decreased significantly with the increase of legally qualified and paid magistrates. Despite the reservation of some limited judicial functions in Queensland, most JPs were restricted to almost exclusively administrative duties.[130] Litigants were guaranteed the adjudication of their disputes before courts and tribunals constituted by lawyers with substantial experience and expertise.[131]

Then, in late 2012, Mr Bleijie announced that JPs would be reintroduced to judicial roles. Although initially restricted to allow a Bench of two JPs with a minimum of five and three years' legal experience, those qualification requirements were abandoned in March 2013.[132] When the six-month trial commenced in June 2013, it allowed two JPs, only one of whom must be an admitted lawyer, and neither of whom need have any legal experience, to constitute the Queensland Civil and Administrative Tribunal (QCAT) in disputes up to $5,000.[133] Using JPs in this essentially volunteer role to dispense justice, Mr Bleijie said he would "be interested to see whether this reduces the cost".[134] JPs in this role are to be paid less than one fifth of sessional QCAT members.[135]

Unsurprisingly for a society that has not been accustomed to having complex legal disputes adjudicated by lay people, the proposal was met with alarm. Each of the submissions received on the Bill noted their disapproval of the lack of any experience requirement in the trial. A fair and accessible justice system is a cornerstone of a just society and arguably some time has passed since it could be seen as an appropriate candidate for cost-cutting. In addition, QCAT is a court within the meaning of Ch III of the *Constitution*,[136] which raises the question whether the delivery of justice by the legally qualified is an "essential characteristic" of courts which cannot be impaired by the appointment of the legally untrained.[137]

[124] See *R v John Hampden* (1684) 9 St Tr 1053 at 1103.

[125] Langbein, n 121, pp 199-203.

[126] Goodman S, *Old Bailey Session Papers* (December 1744, No 69) p 36.

[127] Legal Affairs and Community Safety Committee, *Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013* (Report No 28, April 2013) p 4.

[128] Dawson, n 113, pp 145-151.

[129] Confirmed by 9 Geo IV, c 83 (1828).

[130] QLRC, *The Role of Justices of the Peace in Queensland*, Issues Paper No 51, February 1998, p 5.

[131] In the case of administrative tribunals, see, eg *Administrative Appeals Tribunal Act 1975* (Cth), s 7; *Queensland Civil And Administrative Tribunal Act 2009* (Cth), s 183.

[132] Bleijie J, "Changes expand eligibility for JP QCAT trial", Media Statement, 19 March 2013.

[133] *Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Act 2013* (Qld), s 6, inserting *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 206E.

[134] "JPs will now be able to hear minor disputes", *Toowoomba Chronicle*, 2 May 2013.

[135] Queensland Law Society, "Submission on Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013", 12 April 2013, p 5.

[136] *Owen v Menzies* [2013] 2 Qd R 327 at [20] (de Jersey CJ), [61] (McMurdo P), [103] (Muir JA); *Owen v Menzies* [2013] HCATrans 18 (Special leave refused).

[137] See *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Kable v Director of Public Prosecutions (NSWs)* (1996) 189 CLR 51.

B. The rule of law: Detention at the Attorney's pleasure

It is some time since the laws have been made, applied and enforced by the same person. In the tradition of Solomon, early courts in England were presided over by the King himself, or in the case of local courts, by a lord or steward. The situation in France was similar: a 12th century account recalls that Louis IX would pronounce his judgments in "the wood of Vincennes, where he would sit down with his back against an oak, and make us all sit round him" while he heard and determined "case[s] to be settled".[138]

Such an approach to justice is at odds with the most basic formulations of the rule of law. As long ago as Aristotle, it was said that "the rule of the law … is preferable to that of any individual"[139] and "rightly constituted laws should be [the final] sovereign".[140] Dicey has identified of one of three elements of the rule of law that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land".[141] Montesquieu wrote that "all would be lost if the same man … ma[de] the laws, … execut[ed] public resolutions, and … judg[ed] the crimes or the disputes of individuals". As far back as 1748, he had presciently warned: "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[142]

By 1178 in England, Henry II had appointed about 18 permanent judges to preside over civil disputes. Although the Crown retained the power to dismiss judges without cause, the importance of tenure became obvious under Charles I, who undertook not to exercise that power in 1641.[143] Charles II temporarily resumed the practice of intermittently removing judges who made decisions which displeased him in the 1670s, and during the 1700s it was not uncommon for new monarchs to decline to reappoint judges who had fallen out of favour,[144] but life tenure was firmly established by legislation passed in 1761.[145]

That security did not extend to the magistracy for some time. The separation of powers remained blurred with magistrates who "exercised both executive … and judicial duties".[146] The appointment of "police magistrates"[147] who "combin[ed] the functions of preservation of the peace, detection of crime, the apprehension of offenders, as well as the duties of sentencing and punishing"[148] demonstrates as much. The lack of clarity in their judicial role was associated with a lack of tenure. In colonial New South Wales, governors regularly dismissed them for failing to commit a police officer, or merely for their "political persuasion".[149]

The formalisation of the position of magistrates aided their independence. From 1850, these magistrates "began to be regarded as officials who were basically judicial-style functionaries … they

[138] Scalia A, "The rule of law as a law of rules" (1989) 56 *University of Chicago Law Review* 1175 at 1175, citing de Joinville J, *The Life of Saint Louis* in (Shaw M, trans, Penguin, 1963) pp 163, 177 (trans of Villehardouin and de Joinville, *Chronicles of the Crusades* (first published 1160-1213)).

