SUPREME COURT OF QUEENSLAND

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Introduction

The conference invites an immediate focus on international criminal activity. While man's capacity for wickedness is an enduring constant, its manifestations have evolved over time, and so necessarily, in the criminal context, have prosecutorial approaches.

Over my lifetime, for example, one saw an international focus from the mid-twentieth century on racketeering and other mafia based crime, narcotics trafficking and the like, multi-jurisdictional crime which among other things inspired prosecutors to follow the money to offshore jurisdictions, perhaps the genesis of current confiscation thrusts and Wickenby type investigations. And necessarily, multi-lateral agreements for mutual assistance were developed to facilitate the investigation and prosecution of that sort of crime – though problematic if not impossible where one of the regimes does not respect the rule of law, as for example, in the Somali piracy cases.

Other dramatically engaging species of multi-jurisdictional crime developed over time. The 1960s witnessed the hijacking of aircraft. The 1970s saw hostage taking, maritime terrorism, the bombings of embassies. Then 11 September 2001 galvanised attention upon international vigilance, and led to counter-terrorism legislation and policies which on one view may in fact challenge the rule of law, rule "by law", not rule "of law"- a rhetorical query. Extreme security responses were and are warranted. The challenge for legislatures has been to erode rights no more than necessary.

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[1] I have been greatly assisted in the preparation of this address by my Associate, Mr Leonid Sheptooha

More recent years have seen us examining crimes against humanity, war crimes, genocide, with the advent of the Rome Statute and the International Criminal Court.

Of a different kind, we have confronted the evil of so called “sex tourism”, and the abuse of the internet to facilitate the sexual exploitation of children, which often has a multi-national aspect: a Thai child abused by an Australian tourist, dissemination of images via a server in, perhaps, California, with the laundering of any financial returns through an account in,say, the Cayman Islands – highlighting the need for levels of co-operation from jurisdiction to jurisdiction, co-operation in three areas: the detection, the investigation and the prosecution of such crimes.

Other recent manifestations of multi-jurisdictional crime include the abduction of children by supposedly caring parents from one jurisdiction into anonymity in another far distant, major environmental dereliction, and cross border tax evasion.

Then there is the phenomenon of illegal entry, really dating in major proportion I suppose from the Vietnam War, though always a product of endemically impoverished living conditions, producing the current disastrous “people smuggling” trend.

The challenges spawned by these apparently never-ending evolutions in the manifestations of man’s capacity for evil, evil of criminal proportion and international dimension, provide ample warrant for this important conference, and demonstrate its potential utility.

In examining the individual subjects going to make up the conference program, we should not lose sight of the over-arching framework, which is no less than the rule of law itself: the universal application, to all citizens, of a legal framework of reasonable proportion, with the safeguarding administration of an independent accountable judiciary. In my experience, conferences like this one offer a useful opportunity to place particular subjects, individually significant as they may be, into that broader spectrum, an opportunity not so apparent in our busy, day to day, professional lives. Lawyers play an important role in the

lives of individual people, in areas as fundamental as liberty and freedom. This necessitates wisdom and understanding which conferences like this can re-inforce or regenerate.

The Conference theme, "a world without boundaries: crime in the 21st century," immediately draws one to that force for good- and evil, in our 2010 world, the internet, and I will first speak a little about that; then venturing into a few disparate topics drawn from the Conference programme which have particularly engaged me: public confidence in sentencing, decriminalization of drugs, how penal statutes are being drafted, and issues arising from two criminal cases on which I have recently sat.

Internet crime

The past three decades have seen the internet develop rapidly, evolving from military and academic origins to become "a critical part of the communications infrastructure of most modern economies."[2] Its importance in daily life is undeniable, and one need look no further than Facebook, with over 500 million active users[3], and sites like Ebay, Twitter and Youtube, to acknowledge a far-reaching global influence. In Australia alone there are 9.1 million active internet subscribers.[4] There is no doubt the internet has brought with it a "transformation in global communications, delivering new opportunities for business, service delivery, information sharing and communications."[5] With these benefits, however, have come new threats, and the technology, while not only changing the way we live, has also changed the face of crime in Australia and around the world.

The rapid mobility of money, information, ideas and commodities via the internet has created new opportunities for cyber-criminals and new challenges for law enforcement agencies. Cyber crime has now extended far beyond the nuisance hacker of the 1990s.

[2] House of Representatives- Standing Committee on Communications, 2010. "Hacksters, Fraudsters and Botnets: Tackling the Problem of Cyber Crime- The report of the Inquiry into Cyber Crime", 1.
[3] See Facebook Press Room: http://www.facebook.com/press/info.php?statistics.
[4] Australian Bureau of Statistics, December 2009. "Internet Activity, Australia", 1.
[5] Above n1.

