NT criminal law: the good, the bad and the stupid

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For various reasons, many of which are difficult to fathom, it now seems that state and territory governments and their respective oppositions have very little to argue about or differ from each other on, except the prize topic of law and order.

Don't get me wrong, its not that they are really opposed on that "problem". In fact, in many respects they are in agreement on the fundamentals: *"Hanging is too good for them and throw the key away"*! It is the differing ways in which their muscles are flexed and their toughness manifested that makes them apparently different. Make no mistake: there is no debate as to how crime and its apparent increase can be tackled. You don't get any bums on seats by instigating that type of debate. Oh no, its *"look how tough we are"* versus *"we are tougher than you, you wimp"*. It's not a particularly edifying debate. The end result of this vulgar spectacle is invariably stupid or bad law.

In some regards, the NT has a justifiably proud criminal jurisprudential record. There are other aspects of its criminal jurisprudential record however, which are far from impressive, both historically and recently.

THE GOOD

Well before the High Courts decision in Mabo, our Territory Supreme Court had accepted in appropriate cases relevant Aboriginal customary law and taken it into account in deciding the question of sentencing:

> *In every case where I have been under a duty to pass sentence on a native, irrespective of the charge, I have heard such evidence as has been available throwing light on the background and upbringing of the native. Where tribal law or custom might possibly be relevant, I have in every case endeavoured to inform my mind on these topics either by hearing evidence in court or perusing any material available to me which seemed to be on the point.*
>
> – Justice Kriewaldt in Queen v Anderson (1954) NTJ240-249

Likewise, our Supreme Court has also taken into account the relevance of the offender's Aboriginality per se when considering sentence:

> *It is not that I countenance one law for the white man and one law for the black man, but the white man's law in dealing with the black man must take full cognizance of his difficulties, his beliefs and his conditions.*
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> - Justice Muirhead in R v Jungala SCC 97 of 1977

How about this priceless dicta from the same judge when dealing with the sentencing of a 14-year-old Aboriginal kid who was appealing a three month suspended jail sentence for stealing a car and other driving offences:

> *...in dealing with Aboriginal children one must not overlook the tremendous social problems they face. They are growing up in an environment of confusion. They see many of their people beset with the problems of alcohol, they sense conflict and dilemma when they find the strict but community based cultural traditions of their people, their customs and philosophies set in competition with the more tempting short term inducements of our society. In short, the young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration. Seldom is anything solved by putting him in prison. If he becomes an offender, he requires much by way of support and perhaps much by way of discipline to set him on the right track...We say this as experience shows that the offences of young Aboriginals tend to occur in repetitive waves, sometimes associated with petrol sniffing, as has recently been the case at Papunya, sometimes associated with other sociological causes, peculiar to a tribal geographical group. Prison sentences previously suspended may thus frequently be served and the sentence of imprisonment, which in the case of the average adult hangs like a sword of Damocles, may be nothing more than a challenge to many of these young people.*
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> – Justice Muirhead in Jabaltjari v Hammersley (1977, 15ALR94)

All of this dicta was well before the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The way our Supreme Court developed that approach to the sentencing of Aboriginal offenders (only possible of course by having judicial discretion to so effect) is the jewel in the crown of the Northern Territory's criminal jurisprudence. In 1990, I presented a paper at a Criminal Lawyers Conference ran by the International Society for the Reform of Criminal Law.

continued page 16

CLANT, from page 7

That paper "bragged" about how the Supreme Court of the Northern Territory, by the application of sentencing discretion had been able over the years to take on board and accommodate Aboriginal customary law and Aboriginality per se in the sentencing of Aboriginal offenders.

At the same session on sentencing, a Texas Supreme Court Judge presented his paper on how they sentenced in Texas. It was with a slide rule. From memory it went like this: down one side the offence; robbery, rape, assault etc. Along the top: sex, race, age, priors and other subjective features. You then apply the slide rule and there is your sentence. He didn't mention the other famous Texas non-discretionary sentence being execution of which there have been hundreds carried out in the last ten years.

