SUPREME COURT
OF QUEENSLAND

The University of Queensland – Inspire U Law Camp
Courtroom 3
Monday 13 April 2015, 3.00pm

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**The Hon Tim Carmody**
**Chief Justice**

# INSPIRE U LAW CAMP

## Introduction

Good afternoon teachers and students. It is a pleasure to be talking to you this afternoon.

It is commonly said that three emotions are experienced by students approaching the end of their high school years. Firstly (and I think most likely), there is *excitement* at the prospect of venturing outside the school grounds and embracing freedom. Secondly (and I know many of you may disagree with me on this one), there is *sadness* to be leaving behind familiar faces and what may have become a comfortable environment for some. And finally, for a number of students teetering on the brink of their futures, *fear* of the unknown can creep in.

For any of you experiencing that last emotion, I hope that I am able to provide information that will lessen any uncertainty or anxieties you may have about whether law is the right path for you. As the saying goes – knowledge is power. The more information you have, the easier it will be to make confident decision about embarking on a legal career.

There are a number of benefits that come with undertaking tertiary legal studies. To name a few of many, first, it a tremendous personal advantage to possess an in depth knowledge of the law which is at the core of our day to day lives.

Whether you are interested in practicing the law in a firm or using the law to achieve other goals, a law degree is a strong asset as well as a stepping stone.

On another level, obtaining a law degree can also be incredibly rewarding, as it can be used to help others. The clearest example of this is pro bono work which is voluntary legal work. There are many disadvantaged people who remain on the outside of the legal system due to financial difficulties and are reliant on pro bono work for access to the justice system.

It is also vital that we have a racially diverse legal profession that reflects the diversity of the Queensland population. Eric H. Holder, a former Deputy Attorney General in the United States of America, importantly said:

> A legal profession lacking in significant racial and gender diversity can only go so far in combating the sense of alienation that disadvantaged clients feel when regularly confronted by an establishment of a distinctly different colour and sex.[1]

Therefore, we need lawyers from a variety of backgrounds in order to truly serve the many races and cultures that make up the state of Queensland.

**The Rule of Law**

But before I address the main points for today, I would like to shed some light on a principle which arguably forms the foundation upon which our entire legal system depends – the **rule of law**. It is universally regarded as the cornerstone of a society that enjoys freedom and democracy.[2] You may or may not have touched on this in legal studies already. A true appreciation of the law, in my view, requires a basic understanding of the rule of law.

Despite the importance of this principle, there is strangely no clear definition for it. However, from the various attempts by academics to give meaning to this rather elusive concept, we know that the rule of law demands that **no one is above the law**. In the eyes

[1] Eric H. Holder, 'The importance of diversity in the legal profession' (2002) 23(6) *Cardozo Law Review* 2241, 2247.

of the law, each and every one of us is the same. Whether you are the Queen of England or the Prime Minister of Australia, you are still subject to the law.

The origins of the rule of law can be traced all the way back to the Magna Carta in 1215. Magna Carta is Latin for "Great Charter" and has been hailed by many as "the most famous and important document in the history of the English-Speaking world".[3] It is an enduring symbol of the **supremacy of the law**, as it had the effect of placing limits upon the previously unrestricted power of King John of England who was using the legal system to his achieve his own ends.[4]

It is timely for me to acknowledge the upcoming 800th anniversary of the Magna Carta this year. I know that senior years are a very busy time, but for those of you who may be interested in learning more about the Magna Carta, I recommend looking into the events, newsletters and publications of the Magna Carta Committee which you can find online.

A rule of law based society is one **governed by law and order** instead of brute force. Without the rule of law, there would be anarchy and we may be facing the frightening possibility of a reality that resembles the fictional one created by the author William Golding in his classic book *Lord of the Flies*. The story takes place on a deserted island where a group of boys are the only survivors of a plane crash. To survive and work towards rescue, the boys choose a leader and use a conch shell they find on the island as a means of communicating and maintaining order. The boys agree that whichever one of them holds the conch shell has the right to speak. The shell is used by the author as a symbol of an ordered society and the rule of law. When the conch shell is eventually destroyed, it is not simply the *shell* that is broken – it marks the collapse of law and order on the island. The end of the rule of law later in the book is followed closely by brutality and death.

