Select Committee into Certain Aspects of Queensland Government Administration
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14/12/2014

Submission to the Select Committee into Certain Aspects of Queensland Government Administration, by Craig Myatt

Maintaining fairness to accused in criminal matters: the separation of powers

Summary

In Australia and in Queensland, our governmental system has what is known as a separation of powers between the legislature, the executive government and the courts, which supports the rule of law.

As a democracy, we also recognise the people of Australia as the popular "sovereign" and who is the ultimate ruler of the State. But in 2014, we still hold historical elements of absolute monarchies of the distant past within our government systems. Permitting the constitutional sovereign, the Queen, to litigate criminal matters before judges who swear their allegiance to that same sovereign, impermissibly contravenes the separation of powers formalised by our Constitution, thus degrading the rule of law. That is inherently unfair to defendants in criminal matters. It also puts the person of the Queen at risk of actions under international law, whereby she is necessarily seen by international bodies as having strict liability as the named litigant, regardless of her treatment by domestic courts. Queensland should forgo the reference to the sovereign in any litigation by the State, and bring all cases to be heard before judicial bodies, as "The State of Queensland", ensuring fairness to all parties.

A Separation of powers maintains the rule of law

In the past, the King or Queen was a monarch with full executive power. This absolute monarch had absolute 'sovereignty", or authority to rule. But in the 17th century in England, that undiluted power was seen as a source of possible abuse of power, which was remedied by the separate expression of power within a Parliament, with separate courts and a separate government.

An ideal or pure separation of powers was described by Professor Vile[1] in his 1967 book *Constitutionalism and the Separation of Powers:*

> *It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. … Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. …each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.*

[1] *M.J.C. Vile, Constitutionalism and the Separation of Powers (2nd ed.) [1967]*

This separation of the sovereign power can be visually described in this way:

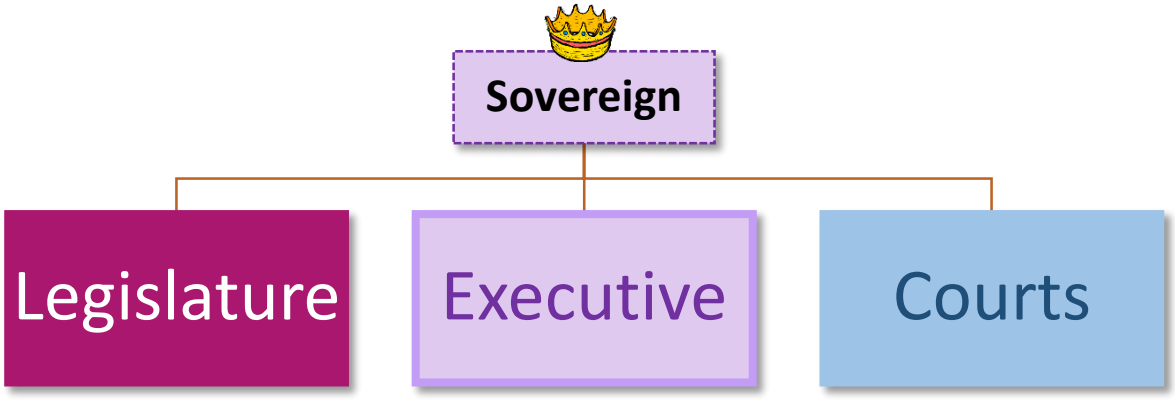

Fig. 1 - Separation of Powers – three 'branches' of government

In democracy with a genuine separation of powers, the "sovereignty" or "authority to rule" is usually "public", making the people of the State, community or polity the ruling "sovereign". This follows the meaning of democracy: *rule by the people*.

