

Aborigines and the Court
The Northern Territory Experience

In May 2011 the Supreme Court of the Northern Territory celebrated its centenary. This significant milestone in the history of the Northern Territory provided a time for reflection on many things, including how the Northern Territory community has dealt with the problems facing the Aboriginal people of the Territory and, particularly, their interaction with the courts.

The Aboriginal people of the Territory have, of course, been present in the region for tens of thousands of years. The history of the Court is of comparatively short duration. The shared history is but a very small part of the history of the indigenous people of the Territory.

At the time of the establishment of the Supreme Court in 1911 the majority of the population of the Northern Territory comprised indigenous Australians. Notwithstanding that status they had little influence beyond their own communities. In 2012 indigenous Australians comprise approximately 30% of the total population of the Territory and, it appears, that percentage is increasing. Aboriginal people now have significant influence in the wider community.

The relationship between the Supreme Court and its judicial predecessors, on the one hand, and the Aboriginal people, who constitute such a significant portion of the people it serves, on the other, has necessarily been variable, complex and complicated. The relationship has sometimes

reflected, and often contributed to, the major shifts in the attitude of the rest of the community towards Aboriginal Australians. Increased knowledge and understanding on the part of all involved has led to significant changes in both attitude and approach to Aboriginal people in the criminal justice system. This is clearly an ongoing process.

In the early days of settlement Europeans established and maintained their presence in the Northern Territory by employing their superior weapons. They engaged in punitive expeditions to respond to actual or perceived threats to themselves. The use of the gun was condoned, if not actually officially approved. Whilst Aboriginal people were subject to British and South Australian law they received very little protection from that law.¹

By the 1890s a longer term change in the relationship between Aboriginal people and Europeans in the Northern Territory was evident. The change has been described as being from one of armed resistance to one of subjugation and exploitation.² It was at that time that Justice Charles Dashwood, who later became known as "Northern Territory Charlie", held office as South Australia's Judge of the Northern Territory. From the commencement of his term Justice Dashwood promoted what were then unpopular notions of respect for Japanese and Chinese immigrants. Initially this liberal approach to race did not extend to Aborigines. In 1893, in his first sitting as the Northern Territory Judge of the South Australian Court, which lasted just three days, no less than 10 Aborigines were convicted of murder and sentenced to death. In reporting the sittings

¹ Criminal Laws Northern Territory: Gray at 10.

² Criminal Laws Northern Territory: Gray at 11.

the local newspaper observed that the Aboriginal defendants did not seem to have the slightest comprehension of what the trials were about.

As a reflection of the times and his own attitude, Justice Dashwood directed that one of the prisoners, a man named Wandi Wandi, be publicly hanged at the scene of his crime and in the presence of members of his tribe in order to dramatically convey to all the awful consequences of committing murder.³

As his tenure evolved Justice Dashwood increasingly recognised the difficulties involved in providing justice to Aboriginal accused. Importantly, after some time in office, he pursued a quest for equal justice towards Aboriginal people including recognition of their entitlement to protection under the law.⁴ He spoke out against the use of violence against Aborigines and the habit of delivering "summary" justice to Aboriginal people. Such summary justice included punitive raids which were sometimes organised by police.

Justice Dashwood cautioned against convicting Aboriginal people solely on the basis of their confessional evidence which he regarded as generally being unreliable. In 1894 he expressed concern that it was unsatisfactory that Aboriginal accused were "utterly ignorant of what is going on" in court. Later in his period of office interpreters were made available where the accused was charged with a serious offence.⁵

³ Big Boss Fella all same judge: A History of the Supreme Court of the Northern Territory, Mildren at 24.

⁴ Mildren, Big Boss Fella at 23.

⁵ Mildren, Big Boss Fella at 25.

In 1900, in the trial of Long Peter, Justice Dashwood left to a jury the issue of whether tribal custom served to provoke an assault by the accused which led to the death of another Aboriginal man and thereby reduced murder to manslaughter. This was an early example of an effort to accommodate customary law in the criminal justice system. I will say some more about this in a moment.