[139] Aristotle, *Politics* (350 BC), (Stephen Everson trans, Cambridge University Press, 1988) Book III, c 16.

[140] Aristotle, n 140, c 11.

[141] Dicey AV, *Introduction to the Study and the Law of the Constitution* (10th ed, Palgrave McMillian, 1959) pp 184, 188.

[142] De Montesquieu C, *The Spirit of the Laws* (Cohler A, Miller B and Stone H, trans, Cambridge University Press, 1989) Book XI, Ch 6, 157 (trans of De l'esprit des lois: first published 1748)).

[143] McIlwain C, "The Tenure of English Judges" (1913) 7 *American Political Science Review* 217 at 222.

[144] Langbein, n 121, pp 81-82.

[145] 1 Geo III, c 23 (1761).

[146] Lowndes J, "The Australian magistracy: From Justices of the Peace to judges and beyond" (Paper presented at the Fourth Annual Colloquium of the Judicial Conference of Australia, Melbourne 12-14 November), 3.

[147] 4 Will IV, No 7.

[148] Weber T, "Origins of the Victorian Magistracy" (1980) 13 *Australian & New Zealand Journal of Criminology* 142 at 142.

[149] Lowndes, n 146 at 9.

acted more independently [and] were expected to be more like judges".[150] Yet, magistrates continued to be part of the Executive in New South Wales until as late as 1982,[151] and not considered judicial officers until 1986.[152] In Queensland, the ties between magistrates and the Executive were not formally cut until the passage of the *Stipendiary Magistrates Act 1991* (Qld).

In 1803, the US Supreme Court authoritatively held in *Marbury v Madison* 5 US 137 at 177 (1803) that "it is emphatically the province and duty of the Judicial Department to say what the law is". The High Court of Australia has long considered the operation of this principle in Australia as "axiomatic",[153] arising as it does from the textual and structural delineation between Chs I, II, and III of the *Constitution*. So important is this principle that the courts in both jurisdictions have placed strict limits on the abilities of judges to act in their personal capacity, lest the "political Branches … cloak their work in the neutral colors of judicial action".[154] Although the textual and structural bases are absent with respect to the States, the *Kable* principle[155] has limited the permissible institutional impairment of State courts as repositories of federal jurisdiction under s 71 of the *Constitution*, extending the consequences of the federal separation of powers to the States in various cases since 1996.[156] Subject to certain strictly defined exceptions, it has become clear that coercive detention is the exclusive province of the judiciary.[157] The course of centuries had clearly separated judicial from legislative and executive power and the rule of law prevailed.

Then, on 17 October 2013, Mr Bleijie removed from the courts the power to indefinitely detain, and conferred it on himself.[158] The Attorney-General had previously been able to apply to the Supreme Court for a continuing detention order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Cth) (DPSOA), but these amendments removed the need to involve the courts at all. It was

[150] Castles A, *An Australian Legal History* (Lawbook Co, 1982) p 327.

[151] *Local Courts Act 1982* (NSW).

[152] *Judicial Officers Act 1986* (NSW).

[153] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262-263 (Fullagar J); see also *New South Wales v Commonwealth* (1915) 20 CLR 54.

[154] *Mistretta v United States* 488 US 361 at 407 (1989), cited in *Grollo v Palmer* (1995) 184 CLR 348 at 366 (Brennan CJ, Deane, Dawson and Toohey JJ), 377 (McHugh J), 392 (Gummow J); *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 (Brennan CJ, Dawson, Toohey, McHugh, Gummow JJ), 45 (Kirby J). See also French R, "Executive toys: Judges and non-judicial functions" (2009) 19 JJA 5.

[155] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[156] See, eg *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Public Service Association (SA) Inc v Industrial Relations Commission (SA)* (2012) 86 ALJR 862. The existence of the principle was affirmed in the following cases (though the court held that in the particular circumstances the legislation was valid): *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458. Though the Qld Premier, Campbell Newman, considers the doctrine of separation of powers "more of an American thing": McKenna M, "Judges living in ivory towers: Newman", *The Australian*, 25 October 2013.

[157] *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ). See also *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444 (Griffith CJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 186-187 (Brennan CJ); *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [39] (Lord Steyn).

[158] *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) inserting *Criminal Law Amendment Act 1945* (Qld), Pts 4, 4A.

immediately criticised as offensive to the separation of powers,[159] and "almost certainly unconstitutional".[160] In less than two months the latter criticism was confirmed by the Court of Appeal.[161]

This free-standing power to subject individuals to indefinite detention was a marked departure from even the DPSOA, the limited protections of which had also attracted substantial criticism.[162] At the very least, the involvement of the Supreme Court under that Act "in a manner which is consistent with its judicial character" encompassed such safeguards as the discretion as to whether and what type of order should be made, the rules of evidence, the exercise of the Attorney-General's discretion by reference to clear criteria, public hearings, and appeal rights (*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [19] (Gleeson CJ)). It required that the Supreme Court be satisfied that the "prisoner is a serious danger to the community [and that] there is an unacceptable risk that the prisoner will commit a serious sexual offence" if released (DPSOA, s 13(2)). The order could only be made during the last six months of a prisoner's sentence and only if they are serving a sentence for a sexual offence involving violence or against children (s 5 read with the Sch). The court had to be satisfied by acceptable, cogent evidence and to a high degree of probability (s 13), based on two independent psychiatric reports (s 8). Orders had to be reviewed annually (s 27). Significant to Gleeson CJ's reasoning in *Fardon*, was the fact that the DPSOA provided clear guidance, requiring the court to have regard to nine distinct criteria (s 13(4)). The standard it prescribed was not devoid of practical content, nor was "the decision-making process is a meaningless charade" (*Fardon* at [22]). As stated at its introduction, a deprivation of liberty "must never be authorised lightly, without reasonable cause based on legitimate grounds".[163]

