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Ethics and etiquette

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The public and the judiciary trust that legal practitioners will conduct themselves in accordance with ethical rules and obligations. An effective courtroom advocate must be mindful of the ethical principles guiding his or her practice and also have regard to the etiquette appropriate to courtroom appearances. Expanding on the presentation given by the Hon Justice Graham Hiley at the 2015 Criminal Lawyers Association of the Northern Territory Conference, this article provides both newly admitted and more experienced practitioners with a sound basis for understanding the origins and sources of legal ethics and the potential consequences for practitioners who fall foul of their duties. Particular reference is made to the Northern Territory jurisdiction but the principles guiding professional conduct are applicable to all Australian practitioners. Justice Graham Hiley of the Northern Territory Supreme Court also offers tips on courtroom etiquette from the perspective of the bench.

INTRODUCTION

The main focus of this article is the appropriate conduct for lawyers appearing in court. All counsel have obligations to the court, to their client and to others including their opponent. Some, for example prosecutors and counsel appearing for model litigants, and counsel appearing for clients with limited mental or intellectual capacity, have additional duties. Breaches of ethical obligations can have serious consequences both for the lawyer and the client.

Detailed information about such obligations is to be found in professional conduct rules, articles and texts, and in decisions of various courts and tribunals.[1] This article is intended to remind readers of those obligations and expectations, and to indicate where such further information might be obtained.

The topic of etiquette covers conduct which is not necessarily the subject of professional rules but which comprises some of the courtesies and conventions of legal practice.

ORIGINS OF RULES AND ETHICAL OBLIGATIONS

Many centuries ago, indeed probably beyond eight centuries ago when the *Magna Carta* was sealed, disputes were settled by use of force, and, for those

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[1] See eg, *Attorney-General (Qld) v Colin Lovitt QC* [2003] QSC 279; *Re Morel* [2015] SASCFC 20; *Law Society Northern Territory v Ian John Rowbottam*, (12 September 2008) (Disciplinary Tribunal: see http://lawsocietynt.asn.au/images/stories/documents/Reasons-for-decision.pdf); *Connop v Law Society Northern Territory* [2016] NTSC 38.

wealthy enough, by battle. The practice of the warring parties engaging expert warriors to conduct the battle on their behalf has become more civilised over the years, with parties now having greater access to guns for hire in the form of lawyers trained to represent them in courts and tribunals.

Nowadays, most laws are made by Parliament, and courts and tribunals[2] have been established to provide a forum for the conduct of battles when disputes arise between people subject to those laws. In addition to what a statute says about the powers, functions and duties of particular courts and tribunals, most courts and tribunals have their own rules, and practice directions, which set out the manner in which the battles are to be conducted between the litigants. Many of those rules and practices are designed to ensure that litigants can fight their battles on a level playing field irrespective of the size of their respective resources.

Rules of ethics and etiquette have been developed in an endeavour to ensure that those who represent the litigants in court, whom we shall refer to as advocates, conduct themselves in accordance with standards that have been recognised and defined over many years as the kind of standards expected of a person who has been admitted to practice as a lawyer, and thus as a member of the legal profession. All members of a civilised society should be able to have the utmost faith in the justice system, which necessarily requires that those who participate in that system conduct themselves in accordance with the professional standards so recognised and defined.

Consistent with the aim of providing justice to all, rules and practices have been developed in relation to those performing particular roles in particular forms of litigation. These include the "cab-rank rule" that has applied to barristers for centuries[3] and special obligations upon prosecutors in criminal matters.[4]

SOURCES OF ETHICAL RULES AND OBLIGATIONS

Any person who practices in the Northern Territory as a lawyer falls within the jurisdiction of the *Legal Profession Act 2006* (NT) (LPA). A "lawyer" is a person who has been admitted to the legal profession by the Northern Territory Supreme Court under the LPA, or by another Supreme Court under a corresponding Act.[5] A "local legal practitioner" is an Australian lawyer who holds a current local practising certificate, and an "interstate legal practitioner" is an Australian lawyer who holds a current interstate practising certificate but not a local practising certificate.[6] The term "legal practitioner" applies to barristers and solicitors.

The Northern Territory Supreme Court has the power to admit a person as a lawyer under the LPA unconditionally or on any conditions it considers

[2] The word "tribunal" is used to include bodies that may not have been established pursuant to a statute, eg, bodies which regulate issues involving members of a club or other organisation to which people belong.

[3] Thomas Erskine's role defending Thomas Paine for seditious libel in December 1792 is celebrated as an early example of the "cab rank" rule in action.

[4] See eg *Rules of Professional Conduct and Practice* (NT) 17.46–17.57.

[5] *Legal Profession Act 2006* (NT) s 5.

[6] *Legal Profession Act 2006* (NT) s 6.

appropriate.[7] Once admitted, the person's name is entered on the local roll,[8] and the person becomes an officer of the Court.[9] An interstate legal practitioner engaged in legal practice in the Northern Territory also has all the duties and obligations of an officer of the Supreme Court, and is subject to the jurisdiction and powers of the Court in respect of those duties and obligations.[10]

A person is not permitted to engage in legal practice or hold him or herself as entitled to engage in legal practice in the Northern Territory unless he or she holds a practising certificate.[11] Practising certificates are granted and renewed each year by the Law Society Northern Territory (Law Society).[12] The Law Society has the power to amend, suspend or cancel a practising certificate.[13] It maintains a register of the names of lawyers to whom it grants local practising certificates.[14]

Chapter 4 of the LPA deals with discipline and complaints. Its purposes are set out in s 461 of the LPA. In broad terms it defines and deals with "unsatisfactory professional conduct" and "professional misconduct", by reference to standards of competence and diligence expected of a reasonably competent legal practitioner and other conduct that might concern the person's fitness to engage in legal practice.[15]

Most of those standards have now been set out in professional conduct rules. Chapter 8, Pt 8.1 of the LPA provides for legal profession rules. The purpose of that Part is set out in s 688:

> The purpose of this Part is to promote the maintenance of high standards of professional conduct by Australian legal practitioners and Australian-registered foreign lawyers by providing for the making and enforcement of rules of professional conduct that apply to them when they practise in this jurisdiction.

The primary source of information for those practising in the Northern Territory is the *Rules of Professional Conduct and Practice* (NT) (NTPCR) made by the Law Society pursuant to its rule making powers in ss 689–695 of the LPA. The NTPCR apply to all legal practitioners save for those practising solely as barristers. Barristers would be expected to behave in accordance with the Australian Bar Association *Barrister's Conduct Rules*[16] as adopted by the Northern Territory Bar Association's *Barristers' Conduct Rules* (Barristers' Conduct Rules NT).[17]

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[7] *Legal Profession Act 2006* (NT) ss 25–26.

[8] *Legal Profession Act 2006* (NT) s 27.

[9] *Legal Profession Act 2006* (NT) s 28

[10] *Legal Profession Act 2006* (NT) s 83.

[11] *Legal Profession Act 2006* (NT) ss 18–19.

[12] *Legal Profession Act 2006* (NT) s 54.

[13] *Legal Profession Act 2006* (NT) s 57.

[14] *Legal Profession Act 2006* (NT) s 87.

[15] See *Legal Profession Act 2006* (NT) ss 464–466.

[16] Australian Bar Association, *Barristers Conduct Rules* (Australian Bar Association, 2010).

[17] Northern Territory Bar Association, *Schedule to the Constitution of the Northern Territory Bar*

Other jurisdictions have similar professional conduct rules. For example New South Wales and Victoria have adopted the *Australian Solicitors' Conduct Rules* formulated by the Law Council of Australia.[18]

Professional rules can serve as a standard of conduct in disciplinary proceedings, a guide for action in a specific case, and as a demonstration of the profession's commitment to integrity and public service.[19] They are a reliable and important indicator of the accepted opinion of the members of the profession.[20] However, as Dal Pont points out, professional 'rules' should not be viewed as exhaustive of lawyers' ethical responsibilities. The tendency to reduce professional ethics to precise rules should not prompt lawyers to approach ethical rules as if they were regulations to be skilfully evaded or discourage lawyers from exercising professional judgment.[21]

CONSEQUENCES OF BREACHING ETHICAL OBLIGATIONS

The main sanction for a lawyer is found in the power of the Supreme Court to remove the person's name from the local roll. Once that happens in one jurisdiction, there will likely be similar ramifications for the person in other jurisdictions where he or she wishes to practice.[22]

Courts also have the power to try, convict and punish a practitioner for contempt of court. A breach of ethical obligations can constitute a contempt of court, if it is conduct that would tend to prejudice a fair trial or undermine public faith and confidence in the administration of justice.

Courts have various other powers aimed at ensuring that justice is done, for example to stay a proceeding where a person accused of a serious offence does not have proper legal representation[23] or to grant a retrial where a trial has miscarried due to the incompetence of legal counsel.

Courts also have, and have exercised, powers to order a practitioner to personally pay costs where he or she has been guilty of some kind of misconduct in the course of conducting litigation. This includes failures to ensure compliance with relevant court rules and directions. In addition to the inherent jurisdiction of

Association Incorporated – Barristers Conduct Rules (adopted 14 March 2002) <http://ntba.asn.au/wp-content/uploads/NTBA-Barristers-Conduct- Rules.pdf>.

[18] Law Council of Australia, *Australian Solicitors Conduct Rules 2011* (LCA, 2011).

[19] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 27.

[20] *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, 154 (Black CJ).

[21] See discussion in Dal Pont, n 19, 27–29.

[22] See eg, Arthur Sideris who was struck off the roll of practitioners in NSW after it was discovered he had used his brother's academic records to gain entry with advanced standing to study a law degree: *The Prothonotary of the Supreme Court of New South Wales v Sideris* (unreported, New South Wales Court of Appeal, Kirby P, Priestley and Powell JJA, CA 40442/94, 15 August 1994). Mr Sideris applied for admission to the NT Supreme Court in 2013 and was refused. Note that a practitioner can be re-admitted in the same jurisdiction after being struck off: see eg, Claire Morel, a criminal lawyer who was struck off the roll of practitioners in South Australia in 2004 but readmitted in 2015: *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401; [2004] SASC 168; *Re Morel* [2015] SASCFC 20.

[23] *Dietrich v The Queen* (1992) 177 CLR 292.

a superior court to make such orders in relation to officers of that court,[24] such powers are expressly conferred in and under some statutes, for example s 43(3)(f) of the *Federal Court of Australia Act 1976* (Cth),[25] and rules and practice directions such as O 63.21 of the *Supreme Court Rules* (NT) and Northern Territory Supreme Court *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms*.[26] See also cases following the application of ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).[27]

Lawyers may also be liable under general negligence or contract law for breach of their duties of competence, care and skill, subject of course to advocates' immunity.

Complaints about the conduct of Northern Territory practitioners can be made to the Law Society.[28] The Law Society can institute proceedings in the Legal Practitioner's Disciplinary Tribunal, dismiss the complaint or impose a reprimand or a fine.[29] It can also take immediate action by suspending the person's practising certificate if it considers that necessary in the public interest.[30]

Should the Legal Practitioner's Disciplinary Tribunal consider that a breach of the ethical rules constitutes unsatisfactory professional conduct or professional misconduct, it may impose a range of disciplinary sanctions. These include a fine or reprimand, suspension or cancellation of one's practising certificate, an order to pay compensation to the client,[31] order to pay costs,[32] and a recommendation to the Supreme Court that the person be struck off the roll.[33]

Aside from formal sanctions, the risk to a lawyer of a loss of reputation is very serious, particularly in a small jurisdiction such as the Northern Territory. A lawyer's effectiveness for his or her client depends upon enjoying a reputation of

[24] See for example *Myers v Elman* [1940] AC 282; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

[25] *De Sousa v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 41 FCR 544; *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 236; *Kumar v MIMIA* (2004) 133 FCR 582; [2004] FCA 18, 22; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; [2005] NSWCA 153; *Bagshaw v Scott* [2005] FCA 104; *Tran v Minister for Immigration Multicultural and Indigenous Affairs (No 2)* (2006) 228 ALR 727; [2006] FCA 199; *Gippreal Pty Ltd v Kurek Investments* [2009] VSC 344.