In seeking to address the issues as best he could, in the political climate that prevailed, Justice Dashwood became responsible for what has been described as the commencement of "a distinct Northern Territory jurisprudence in relation to trials of Aboriginal people".⁶

Whilst the observations made by Justice Dashwood and the innovations he introduced may seem both obvious and modest today, in the context of the time they were matters of some significance. The mood of the time is to be gathered from some research carried out by Justice Bevan in 1914. He compiled a list of murder trials for the period 1884 to 1911 which revealed that in all cases in which Aboriginal accused were charged with the murder of whites at least some of the accused were found guilty. On the other hand the accused was found guilty in only one of four cases in which Europeans were charged with the murder of non-Europeans.

Justice Bevan observed:

I do not hesitate to say that the whole matter turns on the racial question. Juries will not convict a white man for an offence against a black, certainly if the evidence is that of blacks, whereas on black evidence there is no difficulty in the way of securing a conviction

⁶ Criminal Laws Northern Territory: Gray at 12.

against a black for an offence against a white man or another black.⁷

The efforts of Justice Dashwood served to identify and highlight concerns and led to improvements on what had previously been generally accepted. Some of what he said was picked up by those who followed. For example in 1928 Justice Mallam presided over a prosecution arising out of events that ultimately led to the infamous Coniston massacre. The judge refused to admit into evidence the confessions of the accused on the ground that no cautions had been administered and he was not satisfied that the Crown had established that the confessions were voluntary. Importantly, Justice Mallam indicated that in future police should not question Aboriginal suspects whilst in custody unless the consent of a Protector of Aborigines had previously been obtained. This provided a taste of what was to come with the introduction of the Anunga Rules some 50 years later.

Generally speaking, throughout this period and through to the mid-20th century, Aboriginal people continued to be treated "harshly and unevenly" by the criminal justice system.⁸ The attitude of those in authority was demonstrated by the accepted practice of treating Aboriginal witnesses in the same way as prisoners. They were often held in custody until they had given their evidence, a practice which Justice Bevan sought to justify by stating that the incarceration was "for their own protection and to prevent them getting away".⁹ This patently illegal

⁷ Criminal Laws Northern Territory: Gray at 15 quoting A Markus, *Governing Savages* (Allen and Unwin, 1990).

⁸ Mildren, "Aboriginals in the Criminal Justice System" [2008] *Adelaide Law Review* 7.

⁹ Mildren, "Aboriginals in the Criminal Justice System" at 8.

practice had been criticised in a Royal Commission in 1920¹⁰ but nevertheless continued into the early 1930s.

Although Aboriginal accused had legal representation they mostly did not have access to an interpreter. They took little part in the trial process and, as was observed by Justice Kriewaldt as late as 1960, may as well have been tried in their absence. If an Aboriginal accused was not present during his trial "no one would notice this fact".¹¹

Justice Kriewaldt wrote of Aboriginal accused taking no interest in proceedings and "certainly" not understanding important evidence. He observed that this caused him "much concern" and he went on to say:

No attempt is made to translate any of the evidence to him. If a jury is present the accused certainly does not understand the summing up nor could it be explained to him. If there is no jury, the accused in most cases has no comprehension of the addresses made by counsel to the judge sitting as the fact-finding tribunal. If the rule requiring substantial comprehension of the proceedings were applied in the Northern Territory, many Aborigines could simply not be tried.¹²

As late as the middle of the 20th century Justice Kriewaldt observed that, if the criminal law was to be applied at all to Aborigines it had to be accepted that "for some years yet" many Aborigines would not understand, even to a limited extent, the method whereby it was decided whether they be guilty or not.

¹⁰ Commonwealth, *Report on Northern Territory Administration*, Parl Paper No28 (1920).

¹¹ Justice Martin Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia" (1960-1962) 5 *University of Western Australia Law Review* 1, 23.

¹² Justice Martin Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia" (1960-1962) 5 *University of Western Australia Law Review* 1, 23.

