
JUDICIAL REVIEW FOR THE CONVICTED FELON IN AUSTRALIA - A CONSIDERATION OF STATUTORY CONTEXT AND THE DOCTRINE OF ATTAINDER

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ABSTRACT

The decision of Patsalis v State of New South Wales [2012] NSWCA 307 represents a fundamental development in the common law of Australia. The extent to which the Felons (Civil Proceedings) Act 1981 (NSW) applied to applications for judicial review brought by prisoners convicted of a serious indictable offence or a felony remained unclear before the decision of Patsalis in New South Wales.

This article examines some of the important implications which flow from the decision of Patsalis, such as the fact that "civil proceedings" in the statutory context of the Felons (Civil Proceedings) Act 1981 (NSW) (the FCPA) was held not to apply to applications for judicial review of administrative decisions brought by a prisoner convicted of a serious indictable offence or a felony who sought to challenge his or her incarceration. The article also examines the common law principle of attainder in light of the statutory enactment of the FCPA.

I INTRODUCTION

The judgment of *Patsalis v State of New South Wales* [2012] NSWCA 307 ('*Patsalis*') is a decision of significance for the law in New South Wales for various reasons. This paper will explore the implications of the judgment and examine some of the important legal principles that flow from it.

Patsalis represents a bastion of protection for the civil rights of prisoners in New South Wales convicted of serious indictable offences. Moreover, it provides an important analysis of the legal meaning of the phrase 'civil proceedings', delivers a useful discussion of important principles of statutory interpretation more generally and otherwise

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examines the effect of the common law principle of attainder in Australia.

II THE FACTS

On 24 September 1999, Michael Patsalis (the applicant) was convicted of murder.¹ On 23 February 2000, the applicant was sentenced to imprisonment for 21 years and 6 months, with a minimum term of 16 years. Accordingly, the applicant is serving a sentence for a serious indictable offence.²

On 9 May 2011 the applicant filed a statement of claim seeking damages for negligence from the State of New South Wales (the respondent).³ The negligence was said to relate to the failure of the respondent to protect the applicant from an assault by another inmate, and also the conduct of the respondent in denying him access to his legal documents (the negligence proceedings).⁴

In accordance with section 4 of the *Felons (Civil Proceedings) Act 1981* (NSW) (the *FCPA*), the applicant sought leave to commence the negligence proceedings.⁵ The statutory effect of section 4 of the *FCPA* is that a person who is in custody as a result of being convicted of a serious indictable offence is prohibited from instituting any 'civil proceedings' in any court except by leave of that court.

When the 'leave question' in accordance with section 4 of the *FCPA* came on for hearing, Schmidt J refused to grant the applicant leave to proceed with his substantive claim against the respondent for access to his legal documents.⁶ In a judgment delivered on 26 July 2011, her Honour held that 'leave to commence proceedings in respect of the complaints as to the access given Mr Patsalis to his legal documents, must be refused as an abuse of process'.⁷

The applicant's substantive claim of access to his legal documents was said to be based upon his right of access to the courts and, by extrapolation, his right to petition the Governor under section 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*CARA*) 'for review of his

¹ *Patsalis* [2012] NSWCA 307, [9].

² *Crimes Act 1900* (NSW) s 4.

³ *Patsalis* [2012] NSWCA 307, [10].

⁴ *Ibid* [14].

⁵ *Patsalis v State of New South Wales* [2011] NSWSC 1583 [14] (Schmidt J); *Patsalis v State of New South Wales* [2011] NSWCA 364.

⁶ *Patsalis v State of New South Wales* [2011] NSWSC 1583.

⁷ *Ibid*.

conviction or sentence or the exercise of the Governor's pardoning power'.⁸

The applicant sought leave to appeal to the New South Wales Court of Appeal against the decision of Schmidt J 'refusing' the applicant leave to commence proceedings in relation to his claim for access to his legal documents (the appeal proceedings).⁹ With the benefit of legal representation in the appeal proceedings, a primary contention advanced by the applicant was that in circumstances where a prisoner seeks judicial review of an administrative decision, section 4 of the *FCPA* had no application.

Accordingly, in the appeal proceedings, the New South Wales Court of Appeal had to determine a number of important questions of law. First, whether section 4 of the *FCPA* applied to the applicant's application for judicial review. Secondly, whether section 4 of the *FCPA* imposes a leave requirement in cases where there had been no disability under the principle of attainder.

III IMPLICATION 1 - LEGAL MEANING OF 'CIVIL PROCEEDINGS'

The first important implication to be drawn from the decision in *Patsalis* relates to the statutory construction of the phrase 'civil proceedings' given by the Court of Appeal. The Court had to determine whether section 4 of the *FCPA* applied to the applicant's application for judicial review. The answer to that question turned ultimately upon whether the phrase 'civil proceedings' in section 4 of the *FCPA* was co-extensive with judicial review proceedings.