The *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) required no such reasonable cause or legitimate grounds. The Act (s 6) empowered[164] Mr Bleijie to recommend, if he considered it "in the public interest", the detention of a person currently or previously in custody under the DPSOA, and the Governor in Council to order that detention.[165] Under that executive detention, supervised release under the DPSOA was no longer available.[166] Detention would continue until the Governor in Council was satisfied, on the recommendation of the Minister, that detention was "no longer in the public interest",[167] or the Supreme Court determined that the declaration was affected by jurisdictional error.[168] The scope for judicial review was severely curtailed.[169] The requirement that a detainee be examined annually by two psychiatrists, who were to report on the person's level of risk,[170] was an illusory protection – such assessments did not affect the power to detain. The only criterion was the Minister's subjective belief that detention was in the

[159] Queensland, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, pp 3298-9 (Anna Palaszczuk).

[160] Keyzer P, "Criminal Law Amendment (Public Interest Declarations) Act Deemed Unconstitutional", *Centre for Law, Governance and Public Policy: The Official Blog*, 18 October 2013.

[161] *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

[162] See, eg Keyzer P and Blay S, "Double Punishment? Preventive detention schemes under Australian legislation and their consistency with international law: the Fardon communication" (2006) 7 *Melbourne Journal of International Law* 407.

[163] Queensland, *Parliamentary Debates*, 3 June 2003, p 2484 (Rod Welford, Attorney-General).

[164] Inserting *Criminal Law Amendment Act 1945* (Qld), s 22(1).

[165] *Criminal Law Amendment Act 1945* (Qld), s 21(1).

[166] *Criminal Law Amendment Act 1945* (Qld), s 22B(2); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13(5)(b).

[167] *Criminal Law Amendment Act 1945* (Qld), s 22B(1)(b), 22F(1).

[168] *Criminal Law Amendment Act 1945* (Qld), s 22B(1)(b), 19(b).

[169] *Criminal Law Amendment Act 1945* (Qld), s 22K(2), (3), (4). Limited only to jurisdictional error: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

[170] *Criminal Law Amendment Act 1945* (Qld), s 22C(3)(a).

public interest, one which has been revealed to be of very broad ambit.[171] In addition, if a person was in detention, the Minister was not obliged even give that person prior notice of the declaration.[172] That lack of notice requirement is offensive to natural justice. This provision appears to have been calculated to evade the difficulties encountered in a number of cases under the DPSOA in which continued detention was refused because the documents were served on prisoners only days before their release.[173] The rights and liberties of citizens should not be abrogated on the basis of government inefficiencies and maladministration.

According to Mr Bleijie, the decision to enact the amendments "was made following careful consideration with community safety at the forefront of our minds".[174] Yet, there had been no consultation with the Royal Australian and New Zealand College of Psychiatrists.[175] The Attorney-General furnished the reassurance that "this legislation will be reserved for the worst of the worst".[176] When the DPSOA was enacted, the then Attorney-General made similar statements: it would be "applied to only a small group of prisoners – the most dangerous sex offenders in our prison system".[177] This was not the experience of the years that followed.[178]

Indefinite executive detention has been controversial before. The High Court held in *Al-Kateb v Godwin* (2004) 219 CLR 562 that indefinite detention of a citizen "can generally only exist as an incident of the exclusively judicial power of adjudging and punishing criminal guilt" (at [139] per Gummow J).[179] Kirby J, in dissent, held that "indefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements" (at [146]). However, McHugh J noted that the court had in three cases[180] upheld regulations authorising the indefinite detention of naturalised persons believed to be "disaffected or disloyal",[181] made in order to prevent an individual "acting in any manner prejudicial to the public safety or the defence of the Commonwealth".[182] In each case, the regulations provided that detention rested on the Minister's "satisfaction". However, critical to all three cases was the fact that Australia was on a war footing – the regulations were upheld because the defence power was enlivened. Although McHugh J (at [61]) and Kirby J (at [165]) disagreed as to whether a future High Court would strike down similar regulations, the point is academic – Queensland is not at war. Gummow J, also in dissent, cited (at [137]) the words of Scalia J in *Hamdi v Rumsfeld* (2004) 72 USLW 4607 at 4621: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

Quite apart from these difficulties, the Amendment Act effectively purported to give the Attorney-General a right of appeal from an adverse decision of the Court of Appeal – to himself. The

[171] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Plaintiff S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636 at [30] (French CJ and Kiefel J); *Plaintiff M79/2012 v Minister for Immigration & Citizenship* (2013) 87 ALJR 682 at [40]-[42] (French CJ, Crennan and Bell JJ).

[172] *Criminal Law Amendment Act 1945* (Qld), s 22(2). Though as soon as practicable after the Governor in Council makes a public interest declaration, the person must be provisionally served with written notice (s 22A).

