The Centenary of the Supreme Court of the Northern Territory

Today we celebrate the 100th anniversary of the founding of the Supreme Court of the Northern Territory of Australia.

The first sitting of a superior court in the Northern Territory occurred in 1875 at Palmerston, the original settlement to the north-east of Darwin. It was a circuit sitting of the Supreme Court of South Australia in what was then known as the Northern Territory of South Australia. The sittings lasted just two days. As we have been reminded during these celebrations, regrettably, on the return journey to Adelaide, the vessel that carried the presiding judge, Justice Wearing, and his staff foundered resulting in their deaths. Thereafter, and unsurprisingly, the South Australian Parliament passed legislation authorising the holding of criminal and civil sittings of the Supreme Court of South Australia in the Northern Territory presided over by a Commissioner. In 1884 the relevant legislation was amended to create the office of "the Judge of the Northern Territory" and allowed for offences to be tried locally by a qualified Legal Practitioner.

The Northern Territory was surrendered to the Commonwealth by South Australia in a process which took some years. The surrender began with negotiations in 1901. In 1907 South Australia passed the *Northern Territory Surrender Act*. The Commonwealth eventually passed the *Northern Territory Acceptance Act* in 1910. The handover date was fixed by proclamation to be 1 January 1911 and on that date the Northern Territory was "declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth".

The Supreme Court of the Northern Territory was established by the *Supreme Court Ordinance 1911* which came into force on 30 May 1911. This is the occasion we celebrate today, 30 May 2011.

The first Judge of the Court was Judge Mitchell. He was appointed for a term of five years "subject to sooner determination and on six months notice being given should the Northern Territory be taken over by the Commonwealth",[1] a condition of limited tenure which would not be acceptable today. In fact Judge Mitchell remained in office only until 1912 when he was replaced by Judge Bevan who came with a more regular tenure, being appointed until age 65 years.

The modern era of the Court commenced with the granting of self-government by the Commonwealth of Australia to the Northern Territory in 1978. The *Northern Territory (Self-Government) Act 1978* established the Northern Territory as a body politic under the Crown. In 1979 the Commonwealth Parliament repealed the *Supreme Court Act 1961* and the Northern Territory Parliament passed the S*upreme Court Act 1979* which created the Supreme Court of the Northern Territory of Australia in place of the Supreme Court previously established by the Commonwealth.

Sir William Forster was the first Chief Justice of the Supreme Court of the Northern Territory. Initially he was the Senior Judge and then, for a short period, the Chief Judge and finally from 1 October 1979, the Chief Justice. He was a champion of the local profession. He warmly welcomed legal practitioners to the Northern Territory and encouraged them to stay. Those who did stay, including the Administrator, myself

[1] Mildren, *Big Boss Fella All Same Judge: A History of the Supreme Court of the Northern Territory*

and many others present today, were then nurtured in their careers. He had an enormous impact upon the development of the Court as a respected Territory institution.

I think of him on this day and how he would view this occasion with a justified sense of satisfaction. He would look at this assembly, in this beautiful Court room, in this impressive Court building and I am confident he would take particular delight in the fact that the bench is comprised entirely by members of the local profession.

The comparatively short history of the Court has necessarily been intertwined with a small part of the history of the indigenous people of the Territory. At the time of the establishment of the Supreme Court the majority of the population of the Northern Territory comprised indigenous Australians. In 2011 indigenous Australians comprise approximately 30% of the total population of the Territory.

The attitude of the courts to indigenous Australians, of necessity, has changed over the last 100 years with fluctuating levels of understanding of, and appreciation for, the different cultures. The relationship between the Court and the indigenous people, who constitute such a significant portion of the people it serves, has also varied with the changing social and political circumstances that have prevailed at particular times.

In the early days of the Court Aboriginal people were treated "harshly and unevenly."[2] For example Aboriginal witnesses were treated in the same way as prisoners. They were often held in custody until they had given their evidence "for their own protection and to prevent them getting

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

away". Although Aboriginal accused had legal representation they mostly did not have access to an interpreter. They took little part in the process and, as has been observed by Kriewaldt J, may as well have been tried in their absence. If an Aboriginal accused was not present "no one would notice this fact".[3]

It is only in relatively recent times that things have improved. A new jurisprudence regarding Aboriginal issues began to emerge in the time of Kriewaldt J. In 1976 Forster J delivered his judgment in *R v Anunga*[4] which led to the so-called Anunga Rules providing guidance in relation to the cautioning of Aboriginal witnesses, the provision of a prisoner's friend to assist with the interview and the provision of an interpreter when necessary. Those rules have consistently been applied by the courts ever since. They have underpinned a fundamental change in how the police and the courts deal with Aboriginal people.

In the early 1970s came the introduction of Aboriginal Legal Aid Agencies both in Central Australia and in the Top End. The agencies which, today, are continuing to evolve are at the very forefront of providing appropriate representation to their Aboriginal clients.

There has also been a significant improvement in the provision of interpreting services for Aboriginal people both in the courts and in the wider community. There is now a dedicated Aboriginal Interpreter Service providing appropriately trained interpreters for both accused and witnesses in court proceedings.