The Court unanimously held that in the statutory context of the *FCPA*, the phrase "civil proceedings" was not to be reconciled with 'judicial review proceedings'. This meant that the applicant did not need leave at all to proceed with his judicial review action against the decision of the Commissioner of Corrective Services refusing him access to all of his legal documents in his prison cell.¹⁰ However, this finding by the Court has much wider consequences for the law in New South Wales.

First, since the statutory enactment of the *FCPA* in 1981, the general trend of jurisprudence in New South Wales had been to apply the

⁸ *Patsalis* [2012] NSWCA 307, [51].

⁹ *Ibid* [9].

¹⁰ *Ibid* [110] (Basten JA).

leave requirement imposed by section 4 to prisoners in custody who were convicted of a serious indictable offence and who otherwise sought to commence judicial review proceedings in a New South Wales court.¹¹

Accordingly, in finding that the phrase 'civil proceedings' in the *FCPA* does not encapsulate judicial review proceedings, *Patsalis* has effectively overturned 31 years of jurisprudence in those cases which have found to the contrary – albeit, without really deciding the question but merely assuming the *FCPA* applied to a prisoner in custody convicted of a serious indictable offence who sought to commence judicial review proceedings in a New South Wales court.

Secondly, more expressly, *Patsalis* appears to have directly overturned the decision in *Potier v Director-General, Department of Justice* [2011] NSWCA 105 ('*Potier*'). In *Potier*, Handley AJA held that the implication from the statutory text and background to the enactment of the *FCPA* 'is that proceedings are either civil or criminal, and proceedings which are not criminal are civil'.¹²

Accordingly, *Potier* held that section 4 of the *FCPA* applied even where a prisoner in custody convicted of a serious indictable offence sought judicial review of an administrative decision. Despite this finding, Basten JA in *Patsalis* held:

Contrary to the intimation in *Potier*, the historical background does not support the proposition that all legal proceedings are necessarily either criminal or civil proceedings. Nor as a matter of policy does there seem to be any good reason why a prisoner should be able to bring criminal proceedings without leave, but not civil proceedings.¹³

Thirdly, the decision of *Patsalis* appears to have settled an apparent disquiet or ambiguity in relation to the question of whether the *FCPA* has application where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review of an administrative decision.

¹¹ *Potier v Magistrate Moore* [2004] NSWSC 1131, [7], [14], [16]; *Potier v District Court of New South Wales* [2004] NSWCA 303, [6]; *Whisprun Pty Ltd v Sams* [2002] NSWCA 394; *Sleiman v Commissioner, NSW Department of Corrective Services* [2008] NSWSC 617, [26]; *Potier v Ruddock and MRRRC* [2008] NSWSC 153, [2], [12]; *Potier v Magistrate Maloney and Ors* [2005] NSWSC 336, [4]; *Sinanovic v New South Wales Department of Public Prosecutions* [2002] NSWSC 82, [20]-[21]; *Schneidas v Jackson* [1982] 2 NSWLR 969, [972G].

¹² *Potier* [2011] NSWCA 105, [10].

¹³ *Patsalis* [2012] NSWCA 307, [45].

As noted previously, the general trend of cases in New South Wales have applied the *FCPA* in circumstances where a prisoner in custody convicted of a serious indictable offence or felony seeks judicial review. Despite this trend, the apparent 'disquiet' or 'ambiguity' appears in the fact that there are a series of other cases in New South Wales which have permitted prisoners in custody convicted of a serious indictable offence or felony to commence judicial review proceedings without any consideration of the *FCPA* at all.

For example, in *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031, Potier (a person convicted of a serious indictable offence) brought an application for writ of *habeas corpus* in order to prepare his appeal with better facilities and access to his legal team. Rothman J dismissed the application. Importantly, his Honour did not deal with the *FCPA* at all, despite stating that: 'These are civil proceedings; not criminal'.¹⁴

Fourthly, all three judges in *Patsalis* expressly provided an important analysis of what was meant by the phrase 'civil proceedings' in the statutory context of the *FCPA* – it appears that such an analysis had not been undertaken in any great detail before the decision of *Patsalis*. In Australia and England, the expression 'civil proceedings' has been the subject of judicial consideration on various occasions.

In *Cheney v Spooner* (1929) 41 CLR 532 ('Cheney'), the High Court of Australia held that a public examination by a liquidator was a "civil proceeding" within the meaning of section 16(1) of the *Service and Execution of Process Act 1901* (Cth). In *Cheney*, Starke J stated that: 'A civil proceeding... includes any application by suitor to a Court in its civil jurisdiction for its intervention or action'.¹⁵

¹⁴ *Potier v General Manager & Governor, MRRC (Metropolitan Reception & Remand Centre)* [2007] NSWSC 1031, [17]. Other cases which do not appear to have considered the statutory effect of the *Felons (Civil Proceedings) Act 1981* (NSW) include: *Anderson, Dunn and Alister v Release on License Board* [1984] 2 NSWLR 312; *Baba v Parole Board (NSW)* (1986) 5 NSWLR 338; *Bromby v Offenders' Review Board* (1990) 22 ALD 249; 51 A Crim R 249; *Clarke v Minister for Corrective Services* (1988) 18 NSWLR 553; *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261; *Johns v Release on License Board* (1987) 9 NSWLR 103; *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364; *Maybury v Osborne & Corrective Services Comm of NSW* [1984] 1 NSWLR 579; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82; *Montgomery v Parole Board* (1988) 40 A Crim R 8; *Potier v Maughan* [2004] NSWSC 590; *Potier v Huber and Ors* [2004] NSWSC 720; *Prisoners A to XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622; *Rendell v Release on License Board* (1987) 10 NSWLR 499; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *State of New South Wales v Bates* (1991) 24 ALD 467; *Todd v Parole Board* (1986) 6 NSWLR 71.

