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ARTICLES

The High Court on Crime in 2023: Analysis and Jurisprudence – *Stephen Odgers*

This article discusses all of the High Court decisions in 2023 that relate to criminal matters. It examines the principles that derive from these cases and identifies jurisprudential themes from the decisions. It discusses in detail four of those decisions. 237

The Parameters of Lawful Physical Punishment of Children under the Australian Criminal Law – *Elizabeth Dallaston*

Many methods of physical punishment used by parents, such as smacking, hitting, and grabbing, if done without consent or lawful justification or excuse, would amount to criminal assault. The defence of lawful correction permits parents and others acting in their place to use reasonable force to punish children in their care. This article undertakes a comparative doctrinal analysis of the lawful correction defences across the Australian States and Territories current to September 2023. This analysis examines the limits on lawful physical punishment by parents provided by the lawful correction defences and identifies areas of uncertainty and inconsistency in both law and application. 255

Criminalising Coercive Control after the Hannah Clarke Homicide: A Comparative Analysis – *Shelly Brown and Kelley Burton*

The murder of Hannah Clarke and her three children in 2020 was a catalyst for the Women's Safety and Justice Taskforce recommendation that CC be a criminal offence in its own right in Queensland. This article examines the scope of CC, the harm done to victims of CC, and the pros and cons of criminalising CC. A comparative analysis of the Scottish CC offence, which is described as the "gold standard", the new New South Wales and the new Queensland CC offence, is undertaken in this research. Most notably, the new Queensland CC offence is broader than the Scottish CC offence, and thus has capacity to capture more CC behaviour. Both Queensland, New South Wales and Scotland could improve the protection of children as primary and co-victims. 268

The Scott Johnson Case: The Manslaughter Plea, Hatred, and Criminal Law Reform for Historic Anti-homosexual and Anti-trans Violence in New South Wales – *Tyrone Kirchengast and Stephen Tomsen*

The Scott Johnson case presents a complex policing and prosecutorial history, including an apparent New South Wales Police attempt to denigrate the deceased and his family to avoid criticism of an early police determination and ongoing insistence on death by suicide. Johnson's killer, Scott White, has now been sentenced in the Supreme Court of New South Wales following his guilty plea to manslaughter. This article assesses issues as to sentencing for crimes of prejudice, especially historic offences motivated by anti-homosexual prejudice. There is pressing concern for such recognition as a matter of retrospective reforms to evidence and sentencing, given the number of unresolved homicides against gay/homosexual and trans victims reviewed by the Special Commission of Inquiry into LGBTIQ Hate Crimes, where a possible element of such offending included "gay hate" prejudice. 293

Evaluating the Validity of Continuing Detention Orders after Fardon, Benbrika, Garlett and NZYQ – *Lucinda Lester*

Eight of nine Australian jurisdictions have implemented legislation enabling the continued detention of offenders perceived to pose an ongoing risk to community safety absent a fresh criminal charge. Three High Court decisions have upheld the constitutionality of these regimes, decisions which should be reopened and overruled on the basis that Ch III courts must not exercise non-judicial power and that state courts must retain their institutional integrity as entities within the integrated judicial system prescribed by Ch III. The first basis has newfound support in light of the recent decision of NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs such that the constitutionality of the legislation may be a question that the Court sees fit to re-open. 302

District Court Appeals Bail: Interpreting Section 22B of the Bail Act – *Daniel Larratt*

Section 22B of the *Bail Act 2013* (NSW) requires an offender to show special or exceptional circumstances before they are released into the community. The provision applies after conviction and before sentencing. However, it is unclear whether the phrase "before sentencing" applies to an offender who has appealed against their Local Court sentence to the District Court. The question has not been considered by any higher court. This article concludes that s 22B does apply to appeals bail, mainly because any other interpretation would defeat its purpose. 319

Objective Seriousness and Moral Culpability in Sentencing: The Role of Causation – *Edward McGinness*

Recent decisions of the New South Wales Court of Criminal Appeal have explored the "vexing" relationship between objective seriousness and moral culpability in the context of sentencing, and, how "causative" subjective features such as mental illness or childhood deprivation may impact upon those assessments. The varying usage and meanings behind "causation" leaves the authorities in a somewhat uncertain state. This article suggests causation ought to be viewed as a matter of degree, where the extent of the impact upon moral culpability and objective seriousness is a function of the proximity of the subjective feature to the offending, rather than the continued use of threshold tests of "sufficient" proximity. 330

Provocation, Murder and the Modern Approach to Interpretation: How Do You Solve a Problem Like Peniamina? – *James Duffy*

