

THE ORIGINS AND EVOLUTION OF THE *PARENS PATRIAE* JURISDICTION

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Lecture on Legal History

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Introduction

Today in exercising the *parens patriae* jurisdiction, courts of equity can make a diverse range of orders for the protection and education of children and incapable persons. But as we shall see, the jurisdiction was not always part of the equitable jurisdiction, and not always directed at the protection and education of children. Over centuries, it evolved from a rather crude feudal incident that was somewhat cynically exploited by the Crown to generate revenue, into the carefully and temperately exercised jurisdiction that exists today, in which the best interests of the subject are the touchstone. And as will emerge, the appropriation of the jurisdiction by the Court of Chancery was instrumental in bringing about that change. Today, I will broadly sketch the history of that evolution, and then discuss a few cases which illustrate how the jurisdiction's history informs its exercise in modern times.

Wardship in the Middle Ages

The history of the *parens patriae* jurisdiction begins in the reign of King Edward I – from 1272 to 1307 – with the institution of a system of wardship¹ whereby the Crown possessed the prerogative power to exercise various legal rights on behalf of those who were deemed unable to properly manage their own affairs, called 'wards'. There were two distinct forms of wardship, each subject to the limitations articulated in the *Prerogative Regis*, a text codifying the King's wardship prerogative powers.²

¹ Lawrence B. Custer 'The Origins of the Doctrine of *Parens Patriae*' (1978) 27 *Emory Law Journal* 195, 195.

² *Ibid* 195-96; Margaret McGlynn, 'Idiots, lunatics and the royal prerogative in early Tudor England' (2005) 26 *The Journal of Legal History* 1, 2.

The first was the King's wardship over those who were termed idiots (those with intellectual disabilities from birth) and lunatics (those who became insane later in life).³ Under this form of wardship, the King was obliged to provide for the care of the ward, but also accorded to the King rights to deal with the ward's property, in lieu of the ward. According to the *Prerogative Regis*, the King was obligated to hold the ward's 'lands without committing waste, and to provide for the [ward] from the seized land', returning the land to the ward's heirs upon death, or to the lunatic if he or she recovered.⁴

The second form of wardship was in respect of minor heirs.⁵ This was a 'feudal incident' – that is to say, one of the obligations incurred by a tenant in exchange for the occupation of land owned by a lord.⁶ Where the tenant held land directly to the King (as distinct from a lesser Lord), the King's wardship power was enlivened where the tenant died, leaving a child heir who, upon reaching the age of majority, would inherit the property left by the deceased tenant.⁷ In the meantime, however, the King received all of the rents and profits of the land, with no obligation to repay the heir, and with half a year's rent payable by the ward upon reaching the age of majority.⁸ Coupled with the ability of the King to transfer wardships to others, the sizeable profit to be reaped from acting as ward of a minor created significant potential for abuse.⁹

From the outset, that potential was not overlooked by the Crown. Edward relegated heirs to ward status for as long as possible, in order to prolong his steady flow of

³ Margaret McGlynn, 'Idiots, lunatics and the royal prerogative in early Tudor England' (2005) 26 *The Journal of Legal History* 1, 3.

⁴ Ibid.

⁵ Lawrence B. Custer 'The Origins of the Doctrine of *Parens Patriae*' (1978) 27 *Emory Law Journal* 195, 196-97.

⁶ Noel James Menuge, *Medieval English Wardship in Romance and Law* (Boydell & Brewer, 2001) 1-2.

⁷ Ibid 1.

⁸ Lawrence B. Custer 'The Origins of the Doctrine of *Parens Patriae*' (1978) 27 *Emory Law Journal* 195, 199.

⁹ W.C. Richardson, *Tudor Chamber Administration: 1485-1547* (Louisiana State University Press, 1952), 166; Noel James Menuge, *Medieval English Wardship in Romance and Law* (Boydell & Brewer, 2001) 2; James Bothwell, *Edward III and the English Peerage: Royal Patronage, Social Mobility, and Political Control in Fourteenth-century England* (Boydell Press, 2004) 68.

profits.¹⁰ He was not alone in this – many of his successors engaged in the practice of transferring wardships as favours, or to the highest bidder.¹¹ By the late fifteenth century, when the administration of the King's prerogative power became more centralised and began roughly resembling modern government departments, the practice was so entrenched that it had become a recognised revenue-raising method. This had the consequence that this form of wardship bore little relationship to the notions of paternal care and protection that were later said to underlie it, and did not serve the interests of those it was ostensibly designed to protect.

