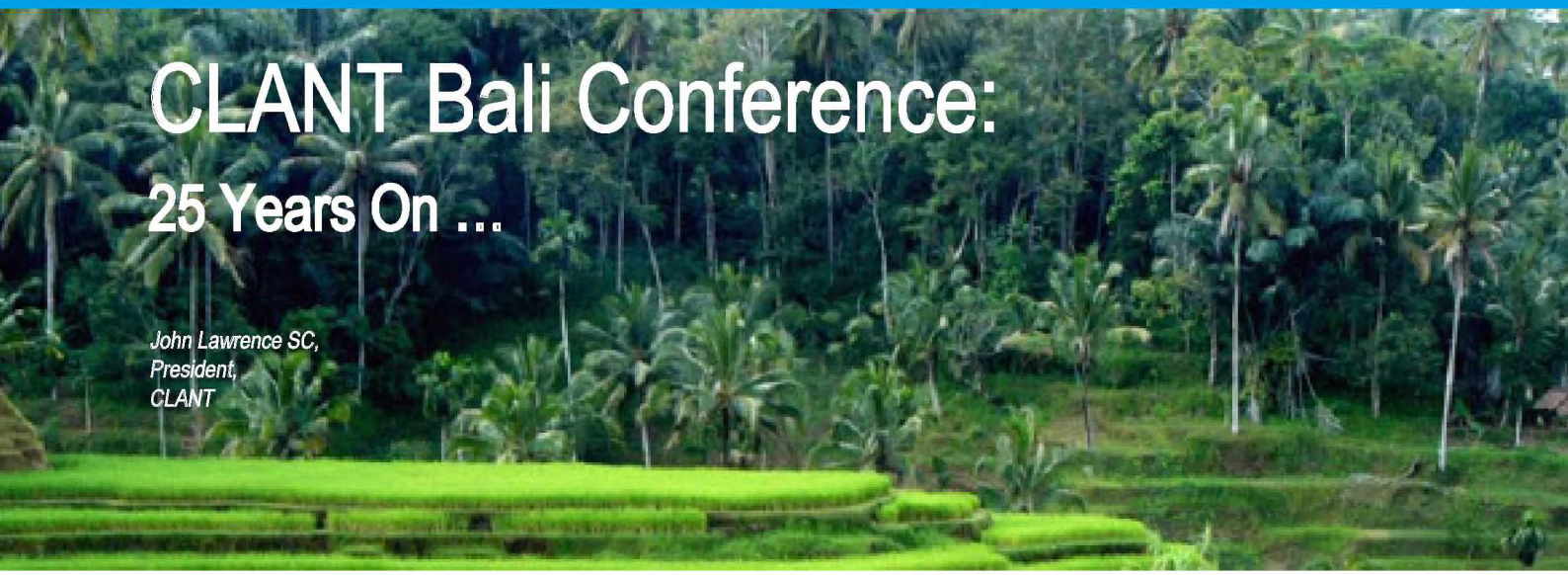

CLANT Bali Conference:

25 Years On ...

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In June this year CLANT held its 13th Biannual Criminal Lawyer's Conference. As always, apart from Port Douglas in 2003, it was held on the idyllic island of Bali. Once again the venue was the sumptuous Bali Hyatt at Sanur.

This Conference was the largest ever with over 200 delegates. From commentators best qualified to opine, through experience and regular attendance, I was reliably informed that this was considered the most successful CLANT Conference ever.

CLANT as an organisation was founded 25 years ago on the 22 August 1986. The signatures on the inaugural document, thus being the founding fathers, were Colin McDonald, Pat Loftus, and Ray Minahan. There were others in the background. Tribute was paid to them when I opened the Conference at the Hyatt this year. Over the 25 years CLANT has been blessed with dedicated practitioners, who have worked tirelessly either as committee members or former Presidents. They all deserve a pat on the back and the 25th year celebration involves a dinner to be held probably sometime in October 2011 (date to be announced).

To return to the 13th Conference to the Keynote Address, we were again privileged to have the Attorney-General, the Honourable Ms Delia Lawrie MLA open the Conference and deliver a speech on her Government's intentions concerning the justice system. In the main it involved the outlining of their radical strategy concerning alcohol management plans and associated measures.

She told us that the plan was radically interventionist and a world first. It is designed to address the high level of alcohol abuse and dependency and its nexus to crime generally and in particular, violence and domestic violence. The backdrop of gross alcohol consumption and abuse and its linkage to offending is nothing that can be denied. I made the point in summing up the Conference that any approach such as this, if it has a prospect of reducing the increasing problem is worth considering and having a crack at. The proof of that radical pudding will be in the eating and only time will tell.

The Attorney-General also mentioned the recent creation of the SMART Court which flows from therapeutic jurisprudence, but as Richard Coates pointed out in his paper its limited by virtue of the fact that it does not include offenders charged with crimes of violence. The Attorney-General ended her presentation by encouraging the legal profession to be proactive and contribute to the law and order debate.

