

Opening of the AIJA Indigenous Justice Conference

Chief Justice Michael Grant

***DoubleTree by Hilton Alice Springs
82 Barrett Drive, Alice Springs, Northern Territory
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I thank Kumalie Riley for her *Welcome to Country*. She is a respected elder, teacher and artist for this country. Her welcome acknowledges and respects the ongoing spiritual and cultural connections of the traditional owners and custodians to this land. It is particularly appropriate to open a conference held in Alice Springs in that manner, and it is appropriate in a very specific sense where that conference is one dealing with indigenous justice issues.

This Institute is also a particularly fitting one to host a conference dealing with those issues. The objectives of the Institute focus on judicial administration, the education of those involved in that undertaking, and the administration of the institutions charged with those tasks. Its membership includes judicial officers, practitioners, academics and administrators. Without the involvement of all those streams nothing can be achieved in the field of judicial administration.

Leaving aside the political and economic calculus, which I will touch upon shortly, Indigenous justice outcomes are heavily reliant on effective case management, the promotion of cultural awareness, ethical considerations, the fair conduct of trials and sentencing proceedings, and technology. I anticipate that last issue will assume greater significance in this jurisdiction in years to come given the vast distances involved, the dispersal of the population, and the consideration of different approaches concerning personal attendance. Those matters are among the central concerns of this Institute.

I must confess at the outset that I am a neophyte so far as indigenous justice outcomes are concerned. I have been in my present role for all of seven weeks. My previous professional activities have been directed almost exclusively to the question of what is and is not lawful in terms of executive, legislative and administrative conduct. That rather arid undertaking has nothing to do with what does or does not work; or what is or is not just.

I should also qualify any observations I make by noting that my experience, such as it is, is limited to the Northern Territory context, and I do not purport to speak about the situation in other jurisdictions. I have, however, being an interested observer of indigenous issues in this jurisdiction over the last 50 years or so. What is strikingly apparent from those observations is that alcohol abuse is the immediate cause of much of the crime and dysfunction in Aboriginal communities. My very brief experience on the Court has already confirmed that alcohol-fuelled violence is a factor in a disturbingly large proportion of the cases coming before it. Of course, that observation says nothing about the root causes of alcohol abuse in communities.

It was 50 years ago this month that Vincent Lingiari led 200 stockmen in their strike and walk-off from the Wave Hill cattle station. Nicholas Rothwell has written recently about that event and subsequent developments in his review of Charlie Ward's book *A Handful of Sand*. Rothwell observes that the event took place at a time when vast changes were transforming remote indigenous Australia. There was what he described as "a sudden shift of social balance". Young men had access to alcohol, and although elders wanted maintain dry communities, newly available motor vehicles were put into service driving sometimes large distances to the closest outlet to load up with booze and bring it back into the communities.

Ward's book identifies a number of factors which had a negative impact on well-being in remote communities over the following years. Chief among them was that alcohol abuse undermined the restraining authority of traditional law, which in turn removed the power of elders to control the behaviour of their younger generations. He writes:

"In the world the Gurindji increasingly inhabited, traditional Aboriginal culture was merely a curio. The elders were forced to accept that, increasingly, the rights of an 18 year-old Gurindji youth were the same as those of the most advanced lawman. The two age groups were divided by a crevasse in their experiences of life: older men and women lived in the world of remembered song and story; the young had television, music and the constant infiltration of Western ways."

That breakdown in social structure was obviously precipitated by dispossession and exacerbated by disadvantage in the fields of education, health, employment and housing.

Senior legal and health practitioners have for many years now been drawing attention to the nexus between alcohol abuse and well-being in communities. Those commentators have been particularly vocal here in Alice Springs, where the difficulties that present are thrown into perhaps their sharpest relief.

Russell Goldflam from the Legal Aid Commission has been one of the most persistent critics of alcohol policy in the Northern Territory, and he will be speaking again on the issue of alcohol regulation during the course of this conference. At the risk of oversimplifying his views, Russell's central thesis is that the most important and effective measure for addressing the immediate problem is the imposition of restrictions on supply. The data from this and other jurisdictions would appear to establish that beyond doubt.

Of course, that response gives rise to a number of difficulties in implementation.