The Standing Committee on Communications' 2010 Report of the Inquiry into Cyber Crime reveals it is now far more likely to be a "loosely-connected network of hackers, middle-men and organised crime who combine to commit large scale online crimes for significant profit."[6] Modern internet crime is diverse, colourfully encompassing everything from hacking, botnets[7], spam, email scams and extortion to phishing[8], identity theft, identity fraud, DNS based attacks and malicious software including viruses, worms and trojans.[9]

It is this bemusing array of cyber crime, coupled with the fundamentally insecure and unregulated nature of the internet[10], which has meant the flourishing of crime in the online environment. Compounding the problem is the fact that cyber criminals continue to adapt, develop and exploit new technologies as a response to anti-cyber crime regulation.[11] The enormous difficulty in collecting data and information about internet crime is a further impediment for law enforcement agencies, as is the circumstance that cyber criminals are increasingly targeting victims in other countries, in order to take advantage of jurisdictional barriers to law enforcement investigations.[12] As a result, the incidence of internet crime, both globally and in Australia, has increased dramatically over the past ten years, and continues at an alarming rate.[13]

According to a 2008 survey by security vendor AVG, Australia then had the highest incidence of cyber crime in the world: more than 39% of us had fallen prey to it.[14] In 2007, the Australian Institute of Criminology reported that 14% of Australian businesses experienced one or more security incidents in the 2006-07 financial year, and in 2008 alone, the Australian Communication and Media Authority received 4291 reports daily, of

[6] Ibid.
[7] This involves controlling an infected computer over a network. The infected computer is known as a "bot".
[8] Phishing describes an online attempt to assume the identity of, or mimic, a legitimate organisation for the purpose of convincing users to divulge personal information such as financial details, passwords, usernames and email addresses (above n1, 19).
[9] Australian Federal Police, "E-Crime" at http://www.afp.gov.au/policing/e-crime.aspx.
[10] Above n1, 10.
[11] Above n1, 35.
[12] Above n1, 37.
[13] Above n1, 31.
[14] Fujitsu Australia Ltd, 2009. "Submission to the Standing Committee on Communications", 3.

the infecting of Australian computers with malicious software.[15] Further, in 2007, the Australian Bureau of Statistics estimated that 30, 400 Australians had been the victims of online phishing scams and 76, 000 were victims of online credit card or bank fraud.[16] This prevalence prompted the General Manager of the Australian Computer Emergency Response Team, Mr Graham Ingram, who will later address the Conference, to state recently[17] that:

> [Cyber crime in Australia] is getting out of control and we are losing. And I think that, with the pressures coming on us over the next few years, if nothing is done to change the current direction we will lose faster.

An unfortunate reality, but one we must face, is that we are all potential victims of this sort of crime, whether government agencies, major corporations, private businesses or home users. It "crosses many technological, conceptual and institutional boundaries" and through its high prevalence, has a real impact on many Australians and Australian businesses, the most obvious being economic.[18] This threat is not likely to diminish in the near future, and particularly so given the growing rate of high speed "always on" broadband services in Australia,[19] and public pressure for a National Broadband Network. An additional concern is that the user-friendly nature of new technology means computer users will require less expert knowledge and will therefore be more vulnerable to cyber crime. Fortunately, technology will also create new opportunities for control.

The transnational threat posed by cyber crime is of increasing concern for the global community and in the past 18 months, major e-security policy reviews have been undertaken in the US, the UK and Australia.[20] These reviews, which in Australia

[15] Above n1, 33.
[16] Australian Bureau of Statistics, 2007. *Personal Fraud Survey*, pp 14, 21 ,24.
[17] Above n1, 35.
[18] Above n1, 41.
[19] The ABS reported that in 2009, Australian household broadband connections grew by 18% to 5 million.
[20] United States: *Cyber Space Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure*, White House, 29 May 2009; and United Kingdom: *Cyber Security Strategy of the United Kingdom: safety security and resilience in cyberspace*, Cabinet Office (UK), June 2009.

culminated in the Government's 2009 *Cyber Security Strategy*, reflect the importance governments are attaching to e-security both as a national and international issue.

These concerns add some weight to the relatively intriguing, but perhaps none too practical notion, that the internet should simply be "turned off." On the other hand, the vast majority of internet use is legitimate and productive. One hopes that through improved research and data collection, Australian law enforcement agencies will become more successful in securing online safety and raising community awareness of the threats.

The current Chairman and CEO of Google, Eric Schmidt, once remarked that "The internet is the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we have ever had." The Conference will raise the question, perhaps in more light-hearted than serious manner, whether we should once and for all end the "experiment in anarchy" and simply turn the internet off.