[26] See Northern Territory Supreme Court, *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms*, 11 June 2009, [29] as amended by Northern Territory Supreme Court, *Practice Direction 10 of 2009 – Trial Civil Procedure Reform*, 5 November 2009.

[27] For example, *Modra v Victoria* [2013] FCA 779.

[28] *Legal Profession Act 2006* (NT) s 472 (unless initiated by the Law Society).

[29] *Legal Profession Act 2006* (NT) ss 496, 499.

[30] *Legal Profession Act 2006* (NT) s 502.

[31] *Legal Profession Act 2006* (NT) s 534.

[32] *Legal Profession Act 2006* (NT) s 529.

[33] *Legal Profession Act 2006* (NT) s 55. Other options available to the Tribunal include ordering that a practitioner's practice is managed in a certain way (s 525(5)(f)) and ordering that a practitioner take a specific course in further legal education (s 525(5)(b)). See eg *Law Society Northern Territory v Ian John Rowbottam*, (12 September 2008) (Disciplinary Tribunal: see http://lawsocietynt.asn.au/images/stories/documents/Reasons-for-decision.pdf).

appropriate behaviour. A lawyer who develops a reputation for a lack of honesty and courtesy may be disadvantaged by more careful scrutiny by judges of the court and will find it more difficult to secure the trust of colleagues when seeking to conclude agreements or resolve disputes.[34]

It is not just new practitioners who need to be reminded of their obligations to the court. Experienced Victorian defence barrister Colin Lovitt QC was found guilty of contempt of court in 2003 by the Supreme Court of Queensland following an incident in the Brisbane Magistrates Court where he had turned towards the media present in court and said that the Magistrate was a "complete cretin".[35]

HIERARCHY OF OBLIGATIONS

It is essential that there be public confidence in the court system and in the administration of justice. The integrity of the system relies particularly on the conduct of its practitioners, 'officers of the court'. All members of the legal profession have a paramount duty to the court.[36]

Judges are particularly reliant upon the advocates who appear before them. The practitioner is the intermediary between client and decision maker, simultaneously assisting both by putting forward the best case for the client's interest that is consistent with law.[37]

At times there might be tension between what a client wants and what the lawyer is obliged or permitted to do. Where there is a clear duty owed to the court that duty will override any duty owed to the client.

The NTPCR provides a guiding statement on each category or "level" of duty: to the court, to the client and to others including other practitioners. Each guiding statement will be addressed below and some specific examples provided.

Practitioners' duties to the court

The guiding statement in NTPCR about duties to the court states:

> Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.[38]

Note that "court" is defined in the NTPCR to include any body described as such and all other tribunals exercising judicial, or quasi-judicial, functions, and

[34] The Hon Justice Pagone, "Divided Loyalties? The Lawyer's Simultaneous Duty to Client and the Courts" (Monash Guest Lecture in Ethics, 20 November 2009).

[35] *Attorney-General (Qld) v Lovitt* [2003] QSC 279.

[36] Legal Services Commission of South Australia, *Legal Professional Ethics* (10 November 2014) <http://www.lsc.sa.gov.au/dsh/ch02s01.php>.

[37] The Hon Justice Pagone, n 34.

[38] *Rules of Professional Conduct and Practice* (NT) (under heading "Practitioners' Duties to the Court").

includes professional disciplinary tribunals, industrial and administrative tribunals, statutory or Parliamentary investigations and inquiries, Royal Commissions, arbitrations and mediations.[39]

Particular duties include:

a) The duty to terminate a retainer with a client if a client insists on withholding information required by a court order with the intention of misleading the court, and will not allow the practitioner to make the relevant information available;[40]

b) The duty to do the work the practitioner is retained to do within sufficient time to comply with court directions;[41]

c) Advocacy Rules: rr 17.1–17.58 which apply to legal practitioners acting as advocates (but not to those practice solely as barristers) – eg, independence and responsible use of privilege;[42]

d) Prohibitions on practitioners:

   i. drawing any court document alleging criminality, fraud or serious misconduct unless the practitioner already has supporting factual material, the evidence would be admissible and their client wishes the allegation to be made,[43]

   ii. appearing as an advocate in a case where the practitioner will be required to give evidence material to the determination of contested issues;[44]

   iii. becoming the surety for their client's bail.[45]

Obligations to and relations with the client

The guiding statement in the NTPCR about relations with clients states:

> Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.[46]

Specific examples of ethical duties include:

[39] *Rules of Professional Conduct and Practice* (NT) "Definitions".

[40] *Rules of Professional Conduct Rules and Practice* (NT) r 11.1.

[41] *Rules of Professional Conduct Rules and Practice* (NT) r 10A.2.

[42] This includes particular duties on prosecutors: see *Rules of Professional Conduct Rules and Practice* (NT) rr 17.46–17.57.

[43] *Rules of Professional Conduct and Practice* (NT) r 12. See also "Preparation of Affidavits", r 11.

[44] *Rules of Professional Conduct and Practice* (NT) r 13.

[45] *Rules of Professional Conduct and Practice* (NT) r 16.2.

[46] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with Clients"). See also, *Connop v Law Society Northern Territory* [2016] NTSC 38, [42]–[46].

a) accepting a retainer from a client only when the practitioner has capacity to attend to the work with reasonable promptness;[47]

b) avoiding a conflict of interest;[48]

c) the duty to inform the client of alternative dispute resolution options;[49]

d) maintaining the confidentiality of a client's affairs even when not covered by legal professional privilege;[50] and

e) restraints on acting against a former client.[51]

Obligations to and relations with other practitioners

The guiding statement in the NTPCR about relations with other practitioners states:

> In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.[52]

These duties include:

a) Not misleading opponent about facts and evidence when negotiating a settlement;

b) Taking all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that communications are courteous and avoid provocative/offensive language;[53]

c) Not to giving undertaking that relies on a third party whose cooperation cannot be guaranteed, and not asking a fellow practitioner to make an undertaking that relies on a third party whose cooperation cannot be guaranteed;[54]

The NTPCR also contain rules about taking over a matter from another practitioner, transferring a practitioner's practice and communicating with another practitioner's client.

Obligations to and relations with third parties

The guiding statement in the NTPCR about relations with third parties states:

> Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of

[47] *Rules of Professional Conduct and Practice* (NT) r 1.1.

[48] *Rules of Professional Conduct and Practice* (NT) rr 8.1, 8.2.

[49] *Rules of Professional Conduct and Practice* (NT) r 10A.3.

[50] *Rules of Professional Conduct and Practice* (NT) rr 2.1, 2.2.

[51] *Rules of Professional Conduct and Practice* (NT) r 3.

[52] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with other Practitioners").

[53] *Rules of Professional Conduct and Practice* (NT) r 18.

[54] *Rules of Professional Conduct and Practice* (NT) r 19A, 20. See also, *Connop v Law Society Northern Territory* [2016] NTSC 38, [42]–[46].

> others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.[55]

The same principles of honesty and fairness dictate that a practitioner must not lie on behalf of their client or make statements which grossly inflate their client's rights.

Potential for conflict between duties

Although practitioners must act in accordance with their client's instructions, they must also use a degree of forensic judgment in following those instructions in order to prevent submissions to the court which the practitioner knows will deceive the court.[56]

Ethical obligations on defence counsel whose client has confessed guilt to them are set out in NTPCR 14:

a) The role of counsel for the defence is still to endeavour to protect the accused from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence charged,[57] and the defence counsel can ensure that the prosecution is put to proof of its case.

b) Note that if a client does confess, the first thing to be determined is whether it is in fact a true confession of guilt. In some cases the law will be sufficiently subtle or complex that it will be difficult for a lay client to determine whether they are in fact guilty of an offence or not.[58]

c) The Rules provide that defence counsel must not put a defence case inconsistent with the client's confession, falsely claim that another person committed the offence or continue to act for that client if the client insists on misleading the court by giving evidence denying guilt.

The duty of confidentiality is most notorious for creating the public perception that "legal ethics" is an oxymoron. Notorious examples of lawyers whose duties of confidentiality to their clients overrode other public interests included:

a) A lawyer who hid knowledge of the whereabouts of the buried bodies of people that his client had previously murdered,[59]

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[55] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with Third Parties").

[56] Legal Services Commission of South Australia, n 36.

[57] JE Singleton, *Conduct at the Bar and Some Problems of Advocacy* (Sweet & Maxwell, 1946).

[58] See Chief Justice Riley, "Ethics and the Criminal Defence Lawyer" (Paper presented at Criminal Lawyers Association Northern Territory Eighth Biennial Conference, Bali, 25 June 2001).

[59] The lawyer was later charged with violating a public health law that required notification to authorities by anyone knowing of the death of a person without medical attendance. The court held this statutory duty was overridden by the lawyer's duty of confidentiality. The New York State Bar Association's Committee on Professional Ethics ruled that the lawyer had an ethical duty to withhold the incriminating information about his client's previous murders. Disney et al, *Lawyers* (Law Book Co., 2nd ed, 1986) 679.

b) A lawyer who allowed other people to go to prison for conduct that the client had privately confessed to.[60]

A practitioner who is informed that his or her client intends to disobey a court order is obliged to advise the client in the strongest terms against such action and to warn of the dangers of so doing. However counsel is under no duty to inform the court or the legal representatives of his opponent of the intention of the client. An exception to this rule is where the intended conduct of the client constitutes a threat to the safety of any person.[61]

If counsel has to withdraw from acting in circumstances where the accused insists on misleading the court, counsel should withdraw without alerting the court to the problem arising from the proposed course of conduct to be adopted by the accused because to raise that matter with the court would be to act in breach of the obligation to maintain confidentiality.[62]

The obligation of candour in relation to the presentation of facts is different from that which applies in relation to the law.

a) Counsel have a positive obligation to inform the court of judicial decisions that are of a binding or persuasive authority or provisions of legislation which appear to be directly in point, irrespective of whether the decision or legislation supports the client's case.
b) On matters of fact, the duty imposed upon counsel is to not knowingly mislead the court.[63] That includes misleading the court by way of statements or conduct that may be regarded as "half -truths".

See for example *Meek v Fleming*[64] where, in a civil case, the defendant, a chief inspector of police, had been reduced in rank to station sergeant for disciplinary reasons relating to the deception of a court in another matter. Counsel for the defence disguised the reduction in rank by presenting the defendant in plain clothes and referring to him as "Mr". Counsel did not correct the plaintiff's counsel or the judge when they referred to the defendant as "Inspector". On appeal the court held that the conduct amounted to concealment as it enabled the defendant to "masquerade as a chief inspector of unblemished reputation enjoying such advantages as that status and character would give him at the trial" and that "the duty to the court here was unwarrantably subordinated to the duty to the client".

COMMUNICATION WITH CHAMBERS

Although the courts and the profession should be working together toward the goals of effective case management and efficient communication, these objectives

[60] The lawyer only revealed the information when the client died seven years later. He was subject to much criticism for failing to make an earlier disclosure but the Law Societies in England and Scotland asserted that the solicitor had been bound not to disclose the confession without the consent of his client. Disney et al, n 59, 677.

[61] *Rules of Professional Conduct and Practice* (NT) r 17.20

[62] D Napley, *The Technique of Persuasion* (Sweet & Maxwell, 4th ed, 2003) 57ff.

[63] See discussion of *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [51].

[64] *Meek v Fleming* [1961] 2 QB 366.

must be viewed in the context of the overarching need for impartiality on the part of judges and ethical conduct on the part of practitioners.

Much of the case law dealing with improper communications with chambers focuses on the courts' concern with ensuring procedural fairness and avoiding an apprehension of bias. However, practitioners should be aware that improper communications could also constitute a breach of their ethical obligations.[65]

The ease of email communication in this day and age makes it easy for parties to communicate directly with a judge's chambers but practitioners must ensure their communications adhere to r 17.40 of the NTPCR (echoed in r 56 of the Northern Territory Bar Association Barristers' Conduct Rules NT) which provides that:

> A practitioner must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
>
> (a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or
>
> (b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner notified to the opponent by the practitioner.

