LAW SOCIETY NORTHERN TERRITORY

THE NORTHERN TERRITORY'S CRIMINAL JUSTICE SYSTEM FAILS THE TEST

By John B Lawrence, President of the Criminal Lawyers Association of the NT

The theme of the Eighth Biennial Criminal Lawyers Conference in Bali was general but bold: "The Criminal Justice System: Serving the Community or Giving it a Serve?". A record number of delegates from all over Australia attended the conference to share views and hear presentations on the question of whether Northern Territory criminal laws and procedures pass muster. By the end of the week the verdict was unequivocal. No, they do not.

The conference was held at the Bali Hyatt Hotel at Sanur Beach between 23-29 June with a record attendance of 117 delegates — 70 delegates from interstate and 40 from the Territory, including members of the judiciary, academics, legal practitioners and experts in criminal law.

A week of presentation, comparison (historical and jurisdictional), exposé and discussion revealed that not only is our criminal justice system presently failing to serve the community adequately but is actually in a period of regression. Things are worse now than they have been in the recent past. In a way, the grappling of the theme via the 20 presentations and related discussions was an examination— a "check up" — on the health of the criminal justice system. The diagnosis was grave: to put it mildly, "things are crook at Tullarook".

The sweep of the general papers was wide ranging. There were also many instructive papers. There was black letter law such as in South Australia Solicitor General Brad Selway QC's paper on the present law on the *Bunning v Cross* public policy discretion. There were two papers on the role, effect and recent developments of DNA evidence working within the criminal justice system. A forensic psychiatrist, Dr Walton, also presented a paper on the role of the forensic psychiatrist in the criminal justice system and how best we criminal lawyers could utilise them.

The majority of the papers had a more general approach to subjects and issues.

These included Anita Delmedico's interesting presentation via overhead projections of late nineteenth century Darwin gaol art. There was, as always, an Indonesian presentation. This paper was jointly delivered by Mr Arianto Subriato from the equivalent of the Legal Aid Office in Jakarta and

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Melbourne Barrister, Michael O'Connell who worked in that office for a period. Their paper outlined recent cases where charges of corruption had been laid and tried against members of the former Suharto regime. It graphically illustrated a regime in transition attempting to grapple via the law with a previously corrupt regime.

There were also two papers, presented by Jonathon Hunyor and Liz Fullerton SC, on aspects of the recent international phenomenon of people smuggling. Amidst all this was a play reading written by Rex Wild QC on the Eureka Stockade Trial.

The keynote speakers were judges: Justice Weinberg from the Federal Court and Chief Justice Doyle South Australian Supreme Court.

On day one Justice Weinberg presented his paper on the independence of the judiciary. His thesis, although covering the topic generally, honed in on sentencing discretion and the recent attacks on it from mandatory sentencing legislation. In a thorough, thoughtful and balanced examination which included the positions in the USA, Canada, Australia (both Federally and interstate, including recent judicial guideline judgments from the Supreme Court of New South Wales) His Honour concluded that the mandatory provisions existent here in the Northern Territory (s 78A) for our property offences were the most extreme: "a radical departure from the past practice in relation to sentencing law in Australia". He suggested that the encroachment on judicial independence by those provisions could provide grounds to challenge their constitutional validity.

Chief Justice Doyle addressed the conference theme itself discussing how the court system and the legal profession properly serve our community. His focus was not on substantive criminal law and procedure but on how lawyers and the court systems serve the community. In that context he identified specific "targets" and by so doing posed questions as to whether such targets were hit or fulfilled by the courts and/or the legal profession. These targets were: accessibility (which he saw as a failure); an effective judiciary; an effective jury system; the treatment of court users; communicating with the community and adjusting to change. His conclusion was that in all those areas there was "plenty of room for improvement".

In between these two keynote speakers the conference heard arguably the best presentation coming from Richard Ackland of *Media Watch* fame. His paper was entitled, "Adventures of a Reptile on the Justice Beat". His thesis and presentation was, as ever, robustly critical. Although legally trained Richard is a journalist by trade. His world (the fourth estate) like ours has certain substantive and procedural rules as well as "fundamental principles".

Serving the public is very much to the fore in the journalist's world. With that in mind Richard bravely stepped into the lion's den and presented his main argument which was that the Melbourne *Age*'s recent revelations concerning allegations of multiple rapes by ATSIC Commissioner Geoff Clarke was a justifiable exercise by the said newspaper. Needless to say the questioning of that thesis by the delegates (many gobsmacked) was extensive and, thanks to the time limits at play, might still be going on as I write. Nevertheless Mr Ackland stuck to his guns manfully and not without genuine persuasion. It was a vivid exercise in displaying two separate professions each convinced they know what is "right". It was not only a gutsy performance but one which helped the conference as a whole develop an appropriate and helpful level of general and self critique.