I turn to the antithesis of anarchy, the stable operation of the sentencing court, which nevertheless, for all that stability, still manages to inspire a fair measure of public debate. I recently acted as commentator on a paper delivered by Professor Arie Freiberg on the subject "The Victorian Sentencing Advisory Council, Engaging the Community." I will this morning echo some of the points made in that commentary, particularly in relation to public confidence in sentencing and the establishment of a sentencing advisory council in Queensland.

Public confidence in sentencing

My first engagement with the prospect of the establishment in this State of a sentencing advisory Council occurred some years ago. Rather out of the blue, as I was driving to the airport to pick up my 90 year old mother who was returning from Townsville to Brisbane, a journalist telephoned asking for a comment on the Queensland Law Society President's proposal for the establishment of a Council here.

Fortunately I knew something about the approach of the Victorian Council, because I had previously attended a most helpful seminar on that subject in Melbourne.

I was subsequently reported as expressing opposition to the establishment of a Council here, on the ground it would be unnecessary, and because the financial resources would better be deployed into direct court services.

I was nevertheless impressed by two particular capacities in the Victorian Council: first, its research capability, for example into the frequency of particular offending, bearing on the need for deterrence, and to provide government with a well-informed basis for legislative reform; and second, its educative function in relation to the community.

As to the former, sentencing courts and appellate courts are often told of the need for deterrent sentences, but not given reliable information about the extent of such offending, such as would justify, say, a lifting of the tariff otherwise applicable.

As to community education, a better informed community may be more likely to understand the sentencing process and appreciate the reasoning behind particular sentences imposed. It is fairly clear that trenchant public criticism of particular sentences erodes confidence in the process, although in my experience that is a temporary phenomenon fairly soon overtaken by the resilience of the system and probably the realisation that the controversial cases account for only a miniscule fraction of the sentencing work daily accomplished in the courts of the State.

But it is the fact that insufficiently informed criticism of the work of the sentencing courts continues, and no doubt that has fed our government's interest in establishing a comparable Council here.

I continue to support those potential capacities for a Queensland Council.

As to guideline judgments, it is interesting that none has been given in Victoria over some years. Again, that more structured mechanism in the Court of Appeal could be potentially useful, notwithstanding the appeal court in Queensland has over the years given a number of judgments of comparable status.

One of the research objectives of the Victorian Council is to gauge public opinion. That is I would think a daunting task. Judges regard themselves as generally in tune with such community expectations as may reliably be gauged. An example is the need for strong sentences to deter crimes of personal violence, and the commercial trafficking in dangerous drugs. But beyond such fairly obvious matters we may run the risk of riding the unruly horse of public policy or opinion.

I recall in this context the counsel of Sir Samuel Griffith in *Deakin v Webb* (1904) 1 CLR 585, 625 as to how courts should not proceed:

> "I hope that the day will never come when this court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a court weak enough, to adjourn the argument simply in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the court to shirk its responsibility, and cast its duty upon another tribunal."

Those words are as apt, a century later, as they were at the inauguration of the High Court. Public policy is potentially an unruly horse, as is determining the public interest on which it is based.

Successive parliaments of this State have respected the wisdom that appropriate results are best secured through the exercise of a comprehensively informed but generally unfettered judicial discretion. This is an area where Judges are acutely conscious of the need to gauge reasonable community expectations. The legislature has been prescriptive

to the extent of imposing maximum penalties and, for example, listing considerations to which the sentencing Judge must have regard. But beyond that, it generally falls to the Judge to determine penalty, and he or she would hope thereby to reflect the public interest. Judges are sometimes criticized for undue leniency, where the passion of the moment blurs appreciation of the conscientiousness with which the Judge has approached the task. Judges cannot bend to every breeze that blows. As Brennan J said in *Dietrich v R* (1992) 177 CLR 292, 319, "contemporary values" which should relevantly inform the judicial process are not "the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community." But the difficult question remains, how are those relevant values to be gauged"

We will need to be careful to ensure that our sentencing advisory council does not become a de facto further Court of Appeal. It will need to refrain, for example, from comment on the adequacy of particular sentences, because that is a matter for the Court of Appeal, and such comment could have the potential to erode confidence in the work of the courts in both the trial divisions and at appellate level. I acknowledge however that the Council's role will be of broader intent.

Drawing from what we are told of the Victorian experience, I consider that our Council has the potential to make valuable contributions to community understanding of what is a critically important process. At a more particular level, it should contribute substantially to the information which courts may be given as to the prevalence of particular types of offending and though with some more difficulty, as to community expectations in relation to outcomes, and assist government to frame desirable legislative change.

I now turn from sentencing to another area which transfixes public opinion, the drug decriminalization debate.

Interdiction or decriminalisation- what works with drug crime?