Rule 17.41 goes on to provide that a practitioner must promptly tell the opponent what passes between the practitioner and a court in such a communication.[66]

The Full Court of the Federal Court in *John Holland Rail Pty Ltd v Comcare*[67] endorsed the notion that, although there was nothing improper *per se* with ex parte communications on administrative or procedural matters, a sustained sequence of communications not circulated to other parties could become unprofessional or improper in the absence of some good reason.[68]

An advantage of email communication is that it allows a sender to copy in other recipients and creates a useful "paper trail". Practitioners would be well advised to make a habit of using the "cc" and "reply all" functions by copying in other parties to a matter into email correspondence with chambers as a matter of course.

R v Fisher

Some examples of "what not to do" by all parties are found in the Victorian case of *R v Fisher*:[69]

- The defendant's lawyer had made a sentencing plea which stressed that the defendant was the "sole carer" of his five-year-old daughter and that this role

[65] Richard Lilley SC and Justin Carter, "Communications with the Court" (2013) 87 ALJ 121.

[66] See the corresponding rule: *Barristers' Conduct Rules* (NT) r 57.

[67] *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221; [2011] FCAFC 34.

[68] In *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221; [2011] FCAFC 34, [22], the Full Court approved the observations made by Brereton J in *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 540.

[69] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100.

would make a sentence of imprisonment especially onerous. It was subsequently discovered that the daughter was in China and the plea was misleading.

- After the plea hearing but before the judge had delivered her sentence, the prosecution sent several emails to the judge's associate without copying in defence, revealing information about the daughter's whereabouts and enquiring whether the matter should be listed for a further mention.
- The associate raised the matter with the judge without first contacting the defence counsel[70] and continued to correspond with the Office of Public Prosecution without initially copying to defence counsel.
- A further hearing date was set, at which bail was contested. At that hearing the defence counsel took no objection to the course that had been followed and, on instructions, told the sentencing judge that the information that had come to light about the whereabouts of the daughter was correct. It transpired that the information was not only relevant to the question of bail but the question of sentence, yet the sentencing judge did not invite further material to be furnished prior to sentence.[71]
- The defendant appealed the sentence on the grounds that the receipt and use by the judge of communications with one party created a reasonable apprehension of bias, and that the failure to allow defence to make further submissions on matters affecting sentence constituted a denial of procedural fairness.
- On the topic of communications with the court, the Court of Appeal made clear statements to the effect that communications by one party to the court should not include information or allegations material to substantive issues in the litigation without the other party's express agreement (save in an exceptional case warranted for example by an ex parte application) and the other parties should be copied in on such correspondence.[72]
- The Court of Appeal found that the failure of the sentencing judge to afford the appellant an opportunity to deal with the adverse findings that she contemplated making did constitute a denial of procedural fairness. That was conceded by the respondent.[73] However the Court of Appeal did not find that a different sentence should be passed.[74]

Regarding the position of defence counsel during a plea: if it is clear to counsel that the accused intends to mislead the court then counsel can take no part in the presentation of that evidence and should decline to act further. However if the situation is not then clear counsel is under a duty to continue to act. It is not for him or her to judge the bona fides of the accused. In the event that the accused subsequently admits to counsel that he has deliberately misled the court then counsel must decline to act further in the matter unless the accused agrees to counsel revealing his misleading conduct to the court.

[70] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [11].

[71] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [62].

[72] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [38]–[39].

[73] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [68].

[74] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [82].

Rule 17.15 allows that a practitioner will *not* have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning such matters to the court, and those statements are not themselves misleading.

Regarding the irregular out of court communications: although an associate is entitled to rely on an undertaking by an officer of the court that the matter would immediately be raised with defence counsel, it is ill advised to continue with correspondence and to consult with the judge until having received confirmation that this has in fact occurred. There is no inflexible rule that any communication between the judge and a party will necessarily disqualify the judge from making a decision but a failure to strictly comply with such procedures risks threatening the integrity of the proceedings and gives rise to the risk of an allegation of at least a perception of bias.[75]

SPECIAL CATEGORIES

A few special rules for different categories are discussed below.

Barristers

The historical "cab rank rule": that is, the duty is to accept a brief in a court in which counsel professes to practice provided a professional fee is offered and there are not any special circumstances to justify refusal, is set out in Pt N of the *Barristers' Conduct Rules*. There are a number of mandatory and discretionary exceptions to the rule that nowadays mean in practice a barrister may be able to avoid taking a brief. Nevertheless the system as a whole requires barristers to uphold the spirit of the rule. Access to representation for all allows us to have confidence as a society that justice is administered properly.

There is another side to the rule that was expressed by the New South Wales Law Reform Commission as follows:

> In our view the main practical effect of the rule … is not that it forces reluctant barristers into accepting unpopular cases, but rather that it reduces criticism of barristers who take such cases.[76]

Parts P and Q of the *Barristers' Conduct Rules* provide for situations where briefs may be refused or returned. The brief in a serious criminal matter can only be returned for good cause and with reasonable notice.

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[75] See the two-step test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[76] New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, Report No 31 (1982) [6.78]. A famous instance arose out of the decision by Dr HV Evatt KC to accept a brief on behalf of a group of industrial unions to dispute the validity of the *Communist Party Dissolution Act 1950* (NSW). The controversy was sufficiently real for a Committee of the New South Wales Bar Association to issue a statement to the press supporting Dr Evatt's right to accept the brief and explaining the duty imposed upon him by his calling as a barrister. Disney et al, n 59, 605.

Barristers must confine their professional work to matters set out in r 74 of the *Barristers' Conduct Rules*.

Prosecutors

Special obligations on prosecutors are found in rr 17.46–17.58 of NTPCR and Pt J of *Barristers' Conduct Rules*. It has been said that the proper role of the prosecutor is that of a "Minister of Justice" whose function is to seek justice and ensure fairness.[77] Obligations relate to ensuring that all material evidence is brought to the attention of the court and/or the accused through calling material witnesses and disclosing all material evidence. Prosecutors must assist the court fairly with submissions of law, avoid attempts to bias the court and ensure that the defendant is accorded procedural justice.

Counsel assisting inquisitorial bodies

Counsel who are assisting inquisitorial bodies are also under some of the same duties as those applicable to prosecutors, such as not arguing any proposition of fact or law which counsel does not believe on reasonable grounds to be capable of contributing to a finding of guilt.[78]

Clients with limited capacity

A person is presumed to have capacity,[79] but practitioners should be alive to the possibility that a client may have a cognitive disability (eg, Foetal Alcohol Spectrum Disorder), acquired brain injury or mental illness. There is no single legal definition of capacity as the capacity required will depend on the type of decision or transaction.[80]

Part IIA of the Northern Territory *Criminal Code*[81] provides for mental impairment and unfitness for trial. In proceedings under Pt IIA, legal counsel may exercise an independent discretion to act "as he or she reasonably believes to be in the person's best interests" where an accused or supervised person is unable to provide adequate instructions on questions relevant to an investigation or proceedings.[82]

In 2011, Jonathon Hunyor and Michelle Swift identified some ethical issues confronting practitioners acting for mentally impaired clients in criminal proceedings given that a client's best interests may well not be served by having

[77] David Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 *University of Tasmania Law Review* 111. In *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68, [82] the High Court stated that the prosecutor represents "not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice".

[78] *Barristers' Conduct Rules* (NT) r 72; *Rules of Professional Conduct and Practice* (NT) r 17.58.

[79] There is a presumption of capacity at common law: *Masterman-Lister v Jewell* [2003] 1 WLR 1511; [2002] EWCA Civ 1889 – such presumption must be displaced on the balance of probabilities by those seeking to assert otherwise.

[80] Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Lawyers* (2009); Client Capacity Committee, Office of the Public Defender, Law Society of South Australia, *Statement of Principles with Guidelines* (2012).

[81] Found in *Northern Territory Criminal Code Act* (NT) Sch.

[82] *Criminal Code* (NT) s 43ZO.

issues of their fitness or mental impairment raised.[83] Given the indefinite nature of supervision orders, it is arguably in an offender's interests to be tried or plead guilty so they have the certainty of a release date.

Counsel are obliged to inform the court if they form the opinion that their client is not fit to be tried. However, Hunyor and Swift suggest that a distinction should more readily be drawn between fitness to plead and fitness to be tried. The minimum standards of capacity required to plead guilty and take part in the sentencing process are said to be "vastly less onerous" than the capacity required to stand trial.[84] Making this distinction may form an important step in protecting a client's best interests.

Issues of mental and legal capacity may arise in many other areas of practice (eg, will preparation, contracts, guardianship orders) which are beyond the scope of this article. The starting point must be that lawyers are under an ethical duty as fiduciary agents to act on their client's instructions, and, if necessary, find a way to ensure their client can maximise his or her autonomy and make an informed choice.[85] Resources published by the law societies in various jurisdictions may provide practical assistance.[86]

In-house counsel

Rule 4 of the NTPCR 4 applies the NTPCR to lawyers who are employed otherwise than by practitioners. In-house counsel must be careful to avoid certain ethical issues; for instance, they must make sure they and their employer understand who the client is when advising different entities within organisational groups. Arrangements about which legal entity is being advised and on what basis the advice is given should be carefully documented. In-house counsel should exercise caution before accepting confidential communications from other sources given their overriding obligation to the organisation and duty to avoid conflict of interest.[87]

Model litigants

The model litigant policy has been adopted by the Australian Government as a guide to the manner in which it and its agencies should conduct themselves in litigation. The development of this obligation can be traced to *Melbourne*

[83] Jonathan Hunyor and Michelle Swift "A Judge Short of a Full Bench: Mental Impairment and Fitness to Plead in the Northern Territory Criminal Legal System" (Paper presented at the Criminal Lawyers Association Northern Territory 13th Biennial Conference, Bali, 30 June 2011).

[84] Chris Bruce QC, "Ethics and the Mentally Impaired" (Paper presented at the Public Defenders Criminal Law Conference, Sydney, 27 February 2011) and discussed in Hunyor and Swift, n 83, 21-22.

[85] The Australian Law Reform Commission recently recommended a shift away from an objective "best interests" approach towards an approach requiring decision makers to act on the "will, preferences and rights" of the person. Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014). See Fleur Beaupert and Linda Steele, "Questioning Law's Capacity" (2014) 40 *Alternative Law Journal* 161.

[86] Law Society of New South Wales, n 80.

[87] Australian Corporate Lawyers Association, "Guidance for In-house Counsel on Ethical Decision Making" (November 2013).

Steamship Co Ltd v Moorehead where Griffith CJ explained it as "[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects".[88] The guidelines issued by each state and territory are largely consistent with the Commonwealth guidelines.

It has been suggested that the model litigant obligation is an ethical, rather than a legal, standard,[89] albeit a standard that courts "can and do exhort the Crown to meet".[90]

Self-represented litigants

Lawyers should be particularly careful when communicating with self-represented litigants and should ensure any statements do not convey a misleading impression.[91]

The Northern Territory Supreme Court publishes guidelines to assist self-represented persons in criminal and civil matters to understand the processes of the Court system.[92] Section 5 of the *Sexual Offences (Evidence and Procedure Act) 1983* (NT) prohibits an unrepresented defendant from directly cross examining a complainant in a sexual assault case.

From time to time the Northern Territory Bar Association has provided counsel to appear pro bono for an unrepresented party in criminal appeals.

ETIQUETTE

Ethics can be understood as professional duties that, if breached, might result in discipline for misconduct. Conversely the topic of etiquette covers the customary behaviour, good manners, and courtesies extended between lawyers appearing in court, and between those lawyers and the Bench.[93] Court etiquette is said to have developed around the time of the enactment of the *Magna Carta* and with the evolution of the legal profession in the 13th century.[94]

One shouldn't necessarily expect to be disciplined for displaying poor etiquette but there are some very good reasons to observe proper etiquette:

a) it marks you as a person to whom the court is a familiar environment,
b) it preserves the dignified and orderly conduct of litigation; and
c) it helps you avoid the possibility of offending your opponent or the judge.