¹⁵ *Cheney* (1929) 41 CLR 532, [538]-[539].

In another Australian decision, the ultimate construction of the phrase 'civil proceedings', contrary to *Cheney*, appeared to have gone the other way. In *Ainsworth v the Ombudsman* (1988) 17 NSWLR 276 ('*Ainsworth*'), Enderby J held of the *Ombudsman Act 1974* (Cth), which protected the Ombudsman in his or her office from liability 'to....any civil or criminal proceedings' unless the relevant act or omission was done or omitted to be done in bad faith, extended to judicial review proceedings.

It appears that Enderby J in *Ainsworth*¹⁶ came to the conclusion that civil proceedings were co-extensive with judicial review proceedings for at least three reasons. First, the history of section 35A of the *Ombudsman Act 1974* (Cth) indicated that it had been inserted in response to a decision in which mandamus was sought against the Ombudsman.¹⁷ Secondly, when section 35A was enacted, equivalent provisions in other jurisdictions of Australia had been judicially interpreted to apply to judicial review proceedings.¹⁸ Thirdly, because the Ombudsman did not make legally-binding decisions, the concerns about loss of civil liberties that informed the English Court of Appeal's decision in *Ex parte Waldron* [1986] 1 QB 824 ('*Waldron*') were not present.¹⁹

In *Waldron*, the English Court of Appeal held that the expression 'civil proceedings' in section 139 of the *Mental Health Act 1983* (UK) did not encapsulate judicial review proceedings. The statutory effect of section 139 was a partial privative clause which protected any act under the *Mental Health Act 1983* (UK) in 'civil or criminal proceedings' unless the conduct was done in bad faith or without reasonable care. The applicant in *Waldron* had sought such certiorari and mandamus in respect of a decision of two doctors to compulsorily admit her to hospital, despite the fact she had subsequently been granted a conditional leave of absence.

Ackner LJ in *Waldron* referred to various authorities to support the proposition that certiorari and mandamus were not to be taken away

¹⁶ An analogous statutory construction issue that was decided in *Ainsworth* came before the New South Wales Court of Appeal in *Botany Council v the Ombudsman* (1995) 27 NSWLR 357. Kirby P (with whom Sheller and Powell JJA agreed) expressly avoided deciding the issue (see paragraph 358D) and left open the correctness of the decision of *Ainsworth* (see paragraph 366G).

¹⁷ *Ainsworth* (1988) 17 NSWLR 276, [283D].

¹⁸ *Ibid* [286G].

¹⁹ *Ibid* [288A-B].

except by 'the most clear and explicit words'.²⁰ Ackner LJ concluded in the following significant terms:

In my judgment the words of section 139 do not provide the clear and explicit words that are necessary to exclude the jurisdiction of the court to grant the remedy of certiorari. On the contrary, the words "civil proceedings" unless specifically defined, are apt only to cover civil suits involving claims in private law proceedings. The words are not apt to include proceedings for judicial review.²¹

Outside the context of statutory interpretation, jurisprudence relevant to the phrase 'civil proceedings' is fickle. In *Rich v The Secretary, Department of Justice and Ors (No 3)* [2011] VSC 224, [8] ('*Rich*'), Whelan J held that judicial review proceedings were "civil proceedings" to distinguish the proceedings from the plaintiff's pending criminal appeal. In *Director of Housing v Sudi* [2011] VSCA 266, [230] ('*Sudi*'), Weinberg JA referred to an 'ordinary civil action' to distinguish between judicial review proceedings and a claim in tort raising a collateral challenged administrative action.

Despite the useful judicial consideration of the phrase 'civil proceedings' in decisions such as *Ainsworth*, *Cheney*, *Waldron*, *Rich* and *Sudi*, those decisions clearly had a limited application in *Patsalis* - particularly because the foregoing decisions plainly were dependent upon a particular statutory context.

Allsop P held that the phrase 'civil proceedings' in the *FCPA* should be 'aptly understood as a claim for a private remedy to redress an injury from wrongful conduct. Its form may be at common law, in equity or in statute'.²² His Honour went further and stated: 'The challenge to the exercise of public power (at least insofar as it concerns the conviction, sentencing and incarceration of the person covered by the Act) is not easily conformable with the expression of an action for a civil wrong'.²³

Basten JA held that 'civil proceedings has an 'apparent simplicity about it which, may, on reflection, prove to be misleading'.²⁴ In this respect, his Honour found that civil proceedings 'applies to civil claims for damages (and related proceedings), but not to applications for judicial review of administrative decisions or other applications in the

²⁰ *Waldron* [1986] 1 QB 824, [841A-B].