Across the globe, nations approach drug policy in radically different ways. In the People's Republic of China and various Muslim nations including Indonesia, drug traffickers and even those found guilty of possession of narcotics, are dealt harsh prison sentences and may even face execution. At the other end of the policy spectrum, many people perceive the Netherlands, and in particular Amsterdam, as leading the way in drug liberalisation. Despite never having legalised drugs, that country has long maintained a drug tolerant culture. Most countries, however, like the United States, Australia and the UK, fall somewhere in the middle.

Ten years ago, I visited Zurich and was struck by the Swiss Government's heroin-assisted treatment and other harm reduction measures, still in place today. I observed an emaciated intravenous drug user injecting himself with heroin in a government sponsored injecting room, known as a "fixerraume" in street jargon. I also witnessed the lawful supply of heroin to addicts, extraordinarily enough heroin obtained by the Swiss Government itself from elsewhere and then sold to users. As a judge committed to traditional notions of criminal justice, it was, as you may appreciate, quite a disturbing experience. Despite this, however, I will at once say that I saw the Swiss initiative as involving an enlightened and unprejudiced response to a remarkably difficult social problem for that country. Whether it would effectively translate to ours is a separate question. What I find most interesting, although not altogether surprising, is that the debate about various forms of drug liberalisation, including the policy of decriminalisation, remains as highly topical and polarising an issue today as it was a decade ago.

The sad reality is that unlawful drug use remains all too prevalent in our society. Recent statistics reveal that two in five Australians aged 14 years or older have used an illicit drug at some time in their lives and that 13.4% of Australians will have used illicit drugs in the previous 12 months.[21] In 2005, drug related deaths in Australia totalled 1388[22] and in 2004 alone, 357 deaths were attributed to accidental opioid overdoses.[23]

[21] AIHW, "2007 National Drug Strategy Household Survey- Preliminary Material", 12.
[22] Australian Bureau of Statistics, 2007. "Deaths Collection", 1.
[23] Australian Institute of Health and Welfare Canberra, 2007. "Statistics on Drug use in Australia 2006", 46.

These matters, taken with the unrelenting parade of drug cases before the courts, regular police detection of trafficking and dealing, and a substantial flow of drugs into the country, confirm the need for continuous vigilance; and also if possible, creative solutions. When faced with this information, many are driven to ask whether the current mechanisms are working optimally. It is with this in mind that I now briefly turn to the issue of drug decriminalization and in particular, the situation in Portugal.

Europe's most liberal drug laws do not belong, as is commonly assumed, to the Netherlands, with its many marijuana haze filled "coffee shops", but to Portugal, the only EU member to have expressly decriminalized drugs.[24] On July 1, 2001, Portugal became the first European country to officially abolish all criminal penalties for drug possession for personal use, including cocaine, heroin, methamphetamines and cannabis.[25] Under the new legal framework, all drugs were "decriminalized" while not "legalized." As a result, drug possession for personal use and drug usage itself are still legally prohibited, but violations are withdrawn from the criminal realm, with violations deemed exclusively administrative.[26] Drug trafficking, of course, continues to be prosecuted as a criminal offence.

Portugal's drug policy is based largely on the argument that fear of prison drove addicts "underground" and that incarceration was also more expensive than treatment.[27] Under that country's current regime, people found guilty of possessing a small amount of drugs, being less than a ten day supply[28], appear before a panel comprising a psychologist, a social worker and a legal adviser, for the consideration of appropriate treatment. The treatment may be refused without criminal punishment. In 2001, the year of decriminalization, Portugal had some 100, 000 heroin addicts, about 1% of its entire

[24] Greenwald, G. 2009. "Drug Decriminalization in Portugal- Lessons for Creating Fair and Successful Drug Policies", Executive Summary.
[25] Szalavitz, M. 2009. "Drugs in Portugal: Did Decriminalization Work?" *Time Magazine Online (April 26)*, 1.
[26] Above n23.
[27] Ibid.
[28] Ibid, 3.

population, and the rate of HIV infection from injection was among the highest in Europe.[29] The introduction of the liberal drug policy was a highly divisive issue in the socially conservative and largely Catholic nation, initially heavily criticised as a policy which would open the country to "drug tourists" and also exacerbate Portugal's drug problem.[30] What has been the effect then?