[88] *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

[89] See eg the Hon Justice Pagone, "The Model Litigant and Law Clarification" (Speech delivered at the Aggressive Tax Planning Workshop, 17 September 2008).

[90] Christopher Peadon, "What Cost to the Crown A Failure to Act as a Model Litigant?" (2010) 33 *Aust Bar Rev* 239.

[91] The Hon Justice Emilios Kyrou, "A Lawyer's Duty" (2015) 89 *Law Institute Journal* 34.

[92] Supreme Court of the Northern Territory, *Self Represented Parties* (2008) <http://www.supremecourt.nt. gov.au/going2court/selfrep.htm>.

[93] R Annesley, *Good Conduct Guide: Professional Standards for Victorian Barristers* (Victorian Bar, 2006) 121.

[94] For more in depth discussion of the history and development of court etiquette see Thomas Gaffney, "Borrowed Manners: Court Etiquette and the Modern Lawyer" (2012) 86 ALJ 842.

In some respects good etiquette overlaps with good advocacy technique. Advocacy is the art of persuasion, and politeness is often the way to persuasion.[95] The two pillars of consideration and respect should uphold every aspect of an advocate's conduct,[96] from punctuality to presentation. Some guidance on appropriate etiquette is as follows.

Courtroom conduct

a) Be on time. Counsel should be ready to go a few minutes before the hour. Most judges are yet to master the art of teleportation and time must to be allowed for the court officer to confirm appearances of counsel and escort the judge from his or her chambers.
b) Avoid speaking while someone else is speaking. If the judge or your opponent starts speaking, counsel should cease speaking immediately.
c) Counsel should also keep silent while a witness is being sworn. This is a solemn occasion.
d) Make sure your mobile phone is switched off or to silent.
e) In some cases, courtesy in the court room looks different from courtesy in a social setting. You should refrain from greeting the judge with "Good morning" when you announce your appearance – though it is a nice sentiment, announcing an appearance is a state occasion and the judge should not feel obliged to wish everybody good morning.
f) When an objection is made, it should be stated concisely so that a judge understands its purpose is other than to interrupt a witness or put counsel off their stride. A seemingly terse, "Objection – irrelevant" is preferable to "Your Honour, I must object to this question. Frankly I just don't see the relevance". Opposing counsel should immediately sit and stop talking if an objection is made.
g) Respect the court reporters and those who may rely on the transcript (which may turn out to be you). Provide a list of witness's names ahead of time, spell out any unusual terms and try to avoid speaking too quickly. Where a witness makes a physical gesture, it helps to provide a narration: "the witness is indicating to a point around five metres away," "the witness has pointed to a spot on the Exhibit A map which I have pencilled a star next to".
h) Do not leave the bar table empty.

Preparation

a) Try to agree early on with your opponent about projected timeframes, uncontested facts and which issues are in dispute.
b) Know what orders you want. Have the orders which you seek prepared ahead of time so they can be provided to your opponent and handed up to the judge.
c) Estimate time accurately – the convenience of other lawyers, court staff and those preparing the court calendar depend upon it. Always advise the court as soon as a case is settled or where there is some change of

[95] PW Young, "Court Etiquette" 76 ALJ 303.

[96] V Coomaraswamy et al, *A Civil Practice: Good Counsel for Learned Friends* (Academic Publishing, Singapore Academy of Law, 2011).

circumstances that will prevent a listing going forth as planned. Early notification assists the court to manage the busy court calendar effectively and helps judges to schedule their in-chambers time productively.

d) Anticipate the judge's reasonable request. Judges often appreciate receiving aides such as chronologies and outlines of submissions. If parties can reach agreement about a document such as a timeline (going back to my point about preparing with opposing counsel) there is no reason why such a document cannot be provided ahead of time. Not only does it save the judge from scribbling madly away in court, it allows a matter to hit the ground running.

Addressing and referring to others

a) A High Court, Supreme Court or Federal Court judge should be addressed as "Your Honour" and referred to as His / Her Honour Justice / Chief Justice X.
b) After the commencement of the *Local Court Act 2015* (NT)[97] a Local Court judge should be addressed as "Your Honour" and referred to as His / Her Honour Judge / Chief Judge X.
c) Outside court a judge should be addressed as "Judge" unless you know that person on first name terms.
d) Inside court a fellow practitioner should be referred to as Mr / Ms X and where the practitioner is a barrister he or she should be referred to as "my friend" or "my learned friend". The term "learned" indicates only that your opponent is qualified to appear as a legal practitioner.[98]

CONCLUSION

The effective advocate will at all times maintain a high standard of conduct including unfailing courtesy to both the court and his or her opponent.[99]

The advice that US Federal Judge and Cornell University Dean, Frank Irvine, had for lawyers is useful advice to end on: "The lawyer should bring his manners into the court room. If he possesses none, he should borrow a set for court room use".[100]

[97] The *Local Court Act 2015* (NT) commenced on 1 May 2016.

[98] Trevor Riley, *The Little Red Book of Advocacy* (Law Society of the Northern Territory, 2nd ed, 2016) 148.

[99] Riley, n 98, 80.

[100] Frank Irvine, *Ethics of the Trial Court* (Cornell University, 1913).

The right to silence

David Morters*

The right to silence is routinely included in the list of indelible rights that constitute the foundation of our criminal justice system. In recent times however its untrammelled application has come under scrutiny and in some jurisdictions has been subject to modification. This article considers the meaning of the concept, its historical origins and development in the case law, the arguments for and against modification and the effectiveness of changes that have been introduced in England and New South Wales. Finally, it expresses a conclusion about how best the balance can be struck between the interests of the individual and the state on this much debated topic.

INTRODUCTION

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: "not to be compelled to testify against himself or to confess guilt".[1] So provides Art 14(g) of the *International Covenant on Civil and Political Rights* (ICCPR) which Australia has ratified.

Of course the provision is general in its terms and provides guidance only as to how the domestic law might deal with this vexed problem of the consequences of a decision by an accused to remain silent, at time of arrest, after service of a brief of evidence or at the completion of the Crown case and what conclusion might be drawn from such election.

This topic gives rise to a great deal of uncertainty as to how properly to resolve the competing arguments, as to how the balance should be struck between the objectives of on the one hand delivering to a jury a comprehensive and reliable account of the facts and circumstances surrounding an allegation whilst also ensuring that an accused receives a fair trial. The author hopes that, because the topic has created a dilemma, a consideration of the subject will be of some interest.

THE RIGHT TO SILENCE – ITS ORIGINS

What is the "Right to Silence" and where did it start? It really depends on what one means when one speaks about the concept. If it is defined as a right to refuse to answer questions upon threat of punishment or death then it has its origins in

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

legal enactments of 1641 and 1661 in England[2] in response to a High Commission inquiry into the activities of the Star Chamber which compelled defendants to answer questions put to them by the court.[3]

According to Wigmore it was largely attributable to the effort of one individual, John Lilburn, who was prosecuted for marketing seditious and heretical books. He refused to respond to questions put to him during Star Chamber interrogations on the basis that he perceived the questioners were attempting to illicit information from him so as to establish other charges against him having largely failed in their attempts at proving the offences before the court. His refusal resulted in a whipping. He pursued the matter through Parliament which led to the inquiry.[4]

Accused might then have been spared the threat of physical harm, however this did not translate in practical terms into a general practice of electing not to give evidence at trial. According to Professor Langbein:

> The fundamental safeguard for the defendant in common law proceedings was not the right to remain silent but rather the opportunity to speak. The essential purpose of the trial was to afford the accused the opportunity to reply in person to the charges against him. The defendant's refusal to respond to the incriminating evidence against him would have been suicidal. The sources show that criminal defendants did not in fact claim any such self destructive right.[5]

In England, by 1848 an accused was required to be told in pre-trial procedures that he or she was not required to answer questions but that anything that was said could be used in evidence against them.[6] That did not translate into a right to silence as we now know it but by that stage accuseds were permitted legal representation in court. The practice had developed that the legal representative would deliver the account upon which the accused wished to rely. A lawyer could relate facts on behalf of their client and did so in most instances. As the Hon Justice McMeekin puts it: "why bark when you have a dog?"[7]

By the end of the 19th century an accused was entitled to give evidence on his or her own behalf. Still however the expectation remained that adverse conclusions could be drawn if the accused elected not to do so. That this was not the case was met with incredulousness by Windeyer J in the NSW Supreme Court decision of *R v Kops*.[8]

In 1912 in England the Judges Rules were issued which included r 5 that introduced a caution which police were required to give to persons they held in

[2] *Act Abolishing Arbitrary Courts 1641* (Eng); *Ecclesiastical Commission Act 1661* (Eng).

[3] GL Davies, "The Prohibition against Adverse Inferences from Silence: A Rule Without Reason?: Part I" (2000) 74 ALJR 26; GL Davies, "The Prohibition against Adverse Inferences from Silence: A Rule Without Reason?: Part I" (2000) 74 ALJR 99, 102.

[4] JH Wigmore, *Wigmore on Evidence* (McNaughton, 4th ed, 1961) vol VIII [2250].

[5] RH Helmholz et al (eds), *The Privilege Against Self Incrimination: Its Origins and Development* (University of Chicago Press, 1997).

[6] *Indictable Offences Act 1848*, 11 & 12 Vict c 42.

[7] The Hon Justice McMeekin, "The Accused's Right to Silence" (Speech delivered to the Bundaberg Law Association Conference, 29 November 2008).

[8] *R v Kops* (1893) 14 NSWLR 150, 165–166.

custody before they questioned such persons. It took several decades, however, before the courts were prepared to recognise that, having exercised the right that had been offered, it would be then unfair for an accused if the exercise of that right could be used against them at trial.[9]

It was not until 1971 that there was acceptance that this right to silence extended beyond pre-trial investigations and that no inference could be drawn from the fact that an accused chose to say nothing at his or her trial.[10] There was criticism of the decision in 1976[11] where it was suggested that there was a conflict with the decision in *R v Christie*[12] which was cited as authority for the proposition that election for silence could have evidentiary value. The debate continued for several years but gradually it became accepted as part of the common law.[13]

Davies comments:

> It may now be accepted that it is common law, both in England and Australia that a person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information relevant to the offence by any person in authority; and that no adverse interest may be drawn from the silence. But that is a conclusion reached without any authoritative basis in the common law, or any sustainable rationale. The only rational explanation for that conclusion, and indeed for the re-interpretation of the terms of the caution which preceded it, is a distrust by judges of the capacity of juries, if evidence of silence was placed before them and comment by judge and counsel permitted, to draw sensible inferences from that silence free of prejudice.[14]

The suggestion that the privilege against self incrimination as we know it, which includes a prohibition on the drawing of adverse inferences, is a firmly established rule of the common law since the 17th century, as was stated by Gibbs CJ in *Sorby v Commonwealth*[15] and is cited in so many of the adherents of the preservation of the rule, is perhaps a liberal interpretation of a far more modern development in the common law. In *Azzopardi v The Queen*[16] McHugh J quite candidly states that eminent jurists such as Wigmore and Levy were "dead wrong" when they expressed such views and that the development of the principle that no adverse inference should be drawn against an accused who exercises a right to silence is a rule of relatively modern origin.[17]

Having freed ourselves from the misconception that any interference with the right would be an attack on a fundamental and longstanding principle of common

[9] *R v Naylor* [1933] 1 KB 685; *R v Leckey* [1944] 1 KB 80; *Woon v The Queen* (1964) 109 CLR 529, 541.

[10] *Hall v The Queen* [1971] 1 WLR 298.

[11] *R v Chandler* [1976] 1 WLR 585.

[12] *R v Christie* [1914] AC 545.

[13] *Parkes v The Queen* (1977) 64 Cr App R 25; *Petty & Maidment v The Queen* (1991) 173 CLR 95.

[14] Davies, n 3, "The Prohibition against Adverse Inferences from Silence: A Rule Without Reason?: Part I", 36.

