Hal Wootten Lecture 2024

Remembering the Past, Imagining the Future

Introduction

It is a great honour and privilege to be able to deliver the Hal Wootten Lecture for 2024. I have prepared a written paper as an adjunct, but I do not intend to read it. Law is inherently exciting and interesting – but not when read. The oral tradition is one of stories, not content.

I met Hal Wootten only once – after his retirement, and called him 'Professor'. He said 'call me Hal' – and so I will.

When I spoke to my father (Hans Heilpern, also a lawyer) and told him of the invitation, I said I was surprised and thought they must have made a mistake. Quick as a flash he said 'You should be surprised, and you are mistaken. The invite was meant for me'. Staggeringly, my uncle Hal Sperling KC a lifelong colleague and friend of the other Hal, responded identically.

Until now, the highlight of my career was some graffiti on the dunny door in the main street of Nimbin. In the 1980's someone had written, 'need a lawyer? call 0407###485'. Then in the 1990's they crossed out 'lawyer', and wrote 'poet'. In 2000 they changed it to 'need a Magistrate?' That led to a few compromising conversations. And finally, now it says 'need a law degree, call David'. My career in a nutshell.

Hal has described the lecture series named in his honour as an opportunity for the speaker to talk about their 'life in the law' – to reflect on their obligations and responsibilities as lawyers, and how they've used this to shape a society where social justice is held dear. I will do this, but only for half the time. For the rest, I really want to speak of 'imagining the future'. I want to address some specific areas of law reform that reflect my aspirations for the future, which is one characterised by nimble legislative change.

Part One – My life in the law

As I read the life story of Hal Wootten, I realised that our life paths and interests were remarkably similar. In writing this lecture, I decided to address these similarities, and illustrate each with a story.

I was actually imagining the old-fashioned scoring for the Olympic diving, where they hold up a mark out of ten as I compared our calling. Hal universally got a ten, and mine was a middling five at best. Just a little too much splash it seems.

Hal and I share a passion for the cause of Aboriginal rights and outrage at the overrepresentation of First Nations people in the criminal justice system. Hal helped establish the Aboriginal Legal Service – for whom I worked in Redfern and Kyogle – and then he went on to be a Commissioner in the Aboriginal Deaths in Custody Royal Commission and a member of the Native Title Tribunal. I went on to be a Magistrate, and did what I could within the strictures of the law to redress the imbalance. In particular, I determined that the word 'fuck' was no longer offensive,[1] meaning that thousands of

[1] Stephen Lawrence and Jeremy Styles, 'David Heilpern AM: On His Retirement' [2021] (Autumn) *Bar News: The Journal of the NSW Bar Association* 98, 98.

cases dropped out of the Local Court list, and attacked the trifecta in *Carr's c*ase,[2] both of which have stood the test of time. However, despite Hal's efforts and mine, the gross overrepresentation continues and grows unabated and Aboriginal people are now the most imprisoned race in the world.[3]

The Uluru Statement from the Heart mentioned only one closing the gap issue - incarceration:

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.[4]

There are still hanging points in many NSW cells,[5] some detention centres are 100% Aboriginal kids, and racism abounds throughout our police forces.[6] I cannot rest easy nor enjoy any sort of retirement while such injustice exists, and neither could Hal.

As Hal wrote, he had a short fuse in the face of injustice.[7] Michael McHugh noted Hal was 'obsessed' by desire to 'see justice for all'.[8] Chief Justice Kiefel said he tried to be a 'nudger of the law'.[9] To point it in the direction that it needs to go. This is a modest appraisal in my view – we do not nudge. We push. Some would say I bulldoze. I am not sure if it is a curse or a blessing, this shared inability to accept inequity. But I can say it hurts – mentally and physically, and I am more driven than ever to respond.