A 2009 report commissioned by the Cato Institute, concerning the period 2001-2006, found that judging by "virtually every metric, the Portuguese decriminalisation framework has been a resounding success."[31] Significantly, none of the "nightmare scenarios touted by pre-enactment decriminalization opponents, from rampant increases in drug usage among the young to the transformation of Lisbon into a haven for 'drug tourists', has occurred."[32] The data indicated that decriminalisation had "no adverse effect on any drug usage rates in Portugal, which in numerous categories are now among the lowest in the EU, particularly when compared with States with stringent criminalisation regimes."[33] Following the first 5 years of decriminalisation, Portugal had the lowest rate of lifetime cannabis use in people over 15 in the EU at 10% and rates of lifetime use of any illegal drug among 13 to 15 year olds fell from 14.1% to 10.6%. Lifetime drug use in older teens, which had risen from 14.1% in 1995 to 27.6% in 2001 also fell to 21.6%.[34]

Since 2001, the total number of drug related deaths for every prohibited substance either declined significantly or remained constant, rates of new HIV infection caused by the sharing of infected needles substantially dropped and new HIV cases among users fell from 2508 in 2000 to 220 cases in 2008. Also, the number of people seeking treatment for drug addiction more than doubled.[35] Interestingly, in the five years post decriminalisation, the prevalence of drugs in Portugal was below the EU average and for almost every

[29] Frayer, L. 2010. "Is Portugal's Liberal Drug Policy a model for US" *AOL News Online*, 1.
[30] Above n24.
[31] Above n23.
[32] Ibid.
[33] Ibid.
[34] Ibid, 11.
[35] Above n28.

narcotic, the lifetime prevalence rates are far lower in Portugal than in Europe generally.[36] According to Glenn Greenwald, the author of the Cato Report, the decriminalisation of drugs "has enabled the Portuguese government to manage and control the drug problem far better than virtually every other Western country does".[37]

Where the 1980s saw a "global policy trend towards harsher criminalisation approaches, even at the user level", there are signs in 2010 that countries are changing tack. [38] Most recently, for example, Mexico, Argentina, Canada and Switzerland have considered the possibility of decriminalizing certain drugs.[39] The Cato Report concludes with the undemanding recommendation that the "Portuguese model ought to be carefully considered by policymakers around the world."[40] In the US for example, it has recently been argued that decriminalization would have the effect of decreasing the overcrowded prison population, reducing the demand for drug dealers and increasing the treatment of drug addicts; currently treatment is only available to 15% of addicts in the US.[41] But it appears decriminalization enjoys little support in Washington.

This Conference presents you, ladies and gentleman, with an opportunity to consider the decriminalization debate and discuss whether such a policy would translate effectively to Australia and elsewhere overseas. The issue is one of dramatic complexity and I have little doubt it is an issue which will linger around for some many years to come.

Consistently with the diversity of the Conference programme, I now move to something completely different, and that is the language of the model penal statute, and its potential to mislead.

Modern Legislation- Taking Liberties with Language

[36] Above n23, 22.
[37] Above n24, 2.
[38] Above n23, 2.
[39] Ibid
[40] Ibid, 28

I address this issue by reference to some of the language used in Australia's counter-terrorism laws.

In the nine years since the terrorist attacks in the US on September 11, 2001, the Australian Government has introduced over 40 new counterterrorism laws.[42] They have been the focus of a great deal of criticism, much of which has centred on what has been described as "unwieldy drafting" and their "indeterminate scope."[43] Indeed, after a detailed review of terrorism trials in Australia since 2003, when Zeky Mallah became the first person to be charged with a terrorism offence under the new laws, one commentator suggested that the "complexity that arises in a terrorism trial is not due to the type of evidence presented to the Court, but rather to the manner in which the elements of the terrorism offences are framed in the *Criminal Code*… the focus should be upon clarifying and simplifying the language of the counter-terrorism laws."[44]

Even a glance at the range of terrorism offences in Divisions 100-103 of the *Criminal Code* reveals not only substantial complexity, but also the potential breadth of those provisions.

It is beyond the scope of this address to meander through the numerous provisions relating to terrorism in the *Code*. I merely offer two examples of vagueness.

The first relates to section 101.6, which provides that "a person commits an offence if the person does any act in preparation for, or planning, a terrorist act". What amounts to "an act done in preparation for" is not defined in the *Code*. There is no prescription of the degree of connection there must be between the preparatory act and the terrorist act itself.[45] It is left as an arguably vague concept said to encompass "a wide array of behaviour, much of which would only be indirectly linked to the terrorist act in question."[46]

[41] Forish, E. 2010. "Viewpoints in the Drug Decriminalization Debate", 1.
[42] Young, M. 2009. "Civil Rights v National Security" *LIJ* (October issue), 6.
[43] McGarrity, N. 2010. "'Testing' our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia" *Criminal Law Journal* (34), 113.
[44] Ibid, 119.
[45] Yehia, D. 2008. "Anti-Terror Legislation- Consideration of Areas of Legal and Practical Difficulties", 9.
[46] Ibid.