[15] *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

[16] *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25.

[17] *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [118]–[135], especially [120].

law, the question is now whether it should be maintained in its present form or there is scope for modification of the right to more appropriately balance the competing interests of state and individual.

Proponents of the protection of a right to silence generally base their arguments on a connection of the right with other fundamental concepts of our criminal justice system, that the burden is on the state to prove an allegation of offending by an individual. That the state has at its disposal significant resources which it can deploy against individuals. That an individual has a right to privacy and a right to personal liberty and that the proper operation of a modern liberal democracy requires that interferences with such rights be restricted.[18]

The converse argument is that an absolute right to silence may have had application in a system where basic rights and freedoms were limited but in the modern context, where there is universal access to education, there are obligations on authorities for full disclosure and persons have the opportunity for access to legal advice and representation, there is no sense in the preservation of a right to silence once a prima facie case has been established. "The simple fact is that the maintenance of the present rule flies in the face of common sense".[19]

A review of the literature reveals that often the protagonists are talking about quite different concepts. Those for the maintenance of a right to silence often focus on an objection to compulsion to answer questions or an eroding of the right at the pre-trial stage. Gray, for instance, concludes that because of the existence of power and information imbalances, the preservation of a right to silence should be maintained for both pre-trial and trial stages of a prosecution and that non availability of the right at either stage would compromise its availability at the other stage.[20] It is submitted however that he fails to provide any justification for the conclusion that there cannot be different rules for different parts of the process depending on what the power relationship is at the respective time. The power relationship is likely to be significantly altered as a consequence of the service of a brief of evidence and the provision of legal advice.

Those arguing for its modification are often focusing on a criticism of the conclusion reached by the High Court in *Petty & Maidment v The Queen*[21] and extended by the majority in *Azzopardi v The Queen* that the cases in which a judge may comment on the failure of the accused to offer an explanation will be "both rare and exceptional… and will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case".[22]

There is a degree of disconnect between the positions for which each of the antagonists is contending. There is a degree of disingenuity in arguing that because there is unfairness at the time of arrest those same prejudices hold good

[18] See eg, Anthony Gray, "Constitutionally Heeding the Right to Silence in Australia" 39 *Monash University Law Review* 156, 158.

[19] The Hon Justice McMeekin, n 7, [43]–[51].

[20] Gray, n 18, 159.

[21] Gray, n 18, 159.

[22] *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25, [68] (Gaudron, Gummow, Kirby and Hayne JJ).

at the close of the Crown case or conversely that because there is no unfairness at a point in time when the accused is fully appraised of the case against him the protection should be abandoned from the outset. A more rigorous analysis is required of the potential consequences for a change in the rule at various stages of the prosecution process and in consideration of the different factors that might apply to the particular circumstances of a matter.

AMENDMENTS TO THE COMMON LAW POSITION

The common law rules as to what can be said about an accused's election to remain silent have developed significantly since the 1970s. The position that was adopted by Melford Stevens J in the English Court of Appeal[23] that there can be a distinction drawn between a prohibition on the drawing of an inference from an election to remain silent in the face of official questioning but that there may be room for comment about the weight to attach to a latter expression of innocence that follows an exercise of the right to silence, has largely been rejected by subsequent authority in the UK and Australia.[24]

Absent legislative amendment, the position in Australia is that it is impermissible for the prosecution to lead evidence for the purposes of demonstrating or suggesting that an accused exercised a right to silence and neither the prosecution nor the judge can ask any questions or make any comments about an accused's election to remain silent, either at time of arrest, at committal proceedings, during the trial or at any other stage of the proceedings. For those states that have adopted the *Uniform Evidence Act* s 89 gives legislative effect to the common law position at least with respect to questioning by an investigating official about an investigation.[25]

The two bases for leading evidence as to an exercise of the right to silence are:

(1) to suggest to a jury that an inference can be drawn as to the accused's guilt because the accused has elected not to say anything in his or her defence or
(2) to detract from the credibility of explanations that are provided at a later point in time, most obviously at trial in the defence case.

On 25 March 2013 amendments were made to the NSW version of the *Uniform Evidence Act* which introduced s 89A.[26] This provision, which is modelled on the *Criminal Justice and Public Order Act 1994* (UK),[27] allows for the drawing of unfavourable inferences about the failure by an accused to respond to any question or representation made during the course of official questioning that it could reasonably be expected the accused would mention at the time of questioning and which the accused subsequently relies on in proceedings. The provision is subject to certain limitations including that:

- a special caution was given prior to questioning;

[23] *R v Ryan* (1966) 50 Cr App R 144.

[24] *R v Sullivan* (1966) 51 Cr App R 102, 105; *Bruce v The Queen* (1987) 61 ALJR 603; *Petty & Maidment v The Queen* (1991) 173 CLR 95, 101, 104–105, 128.

[25] See S Odgers, *Uniform Evidence Law* (Thomson Reuters, 10th ed, 2012) [1.3.5680].

[26] *Evidence Amendment (Evidence of Silence) Act 2013* (NSW).

[27] *Criminal Justice and Public Order Act 1994* (UK) c 33.

- a legal representative is present during questioning;
- the offence the subject of the investigation carries a maximum penalty of at least five years imprisonment;
- the defendant is 18 years of age or older and is capable of understanding the special caution; and
- a defendant cannot be convicted solely on the evidence of failure to mention a fact that is subsequently relied upon.

The amendments were introduced to give effect to the second basis for modification of the right to silence; to affect the credibility of subsequent explanations. As was commented by the New South Wales Law Reform Commission (Commission) in its 2000 report: "It is difficult to see how one could do more than infer that evidence of a not previously disclosed fact is an invention".[28]

There are several arguments in favour of such an amendment. Politicians who introduced the amendment relied on the claim that a right to silence was being exploited by criminals, particularly members of criminal gangs or career professionals, and that it could be expected that persons who were innocent of the crimes that were alleged against them would be expected to provide information about their innocence in response to such allegations.[29]

A second argument is that, by encouraging an accused to provide an explanation, it will improve the efficiency of police investigations by allowing police to concentrate on an investigation of the information that has been provided in exculpation by the accused.

A third argument is that the prohibition against the drawing of adverse inferences developed at a stage in the history of criminal investigations in Australia which was characterised by police corruption and other improper practices of investigation and prosecution. That situation has substantially changed in recent times as a consequence of reforms such as the introduction of electronic recording of interviews and the obligations on police and prosecution of full disclosure. In such circumstances it is suggested that the need for an absolute right to silence is somewhat diminished.

A fourth argument is that there is a degree of illogicality in directing a jury that they should draw no conclusion from the fact that an accused has elected not to answer allegations or has provided an explanation only at the time of trial.[30] The illogicality of the situation was arguably recognised by the High Court in *Weissensteiner v The Queen*[31] where they adopted a more practical approach to the questions that arose from the failure of an accused to provide explanation in a particular set of circumstances. The facts that presented in that case were that an accused had gone sailing from Cairns with an elderly couple and returned to port several months later without them. In the absence of an explanation from the

[28] New South Wales Law Reform Commission, *The Right to Silence*, Report 95 (2000) [2.107].

[29] See for instance The Hon Barry O'Farrell MP, "Crime Crackdown: 'Right to Silence Law' Toughened" (Media Release, 14 August 2012).

[30] See eg, Davies, n 3, "The Prohibition against Adverse Inferences from Silence: A Rule Without Reason?: Part II", 105.

[31] *Weissensteiner v The Queen* (1993) 178 CLR 217.

accused about where the elderly couple had gone, the jury were told that, where information relevant to the allegation was likely within the knowledge of the accused, they could more readily draw an inference from the circumstances as to the accused's guilt than if the accused had given evidence.

A fifth argument is that it contributes significantly to greater public expense in the prosecution of criminal matters. The prosecution may be left with an obligation to prove all aspects of the Crown case notwithstanding only some become relevant to the final determination where an accused elects to give evidence at the trial.[32]

There has been much criticism of the effects of the introduction of s 89A on the administration of criminal justice in NSW just as there has been similar criticism of its UK equivalent in that jurisdiction. This article will canvass some of those criticisms so as to arrive at an opinion about the desirability of its introduction in other jurisdictions such as the Northern Territory where it is being seriously considered by the executive.

The Commission came to the conclusion in its report prior to the introduction of the provision that there was no basis for change to the existing law. The Commission argued that the only basis for admission of evidence about a failure to answer questions during investigation was that the failure to make a timely disclosure might give rise to an inference of guilt or recent fabrication.[33] Consistent with the law in Australia, a jury is only entitled to conclude that a lie or a course of conduct can constitute an admission of guilt if the only reasonable inference attributable to such lie is that it was told because the accused knew that the truth would implicate him or her in the commission of an offence.[34] According to the Commission: "Even if the defendant acted completely unreasonably, if he or she was not motivated by a consciousness of guilt, the silence is irrelevant: it proves nothing".[35]

The Commission's report goes on to list a series of alternative explanations as to why a particular accused might elect not to provide an explanation to the police other than because of a consciousness of guilt including:

- attitudes towards police,
- cultural factors,
- personal characteristics such as gender, age, mental disability, lack of education and low cognitive ability,
- communication factors such as language differences, tiredness or the effects of drugs or alcohol,
- lack of police disclosure of the specificity of allegations and evidence establishing the defendant as a suspect;
- protection or fear of others;

[32] See for instance Justice K van Dijkhorst, "The Right to Silence: Is the Game Worth the Candle?" (2001) 118 *South African Law Journal* 26.

[33] New South Wales Law Reform Commission, n 28, [2.111].

[34] *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, [16].

[35] New South Wales Law Reform Commission, n 28, [2.111].

- other reasons such as the effluxion of time, embarrassment about the nature of allegations or an explanation that is available; the opportunity to think about or seek advice about allegations.

There have been numerous other articles written which are critical of the NSW amendments, some of which are described below.

In a paper delivered on 11 February 2013,[36] David Hamer focused on the complexities that the reform gave rise to in response to claims by politicians in the media that the reforms were justified as a simple matter of common sense.

One problem Hamer identifies is the complexity of the special caution that will need to be given under the new provision and the potential difficulty a defendant may have in understanding it. A UK study found that only 10% of suspects and 13% of the general population understood the caution fully. That part of the caution which advises that an adverse inference may be drawn from an election to remain silent was understood by only 4.2% of the general population. Further, the study found that 96.3% of the participants claimed to understand the caution when in fact they did not.[37]

One can imagine the difficulties that will present in jurisdictions such as the Northern Territory where factors such as language, culture, education and affectation of mental disorder because of drug or alcohol abuse come into play. The interactions between police and suspect regularly reaches the level of high farce, all captured on video, as a police officer attempts to convince an indigenous suspect that they do in fact understand the caution that is presently required.

A second problem identified by Hamer is that the provision requires that a suspect be represented at the police station by a legal representative.[38] Advice over the telephone is insufficient. There is no duty lawyer system in place in Australia as there is in the UK. Anecdotal evidence suggests that a strategy being employed by defence lawyers in NSW is to advise clients by telephone that they should say nothing but refuse to attend the police station so that this condition cannot be satisfied. That defence is obliged to engage in such tactics can only reflect poorly on the system of criminal justice. It gives rise to the potential for inadequate representation of clients and allegations of improper influence by police if telephone legal advice is not followed.

There is potential for further complication if a lawyer does attend the police station to provide advice to the client and that advice is to exercise a right to silence. Hamer relates some of the consequences that may result from such advice including the erosion of the lawyer/client relationship if the advice is called into question at trial and the possibility that a lawyer will be required to give evidence at subsequent proceedings to address the issue as to whether the receipt of legal advice was a reasonable explanation for the defendant to refuse to

[36] D Hamer, "NSW Right to Silence Reforms" (Paper presented at the Sydney Institute of Criminology and NSW Bar Association Seminar, Sydney Law School, University of Sydney, 11 February 2016).