[2] Hon Marilyn Warren AC, 'Does Judicial Independence Matter?' (2011) 85 *Australian Law Journal* 481, 481.
[3] Magna Carta Committee, *What is the Magna Carta?* Magna Carta Committee – Celebrating 800 Years of Liberty<http://www.magnacarta.org.au/what-is-magna-carta/>.
[4] Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State?' (2014) 39(1) *Alternative Law Journal* 3, 3.

Although only fictional, *The Lord of the Flies* serves as a very powerful example of the necessity of the rule of law for maintaining an ordered and civilised society and the risks of living in a world without it.

It is certainly a book worth reading. But for those of you busy studying – to the best of my knowledge – there are a few movie adaptations. There seems to be a movie for just about everything now.

**The Queensland courts**

I will now endeavour to provide some more practical information about the courts and judging.

There are **three levels** of Queensland courts – the Magistrates Court, the District Court and the Supreme Court – which are ranked according to the seriousness of the matters that come before them.

*Magistrates Court*

Firstly, the Magistrates Court hears the less serious criminal offences (like traffic offences or disorderly behaviour) and civil matters involving an amount of $150,000 or less.

It is also the court where most matters originate before being referred to the higher courts.

Within the Magistrates Court there is the Childrens Court which is responsible for dealing with people under 17 years.

*The District Court*

The District Court hears serious criminal offences as well as civil matters where there is a disputed amount of over $150,000 but under $750,000.

There are 39 judges in the Queensland District Court. Within the District Court certain judges sit in the **Planning and Environment Court** which involves disputes relating to various issues such as planning and development or nature conservation.

Particular District Court judges are also judges of **the Childrens Court of Queensland** which (similar to the Childrens Court in the Magistrates Court) hears criminal matters involving children under the age of 17.

*The Supreme Court*

The Supreme Court – the highest of the three courts – is made up of both the **trial division** and the **Court of Appeal**. Excluding myself as Chief Justice, there are 26 Supreme Court judges. Twenty judges are part of the trial division and the remaining six are Court of Appeal judges. A key distinction between these two divisions within the Supreme Court is that matters before the trial division are heard by a *single* judge. On the other hand, matters that come before the Court of Appeal are heard by President McMurdo plus a panel of three to five Court of Appeal Judges.

You will hear me use the term "jurisdiction" regularly from this point. You might have already covered this in legal studies, but just to make sure you are familiar with it, it is referring to the particular power or authority held by a court. For example, a court does not have the authority to do something that falls outside of its jurisdiction.

In its **criminal jurisdiction**, the trial division of the Supreme Court is responsible for hearing the severest criminal matters, such as murder. In its **civil jurisdiction**, the trial division can hear matters involving a disputed amount greater than $750,000.

The Court of Appeal is responsible for what is called the **appellate jurisdiction** of the Supreme Court. This means that parties who feel a sentence or decision of a lower court or tribunal is unsatisfactory can take the matter to a higher authority for review. Therefore, the Court of Appeal provides an opportunity for dissatisfied parties to appeal.

The Court of Appeal has the power to either *dismiss* the appeal of the dissatisfied party meaning that the decision of the lower court would still stand, or alternatively, they may *allow* the appeal which would have the effect of setting aside the decision of the lower court. When a decision is set aside the Court of Appeal will make a different order to the one made by the lower court.

The Supreme Court also has **administrative jurisdiction** which means that they have the power to review the legality of decisions made by government officials. It is important to recognise that this is *not* a power to decide whether a government decision is a good or bad one or whether a better decision could have been made. It is limited to looking at legal considerations only – for example, whether the government has acted outside of the legal boundaries of their authority.