The definition of "terrorist act" under the *Criminal Code*, itself the subject of criticism, expands any lack of fixed clarity by its inclusion of a "threat of action."[47] Accordingly, acts merely preparatory to the making of a "threat of action" may amount to an offence pursuant to section 101.6. Furthermore, a person may commit an offence under this provision notwithstanding that "a terrorist act does not occur"[48] or that "the person's act is not done in preparation for…a specific terrorist act."[49] The Crown does not have to prove a specific terrorist act and "the offence does not require any evidence of time, date or location of an alleged attack."[50] This means that acts merely preparatory to the making of a threat of action against an unspecified target may constitute an offence.

The grasp of the legislation is broadened by the circumstance that a "preparatory offence" may occur whether or not the conduct constituting the alleged offence occurs in Australia and whether or not the results of that conduct ensue in Australia.[51] Followed to a logical conclusion, a host of unusual scenarios may arise. It seems that any number of apparently innocuous acts, from sending a text or writing an email to meeting a friend overseas could potentially be condemned as preparatory to the making of a threat. It has been observed that the "indeterminacy of these offences becomes even more apparent when the preparatory offences are combined with one of the inchoate offences, for example, the charges of conspiring to do an act in preparation for a terrorist act or attempting to incite another to engage in a terrorist act."[52]

The second example concerns Division 102 of the *Code*, which contains a number of offences relating to "terrorist organisations". It has been said of these offences that they are "even more indeterminate than the preparatory offences" in Division 101."[53] This is because the Court must first determine whether a group is a "terrorist organisation" before

[47] See 100.1 *Criminal Code Act* 1995 (Cth) for definition.
[48] See s 101.6(2)(a) *Criminal Code Act* 1995 (Cth).
[49] See s 101.6(2)(b) *Criminal Code Act* 1995 (Cth).
[50] Above n44, 10.
[51] See sections 101.6(3) and 15.4 *Criminal Code Act* 1995 (Cth).
[52] Above n42, 114.
[53] Ibid.

considering whether an individual actually committed a terrorist organisation offence.[54] A "terrorist organisation" is defined as "an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)" or an organisation that is specified by the regulations as a terrorist organisation, of which there are currently twenty.[55]

One of the difficulties arguably associated with this definition is that it falls to a jury to determine what constitutes an "organisation" as the term is not defined by the *Code*. Is it sufficient, for instance, if the evidence establishes that a group of twenty people come together once a month for a particular shared aim or purpose? The *Code* leaves this question open for the jury. A jury also has to consider undefined and nebulous concepts like "indirectly fostering the doing of a terrorist act".[56] This concept becomes even more cloudy when you consider that the terrorist act may be a "threat of action". Thus, the definition of a "terrorist organisation" under the *Criminal Code* may embrace, "an organisation (term undefined) that is indirectly engaged in fostering the making of a threat." Will a jury confront such an issue with the confidence it brings to bear in dealing with the modern defences of provocation and self-defence?

I mentioned at the outset the challenge for legislatures, in this milieu, to erode rights only so far as necessary. Another is not to diminish the certainty, predictability and comprehensibility of the law, especially in the criminal arena, no matter how powerfully constraining the stipulation for public security.

I conclude with reference to the Conference's last session, and two cases in which I was judicially involved, the Arukun rape appeals and the Attorney-General's appeal against sentences imposed on three participants in the Palm Island riot of 2004.

Legal issues arising out of the Arukun and Palm Island cases

[54] Ibid.
[55] See Part II, *Criminal Code Regulations* 2002 (Cth).
[56] Above n44, 10.

On 13 June 2008, the Queensland Court of Appeal, constituted on this occasion by the three most senior judges available to sit, including the President of the Court of Appeal, Justice Margaret McMurdo and Justice Keane as he then was, delivered judgment in *R v KU; Ex parte A-G (Qld)* [2008] QCA 154. The decision is one of the most significant decisions of the Queensland Court of Appeal in the criminal jurisdiction in recent decades, and the case attracted national and international attention.

The Attorney-General had earlier[57] been granted an extension of time within which to appeal against sentences imposed in the District Court following pleas of guilty by nine adult and juvenile indigenous offenders for their rape of a 10 year old indigenous girl at the Arukun community in the remote western region of Cape York. In the District Court, the adult offenders had been sentenced to fully suspended six- month terms of imprisonment, and the juvenile offenders to 12 months probation with no convictions recorded. The perceived inadequacy of the sentences provoked national and international interest and indeed, outrage. Such was the high level of public interest, that media outlets were permitted to make live audio and visual recordings of the delivery of judgment, which unusually also included a synopsis.

While a myriad of issues confronted the Court of Appeal, I focus on two which stood out in terms of principle.

