Reflections on a month of horror and law

John Lawrence, president CLANT

Our Association like Australia reels from the horror of the murders committed in Kuta on Saturday night 12 October 2002. As I write (week ending 18 October) it's early days but all portents are terrible.

Clearly a large number of young men and women have been indiscriminately murdered in the most horrendous of circumstances.

Countless others have been dreadfully injured and scarred both physically and mentally. At this stage one has a massive dread that over the next few weeks the full picture and the ramifications from the bombings will increase the hurt, suffering and grief that Bali and Australia presently reels under.

All news is bad and getting worse.

Our Association's 9th Biennial Conference was to be held in Bali in July of next year. That conference, like all others, is known as **"the Bali Conference"**. It has always been held in Bali and our Association during the last eighteen years has developed a close and affectionate relationship with Bali and its people.

The street obliterated by the bombings would be all too familiar to the hundreds of conference attendees over the years. We have all walked that street. We have all eaten and drunk in those restaurants and bars which are now charred ruins.

On behalf of our Association and members I extend our deepest sympathies and condolences to the loved ones of all the dead and injured from the Kuta disaster of 12 October 2002. Our Association will be making a significant contribution to the relief fund.

As I write, in the scheme of things, our Association and its conference doesn't really count. However, July 2003 is nine months away and because of that our Committee met on 15 October to discuss the situation.

It was decided that the 2003 Conference could not be now in Bali. Alternatives were discussed.

At this stage the likelihood is that there will be a 9th Biennial Conference in July 2003 and it will be in Port Douglas, Queensland.

Whether there will ever be another "Bali Conference" is questionable.

I don't think these recent events are ones that can be said will be forgotten and things will eventually return to normal: "normal" might just be no more.

They said the world changed on 11 September 2001 and they might be right.

Personally, and I stress personally, I have always found Bali a rather incongruous place. The Bali we tourists or conference delegates visit has a veneer quality to it.

It's not *really* what we make it out to be: the tropical paradise of happy locals and holiday makers benefiting from each other's mutual relationship. There's quite a lot more to it. You glimpse the other side of it every day. From the moment you arrive at the airport.

Whilst being bedecked by friendly guides with garlands of frangipannis you're still watching the uniformed military with their surly expressions and sub machine guns. One senses there's something else.

You learn of Bali's history which teems with wars which have ravaged its population, not to mention its natural disasters which have done likewise. There is also the juxtaposition of Hindus within the world's largest Muslim state. And of course you are in Indonesia and so overhanging all is that pall of a truly military state.

My first trip to Bali was to the well known three star motel in Sanur, perhaps unfortunately named, Swastika Bungalows.

It allowed a view of both sides: over the back wall of our lovely garden/pool/court yard you could see the third world: serious poverty in the shape of children working in fields, rubbish tips and the concomitant odour.

Look back and there was the garden and pool resplendent with corpulent Europeans baking and glistening, cocktails to hand.

The carnage of 12 October may well have split asunder the prospect of a return to that workable yet tense relationship of opposites. Certainly as far as hosting a conference of lawyers and eminent jurists is concerned.

Only time will tell I suppose.

Meanwhile, closer to home. I ask this question, is our criminal justice system going nuts? In the last few weeks the national and local press both written and otherwise have been going feral on the recent judgment of Gallop J concerning the application of customary law to a sentence regarding unlawful carnal knowledge. Unfortunately, my lips have to be basically sealed as it would appear that the Justice's appeal is now going to be appealed by our DPP but, really, one can't help but wonder what is going on when one looks at the front page of *The Australian* of Thursday 17 October. *(Editor's note: Just before going to print, the DPP announced he was going to appeal the Gallop decision)*

continued next page

CLANT, from previous page

The good news is that at long last Mr Glen Dooley has made the front page of *The Australian*. But having said that, some of the features in that article really makes one wonder what on earth is going on. Before the article, what happened in this case? Mr P, a 50 year old traditional Aboriginal from West Arnhem Land pleaded guilty to unlawful carnal knowledge.

The girl in question was 15. She was, in customary law, his wife. The maximum penalty for that crime is seven years.

The magistrate sentenced him to 13 months imprisonment to serve four months. He appealed that sentence.

Gallop J found that the sentencing magistrate erred in taking into account factors which were irrelevant: to wit, facts relating to non consent.

The Crown agreed the learned magistrate had erred. The appeal was upheld and the sentence of imprisonment was suspended with one day to serve.

Paul Toohey of *The Australian* struck.

Of course the case is sub judice so I can't say too much. However, it's worth pointing out in this "debate" (for want of a better expression) that despite the shameful nonsense of Terra Nullius which Mabo eventually corrected, our Territory criminal jurisprudence has had for decades taken into account in various aspects and varying degrees the application of Aboriginal customary law.

In many respects it has been the jewel in the Crown of the Territory's criminal common law.

What Gallop J did in this case before him, and since so wrongfully reported by *The Australian*, was nothing new. Our Courts have been applying the same to good effect for years.

Now, since the reporting of this case Aboriginal customary law and its role (if any) is being spotlighted, if not attacked. This is disturbing. The attacks are predictably shallow and easy. One swallow does not make a summer.

The individual aspects of this case, curial and (importantly) *non* curial (courtesy of our intrepid stirrer Paul Toohey) are being used to attack and undermine customary law and its application in Aboriginal communities. Again that's easy and shallow.

If there is one thing that we know about Aboriginal communities historically and currently it is that they are in varying degrees of disarray and dysfunction.

There are many reasons for this.

However, taking away the application of customary law based on the individual facts of this case as reported by the media would be a very disturbing development.

In many ways customary law, its retention and application along with language and the like, are the main things which prevent Aboriginal communities regressing into worse dysfunction.

What alternatives are being posited by the customary law attackers: we know from experience there aren't any and VB, kava and dope will increase its disastrous effect.

I don't think I've heard one word about that aspect which, of course, is further away than the end of one's nose than the other aspects which have been easily and hotly argued in this case.

To return to the front page article of the Thursday 17 October 2002 *Australian* which graphically illustrates the disturbing and misguided nature of this whole debate. Here are some quotes from the same:

> "The DPP appears to have responded to public disquiet about P's case."
> "The DPP's approach will reverse the position it took in an Appeal Court last week."
> "However, *The Australian* revealed on the weekend that despite the evidence of a form of tribal marriage, the girl originally complained to police that she had been repeatedly punched and raped by P when he "took delivery" of her."

What a charming state of affairs that story illustrates as far as our criminal law is concerned at the moment.

To date our courts have listened to and when considered appropriate, applied, to varying degrees, Aboriginal customary law. It has been a productive and impressive piece of jurisprudence.

It would be unfortunate that such an approach is to be undermined, if not Shanghai'd by a combination of this individual case (with its facts as reported as opposed to those facts before the Sentencing Magistrate), the media and politicians.①