THE KILLING OF QUINTON WEBB: FROM HUCKITTA TO HATTON AND BACK AGAIN

ABSTRACT

On New Years Eve 1978, powerful and popular Central Australian pastoralist Quinton Webb was shot dead at his homestead on Huckitta Station, 300km northeast of Alice Springs. Police swiftly rounded up five young Arrernte suspects aged between 12 and 28. Before being charged, they were compelled to return the crime scene, where they each participated in a re-enactment, the records of which became the principal Crown evidence in the subsequent trial, resulting in four murder convictions. On appeal, Frank Vincent QC, John Coldrey and Dyson Hore-Lacey memorably argued that rules of voluntariness and principles of fairness demanded that the convictions be overturned. The appeal narrowly failed, but over the next few years the principles relied on in the Huckitta case were applied by the High Court, which developed ground-breaking jurisprudence protective of suspects, only to see legislatures respond by passing laws to erode these common law rights.

Forty years later, the fight continues over the limits of police powers to detain child suspects in the Northern Territory.

> *"Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny."*[1]

PART 1: FROM HUCKITTA

1.1 No Picnic

Quinton, Kil, and Bennett Webb were three brothers who ran their cattle on Huckitta, Mount Riddock and Alcoota stations, covering almost 14,000 square kilometres of Alyawerr and Anmatyerre country roughly the same size as the nation of East Timor. Huckitta Station alone, on the Plenty River halfway between Alice Springs and the Queensland border, stretches 200 km from north to south. With this much real estate, the Webbs were wealthy men, but they lived all their lives in the bush, grew up with the locals, and spoke fluent Arrernte.[2] Life was no picnic. Still, they had their fun. In 1946, they challenged Bob Darken, the Harts Range Police Station copper, to race their stock horses back to the cattle yard after a day of branding. That was so much fun they got a bloke to grade a track so they could have a proper race meeting, which became "the race that stops the stations", the Harts Range Races, an annual event to this day. And even if you've never heard of, let alone been to Atitjere, as Harts Range is properly called, everyone in the Territory benefits from the Webbs' bright idea, because we get a day off every August for Picnic Day, thanks to Senior Constable Darken's successful application to the Administrator to gazette the Harts Range Amateur Racing Club meeting as a public holiday.

On New Years Eve 1978, by which time the oldest of the Webbs, Quinton, was pushing 70, but still managing Huckitta Station, a Ford panel van turned up at the homestead driven by 13 year old Kevin

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[1] *Donaldson v Broomby* (1982) 60 FLR 124; 40 ALR 525; 5 A Crim R 160 (FCA), Deane J at 126. This quote is on "The Gong", the occasional CLANT award for criminal advocacy

[2] Peter Latz, "Being a cowboy: not all it's made out to be" *Alice Springs News* 9 December 2014

Stuart.[3] There were four other youngsters in the vehicle, 12 year old Mark Collins, 14 year old Joylene Williams, and two women in their twenties, Josephine Woods and Janice Edwards. They were all from Amoonguna, a settlement a few miles out of Alice Springs. They'd stolen the vehicle, along with a Winchester rifle and some ammunition, from the Amoonguna store, and were heading for the Queensland border. They fuelled up, but later in the morning they returned with two flat tyres. Quinton obligingly radioed for a replacement tube. Within an hour or so, he was dead, having been shot, as the evidence in their subsequent trial strongly suggested, by the 12 year old, Collins, in prosecution of a common purpose the jury was satisfied he had formed with Stuart, Woods and Williams, all four of whom were convicted of murder. That was the end of Quinton Webb, and the beginning of the story we want to tell.

1.2 The police

Police first arrived at the scene before sunset that day from Quinton's mate Bob Darken's old stomping ground of Harts Range, shortly followed by four more police from Alice Springs. By 8:30 pm they had rounded up and arrested the Huckitta Five, as they came to be called, who by midnight – when the clock ticked over into the new year – had all been secured in cells at the Harts Range Police Station, and charged with the property offences they'd committed back in Amoonguna. They complained to their lawyers that during the night outraged locals attending a nearby new year's eve party had threatened to lynch them, but this was denied by police and remained unproven. The trial judge declined to have regard to the allegation.