*Regional Queensland Courts*

It is also significant to be aware that while the majority of judges in the various levels of the Queensland courts are Brisbane-based, a number of judges are permanently based in regional Queensland.

For instance, in the Supreme Court, of the total of 26 judges, three of these judges are based outside of Brisbane in Cairns, Rockhampton and Townsville. In the District Court, out of the total of 39 judges, 13 of these judges are based in areas such as Cairns, Maroochydore, Southport, Townsville, Beenleigh and Ipswich.

Although some of the regional Queensland areas already have permanent judges, Brisbane judges still go on circuit at different times throughout the year to these regional areas to assist with the workload.

There are also a number of areas in Queensland that do not have a permanent judge and are dependent on Brisbane judges travelling on circuit to sit in court. Such areas include Hervey Bay and Toowoomba.

**Process for Criminal Matters**

Crime always seems to be the area of greatest fascination for the majority of law students. So I will briefly distinguish between certain aspects of the process for sentences and criminal trials.

*Sentences*

Sentences are heard before a single judge. The sentence handed down by the judge is largely dependent upon the submissions from the prosecution and defence (which is representing the offender).

It is also relevant to note that there is a difference between a sentence where the offender pleads guilty from the *outset* and a sentence that follows the conviction of the defendant after a jury trial. Where an offender pleads guilty from the start there is no question as to the offender's guilt. It is simply a question of the *degree* of the penalty that should be imposed on the offender for their actions.

There are two types of offences – **summary offences** and **indictable offences**. Summary offences are sometimes called simple offences and include offences such as disorderly behaviour and other minor criminal offences. On the other hand, indictable offences are of a more serious nature and include crimes such as murder or rape. Summary offences are contained on what is called a bench charge sheet and indictable offences are contained in an indictment. Whereas the various offences on a bench charge sheet are referred to as "charges", offences on an indictment are called "counts".

Which court will hear the sentence – whether it is the Magistrates, District or Supreme Court – depends on the *type* of offence and whether the court has the jurisdiction to deal with particular offences.

In a sentence the offender must be arraigned on all charges or counts. An **arraignment** involves formally reading to the defendant all the charges laid against him or her and

asking whether they plead guilty or not guilty in respect of each charge or count (if there are multiple charges or counts). An arraignment might sound like this:

> Maxwell John Robinson, you stand charged that on 28th day of September 2014 at Mansfield in the State of Queensland you unlawfully had possession of the dangerous drug methylamphetamine. Maxwell John Robinson, how do you plead, guilty or not guilty?

Where the defendant pleads guilty, the sentence usually takes place directly after and the **allocutus** is administered. This is essentially informing the defendant of his or her rights. To use my previous example of Maxwell John Robinson, an allocutus would be:

> Maxwell John Robinson, you have been convicted on your own plea of guilty of one count of possessing a dangerous drug. Do you have anything to say as to why sentence should not be passed on you?

From this point, both the prosecution and defence will give **submissions** to enable the judge to make the most appropriate sentence. Once the submissions are over, the judge will pass sentence on the defendant. But I will explain more about the role of the sentencing judge and how they decide on the most appropriate sentence shortly.

*Trials*

Unlike the situation where the defendant pleads guilty, in a trial there is a question about whether the defendant actually committed the offence that he or she has been accused of. Clearly there will be a very different process in a trial than a sentence alone – the biggest difference, of course, being the presence of a jury panel.

At the beginning of a trial the courtroom is filled with many potential jury members. But as I am sure you are all aware, only 12 are chosen. The accused will usually be arraigned in the presence of all potential jury members. The arraignment in a trial will be in the same form as that in a sentence where there is a guilty plea. However, the accused will enter a

plea of "not guilty" in a trial. Therefore, instead of an allocutus being administered automatically as in the case of a guilty plea, there is a process called a **jury empanelment**. This is the method used to choose the panel of 12 jurors. The names of all potential members are placed in something that looks like a wooden spinning barrel. The judge's associate will then proceed to draw names out of the barrel and call them out.