[173] See, eg *Attorney-General (Qld) v Watego* (2003) 142 A Crim R 537; *Attorney-General (Qld) v Nash* (2003) 143 A Crim R 31; *Attorney-General (Qld) v Foy* [2004] QSC 428; *Attorney-General (Qld) v Francis* (2005) 15 A Crim R 399.

[174] Bleijie J, "New legislation to protect the community", Media Release, 16 October 2013.

[175] Queensland, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, p 3298 (Anna Palaszczuk). The only consultation was with the Department of Premier and Cabinet, Queensland Treasury and Trade, and the Department of Community Safety: Explanatory Notes, *Criminal Law Amendment (Public Interest Declarations) Amendment Bill*, 3.

[176] Bleijie, n 174.

[177] Queensland, *Parliamentary Debates*, 26 November 2003, p 5127 (Rod Welford, Attorney-General)

[178] See the figures presented in Queensland, Corrective Services, DPSOA Fact Sheet, January 2009, 2.

[179] Citing *Chu Kheng Lim* (1992) 176 CLR 1 at 27.

[180] See *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359; *Little v Commonwealth* (1947) 75 CLR 94.

[181] *War Precautions Regulations 1915* (Cth), reg 55(1).

[182] *National Security (General Regulations 1939* (Cth), reg 26.

Act was confined in its operation to persons who were or had been subject to a continuing detention order under the DPSOA in respect of whom the appeal process in the Court of Appeal had been exhausted.[183] This effectively confers on the Executive a "power to nullify orders of the Supreme Court … analogous with the power of an appellate court".[184] That power "undermine[s] the authority of orders of the Supreme Court" in a manner that is repugnant to the functions of the Supreme Court as a repository of federal jurisdiction.[185] On that basis, on 6 December 2013, the Queensland Court of Appeal found that the Amendment Act was invalid.[186] In a related judgment on the same day, the court dismissed Mr Bleijie's appeal against Mr Fardon's release on a supervision order, concluding that there was "a substantial amount of evidence to support the finding" that there were good prospects that he would comply with the order.[187]

To keep Fardon in custody, Mr Bleijie had, for a time, joined Louis IX under the old oak tree. However, the strong constitutional foundation for the judicial institution that was lacking in the 12th century meant the laws that allowed him to sit there "are 'no law' at all".[188] That is not to say he will defer to those institutional structures: "If we can't appeal this decision, then we will look at other options".[189] There is, that is to say, more than one oak tree in the wood.

IV. Reforms in the Executive

The notable institutional reforms affecting executive power in Queensland appear to be in aid of security for the G20 Heads of Government Summit in Brisbane on 15-16 November 2014. On 20 August 2013, Mr Bleijie introduced legislation conferring emergency powers on police during that conference.[190] The *G20 (Safety and Security) Act 2013* (Qld) prohibits the possession of various otherwise innocuous items including insects, two-way radios, and flotation devices (s 59, Sch 6, items 8, 11, 16) within the central suburbs of Cairns, Brisbane (ss 8-11, Schs 1-5) and other "security areas" without lawful excuse. The Act reverses the presumption of innocence (s 63) and confers searching and other coercive powers on police officers and other "appointed persons" (ss 23(1), 25(1)). There is a power to arrest without a warrant if a search is refused (s 79). The presumption in favour of bail is reversed (s 82(2)). In addition, a person can be prohibited from entry into a security area if the police commissioner is reasonably satisfied that they may disrupt any part of the G20 meeting (s 50(1), (2)(c)). Unless it is "reasonably practicable to do so", the person need not be notified of the prohibition (s 51(1)); and the list need not be made public (s 52(4)). If the person enters or is in a prohibited area, he or she is liable to be removed by police or appointed persons (s 54). If the person lives in the security area, the cost of their alternative accommodation will fall to the Queensland Government (s 84).

These powers are and are intended to be extreme. They are concerning in their own right given the long and unhappy history of abuse of excessive police power.[191] However, they also serve as the

[183] *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld), s 6, inserting *Criminal Law Amendment Act 1945* (Qld), s 19 (definition of "relevant person") and s 21(2).

[184] *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [35].

[185] *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [41]. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

[186] *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

[187] *Attorney-General (Qld) v Fardon* [2013] QCA 365 at [44].

[188] *Attorney-General (Qld) v Lawrence* [2013] QCA 364 at [44], citing *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 472 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 267-268 (Dixon CJ).

[189] Bleijie J, "Attorney-General takes action on Fardon release", Media Releases, 8 December 2013.

[190] *G20 (Safety and Security) Bill 2013* (Qld), passed on 7 November 2013.

[191] This is dealt with in more detail in Trotter A and Hobbs H, "The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie" (2014) 36 Syd LR 1.

platform for two further concerning changes designed to aid security that have been the subject of less comment: a personal immunity from suit for police officers and the release of a broad spectrum of information to ASIO.