The next morning the Huckitta Five were taken, without explanation, without being told that there was a murder investigation under way, and without being given an opportunity to telephone family or seek legal advice, back to Huckitta, and directed to wait under a tree, where they stayed for five hours. It was a hot Central Australian summer's day. Then, from 3 pm, one by one, they were invited to participate in a re-enactment, in the presence of Bobby Armstrong (a person previously unknown to them), who had been engaged by police to be an interpreter and prisoner's friend for the occasion. Here's a typical example of how the invitation was administered, based on evidence of Sgt Chung given on the voir dire. This was to the 12 year old, Collins:

> [Chung] said, "Mark, this is Bobby Armstrong. He speaks your Aboriginal language. Do you want him with you as a friend while I talk to you?" Mark Collins replied, "Yes", and Chung said to Armstrong, "Bobby, will you tell Mark in Aboriginal language that I wish to ask him some questions about the trouble here yesterday…. Armstrong then spoke to Collins in Aboriginal language and then I said to Armstrong, "What did he say?" He said, "yes".[4]

This is just the start, but you get the picture. It goes on at length, and in answer to each and every question, Collins gives the same monosyllabic affirmative response. The expression "gratuitous concurrence" may not have been in vogue back in 1979, barely three years after the Anunga Rules had been propounded, but by then those rules had already been incorporated into police General Orders.[5] In any event, all of the suspects gratuitously concurred, participated in the re-enactments and proceeded to comprehensively dob themselves in.

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[3] These and subsequent details are drawn largely from the judgments of Muirhead and Brennan JJ in *Collins and Others v R* [1980] FCA 88; (1980) 31 ALR 257 ("*Collins*")

[4] *Collins* at 300 per Brennan J

[5] Northern Territory Police, *Circular Memorandum No 11 of 1975*

They were then taken back to the Harts Range police station, interviewed over the next two days, and charged with murder.[6] Those interviews were all excluded by the trial judge, for reasons summarised in the appeal as follows:

> He found that the admissions then made were voluntary but he excluded them in the exercise of his discretion, mainly because in his view following the investigations conducted at the scene of the killing on 1 January, he considered the appellants' continuing detention without being brought before a Justice of the Peace, not only unlawful, but unlawful to an extent which justified the exclusion of those otherwise relevant, probative and voluntary confessions.[7]

However, that victory for the defence proved to be hollow, because the trial judge declined to exclude the fatally incriminating re-enactments, even though they had been conducted after the suspects had been in continuing detention without being brought before a Justice of the Peace for some 19 hours.

On appeal to the Federal Court (the current in-house appellate arrangements had not yet been set up back then, just a year or so after the Northern Territory had been granted self-government), the majority upheld the convictions, but Brennan J dissented. He found that:

> [t]he police action in removing the prisoners from the cells at Harts Range and moving them without their consent (so far as the evidence shows) to Huckitta for the re-enactment was unlawful… By s34(1) of the *Police and Police Offences Ordinance*, it is provided:
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> > Any person apprehended without a warrant shall be forthwith delivered into the custody of the member who is in charge of the nearest police station, in order that the person may be secured until he can be brought before a Justice to be dealt with according to law…
>
> [A] police officer's power does not extend to the compulsory taking of a prisoner who is in custody at a certain place on one charge to some other place to investigate some other charge.[8]

And having considered these and other circumstances of the case, Brennan J concluded that the trial judge had erred in finding that the re-enactments were voluntarily given. He finished with a defiant flourish, citing Blackstone: "At the common law… his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men."[9]

Brennan J's dissent, troubling and compelling as it was, might have counted for little, but for the fact that the following year he was appointed to the High Court of Australia. Instead, his dissenting judgment in *Collins* served as one of the foundation stones of the jurisprudence developed by the High Court over the next few years culminating in *Williams v The Queen,*[10] which considered and constrained the lawful limits of post-arrest police detention, as we shall shortly discuss.