Notwithstanding that strong expression of concern Justice Kriewaldt allowed such trials to proceed in his court. It seems he did so on the basis that a failure to punish crimes would lead to a return to the lawlessness of the past. He said:

If the ordinary rule requiring comprehension of the nature of the proceedings were consistently applied, the result would be that the white community would have to overlook entirely many crimes committed by Aborigines. If the law were to adopt that attitude, there would be a reversion, I think, where the victim is white, to a policy of reprisals, and that would be worse than to continue with the present system.¹³

The approach adopted by Justice Kriewaldt was, as we now recognise, wrong. In the 1990s in the Northern Territory case of *Ebatarinja v Deland*¹⁴ the High Court dealt with the case of a deaf mute Aboriginal man who was unable to communicate except by using his hands to ask for simple needs. He had been charged with murder but was unable to communicate with his lawyers and unable to follow legal proceedings. In directing that Magistrate Deland be prohibited from further hearing committal proceedings against the accused, the Court observed that it was well established that the accused should not only be physically present in court but should also be able to understand the proceedings and the nature of the evidence against him or her. Where a defendant does not speak the language in which the proceedings are being conducted the absence of an interpreter will result in an unfair trial. In so concluding the High Court

¹³ Justice Martin Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia" (1960-1962) 5 University of Western Australia Law Review 1, 24.

¹⁴ [1998] 194 CLR 444 at 454.

referred to the 1885 Queensland case of *R v Willie*¹⁵ in which Justice Cooper is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder where no interpreter could be found competent to communicate the charge to them.

After the death of Justice Kriewaldt, Professor Geoffrey Sawer published a paper, derived from the notes of his friend, entitled "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia".¹⁶ In the course of those notes Justice Kriewaldt reflected on his period in judicial office and drew some conclusions regarding the position of Aborigines in the criminal justice system in 1960. Some of his conclusions were reassuring but others are now seen as quite unacceptable. The conclusions included the following:

- (a) an Aborigine who committed a crime against a white person would not be prejudiced by his colour – a welcome change from the observations of Justice Bevan in 1914;
- (b) Aborigines enjoy the protection of the law to the fullest extent in their dealings with whites;
- (c) Aboriginal people should be subject to the same law as the rest of the community;
- (d) no Aborigine who had appeared in his court had understood the respective functions of judge, jury or witnesses;
- (e) it must be accepted that many Aborigines will not understand, even to a limited extent, the method whereby it is decided whether they be guilty or not;

¹⁵ (1885) 7 QLJ (NC) 108.

¹⁶ (1961 – 1962) 5 University of Western Australia Law Review.

- (f) nevertheless the law should be enforced to avoid a return to lawless ways;
- (g) the paucity of the vocabulary of the average Aborigine presents a real difficulty in communication;
- (h) the average Aborigine has a low degree of intelligence;
- (i) the Director of Welfare should be able to plead guilty for an Aborigine, even to a charge of murder, except where the accused Aborigine had sufficient knowledge of the proceedings, in which case a plea of guilty should not be entered without his consent;
- (j) the use of juries in cases involving Aboriginal accused should be abolished; and
- (k) in the case of serious crimes the trial Judge should be supported by two assessors.

Justice Kriewaldt died in office in 1960. Notwithstanding criticisms that may be levelled at him from this distance and with the benefit of a substantial degree of hindsight, he was highly regarded. At the time of his death Gough Whitlam stated that the Commonwealth "was very fortunate to have the services for 10 years of a man of the temperament and scholarship of Mr Justice Kriewaldt in that outpost of British law and of Australian administration".¹⁷ Professor Geoffrey Sawer described him as a "born scholar" who regarded his "opinions as a method of educating the profession, both private and official, in a place where there was little other opportunity for reflection on the basic legal problems".¹⁸

¹⁷ Commonwealth, House of Representatives, Debates, 18 April 1961, pp925-6.

¹⁸ Sawer G, "Judge Martin Kriewaldt; Nine Years of the Northern Territory Supreme Court" (1960 – 1962) 1 Adelaide Law Review 148.