It is within that context that I wish to belatedly acknowledge country. One day, I was sitting in Brewarrina, home of the oldest human structure remaining in the world, the fish traps. I flew from Dubbo in an eight-seater plane with court staff and sheriff. When we got there, the registrar told me that unfortunately there was no transport for kids and so please could I not refuse bail to any young people. Well, I said, I will do my best. Sadly, there was a young person that day charged with multiple breaches of bail, and he could not go home. So I refused bail. I got on the plane, and lo and behold in the seat across the aisle from me was that 16-year-old lad. He was handcuffed to the hand hold, and behind him was a police officer. He gave me a big grin. But as the plane moved he looked very scared, and I asked him if he was OK. He said he'd never been in a plane. And he'd never been out of Bre' before. As the plane started taking off, he started shaking and then gagging and vomiting so I grabbed my vomit bag and held it for him. Never being one for bodily fluids I held it in one hand, and turned and looked out the window to see the full expanse of the fish traps below me. And I froze that scene in my mind like a tableau. Only 250 years of occupation and this is what it has come to. A magistrate

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[2] *DPP v Carr* [2002] NSWSC 194.

[3] Mike Roettger, Krystal Lockwood and Susan Dennison, 'Indigenous people in Australia and New Zealand and the intergenerational effects of incarceration' (Research Brief 26, Indigenous Justice Clearinghouse, December 2019).

[4] First Nations National Constitutional Convention, 'Uluru Statement from the Heart' (Statement, Uluru, Northern Territory, 2017) <https://ulurustatement.org/the-statement/view-the-statement/>.

[5] Aboriginal Legal Service NSW/ACT, 'Hanging points remain in prison where Aboriginal man took his life' (Media Release, 1 February 2024).

[6] Chris Cunneen, '"The Torment of Our Powerlessness": Police Violence Against Aboriginal People in Australia', *Harvard International Review* (Web Page, 30 September 2020) <https://hir.harvard.edu/police-violence-australia-aboriginals/>.

[7] Hal Wootten AC QC, 'Living in the Law' (Hal Wootten Lecture, Faculty of Law and Justice, University of New South Wales, 16 October 2008) 9.

[8] Hon Michael McHugh AC QC, 'The Impact of High Court Decisions on the Governance of Australia' (Hal Wootten Lecture, Faculty of Law and Justice, University of New South Wales, 23 August 2007) 2.

[9] Hon Susan Kiefel AC, 'A nudge in the right direction; some landmark cases and the development of the law' (Hal Wootten Lecture, Faculty of Law and Justice, University of New South Wales, 24 November 2022).

holding a vomit bag for a kid on his way to prison, completely divorced from his culture and the technology and knowledge of his ancestors' tens of thousands of years ago.

And so, with feeling. I would like to show my respects and acknowledge the Bedegal people who are the Traditional Custodians of the Land on which this meeting takes place, and to Elders past and present.

Hal was a QC at 44, and I never became a QC, SC or KC. I did often get called a 'fat C---'. Hal was a Judicial Officer of course, and so was I. He gets a scorecard nine for the Supreme Court, and in this case I am giving myself a healthy eight for the Local Court. I am honoured to be the first magistrate to give this lecture.

When I was first a magistrate an unnamed Chief Justice of the Supreme Court was invited to speak to our annual conference dinner. A small secret - magistrates generally have no time for Supreme Court judges, certainly not for reasons so destructively elucidated recently by Magistrate Prowse.[10] But because they are paid too much, they wear wigs, they have the best superannuation in the world, they have these mythical things called associates, and tipstaff. Anyway, jealousy is like eating poison and expecting someone else to get sick, so we invited the Chief Justice (let's call him) James Spigelman. Reading the room brilliantly, he told us this apocryphal story:

> On the day of my appointment, I was dancing around the living room, saying 'I James Spigelman am Chief Justice of the Supreme Court of NSW' and looking in the mirror, smugly. My wife, ever alert to my fits of egotism, suggested nicely that I go for a drive. So I got in my brand new Chief Justice-mobile Holden Statesman and, perched up on a cushion, drove around for a while, playing with the buttons and gadgets I had not seen before. So focussed was I on the stereo system that BANG, I drove straight into the back of a truck. The driver got out of the truck, all blue singlet chook fowler shorts[11] and aggro and he banged on the window. I pressed the magic button for the window to come down. 'Who do you think you are?' he asked. 'I am James Spigleman, Chief Justice of the Supreme Court of NSW' I answered. His response? – 'I wouldn't give a fuck if you were a Magistrate'.

For most people the Magistrates Court is the law, and their only contact with it. All criminal cases begin in the Local Court and 90% finish there. It is the same proportion of civil cases.