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[6] *Collins* at 304 per Brennan J
[7] *Collins* at 265 per Muirhead J
[8] *Collins* at 315, per Brennan J
[9] (*Comm* iv, 296) cited by Windeyer J in *Rees v Kratzmann* (1965) 114 CLR 63 at 80, cited in *Collins* at 325
[10] [1986] HCA 88; (1986) 161 CLR 278

The lawyers

Before doing so, though, it is worth mentioning the remarkable impact the Huckitta case had on the lawyers who were engaged in it. Firstly, there was the trial judge. Still in his forties, John Gallop, who died just two years ago, had only been appointed to the bench the previous year, but went on to become one of the longest serving superior court judges in Australia. As a fledgling on the bench, running the Huckitta trial must have been an extraordinarily challenging task. Before him was a formidable array of five extremely keen and forthright defence counsel, including three future eminent Victorian judges, the "Junior Rumpoles" as they later styled themselves, brought in and instructed by CAALAS, the Central Australian Aboriginal Legal Aid Service. The trial extended for months, and the voir dire alone ran from mid-June into August, with the transcript of the cross-examination of one of the police officers running to over 300 pages. Justice Gallop "allowed the cross examination of counsel to range far and wide".[11] Ultimately, none of his rulings was disturbed on appeal, including his highly unusual decision to grant appeal bail to the juvenile accused, after they had been convicted and sentenced for murder, so that they could be housed in Giles House, the newly opened Alice Springs Juvenile Detention and Training Centre, rather than in prison, there being no statutory provisions available at that time for such sentence to be served elsewhere. The Crown's application – perhaps unprecedented, certainly exceptional – for special leave to the High Court to challenge the decision to grant bail was refused. So was the application by the accused for special leave to appeal against their convictions. An appeal was commenced but abandoned[12] against the sentences Gallop J imposed of nine years two months with non-parole periods of four years, in which he had exercised the discretion then available to the court not to sentence Aboriginal offenders convicted of murder to the otherwise mandatory penalty of life without parole.

One can speculate that for Gallop J the Huckitta trial must have been a milestone, and perhaps indeed a millstone, but there is no doubt that it was a life-in-the-law changing experience for at least some of the counsel who appeared before him. The Honourable John Coldrey QC, for example, who appeared for Stuart in the trial and on appeal, devoted most of his address to the 2008 Victorian Criminal Bar Association dinner on the occasion of his retirement from the Supreme Court bench, to reminiscing about the case.[13] Coldrey's highly entertaining account is peppered with amusing and moderately scandalous anecdotes about the conduct of his colleagues, but he concludes with utter seriousness, quoting the "criminal law credo" he and Frank Vincent QC co-wrote, "filled with idealism and shiraz", and which Vincent duly delivered to the appeal court. Here is an extract:

> A man has been killed. There is no suggestion in any of the material that there was any justification or even a sensible reason for his death. For practical purposes, the only evidence against the four people who are involved in some way in the events that led to that death is to be found in this confessional material, and that poses for the legal system a very real challenge. On the one hand, it can be said that justice must be done, and that the perpetrator or perpetrators be convicted. On the other hand, justice must never be achieved at the cost of the integrity of the system upon which we all depend. … It is always easy to want to find in favour of the clearly innocent. It is always easy to want to find in favour of the beautiful. It is a far more difficult task, it requires a far higher degree of honesty at all levels in our system, to say, irrespective of what the

[11] *Collins* at 267, per Muirhead J

[12] Curiously, the Order of the Federal Court as reported in (1980) 31 ALR 257 at 326, is "The appellants' respective appeals against silence [sic] be stood over generally."

[13] *Victorian Bar News*, No. 146 Summer 2008/2009, 36

> situation appears to be in the short term, the wisdom of the common law requires that the fundamental relationships between people, and the society in which they live, be maintained.