A very significant advance in the manner in which the criminal justice system in the Northern Territory dealt with Aboriginal people came when, in 1976, Forster J delivered his judgment in *R v Anunga*¹⁹ which led to the so-called Anunga Rules. Those Rules, which were endorsed by the other members of the Court, have been described as "a uniquely Territorian addition to the common law of evidence".²⁰ They provided guidance in relation to the conduct of police officers when interrogating Aboriginal persons. The Rules now underpin the present Police General Orders. They provide for the cautioning of Aboriginal witnesses, the requirement of a prisoner's friend to assist with the interview and the requirement of the assistance of an interpreter when necessary. The Rules have consistently been applied by the courts ever since. They have provided the foundation for a fundamental change in how the police and the courts deal with Aboriginal people. However concern has recently been expressed that they may be at risk with the introduction of the Uniform Evidence Act into the Northern Territory later this year.²¹

At about the same time there was a further development of enormous significance. In the early 1970s Aboriginal Legal Aid Agencies commenced in both Central Australia and in the Top End. The agencies which, today, are continuing to evolve have, since their commencement, always been at the forefront of efforts to improve the lot of their clients. They provide appropriate representation and education and are significant contributors to the administration of justice in the Northern Territory.

¹⁹ *R v Anunga and Others* (1976) 11 ALR 412.

²⁰ Professor Les McCrimmon, *The Uniform Evidence Act and the Anunga Guidelines: Accommodation or annihilation?* (2011) 2 NTLJ 91.

²¹ McCrimmon, *The Uniform Evidence Act and the Anunga Guidelines: Accommodation or annihilation?*

In 2012 the North Australian Aboriginal Justice Agency (NAAJA) has a complement of 40 legal practitioners servicing the Top End of the Northern Territory. The Central Australian Aboriginal Legal Aid Service (CAALAS) has 22 legal practitioners servicing the Centralian region.

The agencies are no longer simply providing advice and representation in the traditional areas of criminal, civil and family law. As an indicator of their developing and changing role the agencies also employ lawyers who occupy "advocacy" roles and what are described as "welfare rights lawyers". They assist Aboriginal people in remote communities and town camps with welfare rights matters, including income management and remote tenancy issues. They provide prison support and through-care projects assisting clients in prison and juvenile detention to gain access to appropriate services and also assist those people in applying for parole and in their pre-and post release management. The agencies have developed a community legal education focus where they provide legal education of a relevant kind to Aboriginal groups and individuals. Information is delivered in radio programs, DVDs, radio messages, informative signs in regional languages and by community visits. They run preventative programs designed to assist in keeping Aboriginal people away from the criminal justice system.

A recognition of the success of NAAJA is that it received the 2010 Australian Human Rights Commission Award in the Law Awards division.

The necessity for competent and professional interpreters has always been recognised. However it was only in 2000 that the Northern Territory Aboriginal Interpreter Service was established with a mandate to find,

recruit, train, supply and coordinate interpreters and translators of Aboriginal languages throughout the Northern Territory. There has been a significant improvement in the provision of interpreting services for Aboriginal people both in the courts and in the wider community since that time.

Today there is a dedicated Aboriginal Interpreter Service providing a number of appropriately trained interpreters for both accused and witnesses in many court proceedings. Difficulties still exist. Aboriginal people live in urban, rural and remote locations and have varying degrees of contact with, and understanding of, mainstream concepts. The service covers 40 language groups and has access to 420 active interpreters of whom 67 are accredited through NAATI²² or have completed a Diploma of Interpreting.²³ However the task is immense and the availability of appropriately qualified interpreters remains a problem. In addition many English words and many legal concepts do not have an equivalent in many Aboriginal languages. The danger of misunderstanding is a constant and continuing concern.

The problem identified by Justice Dashwood and Justice Kriewaldt regarding the comprehension of some Aboriginal accused of the trial process remains a concern. The continuing improvement in the Interpreter Service is one way of endeavouring to avoid such problems.