²¹ *Waldron* [1986] 1 QB 824, [845C-D].

²² *Patsalis* [2012] NSWCA 307, [5].

²³ *Ibid* [6].

²⁴ *Ibid* [43].

supervisory jurisdiction of the Court reflected in s 69 of the *Supreme Court Act 1969* (NSW).²⁵

Sackville AJA agreed with the reasoning of Basten JA, adding: 'a statutory prohibition on persons instituting civil proceedings may not prevent a person applying to the Court for judicial review of administrative decisions or conduct said to be beyond power'.²⁶ Accordingly, his Honour found that in the statutory context of the *FCPA*, the phrase 'civil proceedings' did not extend to judicial review proceedings.

Given the foregoing, *Patsalis* represents a landmark decision in New South Wales law. The decision provides clear appellate authority for the proposition that persons in custody in New South Wales convicted of a serious indictable offence or felony who seek judicial review of an administrative decision do not need leave under section 4 of the *FCPA*.

IV IMPLICATION 2 - PROTECTION OF THE CIVIL RIGHTS OF PRISONERS

The second important implication from *Patsalis* is the protection of the civil rights of prisoners in New South Wales. In effect, the New South Wales Court of Appeal was faced with whether to adopt either a narrow or broad construction of the phrase 'civil proceedings' in the *FCPA*.

A narrow construction would mean that the phrase 'civil proceedings' is not co-extensive with judicial review proceedings in the context of the *FCPA*. A broad construction would mean, in effect, that "civil proceedings" in the *FCPA* are inclusive of judicial review proceedings.

Basten JA, who wrote the leading judgment in *Patsalis*, sought to give effect to protecting the civil rights of prisoners by favouring a narrow construction of the phrase 'civil proceedings' in the *FCPA*. In this respect, his Honour cited with approval the decision of *Raymond v Honey* [1983] AC 1 where Lord Wilberforce held that: 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.²⁷

²⁵ Ibid [9].

²⁶ Ibid [116].

²⁷ Ibid [52]. See further, *Reg v Board of Visitors of Hull Prison, Ex parte St Germain* [1979] QB 425, [455] and *Solosky v The Queen* (1979) 105 DLR (3d), 745, 760 (Dickson J), a decision of the Supreme Court of Canada.

Basten JA subsequently reasoned: “Thus, where a prisoner has a legal right enforceable by a court under the general law.... such a right may be removed or conditioned by statute, but the intention in that respect must be clear”.²⁸ Given the apparent ambiguity of what legal meaning was to be ascribed to the phrase ‘civil proceedings’ in the *FCPA*, his Honour reasoned that the ambiguity must be construed in favour of the prisoner:

While the imposition of a leave requirement, which vests control of access to the courts within the court themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the presumption in favour of non-interference will mean that the leave requirement will not be given an expansive construction.²⁹

Basten JA went further, notably stating:

The requirement for leave is itself a constraint on access to the courts, being an important civil right which is no longer removed from those convicted of serious indictable offences. Accordingly, it is appropriate to adopt an approach to the question of statutory construction which limits the civil rights in question only to the extent necessary to give effect to the statutory provision.³⁰

Patsalis represents a prime example of a case where civil rights will not be taken away unless the intention of parliament is abundantly made plain in the passing of relevant laws.³¹ Given that it was not clear that the enactment of the *FCPA* was to place greater limits on access to the courts by prisoners than applied at common law (given the common law principle of attainder), a broad construction could not be adopted. As Allsop P held: ‘The purpose of the leave provision was to ameliorate the perceived harshness of the doctrine of attainder’.³²

²⁸ *Patsalis* [2012] NSWCA 307, [53].

²⁹ *Ibid* [53].

³⁰ *Ibid* [56].

³¹ The formal derogations of the rights and privileges of prisoners from the entitlements of ordinary citizens are considerable. See further, G Zdenkowski, ‘Judicial Intervention in Prisons’ (1980) 6 *Monash University Law Review* 294; G Zdenkowski, ‘Review of Disciplinary Proceedings in Australian Prisons’ (1983) 7 *Criminal Law Journal* 3; JF Staples, *Courts, Convicts and Labor Governments in New South Wales – from Cable to Dugan and Beyond*, Eleventh Annual John Curtin Memorial Lecture, Australian National University, Canberra, 1981; JF Nagle, *The Report of the Royal Commission into NSW Prisons*, NSW Government Printer, Sydney, 1978; Australian Law Reform Commission, *Sentencing: Prisons*, Discussion Paper No 31 (1987).

³² *Patsalis* [2012] NSWCA 307, [4].