If those words sound familiar, it may because you heard them from Justice Lex Lasry, as he then still was, when he delivered the Fourth Tony Fitzgerald Memorial Lecture for CLANT in 2016, and adopted them as his own credo.[14]

It is an extraordinary thing that a momentary and obscure act of meaningless violence by a child in such a remote place so profoundly influenced not only the course of the law, but also the course of some of our leading lawyers.

The impact on the sole instructing solicitor for the five accused, Pam Ditton, is also noteworthy. The inherent difficulties of performing such a task, including the ever-present risk that a conflict might arise, are obvious, but the CAALAS shoestring budget allowed for no alternative, even with counsel generous enough to appear at reduced fees. During the proceedings, Ditton's landlord, himself, like the deceased, a grazier, summarily evicted her from her home on the ground that she was working for "the murderers".[15] Ditton, who continued in legal practice in Alice Springs for another 20 years, acquired from the case a deep and abiding distrust of police treatment of Aboriginal suspects, after experiencing what she was convinced was the duplicity of the investigating police officers. Despite the strenuous efforts of the defence team, this was never proven. And Ditton also vividly recalls being instructed by an anguished Janice Edwards, the sole member of the Huckitta Five to be acquitted, that she considered herself a marked woman. Edwards insisted that she would be held responsible and punished, not by the court that had discharged her, but by the law of her Aboriginal community. Within a year or so, Janice Edwards' body was found behind the Flynn Church in Alice Springs. The death was suspicious, but no clear cause was ever identified.[16]

PART 2: TO HATTON

On 24 February 1988, as a response to the unequivocal confirmation of the common law of arrest as set out by the High Court (including Brennan J) in *Williams v The Queen*[17] Northern Territory Chief Minister Steve Hatton introduced amendments to the *Police Administration Act 1978* (NT) to expand police powers of detention following arrest. Looking back it is hard to explain the great controversy that this caused in our legal community at the time. There was enormous concern expressed across the NT legal profession. There were meetings and rallies aimed at preventing the expansion of police powers following arrest. Despite Hatton's claim that *Williams* represented "a qualification of the common law",[18] the case had in fact merely re-stated the common law position that a police officer is not permitted to delay the taking of an arrested person before a justice in order to facilitate police investigations, a key issue, you will recall, in *Collins*. The Amendment Bill was viewed by proponents as necessary in light of the *Williams* decision: they argued that police needed to be invested with post-arrest investigatory detention powers and that the police practices which were allowed to develop prior to that decision should continue. The opponents, including many of us here, saw the Amendment Bill as an enormous inroad on our civil liberties. Articles were published in law journals

[14] Accessed at https://clant.org.au/wp-content/uploads/Lasry_Fitzgerald_Lecture-1.pdf
[15] Jon Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (The Federation Press, Sydney, 1993), 185
[16] Personal communication, Pam Ditton, 19 June 2019
[17] [1986] HCA 88; (1986) 161 CLR 278 ("*Williams*")
[18] Northern Territory Legislative Assembly, *Parliamentary Record* (23 February 1988), 2470

criticising the legislation[19] while the then Police Commissioner presented a paper at a conference in Sydney defending the need for such powers.[20] Back in Darwin the NT News was editorialising on the "facts" of the Amendment Bill causing the then president of the Bar Association Dean Mildren QC, the then president of the Law Society, Graham Hiley QC and Colin McDonald the then president of the NT Criminal Lawyers Association to respond and have their joint letter published to correct that paper's editorial. The three presidents quoted "the great jurist Blackstone" (no doubt a first for the NT News) who said in 1756 "personal liberty is an absolute right vested in the individual by the immutable laws of nature and has never been abridged by the laws of England without sufficient cause". They quoted Justices Mason and Brennan in *Williams* "if the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able – as the courts are not – to prescribe safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are kept in custody", pointing out that the Bill did not propose any safeguards whatsoever. They concluded that as a result, if the Bill became law, the safeguards would have to be invented by the courts and that the Bill "will not enhance the administration of criminal justice in this Territory".