The first involved the tension between the Court's duty in re-sentencing on an Attorney's appeal, and the circumstance that the prosecutor had in this case urged the District Court to impose non-custodial sentences on all the offenders. The Court of Appeal acknowledged[58] the confirmation in *GAS v The Queen*[59] that, while it is for the sentencing judge alone to determine the sentence,[60] an appeal court might "dismiss [an] appeal on the ground that the prosecution led the sentencing judge into a material and decisive

[57] See *R v KU; Ex parte A-G (Qld)* [2008] QCA 20.
[58] See [2008] QCA 154 [at 93-97].
[59] See (2004) 217 CLR 198 [at 213].

error".[61] On the other hand, that should not occur where the relevant error is explained by the judge's own "failure to appreciate, and give sufficient weight to, exactly what the appellants were admitting, in the circumstances of the case, by their pleas of guilty."[62]

Previous and extant Queensland authorities[63] militate an approach to sentencing whereby the sexual abuse of a child by an adult is regarded so seriously that it "should ordinarily mean detention in custody of the offender, in the absence of exceptional circumstances".[64] The Court of Appeal concluded[65] that it was the judge's independent error which explained the sentences imposed, and that the stance taken by the prosecution in the District Court did not constrain the Court of Appeal in re-sentencing.

The second issue I mention is how the established dysfunctional character of the Arukun community, and the grossly disadvantaged backgrounds of the offenders, bore on an otherwise appropriate level of sentence. The Court of Appeal emphasised the entitlement of all members of the community to equality of treatment in the law's response to offences committed against them, wherever they may reside. However, in *Neal v The Queen*[66] Brennan J as he then was, said:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.

[60] See *R v Black; R v Sutton* [2004] QCA 369.
[61] See also *R v Richardson; ex parte A-G (Qld)* (2007) 175 A Crim R 244; [2007] QCA 294 at 250 – 251 [32] – [34].
[62] See (2004) 217 CLR 198 [at 213-214] and also *R v Pham* [1996] QCA 003.
[63] See *R v Quick; ex parte A-G (Qld)* (2006) 166 A Crim R 588; [2006] QCA 477 [at 589] and the cases there cited.
[64] See [2006] QCA 477 [at 5 and 18-19].
[65] See [2008] QCA 154 and the discussion at paras 99-118.
[66] (1982) 149 CLR 305 [at 326].

Consistently with *Neal*, established dysfunction and disadvantage are relevant to the level of the sentence imposed.

Importantly though, the Court of Appeal stressed[67] that:

> Relevant personal disadvantage must be established by evidence relevant to the particular offender even if that disadvantage arises by reason of the offender's membership of a particular ethnic group. To adopt an approach which proceeds on the basis that the courts may take judicial notice of the supposed effects of a community's dysfunction upon all or any of its members, is to engage in the kind of stereotyping which was deprecated by this and other Australian courts…. This approach diminishes the dignity of individual defendants by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of observing the standards of decent behaviour set by law.

Having considered the circumstances of disadvantage relevantly suffered by each offender, the Court determined that it should "impose the most lenient sentence which may be imposed consistently with the gravity of the rape of a10-year old girl, committed by an adult acting in company with other men."[68]

In the result, the three adult offenders were re-sentenced to terms of six years imprisonment, with parole eligibility after two years and four of the juvenile offenders were sentenced to three years probation, with the other two juveniles being sentenced to three and two years detention respectively, with convictions recorded.

The Court undertook a comprehensive review of past sentences imposed both in Queensland and elsewhere in the nation, for rape committed on a child by offenders while in company. The Court also emphasised the need for unrushed, comprehensive application to the task by Queensland courts sitting on what is known as the "Cape Circuit."

[67] See [2008] QCA 154 [at 133].

I turn finally to the Palm Island case. At the outset, I make clear I do not intend to traverse the Coroner's finding and subsequent District Court and Court of Appeal decisions in relation to the death of Cameron Mulrunji. Nor do I intend to address the sentencing of Lex Wotton in the District Court for his involvement in the riot.

My involvement related to the Attorney General's appeal against sentences imposed on three participants in a riot on Palm Island on 26 November, 2004.[69] Two of the offenders, Poynter and Norman, were sentenced to 12 months imprisonment to be served by way of an intensive correction order and the third, Parker, was sentenced to 18 months imprisonment, suspended after 6 months.

The appeal concerned events following the death of Cameron Doomadgee Mulrunji, on 19 November, 2004 while in police custody on Palm Island. In the week following Mulrunji's death, the Palm Island community, suspecting a police officer to be responsible, held public meetings and tensions rose over perceived lack of police action and proper investigation. After a community meeting on 26 November 2004, approximately 300 people, one eighth of the Palm Island population, assembled at the police station and demanded that the police officers leave. The group threw rocks at the station and police officers and yelled abuse. Ultimately, the officers retreated to a nearby hospital and police barracks and over the next three hours the police station and court house were burnt down. A number of police officers were injured over the course of the riot.