More modern thinking holds that the loss of liberty is the proper measure of the punishment imposed by the court, and that goals of rehabilitation and respect for authority will be better served if prisoners retain their civil rights in other respects.³³ In the past the courts showed greater reluctance to accede to judicial review applications than is now the case.³⁴

It was formerly considered that there was a public policy which prevented the review of decisions made in the course of administering prisons,³⁵ on the basis that such interference might promote discord and undermine authority.³⁶ Such a policy was consistent with the view that imprisonment was accompanied by a loss of civil rights.³⁷

Accordingly, *Patsalis* appears to accord with modern thinking which allows prisoners to retain their civil rights. Despite a change in judicial attitudes, willingness to intervene depends on where the decision under review falls along a spectrum, intervention being most likely when a right to release, albeit conditional, is directly affected and least likely where the decision made affects the enjoyment of amenities and is justified on administrative grounds.³⁸

V IMPLICATION 3 - THE COMMON LAW PRINCIPLE OF ATTAINDER IN AUSTRALIA

The third and final important implication to flow from *Patsalis* is the significant discussion by the Court of the common law principle of attainer. The ancient common law doctrine of attainer led to

³³ *Halsbury's Laws of Australia*, "Judicial Review, [335-950] Availability of review", LexisNexis Australia [Accessed 13/11/2012]; *Patsalis* [2012] NSWCA 307, [56] (Basten JA).

³⁴ *Flynn v R* (1949) 79 CLR 1; [1949] ALR 850; *R v Classification Committee; Ex parte Finnerty* [1980] VR 561; *Ex parte Johns* [1984] 1 Qd R 450; *R v Walker* [1993] 2 Qd R 345; (1992) 60 A Crim R 463; *R v Board of Visitors of Hull Prison; Ex parte St Germain* [1979] 1 QB 425; [1979] 1 All ER 701; [1979] 2 WLR 42.

³⁵ *Gibson v Young* (1900) 21 LR (NSW) L 7; 16 WN (NSW) 158. Compare *Quinn v Hill* [1957] VR 439 at 452; [1957] ALR 1127 (Smith J) (public policy is no defence); *Hall v Whatmore* [1961] VR 225.

³⁶ See, eg, *Becker v Home Office* [1972] 2 All ER 676, 682 (Lord Denning MR).

³⁷ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; 22 ALR 439; 53 ALJR 166; Compare *R v Board of Visitors of Hull Prison; Ex parte St Germain* [1979] 1 QB 425, 455-6; [1979] 1 All ER 701; [1979] 2 WLR 42 (Shaw LJ).

³⁸ *Smith v Corrective Services Cmr of New South Wales* (1980) 147 CLR 134; 33 ALR 25; 55 ALJR 68; *Burke v R* (1981) 148 CLR 146; 38 ALR 223; *Burr* (1981) 4 A Crim R 188; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364; 57 ALR 37; 59 ALJR 96; 14 A Crim R 293; *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606; *Gibbs v New South Wales* (1990) 21 NSWLR 416; 51 A Crim R 306; *New South Wales v Bates* (1991) 24 ALD 467.

automatic extinction of various civil rights and capacities, such as the rights to inherit and to hold or deal with property, where the accused was sentenced to death or outlawry having been convicted of treason or a felony.³⁹

The ancient common law doctrine of attainder is no longer part of Australian law.⁴⁰ However, various legal disabilities still affect prisoners in Australia. At common law a prisoner serving a life sentence for a capital felony is disabled from suing in the courts until his or her sentence is served or a pardon is received.⁴¹ The common law restriction has also been held to extend to non-capital felonies.⁴² In some jurisdictions the effect of this common law⁴³ rule has been expressly abolished or modified by statute.⁴⁴

Importantly, the common law principle of attainder was considered in *Patsalis* in the context of the application of relevant principles of statutory interpretation. In the appeal proceedings in *Patsalis*, the applicant argued that the phrase “civil proceedings” is to be construed consistent with the objects and purposes of the *FCPA*.

The history of enactment of the *FCPA* demonstrates that its purpose was to remove the bar to bringing civil proceedings that the common law placed on felons convicted and sentenced to death. In that respect, the *FCPA* was preceded by the *Report of the Royal Commission into New South Wales Prisons* (Commissioner: Nagle J), 1978 (*Nagle Royal Commission Report*).

³⁹ *Halsbury's Laws of Australia*, “Legal Incidents of Imprisonment, [335-320] Legal capacity”, LexisNexis Australia [Accessed 13/11/2012].

⁴⁰ R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, Melbourne, 1999.

⁴¹ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583; 22 ALR 439; 53 ALJR 166.

⁴² *Macari v Mirror Newspapers Ltd* (unreported, SC (NSW), Cantor J, CLD No 10312/1980, 4 March 1980). This decision has been criticised: G Zdenkowski, ‘Prisoners Denied Access to the Courts’ (1980) 5 (5) *Legal Service Bulletin* 239.