It is over 31 years since the enactment of the amendment, the provisions of s137 are now regarded as "normal" and there is a paucity of subsequent jurisprudence. Was it ever meant to apply to children? Police Commissioner Palmer wrote in his paper presented to that conference in Sydney in 1989: "Additionally, the amendments do not in any way change the obligations placed on police in their dealings with juveniles ...".

In order to properly scrutinise s137 in each case where it is invoked it is necessary to understand the underlying common law as so clearly confirmed in *Williams:*

> It is always necessary in dealing with any law that alters the common law, and especially where the common law rights of the liberty of the subject… are concerned, to consider what was the previous law, and what were the apparent reasons for the alterations made, and then to see what reasons there were for altering the law, and what the legislature has done to remedy what it conceived to be defects of the law.[21]

At common law police officers had power to arrest and detain a person without warrant upon holding a reasonable suspicion that the person was committing or had committed a felony. The power has been extended to cover other offences and is replicated in s123 of the *Police Administration Act 1978* (NT):

> A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing, or is about to commit an offence.

To be a valid arrest, the officer must subjectively believe that the person arrested has committed an offence, is about to commit an offence or is committing an offence and that belief must be based on grounds that are objectively reasonable.

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[19] For example, E P Aughterson, "The Expansion of Police Detention Powers in the Northern Territory"(1989) 13 *Criminal Law Journal* 103

[20] Commissioner Michael J Palmer and Barbara Murphy, "Investigatory Detention – A Need or a Want", *Australian Police Journal*, Oct-Dec 1989, 126

[21] *Nolan v Clifford* (1904) 1 CLR 429 at 444, per Griffiths CJ

The common law provided that it must be conveyed to the arrestee what the conduct is in respect of which the person is being arrested because "the arrested person is entitled to be told what is the act for which he is arrested".[22]

This common law requirement is contained in s127(1) of the *Police Administration Act*:

> A member of the Police Force who arrests a person for an offence shall inform the person, at the time of the arrest or as soon as practicable thereafter, of the offence of which he is arrested.

In order to justify an arrest at common law it was compulsory for a police constable to take the arrested person without delay before a magistrate and by the most direct route that is, as soon as practicable. It was not lawful for the police to hold a person arrested for an offence merely for the purpose of questioning. As the High Court held in *Williams*:

> The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation. It is the point from which the judicial process commences and purely ministerial functions cease.[23]

Section 137(1) reflects the basic common law right that a person must be taken before a court as soon as reasonably practicable following arrest:

> …a person taken into lawful custody under this or any other Act shall… be brought before a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act 1982* or is released from custody.

In Australia, under common law principles an arrest must be carried out for the purpose of taking the person before a justice or court as soon as reasonably practicable. Under the common law, what was not permissible was to delay bringing an arrested person before a court or justice in order to further investigate or question the person. In *Williams* Gibbs CJ, who took a more liberal approach to the powers of police, concluded that there was "no power to detain a citizen merely for the purpose of questioning him".[24]

The position was summed up in *Williams:*

> There is no real protection for the individual in any formula which says that the police may not detain an arrested person longer than is necessary to enable them to prefer a charge. Obviously there must be a reasonable time to formulate and lay appropriate charges for the purpose of bringing a person before a justice. The common law allows time for this and it is covered by the words "as soon as practicable". But it is something quite different to say that the police should be able to detain an arrested person to enable them, by further investigation, to gather the evidence necessary to support a charge.[25]

The common law position was of course modified by s137 (2) and (3) to allow for just this purpose. It enabled "post-arrest custody to be extended to 'a reasonable period' for the purpose of questioning the person arrested or for further investigations in relation to offences attracting

[22] *Christie v Leachinsky* [1947] UKHL 2; [1947] AC 573 at 592
[23] *Williams* at 306 per Wilson and Dawson JJ
[24] *Williams* at 283 per Gibbs CJ
[25] *Williams* at 312 per Wilson and Dawson JJ

custodial penalties."[26] Although these modifications were in response to *Williams,* the safeguards which the court in *Williams* clearly stated should accompany such legislation "which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody"[27] were not.