This "popular sovereignty" is what is referred to by constitutional scholar Ms Anne Twomey, as a "new crown", or "*…a new Crown is created when the Queen is directly advised by Ministers responsible to a legislature of a particular polity…"*[2]. A "polity" is a state or organised community, in this case the "polity" is the community organised into a state: Queensland[3]. She indicated[4]:

> "*A new Crown is established… The polity itself does not need to have attained formal independence or to be internationally recognised as sovereign…".*

Thus the community of Queensland is the new "sovereign" of Queensland, a concept recognised by the Preamble of the Constitution of Queensland:

> *"The people of Queensland…adopt the principle of the sovereignty of the people…" (Preamble, Constitution of Queensland, 2001)*

The Constitution of Queensland identifies fairly clearly the three separate branches of the people's power, to be expressed as three distinct branches of government:

1. The Parliament (Chapter 2)
2. The executive Government (Chapter 3)
3. The Courts (Chapter 4)

Officers of each of those branches typically swear allegiance to "the sovereign". And while the Queen, as a "constitutional sovereign", maintains a ceremonial role as head of State, in practice, the Head of State who holds the actual power under the Constitution is not the Queen, but the Governor of Queensland, (or Australia). This was formalised in the Australia Act 1986 (Cth), which indicates:

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[2] *Twomey, A., 'The Unrecognised Reserve Powers' (The High Court Lecture Series, 14 November 2012) p7.*
[3] *Delbridge, A., et al Eds. 1996. The Macquarie Concise Dictionary 3rd Edition. Macquarie University: The Macquarie Library.*
[4] *Twomey, A., Op Cit, p3.*

7 Powers and functions of Her Majesty and Governors in respect of States

(1) Her Majesty's representative in each State shall be the Governor.
(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.

In Queensland, scholars of the doctrine of the separation of powers, Alvey and Ryan[5], noted that the separation of powers affords freedom from the "tyranny" of absolute power in government:

> *…the Separation of Powers is important in protecting citizens from the abuse of government power. This is partly achieved by the rule of law, a separate and independent judiciary, judicial review, and legislative or constitutional protection of civil rights.*

So the "rule of law" is supported by a proper separation of state power, which in turn is maintained to ensure the protection of liberty, of individuals' freedoms.

The *rule of law*

Most citizens in Australia and Queensland know of the term the "rule of law", but don't understand its implications, nor the founding principles which in turn have implications for the Queensland governmental system.

The World Justice Project[6] describes the "Rule of Law" as:

> *"The rule of law is a system in which no one, including government, is above the law; where laws protect fundamental rights; and where justice is accessible to all."*

They identify four basic principles of the *rule of law*:

(a) all including government are accountable to the law;
(b) laws protect freedoms and should not be arbitrary;
(c) the administration and application of the law is fair; and
(d) adjudicators of the law are fair and impartial.

Most Queenslanders would expect that as a free democracy that we have a solid "rule of law", but that is only partly the case. The 2014 World Justice Project Rule of Law Index[7] rates countries on the strength of their *rule of law*. The index is made up of scores in eight areas. Australia has solid scores in *Limited Government Powers* (score: 86%), *Absence of Corruption* (score: 86%), *Order and Security* (score: 86%), *Fundamental Rights* (score: 82%), *Open Government* (score: 75%) and *Regulatory Enforcement* (score: 80%). However we fair worse next to other countries in *Civil Justice* (score: 73%) and *Criminal Justice* (score: 73%).

Partly, the lower score within the Criminal Justice area is because the criminal system is judged by the World Justice Project as being less than fully impartial in Australia (sub-score: 0.53)[8].

A specific problem which directly relates to the perceived lack of impartiality in the criminal justice system, in this case in Queensland, is that the litigant in criminal matters, has a special relationship with the judge adjudicating her case.

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[5] *Alvey, J., Ryan, N., 2006, The Separation Of Powers In Queensland, 54th Australasian Political Studies Association Conference University of Newcastle*
[6] *http://worldjusticeproject.org/what-rule-law*
[7] *http://worldjusticeproject.org/sites/default/files/files/country_profiles.pdf*
[8] *Ibid.*

In criminal cases in Queensland and generally in other states, or cases heard on appeal in the High Court, the Queen is the litigant, for example *The Queen v the Defendant*. The constitutional scholar Anne Twomey said that this reference to The Queen, however, was not a reference to "The Queen" herself:

> *The terms 'Queen' and 'Crown' mean a number of different things in legislation. Sometimes they mean the Queen herself, but more commonly they mean the relevant polity or the executive government. The reference to the Queen as a party to criminal litigation has nothing to do with the Queen herself. It is just a term that represents the State as a whole.*[9]

While this may be true in other senses, it is not so under Queensland law. Referring to the *Acts Interpretation Act 1954 (Qld),* the Act defining how legislation is read, "The Queen" and "the Crown" are not "metaphors" for "the People", or "polity" but in fact a direct reference to Queen Elizabeth II, or the reigning constitutional sovereign:

> ***52 References to the Crown etc.***
>
> *In every Act—*
>
> *(a) reference to the Sovereign reigning at the time of the passing of such Act, or to 'Her Majesty', 'His Majesty', 'the Queen', 'the King', or 'the Crown', shall be construed as references to the Sovereign for the time being, and, where necessary, shall include the heirs and successors of such Queen or King; and*

Further, the legislation defining the statutory body which brings criminal prosecutions, the *Director of Public Prosecutions Act 1984 (Qld)* specifically refers to The Queen by one of Her Majesty's names:

> ***10 Functions of director***
>
> *(1) The director—*
>
> *(a) shall prepare, institute and conduct on behalf of and in the name of Her Majesty—*
>
> *(i) criminal proceedings; and*
> *(ii) proceedings in the Court of Appeal; and*
> *(iii) proceedings in the High Court of Australia that arise out of criminal proceedings;*

So while Ms Twomey said that "*The reference to the Queen as a party to criminal litigation has nothing to do with the Queen herself",* in fact, the Queen is unequivocally under the principal law, the "litigant" in criminal matters. The Queen is indeed the party who brings criminal prosecutions in Queensland.

What might be a better way to frame Ms Twomey's statement, is that "The Queen" or "Crown" is a "proxy" for the people's "popular sovereignty". Therefore a literal reference to "The Queen" as the criminal litigant, is in spirit a reference to the "polity" which is the people of Queensland, or the sovereign which by fact of their power to elect representatives in Parliament or change parts of the Constitution, holds the sovereignty.

[9] *Email from Anne Twomey to Craig Myatt, 29/9/2014*

That concept of popular sovereignty which is essentially that "The Queen" might be a "proxy" for the people of Australia, or in this case the people of Queensland, is an idea given legitimacy by the High Court[10], and expressed here by the former Chief Justice of the High Court, Chief Justice Brennan:

> *As the Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate sovereignty of the nation resides, the Oath of Allegiance and the undertaking to serve the head of State as Chief Justice are a promise of fidelity and service to the Australian people.*[11]

Furthermore, after the assent in 1986 of the Australia Act, which by s7(2) effectively removed any legislative powers from the British Monarch, making the Governor the effective constitutional sovereign, it is not clear that the Queen had legislative power to bring public prosecutions in a court.

Thus we have a pickle: we have a judge who hears the Queen's case, but also swears allegiance to her as sovereign. We have a litigant with questionable standing as a litigant in court in any criminal prosecution. And according to the High Court, "The Queen" is no more than a "metaphor" or proxy for the people of the State, who are the real sovereign. So why not place their names as "sovereign" on criminal prosecutions as litigant?

Because that is an impermissible breach of the separation of powers. The executive government of the State administers laws, and to have the sovereign doing so, is a contravention of the doctrine of the separation of powers, which impermissibly places the court in the conflicted position of not only swearing allegiance to the sovereign, but also hearing the sovereign's case. This is called a conflict of interests, creating what is better known as an apprehension or perception of bias in the judge, disqualifying the judge from any adjudication in that particular case.