The discrete issue I briefly examine this morning concerns the balance the Court sought to strike between the maintenance of public order and the context in which the riot occurred.

As mentioned, established dysfunction and disadvantage are relevant to the level of sentence imposed. Thus, the "context" and background of the offence may, in certain circumstances, act as a mitigating factor for sentencing purposes. In this case, the riot

[68] See [2008] QCA 154 [at 299].
[69] See *R v Poynter, Norman and Parker; Ex parte A-G (Qld)* [2006] QCA 517.

"was a response to perceived unlawful fatal violence by a police officer on a community member."[70] The majority of the Court held that "for sentencing purposes, [this] point lacks significance" and emphasised what was seen as the far more important consideration of maintaining public order.

The majority held that "[r]ecent and not so recent world history illustrates the immense damage wrought by riots",[71] observing that:

> Involvement in a riot is an intrinsically dangerous enterprise. Riots by nature endanger personal safety and the security of property. They may also, if of a certain scale, jeopardize the long-term health of communities. This riot had all those consequences[72].....Whatever the level of one's perceived resentment, respect for the rule of law must prevail, or the consequence is anarchy, and Palm Island was that evening headed in that dismal direction.[73]

In the result, the Attorney-General's appeals were allowed and the offenders were re-sentenced to terms of imprisonment of 15 months, 18 months and two years respectively.[74]

The Arukun and Palm Island cases attracted the attention of the nation, raising social awareness of the plight and difficulties confronting remote indigenous communities. The significant social issues explored in those cases extend beyond those particular indigenous communities. The death of Cameron Mulrunji on Palm Island was one in a tragic succession of numerous deaths in custody since the Royal Commission into Aboriginal Deaths in Custody handed down its report in 1991.[75] That report revealed that

[70] See *R v Poynter, Norman and Parker; Ex parte A-G (Qld)* [2006] QCA 517 [at 31].
[71] See *R v Poynter, Norman and Parker; Ex parte A-G (Qld)* [2006] QCA 517 [at 37].
[72] See *R v Poynter, Norman and Parker; Ex parte A-G (Qld)* [2006] QCA 517 [at 34].
[73] See *R v Poynter, Norman and Parker; Ex parte A-G (Qld)* [2006] QCA 517 [at 39].
[74] Poynter: sentenced to 18 months' imprisonment with a fixed parole release date after 5 months; Norman: sentenced to 18 months' imprisonment with a fixed parole release date after 4 months; and Parker: sentenced to two years' imprisonment with a fixed parole release date of 28 April, 2007.
[75] Thalia, A. 2009. "Manifestations of Moral Panics in the Sentencing of Palm Islander Lex Wotton" *Current Issues in Criminal Justice* 20(3), 466.

indigenous people constituted 14% of the Australian prison population and were 15 times more likely to be in prison than non-Aboriginal Australians.[76] Indigenous prisoner numbers have continued to increase and as at June 2008, they represented 24% of Australia's prison population.[77] The imprisonment rate for indigenous men also increased by 22% between 2002 and 2006 and the indigenous female imprisonment rate increased by a startling 34%.[78] Indigenous Australian men are 16 times more likely to be imprisoned than non-indigenous men, with indigenous Australian women 23 times more likely to be imprisoned than non-indigenous women.[79]

Other statistics are similarly confronting; indigenous life expectancy is 17 years less than that of the general Australian population;[80] and the rate at which indigenous children are placed under care and protection orders is around seven times the rate for other Australian children.[81]

Ameliorating these positions remains, dismally after so many decades, something the Australian community struggles to achieve, but continue we must. The failures to date should only inspire a renewed determination to succeed.

Conclusion

I conclude by congratulating the organising committee, chaired by His Honour Judge John Robertson of the District Court of Queensland, for devising an interesting programme and securing an array of talented speakers to present it. In adding my own welcome as Chief

[76] *Royal Commission into Aboriginal Deaths in Custody, National Report* (1991) Vol 1 [at 9.3.1].
[77] Australian Bureau of Statistics, 2008. "Prisoners in Australia 2008", 22.
[78] Steering Committee for the Review of Government Service Provision, 2007. "Overcoming Indigenous Disadvantage: Key Indicators 2007", 128.
[79] Ibid, 129.
[80] This statistic, while recorded in 2003, is the most current statistic available. Australian Institute of Health and Welfare and Australian Bureau of Statistics, 2008. "The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People 2008, 154.
[81] Ibid.

Justice to visitors to this State, I wish you all, ladies and gentleman, a stimulating and productive conference.