In view of the fact that no such safeguards were included in the legislation it is up to the lawyers and the courts to ensure that whatever is done under the provisions of s137(2) and (3) is strictly assessed against this background of common law rights as pertaining to arrest and detention:

> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.[28]

It was in this light that Justice Nader, the judge in a 1992 murder trial, assessed the admissibility of confessional material. The case involved the first significant challenge to confessional material obtained during detention pursuant to s137(2). His Honour posed the question which in his view a judge must ask once satisfied that the accused was lawfully taken into custody:

> Was it reasonable in all the circumstances to continue to hold the accused in custody (without bringing him before a Justice as soon as was practicable) to enable him to be questioned or to enable investigations to be carried out, or both?[29]

His Honour viewed his task as obliging him to look at all of the known circumstances and apply the test, as to whether or not the accused was held after his arrest for a reasonable period as provided by s137(2), objectively, and confirmed that the test is applicable throughout the whole of the time during which confessional statements are made: "[I]n considering the question the Judge should keep to the forefront of his mind the jealousy with which the courts and the law regard the liberty of the subject." His Honour went on to say that it could not have been the intention of parliament to permit a reasonable period of detention for questioning and investigation for the limited purpose of converting an existing suspicion of guilt into a stronger suspicion of guilt.[30]

On appeal the Court of Criminal Appeal considered the section in view of the common law:

> From the moment a person is arrested the time for bringing him before a justice of a Court commences to run and, if that is not achieved as soon as is practicable, then continued detention is unlawful unless his holding in custody is continued as authorised by s137(2). The fundamental policy behind the duty to take an arrested person before a Justice so "that the law enforcement processes should be transferred as quickly as possible from the executive level to the objective and uncommitted judicial level"…Since the operations of the legislation affect the liberty of the subject, it must be construed strictly against those who seek to justify the continued detention of a person in custody in reliance upon its provisions.[31]

The Court concluded that s137(2) must be read in the light of the common law as unequivocally confirmed in *Williams:*

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[26] *North Australian Aboriginal Justice Agency* at [24]
[27] *Williams* at 296 per Mason and Brennan JJ
[28] *Williams* at 292 per Mason and Brennan JJ
[29] *Heiss v The Queen; Kamm v The Queen* (1992) 2 NTLR 150 per Gallop, Martin and Mildren JJ at 166
[30] Loc. cit.
[31] Ibid. at 168

> Section 137(2) does not do away with any of the protections afforded by the law to persons accused of an offence during the course of the investigation, apart from enabling a delay in the release of the person from custody for the limited purposes and for a reasonable period.[32]

In deciding to exclude confessional material in a different murder case, Mildren J (as he then was) also described s137 as *"*a significant derogation upon the rights of the liberty of the subject and there are no safeguards built into the provisions as recommended by four of the Justices of the High Court in *Williams*".[33] In this case, by the time the first record of interview commenced the accused had been in either the company of police or in custody for 21 hours and 20 minutes. His Honour described the length of time as "a very long time and one which must be viewed with considerable caution, particularly where the accused is an Aboriginal with limited English speaking skills…".[34] His Honour concluded that the police persistence in continuing the questioning of the accused after he had indicated to police that he "wanted to sit quiet" deprived the confession after that point of its voluntariness saying "[T]his is particularly so when an accused had been held in custody for a very long period of time".[35]

Recently, the NSW Supreme Court of Appeal decided by majority[36] that an arrest was unlawful in circumstances where the arresting officer conceded that he did not have an intention to lay charges when he carried out the arrest. It remains to be seen whether this decision will survive scrutiny in the High Court, which has granted special leave to the State of NSW to prosecute an appeal.

