Good Morning and Welcome.

I acknowledge the Larrakia People as the traditional custodians of this land and their elders past, present and emerging.

I am delighted to open this Law Week 2024 Darwin Community Legal Service Conference which has the theme "Justice / Community / Inclusion".

My speech topic is:

WHAT IS JUSTICE? DEFINING, ACCESSING AND ADMINISTERING 'JUSTICE' IN THE NORTHERN TERRITORY

To state the obvious: 'Justice' is a broad normative concept, which can be understood in many different ways, depending on the context in which it is considered.

Even in the legal context, 'justice' has many facets and means different things to different people.

Victims of crime generally have a different sense of justice from those accused of crimes.

Politicians who pass written laws may have a different perspective on justice from the Judges who must apply the written law.

Judges administering justice may have a different perspective on justice from the lawyers who argue cases before them.

Between the Judges of different courts, and even between the Judges of the same court, there can be different views about the way justice should be administered in a particular case.

Between the lawyers who argue a case and advise their clients, there are different perspectives on what justice requires in any particular case.

Even within ourselves, as lawyers, we often see what then Chief Justice Warren of the Victorian Supreme Court described as:[1]

> ... the demands of two different expressions of justice – one, justice as embodied in the application of the rule of law and legal principles developed over centuries and two, justice as a guiding, philosophical and moral imperative.

[1] M Warren, Chief Justice of Victoria, 2014 Newman Lecture, Melbourne, p 16.

The competition between these two demands is illustrated in a paper written by now Chief Justice Gageler of the High Court[2] who related a story about a jury trial in western Queensland of a prosecution for sheep stealing. When the judge asked the question 'how do you find the accused, guilty or not guilty?' the foreman's answer was 'Not guilty your Honour – provided he gives back the sheep'. His Honour observed that the verdict is perverse to lawyers, but did not seem that way to the local members of the jury. If their concept of justice is one of maintaining social harmony, there is nothing at all perverse about deciding that a man should not face criminal sanction for taking his neighbour's sheep provided he makes restitution. If, as a lawyer, your concept of justice is the common law concept according to the rule of law, the verdict is perverse because the rule of law postulates the existence of a legal rule and imposition of a legal sanction for breach of that legal rule, with the link between the rule and the sanction being the fact of breach, as proved to the relevant standard.

Another illustration might be a lawyer who puts the barely arguable submission that their client's pretty unexceptional circumstances are exceptional to persuade a Judge that a mandatory minimum sentence of imprisonment does not apply, and the Judge who seriously considers the submission, because justice does not warrant a sentence to imprisonment. It might be thought that the rule of law pulls one way, while justice as a philosophical and moral imperative pulls the other.

As lawyers in a free and democratic society, the rule of law is a principle embedded in all of us. I have seen the rule of law described in many ways. At their heart, most descriptions say something like:[3]

> The people and governments should be ruled by the law and obey it and the law should be such that people and governments will be able and willing to be guided by it.

Numerous subsidiary principles radiate from this, all of which will be well known to you. Some of them are: the law is applied equally and fairly – no-one is above the law; the judicial system is independent, impartial and open, with fair and prompt trials and determinations; the law is capable of being known

[2] S Gageler, Justice of the High Court, 'Truth, Justice and Sheep' (2018) 46 Aust Bar Rev 205 at 207.
[3] G de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy*, 1st ed, 1988.

by everyone; people can only be punished in accordance with the law; the presumption of innocence; and the right to silence.

As then Chief Justice Gleeson put it in 2001:[4]

> ... the essence of the rule of law is that all authority is subject to, and constrained by, law. The opposing idea is of a state of affairs in which the will of an individual or a group ... is the governing force in a society. The contrasting concepts are legitimacy and arbitrariness. The word 'legitimacy' implies an external legal rule or principle by reference to which authority is constituted, identified and controlled.

With those principles in mind, it is not a difficult exercise to understand how the rule of law and legal principle embody the concept of justice.