A. Accountability: Police officers' immunity from suit

In the Anglo-Saxon age, police were private and unaccountable. The tythingman, an elected leader of 10 households, exercised a wide range of administrative and governmental duties, including maintenance of the peace.[192] Although the Normans retained the tythingman after 1066, his authority was diminished as a royal representative, the sheriff, was granted "augmented authority to supervise the maintenance of the peace and the administration of the law".[193] By the mid-13th century, the tythingman had come to be known as a "constable" and in the 14th century this position became subservient to the newly created JPs, eventually becoming their "subordinate executive officers".[194] Subject to certain exceptions, each resident was required to "rotate" through the role of constable.[195] As the duties of the constable became more onerous, householders began paying deputies rather than fill the role themselves; this delegation had the effect that "[i]nefficiency and incompetence became widespread as illiterate men of low intelligence were recruited".[196]

It had long been the practice of the magistrates to turn to the military in the face of large-scale public disorder. However, this practice began to dissipate from the 18th century as their brutality and lack of discipline often exacerbated the situation. In Edinburgh in 1736, Captain John Porteous of the City Guard ordered his men to fire into a crowd in order to quell a disturbance arising from a public hanging. Six civilians were killed, and Captain Porteous was convicted of murder and sentenced to death, though he was lynched by a mob before the sentence was carried out.[197]

Although some watchmen had been funded by individuals and organisations since the 1500s, "professional" police forces did not take hold in England until Magistrate Henry Fielding's Bow Street Runners in 1749. The move away from the military and the development towards a quasi-professional and salaried police service represents an important shift towards formalisation and regularisation. This shift was intensified by the economic successes of the 1798 Thames River Police,[198] which laid the foundations for Sir Robert Peel's *Metropolitan Police Act 1829*.[199] This Act swept away the cacophony of parish constables and watchmen and replaced them with the first modern police force with internal accountability structures.

On an individual level, criminal sanctions against police were characterised by "vague charges and petty penalties".[200] In tort, however, police officers were liable individually. No vicarious liability attached to the State, because their authority was considered original by virtue of their appointment, rather than delegated from those who appointed them.[201] In Australia, that position was qualified in 1959 to expose the Commonwealth to vicarious liability for traffic accidents involving police officers

[192] See generally Reith C, *A Short History of the British Police* (Oxford University Press, 1948).

[193] Lambert J, *Police Powers and Accountability* (Croom Helm, 1986), p 21.

[194] See Lambert, n 193, pp 21-22; Willcock J, *The Office of Constable: Comprising the laws relating to High, Petty and Special Constables, Headboroughs, Tithingmen, Borsholders, and Watchmen, with an account of their institution and appointment* (John S Little, 1840) p xi. See also *The Assize of Arms of 1252* and the *Statute of Winchester of 1285* (13 Edw I, St 2).

[195] See Willcock, n 194, pp 14-15.

[196] Lambert, n 193, p 22.

[197] Sir Walter Scott, *Waverley Tales Vol 51: Tales of a Grandfather being stories taken from Scottish history* (1834) p 233.

[198] See Colquhoun P, *A Treatise on the Police of the Metropolis* (1797).

[199] 10 Geo IV, c 44

[200] ALRC, *Complaints Against Police* (Report 1, 1975) at [189].

[201] *Enever v The Queen* (1905) 3 CLR 969 at 975 (Griffith CJ), 991 (O'Connor J); *Fisher v Oldham Corporation* [1930] 2 KB 364; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113 at 119 (therefore, conversely, no action per quod servitium amisit at the suit of the Crown).

and other State officials.[202] In the UK, vicarious liability for police was introduced in 1964 following recommendations of a Royal Commission.[203] In 1975, the Australian Law Reform Commission recommended similar provisions in Australia, but made the important qualification that punitive damages for egregious police misconduct "should only be recoverable from the individual police officer himself".[204]

Over time it became recognised that the police force, being entrusted with intrusive and coercive powers,[205] depended for their legitimacy on their individual accountability for the misuse of those powers.[206] In the 1970s, a new constitutional tort was recognised in the United States for the abuse of human rights by state agents.[207] In 1994, laws in the United States allowed federal agencies to commence proceedings against local and state police departments for infractions on individual rights.[208] Greater accountability came in England with the *Human Rights Act 1998* (UK), and the Canadian Charter of Human Rights has also founded claims against police.[209] In 2007, Canada became the first common law jurisdiction to recognise a duty of care owed by police officers to suspects.[210] In Australia, the lack of constitutional foundation has forced police accountability to adjust in different ways.[211]

Empirical research into civil suits against police in Australia reveals that most suits are for excessive use of force.[212] This indicates that "a substantial proportion of litigation is a reaction to abuses of police power and position, [including] physically" and runs contrary to the common fear that police officers "risk being sued simply for doing their job".[213] In any event, police officers are not the only professions who are routinely exposed to liability: "Surgeons do not turn off the light over the operating room table because they owe a duty of care to patients. They perform the operation, with care".[214] Surveys of police chiefs suggest that they themselves consider by overwhelming majority that accountability to civil suit makes officers more professional in their conduct.[215]

[202] *Commonwealth Motor Vehicles (Liability) Act 1959* (Cth), s 5.

[203] *Police Act 1964* (UK) s 48.

[204] ALRC, n 200 at [229]. See also, eg *Law Reform (Vicarious Liability) Act 1983* (NSW), ss 6, 8; *Police Service and Administration Act 1990* (Qld), ss 10.5, 10.6. See more recently *New South Wales v Ibbett* (2006) 229 CLR 638.

[205] See Lambert, n 193, p 33.

[206] See generally McLaughlin E, "Forcing the issue: New Labour, new localism and the democratic renewal of police accountability" (2005) 44 *Howard Journal* 473.

[207] *Bivens v Six Unknown Named Agents*, 403 US 388 (1971)

[208] 42 USC s 14141 (1994).

[209] *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 39 OR (3d) 487.