The prosecution and the defence have the opportunity to call out "standby" (in the case of the prosecution) or "challenge" (in the case of the defence). What this means is that a potential jury member that would otherwise have been one of the 12 on the panel is no longer able to be a jury member in that particular trial. Prosecution and defence are limited in the number of "standbys" or "challenges" they can use. Therefore, they have to think carefully before exercising this right. And they must exercise this right before the potential member takes the oath or affirmation.

Prosecution and defence will be considering whether potential jury members might be unfavourable to the side they are representing. Personal factors such as the occupation or age of the potential jury member may be relevant to their decision.

Once the empanelment process has concluded and the jury of 12 has been chosen, the prosecution will open its case and then proceed to call all prosecution witnesses. When a prosecution witness is called, it begins with the **examination-in-chief** where a number of questions will be put to the witness by the prosecution. This will be followed by **cross-examination** where the witness is questioned by the defence. Once the cross-examination is over, the prosecution will have the opportunity to re-examine the witness in respect of a matter that was addressed in the cross-examination. After the **re-examination,** or if the prosecution elects not to re-examine the witness, the witness will be excused and the next witness will called in. This same process is repeated for each of the prosecution witnesses called to give evidence.

Once the prosecution has finished calling all of its witnesses, the defendant will be **"called upon"**. This means that the defendant is asked whether he or she intends to give

evidence. If the accused chooses to give or call evidence, the representative for the defendant will follow the same process as the prosecution when calling witnesses.

Where the defence chooses to give or call evidence, then the defence representative will give its closing address to the jury panel. This will be followed by the prosecution's closing. If however the defence chooses not to give or call evidence, then the prosecution will give the closing address first followed by the defence closing.

The judge presiding over the trial will then give the jury what is called a **"summing up"**. As the name suggests, this is simply a matter of the judge summing up the case and evidence of the prosecution and defence for the benefit of the jury.

After the summing up, the jury will then retire to deliberate on the **verdict**. This means that they leave the courtroom and go out into a separate room where they can discuss the possible guilt of the defendant. If the jury has any questions that it would like to clarify during deliberations, it can send out a note to the judge with the question. The jury will then be brought back into the courtroom and the judge will attempt to answer the question. Once the question is answered the jury will go back into the room to continue deliberations.

When the jury has reached a verdict they will send word to the judge. Court will then be resumed and the verdict will be taken by the judge's associate. If the defendant is found *not guilty* by the jury, the defendant will be discharged by the Judge and free to leave. On the other hand, if the defendant is found guilty, the matter will proceed to a sentence.

It is generally the rule that there must be a **unanimous verdict** – essentially, this means that all 12 jurors must agree on whether the defendant is guilty or not guilty. For example, there cannot be a verdict where 7 jurors think the defendant is guilty but 5 believe that the defendant is not guilty.

However, there are circumstances where a **majority verdict** might be taken. This means that where there are 12 jury members, instead of there being a unanimous verdict where

all 12 jurors agree, only 11 jurors out of the 12 need to agree on the verdict. This may be allowed in circumstances where after the prescribed time the jury is, to the judge's satisfaction, unable to reach a unanimous verdict. It is important to note that there cannot be a majority verdict in the case of murder.

**The Role of the Sentencing Judge**

Although there is general agreement about the fact that there should be a penalty for criminal offending, there is no such agreement on the actual penalty that should accompany the offending. A Lord Chief Justice of England said that "there is no such thing as an absolutely correct sentence."[5]

This makes the job of the sentencing judge a difficult one, as the judge is required to balance various factors including sentencing objectives, facts and comparative sentences in order to arrive at an appropriate sentence.

*Sentencing objectives*

The Queensland *Penalties and Sentences Act* 1992 contains a number of objectives[6] that the judge may take into account when sentencing. First, there is **retribution**, which is a very punishment-centred objective focused on the seriousness of the offending.

There is also **deterrence-based** sentencing which has two purposes. On one level it is concerned with preventing the offender from committing a similar offence in the future – the term for this is *special* deterrence. On another level, the deterrent effect is intended to reach members of the wider community who may be contemplating committing similar offending – this is referred to as *general* deterrence.