As for the idea of the distinct and separate expression of justice as a guiding philosophical and moral imperative, I like the approach of then Justice Allsop of the Federal Court, who observed as follows:[5]

> Law is not just command; it is societal will amenable, to a point, to rational and general expression, engendering loyalty and consent through its utility, practicality and humanity, and through its characteristics of certainty, fairness and justice. ... Law can, ultimately, only work practically and usefully through consent and loyalty. And no system of law can engender loyalty and consent without an inhering justice, some intuitive response from acceptable and accepted values ... The need for balance of, and the inevitable relationship between, rules and values and their interconnectedness should be recognised as a central feature of the law and the administration of justice. ...
>
> [His Honour went on:] That the law is drawn in part from an indefinable human source, "a source of feeling, of emotion, of a sense of wholeness" gives it a protective strength in the service of human society. That source of feeling and emotion includes a sense of, or need for, order or stability, but order in its human place informed by the dignity of the individual, and not overwhelmed by abstraction and taxonomy. That partly indefinable sense of wholeness of the law provides the systemic antidote to logical reductionism that, on its own, would see the law as the sharp instrument

[4] M Gleeson, Chief Justice of the High Court, 'Courts and the Rule of Law', The Rule of Law Series, Melbourne University, 7 November 2001.
[5] J Allsop, 'The Rule of Law is not a law of rules' [2018] FedJSchol 22.

> of those who control power. That justice cannot be defined is its inherent strength.
>
> ...
>
> [His Honour said:] The Rule of Law lives in the recognition by society of the human character of law: its essential underpinning human values: honesty, equality of treatment, a respect for the dignity of the individual, the rejection of unfairness, and mercy, in the place of an independent judicature and an independent profession, and in the judicature's exercise of its accompanying irreducible protective power.

On this approach, the guiding philosophical and moral imperative expression of justice is inextricably linked with the rule of law expression of justice. As Justice Allsop further observed:

> Nothing is perfect. ... The need for balance of, and the inevitable relationship between, rules and values and their interconnectedness should be recognised as a central feature of the law and the administration of justice.

To my mind, that recognition of the centrality to justice of the interconnectedness between rules and values sums up the way we, as lawyers and judges, understand, strive for, and seek to do justice in our work in our community. And we do that without putting it into words or thinking much about it. It's just what we do.

Administering justice in the Northern Territory

I'm going to jump now to the sub-heading of administering justice in the Northern Territory.

Here, I speak about and from my own perspective. Of the many Supreme and Local Court Judges who administer justice in the Territory, I am sure we all have some similar and some different experiences and perspectives, all functions of what Courts we sit on, where we sit, how long we have been a Judge, what we did before we were appointed, and who we are as people.

I've been a Judge now for 3 ½ years. It sounds like a long time, but it feels like a very short one.

At the risk of sounding disgruntled, bitter and/or worn down (which I assure you I am not), my experience of the work of administering justice in the Northern Territory contains the following elements.

First, a heavy workload. The workload is comprised of writing or preparing reasons for decisions, mostly in civil matters, appeal matters, or in relation to the admissibility of evidence issues heard before or during a criminal trial; preparing sentences and sentencing remarks for offenders who plead guilty; and preparing for criminal trials, drafting aid memoire, summarising the evidence as the trial progresses and preparing the summing up for the jury. All of that takes considerable time and effort. To illustrate the point that the workload is a heavy one, in 2023, there were 7,240 criminal listings in the Supreme Court, comprising 1,938 criminal sitting days. By comparison, in 1997, there were 2,306 criminal listings. Back then, we had the same number of permanent Judges that we have now, but we are now doing more than three times the amount of work.

The weight of the workload is compounded by a complexity not known in earlier times. As Justice Mildren observed in his retirement speech in 2013:[6]

> The problem is that, because of new technology, more evidence is available for consideration. The rules of evidence have become more and not less complicated ... to deal with it. Added to that, internet research has produced a vast array of legal precedents, which judges complain about, mostly because they are not helpful or particularly illuminating of some legal principle which is long established anyway. Nor is it assisted by the ever-burgeoning length and complexity of modern statutes and regulations which our legislatures consider necessary for a modern, ordered society.