In that case, a civil action for wrongful arrest and false imprisonment, Mr Robinson argued that an intention to charge was an essential precondition to a lawful arrest, while the State of NSW relied on the statutory powers of arrest. Basten JA rejected the State's argument that the question should be answered by reference to the terms of the statute saying: "It is necessary to start with a correct understanding of the common law".[37] He then stated that the statutory interpretation principle of legality "requires a clear statement of statutory intent in order to construe a statute as impairing or overriding a fundamental freedom accorded to individuals under the common law".[38]

Basten JA went on to find that arrest is a legal term and is generally used "to identify that deprivation of liberty which is a precursor to the commencement of criminal proceedings against the person arrested and which may be justified as necessary for enforcement of the criminal law".[39] His Honour cited the statement in the joint judgment of French CJ, Kiefel and Bell JJ in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* that "custody after arrest is an executive measure not an exercise of judicial power".[40]

At least for the time being, *Robinson* reminds us that notwithstanding legislative intervention, the common law continues to operate as a protective bulwark against the use of executive power to deprive citizens of their personal liberty.

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[32] Ibid. at 182
[33] *R v Cotchilli* [2007] NTSC 52 at [21]
[34] Ibid. at [67]
[35] *R v Cotchilli* [2007] NTSC at [52]
[36] *Robinson v State of NSW* [2018] NSWCA 231 ("*Robinson*") per McColl JA and Basten JA, Emmett AJA dissenting
[37] *Robinson* at [132]
[38] *Robinson* at [132]
[39] *Robinson* at [136]
[40] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41; (2015) 256 CLR at [24]; cited in *Robinson* at [180]

The question remains, however, as to how effective the common law is to protect the liberty of Northern Territory young persons and children, citizens like the Huckitta Five.

PART 3: BACK AGAIN

Despite the reassuring assurance of Commissioner Palmer referred to above that the enactment of s137 did not change the legal protections for young people and children, in fact, since its enactment it has been largely taken for granted that s137 does apply to them. For example, in *R v LLH*,[41] in the exercise of his discretion Mildren J excluded an electronically recorded interview of a 14 year old accused, on the basis that police had acted improperly and deliberately. One of the relevant considerations His Honour adverted to was that the accused child had been held in custody for ten hours before the interview commenced. However, there was no finding, or apparently any submission, that s137 was inapplicable.[42]

Nevertheless, serious concerns and criticisms of Northern Territory police practices regarding the pre-charge detention of young people and children persist. In *Collins*, the defence had argued that the conduct of the police, including the 19 hours of detention before the re-enactments were elicited, amounted to a "softening up"[43] process. That was almost 40 years ago. Last month, in our evidence to a parliamentary inquiry into the *Youth Justice and Related Legislation Amendment Bill 2019* (NT), the Northern Territory Legal Aid Commission, with depressing familiarity, was still running the same argument, when we gave the following evidence:

> If you keep people in custody long enough, guess what, it is easier to get them to talk. That is often the situation when young people are held, certainly in the Alice Springs watch house, they are eventually broken down just by the passage of time sitting in a cell for hours after hours on end and then the police get the confession they want. That is completely inconsistent with the way our youth justice should work and the way the police should use their power.[44]

On 17 November 2017, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory handed down its Final Report, which included findings regarding the detention of children and young people in Northern Territory police watch houses.[45] It recorded that in a single apparently not atypical month in 2017, three young people aged 12, 13 and 14 years had been held in the Alice Springs watch house for 30 hours, and an 11 year old was held for 17 hours. Over the ten years to 2017, the median duration of police custody episodes for children and young people increased by 25%. This is despite the fact that, as the Royal Commission noted, section 4(c) of the *Youth Justice Act 2005* (NT) establishes the principle that a youth should only be kept in custody on arrest "as a last resort and for the shortest appropriate period of time". The Royal Commission found that children and young people were being subjected to watch house detention for "unreasonably long periods of time". It noted that other Australian jurisdictions generally have fixed police custody time limits, as follows:

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[41] [2002] NTSC 47

[42] *R v LLH* [2002] NTSC 47 at [27]