The main reason for the negative conclusion given to the NT criminal justice system was the legislative developments introduced to our judicial system in recent years by the present Northern Territory Government.

Although our beloved s78A of the

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Sentencing Act was always going to be up for criticism the paper which undoubtedly had the greatest, indeed unanimous, affect on the conference delegates was that presented by the Northern Territory's Director of Public Prosecutions, Rex Wild QC, and the Director of Legal Aid, Richard Coates. Their presentation was also greatly assisted by the commentary given by Supreme Court Justice Steve Bailey. It outlined the unsatisfactory nature of s164 of the Criminal Code which creates mandatory life imprisonment for murder — a Northern Territory law which this publication and our Association have consistently highlighted and criticised. All, of course, to no avail.

The paper, presented on Tuesday afternoon of the conference, had an effect on the delegates at the time and a genuinely lasting effect on the conference as a whole. It outlined and explained mandatory life and all its shortcomings. "One size fits all" was seen to produce gross injustices. As to its stupidity "the law for itself speaks" but it was the case examples given by both Rex and Richard that really brought home to the delegates the unsatisfactory nature of it. Most importantly Justice Bailey revealed the lie that there was some kind of review after 20 years either by the Parole Board and/or the Executive Council. His exposition of the applicable legislation made it clear that the Northern Territory Parole Board ("NTPB") has no statutory basis to be involved in any way whatsoever as regards a prisoner sentenced to

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mandatory life imprisonment for murder. Thus all this political talk about 20 years is precisely that, political talk. As Richard Ackland put it in his column in *The Sydney Morning Herald* following the conference, "Life Means Forever In The Never Never". At present the Northern Territory law is that all lifers will not be released; they will die in gaol.

The case examples given by the presenters had great power. In the recent Spielberg movie "AMISTAD" former USA President and great criminal trial lawyer, John Quincy Adams, when beseeched by the representatives of the Amistad slaves to appear for them initially declined but he gave them gratis advice on how to win their court case. He said:

> When I was a trial lawyer a long time ago I realised, after much trial and error in the court room, that whoever tells the best story wins the case.

The "true life" stories given by Rex Wild and Richard Coates exposed the injustices that presently exist in our system of criminal justice. There was none more moving than that of Tommy Neal.

Tommy was a 21 year old Arrente man who was in Mt Isa in 1980. He was destitute, hungry and intoxicated on methylated spirits when he broke into a house and stole 15 cents, a radio, some food and a blanket. He was disturbed by the home owner, an elderly man, who Tommy punched and kicked in the ensuing struggle. The victim died from resultant head injuries. Although there was no evidence of intent to kill or cause grievous harm he was convicted of murder in the Supreme Court of Queensland at Mt Isa in April 1981, the Crown having relied upon the felony murder provisions of the Queensland Court. He was sentenced to the only available sentence, being life imprisonment. Tommy's tragic move was in 1987 when he applied for transfer via the Prisoners (Interstate) Transfer Act so that he could be housed in the Alice Springs Gaol and thus enjoy family visits. If he had remained a prisoner in Queensland he would have been eligible for release on licence after serving 13 years of his sentence and most likely before he had served more than 15 years. In 1996 he petitioned the NT Administrator to exercise a prerogative of mercy to release him from custody on licence. That was rejected. In October 2000 Tommy completed his twentieth year in gaol and presently still sits with all other lifers with no prospect of release.

This example, and others given by the presenters and in the subsequent discussion, made the point that historically one of the strongest arguments for not having capital punishment was the realisation that — human beings being human beings — errors will always play a role. If a system is dependent upon human beings, no matter how sophisticated it is, it cannot be fail-safe. The criminal justice system and the way it determines guilt and fashions a sentence is highly dependent on the human being; the role of the witness and all its vagaries, the juror; the judges; the prosecutors; the defence lawyers; one or many or all, can get things wrong.