[210] *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620; cf *Calveley v Chief Constable of Mersyside Police* [1989] 1 All ER 1025; *Tame v New South Wales* (2003) 211 CLR 317; *Fyfe vAttorney-General* [2004] NZAR 731.

[211] See Ransley J, Anderson J and Prenzler T, "Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability" (2007) 40 *Australian and New Zealand Journal of Criminology* 143 at 146.

[212] Ransley et al, n 211 at 152.

[213] Ransley et al, n 211 at 148.

[214] *Hill v Hamilton-Wentworth Regional Police Services Board* (2005) 259 DLR (4th) 676 at 693. See also the move away from immunity from suit for barristers: *Arthur JS Hall & Co v Simons* [2000] 3 All ER 673; *Lai v Chamberlains* [2007] 2 NZLR 7; its retention in Australia is not attributable to such an argument: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) (2005) 223 CLR 1 at [29].

[215] Martinelli TJ and Pollock JM, "Law Enforcement Ethics, Lawsuits, and Liability: Defusing Deliberate Indifference" (2000) 67 *The Police Chief* 52. See also Goldsmith A, "The Pursuit of Police Integrity: Leadership and Governance Dimensions" (2001) 13 *Current Issues in Criminal Justice* 185 at 195 ("Civil liability of police in the common law of torts … is an increasingly promising form of legal accountability").

Statistical analyses reveal that the number of cases and amounts awarded against police have increased over the last 30 years.[216] In the same period, there has been one large-scale inquiry into police misconduct in a different State every decade.[217] Various reforms have been implemented including external oversight by corruption commissions and Ombudsmen and internal administrative, organisational and structural reforms.[218] However, direct liability of police to those they improperly injure is, obviously enough, a less shielded and more effective mechanism than internal self-regulatory procedures – in at least six of 22 cases between 1994 and 2002, the courts upheld civil suits where the police declined to act on complaints relating to the same incident.[219] Such individual liability and the threat of it had become an essential part of a web of accountability mechanisms that together create an "effective means of controlling behaviour and achieving compliance".[220] In 2009, 20 years after the Fitzgerald Inquiry exposed extensive impropriety in the police force, a private prosecution against police misconduct was successful for the first time in Queensland.[221] The salaried, professional police, answerable to the state and to the individual had come a long way from their unbridled, voluntary community-based origins.[222]

That is not to say that problems with brutality had been eradicated. On 9 July 2006, Bruce Rowe, a 65-year old homeless man, was using public toilets to change his clothes. When asked to move on by Constable Arndt and three other officers, he walked to a bench to write down their names. He was then arrested for contravening a direction. Constable Kemper held Mr Rowe's hands behind his back and took him "in a hugging grip" and Constable Arndt kicked Mr Rowe's legs out so that he "subside[d] to the ground in a 'splits' posture". The four police officers were joined by two more, and CCTV footage shows Mr Rowe "underneath the others", with Constable Arndt "repeatedly lunging with a knee in the direction of Mr Rowe on the ground". Both the initial direction and the arrest were found unlawful in *Rowe v Kemper* (2009) 1 Qd R 247.[223]

In February 2011, Magistrate Bradford-Morgan noted that the CCTV images were "disturbing" and found Constable Arndt guilty of common assault, imposing a $1,000 fine and $2,000 in costs.[224] The order was confirmed in *Arndt v Rowe* [2011] QDC 313. The Queensland Police Service decided not to take disciplinary action against Mr Arndt, deciding instead to "provide managerial guidance". The CMC sought review of that decision. On 10 May 2013, Mr Arndt's application to strike out the CMC's application was dismissed in *Crime & Misconduct Commission v Assistant Commissioner, Queensland Police Service* [2013] QCAT 231. The officers remain on the beat. The Queensland Police Union (QPU) denounced the prosecution and set about lobbying for reform.

Then, on 19 November 2013, the Premier introduced a Bill that would make police officers immune from personal liability[225] and attach liability instead to the Crown.[226] The Bill comes three months after legislation conferring extraordinary powers on police in preparation for the G20 conference in 2014. The incentive for police officers to maintain appropriate standards in the exercise

[216] See, eg Kappeler V, Kappeler S and del Carmen R, "A content analysis of police civil liability cases: Decisions of the federal district courts, 1978-1990" (1993) 21 *Journal of Criminal Justice* 325; Smith G, "Actions for damages against the police and the attitudes of claimants" (2003) 13 *Policing and Society* 413; McCulloch J and Palmer D, *Report: Civil litigation by citizens against Australian police between 1994 and 2002* (Criminology Research Council, Canberra, 2005).

[217] Fitzgerald Report, n 22; Wood Report (NSW) 1997; Kennedy Report (WA), 2004).

[218] See generally Ransley et al, n 211 at 193.

[219] McCulloch and Palmer, n 216, pp 90-94.

[220] Ransley et al, n 211 at 157.

[221] See *Arndt v Rowe* [2011] QDC 313 (appeal from Magistrates Court).

[222] Senior H, *Constabulary: The Rise of Police Institutions in Britain, the Commonwealth and the United States* (Dundurn Press, 1997) p 9.

[223] Note that the Police Ethical Standards Command had earlier found that there was "insufficient evidence to charge any of the police officers over the incident": "Judge upholds cop's conviction for assault", *Brisbane Times*, 19 December 2011.

[224] "Officer fined for assaulting homeless man", *ABC News*, 10 February 2011. The fine was paid by the QPU.