[37] S Fenner, G Gudjonsson and I Clare, "Understanding of the Current Police Caution (England and Wales) Among Suspects in Police Detention" (2012) 12 *Journal of Community and Applied Social Psychology* 83.

[38] Hamer, n 36, [2].

answer questions and therefore no adverse inference should be drawn.[39] Smyth identifies the consequences such advice might have for suits in negligence given the removal of immunity for out of court work done by lawyers following the introduction of the *Civil Liability Act 2002* (NSW).[40] One solution that the proponents of s 89A have been keen to advance is for the requirement that a lawyer be physically present when the special caution is given, be removed. There appears no impetus for the introduction of a duty lawyer system which underpins the amendments in the UK.

Dixon and Cowdery focus on the processes that are already in place which require defence disclosure in arguing that s 89A is an unnecessary and complicating addition to the criminal justice process.[41] They point to the long list of disclosure obligations that are placed on the defence under the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure Act 2013* (NSW). These obligations include disclosure of:

- the nature of the accused person's defence, including particular defences to be relied upon,
- the facts about which the defence takes issue,
- any statement of alibi (an obligation that has existed since well before the new Act),
- any statement alleging mental impairment,
- any expert report that an accused intends to rely upon at trial,
- any intention to put the prosecution to proof on continuity, surveillance activities, authenticity of documentary evidence or challenges to the indictment.[42]

The authors concede that the consequences of failure to comply with disclosure obligations are uncertain given the courts have a wide discretion as to how they deal with a breach.

They argue that the debate that occurred in the public arena over s 89A took no real account of the mechanisms in place to prevent "trial by ambush" but instead focused on a panicked sense of imbalance that was not supported by empirical evidence. That assertion is supported by statistics reported in the Commission's Report that in 1980 only 4% of suspects charged and tried in the Sydney District Court remained silent in police interviews and in only 7 to 9% of cases in 1988 and 1989, suspects in matters prosecuted by the Victorian DPP had failed to answer questions.[43] Of course these statistics are open to the same criticisms of all statistics and there is no study available that provides more detailed information about the percentage of suspects that participate in interviews, their rates of charging or conviction. It appears that the NSW

[39] Hamer, n 36, [6].

[40] DT Smyth, *The Attack on the Right to Silence. An English Method in the Antipodes. Should We Worry?* (April 2013) <http://criminalcle.net.au/attachments/The_Attack_on_the_Right_to_Silence_DANIEL_SMYTH.pdf>.

[41] D Dixon and N Cowdery, "Silence Rights" (2013) 17 *Australian Indigenous Law Review* 23.

[42] Dixon and Cowdery, n 41, 24–25.

[43] New South Wales Law Reform Commission, n 28, [2.16].

government did not rely on statistical information as the basis for its amendments but rather an appeal to "common sense"; a rhetorical argument that is difficult to argue against.

Dixon and Cowdery refer to the complexities that flow from the amendments as evidenced by a series of decisions in the UK and the retrograde effect of encouraging greater reliance by police on the interview process rather than the focus that has developed on the investigation of objective information as a consequence of developments in the criminal law over the past several decades as negative aspects of the amendments. They conclude that the negative aspects significantly outweigh the true attributes of the new provision when it is accepted that many of the arguments in support of the amendments fail to recognise that the problems identified have been dealt with in other ways.

Chu[44] focuses on the experience of the UK courts to similar amendments in that jurisdiction. He quotes a 1999 report on the changes as concluding that: "it is surely beyond argument that the demands on the judge and jury of the complex edifice of statutory mechanisms introduced by s 34 are enormous in proportion to the evidential gains they permit".[45]

Chu refers to several English authorities including *R v B*[46] in which the Court of Appeal described the legislation as a notorious minefield of complexity and *R v Brizzalari*[47] in which the court delivered a message to prosecutors that, because of the complexity of the provision, they should not exhort the court to reliance on s 34 unless the merits of the individual case require that it should be done.

Hamer[48] makes a similar point about the complexity of a direction required which he notes stretches to ten pages with commentary in the UK Crown Court Benchbook. He notes a quote from the court in *R v Bresa*[49] that:

> [E]ven in the simplest and most straight forward of cases it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit.

Neither of the principal online commentaries on evidence law in Australia[50] cite any authorities relating to the application of s 89A. It is unknown to the author what the experience has been of the operation of the provision by defence and prosecution in NSW. Perhaps its complexity is a factor in it not being the subject of judicial interpretation to date.

The criticisms of s 89A are in the author's opinion well justified. The potential consequence of applying pressure to suspects to participate in an

[44] V Chu, "Tinkering with the Right to Silence: The Evidence Amendment (Evidence of Silence) Act 2013 (NSW)" (2013) 17 *University of Western Sydney Law Review* 25.

[45] Chu, n 44, 38.

[46] *R v B (Kenneth James)* (2003) EWCA Crim 3080, [20].

[47] *R v Brizzalari (Michael)* (2004) EWCA Crim 310, [57].

[48] Hamer, n 36, [9].

[49] *R v Bresa (Adem)* [2005] EWCA Crim 1414, [4].

[50] JD Heydon, *Cross on Evidence* (LexisNexis, subscription service); Stephen J Odgers, *Uniform Evidence Law* (Thomson Reuters, subscription service).

interview at the time an allegation of criminal conduct is first levelled, at a police station and in circumstances where it is unlikely that the suspect will have a proper appreciation of the case that has been amassed against him or her cannot help but give rise to unfairness. That will particularly be the case for suspects who are disadvantaged through language difficulties, cognitive abilities, cultural differences and the like.

Gray[51] provides a poignant example. A person is accused of murder. The person has killed another. The person is in a mentally precarious state. The person refuses to answer. The requirements of s 89A are otherwise satisfied. The person killed because he was sexually abused by the person whom he killed. There might be a whole range of reasons why the person does not raise this fact at the time he is being interviewed by police. Those reasons might have as much basis in common sense as the expectation that the person would immediately tell the police of the reasons for the killing. Is there fairness in the drawing of inferences in those circumstances?

The complications for lawyers in providing appropriate advice in such circumstances are apparent and the complexities in application of such provision have been demonstrated by the experiences of the UK courts.

I am of the opinion that the amendment is flawed for much the same reasons as a blanket prohibition on the drawing of inferences is flawed. Neither gives recognition to the complexities that might come to bear on a decision whether or not to choose to provide an explanation and at what time it might be appropriate to provide such explanation. Both are inflexible responses to circumstances that will vary widely from case to case.

RECOMMENDATIONS FOR REFORM

What is advocated is a more flexible approach to a determination as to what comment if any should be made by a judge instructing a jury about an accused's election to say nothing in response to allegations that have been levelled against him or her.

Many will disagree with any proposal that in any circumstances an inference should be drawn from the exercise of the right to silence. The potential call to arms may resound: "It is the Crown which brings the charges, it is for the Crown to prove the charges". As Gray puts it:

> Consistent with the presumption of innocence, with liberal values, and in recognition of the power that government has over the individual, it is for the government to prove the truth of an accusation it makes. An individual should not be required to assist the government to make its case, on pain of punishment.[52]

That is powerful rhetoric but is there a case for its amelioration in certain circumstances? Is it any more compelling than an assertion of the reality that the community has an expectation that those who are innocent will say so; the expectation that an accused will respond to his or her accusers. What about the rights of victims? What about the burden that is placed on the investigative

[51] Gray, n 18, 156.

[52] Gray, n 18, 187.

process because investigators are required to disprove all possible explanations consistent with innocence rather than a specific explanation which is advanced by an accused?

To quote Justice van Dijkhorst:

> Initially one baulks at the idea of punishing an accused for his refusal to co-operate. But that flows from the right to silence which we have given him. Absent the right, there is no legitimate reason for his refusal to state his case…Those that argue that thus the accused would be required to convict himself forget the presumption of innocence and deem him guilty *a priori*. The law deems him not guilty and expects an exculpatory explanation if there is one. If it happens that there is no answer to the charge, so be it. The truth will be out and that is the object.[53]

The prohibition against the drawing of inferences against a person who elects to exercise a right to silence has not existed since time immemorial but rather developed during a period where there were justifiable concerns about the practices adopted by police in their dealings with suspects. A number of key initiatives, most significantly the requirement that suspect interviews by recorded, have made the activities of the police far more transparent the evidence obtained from such interactions far more reliable. I am not saying that these changes justify the drawing of adverse inferences from a failure to speak with police at this early point in time, just that they are one factor in questioning the applicability of the blanket rule that no inference should be drawn.

Similarly, the principles that underlie the standard direction emerged at a time when disclosure of the evidence that had been collected against an individual was far less extensive than what it is today. Most jurisdictions (the Northern Territory excluded) have introduced extensive disclosure laws into their criminal practice legislation. The common law now recognises that the prosecution owes a duty to disclose all relevant or potentially relevant material and a failure to disclose in accordance with that duty may constitute an unfairness to an accused which will result in the quashing of any conviction.[54] With the way technology is developing it is likely we are close to seeing the introduction of systems of automatic disclosure where police download information that has been collected on their database and defence are given an electronic key to access the material contained in the relevant file. Such a system, where the responsibility will be removed from the prosecutor is preferable to the author.

These are but two examples of the change in the nature of the relationship between accused and accuser which place the accused in a far superior position of knowledge and power than was the situation when cases such as *Petty & Maidment v The Queen* were decided.

In addition, strict adherence to the rule set down in *Petty & Maidment v The Queen* arguably results in inequitable outcomes across different offending groups. Those that are most capable of protecting their interests, the educated, the criminally experienced, persons with resources to afford legal representation, are more likely to exercise a right to silence yet arguably it is those very same groups of persons that are best able to provide responses to allegations that are put.

[53] Justice van Dijkhorst, n 32, 50.

[54] *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68, [17].

Although there is no empirical evidence to confirm the supposition[55] it is a fair assumption that it is the most vulnerable that are more likely to participate in interviews with police. There is a degree of inequity in the fact that those that are least capable of protecting their rights suffer the consequences whilst those with greater acumen or resources are more effectively protected. Newbury comments:

> The perverse result is that fewer admissions and confessions are obtained from the non-vulnerable group, leading to a lesser risk of conviction and gaol. This creates the potential for skewing of convictions and custodial sentences towards the vulnerable group.[56]

Similarly, a distinction is drawn between a refusal to talk to a person in authority and a refusal to talk or respond generally. In *R v Alexander*[57] the court accepted that an adverse inference could be drawn from a person's election to refuse to answer a question put by an acquaintance in circumstances where an answer would be expected. In *Petty & Maidment v The Queen* the High Court was careful to restrict the principle to questions put by persons in authority thus arguably preserving the exception accepted in *R v Alexander*.[58]

The argument that the prohibition on drawing inferences from silence protects the vulnerable from police manipulation is also without merit in modern times of recorded interviews and where a large body of authority has built up to ensure the exclusion of inculpatory statements that are obtained by arguably improper questioning. In fact the existence of the prohibition provides an incentive for authorities to use tactics to encourage a person to participate in an interview rather than placing the incentive on the individuals themselves to freely and voluntarily choose.

A further argument is the cost that can result from an accused's election to remain silent. Justice van Dijkhorst provides a number of examples from South African courts about the expense incurred in prosecutions because of reliance on the right.[59]

In *S v Vermaas, S v Du Plessis*[60] for instance, a qualified attorney was accused of committing 160 instances of fraud. The facts were complicated and, in the absence of any admissions by the accused, the prosecution was required to prove all aspects notwithstanding there was virtually no challenge to any of the evidence that was led throughout the trial. The trial was completed five and a half years after it first commenced and the cost for the prosecution alone was in the vicinity of $600,000.

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[55] New South Wales Law Reform Commission, n 28, [2.60]–[2.71].

[56] M Newbury, "Historical Child Sexual Abuse Investigations: A Case for Law Reform" (2014) 26 *Current Issues in Criminal Justice* 43.

[57] *R v Alexander* [1994] 2 VR 249 adopting *Parkes v The Queen* [1976] 1 WLR 1251.

[58] *Petty & Maidment v The Queen* (1991) 173 CLR 95, 99, 107.