⁴³ As to the Commonwealth position it appears that the common law applies to federal prisoners. In the Australian Capital Territory the common law appears to apply despite change of law in New South Wales: *Seat of Government Acceptance Act* 1909 (Cth) s 6 (all laws in force in the Territory immediately before 1 January 1911 continue in force until other provision is made); As to South Australia see *Milern v Wilson* (1980) 23 SASR 485 (decision based on *Criminal Law Consolidation Act* 1935 (SA) s 330 (repealed)); *Bromley v Dawes* (1983) 34 SASR 73; 10 A Crim R 98.

⁴⁴ *Criminal Code* (NT) s 435A; *Felons (Civil Proceedings) Act* 1981 (NSW); *Public Trustee Act* 1978 (QLD) s 95; *Prisoners (Removal of Civil Disabilities) Act* 1991 (TAS) (repealed *Criminal Code* (TAS) ss 435-437 which provided that there were no proceedings for recovery of any property, debt or damage); *Crimes (Amendment) Act* 1973 (VIC) s 5(1) (repealed *Crimes Act* 1958 (VIC) ss 549-561); *Criminal Code* (WA) s 730 (common law restrictions have been abolished).

The Commission recognised the injustice of the common law rule⁴⁵ and recommended that the rule be abolished and that prisoners should have full access to legal advisors and to the courts.⁴⁶ Accordingly, the *Nagle Royal Commission Report* was followed by the enactment of the *FCPA* in 1981.⁴⁷

The applicant argued that a fundamental object and purpose of the *FCPA* was to 'expand' the rights of prisoners in New South Wales, by allowing them to commence 'civil proceedings' in New South Wales subject to a grant of leave. In this respect, it was assumed by the applicant that at common law, prisoners did not have legal rights to commence 'civil proceedings' as convicted felons (*as convicted capital or non-capital felons*).

A number of passages from the second reading speech of the *FCPA* demonstrate that the purpose of the Act was to give convicted felons the opportunity to institute private civil actions from which they had previously been barred and thus to expand and not contract the rights of prisoners.

For example, The Honourable Mr Walker said the following in the *Second Reading Speech of the Felons (Civil Proceedings) Bill (FCPB)*:

The bill represents an important reversal of an extraordinary aberration in New South Wales common law. That aberration was long regarded as extinct, an archaic and feudal denial of rights which had disappeared from the common law in the same way as trial by battle and witch burning. I am speaking of the ancient doctrines of felony and corruption of the blood. Without embarking on a detailed historical analysis of their origins, their remaining practical effect is the complete abrogation of the right of a person convicted of a felony to institute or maintain civil proceedings in any court. Perhaps I should say this is their known effect, for the full extent of the application of the doctrines have never been judicially considered. In fact the continued application of the doctrines in New South Wales law had not really been formally acknowledged until Darcy Dugan commenced defamation proceedings against Mirror Newspapers Limited.⁴⁸

⁴⁵ The Honourable Justice Nagle, *Report of the Royal Commission into New South Wales Prisons*, 1978, [372]-[373].

⁴⁶ *Ibid* 179-180 [474].

⁴⁷ *Schneidas v Jackson* [1982] 2 NSWLR 969, [971A].

⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981, 4831 (Frank Walker).

In a similar fashion, The Honourable Mr Dowd made the following comments in the Second Reading Speech of the *FCPB*:

A felon, who may not be serving a sentence significantly longer than a person serving a sentence for a misdemeanour, must have the right to protect his property and to bring proceedings for personal injuries received in or out of the prison system. Prison officers are not exempt from obligations to prisoners. Felons must have rights in respect of personal physical injury, and the Opposition supports the measures in the bill which will give those rights. A felon must also have rights to protect property by way of injunction, declaration or proceedings for damages. He must be able to protect his property except where it is necessary to use that property to meet an order for damages awarded to his victim.⁴⁹

The Honourable Mr D P Landa said the following during the *Parliamentary Debates* of the *FCPB* in the Legislative Council:

One such archaic remnant of the common law that came to notice comparatively recently is a doctrine that effectively denies convicted felons under sentence the right to commence or maintain civil proceedings in any courts. This consequence is also the last practical effect of a doctrine of attainder, which treated persons convicted of capital felonies as 'civilly dead'. These doctrines operate to prevent a life-sentence prisoner from instituting civil proceedings for the term of his life, even though he may be released from gaol after serving a portion of the life sentence.⁵⁰

The Applicant argued that it was clearly not the object of Parliament, following the *Nagle Royal Commission Report*, to place a greater restriction on the rights of prisoners than what they had at common law. It was therefore necessary to identify the scope of the common law rule. Did it prevent felons from accessing the courts in respect of public law remedies?

It seems to be the case that an attainder could always be falsified by writ of error.⁵¹ The executors of the estate of an outlawed deceased

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 April 1981, 5586 (John Dowd).

⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 April 1981, 5799-5800 (Paul Landa).