[225] *Public Service and Other Legislation (Civil Liability) Amendment Bill 2013* (Qld), cl 13, omitting ss 10.5 and 10.6 of the *Police Services Administration Act 1990* (Qld) and inserting ss 10.5(1)(a)-(e).

of those and other powers is seriously reduced, as they are not liable to contribute unless engaged in conduct both with gross negligence and other than in good faith.[227] South Australia, the only other State or Territory with a similar civil immunity provision, requires only the latter (bad faith) element for individual accountability.[228] The President of the QPU noted his approval of the Bill, which would allow "police greater peace of mind as they go about their job".[229]

B. Privacy and secrecy: ASIO reforms

For most of history there has been no right to privacy. Governments and monarchies obtained and used information as they saw fit, without limitation or accountability. As Hallam said of medieval Italy:

> They judged, they punished, according to what they called reason of state. The public eye never penetrated the mystery of their proceedings … The terrible and odious machinery of a police, the insidious spy, the stipendiary informer … found their natural soil in the republic of Venice.[230]

Before the rise of technology, privacy took a somewhat cruder form. The Fourth Amendment to the US Constitution, first drafted in 1789 by James Madison, ensures a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". The first academic declaration of a right to privacy came in 1890 with an article in the *Harvard Law Review* by Samuel Warren and Louis Brandeis,[231] the latter of whom went on to support the right to privacy as a Supreme Court judge in 1928.[232] The right found another voice in dissent in 1961,[233] which was picked up four years later and enshrined in US constitutional law.[234] It has since been applied in various contexts to curb government incursion on private activity.[235]

In the meantime, the right against "arbitrary interference with … privacy" had been enshrined in Art 12 of the *Universal Declaration of Human Rights* in 1948 and Art 8 of the *European Convention of Human Rights*, in force since 1953. English law did not traditionally recognise such a right, until it was incorporated in 2000 by the *Human Rights Act 1998* (UK).[236] In Australia, although it is generally accepted that the common law has not developed to recognise a right to privacy, the door has been left open by the High Court,[237] and two lower courts have marched through it.[238] The careful safeguarding of privacy has been the subject of a good deal of federal and State legislation, including the *Privacy Act 1988* (Cth), which requires that personal information not be collected unless it is necessary for or

[226] *Public Service and Other Legislation (Civil Liability) Amendment Bill 2013* (Qld), cl 13, omitting ss 10.5 and 10.6 of the *Police Services Administration Act 1990* (Qld) and inserting ss 10.5(2)-(3); see also cl 8 amending the *Public Service Act 2008* (Qld) by inserting ss 26A-26C.

[227] *Public Service and Other Legislation (Civil Liability) Amendment Bill 2013* (Qld), cl 13, omitting ss 10.5 and 10.6 of the *Police Services Administration Act 1990* (Qld) and inserting ss 10.5(4)(a)-(b); see also cl 8 amending the *Public Service Act 2008* (Qld) by inserting ss 26C(3)(a)-(b).

[228] *Public Sector Act 2009* (SA), s 74(4).

[229] Remeikis A, "Police to gain protection from being sued", *Brisbane Times*, 20 November 2013.

[230] Hallam H, *View of the State of Europe during the Middle Ages* (Murray, 1818) pp 342-343.

[231] Warren S and Brandeis L, "The Right to Privacy" (1890) 4 Harv L Rev 193.

[232] *Olmstead v United States*, 277 US 438 (1928) (Brandeis J).

[233] *Poe v Ullman*, 367 US 497 (1961) (Harlan J).

[234] *Griswold v Connecticut*, 381 US 479 (1965).

[235] See most notably *Eisenstadt v Baird*, 405 US 438 (1972); *Roe v Wade*, 410 US 113 (1973); *Lawrence v Texas*, 539 US 558 (2003).

[236] See further *Venables & Thompson v News Group Newspapers* [2001] 1 All ER 908; *Campbell v MGN Ltd*. [2002] EWCA Civ 1373.

[237] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; cf *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

[238] *Grosse v Purvis* [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

directly related to the function of the government or private collecting entity.[239] It was re-examined in 2008 by the Australian Law Reform Commission to address challenges presented by the rapid advance of technology.[240] In Europe, the negotiations on the General Data Protection Regulation are ongoing but the instrument includes a right to be forgotten and to erasure in Art 17.[241]

The advance of technology and information mining capacities has, however, outstripped the development of privacy laws. Most recently, documents leaked by Edward Snowden have revealed that the US National Security Agency has collected an enormous amount of personal information and correspondence of both US citizens and tens of millions of foreign nationals without any immediate purpose.[242] Australian intelligence agencies have also offered to "share bulk, unselected, unminimised metadata" collected about its citizens with foreign countries.[243] By now, and in light of the strong public recoil against such data-collection activities in response to the leaks, the need to eliminate all unnecessary and excessive access to personal information by governments is tolerably clear. As Brandeis and Warren rhetorically asked in 1890, if a man's house is his castle, is it desirable to "close the front entrance to the constituted authority, and open wide the back door to idle or prurient curiosity?"[244]

Then, on 19 November 2013, Mr Bleijie answered that question in the affirmative. He introduced amendments providing for the release of personal information and photographs to ASIO.[245] The amendments received limited public attention,[246] not least because it was rushed through the Parliament in two days as part of a 176-page Bill replete with controversial amendments targeting bikies, and the only mention of ASIO was buried in a regulation to the *Transport Planning and Coordination Act 1994* (Qld).[247]

The amendments allow for the provision to ASIO of "any information in a transport information database", including direct access to the database.[248] That information includes names, addresses, vehicle registrations and photos.[249] All restrictions imposed in other legislation are dispensed with, and the information can be used for any purpose "consistent with the agency's functions".[250] That definition is "very broad and would go beyond what would typically be regarded as law enforcement purposes".[251] Use of the information for another purpose, whatever that might be, is an offence[252] –

[239] *Privacy Act 1988* (Cth), s 14 (Principle 1).