There have been significant developments in how trials run in the Northern Territory courts where Aboriginal accused and/or Aboriginal witnesses are involved. Interpreters are now used as a matter of course

²² National Accreditation Authority for Translators and Interpreters

²³ Source: Aboriginal Interpreter Service.

where language difficulties have been identified. In addition, with the increased education and understanding of judicial officers and the harnessing of the experience of others over a lengthy period of time, other mechanisms have been developed to ensure a fair trial.

In exercise of the power to ensure a fair trial judges today in the Northern Territory have become more interventionist than their predecessors. Judges are now more inclined to take tighter control over the questioning of Aboriginal witnesses. The most obvious example is the willingness of judges to identify for counsel and, if necessary, for the jury, the fruitlessness of leading questions directed to some Aboriginal witnesses even in cross-examination. The well-known concept of gratuitous concurrence may reduce the weight to be accorded to answers to such questions to such an extent as to make the answer worthless. Judges are now likely to interfere if counsel asks questions of an "either/or" nature, they are likely to point out the unreliability of answers when some Aboriginal witnesses are required to provide detailed numbers or specific times. In appropriate cases they will disallow questions which may be culturally offensive. Again, in an appropriate case, when an Aboriginal witness falls silent or fails to answer a particular question the judge is likely to query whether this is deliberate evasion on the part of the witness or whether some cultural factor is at work and suggest a different approach should be adopted.

On the occasion of the celebration of the centenary of the Court I observed that a continuing cause for concern arises from legislative intervention into the manner in which the courts deal with the issue of customary law and cultural practices. I repeat those remarks.

From the days of Justice Dashwood until 2007 the Supreme Court of the Northern Territory developed an approach to the sensitive area of conflict between the law of the Northern Territory and the customary law and cultural practices of some Aboriginal communities. The courts accepted and asserted the primacy of the law of the Northern Territory. Subject to that law issues of customary law and cultural practice were given appropriate weight in determining the culpability of an offender in all of the circumstances of the offence.²⁴ In 1900 Dashwood J, in dealing with an Aborigine charged with the tribal murder of another Aborigine as a result of carrying out of tribal punishment, explained to a jury that:

Strictly speaking no cognizance could be taken of individual or tribal customs as serving to excuse offences against British law. All persons living under the law, blacks or whites, were equally liable to punishment if they overstepped the boundaries laid down; but in this case the jury might consider the fact of moment connected with the query of whether the prisoner is guilty of murder or the lesser crime of manslaughter.²⁵

In 1954 Kriewaldt J said:

In every case where I have been under a duty to pass sentence on a native, irrespective of the charge, I have heard such evidence as has been available throwing light on the background and upbringing of the native. Where tribal law custom might possibly be relevant I have in every case endeavoured to inform my mind on these topics either by hearing evidence in court or perusing any material available to me which seemed to bear on the point.²⁶

A recent statement to the same effect was made by the Northern Territory Court of Criminal Appeal in *R v GJ*²⁷ where it was said:

²⁴ *Hales v Jamilmira* (2003) 13 NTLR 14; *Walker v New South Wales* (1994) 182 CLR 45.

²⁵ *R v Long Peter* referred to Mildren, Big Boss Fella at 26.

²⁶ *R v Anderson* (1954) NTJ 240 at 248.

²⁷ [2005] NTCCA 20.

It is not in contention that where Aboriginal customary law conflicts with Territory law the latter must prevail. Similarly, there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact; see *Hales v Jamamira* (2003) 3 NTLR 14.

The approach developed by the courts over many years has, in recent times, been the subject of legislative attention. In 2007 the Northern Territory experienced what has been called “the Intervention”.²⁸ Legislation passed in support of that process included s 91 of the *Northern Territory National Emergency Response Act* (Cth) which provided that a court in determining sentence “must not take into account any form of customary law or cultural practice as a reason for ... lessening the seriousness of the criminal behaviour to which the offence relates”. The second reading speech referred to an agreement reached in a 2006 meeting of the Council of Australian Governments (COAG) as justification for the change. Reference to the communiqué issued as a result of that meeting reveals only the following justification:

The law’s response to family and community violence and sexual abuse must reflect the seriousness of such crimes. COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.