Chief amongst them is the resistance of the alcohol industry to measures directed to the restriction of supply. Although the Licensing Commission has had some success with various programmes over the years, the alcohol industry has been an effective and powerful lobby group in its own cause. Those measures have suffered from a lack of consistency and follow through, which is no doubt a product of political considerations.

Another difficulty lies in the means of implementation. We know from the various decisions in *Maloney* concerning Palm Island that although there is no unqualified right to purchase and possess alcohol, measures directed to restricting purchase and possession must apply without distinctions based on race unless introduced under the umbrella of “special measures”.

Difficulties also arise when considering the approach appropriately taken by the courts in sentencing for offences, particularly those in which alcohol is a factor.

There has been much commentary in recent times directed to the appallingly high rates of Aboriginal incarceration. It is an issue which has recently been taken up by the Australian Bar Association. To say that the rates are too high is to state the obvious. That statement does not address what lies beneath that phenomenon, and what is the appropriate response to each individual case which comes before the courts.

It is one of the issues addressed by Kieran Finnane – who is a delegate to this conference – in her recent book *Trouble: On Trial in Central Australia*. The author includes a quote from a senior legal aid practitioner – who is also a delegate to this conference – to the effect that behind many incarcerated Aboriginal men stand Aboriginal women who have been subjected to alcohol-fuelled abuse. Underlying that observation is the fact that sometimes incarceration is the only means by which victims are afforded protection and respite.

There are conflicting views concerning the appropriate approach to the sentencing process in such cases. On one side of the argument is what might be called the empirical approach, which questions the appropriateness and efficacy of applying the principle of general deterrence when dealing with offenders who have committed crimes of violence in a haze of alcohol. The argument follows that the imposition of tougher penalties in service of that principle ignores the fact that there is no evidentiary basis in support of the proposition that general deterrence does in fact generally deter.

On the other side of the argument lies what might be called the instinctive functional approach. That approach acknowledges that while the courts are powerless to alleviate the dysfunction and deprivation which underlies alcohol-fuelled violence, Aboriginal women and children living in those communities “are entitled to equality of treatment in the law’s responses to offences against them”. On that argument, the protection which the law affords includes the imposition of sentences which incorporate a component designed to deter other members of the community from committing crimes of that nature. The protection of the community also figures in that calculus.

As a former Justice of the Supreme Court of the Northern Territory observed:

“Until such time as it is demonstrated to me that people who are minded to take up a weapon with a view to assaulting some person with whom they have a grievance are not deterred by the knowledge that others who have done similar things have spent time in gaol, then the element of general deterrence remains a meaningful factor in the sentencing process for such offences. If it is

emphasised by the courts often enough and firmly enough then the message must start to get through, or be reinforced, that the community and individuals within it will be to some extent relieved of the threats, the real tragedy and distress caused by assaults with offensive weapons.”

This might be considered to be the antithesis to the empirical approach, based on the rigid application of traditional sentencing principles.

There is yet to be a satisfactory resolution to that question, and it is difficult to conceive of how the efficacy of general deterrence in this context is susceptible of measurement in any empirical sense. The value of conferences like this, and the work done by institutions such as the AIJA, is to inform the debate.

There are so many more issues in the field of indigenous justice which benefit from this form of examination. Much work has been done on the development of interpreting services. Justice Blokland, the chair of the organising committee for this conference, has been at the vanguard of those developments in recent years. Much more needs to be done in the field of development and training, but like so many issues arising in the indigenous justice context we are reliant on executive government for the provision of adequate funding for that purpose.

Significant steps have been taken in relation to adequate mental health assessment in the criminal justice system, but again much more needs to be done. We have only just begun to grapple with the influence and assessment of conditions such as FASD and undiagnosed depression in the indigenous justice context.

There is a continuing gulf between the processes in the criminal justice system and the understanding of some indigenous participants. Notions such as the difference between guilty and not guilty as those concepts are understood in the Western legal tradition, and the right to silence, remain poorly understood in traditional indigenous communities. The respective roles of police and the courts are misunderstood. People are sometimes unsure about going into a court room to observe proceedings involving family members lest they themselves are sent to prison. These matters can only be addressed by concerted community legal education.

All those issues remain to be addressed satisfactorily, at least in the Territory context.

I congratulate the organising committee for the work it has done in bringing this conference together, and I wish all delegates well in their consideration of these crucial issues.