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[3] 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.
[4] R v Anunga and Others (1976) 11 ALR 412.

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

One area of concern is the manner in which the courts are required to deal with the issue of customary law and cultural practices. Over the period to 2007 this Court 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.[5]

In 2007 the Northern Territory experienced what has been called "the intervention".[6] 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 effect of that 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.[7] This, of course, means that the court must sentence in a partial

[5] *Hales v Jamilmira* (2003) 13 NTLR 14; *Walker v New South Wales* (1994) 182 CLR 45.
[6] *R v Wunungmurra* (2009) 231 FLR 180 at 182
[7] *R v Wunungmurra* (2009) 231 FLR 180 at 182

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 of the offending. The artificiality involved is obvious.

The following observations of Brennan J 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.[8]

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

As we move into the second century of the Supreme Court we must continue to strive for an ever improving understanding of the indigenous people of this Territory. Whilst the same law must apply to all, we as a community must be conscious of our differences and make appropriate allowance for those differences.

Throughout the history of the Supreme Court a large part of the business of the Court has been dealing with crime. Looking back over 100 years it

[8] *Neal v The Queen* (1982) 149 CLR 305 at 326

is possible to discern a long-term change in the approach to the criminal law by the Court and by the community which it serves.

There has always been a concern in this community, and in communities throughout Australia, as to levels of crime and how we should deal with those who commit crimes. This is not a recent development and it is a fact of life that will be with us for so long as crimes are committed. There have always been those who do not think beyond the response of locking up those who commit crimes and throwing away the key. Those who adopt this superficial "warehousing" approach to the problem find encouragement in the manner in which crime, and sentencing for crime, is reported in the popular media, with its understandable emphasis on the sensational and its, again understandable, failure to fully explain the reasons for decisions made by individual judicial officers. This leads to perceptions that the courts are "soft on crime" and then to the phenomenon we now know as "law and order auctions" in the lead up to any election. Many politicians, at least publicly, feel the need to be perceived as being "tough on crime" and promise ever more punitive responses.

However behind the rhetoric I sense a growing awareness amongst politicians, the media and the wider community of the need to identify and address the underlying causes of crime. There is, it appears to me, an increasing understanding that, if we are to reduce crime and enjoy a safer community, our attention needs to be focused upon addressing the reason for the criminal activity in an endeavour to ensure such activity does not occur or does not occur again. The earlier a problem is identified and addressed the greater is the prospect that it will not lead to criminal activity. If alcohol is a problem, or if drugs or gambling or anger

management or some form of mental illness is a problem, then it is cheaper and more effective to endeavour to deal with the problem before any crime is committed rather than in the sentencing process after a crime is committed. Once a crime has been committed there is an even greater need for focus on rehabilitation as part of the response. Commenting on the Productivity Commission's 2010 Government Services Report,[9] which recorded the Northern Territory as having the highest recidivism rates in the country, the responsible Minister is reported to have promised "a stronger focus on rehabilitation, education and training in a new era in corrections."[10]

Whilst public denunciation, punishment and the need to protect the community will continue to be necessary and significant elements in determining appropriate sentences, issues of prevention and rehabilitation are increasingly recognized as being important factors for consideration in our endeavour to reduce crime. The wider and the more effective the rehabilitation programs delivered both in custody and in the community may be, the greater the prospect that recidivism will be reduced.

In the Northern Territory, as in many parts of Australia, new sentencing options are being explored. We actively pursue a policy of diversion for juvenile offenders in appropriate cases. Wherever reasonably possible we seek to keep juveniles out of the criminal justice system. We are now identifying offenders with drug problems and encouraging them to undertake appropriate rehabilitation programs prior to sentencing. We reward such offenders with reduced sentences when they succeed. We are experimenting with ways of identifying people with problems with

[9] The Productivity Commission Report into Government Services 2010
[10] NT News 28 November 2010

alcohol and endeavouring to direct them into rehabilitation programs. We have an Alcohol Court to deal with offenders who have an alcohol dependency. We are trying new approaches.

In recent times a fresh and wide ranging initiative to address the vexed problem of alcohol abuse has commenced. It is, as yet, too early to measure the impact of the initiative. However the fact that the issue is being discussed and is the subject of both debate and action in the community is to be welcomed.

I would like to think that there is a developing political and community will to address the alcohol problem along with other causes of crime. I hope that there is an increasing acceptance that the need to pursue enlightened policies does not have to be accompanied by the need to disguise those policies with other punitive measures designed to fuel the public perception that the legislature is "tough on crime". There is much thought being given to alternatives to ever-increasing periods of incarceration as a means of reducing crime and recidivism. There is room for optimism.

It was 100 years ago today that the Supreme Court of the Northern Territory commenced. Much in the world has changed dramatically in the intervening 100 years. However some things have remained constant. Importantly the guiding principle of this Court has been, is now and will continue to be to do right to all manner of people according to law without fear or favour, affection or ill will. That remains our promise.

Thank you for your attendance here today on this very important occasion.

Please adjourn the Court.