The effect of the legislative provision, whether intended or unintended, has been held to be that customary law and cultural practice must not be taken into account in determining the gravity or objective seriousness of an offence.²⁹ This, of course, means that the court must sentence in a

²⁸ *R v Wunungmurra* (2009) 231 FLR 180 at 182.

²⁹ *R v Wunungmurra* (2009) 231 FLR 180 at 182.

partial factual vacuum. Although the level of moral culpability of an offender may have been substantially reduced because he or she acted in accordance with, and under pressure to perform, a cultural practice, the court is barred from taking those matters into account. The effect is that the court is not entitled to consider why an offender has offended and pass an appropriate sentence. The court is required to ignore the actual circumstances that led to the offending. The artificiality involved is obvious. When the legislation was recently amended no change was made to ameliorate the harm done.

The following observations of Brennan J made long before the legislative action are pertinent:

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.³⁰

Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community. It seems to me this was a backwards step.

In the Northern Territory all serious criminal matters are tried before a judge and jury. The jury panel is selected from the annual jury list which itself is drawn from the electoral roll. The experience of those who practice as advocates in the criminal justice system, and particularly in Alice Springs, is that Aboriginal people are underrepresented on the jury

³⁰ *Neal v The Queen* (1982) 149 CLR 305 at 326.

panel. In recent times a challenge was made to the array³¹ in the trial in Alice Springs of two young Aboriginal men for the murder of an admired and well-known European.³²

The matter was referred to the Full Court. The Court was informed by the parties that it was agreed that: 21% of the Alice Springs population is of Aboriginal descent; 45% of the Central Australian population is of Aboriginal descent and that 83% of the Northern Territory prison population is of Aboriginal descent. The Court was advised that the usual experience is that the proportion of Aboriginal people on a particular jury in Alice Springs is substantially lower than the proportion of Aboriginal people in the total population of Alice Springs.

Whilst the Full Court found that there were irregularities in creating the panel it concluded that a challenge to the array could not succeed merely because the racial mixture of the panel does not reflect the racial mixture of the community from which the panel has been drawn.

As a consequence of that judgement and the recommendation of the Court, the provisions of the *Juries Act* have been referred to the Northern Territory Law Reform Committee. One aspect to be considered is whether a method can be devised to increase the participation of Aboriginal people in the jury system. The Committee is presently considering this matter.

Thus far I have discussed the changes in the manner in which the Courts of the Northern Territory have dealt with Aboriginal offenders. What

³¹ Pursuant to s 352 of the *Criminal Code (NT)*.

³² *R v Woods and Williams* [2010] NTSC 69 at [94].

really needs to be addressed in the Northern Territory is why we have so many Aboriginal offenders and what can be done to reduce the number.

In a paper entitled *Law and Disorder in Aboriginal Communities* delivered to the Criminal Lawyers Association of the Northern Territory conference in 2011, Richard Coates, the Director of Public Prosecutions in the Northern Territory, advised that although indigenous people constitute 29.9% of the Territory's population, they have regularly accounted for more than 80% of the prison population. In the year 2000 there were 400 indigenous prisoners in the two Northern Territory goals, in 2010 the average daily number of indigenous prisoners was 912 which is 82% of the total prison population and an increase of 128% over the figure from 2000.³³ It is readily apparent that the problem is not decreasing.

The solution to the problem is, of course, not to be found in the courts but rather must be addressed through the community as a whole. In the Northern Territory, amongst the Aboriginal people, there is an excess of deprivation and disadvantage. Many children are born into and brought up by dysfunctional families where the excessive consumption of alcohol and consequent violence is commonplace. In other families problems arise through the abuse of cannabis. Significant amounts of money are being diverted from the purchase of food to obtain cannabis. According to one researcher the majority of indigenous domestic violence in the cross-border areas of Western Australia, South Australia and the Northern Territory is linked to cannabis abuse.³⁴

³³ Coates: *Law and Disorder in Aboriginal Communities* 2011 citing Department of Justice Research and Statistics.