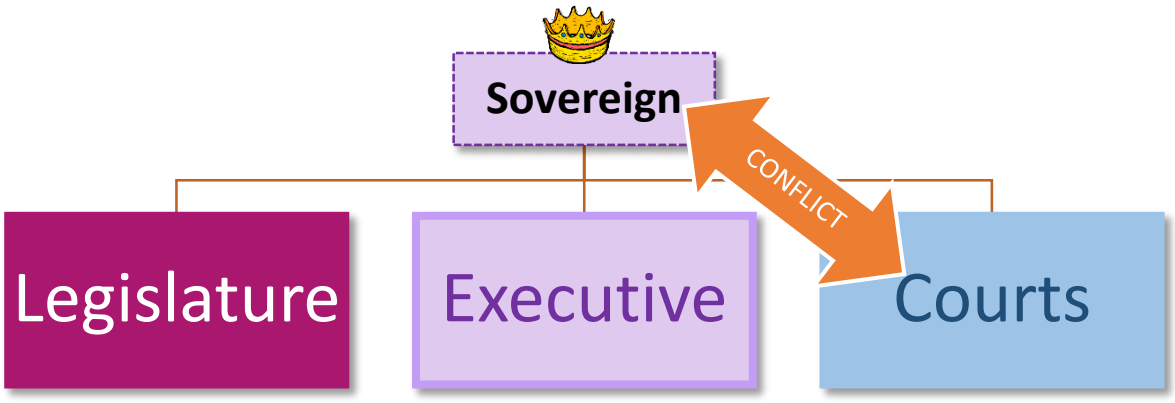

Fig. 2 - This creates a "conflict of interests" for a court

The "State of Queensland" should prosecute criminal cases, not the Queen

Where the constitutional sovereign becomes a party in a court, an important element of the rule of law degrades, so that the adjudicators of the law are no longer fully fair and impartial. That arises because the judges themselves swear allegiance to the Queen as the sovereign. That is true be that an allegiance to a literal constitutional sovereign, or to a popular sovereign. While naming the monarch as prosecutor may have been a historical part of the system of government which we

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[10] *Mason, CJ, Australian Capital Television Pty Ltd & New South Wales v Commonwealth [1992] HCA 45; (1992) 177 CLR 106, at 37.*
[11] *Hon Sir Gerard Brennan, 21/4/1995 Speech on swearing in as chief justice*

inherited along the way from the English, this "convention" no longer seems to apply in our system, which has developed quite differently, after federation, to the English system of government.

We all recognise the famous expression that "justice should be seen to be done". This principle is well resolved in common law, within the precedent *Rex v Sussex Justices; Ex parte McCarthy*[12], where Lord Hewart said:

> *"… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

The problem in that case, was that the Magistrate was seen as having a conflict of interests, because he had heard a case in which his deputy clerk had a link to one of the parties in the case, giving the appearance that his clerk may have improperly influenced him on behalf of that party. This is what is known as "apprehended bias" and in that famous case, the defendant's conviction was quashed merely because of the *appearance* of bias and nothing else.

In 1994, referring to the same principle in Webb & Hay v R[13], the High Court of Australia explained how they would normally apply the test for apprehended bias of judges:

> *"…this Court has held that the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case…*"

Using this test, it would be obvious to a reasonable person, that if a District or Supreme Court judge of Queensland has sworn allegiance to the Queen, then where the judge has to conduct any proceeding where The Queen is one of the parties to a criminal or other case, that judge by definition will be suspected of partiality to the Queen, because the party is the person that judge swears allegiance to. There could be no more explicit case of apprehended bias, than in Queensland's justice system, where the judge is <u>*by law*</u> required to favour the sovereign:

> *Oath or affirmation of allegiance and of office—Judge*
>
> *I, ..(name).., do sincerely promise and swear that I will be faithful and bear true Allegiance to Her Majesty Queen Elizabeth II as lawful Sovereign of Australia and to Her heirs and successors, according to law; and*
>
> *As a judge of the Supreme Court of Queensland (or District Court of Queensland) (and/or as (title of other office, for example, Chief Justice of Queensland)), I will at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of my knowledge and ability without fear favour or affection.*
>
> *So help me God!*
>
> *(Constitution of Queensland, 2001)*

This principle of "equal justice"[14], spoken as part of the oath of Justices, is the lynchpin of "fairness", which is one of the World Justice Project's elements of the "rule of law": *(c) the administration and application of the law is fair.* In other words, it would be impossible for a judge to be truly fair and

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[12] *R v Sussex Justices; Ex parte McCarthy [1924]*
[13] *Webb & Hay v R [1994] HCA 30*
[14] *Kable v Director of Public Prosecutions (NSW) [1996] HCA 24 at 27; French CJ, Crennan And Kiefel JJ, Green v The Queen; Quinn v The Queen [2011] HCA 49, at 28*

impartial where one of the parties before them is not only favoured by them, but importantly, favoured by requirement of the oath they swear, defined by a statute. That is truly unfair!

This problem also affects poor defendants of criminal matters in other ways. Solicitors or barristers in Queensland also swear an oath of allegiance to the Queen, when they become solicitors. Again, it would be hard for an accused to accept that the lawyer who is defending them, must first be faithful to the Queen, the very adversary they face in the criminal trial.