I was delighted to read that Hal, like me joined the communist party, which he described as very boring and where dissent was unimaginable. I too did a stint with the doctrinaire, and learnt the difference between Spartacists, Trotskyites, Maoists, Stalinists, Leninists and the ONE TRUE PARTY. It was the same year the movie 'The Life of Brian' was released, and anyone who recollects the scene of Peoples Front of Judea will understand why I soon lost faith.

Like me, Hal had a lifelong love of the people of PNG, and I first visited on a Law Foundation grant in 1979, and then later trained Magistrates there for over 15 years. In PNG Hal learnt 'the power of humiliation, its ubiquitous and corrosive effect where one group of people believe they are superior to another'.[12] I too learnt lessons there, and in particular one from the then President of the Children's Court. I was placed next to her at a dinner, and we talked about our families, and I asked her how many children she had. She said 'four plus ten'. I thought that was a pretty heroic effort, and so I asked

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[10] Ellie Dudley, 'Rogue NSW magistrate Roger Prowse to be probed by judicial watchdog', *The Australian* (online, 10 January 2024) <https://www.theaustralian.com.au/business/legal-affairs/rogue-nsw-magistrate-roger-prowse-to-be-probed-by-judicial-watchdog/news-story/d3cd664788df0564612e7062ad870a87?amp>.

[11] Kate McClymont, 'Police corruption defined by Chook's crotch cam', *The Sydney Morning Herald* (online, 19 May 2013) <https://www.smh.com.au/national/nsw/police-corruption-defined-by-chooks-crotch-cam-20130518-2jtb9.html>.

[12] Hal Wootten (n 7) 12.

her how come four plus ten. 'Well', she said, 'I have four of my own, and then if kids from my court have nowhere to go, I just take them home on bail or until they get placed. But, once I got to ten, my husband said "enough" so I would have to wait for one to go back to their village, or turn 18 or we got them independent before I got another one'. Now that was a revelation to me, and utterly opposed to all our stuffy ideals about judicial independence and aloofness from the people we serve.

Hal, like me, helped start a law school. For Hal, he saw a need for a different way of teaching and approaching the law. For me, my colleagues and I saw that regional people were being disadvantaged by having to travel to Sydney, and so we set up the first non-metropolitan law school in NSW. I am so proud of Southern Cross University, and its graduates, many of you who are here tonight, and I guess the lesson is that ideas can sometimes lead to greatness. There was no greater professional joy for me than when students I had taught appeared before me as advocates. Sometimes they would bring a book I wrote and plonk it on the bar table. Brilliant advocacy. Hal became Dean immediately. It took me about 30 years. Sigh.

Hal Wooten was concerned about the mental health of legal practitioners. He wrote:

> … there is no lack of evidence of the agonies suffered in wrestling with the choice of such a profession. For long it was a literature of personal anecdote and rhetorical affirmation, then from the 1980s and 1990s it was subjected to largely subjective theoretical analysis, followed more recently by statistical collection and analysis, so that it increasingly merges with epidemiological study of mental illness and depression, where lawyers head the tables. The challenge was for me an intensely personal matter, to be resolved within me. There were no counsellors or mentors, or kindly souls to manipulate my learning or working environment. As so often in my life I turned to other men's flowers, taking comfort in William Henley's Invictus: Out of the night that covers me, Black as the Pit from pole to pole, I thank whatever gods may be For my unconquerable soul. [13]

He was ahead of his time in this cause, and my own battles with vicarious trauma are well documented.[14]

Speaking out about this while still serving as a judicial officer was incredibly difficult and probably the proudest moment of my career. The support I engendered from my colleagues on the bench and in the broader profession was simply extraordinary. I was recently asked at a leadership forum if there was something I wished I had known earlier in my career. There was – that to show vulnerability is not a sign of weakness, it is a sign of strength. It brings out the best in others.