[5] Lord Chief Justice Taylor, 'Judges and Sentencing' (1993) 19(2) *Commonwealth Law Bulletin* 760, 761.
[6] *Penalties and Sentences Act 1992* (QLD) s 9(1).

**Rehabilitation**, on the other hand, is about identifying and working on the *cause* of the criminal behaviour. Therefore, the sentence can be viewed as a potential means of reformation for the offender.

The **public denunciation** objective is concerned with sending a message to both the offender and the community about the importance of abiding by the law and the public's outrage at the criminal behaviour.

The final purpose of **community protection** is self-explanatory.

The ultimate decision as to which of these five objectives will apply to the sentence rests with the judge.

*Factual considerations*

In addition to which objective (or objectives) should inform the sentence, the presiding judge must also take into account various factual considerations when determining the appropriate sentence, including the nature and seriousness of the offence and its physical, mental or emotional impact on a victim.[7]

Other significant considerations include the blameworthiness of the offender, the maximum and (where applicable) any minimum penalty for an offence, any damage, loss or injury resulting from the offender's conduct, the offender's age, character and intellectual capacity, any aggravating or mitigating factors connected to the offender, frequency of the offence, time already spent in custody for the offence, any previous convictions, assistance given to law enforcement agencies and whether there has been a guilty plea.[8]

*The difficulty of sentencing*

[7] *Penalties and Sentences Act 1992* s 9(2)
[8] *Penalties and Sentences Act 1992* ss 9(2), 13, 13A, 13B.

As you can see, the role of the sentencing judge can be a difficult task. The judge is required to weigh up a multitude of considerations in order to determine the most appropriate sentence in all of the circumstances. It is a matter of balancing the sentencing objectives in one hand while balancing the various factual considerations in the other.

Prosecution and defence may also hand up comparative sentences to assist the judge in making a determination. Comparative sentences are sentences handed down by other judges for similar offending in comparable factual circumstances.

Owing to the inexact and intuitive[9] nature of sentencing, the sentencing judge has frequently been described as an "artist" of sorts. For example, in the book *Australian Criminal Justice*, it says that the sentencing process "is hailed as an art and not a science"[10]. Also, in an interview-based study of 31 judges from the Queensland Supreme and District Courts, a number were reported to have referred to the process as either an "art" or the "art of sentencing". [11]

**Conclusion**

To conclude, Dennis Foley, an Indigenous Research Professor at the University of Newcastle, emphasised the need for more Indigenous lawyers and encouraged Indigenous students to devote themselves to the legal profession. He said:

> The difference between those that start and those that finish is a human quality that we all have, but only few of us master. It's about being able to maintain your driving ambition, your passion to achieve or keeping that "fire in the belly" alive.[12]

This is undoubtedly true. For all students in their first year of law at university this is a critical message. Studying law is no easy feat. It regularly involves long hours of study

[9] Geraldine Mackenzie, 'The art of balancing: Queensland Judges and the Sentencing Process' (2003) 28(6) *Alternative Law Journal* 288, 289.
[10] Mark Findlay et al, *Australian Criminal Justice* (Oxford University Press, 3rd ed, 2005), 256.
[11] Mackenzie, above n 9, pg 289.
[12] Dennis Foley, 'Quadrivum: So you want to be a lawyer?' (2014) 8(11) *Indigenous Law Bulletin* 19, 19.

and extensive preparation to remain on track. A number of faces that law students see in classes in their first year may not be there when they reach the final year of their degree. As Foley so rightly pointed out, completing a law degree requires that students hold fast to their driving ambition and continually fuel that fire.

But for those law students who *do* master that human quality that Foley spoke of, they will come out the other end with a law degree, and hopefully use that degree to find a career that is both stimulating and rewarding.

I wish each and every one of you the best for your senior years. I hope that some of the faces I see here today will one day be gracing the courtroom as valued members of our legal profession.