[43] *Collins* at 264, per Muirhead J

[44] Russell Goldflam, *Social Policy Scrutiny Committee* (Public Hearing Transcript 30 May 2019), 49, accessed at https://parliament.nt.gov.au/__data/assets/pdf_file/0008/704969/85-2019-Corrected-Transcript-Public-Hearing-Thursday-30-May-2019.pdf

[45] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory ("RCNT"), *Final Report Volume* 2B at 232 ff, accessed at https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-2b.pdf

> In New South Wales, police can only hold a person, child or adult, for a maximum of six hours without charge beginning from the time of arrest which can be extended once by an authorised officer. In South Australia, both adults and children can be held for up to four hours unless police get an extension of up to eight hours from a magistrate or judge. In Queensland, a police officer can detain children and adults for a reasonable time, taking into account factors such as age and mental capacity, for investigation or questioning not exceeding eight hours. A judge or magistrate can grant an extension of the custody period for a reasonable time of no more than eight hours. For a Commonwealth offence other than terrorism, a person who is Aboriginal or appears to be under 18 cannot be held for longer than two hours.[46]

Those limits are examples of the safeguards recommended by the High Court in *Williams* over 30 years ago, safeguards that are yet to be adopted in the Northern Territory.

In light of these findings, the Commission recommended that a statutory limit of 4 hours be placed on pre-charge detention of children and young people by police, unless extended by a judge.[47]

Nevertheless, despite having announced that it accepted the intent and direction of all of the Royal Commission's recommendations,[48] the Northern Territory Government has recently introduced a Bill to the Legislative Assembly which will, if enacted, authorise police to detain children and young people for up to 24 hours without judicial oversight or approval. This is completely out of step with Australian standards, with our international treaty obligations, and, poignantly, with the lessons we should have learnt from the Huckitta case. We are in effect back where we started 40 years ago.

Just three years before Bob Darken and the Webb brothers established the Harts Range Races, Justice Frankfurter of the United States Supreme Court delivered that court's opinion in *McNabb v US*,[49] a case in which the petitioners, three members of a clan of Tennessee mountaineer moonshiners, had been convicted of fatally shooting a tax inspector. They confessed after "unremitting questioning" over prolonged periods of police detention. The court granted the petition that the McNabbs' confessions had been wrongly admitted, not because they had been involuntary (although that finding might also have been open to the Court), but because (as in *Williams*) the detainees had not been taken forthwith before a judicial officer after their arrest. The Court observed "the history of liberty has largely been the history of observance of procedural safeguards", and also said this:

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous, as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its

[46] RCNT, *Final Report,* Volume 2B at 236 (citations omitted)
[47] RCNT, Recommendation 25.3
[48] Northern Territory Government, "Safer Communities: Response to the 227 Recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory" (Media Release, 1 March 2018), accessed at http://www.newsroom.nt.gov.au/mediaRelease/24289
[49] 318 US 332 (1943)

> vindication. Legislation… requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard – not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.[50]

The Northern Territory legislative arm now has the opportunity, and in our view, the responsibility, to confer on the judicial arm the power to "prevent disregard of cherished liberties" by the executive arm, by implementing the Recommendation of the Royal Commission that children not be detained in a police watch house for more than 4 hours without judicial authorisation.

Moreover, in our view lawyers can and should do more to challenge the lawfulness of the detention of children and young people pursuant to the power given to police by s137. Arguably, the scope of that power is limited by the "shortest appropriate period of time" principle set out in s4(c) of the *Youth Justice Act 2005* (NT). Indeed, it may even be arguable that s137 is not applicable to young people and children at all. Similarly, lawyers and judges should not lose sight of the authoritative body of jurisprudence which establishes that statutory provisions such as s137 modify but do not replace the common law, the underlying features of which continue to apply.

To protect the "cherished liberties" of young people and children it is insufficient to count on good legislating. We also need to count on astute, rigorous and vigorous lawyering.

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26 June 2019

Sanur, Bali

[50] Ibid. at 343