[59] Justice van Dijkhorst, n 32, 37–45.

[60] *S v Vermaas, S v Du Plessis* [1995] 3 SA 292 (Constitutional Court).

Bagaric identifies the decision of *Weissensteiner v The Queen*[61] as an instance where the courts have recognised that in certain circumstances there should be a relaxation of the rule that no inferences can be drawn from silence. He summarises:-

> Thus the wash-up of [*Weissensteiner v The Queen*] is that where the accused fails to give evidence, in certain circumstances, exercise of the right to silence effectively constitutes an item of circumstantial evidence against an accused, and in such circumstances judicial comment that an inference of guilt can more safely be drawn is permissible.[62]

The High Court couched its judgment in terms which suggested that the decision did not impinge on the right to silence but, as Bagaric effectively argues, the decision had that exact effect and was in stark contrast to the decision in *Petty & Maidment v The Queen* that an incident of the right to silence is that no adverse inference can be drawn against an accused person by reason of his failure to answer questions or provide information.[63]

Bagaric argues that it would have been far more logical for the majority in *Weissensteiner v The Queen* to accept that the decision did impinge on an individual's right to silence but that such consequence was justified in circumstances where there was competition with other rights, in this case "the community's interest in convicting the guilty in some circumstances, including where there is a prima facie case against the accused who must have knowledge of the relevant facts…"[64]

What flows from a recognition of the true effect of *Weissensteiner* is that there will be some instances in which it is appropriate for a jury to draw conclusions about an accused's election to exercise a right to silence. To give a direction to a jury to the contrary when such circumstances prevail is to ignore generally held principles about human behaviour, that a person who is confronted with a false allegation will provide information in conflict with such an allegation. As Newbury comments:

> Such a direction is founded on the questionable presumption that jurors will understand and pay regard to judicial directions, even though research has shown that the interpretation of complicated legal directions is "potentially challenging for jury members". The possibility that jurors may regard silence as incriminating, even when directed not to, erodes its value, both to the innocent and guilty suspects alike.[65]

Or as the Hon Justice McMeekin candidly puts it:

> The reality of life is that if the facts cry out for explanation then no matter what a judge says any juror is going to ask themselves why the accused chose not to explain the facts.[66]

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[61] *Weissensteiner v The Queen* (1993) 178 CLR 217.

[62] M Bagaric, "The Diminishing Right of Silence" (1997) 19 Syd LR 366 (online).

[63] *Petty & Maidment v The Queen* (1991) 173 CLR 95, 99.

[64] Bagaric, n 62.

[65] Newbury, n 56, 48.

[66] The Hon Justice McMeekin, n 7, [56].

CONCLUSION

The underlying rationale behind an argument that there should be a relaxation of the principle that no inference should be drawn from an exercise of the right to silence is that, rather than treating the principle as some sort of sacrosanct and indelible human right, which given its relatively recent history of development it is clearly not, it is better to view it in terms of a piece of circumstantial evidence from which an inference may be drawn where no other reasonable explanation is suggested. That is the way in which our system of criminal justice consistently deals with inferential evidence.

Where, at a police station, an indigenous person with limited formal education and ability with the English language, is cautioned and on the advice of his lawyer elects to remain silent then there are clearly explanations for such conduct and a jury should be told that no inference should be drawn from that exercise of the right.

Where, on the other hand, a company CEO with post graduate qualifications and a detailed knowledge of the business that he or she operates, is confronted at trial with allegations of deceptive conduct, having been served a full copy of the brief of evidence and received the best legal advice money can buy, elects not to get in the witness box and confront the allegations that are levelled against him or her, the same test should not apply. Or more exasperatingly, if the accused gets in the witness box and provides an explanation that has not previously disclosed, which, if it had been disclosed, would have avoided the necessity for the prosecution to lead five weeks, five months or five years worth of evidence.

Between these two examples are a wide range of scenarios each of which will demand a different assessment as to what if any direction should be given about an accused's election to remain silent, either pre-trial or at the trial.

It is the judge in any trial that is in the best position, having received evidence about the circumstances, to decide whether a discretion should be exercised to direct that an inference can be drawn, or that a neutral position be adopted and no direction given at all, or that the jury be directed against drawing such inferences because of the circumstances that prevail in the particular matter. If a jury were directed that they could draw inferences then it would be for them to decide, after alternative explanations have been placed into the mix,[67] whether to draw the inference.

To conclude, although the author does not agree with Jeremy Bentham that the right to silence is "one of the most pernicious and irrational notions that ever found its way into the human mind",[68] there is merit in the argument advanced by Davies that there is an apparent incongruence between a blanket prohibition on the drawing of inferences and community expectations that an accused would respond if innocent. The law should reflect community values and expectations. The most effective way to achieve that objective is to entrust in the judge the discretionary power, guided by a statutory framework, to give appropriate

[67] The Hon Justice McMeekin, n 7, [49].

[68] J Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* (Hunt and Clarke, 1827) Vol V.

directions about both pre-trial and at trial silence based on the circumstances that prevail and rely on juries to draw sensible conclusions based on the evidence and the directions that they are given.

Driving whilst disqualified – A case for change

Julian R Murphy and Hugo Moodie

This article arises out of the authors' concern at the approach of Northern Territory courts to sentencing for the offence of driving whilst disqualified, which has been labelled "informal mandatory sentencing" by another commentator. It is posited that not only does this approach rest on an unstable precedential foundation, but it also lacks cogent justification in sentencing principles and is an inefficacious means of protecting the public and deterring further offending. Particular concern is expressed at the impact of the current approach on Indigenous Territorians. It is suggested that it is open to the courts to curtail and eventually reverse the overly punitive approach to sentencing for this offence, an approach that is largely the product of judge made law. Failing that, reference is made to other jurisdictions to make good the proposition that legislative intervention in this area is long overdue.

I. INTRODUCTION

Imprisonment rates in Australia have been a cause of concern for decades now. Nowhere is this issue more keenly felt than in the Northern Territory ("the NT") where the imprisonment rate is four times[1] the national average.[2] The incarceration crisis is of special concern for Indigenous[3] people, who make up 86% of the NT's prison population despite comprising only 30% of the general population.[4] The recent marking of the 25th anniversary of the Final Report of the Royal Commission into Aboriginal Deaths in Custody should serve to underline the urgency of the task of reducing the NT's Indigenous incarceration rate. An area where it would be possible to make immediate inroads into this problem is the sphere of driving offences, particularly the offence of driving

[1] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2014* (2014) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Northern%20Territory~10021>.

[2] One incident of such an agenda is the cost imposed on the taxpayer. In a time of relative fiscal austerity it costs $292 per day to imprison someone in Australia. See Productivity Commission for the Steering Committee for the Review of Government Service Provision, *Report on Government Services* (2015) Volume C: Justice, Table 8A.7.

[3] In this article the term "Indigenous" is intended to encompass both Aboriginal and Torres Strait Islander people.

[4] Australian Bureau of Statistics, n 1.

whilst disqualified. This offence results in huge numbers of persons going to prison each year,[5] many of them Indigenous.

This article examines NT sentencing jurisprudence in respect of the offence of driving whilst disqualified and ultimately contends that the current approach is supported by neither sound legal principle nor convincing public policy considerations. To ground the discussion this article opens by etiologically tracing the lineage of case law out of which the current approach has grown. The three primary legal and policy rationales for the current approach – to punish contempt for court orders, to deter like offending and to protect the public – will then be examined and debunked. The article will raise particular concerns about the effect of the current sentencing approach on Indigenous Territorians. Finally, with reference to developments in other Australian jurisdictions and abroad, a case will be made for an alternative approach, one which would see fewer people imprisoned but would not adversely affect public safety or crime rates.

II. Imprisonment, save for exceptional circumstances – The current NT position, and how we got here

The current NT approach to sentencing for the offence of driving whilst disqualified was articulated by one of the jurisdiction's most experienced judicial officers in the following words:

> ...the attitude of the Courts for quite some time in relation to the offence of driving whilst disqualified is to treat this offence as a serious one … unless exceptional circumstances exist, a term of imprisonment is almost inevitable.[6]

The extraordinary nature of this position, which creates a default presumption of imprisonment, only strikes home when one has regard to the statutory maximum penalty: originally 6 months' imprisonment, now 12 months' imprisonment.[7] To the authors' knowledge there is no other offence with a similar maximum penalty that, absent legislative prescription of a mandatory sentence, is treated with such severity by courts. This state of affairs calls for a consideration of how such a severe sentencing practice emerged.

The offence of driving whilst disqualified was introduced in the NT in 1949[8] and first warranted a recorded decision of the Supreme Court in *Daniels v Nichol*,[9] a single justice hearing of an appeal from the Court of Summary Jurisdiction. In the first instance the offender had been sentenced to three months' imprisonment for the offence of driving whilst disqualified and one month's imprisonment for the offence of driving with a blood alcohol content of 0.255 grams of alcohol per 100 grams of blood. Both sentences were to be served concurrently. No doubt the appeal was motivated in part by the disparity between the terms on the two distinct counts, sharing as they did the same statutory

[5] Approximately a quarter of the NT prison population at any one time is made up of driving offenders: Northern Territory, *Parliamentary Debates*, Legislative Assembly of the Northern Territory, 5 March 2011, Parliamentary Record No 19 (Mr McCarthy).

[6] *Breadon v Nicholas* (2010) NTSC 70, [25] (Mildren J).

[7] *Traffic Act 1949* (NT) s 31.

[8] *Traffic Ordinance 1949* (NT) s 55(8).

[9] *Daniels v Nichol* (unreported, Supreme Court of the Northern Territory, Forster J, 13 August 1976).

maximum and factual substratum. Justice Forster dismissed the appeal in words that were to have lasting ramifications: "for the offence of driving whilst disqualified from holding a driving licence *imprisonment is the appropriate penalty save in exceptional circumstances*".[10] These words have littered subsequent decisions of the Supreme Court in this area.[11]

In light of the cascade of cases flowing from *Daniels v Nichol* it is instructive to return to the source and consider the words in their original context. The much-quoted utterance comes, almost as an afterthought, in a single paragraph consideration of the appeal against sentence; the bulk of the judgment addresses the appeal against conviction. Yet the enthusiasm with which the words have been quoted in subsequent decisions has resulted in them attaining an authority unwarranted by their original deployment, which calls to mind the words of Windeyer J in a very different context: "We must always beware lest words used in one case become tyrants over the facts of another case."[12]

It should be noted, however, that there is a less prescriptive line of authority deriving from *Daniels v Nichol*. This line of cases reads Justice Forster's words permissively, recognising the injustice that bright line rules tend to create in the context of the sentencing exercise. As early as 1987, in *Seears v McNulty*,[13] judges were endeavouring to water down the words "exceptional circumstances" from *Daniels v Nichol* to allow for a case-by-case approach to the question of whether imprisonment is warranted for an offence so far down the statutory scale of seriousness.[14]

This more nuanced approach is consistent with the caveat on the *stare decisis* doctrine that warns courts to be chary not to treat the words of earlier judges as if they bear the precision of those set down in statute.[15] It is also consistent with three other loadstars of criminal sentencing jurisprudence, namely the premium placed on "individualised justice",[16] the imperative that imprisonment must be "a

[10] *Daniels v Nichol* (unreported, Supreme Court of the Northern Territory, Forster J, 13 August 1976) [7] (emphasis added).

[11] A sampling of the cases that have quoted *Daniels v Nichol* with approval include: *Pryce v Foster* (1986) 38 NTLR 23; *Ross v Sears* (1988) 54 NTR 26; *Oldfield v Chute* (1992) 107 FLR 413; *Marshall v Llewellyn* (1995) 79 A Crim R 49.

[12] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 400 (Windeyer J).

[13] *Seears v McNulty* (1987) 28 A Crim R 121, 131.

[14] See also *Oldfield v Chute* (1992) 107 FLR 413, 416; *Hales v Garbe* [2000] NTSC 49, [11]; *Stanischewski v Trenerry* [2001] NTSC 50, [13]–[14]; *Toulson v Burgoyne* [2003] NTSC 46, [9]; *Ross v Toohey* [2006] NTSC 92, [14]; *Carcuro v Norris* [2007] NTSC 18, [12], [25].