The vast majority of the Court's work is in crime. I would say that around half of that criminal work involves serious acts of violence or sexual offending. The facts of such offending are often gruesome, abhorrent and disturbing. Many of the offenders have personal histories involving poverty, neglect, abuse, dysfunction, exposure to substance abuse and/or periods of mental illness or disability, the facts of which are also often disturbing. The unpleasantness of the material we digest each day adds extra weight to the workload.

[6] Ceremonial Sitting to Farewell the Honourable Justice Dean Mildren RFD, 15 February 2013, 33-34 NTLR.

There is a relentlessness about the work of the administration of justice in the Northern Territory, and probably in all jurisdictions. The Courts deal over and over again with the same kinds of offences, not uncommonly with the same offenders, and the same precipitating factors to the offending, particularly alcohol and drug abuse, social disadvantage, dysfunctional families and wrong attitudes to violence. As Chief Justice Riley observed on his farewell sitting in 2016:[7]

> The rates of incarceration in the Northern Territory are high; indeed alarmingly so, but are necessary because serious crimes are being committed. Proportionate sentences must be imposed. The Courts are at the very end of the process and it is all too late at the time of sentencing. Compelling research has demonstrated that it is not an answer to increase sentences to become ever-more punitive. It is not an answer to have mandatory minimum terms of imprisonment ...
>
> Rather, it is social and environmental problems that must be addressed by the whole community and, hopefully, with effect before the criminal justice system is engaged.

There are many more positive things involved in being a judge and administering justice in the Northern Territory, which counter-balance these elements. I don't intend to speak about them on this occasion, but my failure to mention them shouldn't be taken as a denial of their existence and weight.

As lawyers, your contribution to the administration of justice is obvious. It is your advocacy, and your soliciting work, that assists the Courts to administer justice. Things that advocates and solicitors do to assist Courts to administer justice are many. I mention a few that I find particularly helpful.

In a field that is relatively new to me, I appreciate oral and written advocacy that involves a clear understanding of, and an ability to clearly articulate, the essence of your case or argument and the reasoning involved. That assists with both the Court's comprehension of your position and efficiency in the use of the Court's time. The key to any persuasive argument is knowing the law. Submissions that 'This is grossly unfair', or 'I am entitled to cross-examine on this topic' or (my favourite) 'This is a criminal trial, your Honour' are not persuasive. These kinds of submissions are made to me often enough for me to need to say that: (1) if reliance is to be placed on a statutory provision, know

[7] Ceremonial Sitting to Farewell the Honourable Chief Justice Trevor Riley, 22 April 2016.

what its words actually say; and (2) if reliance is to be placed on a principle of law, refer to (or at least have ready) the leading case that established it.

I also appreciate the timely provision of materials and/or written submissions. By 'timely', I don't mean provision in the hour before the hearing, I mean more than 24 hours before the hearing. There is little point spending time writing good submissions if the Court does not get them in time to give them due consideration before the hearing.

I also appreciate when the parties come with agreed positions. Agreed facts, agreed proposed orders, agreed ways to proceed are all of great assistance to the administration of justice. Agreed positions are facilitated by talking to your opponent before a hearing and a reasonable and courteous approach to the matter.

I also appreciate calm and level heads at the bar table. Hyperbole, hysteria and temper tantrums on the part of advocates (and Judges, for that matter) add another layer of stress to an already stressful environment. They should not occur.