Things did not improve with the establishment, in 1540, of the Court of Wards and Liveries, a statutorily created court that was vested with the King's prerogative wardship power. The Court was 'established with the express purpose of increasing revenue from sales of wardships',¹² and continued the profit-driven exploitation that had characterised wardship policy previously.¹³ The Court – a symbol of feudal servitude – was abolished in 1660, two decades before the Glorious Revolution. According to the repealing statute, which also extirpated many other surviving features of the feudal system, the result was justified on the basis that 'it hath beene found by former experience that the Courts of Wards and Liveries and Tenures...[has] beene much more burthensome grievous and prejudiciall to the Kingdome then they have beene beneficiall to the King'.¹⁴ The statute, while abolishing the Court of Wards, made no provision for the transfer of any of its functions, or the establishment of a replacement institution.

Appropriation by the Court of Chancery

In an article tracing the *parens patriae* jurisdiction, Lawrence B. Custer contends that this development created a significant gap in the law, that Chancery judges later

¹⁰ James Bothwell, *Edward III and the English Peerage: Royal Patronage, Social Mobility, and Political Control in Fourteenth-century England* (Boydell Press, 2004) 68.

¹¹ *Ibid.*

¹² Lawrence B. Custer 'The Origins of the Doctrine of *Parens Patriae*' (1978) 27 *Emory Law Journal* 195, 199.

¹³ See H.E. Bell, *An Introduction to The History and Records of the Court of Wards & Liveries* (1953, Cambridge University Press) 133.

¹⁴ Charles II, 1660: An Act takeing away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in Lieu thereof.

sought to rationalise.¹⁵ An instance of this is to be found in *Falkland v Bertie* (1696), where Lord Chancellor Somers states:

In this court there were several things that belonged to the *King as Pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, &c., afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute; but upon the dissolution of that court, came back again to the Chancery, where the interests of infants are so far regarded and taken care of, that no decree shall be made against an infant, without having a day given him to shew cause after he comes of age.¹⁶

Mr Custer's argument is that the Lord Chancellor introduced an anachronism into his account of 'the King as Pater patriae'; and that the notion of the paternal ruler was a relatively modern concept that postdated the King's feudal wardship prerogative, which he contends is the true origin of the jurisdiction referred to by the Lord Chancellor. Custer's view is not shared by all. My colleague Justice Kunc of the Supreme Court of New South Wales, for example, disagrees with the feudal wardship account,¹⁷ and instead argues that 'the Court of Chancery exercised a paternal jurisdiction over infants that predated the Court of Wards and that was distinct from its wardship jurisdiction'.¹⁸

No doubt, given the unprincipled way the feudal wardship prerogative was exercised, it does not provide a complete answer to the search of the origin of the principles that inform the exercise of the *parens patriae* jurisdiction today. At the least, though, it can be said that the feudal wardship system was a rudimentary predecessor of the jurisdiction, and irrespective of its influence on the jurisdiction, its abolition enabled

¹⁵ Lawrence B. Custer 'The Origins of the Doctrine of *Parens Patriae*' (1978) 27 *Emory Law Journal* 195, 201.

¹⁶ *Falkland v Bertie* (1696) 23 ER 814, 818 (Lord Chancellor Somers).

¹⁷ Justice Kunc, 'Dented and rusty like a suit of armour? Reflections on the origins of the *parens patriae* jurisdiction' (Speech delivered at the Francis Forbes Society Legal History Tutorial, Sydney, 15 October 2014) 12.

¹⁸ *Ibid* 17. See also John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159, 165.

the growth of what would have otherwise been, at best, a competing system. And regardless of the origin of the *parens patriae* jurisdiction as a matter of historical fact, the early equitable jurisprudence was, as *Falkland v Bertie* shows, founded on the theory that it derived from the Crown prerogative.