Anyway, at the end of the session, I felt the Territory came out streets ahead of Texas as far as sentencing offenders was concerned.

THE BAD AND THE STUPID

Historically the Territory has little to be "braggy" about. Welfare ordinances and the way they dealt with the Stolen Generation: direct discriminatory legislation against Aboriginal people and the law that allowed for and affected Aboriginal offenders to be hung at the scene of the murder are gruesome and relatively shameful aspects of Territory criminal law.

In recent years the wheel seems to have been turning the full circle back to those days. Most of the legislative additions to our criminal law in the last ten years have been either bad and/or stupid. Of course we had the three year experience with mandatory sentencing for property offences. Grossly disproportionate sentences, manifest injustice and no effect on the crime rate served to expose that caper for what it was: a crude political exercise. It was a Territory legal development that was bad not just stupid.

The new NT Labor Government has proceeded to replace bad laws with daft laws in many respects. A good example of their legislative manifestation of getting tough is their new drug laws, and in particular the "Drug House" laws.

What total baloney that is. Talking of baloney, remember one of its predecessors which was if anything more stupid: The *Public Order Anti-Social Conduct Act*.Thankfully that tripe was repealed but the Drug House laws are just as daft. Our Association said at the time of their introduction that they were cosmetic window dressing to show the public that the new Government was being tough and we maintain that just over six months after they have been on the statute book.

The law falsely created a dragon so that the Government could then slay it. It gave the police some extra powers which they didn't need as well as setting up further legal procedures which they probably didn't want. The proof of the pudding is to look up at the score board which tells us there have been all of two houses declared Drug Houses and one woman charged with supplying cannabis from such a Drug House.

I understand she is pleading not guilty to the charge. So much for breaking the claimed link between drug offences and property offences.

Mind you the laws have had a tough effect on her in that she has already been evicted from her Housing Commission flat: great stuff!

The posturing by the politicians in selling and justifying this garbage is as facile as the laws themselves.

One can't help but fear for the future as regards criminal legislative developments if the level of the debate is anything to go by.

Only in the last month or so we've heard suggestions from a Darwin City Council alderman to introduce some sort of "pass laws" to address the chronic problems caused by alcoholism and itineracy that constantly blight the streets of Darwin.

Not only would such a scheme offend fundamental human rights it would clearly breach the provisions of the *Racial Discrimination Act* on the grounds of race. What's more the practicalities of establishing and effecting such a system don't bear thinking about.

More importantly such a proposal, once again, fails to address the real causes of this very real blight in our community.

The problem is deep rooted and needs to be addressed at that level. It's not that politicians from all sides don't know that. Again, none of this is new.

We had, more than ten years ago, the comprehensive recommendations from RCIADIC which covered the field: social, economic and employment aspects within Aboriginal communities themselves, plus the secondary recommendations concerning alcohol rehab, sobering up shelters etc.

Just to confirm how none of this is new, let's quote once again Justice Muirhead from the mid 80s:

> *As is usual in this depressingly frequent type of offence, the root cause was alcohol. For over 10 years sitting in this Territory, I have endeavoured to draw attention to the need for something to be done about the marketing, the regulation and supply of alcohol, particularly to our Aboriginal community, the need for detoxification units, modern treatment and rehabilitation centres. I have not been alone in this exercise but it's been entirely fruitless. The courts can achieve little, if nothing. The Aboriginal councils appear to recognise the problem and it is the Aboriginal people who almost entirely suffer its consequences. One can only keep hoping that at national level there will be recognition of the seriousness and complexity of the problems coupled, I hope, with some action.*
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> - James Muirhead, R v Mungkuri and Nyaningu, 1985 12 Alb 11.

As can be seen, most of the good is in the past while most of the bad and stupid is recent: watch this column! ①