⁵¹ M Hale, *Pleas of the Crown* (R Tonson, 1678) 234. This edition of *Hale's Pleas of the Crown* provides no express authority for this proposition. It is to be noted that the 1716 edition merely cites Coke; M Hale, *Pleas of the Crown* (The Savoy: Printed by J Nutt, 1716) citing '3 Inst. 231' where it appears the proposition is implicit.

could use a writ of error to demonstrate a defect in the outlawry.⁵² The writ of error, from about 1615 "lay only of grace and required the fiat of the Attorney-General".⁵³

In *Earl of Leicester v Heydon* (1571) 1 Plowden 384 the plaintiff brought an action in trespass against the defendant. The defendant pleaded that the plaintiff was the subject of attainder by reason of a trial for treason.⁵⁴ In response, the plaintiff argued that the purported attainder was void, on the basis that the Commission of Oyer and Terminer before which the treating case had been heard had not been properly constituted as a matter of law.⁵⁵ The Court held that the defendant's plea was "insufficient in law to preclude" the plaintiff from his action.⁵⁶

Sir Edward Coke made reference to the decision of *Earl of Leicester* as authority for the following legal principle: '...wheresoever the judgment of attainder is void or *coram non iudice*, the party is not driven to his Writ of Error, but may falsify the attainder by plea, showing the special matter which proveth it void, or *coram non iudice*'.⁵⁷ It appears that Blackstone also adopted the view of Coke.⁵⁸

That the common law rule applied in New South Wales was confirmed in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583. The origin of the common law rule was explained on the basis that a person convicted of a felony and sentenced to death '...was attained so long as the attainder endured. Every person so attained was 'disabled to bring any action; for he is extra legem positus and is accounted in law civiliter mortuus'.⁵⁹

Jacobs J⁶⁰ in *Dugan*, with whom Barwick CJ⁶¹, Gibbs J⁶², Stephen J⁶³ and Mason J⁶⁴ agreed, referred to A V Dicey's *A Treatise on the Rules for*

⁵² *Marshe's Case* (1591) 78 ER 528, [529], Croke Eliz 273, [274].

⁵³ J H Baker, *The Legal Profession and the Common Law* (Hambledon Press, 1986) 299, citing *Gargrave* (1615) 1 Rolle Rep 175.

⁵⁴ *Earl of Leicester v Heydon* (1571) 1 Plowden 384, [389].

⁵⁵ *Ibid* [396].

⁵⁶ *Ibid* [400].

⁵⁷ Edward Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Cases* (M Flesher, 1644) 231.

⁵⁸ William Blackstone, *Commentaries on the Law of England: Book the Fourth* (Clarendon Press, 1769) [383]-[384].

⁵⁹ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, [602] (Jacobs J) citing *Co. Litt.* 130 a.

⁶⁰ *Ibid* [602]-[603].

⁶¹ *Ibid* [587].

⁶² *Ibid* [588].

⁶³ *Ibid* [592].

⁶⁴ *Ibid* [601].

Selection of the Parties to an Action (1870) as authority for the nature and scope of the common law rule. Dicey also stated the following, citing *Coke upon Littleton* 128a, [3] as authority: 'An outlaw cannot, while his outlawry lasts, come into any court for any other object than to apply to have his outlawry reversed or set aside'.

Sir Edward Coke had put the matter thus in the following terms:

In a writ of error to reverse and utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled if he were outlawed at several men's suits, he should never reverse any of them.⁶⁵

The same exception to attainder is recognised in *Blackstone's Commentaries on the Laws of England* where, after setting out the implications of attainder, the following is stated:

This is after judgement: for there is a great difference between a man convicted and attained; though they are frequently through inaccuracy thrown together. After conviction only a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon or be allowed the benefit of clergy: those which suppose some latent sparks of merit, which plead in extenuation of his fault.⁶⁶

There is also judicial consideration in the United States of the common law issue in relation to the legal status of a convicted felon. It appears that the predominant view with respect to the non-capital felony is that, as creature of statute, it is not part of the common law.⁶⁷ A wide-ranging account of the application of the doctrine of attainder in the United States is given treatment in a publication titled 'The Collateral

⁶⁵ Sir Edward Coke, *Commentary upon Littleton* (18th ed, revised and corrected by Charles Butler, 1823) 128 a.

⁶⁶ Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* (Psychology Press, 2001) vol IV, 381.

⁶⁷ *Platner v Sherwood*, 6 Johns Ch 118, 2 NY Ch Ann 73, 1822; *Chesapeake Utilities Corp v Hopkins*, 340 A2d 154, 1975, [155], fn3 ('Although not without uncertainty, it appears that....civil death, at common law, followed as a consequence of a death sentence, and that the attribute of civil death has been attached to life imprisonment and imprisonment for less than life by specific statutory enactments since 1766').

Consequences of a Criminal Conviction' (1970) 23 *Vanderbilt Law Review* 929.⁶⁸

In the *Vanderbilt* publication, reference is made⁶⁹ to an *obiter* statement in the decision of *Kenyon v Saunders*, 18 RI 590, 1894, to the effect that the common law rule precluding suits 'was founded upon the reason that, as the conviction worked a forfeiture of goods to the Crown, a prisoner convicted of a felony no longer had any property to sue for'.