Falkland v Bertie was followed by a series of cases which similarly attributed Chancery's 'pater patriae' jurisdiction to the Crown's former prerogative power.¹⁹ *Eyre v Shaftsbury* (1722)²⁰ was one such example. In that case, the Earl of Shaftsbury devised the guardianship of the person and estate of his child to Mr Justice Eyre and two others while omitting the words 'and to the survivor of them'. The Earl of Shaftsbury was predeceased by two of the three persons nominated. The child's mother – the Countess of Shaftsbury – argued that omission of the words of limitation had the consequence that the guardianship did not survive, on the basis that if a guardianship power were given to three, and one should die, the survivor could not execute the power, and her child was therefore to stay with her. Justice Eyre, who sought to exercise his alleged guardianship right on the ground that the child's mother and male attendant were not appropriate carers, contended that the guardianship was not devised to three jointly (but presumably severally), such that his right of guardianship survived.

The Court granted Justice Eyre's application and transferred the custody of the child to Justice Eyre. The important point for present purposes is that, for its jurisdiction to do so, the Court relied on the proposition that:

[T]he King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every local subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as *pater patriae*, and there is the same reason to extend this case to infants.²¹

¹⁹ The following cases are cited in sequence by both Justice Kunc and Mr Custer.

²⁰ *Eyre v Shaftsbury* (1722) 24 ER 659 at 659.

²¹ *Ibid* 664.

In discussing the effect of statutes on the jurisdiction, the Court also restated the explanation which had been given by Lord Chancellor Somers of how the prerogative power had come to reside in the Court of Chancery:

[S]everal acts of parliament have made alterations in some cases of this nature, which so far stand altered, and no further; but unless there be express words in an act of parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one act that has taken away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots and lunatics. *Since the statute which took away the court of wards, the jurisdiction of wardship returns to the Court of Chancery ... and it appears ... that a writ may issue out of this Court to remove the guardian of an infant, and to put another guardian in his stead.*²²

And this narrative was repeated in other cases.²³ For example, in *Smith v Smith* (1745), Lord Chancellor Hardwick said:

Upon the cessure of *the courts of wards*, the care of the government of infants reverted to this court, to whom it originally belonged, and in respect of lunaticks, ideots, and infants, the king is bound to take care of them ; It is not a profitable jurisdiction of the crown, but for the benefit of infants themselves, who must have some common parent.²⁴

Two emergent themes are worthy of emphasis, because of their ongoing significance: *first*, the proposition that only distinct provisions in a statute could detract from the Court's parental jurisdiction; and *secondly*, that the benefit of the ward – whether infant or incapable person – (and not the generation of revenue) was the object of the jurisdiction.

²² Ibid.

²³ See, eg, *Shaftsbury v Shaftsbury* (1725) 25 ER 121 and *Smith v Smith* (1745) 26 ER 977.

²⁴ *Smith v Smith* (1745) 26 ER 977 at 977.

Before long, the jurisdiction grew beyond wardship, so as not to depend on the classification of persons as wards. This is evident in *Butler v Freeman*,²⁵ in which a father complained that his infant son had been lured into a marriage to which the father did not consent. The respondent objected to the jurisdiction of the Court in respect of the matter; because the father was alive, so the objection went, the Court had no guardianship over the infant, which carried with it the consequence that the Court had no jurisdiction to intervene. Rejecting this submission, the Lord Chancellor held:

[T]he Court does not act on the foot of guardianship of wardship: the latter is totally taken away by the [statute] and without claiming the former, and disclaiming the latter, has a general right delegated by the Crown as *pater patriae*, so interfere in particular cases, for the benefit of such who are incapable to protect themselves.²⁶

Unfastened from the apparatus of wardship, courts of equity could exercise *parens patriae* jurisdiction on an ad hoc basis, and to cure particular problems which beset minors' lives, such as when in 1827 the infamous William Wellesley's adultery resulted in Lord Chancellor Eldon stripping him of custody of his children – in that case, the Court relied on no wardship or guardianship classification do so.²⁷ By the early 1800s, the jurisdiction had evolved into one whereby courts of equity could protect the interests of minors, irrespective of the absence of a statute explicitly prescribing this power.

Australia

By the time the common law of England migrated to Australia (whether upon settlement in 1788, or alternatively upon passage of the (IMP) *Australia Courts Act* 1828), the *parens patriae* jurisdiction had evolved into its modern form, and became

²⁵ (1756) 27 ER 204.

²⁶ *Ibid* 204.

²⁷ *Wellesley v Beaufort* (1827) 38 ER 236.

incorporated into Australian law. In New South Wales today, the jurisdiction is exercised by the Supreme Court, as a subset of the equitable jurisdiction that is vested in the Court by, *inter alia*, ss 57-64 of the (NSW) *Supreme Court Act 1970*.