Hal was deeply concerned about environmental matters, and so have I been. Hal gets his customary score of ten as President of the Australian Conservation Foundation and as Patron of the Environmental Defenders Office. He proudly loved getting into the bush and once told me a nauseating story of having a leach in his eye for 36 hours in the Daintree. I helped formed Lawyers for Forests,[15] and gratefully continue to provide legal advice to those engaged in direct action to save the environment. I fundamentally believe in non-violent direct action, in breaking the law to make the law. At least two of the previous speakers in this lecture series have touched on this – Jennifer Robinson, and of course Albie Sachs. There is a time when inaction in the face of grave injustice is not an alternative. I recently spied Bob Brown when we were at the Byron Writers Festival, and he was giving a talk to children about his book. 'I never minded going to prison' he said. 'I got to read and meet some lovely people'.

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[13] Ibid 3.

[14] David Heilpern, 'Lifting the judicial veil – vicarious trauma, PTSD and the judiciary: a personal story' (Tristan Jepson Memorial Lecture, 25 October 2017).

[15] David Heilpern, 'Environmental law: Lawyers for forests' (1996) 21(6) *Alternative Law Journal* 294.

Hal also showed ongoing commitment to and support for Palestinian lawyers, law students and law schools. He lived in West Bank for three months and was detained by the Israeli authorities when supporting Palestinians who regularly went to protect the local farmers from Israeli settlers' violence.[16] At 92, he enrolled in Arab Studies as an undergraduate. One of his regrets was that he was unable to sufficiently support

> … scholarships and fellowships to students and staff of the law schools of Nablus and Jenin that I got to know during my recent three months on the West Bank, men and women who are isolated by the checkpoints and travel controls of the occupation…yet aspire to help build in Palestine a liberal democratic state that respects the rule of law and human rights. It would be like rain in the desert, a Jewish friend said, when I mentioned my dream that these Palestinians might have opportunities to spend time in Australian law schools.[17]

I share this hope and vision.

Finally, Hal started life in my hood, the far north coast of NSW, indeed not three kilometres from where I now live and he kept a lifelong interest in the land.

Part Two – Change the law

When I was at law school, here at UNSW, and then at Macquarie, there was a hopeful but simplistic view that the slow erosion of the common law was a good thing, and that codification was superior to the inflexibility and fuddy-duddiness of judge made law. Imagining the future then, I saw a nimble and flexible statutory regime as the ideal model for law reform. In many ways this was a forlorn hope, because parliaments have proven themselves to be inflexible - perhaps due to Hal's well-known distain for the Murdoch Press.[18] Whatever the reasons, I want to spend the rest of this speech focussing on some rapid areas of change that I envisage a deft parliament could alter without great controversy. I have chosen three areas to imagine the future - remand rates, victim's rights, and drug law. For each I outline simple, non-controversial law reforms. I envisage that a nimble parliament, not subject to the vagaries and vested interests of the tabloid muck, could just act tomorrow.

A. Remand

The situation with remand in Australia is utterly shameful, and an indictment of our criminal justice system. The words 'innocent until proven guilty' ring hollow when 42% of people in custody in NSW are actually only bail refused, not convicted. Worse still, more than 60% of young people in custody are there on remand. Resource allocation means young people fare worse than adults.

And let's make no mistake, every time the bail laws are tightened, there is only one group really affected. The remand rate for Aboriginal adults has gone up 47% in the last five years.[19] For non-Aboriginal people it has increased only 2%. So all that tightening of bail laws has actually principally affected one tiny proportion of the Australian population. And refusal of bail is like an insatiable beast. It reminds me of visiting the USA in the 1990's where they had 'do drugs do time'. I visited some

[16] Andrew Dahdal, 'In Memory of 'Hal' Wootten (1922-2021)', *Pearls and Irritations* (Tribute, 29 August 2021) <https://johnmenadue.com/in-memory-of-john-halden-hal-wootten-1922-2021/>.
[17] Hal Wootten (n 7) 23.
[18] Malcolm Brown, 'Lawyer at forefront of rights for Indigenous and PNG', *The Sydney Morning Herald* (online, 2 August 2021) <https://www.smh.com.au/national/lawyer-at-forefront-of-rights-for-indigenous-and-png-20210802-p58f0b.html>.
[19] Patrick Begley, 'Police had a plan to help reduce Aboriginal incarceration. Then this happened…', *The Sydney Morning Herald* (online, 29 July 2024) https://www.smh.com.au/national/nsw/police-had-a-plan-to-help-reduce-aboriginal-incarceration-then-this-happened-20240624-p5jobf.html>.

jurisdictions where possession of drugs equalled a minimum of five years imprisonment. Yet the tabloids were all calling for tougher sentences because the drug situation was out of control. Same with bail – it is not actually about locking up more people, but the right people. And that takes time to assess.