Clearly, that is manifestly unfair, and appears to be the product of a historical error. Originally in English law, there was no "separation of powers", thus if the sovereign brought a case against a person, as an absolute monarch, it would present no real difficulty in that the person had to submit to the monarch's ultimate judicial power as well. As English law progressed to the Westminster Parliamentary system, however, and then was ported over to the Australian Colonies, then the new Australian nation, with its formalised separation of powers[15], the monarch's role as litigant in criminal matters was a conflict in the law.

The right way to proceed is to follow the doctrine of the separation of powers. Revisiting the three roles of the separate branches of government under Queensland's constitution, we see that the appropriate litigant for any court action on behalf of the sovereign is the executive government:

1. The Parliament: ***makes the law***
2. The executive government: ***administers the law***
3. The Courts: ***apply the law***

This leaves an interaction between two separate branches of government, the executive and the court, where the defendant in the criminal matter is now flanked by two branches of government who have no inherent conflict of interest, dealing with laws created by a third branch, as shown:

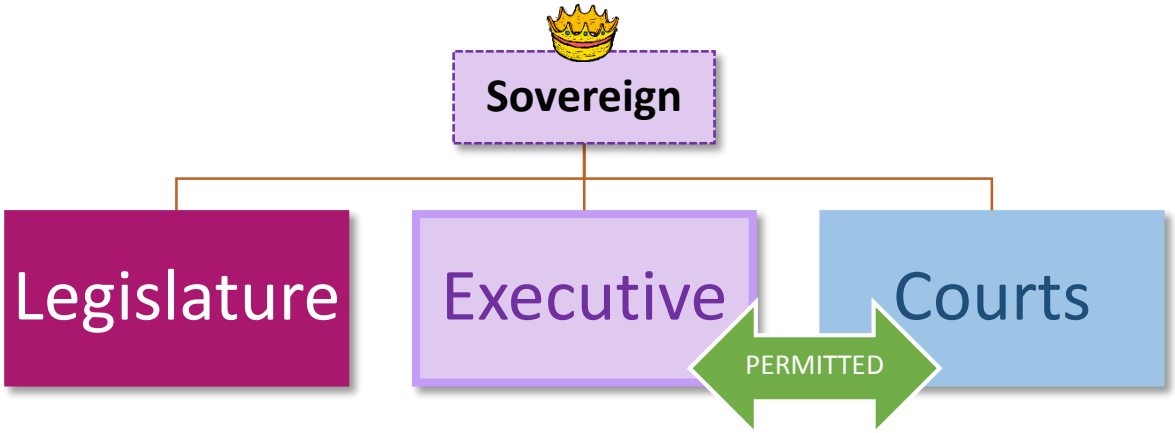

Fig. 3 - Executive government of Queensland brings a criminal case before courts

So the case would become *"The State of Queensland v the Defendant"*. In the Constitution of Queensland, the executive government is called "The State":

> *51 Powers of the State*
>
> *(1) The Executive Government of the State of Queensland (the State) has all the powers, and the legal capacity, of an individual. (Constitution of Queensland 2001)*

Therefore, it is permissible under the separation of powers that "The State of Queensland" or the executive government litigates criminal matters, thus ensuring fairness to the accused. This takes

[15] *Kable v Director of Public Prosecutions (NSW) [1996] HCA 24*

advantage of the central reason for the separation of powers, to ensure that there is no abuse of executive power by the sovereign, and individual freedoms are upheld.

Risks inherent to a change, and in the status quo

A possible implication of this historical error, which places the constitutional sovereign's name on an indictment, is that it endorses some practice or philosophy from its origin, a time when an "absolute monarch" might have been the litigant in criminal matters. The symbolism is an endorsement of the system of absolute monarchy, which was repudiated by the system of parliamentary democracy, brought in to eradicate, partly, the associated harm to individual freedoms.

Put simply, having the Queen on indictments holds the appearance of "rigging" the outcome. It sends a message which might be interpreted as a governmental desire to confound defendants, with ambiguity about who their accuser is, and a push to degrade their legislative freedoms. Laws should enhance, uphold and protect freedoms, as propounded by s4 of the Legislative Standards Act:

> ***4 Meaning of fundamental legislative principles***
>
> *(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.*
> *(2) The principles include requiring that legislation has sufficient regard to—*
> *(a) rights and liberties of individuals; and*
> *(b) the institution of Parliament.*

The key phrases in this important legislation which forms the spirit of all laws in Queensland, are *"parliamentary democracy based on the rule of law"*, and that laws firstly have regard for *"rights and liberties of individuals"*, even before the Parliament.