The modern jurisdiction is wide-ranging and far-reaching.²⁸ It extends as far as necessary for the protection and education of the child.²⁹ It is not a jurisdiction that is encumbered with technicalities.³⁰ No jurisdictional limits have ever been described and, subject to the requisite nexus with the welfare of the child, in theory it is unlimited.³¹ The power is more extensive than that of parents, because the courts can authorise or permit steps to be taken in relation to children which even parents cannot – such as to consent to particular kinds of operations, or to authorise indefinite protective detention.³² Thus as has been said “the jurisdiction is of a very broad nature, and ... can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations”.³³ It has been invoked to enable the performance of medical procedures (where consent by or on behalf of a child has not been forthcoming) including vaccination,³⁴ involuntary admission and treatment for anorexia nervosa,³⁵ abortion,³⁶ sterilisation of an intellectually disabled child for reasons which were not

²⁸ The following two paragraphs (with a few small changes) have been taken from Justice Paul Brereton, ‘Children’s Issues in the Supreme Court’ (Speech delivered at the Address to the Children’s Court of New South Wales Meeting, Sydney, 8 April 2016).

²⁹ *Wellesley v Wellesley* (1828) 2 Bli N S 124; 4 ER 1078, 183 (Lord Redesdale); cited in *Marion’s Case*, 258 (Mason CJ, Dawson, Toohey, and Gaudron JJ).

³⁰ *Re Frances and Benny* [2005] NSWSC 1207 [17] (Young CJ in Eq).

³¹ *In re X (A Minor)* [1975] 2 WLR 335 at 339-340, 342, 345, 345-346; [1975] 1 All ER 697 at 699-700, 703, 705, 706; *In re R (A Minor)* [1991] 3 WLR 592; [1992] Fam 11; *Marion’s Case*, at 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Director-General, New South Wales Department of Community Services v Y* at [90] (Austin J: “contemporary descriptions of the *parens patriae* jurisdiction over children accept that in theory there is no limitation on the jurisdiction”).

³² *Marion’s Case*, at 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³³ *Re X* [1975] 1 All ER 697 (Latey J).

³⁴ *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193.

³⁵ *Re W* [1992] 3 WLR 758; [1992] 4 All ER 627; *Re C* [1997] 2 FLR 190; *DoCS v Y* [1999] NSWSC 644.

³⁶ *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311.

therapeutic,³⁷ parentage testing,³⁸ and even indefinite protective detention and restraint.³⁹

Nonetheless, while the jurisdiction is “extremely broad”, it is to be exercised with restraint, only in exceptional cases,⁴⁰ and with considerable caution; and there must be “some clear justification for a court’s intervention to set aside the primary parental responsibility for attending to the welfare of the child.”⁴¹ Generally, the greater the interference with the liberty of the object of the exercise of the jurisdiction, the greater the caution required in its exercise.⁴²

To illustrate the application of these principles, and to highlight the importance of the jurisdiction’s history in defining its content, I will discuss three modern Australian cases.

1. *Connection to wardship*

The first is *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 – which has been very influential in the development of the *parens patriae* jurisdiction in this State. It concerned a fifteen-year-old plaintiff, who was in the care of the Minister for Youth and Community Services under the (NSW) *Child Welfare Act* 1939, and sought relief against the Minister’s decision to refuse permission for her to have an abortion. While the plaintiff attributed the Court’s power to override the Minister’s decision to its *parens patriae* jurisdiction, the Minister denied this proposition, instead submitting that the Court could not interfere with the care of any child made a ward (of the Minister, not the Court) under the *Child Welfare Act*,⁴³ s 9 of which provided:

³⁷ *Marion’s Case* (1992) 175 CLR 218.

³⁸ *In re L (An Infant)* [1968] P 119.

³⁹ *Re C* [1997] 2 FLR 180; *Re Thomas* [2009] NSWSC 217; *Re Sally* [2009] NSWSC 1141.

⁴⁰ *Re Victoria* (2002) 29 Fam LR 157 (Palmer J); *Frances and Benny* [2005] NSWSC 1207 [18] (Young CJ in Eq).

⁴¹ *Marion’s Case* (1992) 175 CLR 218, 280 (Brennan J).