Keynote Address

Our Keynote Speaker was Robert Richter QC from the Melbourne Bar. Over the years CLANT has had many distinguished Keynote Speakers and Robert fulfilled the task with aplomb. We have been blessed with the likes of Noel Pearson, Anthony Mason, Michael Kirby and Major Mori to name a few. Robert Richter QC delivered a thunderous paper addressing the official Conference theme: ***"Extremes in Justice"***.

It was a personal delight to meet Robert Richter QC and hear his story, which is in any man's language, remarkable. He is Russian by birth, born in the southern Republic of Kyrgyzstan. He was brought up in Israel. His family arrived here in Melbourne when Robert was aged 13. He had no English when he arrived. He was educated at Balwyn High School and read law at the University of Melbourne. He was admitted as a Barrister in 1971 and took silk in 1988. He has a reputation for high profile cases, including representing Julian Knight from the Hoddle Street disaster as well as successfully defending the Victorian Police Officer Cliff Lockwood, and of course of most recent times, defending Mick Gatto from the Underbelly "theatre of the absurd".

His Keynote Address was entitled

"The More things Change, the more they Don't".

In many respects the fundamental aspects emerging from the 13th Conference were addressed not only by Robert Richter QC but also papers immediately following from Tom Percy QC and the joint paper delivered by Dr Marich and David Grace QC plus the presentation of the paper on Indigenous imprisonment by Professor Chris Cunneen and the paper on Justice Reinvestment by Melanie Schwartz.

Mr Richter QC's paper was uncompromising. It was thorough, erudite and compelling. From his vast experience and knowledge of the criminal law as well as philosophy and political philosophy he delivered a comprehensive thesis which spoke of extremes in the law and injustice.

To have a presentation quoting John Stuart Mills' political philosophy of "selfprotection" was a real indication that the Bali Conference has "arrived". He focussed on four areas relevant to the theme. They were mandatory sentencing; drug laws; sex cases and double jeopardy.

He spoke as a conservative when it comes to the 'core values' of the Criminal Justice System. He declared an abiding faith in the jury system and its efficacy and suggested that it could also do the sentencing process as well as the verdict process. He did make some points on sentencing which bear repeating. For victims of crime, no sentence is adequate. That is the reality; we all know this. He described the recent Victorian DPP's campaign for longer sentences as a ***"crusade"*** and made the interesting point, almost Ivan Illich like, that the criminal law itself makes crime. He talked about Stuart Mill's point concerning preventing harm to others and to his rule of self-protection which allows for maximum liberty and allows, what our justice system shall always need, namely generosity and altruism.

When talking of the significant difficulties surrounding ancient allegations of sexual offence and the victim determining the time to lay the charge, he suggested the concept of restorative justice should be explored and considered. His was a thorough presentation using the Conference theme to expose the deterioration and the unsatisfactory state which our criminal justice system has reached and where it still continues to lurch.

We then got some specific particulars on this lurch from the next presenters, namely Tom Percy QC followed by Dr Marich and David Grace QC. Tom Percy QC exposed the lie and furphy which is the sentencing principle of general deterrence. His paper was comprehensive and analytical and drew on Australian and International examples and authorities. While doing so he pointed out the vulgar and dishonest reliance placed on this principle by our politicians. This again touched on the deleterious relationship between our politicians, the media and criminal law reform. The Northern Territory Attorney-General called it the **"race to the bottom",** while Mr Robert Richter QC called it **"fear and loathing".** It is that old chestnut, the political law and order auction which drags us and lurches us into the abyss.

Tom Percy QC illustrated the fallacy with the examples of death penalties in the USA. Out of the ten States in America with the highest murder rate, eight of them have capital punishment. From the ten States with the lowest murder rates, only four have capital punishment. He told us that in 2010 there are still 23 countries which have the death penalty, although in 2009 there were 40. He suggested that if we had a referendum on the death penalty, the result would be marginal. Tom did not only expose the fallacy, he suggested what does work. He pointed out evidence that increased police resources impact positively on the crime rate whereas a sentence in principle of general deterrence does not.

What Tom said was true, but the point was made that it was not exactly radical. Australian, New Zealand, English and Scottish Judges have all been saying the same concerning general deterrence for literally ever. Tom said we need a wholesale change of attitude. He made the point that being tough on crime just does not work, it's a fallacy and it is time to take a different approach. His last statement resonated. He suggested that if politicians want to get tough and serious then they should get tough and serious on our education system; as well as the problems of poor parenting caused by social and economic dysfunction.

Dr Marich and David Grace QC came in Mr Percy's wake with more particulars on the painful, fruitless, non effective lurch to the right on sentencing. Both explained to us the weird recent campaign on sentencing prosecuted by the recently resigned Victorian DPP. The Victorian DPP had been submitting to the Courts that they were not bound by current sentencing practices. Also that they can forget what their learned body, the Victorian Advisory Council on sentencing, tells the Court. Also while you're at it, forget the fact that Victoria has the lowest rate of imprisonment per head, and guess what? the lowest level of crime in the country. Dr Marich then explained to us on the particulars with an analysis of aggravated burglary and the penalties attached, while David Grace QC reminded us of the badge of fairness which is necessary in any sentencing exercise as outlined by the High Court decision of Lowe on parity. Mr Grace QC ultimately submitted that this development ill befits a just and free democratic society.