³⁴ Lloyd J 2004 *The Impact of Cannabis on Indigenous Women* paper presented at *The Australasian Drug Strategy Conference May 2004*. Coates: *Law and Disorder in Aboriginal Communities* 2011.

The children brought up in those families are not adequately supervised and are not provided with appropriate boundaries. They see only negative role models. They are brought up in homes where the accommodation is overcrowded and facilities are substandard, if present at all. They do not attend school on a regular basis and, when they do attend school, they are often over tired. The children do not obtain a worthwhile education and do not go on to obtain employment. In 2010 73% of indigenous prisoners received into the Territory's prisons were unemployed.³⁵ The children of those prisoners are highly likely to follow in the footsteps of those who went before them.

How to address the problem has confronted politicians and the community over many years. It is apparent that what has been tried thus far has been unsuccessful. In 2007 we saw the Intervention in the Northern Territory. The Intervention was initiated by the Howard government and has been continued under subsequent labor governments. It has been the subject of much criticism. Whatever may be its faults it is at least a bold attempt to start to address the problem. I do not want to enter the political debate other than to encourage critics of the Intervention not to tear it down but rather to make positive and reasoned suggestions as to how it may be improved. Whatever is achieved will necessarily be the result of a gradual process.

One area in which I believe an immediate impact can be made upon the lives of many and upon violent crime in the Northern Territory is with the curbing of alcohol abuse. The harsh reality is that in 2010 60% of all

³⁵ Northern Territory Department of Justice Correctional Services, statistical summary 2001 – 2010 quoted in Coates: Law and Disorder in Aboriginal Communities 2011.

assaults and 67% of all domestic violence incidents in the Northern Territory were alcohol related. 72% of Territory prisoners stated their offence was committed under the influence of alcohol. The old song that boasted that we “have got some bloody good drinkers in the Northern Territory” was wrong. We have many dangerous drinkers who commit violent crimes.

In 1959 Kriewaldt J said to a Darwin jury³⁶:

Gentlemen of the jury: I begin my 9th year as a judge of the Northern Territory. Each year I have begun the judicial year with a murder case. This year is no exception. So many of the murder cases I have heard, both in this Court Room and in Alice Springs, have been cases where an Aboriginal has been killed by another Aboriginal and nearly always because liquor had been consumed by the parties that figured in the incident.

Regrettably, the position remains the same today. In a recent article Russell Goldflam, a senior legal officer with the Northern Territory Legal Aid Commission in Alice Springs, wrote:

Because if we don't fix up this grog business, whatever else we do to stop the violence, whatever else we do to address my town's social problems, however much money we spend, whatever laws we pass, or gaol sentences we impose, or programs we deliver, or houses we build, or theories we devise, or prayers we offer, I know this: if we don't take the hard decisions and fix up this grog business, whatever else we try, will fail.³⁷

I have now been on the Supreme Court of the Northern Territory for 13 years. One of my colleagues has been on the Court for 20 years. All of my colleagues have been calling, year in and year out, for the abuse of

³⁶ R v Aboriginal Balir Balir (1959) NTJ 633 repeated in Mildren, Big Boss Fella at 154.

³⁷ Damming the Rivers of Grog: Russell Goldflam, Balance Edition 1/2011.

alcohol in the whole community to be addressed. I am pleased to say that in 2011 a fresh and wide-ranging initiative to address the problem was commenced by the Northern Territory government. It is, as yet, too early to measure the impact of the initiative. As with the Intervention it has its critics. However the fact that the issue is being discussed in Northern Territory in terms of "something must be done" and is the subject of both debate and action is something I welcome.

There has been much innovation and vast improvement in the way in which the courts of the Northern Territory deal with indigenous Australians however there remain issues to be resolved. There is a long way to go.