The purpose of this article is to highlight the interpretive challenges that currently exist in s 304 of the Criminal Code (Qld) dealing with provocation as a partial defence to murder. The section retains language that is out of step with contemporary parliamentary drafting, and has been amended in ways that make its application more complicated than needs be. The split High Court decision of *Peniamina v The Queen* illustrates how judges at the highest level have been challenged by the "antiquated" and "awkward" language of the section, when applying the text, context and purpose of the Act to interpret the meaning of a particular subsection within s 304. A redrafted s 304 is suggested to remedy some of the linguistic defects in the section, and to avoid the Peniamina precedent, which arguably does not give effect to the intention of Parliament when it amended s 304. 342

A Tale of Podcasts and DNA Lab Failures – Was Queensland's Double Jeopardy Law Reform the Answer? – *Kerstin Braun*

The double jeopardy rule protects persons from being tried and punished twice for the same offence. In Queensland, limited exceptions to this rule have been in operation since

2007. For example, an acquitted person can be retried for murder, where there is "fresh and compelling evidence", and the re-trial is in the interests of justice. In 2023, after the discovery of DNA testing failures at a state-run Queensland forensic DNA laboratory, the Queensland government introduced a bill expanding these exceptions to additional offences. The bill became law in March 2024. This article ponders whether double jeopardy law reform was needed to respond to the DNA lab shortfalls. It considers the problem, how the new double jeopardy law reform responds to it and whether the introduced law is an appropriate remedy. 359

Re-trials after Acquittals Ruled Unconstitutional in Germany – *Greg Taylor*

After much debate, the Federal Constitutional Court in Germany has just decided that it is unconstitutional to permit a prosecution to be re-opened after an acquittal on the ground that there is compelling new evidence such as DNA evidence. However, the Court's reasoning is unconvincing and contradicted by a powerful dissent. It also leaves the law in an odd state, as re-opening the prosecution is already allowed when the accused makes a credible confession. 373

Does Female Genital Cosmetic Surgery Constitute Female Genital Mutilation in Australia? – *Dr Chris Corns*

In Australia there exists significant overlap between the criminal offence of female genital mutilation (FGM) and female genital cosmetic surgery (FGCS). In order not to be a criminal offence, FGCS must come within one of the exceptions set out in the relevant legislation criminalising FGM. It is argued that many forms of FGCS do not fit within the statutory exceptions and hence are prima facie unlawful. This raises important issues concerning prosecution policy regarding such cases. This article explores the laws in Australia governing FGM and the inter-relationship between FGM and FGCS. It is suggested that the cosmetic surgery sector, and the medical profession as a whole, have a responsibility to provide clarity as to the circumstances when FGCS is lawful and when it is unlawful. 376

Judicial Knowledge of Personal Abuse at Sporting Events – *Robert Shiels*

A charge of behaving in a threatening or abusive manner, a statutory offence in Scotland, was proved against an accused, and so too was the statutory aggravation of religious prejudice. As a spectator, he had called police offices "hun cunts" when they were on duty at a professional football match. An appeal to the Sheriff Appeal Court was refused and the original charge and the aggravation were upheld. A further appeal to the High Court of Justiciary was successful, in regard only to the alleged sectarian remark. It was not within judicial knowledge, in a footballing context, that the term "hun" referred to members of the Protestant faith generally as distinct from supporters of Glasgow Rangers Football Club. 388

The Vanuatu Penal Code: A Flawed Gem? – *Eric Colvin*

The Vanuatu Penal Code is one of a number of criminal statutes in the Pacific that were enacted during the era of independence. Although most of these statutes are transplants, the Vanuatu Code is unique in both origin and style. Its most striking feature is its brevity, with less than half the length of the equivalent statutes of its neighbours. This is achieved mainly by favouring simple definitions of a restricted range of offences, with finer gradations in harm and culpability to be handled through the exercise of sentencing discretion. The Code is flawed in some respects. However, it also has virtues which merit wider contemporary attention. 391

2023 Sentencing Review – *Lorana Bartels*

This review focuses on the sentencing issues associated with disability. It commences with a discussion about definitions and terminology. It then considers the Australian legislation and case law governing various health issues that may constitute disability as a sentencing factor. Next, the review summarises relevant sections of bench and bar books and outlines the specialist court programs designed to respond to the needs of people with disabilities. The review also summarises the relevant findings and recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, as well as other recent research. Overall, the review reinforces the need for substantial legislative, case law and practice reforms. To be most effective, such reforms should adopt an intersectional approach and be co-designed with people lived experience of both disability and the criminal justice system. 406