Yet the situation is capable of remedy rapidly, with no additional cost or controversy. A story will illustrate exactly how. If I was sitting in Lismore, I would have on average five to ten fresh custody matters every Monday, together with a list of over 100 defendants. And bail refusal led to being held in custody for months if not years. I could give each application only a few minutes at most. And the consequences of error can be fatal. Literally. Like almost every Magistrate, I granted bail to men who then killed, and refused bail to those who died in custody.[20]

But the only review is to the Supreme Court. Yet the District Court is sitting right next to me, literally almost every week of the year. And they have gaps in their day when juries are out or short matters fall over. This is absurd. Almost all other appeals are to the District Court, including findings of guilt and sentence severity. Yet for reasons lost to the sands of time, bail appeals are to the Supreme Court only. And this costs clients tens of thousands of dollars, and it only sits in Sydney, removed from family and friends and community and takes months.

If I refused bail in Lismore then the appeal should be heard in the District Court within days, and family can come, and the DPP is involved and a fresh look can be given in the cool light of day without the frantic mouth-over-fire-hydrant atmosphere of the Local Court.

Of course, there are resource implications, but the bail list in the Supreme Court would evaporate, and free up enormous resources. I imagine that this process would be much more likely to ensure that those who should be refused bail are, and those who should not, are not. Every bail refusal is a tragedy and a failure. The quickest and most efficient way of dealing with bail appeals should be utilised.

B. Victim's Rights

I have three stories of law reform in the area of victim's rights.

I will start with the Victorian case of *Johnston*.[21]

In December 2020, the police entered a property owned by Johnston subject to a specific search warrant to locate a young missing child. Shortly after they entered, they were informed that the child had been located some kilometres away. Nevertheless, the police decided to keep searching and uncovered some video evidence of Johnston having sexual intercourse on multiple occasions with an unconscious female. The police some months later obtained a warrant and lawfully seized the computer. There is no issue that the first search was unlawful – they had no right to continue. Investigators then showed the video to the victim AB who was the ex-partner of the defendant, and she had no idea she had been drugged and raped and disclosed that there was an AVO against Johnston at the time.

When Johnston's case reached trial for four counts of aggravated sexual assault, Her Honour the County Court Judge, admitted the evidence notwithstanding that it was obtained illegally. She stressed the seriousness of the crime, the importance of the evidence and the relatively innocuous breach of the law by the police, particularly seeing that the initial entry was legal.

[20] *Inquest into the Death of Dwayne Johnstone* (Coroner's Court of New South Wales, Coroner O'Sullivan, 21 August 2024).
[21] *Johnston (A Pseudonym) v The King* [2023] VSCA 49.

The appeal court, three men, focussed on the actions of the police, finding at 151: 'This was a deliberate, continuous, invasive and totally inappropriate search of private property, in the absence of the owner and occupier and without lawful excuse'.

They excluded all evidence. The rape charges were discontinued. Not once is there any mention of the word victim in the reasons for decision by the higher court.

That judgment when analysed represents a triumph of legalism over modern community values, of property rights over personal rights, and of a defendant's privacy over a victim's justice. The decision is wrong on legal, discretionary and principle grounds. Even if it is legally arguable, then the law should be changed. The offending conduct by the police is at worst a trespass, completely disproportionate to the wrong of multiple sexual assaults.

The court abrogated its responsibility by making no mention of the role and rights of the victim, relegating her to the epitome of the silent, hidden, immaterial non-party.

By way of law reform, section 138 of the *Evidence Act 2008* (Vic), and similar provisions around the country should be amended to remove the mandatory consideration of whether the police have been disciplined for their impropriety, and include for mandatory consideration the rights of the victims of crime to have defendants tried.

In my view, the court's determination in this case is completely at odds with community values. To suggest that a one-hour illegal search ought to lead to the dismissal of four rape charges is nothing short of outrageous.