I have no doubt that the elements of my work I have just spoken about are elements of your work as well. There is little we can do to change the elements of disturbing content and relentlessness. I do think, however, that we can reduce the negative impact upon ourselves of those things by, firstly, taking good care of our own health and well-being, and keeping an eye on the health and well-being of our colleagues and fellow professionals. Secondly, we can truly believe in the strengths of our system of administration of justice, recognise its limitations and defend those strengths and weaknesses in the face of ill-founded and ill-informed criticism. Perhaps, by offering information to the broader community about what the system can and cannot do, we can shift attitudes away from that the Courts should be tougher on criminals and towards solutions to social and environmental problems.

Access to justice in the Northern Territory

I'm now going to move to the sub-heading of access to justice in the NT.

Again, the phrase 'access to justice' is a broad concept. It is recognised as a key tenet of the rule of law. Relevantly, it encompasses access to legal advice and services, and posits that equality before the law requires that there not be financial, social, cultural or geographical barriers to obtaining legal advice and

services. Access to justice is enshrined in Art 14 of the International Covenant on Civil and Political Rights.

Given your roles and the community legal organisations you are part of or work with, I am sure you are already aware of the barriers faced by people in the Northern Territory to obtaining legal advice and services. There are many. The gaps between funding and need for legal services provided by Territory legal aid and community legal organisations. The difficulties engaging and retaining lawyers in such organisations. The insufficient numbers and availability of interpreters to assist speakers of languages other than English both in court proceedings and when legal advice is needed. The tyranny of distance between people living in regional and remote areas and legal services providers and the courts. The high prevalence of hearing loss, FASD and other disabilities in our community, particularly amongst Aboriginal people. The difficulties speaking to clients in custody because of staffing shortages and lockdowns in prisons. And so on...

The solutions to those problems are in some instances obvious (more funding) and in other instances wide-ranging and intractable (social, cultural, health, housing, etc).

I do not have the solutions and, even if I did, you are not the ones with the capacities to put them into place.

Instead, I offer you what might be regarded as a little pep talk.

As then Chief Justice Gleeson said in 2006,[8] information about the law, and assistance in giving practical effect to that information, provided through skilled professional advice, promotes justice. Bringing to people an understanding of the law, and helping them to develop their capacity to take advantage of that understanding, is what is essential. People who know their rights, and their potential liabilities, can use that knowledge, within the limits of their individual capacities, to seek to fulfil their individual and collective aspirations. Providers of legal aid and public or private pro bono legal work perform public service of immeasurable benefit, often by keeping their clients out of court, thereby avoiding the need for conflict and conflict resolution, which are sometimes regarded as the manifestation of a concept of justice that is inherently adversarial.

[8] M Gleeson, National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006.

What your clients (and many others in our community) need is practical and reasonably affordable advice and assistance in the conduct of their ordinary affairs. The need is great and the demand is largely unmet. Your commitment as members of the profession to the duty all members have to do their best to make legal services available to those in need of them is generous, admirable and appreciated - appreciated by your clients and appreciated by the Judges you appear before, even if we don't always make you feel appreciated.

In 2023, then Chief Justice Kiefel gave an address to the National Access to Justice and Pro Bono Conference in Brisbane. said:[9]

> In 2003, Ronald Sackville delivered an address in which he remarked that:
>
> > The expression 'access to justice' is ubiquitous in legal and political discourse. Its attractiveness as a catchphrase owes much to the powerful linguistic messages it conveys. These messages include both an *ideal* and an implicit *promise* that the ideal is attainable.
>
> [CJ Kiefel went on]: The pursuit of access to justice has a long history. ... The expression 'access to justice' is firmly entrenched in socio-political and legal discourse.
>
> The implicit promise that Ronald Sackville observed is that the law and our legal system are capable of achieving the goal of access to justice. Views about how access to justice may best be achieved may have changed over time, but there can be no doubt that this goal continues to be worth pursuing.

I commend you for your part in the worthwhile and ongoing pursuit of this goal.

Please enjoy this Conference.

Thank you.

[9] S Kiefel, 'Pro bono work, legal aid and access to justice: some matters of history', 2023 National Access to Justice and Pro Bono Conference, Brisbane, 22 June 2023.