The remedy, which is to put the actual litigant's name on indictments, *The State of Queensland*, removing The Queen or sovereign from a role at all in litigation, is a complete solution, which puts freedom first. However, one of the most obvious criticisms of the approach that makes the State of Queensland the litigant, replacing the Queen as litigant for criminal matters, is that it implies that past cases may be at risk of being invalidated where an apprehension of bias existed. And what of the *Australia Act*, and the implication that from 1986, there was no actual legislative basis for The Queen prosecuting criminal matters in her name?

Putting aside the more troubling implications, this problem could be resolved with legislation, which altered the status of those cases, precluding the reopening of earlier criminal matters on that basis, from a certain juncture.

On the other hand, maintaining the current arrangement has inherent legal risks for the sovereign, at present Queen Elizabeth II. One such risk is that while in Australia, courts tend to tolerate this inherent conflict in the system, international judicial bodies would be unlikely to view such an arrangement as sensible. One example might arise if, for example the State of Queensland breached international human rights law, as part of a prosecution before a court. A well known example of a similar type of behaviour is where the Queensland Government has sought to arbitrarily detain persons not based upon actions they have done, but based upon a societal group or association they belong to, via the Vicious Lawless Associates Disestablishment Act, or VLAD Act.

While it is the executive government of Queensland and not the Queen herself who contravenes Article 9, 14 or 22 of the International Covenant on Civil and Political Rights (ICCPR) when they prosecute a person that way, that is inherently offensive to international law, it could be "The

Queen" who is literally exposed to the risk or the "strict liability", as the *named* litigant, of any possible legal action under the first protocol of the ICCPR.

The first protocol allows parties who have been victims of contraventions of the ICCPR to take their grievance directly to the United Nations Human Rights Committee. This was successfully done by Ms Corinna Horvath recently[16], a Victorian woman who was beaten by Victorian police in her home, and who took her grievance to the United Nations, under the first protocol of the ICCPR. While The Queen herself is very much at arms length from such conduct engaged in her name by the State of Queensland, bringing a complaint against her to the United Nations might persuade her to see the error in her ways[17], for example saying that she, as a person who should know better, has tacitly supported a breach of law by voluntarily retaining her name on legal action which is inherently unlawful, repugnant to the Queensland and international communities, doing things that her government, by virtue of its earlier ratification of the ICCPR in 1980, promised never to do. Under Article 50 of the ICCPR, where the federal government enters into an agreement under the ICCPR by ratification, then this is binding on all state governments in Australia, including Queensland.

In such cases, the accepted protocol appears to be to avoid any embarrassment to the sovereign. But where her name is so overtly used in prosecutions, and where this indicates by reference to statute law, Her Majesty's personal involvement, it might be hard to suggest that she is merely a "proxy" for another entity.

The real heart of the issue for Her Majesty or her heirs, is not so much that they may be found to have contravened international law, but that her moral authority, or "goodness" is brought into direct question by such a legal challenge in an international forum like the United Nations. What that might actually mean to the person of the sovereign, rests upon her personal "contract" with her people, made in the 1953 coronation oath:

> *"…solemnly promise and swear to govern the Peoples of…Australia…according to their respective laws and customs"*

To make that promise is to be "good", "wholesome", and never break the law. Finding oneself as sovereign, theoretically speaking, being asked to explain in a public forum why one's conduct is a breach of the law and so one's own oath, destroys the authority which derives from the oath.

So allowing the status quo to be maintained is inherently risky as well, and at present, it is likely that international law will become more, not less important, with increasing globalisation of Australia's affairs, including its legal affairs.

The conclusion, of course, is that it is durable as a legal solution, sensible for the constitutional sovereign, and right in law to ensure the State of Queensland is named as the litigant in criminal cases, reflecting their real status as administrators of criminal law in Queensland.

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[16] *Communication No. 1885/2009 United Nations Human Rights Committee 8/5/2014*
[17] *http://www.abc.net.au/news/2014-05-05/victoria-breached-un-covenant-in-treatment-of-corinna-horvath/5431690*