A very positive paper was presented by Professor Chris Cunneen from the James Cook University to explain the Australian Prison Project. His was an historical and empirical analysis of imprisonment and the racialisation of Australia's imprisonment rate. He described

A Quarrel QC's in Bali

Back row L-R: Jack Karczewski, Tom Percy, Suzanne Cox, Rex Wild, David Grace.
Front: The Hon Austin Ashe AC, The Hon Justice Dean Mildren RFD, The Hon John Nader, Robert Richter, Michael Abbott, The Hon Lex Lasry.

the Australian Northern Territory penal culture historically from the public executions of Aboriginal offenders to lashings and floggings, to the current disproportionate imprisonment rates for Aboriginies. His viewpoint was that from the nineties on, the jailing of Aboriginal offenders has reached a new orbit, a new planetary system. Sure it is, as Richard Coates illustrated with his statistics in his paper, that crimes of violence and domestic violence have risen, and true it is that the number of victims, the number of Aboriginal women victims, has risen, but surely that is the point. The point that Robert Richter QC, Tom Percy QC, Dr Marich and David Grace QC made; the point we know. For the last 20 years Aboriginal imprisonment rate has doubled and it does not work, it does not reduce crime; it does not make our community safer, it does not help the children and wives. Apart from the respite period, the prisoners will return to their same communities, and if those communities are not changed socially and economically then the same crimes will inevitably be committed. Further, it should be said that any Scandinavian or whatever rehabilitation prison program delivered in Northern Territory prisons is not going to fix up offenders so that when they return to the same dysfunctional community they will not reoffend. This is the same **"pie in the sky"** as the principle of general deterrence. It is a fallacy. Further, the massive recent increase in Aboriginal imprisonment is not so because the violent crime rate has increased. A lot of it has to do with the Government playing tough on law and order and amending the legislation accordingly, whether it be the *Bail Act,* the *Criminal Code,* the *Evidence Act,* the *Sentencing Act, Misuse of Drugs Act etc.* All have undergone almost six monthly amendments, invariably pandering to the clamour of *NT News* headlines. Amendments designed to increase the securing of convictions and the gaol population. It is simply not all there to protect Aboriginal children and women. As to this ***"race to the bottom",*** on Professor Chris Cunneen's evidence we are already there.

Melanie Schwartz a lecturer from the Law Faculty, University of New South Wales, followed Professor Cunneen. She prefaced her presentation with ***"and now***

the good news". She informed the Conference about American initiatives to combat their crime rate. It is called ***Justice Reinvestment***. It is a scheme to take funds from Corrections and Jails and put it into the areas where the prisoners come from and where the crime occurs. She presented an analytical dissertation which was an empirical paper based on real data. The scheme also had a mercantile lure; for instance a hundred or so prison beds in fact equals three thousand school desks. The endeavours in the USA have produced seriously positive results. Similarly, in the United Kingdom, the Government there has been bringing in legislation to basically affect a reduction in the gaol population. They have a non-parole period now of fifty per cent across the board. They have amended their *Bail Act* and taken other measures directly designed to reduce their gaol population.

In summing up I made the point that if the Northern Territory Government says, with no little force, that alcohol is the major problem, and cause of dysfunction, crime, violence and domestic violence, and therefore it takes up arms against it with a radical approach and an approach, never before taken elsewhere in the world, then CLANT sits up and pays attention and says we will give it a go. Likewise then CLANT says, with ***justice reinvestment*** which has a scientific empirical basis; it has data; it has powerful mercantile and financial arguments, then the Northern Territory Government should get across this area fully and properly and try and introduce it into our justice system. CLANT will be urging upon our government the need for it to attempt justice reinvestment measures in some of our "hottest spot" communities. With any luck Professor Cunneen and Ms Schwartz will be consulted to effect the same.

Conclusion

There were of course many other interesting papers delivered throughout the week, some of macro, some of micro flavours in criminal law. In between there were hot and colourful discussions as well as the usual loud social component which makes the Bali Conference the singular experience it is. Roll on number fourteen.

The question has to be asked, how have we as law practitioners allowed this to happen? The Northern Territory Bar Association has virtually been silent on the last twenty years on these issues. CLANT has had a bit of a go. We have said consistently that if the game plan is to reduce crime and make the streets of Darwin, Alice Springs and Aboriginal communities safer the punitive approach, apart from respite, will not work. The evidence is one way. This was pointed out by Rex Wilde QC in his interesting presentation. He made the point that you have to invest money and time into education ensuring that children attend schools and pre-schools and to producing people that come out and not go the wellworn only track. Also time and money needs to be invested in employment.