The development of the common law, from which section 138 was born, occurred long before the modern development of victim's rights. An amendment to avoid absurd results such as this is long overdue. How is AB meant to feel at this outcome – raped in her own home, drugged, videoed and then abandoned by a legal system more concerned with process than with substance. AB would rightly be outraged that the actions of overzealous police in searching for one hour have led to the position where overwhelming evidence that she was raped four times whilst stupefied to unconsciousness and videoed is excluded.

The second area of victim's rights involves another story. Imagine entering a police station to report a rape, and they hand out an information card. It says:

> Please note that if you report this rape then the defence or police may obtain court orders that you surrender all your electronic devices and every email, Facebook post, SMS or other social media activity. The defendant personally will be able to see all of that material. And not only that, but if it ends up on the front page of the newspaper, even material never used in the trial, then there is nothing you can do about it because the 'journalist' will not disclose their source.

How many women would report that crime in those circumstances? In the post-Bruce Lehrman debacle, this digital strip-searching is the current state of the law.

That nothing has been done to protect the victim from the publication of that material is a serious gap that ought to be remedied by amendment without controversy.

A nimble legislature would simply pass a law that prohibits the publication of any material that could reasonably be suspected as having been obtained as a result of a court order to produce. The only exception would be with the consent of the court.

The third area of victim's rights involves sentencing, or rather the inadequacy of sentencing. In the case of Boyd Kramer,[22] the victim was raped on 20 December 2020. Kramer had pleaded not guilty, and the victim had been cross examined by Margaret Cunneen SC at length in a trial. The jury found him guilty in February 2022. The District Court Judge, Judge John North, despite the plea of not guilty sentenced him to a Community Corrections Order for 2 years with some community service component.

Keep in mind that the standard non-parole period is 7 years imprisonment. And the maximum penalty is 14 years. And parliament has specifically excluded an Intensive Corrections Order (or previously a suspended sentence) as an option.

The Court of Criminal Appeal found that the sentence was manifestly inadequate. This means that they found that the sentence was blatantly and obviously deficient. And of course, it was – a Community Corrections Order is what you get for a second shoplifting matter or perhaps an altercation at a pub. However, despite this finding the Court of Criminal Appeal failed to interfere with the sentence as the prosecution had not negated the application of a residual discretion not to interfere with the sentence. You can see the interview with the victim, and my comments on 60 Minutes,[23] and her anger is visceral. And why wouldn't she be angry – I am angry about it as well.

This residual discretion,[24] with its onus on the prosecution is an archaic, judge-made proviso which has no place in modern sentencing. If a sentence is manifestly inadequate it ought be fixed so that it is no longer inadequate. Sure, some wriggle room by way of exceptional circumstance ought be maintained, but the onus should be on the defence. And, if you rape someone, and plead not guilty and you are convicted it would want to be one hell of an exceptional case for a person not to spend time behind bars.

A nimble legislature would respond by passing laws that rid us of the proviso to start with. If it is inadequate, that is surely sufficient.

C. Drug Law

There is a meme floating around which has an elderly woman holding a placard at a protest meeting which reads 'I Can't Believe I Have To Keep Protesting This Shit'. And that is how I feel about drug law reform. In giving evidence recently to a NSW inquiry I reflected that when I commenced law I had represented abortionists, prostitutes, SP bookmakers, vagrants, homosexuals, blasphemers and now all of these are decriminalised or legalised or just regulated. And the sky has not fallen. No-one rational suggests winding back the clock on these reforms. Yet drug law reform seems to be stuck in the 1950s with all the waste of police, court, legal profession and prison resources all in an effort to deal with at worst a victimless health problem and at best harmless experimentation.

In this part of the lecture I will just concentrate on two areas: mushrooms and drug driving.

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[22] *Kramer v R* [2023] NSWCCA 152.

[23] Nina Funnell, ''The trial was worse than the rape': Brave survivors speak out', *60 Minutes Australia* (Web Page) <https://9now.nine.com.au/60-minutes/sexual-assault-rape-survivors-speak-out-madeline-lane-emily-campbell-ross/b4c6448d-6095-412e-8cdf-d44c0c57c286>.

[24] Judicial Commission of New South Wales, *Sentencing Bench Book: Appeals* (November 2023) [70-100] <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/appeals.html#p70-100>.