[240] ALRC, *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108.

[241] Note however that the scope of "controller" is uncertain and appears not to include a search engine such as Google: Court of Justice of the European Union, Opinion of Advocate General Jääskinen, *Google Spain SL v Agencia Española de Protección de Datos* (Case C-131/12), 25 June 2013.

[242] See, eg Greenwald and MacAskill, n 27; Borger J, "GCHQ and European spy agencies worked together on mass surveillance", *The Guardian*, 2 November 2013.

[243] MacAskill E, Ball J and Murphy K, "Revealed: Australian spy agency offered to share data about ordinary citizens", *The Guardian*, 2 December 2013.

[244] Warren and Brandeis, n 231 at 220.

[245] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill* (Qld), Pts 21, 22.

[246] No submissions addressed the issue: Legal Affairs and Community Safety Committee, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Report No 46), November 2013, pp 15-16.

[247] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), cl 216, inserting *Amendment of Transport Planning and Coordination Regulation 2005* (Qld), reg 10(2).

[248] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), cl 214, inserting in particular, *Transport Planning and Coordination Act 1994* (Qld), s 36I.

[249] Explanatory Notes, *Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013*, 6.

[250] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), cl 214, inserting *Transport Planning and Coordination Act 1994* (Qld), s 36J; cl 213 inserting definition of "law enforcement purpose" in s 3.

[251] Legal Affairs and Community Safety Committee (Report No 46), n 246, p 31.

[252] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), cl 214, inserting *Transport Planning and Coordination Act 1994* (Qld), s 36K.

but of course the operations of ASIO are by their nature secret.[253] In any event, if the information is released honestly and without negligence, no person or the state can be liable for any civil or criminal sanction.[254] The committee highlighted the "potential for infringement of the legitimate expectation of individuals that their personal information will be subject to limited disbursement".[255] Mr Bleijie justifies the amendments on the basis that they are necessary for ASIO "not only in its preparations for the G20 summit but also in its ongoing role of monitoring and protecting national security".[256]

V. Conclusion

To place Mr Bleijie's institutional reforms in the context of history is to illustrate the centuries of work that they undo. His oft-repeated "concern" with transparency and accountability in executive government should cause particular anxiety among not just Queenslanders, but all Australians. While the Premier appears to have backed away from Mr Bleijie's suggestion that the freedoms provided under the *Right to Information Act 2009* (Qld) could be wound back, the veil of anonymity previously enjoyed by whistleblowers has been lifted, further marginalising those prepared to blow the whistle on corruption. Such a move is against the tide of reform towards open and transparent government, away from the opaque and secretive governments of previous centuries. The abolition of the Sentencing Advisory Council – a body designed to assist in bridging the gap between community expectations and sentencing policies – and the lack of legitimate committee engagement seem incongruous with his repeated reliance on "community consultation" and provides only minimal public savings. Moreover, it compromises the scrutiny and accountability that have through centuries of development come to be critical to the democratic structure. The removal of electoral donation and expenditure caps also threaten the democratic process by exaggerating the interests of the wealthy, a risk that has been identified and dealt with since 1883.

In the Executive, immunity for police officers from suit is a step away from accountability, contrary to the trend commencing with the development of a professional and structured police force in the 18th century. The needless release of personal information to ASIO ignores the gradual implementation of greater privacy controls and the recent global concerns about state compilation of personal information. The emergency powers conferred in advance of the G20 conference are both unwarranted and overly broad.

In the judicial branch of government, the reintroduction of JPs into judicial roles is alarming. The use of lay-judges, unlearned in the law, was abandoned in England and Australia as soon as practicable and their return serves no legitimate interest. Perhaps most uneasily, the unconstitutional attempt to transfer jurisdiction from the Supreme Court to the discretion of the Attorney-General disregards a lesson, well revised since Montesquieu's era, that the convergence of powers compromises liberty. It recalls an earlier time, of absolute monarchs and oak trees.

If this historical context were not enough to illustrate the thorough undesirability of the institutional reforms legislated and foreshadowed by the Attorney-General, there is no shortage of practical and policy objections to supplement it. Some of these have been mentioned in relation to each reform, but they only graze the surface of the criticisms that have been more fully aired by the various submissions on each Bill, the academic discussion and the public objections of civil libertarians. The roll-back of carefully crafted institutions of good governance in Queensland, primarily instigated by the Attorney-General, must be noted in detail. In due course, steps must be taken to redress his great leap backward.

[253] See, eg *Australian Security Intelligence Organisation Act 1979* (Cth), s 8A(5).

[254] *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), cl 214, inserting *Transport Planning and Coordination Act 1994* (Qld), s 36M.

[255] Legal Affairs and Community Safety Committee (Report No 46), n 246, p 31.

[256] Queensland, *Parliamentary Debates*, 19 November 2013, p 3988.