In that regard the case of Cosmos Tippiloura was outlined during the discussion. Cosmos was a 30 year old Tiwi man at the time of this crime. He was a popular and generally law abiding member of his Nguiu Community. He was married and had children. One night he came home from the Club. He had been drinking and was intoxicated. He found a Tiwi man in his bed lying asleep and naked . This had happened on an earlier occasion when he had growled at the man and chased him away. He attempted to do the same again. The man didn't move. He kicked him to no affect. He then went into the kitchen and came back with a fighting stick and hit the man two-three times to the head. By so doing he fractured his skull from which the man tragically died. Cosmos said in his resultant police ROI that he didn't mean to kill him (of course our definition of NT murder requires only an intention to cause grievous harm). Cosmos was arrested that night and charged with murder. Prior to any trial defence lawyers produced a psychiatric report from the late Dr Joan Ridley, forensic psychiatrist. She said that Cosmos was, at the time of the assault, probably suffering from "abnormality of mind", therefore diminished responsibility would apply to reduce murder to manslaughter. The defence also had evidence available from an anthropologist, an expert on Tiwi culture, who stated that the conduct by the deceased would have constituted in Tiwi law provocation to Cosmos when so confronted thus reducing again the charge of murder to manslaughter. Now for reasons that are not known and cannot even be fathomed Cosmos's charge of murder was not settled. It went to trial. Human beings being human beings etc, etc. The gauntlet of mandatory life was tragically run. Both Dr Ridley and the anthropologist, Mr Robinson, gave their evidence for the defence. After six hours the jury returned a majority verdict of guilty to murder and Cosmos was sentenced to life imprisonment. That was in April 1991. Since then he has seen many prisoners come and go doing fixed periods for manslaughter convictions whose facts were far graver than his case and who had far less defences available. Like Tommy Neal his present incarceration until he dies is a grave wrong.

Following the presentation of the paper and the resulting discussions, at the tea break I deliberately bailed up one of the interstate judges who was present and asked him, "what do you think about that then?" He was clearly moved by the session and said two words, "absolutely disgraceful". Enough said.

On the closing day of the conference it was decided to pass one resolution only although several were floated during the week. Following the effect of the expose on mandatory life imprisonment the previous movers decided to withdraw all others so as not to detract from the weight of a single conference resolution. The resolution was:

> A request to the Northern Territory Government to review its position in respect of mandatory life imprisonment for the offence of murder so that it is relatively consistent with the law in the rest of Australia.

This Association will continue in its efforts to effect that resolution. I would also like to think that when the delegates of the ninth Biennial Criminal Lawyers Association Conference are by the pool in 2003 Tommy Neal and others will not still be in Berrimah Prison.

Of course the conference wasn't all doom and gloom. Many of the sessions were highly entertaining and many a good laugh was had during them. Justice Weinberg in the beginning formally addressed the delegates on the threat to judicial independence by mandatory sentencing. He wasn't the only judge at the conference aware of the threat to judicial independence. One judge in particular covered himself in glory on a daily basis by making contributions during discussions which were, as it happened, normally at the same time of the day. Indeed, some delegates set their watches by these pronouncements. Many by the pool would heed the time, realise it was time for Justice-what's-his-name to pay out on the evils of executive encroachment and government generally, re-enter the conference room solely to hear the daily spray. The courageous judge's contributions were not only colourful and controversial. They were telling and accurate.

Betwixt all the highbrow analysis and discussion the conference included social intercourse; nasi gorengs, bintangs and extramural adversarial activities between prosecutors and defence lawyers — the more robust and colourful occurring in the Sari Bar at Kuta.

Again Tom Pauling QC excelled with Tom's Terrific Tours which he conducts for the lucky delegates who book in advance. By all accounts it was once again a raging success. Tom Pauling was made an Honorary Life Member for his consistent contribution to CLANT over past years.

The traditional last hurrah for the conference was the Gala Dinner. It was held in the beautiful gardens of the Hyatt. Good food and wine was followed by the traditional after dinner speech given this year by former Territory Tyro Ian Barker QC. As former Solicitor General and the author of the Self Government Act back in the 70s Mr Barker had a few things to say about how those legislative powers were being used nowadays in the criminal jurisdiction. His comments weren't complimentary.

He dedicated the speech as a toast to the lawyers of the Northern Territory. His anecdotes were, as usual, hilarious, highlighting the unique, ridiculous and sublime nature of practising law in the Territory. It included parrots being eaten by dingoes and a former Territory Supreme Court Judge who wore riding boots and shorts under his gown. However, at the end he made the historical point that the Northern Territory Government's recent legislation in criminal law (mandatory sentencing and the proposed new anti social legislation) was akin to the disgraceful previous laws in the Territory which dealt with Aboriginals in such a discriminatory manner. He considered that the present legislators who had done this should feel ashamed.

As the four day event concluded many delegates observed that the Bali conference has effectively become *the* criminal law conference for the whole of Australia. There were suggestions made by several interstate delegates that in future the CLANT Conference formally "come out" and become the National Australian Criminal Lawyers Conference. That suggestion was considered but not agreed to by the Committee of CLANT.

The majority of the papers presented at the conference are available in bound form. There are an additional four papers in loose-leaf form also available. It is hoped that in due course the other three papers presented at the conference will be published in written form. Limited copies of the bound and already published papers are available at a cost of $25 per set.

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