The view taken in *Saunders* in relation to the common law doctrine of attainder appears to be supported by closer consideration of the *Forfeiture Act 1870* (UK) (*FA*). In *Dugan*, Stephen J⁷⁰ held that the *FA* removed some of the disabilities of attainder but expressly preserved the prohibition on bringing proceedings. The statutory effect of section 8 of the *FA* prevented a person sentenced to death for treason or felony from bringing 'any action at law or in equity for the recovery of any property, debt or damage whatsoever'. It is plain that section 8 would not have precluded judicial review proceedings. Accordingly, to the extent that the *FA* is regarded as a codification of the common law position of attainder, it supports the narrower view adopted in *Saunders*.

Even aside from the remedies of suit that were available to a person subject to attainder, such a person was not beyond the protection of the law - for example, he or she was protected from torture from ancient times (*Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [16] citing *Coke's Third Institute*).

Accordingly, in light of the foregoing, the unqualified breadth of some statements of the doctrine, e.g. that an attained person is 'civilly dead', was not to be taken literally. As a result, the Applicant argued successfully in *Patsalis* that the common law rule of attainder did not apply at least in respect of a felon's right to bring proceedings related to his or her status as an outlaw. A pardon would bring that status to an end.⁷¹

The High Court of Australia in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 confirmed that a *convicted capital felon* was prohibited from

⁶⁸ Walter Mathews Grant et al, 'The Collateral Consequences of a Criminal Conviction' (1970) 23 *Vanderbilt Law Review* 929.

⁶⁹ *Ibid* 1019, footnote 622.

⁷⁰ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, [593].

⁷¹ *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561, [567].

maintaining an action in an Australian court. However, despite *Dugan*, Sackville AJA held in *Patsalis* that the position with respect to the legal restriction on *non-capital felons* from commencing an action and the extent of the principle of attainder in Australia remained unclear:

Dugan... did not decide that an attained person was incapable of instituting proceedings claiming prerogative or declaratory relief in relation to the conditions of his or her incarceration. It is not clear whether the common law disability extended this far.⁷²

Accordingly, the New South Wales Court of Appeal in *Patsalis* was invited by the applicant to provide an analysis of the interaction of the common law principle of attainder and the statutory object and purpose of the *FCPA* – in the statutory context of resolving the correct legal construction of the phrase “civil proceedings” in the *FCPA*.

Allsop P in *Patsalis* provided a construction of “civil proceedings” by having regard not only to the statutory objects and purposes of the *FCPA*, but by considering the historical nature of the passing of the Act: “Whilst the context may be seen to be the whole historical context of English and Australian colonial law, the High Court’s decision in *Dugan* as the apparent catalyst for the Act is the primary point of context”.⁷³

Allsop P held that: “The substantive legal context to the passing of the *Felons (Civil Proceedings) Act 1981* (NSW) was the decision of the High Court in *Dugan v Mirror Newspapers Ltd* [1978] HCA 54; 142 CLR 583”.⁷⁴ Given the statutory context and history of the passing of the *FCPA*, his Honour found that the effect of the phrase ‘civil proceedings’ in the Act did not place greater limits on prisoners than the ‘perceived harshness of the doctrine of attainder’.⁷⁵

Such a statutory construction of the phrase ‘civil proceedings’ in the *FCPA*, according to Allsop P, places that phrase in its proper context.⁷⁶ Basten JA agreed, indicating contrary ‘reasoning ignores historical considerations’ in the passing of the *FCPA*.⁷⁷ Sackville AJA also agreed, adding that since:

⁷² *Patsalis* [2012] NSWCA 307, [113].

⁷³ *Ibid* [5].

⁷⁴ *Ibid* [2].

⁷⁵ *Ibid* [4].

⁷⁶ *Ibid* [5].

⁷⁷ *Ibid* [38].

s 4 of the Felons Act is no more extensive than the common law rule, a person in custody by reason of having being convicted of a serious indictable offence would not require leave to institute judicial review proceedings seeking relief in relation to administrative decisions which he or she would otherwise have standing to challenge.⁷⁸

VI CONCLUSION

The law should always attempt to be not only consistent, but clear.⁷⁹ Before the judgment of *Patsalis*, the extent to which the *FCPA* applied to prisoners convicted of a serious indictable offence or felony who sought to bring a judicial review claim challenging his or her incarceration remained unclear.

The extent otherwise of the application of the *FCPA* to prisoners convicted of a serious indictable offence or felony who seek judicial review independent of a challenge to his or her incarceration remain unclear. As Allsop P observed in *Patsalis*, it 'is unnecessary to chart the metes and bounds of the phrase "civil proceedings" in the *FCPA*'.⁸⁰ Whilst the legal operation and application of the *FCPA* has not been fully tested, *Patsalis* undoubtedly represents a step in the right direction for eliminating the apparent ambiguity of the proper legal operation of this important Act of Parliament.

⁷⁸ *Ibid* [114].

⁷⁹ G Wilson, 'Unconscionability and Fairness in Australian Equitable Jurisprudence' (2004) 11 *Australian Property Law Journal* 1.

⁸⁰ *Patsalis* [2012] NSWCA 307, [7].