Most in the legal community will be aware of two concepts: 'show cause'[25] and 'deemed supply'.[26] Show cause means if you are caught in possession of more than certain amounts of drugs, the chances of getting bail becomes infinitely more remote. Deemed supply means if you are in possession of certain quantities of drugs, then you are presumed to be a drug supplier for the purposes of sentencing. Last concept, is admixture,[27] which means that if you are in possession of a drug mixed with another substance, then the whole lot is counted for both show cause and deemed supply.

All this works with some minimal logic with cannabis leaf. The deeming amount, for example is 300 grams, which in the old-fashioned calculus a bit over 10 ounces. But it is completely stupid with mushrooms. The deeming amount for Psilocybin is .15 of a gram.[28] The amount that triggers show cause, called a commercial quantity, [29] is 25g. The admixture provision means the whole mushroom containing the psilocybin is taken into account. And a field mushroom, on average, from Coles at Ocean Shores weighs 111g. So you can see that a poor psychedelic seeker who picks a mushroom from the paddock is at maximum risk of being bail refused and presumed a supplier for the purposes of sentencing. This is not just academic, as cases like *Jenkinson v R*[30] show**.**

Dozens of real people posing no risk to the community are sitting in prison right now. And an amendment to make the amounts reasonable or akin to the Commonwealth provisions which rely on purity are long overdue.

Finally, to drug driving for prescribed THC. What can I say that has not already been said so lucidly and convincingly by me already? I am sick of hearing my own voice on this as are all of you.

Australia does more random roadside drug checks than all the rest of the world combined. There is not a single coronial finding in Australia that suggests medicinal cannabis is to blame for road trauma. The NSW testing regime of 250,000 tests comes out of road safety dollars that could be spent actually saving lives. There now 1 million prescriptions for medicinal cannabis in Australia and not one of those people are permitted to drive if they take it as prescribed. Tens of thousands of people are caught and lose their licences, and hundreds of thousands go back to their much more road-safety dangerous prescription pain killers or benzodiazepines. Hundreds of thousands are blissfully driving around thinking they are insured when they are not even though they are taking medicine as prescribed.

Here is an excerpt from the current AAMI car insurance product disclosure document at page 18:

> You are not covered under any section of this policy for damage, loss, cost or legal liability that is caused by or arises from or involves:
>
> > an incident occurring when your car is being driven by, or is in the charge of, anyone who … had more than the legal limit for alcohol or drugs in their breath, blood, saliva or urine as shown by analysis.

There is no legal limit for THC as we know, and a person is likely to test positive for 24 hours after use.

It is policy insanity driven only by police, alcohol companies and road safety gurus that habitually, maliciously and wantonly confuse causation with correlation. Almost a million Australians are criminalised by this absurd provision, probably the greatest criminalisation of our population in

[25] *Bail Act 2013* (NSW) s 16B.
[26] *Drug Misuse and Trafficking Act 1985* (NSW) s 29.
[27] Ibid s 4.
[28] Ibid sch 1.
[29] *Bail Act 2013* (NSW) s 16B(1)(f).
[30] [2024] NSWCCA 34.

Australian legal history. It does not matter if your drink is spiked with THC: you are guilty, as the offence is now absolute liability.[31] You don't even get your day in court in most cases because of immediate suspension.[32]

Just change the drug driving law.

Conclusion

My favourite Hal Wootten quote is: 'My career has been built on my inability to say no when invited to do something I was not qualified to do'.[33]

So true. I mean, imagine making me a Magistrate, or a Dean. Let alone saying yes to this lecture.

My second favourite quote, which is the way Hal finished his lecture in this series named after him is: 'Don't let the bastards get you down, and don't forget about climate change'.[34]

Thank you to UNSW and to Hal's family for inviting me, and thank you to each of you for listening, and for coming.

[31] Paul Gregoire, 'Former NSW Magistrate David Heilpern Condemns Absolute Liability Drug Driving Ruling', *Sydney Criminal Lawyers* (Blog, 12 March 2024) <https://www.sydneycriminallawyers.com.au/blog/former-nsw-magistrate-david-heilpern-condemns-absolute-liability-drug-driving-ruling>.
[32] Ibid.
[33] Hal Wootten (n 7) 10.
[34] Ibid 25.