⁴² *Re Thomas* [2009] NSWSC 217 at [35].

⁴³ *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 322.

Notwithstanding any law relating to the guardianship or custody of children the Minister shall be and become the guardian of every child or young person who becomes a ward to the exclusion of the parent or other guardian and shall continue to be such guardian until the child or young person ceases to be a ward.

This provision – and others like it – were said by the Minister to exclude the Court’s *parens patriae* jurisdiction in respect of those children who were wards under the Act.

The Chief Judge in *Equity’s* gave a historical answer to this submission, pointing out that the Court’s *parens patriae* jurisdiction did not depend on classification of a child as a ward. He wrote:

In [the Court’s] role as *parens patriae* it has always had power to interfere with the actions of guardians where necessary to protect the welfare of wards. This is, of course, a power not restricted to wards nor arising because of wardship. It is a power of the Sovereign to protect persons who from their legal disability stand in need of protection. It is a power exercisable at large. A person does not have to be made a ward of court before it can be exercised.

That being the nature of the court’s power over, for example, infants, one is prompted to ask why are those infants who are wards of the Minister denied access to and the benefit of this power of the court that is there for the protection of persons?⁴⁴

The Chief Judge reviewed the authorities bearing on the matter, which illustrated the proposition (which as we have seen is well-rooted in history) that the jurisdiction could be abrogated only by a statute by express words or necessary implication.⁴⁵ In the absence of any such necessary implication from the mere fact that a child was a

⁴⁴ *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 323.

⁴⁵ See, eg, *Carlseldine v Director of Department of Children’s Services* (1974) 133 CLR 345 at 351 (McTiernan J), 366 (Mason J).

ward of the Minister, the Court held that it retained jurisdiction to make orders for the care, control and protection of the child plaintiff, including for the medical treatment of the child. And in the exercise of that power, the Court determined that an abortion was in child's best interests, and ordered that the Minister give the necessary consent.⁴⁶

The care confirmed the jurisdiction's foundation in the care and protection of children generally, as distinct from Middle Ages focus on wards alone – a characteristic that would later be echoed by Brennan J in *Marion's Case* (1992) 175 CLR 218:

The *parens patriae* jurisdiction has become essentially protective in nature and protective orders may be made *either* by the machinery of wardship or by ad hoc orders which leave the guardianship and custody of the child otherwise unaffected. The court is thus vested with the jurisdiction to supervise parents and other guardians and to protect the welfare of children.⁴⁷

2. *Department of Community Services v Y*

The second case is *Department of Community Services v Y* [1999] NSWSC 644, which concerned a fifteen-year old girl suffering from anorexia nervosa who had gone through troubling cycles of extreme weight loss. The evidence showed that her parents, while well-intentioned, were an obstacle to her recovery, as they persisted in their belief that her weight loss was caused by a physical disorder, and thus frustrated the attempts of the child's doctors to administer care plans for the treatment of anorexia. So the Department of Community Services invoked the *parens patriae* jurisdiction of the Supreme Court to have her made a ward of the court, so that the court could authorise and supervise her treatment on an ongoing basis.⁴⁸

⁴⁶ *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 326-7.

⁴⁷ *Marion's Case* (1992) 175 CLR 218 at 280 (Brennan J) (citations omitted) (emphasis added).

⁴⁸ *DoCS v Y* [1999] NSWSC 644 [81] (Austin J).

Questions arose as to the interaction of the *parens patriae* jurisdiction and various statutory regimes. In respect of the (NSW) *Children (Care and Protection) Act 1987*, Austin J held that the procedural framework created by the statute contemplated the continuing existence of the inherent jurisdiction of the Supreme Court. Accordingly, the Children Court's power, for example, to declare children to be wards only went so far as exercise of the power was consistent with an order made by the Supreme Court 'in the exercise of its jurisdiction with respect to the custody and guardianship of children'.⁴⁹ And in respect of the (CTH) *Family Law Act 1975*, Austin J expressed the view (*obiter*) that the correct construction of the statute yielded the conclusion that it too did not interfere with the Court's *parens patriae* jurisdiction.⁵⁰ (In any event, the Family Court has a statutory "welfare power", which broadly corresponds with the *parens* jurisdiction, and which in turn is now cross-vested to the Supreme Courts).

Thus, notwithstanding the many statutes which could be taken to create inconsistent schemes for the care of children, the jurisdiction survives and thrives. At least part of the reason for this result is the principle that *parens patriae* jurisdiction can only be displaced by clear statutory intention, a principle relied on by the High Court in holding that the inherent jurisdiction of the Supreme Court of Queensland in relation to the custody of infants was not abolished by the (QLD) *Children's Services Act 1965-1973* in *Carseldine v The Director of Department of Children's Services* [1964] HCA 33. That principle itself is an old one, since as early as 1722 it was doctrine that 'unless there be express words in an act of parliament for that purpose, the [*parens patriae*] jurisdiction of this Court remains as before',⁵¹ again demonstrating the significance of the jurisdiction's historical roots in its modern application.

3. *Re Thomas*

The final case is *Re Thomas* [2009] NSWSC 217, which concerned a troubled fifteen year old, with an escalating history of self-harm and anti-social behaviour to such a degree that the administration of therapy to him in regular residential facilities was

⁴⁹ *DoCs v Y* [1999] NSWSC 644 at [89] (Austin J), citing (NSW) *Children (Care and Protection) Act 1987* s 73(4).

⁵⁰ *DoCs v Y* [1999] NSWSC 644 at [90]-[97] (Austin J).

⁵¹ *Eyre v Shaftsbury* (1722) 24 ER 659 at 664 (emphasis added).

impossible. In addition to violently assaulting his carers and security staff,⁵² Thomas would scour facilities for the means to self-harm, and after receiving medical treatment to heal lacerations he had self-inflicted and to remove objects he had inserted in himself, would often re-open those lacerations re-insert objects in those wounds.⁵³ On the strength of the opinions of the psychologists treating him, therefore, the only way of treating Thomas' mental illnesses was to provide treatment through a safe and secure environment,⁵⁴ which required an order for the detention of Thomas pending further order of the Court.

When first presented with the application, I was sceptical. While the *parens patriae* jurisdiction was born during an epoch of history in which the law might have been more tolerating of detention, the law has moved on. Now, the law attaches fundamental importance to protection from the deprivation of a person of liberty for non-criminal acts. That fundamental importance is evidenced by the widespread ratification by nations of international human rights instruments which condemn unlawful and arbitrary detention, both generally⁵⁵ and in relation to children.⁵⁶ For example, Article 39 of the United Nations *Convention on the Rights of the Child* provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

Notwithstanding both domestic and international law's wariness of the deprivation of personal liberty, however, I was persuaded that the deprivation of Thomas's liberty for protective purposes was justified, and even necessitated, by the protection and promotion of his welfare.⁵⁷ Consistently with English authority which considered the compatibility of a similar type of order with an analogous human rights instrument,⁵⁸ a protective detention order in these circumstances did not violate Thomas' human

⁵² *Re Thomas* [2009] NSWSC 217 at [3], [17].

⁵³ *Ibid* [10], [16], [17].

⁵⁴ *Ibid* [19]-[21].

⁵⁵ *International Covenant on Civil and Political Rights* art 9.

⁵⁶ *Convention on the Rights of the Child* art 37.

⁵⁷ *Re Thomas* [2009] NSWSC 217 at [38].

⁵⁸ See, eg, *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 2 WLR 1141.

rights, and since the protection and promotion of a child's welfare lies at the heart of the *parens patriae* jurisdiction, I made the order.⁵⁹ *Re Thomas* is therefore an example of the way in which this historical jurisdiction coheres with more modern developments: in this case, the growth of international instruments on the rights of children.

As a footnote, similar orders have since been made in perhaps twenty cases, and Thomas, who responded quite well, was progressively transferred to a "step-down" facility with increased independence, and, at age 18, to adult care arrangements with a guardian appointed.

Conclusion

Thank you, Professor Rolph, for the invitation and opportunity, to address your students. It was almost irresistible to a graduate of your University in Arts (majoring in history) and in Law. Perhaps the message that I should leave you with is that, just as the history of the *parens patriae* jurisdiction – a vital part of modern equitable jurisdiction – is inextricably tied to the content of principles that govern its exercise, so that an understanding of those principles cannot be divorced from the series of historical events which created them, so too is that the case in most areas of our law. The study of law and the study of history are necessarily and closely connected.

⁵⁹ *Re Thomas* [2009] NSWSC 217 at [38].