[15] *Bridge Trustees Ltd v Houldsworth* (2010) 4 All ER 1069 (CA), 1084 (Mummery LJ); *Mills v Mills* (1938) 60 CLR 150, 169 (Rich J); *Benning v Wong* (1969) 122 CLR 249, 299 (Windeyer J); *Scott v Davis* (2000) 204 CLR 333, 370 (McHugh J); *Papconstuntinos v Holmes a Court* (2012) 249 CLR 534, 538 (French CJ, Crennan, Kiefel and Bell JJ).

[16] *Elias v The Queen* (2013) 248 CLR 483, 495 (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Bugmy v The Queen* (2013) 249 CLR 571.

sentence of last resort"[17] and the hostility towards limiting a sentencing judge's broad discretion by the artificial introduction of "excessive subtlety and refinement".[18]

But the edifice created by that single sentence of *Daniels v Nichol* has proved strong enough to withstand the incursions of more moderate judgments in the ensuing years. The consequence is that in contemporary times it remains the case that: "[t]he usual disposition for an offender who drives whilst disqualified is by way of a sentence of imprisonment even for a first offence".[19]

Where the courts have failed Parliament has had some modest success in curbing the force of the *Daniels v Nichol* prescription. Legislative intervention creating alternative modes of imprisonment has given the courts a licence to prefer dispositions other than actual imprisonment for this offence. In 1988 "Home Detention Orders" were created[20] then in 2011 "Community Based Orders" and "Community Custody Orders" were introduced.[21] In the Second Reading Speech introducing the 2011 amendments the following was said:[22]

> Approximately 25% of the prison population is made up of driving offenders who serve an average of 75 days. This provides limited opportunity to access treatment or training programs targeting alcohol misuse and bad driving behaviour. Driving offenders are almost always disqualified from obtaining a licence and, when released from prison, are placed at risk of quickly committing a further driving offence, particularly if they are placed in a situation where there is no alternative for them but to drive while disqualified from doing so. This further contributes to the revolving door of recidivism. What this cohort of offender needs is intervention, supportive training, and rehabilitation targeting their offending behaviour such as treatment for alcohol misuse. Under the new era in Corrections, this cohort will be able to be diverted from prisons to an appropriate residential treatment and training centre.

Notwithstanding Parliament's laudable aspirations the new scheme has had only a limited impact due to many practical impediments to offenders being offered, and then being found suitable for, these dispositions. Worryingly, there is evidence from the 1990s confirming what the authors' intuit to remain the position, namely that these alternative sentencing dispositions are handed out at a lower rate to Indigenous offenders.[23] The current judicial approach remains, as one commentator labelled it, "an informal mandatory sentencing regime".[24]

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[17] *R v Way* (2004) 60 NSWLR 168, 191.

[18] *Weininger v The Queen* (2003) 212 CLR 629, 638 (Gleeson CJ, McHugh, Gummow and Hayne JJ), quoting from *R v Storey* [1998] 1 VR 359, 372. See also *Pearce v The Queen* (1998) 194 CLR 610, 622 (McHugh, Hayne and Callinan JJ).

[19] *Henda v Cahill* [2009] NTSC 63, [8].

[20] *Criminal Law (Conditional Release of Offenders) Amendment Act 1987* (NT).

[21] *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT).

[22] Northern Territory, n 5.

[23] Thalia Anthony and Harry Blagg, "STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia" (2013) 22 *Social & Legal Studies* 43, 51.

[24] Anthony Pyne, "Ten Proposals to Reduce Indigenous Over-representation in Northern Territory Prisons" (2012) 16 *Australian Indigenous Law Review* 2, 3.

III. Debunking the justifications for the NT's current approach

There are three commonly advanced justifications for the NT's current approach to sentencing for the offence of driving whilst disqualified. First, it is said that driving whilst disqualified is akin to contempt of court and, accordingly, deserving of severe sanction. Secondly, stern sentences for driving whilst disqualified are said to be necessary to deter further disqualified driving and other driving offences. Finally, driving whilst disqualified is sometimes characterised as a public safety offence.

(1) A contempt of court?

The justification most frequently advanced for imposing heavy custodial sentences on disqualified drivers is that these offenders are contemptuous of court orders. The gravamen of the offence is often formulated as the offender's "contumacious"[25] contravention of an order of the court. This formulation was expressed as early as 1949 in Victoria in the Second Reading Speech for the Bill which introduced the offence of driving whilst disqualified into the *Motor Car Act 1928* (Vic). Lieutenant Colonel Leggatt, who delivered the speech, warned: "The offence is a serious one and it is considered that, where a person *wilfully disobeys the order of the court*, power to arrest should be given and the penalty of imprisonment provided".[26]

A quarter of a century later, in 1976, Colonel Leggatt's words echoed in the distant halls of the NT Supreme Court where the offence of driving whilst disqualified was first described as "a serious contempt of the court".[27] Since then this characterisation has gained traction with the NT judiciary, so much so that it seems that now the only difference of opinion is over which pejorative descriptor best encapsulates the heinousness of the offence. The institutional disdain for disqualified drivers has generated a litany of epithets including: "disobedience",[28] "defiance",[29] "a flagrant disregard",[30] "a grave breach of the law",[31] "flouting the law"[32] and "contumacious of the Court and the law".[33]

In *Hales v Garbe*,[34] Martin CJ emphasised how important the notion of contemptuous conduct was in the court's sentencing calculus for this offence. The

[25] *Lynch v Dixon* [2004] NTSC 45, [33].

[26] Victoria, *Parliamentary Debates*, Legislative Assembly, 28 September 1949, 2391–2392 (Lieutenant Colonel Leggatt) (emphasis added).

[27] *Daniels v Nichol* (unreported, Supreme Court of the Northern Territory, Forster J, 13 August 1976), [7].

[28] *Hales v Garbe* [2000] NTSC 49, [6].

[29] *Ross v Seears* (1988) 54 NTR 26, 30; *Stanischewski v Trenerry* [2001] NTSC 50, [22]; *Eustace v Hales and Rigby* (unreported, Supreme Court of the Northern Territory, Riley J, 21 March 2002) [10] quoting *Crook v Roberts* (1990) 53 SASR 236, 238; *Carcuro v Norris* [2007] NTSC 18, [24].

[30] *Mick v Burgoyne* [2006] NTSC 5, [19].

[31] *Thomas v Henderson* (2001) 162 FLR 395, 398.

[32] *Pryce v Foster* (1986) 38 NTR 23, 29.

[33] *Lynch v Dixon* [2004] NTSC 45, [33].

[34] *Hales v Garbe* [2000] NTSC 49.

case involved a Crown appeal against sentence after a 24 year old man was fined (an aggregate fine) and disqualified for drink driving and driving whilst disqualified. On reading the appeal judgment there does not appear to have been anything erratic about the driving nor does it appear that the offender had any prior offences for driving whilst disqualified.

On appeal the Chief Justice concluded that an aggregate fine should not be imposed on an offender guilty of simultaneously drink driving and driving whilst disqualified since these two offences, in his formulation, where not founded on the same facts, or even "part of a series of offences of the same or similar character".[35] In resentencing, his Honour proposed a dichotomy between drink driving, which he said "poses a threat to the public", and driving whilst disqualified, which he said involves "disobedience of an order of a court, or to the will of Parliament expressed in legislation".[36] His Honour fined the defendant $700 for the offence of drink driving and imposed a four month term of imprisonment, albeit suspended immediately, for the offence of driving whilst disqualified. The Chief Justice's sentence illustrates the court's conceptual hierarchy of driving offences whereby amongst offences sharing the same statutory maximum driving whilst disqualified is considered far, far more serious than other offences causing significantly more danger to the public.

On close examination, however, it becomes apparent that the prevailing emphasis on punishing disqualified drivers for acting in contempt of court is misplaced. Court orders are routinely breached. Breaches of court-confirmed domestic violence orders, suspended sentences, community work orders, and bail conditions are commonplace. Such breaches are constitutionally similar to the breach committed by a disqualified driver; in each case the offender has failed to obey an order of the court. Yet an offender guilty of breaching a court order to undertake community work or reside at a given address, under bail conditions, is rarely accused of being contumacious of a court order and exposed to a lengthy custodial sentence. There is no reason to draw a distinction between offenders who breach a court order not to drive, and offenders who breach other orders of the court. Singling out disqualified drivers as being particularly contemptuous is doctrinally incoherent, and leads to the imposition of disproportionately harsh sentences.

(2) Deterrence

As articulated in the *Sentencing Act* (NT) the goal of deterrence is twofold:[37] to discourage the offender from committing the same or a similar offence (specific or personal deterrence), and to discourage others from the same (general deterrence). Deterrence has been described as the "paramount consideration"[38] and the "primary objective"[39] in sentencing disqualified drivers. There is, admittedly, a value in deterring people from committing the offence of driving

[35] *Hales v Garbe* [2000] NTSC 49, [6].

[36] *Hales v Garbe* [2000] NTSC 49, [6].

[37] *Sentencing Act* (NT) s 5(1)(c).

[38] *Gokel v Hammond* [2001] NTSC 9, [18].

[39] *Stanischewski v Trenerry* [2001] NTSC 50, [22].

whilst disqualified. That value stems from the fact that the commission of the offence erodes the integrity of the system of disqualification orders, which is thought to be a powerful mechanism for deterring people from committing other driving offences.

In *Smith v Torney*,[40] Muirhead J enunciated the rationale for prioritising deterrence when sentencing for this offence:

> The disqualification power is a vital weapon in the armoury of courts of summary jurisdiction … to combat the appalling toll of killed and injured on our roads … It is only an effective weapon if it is strictly enforced, but such orders are, by circumstance, difficult to supervise and enforce … The only practical method of obtaining maximum compliance with such orders is to ensure that those subject to such orders understand that the consequence of a breach will almost inevitably be grave, and imprisonment must, in this regard, be the general sanction.

Justice Muirhead's reasoning is attractive, appealing as it does to our desire to eradicate the scourge of drink driving. Put simply, his Honour's reasoning is that courts must come down hard on disqualified drivers so that disqualification orders are obeyed and the threat of being subjected to such inconvenience continues to deter drivers from drink driving. But that reasoning is deceptive in its simplicity, grounded as it is in the assumption that deterrence works, ie that a potential drink driver will think ahead to possible detection and disqualification and decide to take a taxi instead. If deterrence can be doubted then the reasoning collapses with its shaky foundations. So does deterrence work?

The importance of deterrence as an aspiration of criminal sentencing has deep roots[41]. Yet in recent decades this foundational concept of criminal law has been the subject of persuasive criticism.[42] Whilst it is beyond the scope of this article to rehearse in any detail the arguments against deterrence theory a few comments are appropriate. In relation to personal or specific deterrence empirical studies have shown, quite convincingly, that severe penalties such as imprisonment do not affect rates of recidivism for the offence of driving whilst disqualified[43] nor for other offences.[44] It is important to note that the recidivism rate is three times higher amongst Indigenous Territorians[45] and that by implication, they bear the brunt of the courts' unproductive attempts to achieve specific deterrence by imposing harsh sentences on repeat disqualified drivers.

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[40] *Smith v Torney* (1984) 29 NTR 31, 36.

[41] See *R v Radlich* [1954] NZLR 86, 87; *Power v The Queen* (1974) 131 CLR 623, 628 (Barwick CJ, Menzie, Stephen and Mason JJ).

[42] See, eg, Mirko Bagaric, "Editorial: The Fallacy and Injustice of Imprisonment to Deter Potential Offenders" (2009) 33 *Criminal Law Journal* 134.

[43] See Richard Edney and Mirko Bagaric, "Imprisonment for Driving While Disqualified: Disproportionate Punishment or Sound Public Policy?" (2001) 25 *Criminal Law Journal* 7, 15–16.

[44] Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, "The Specific Deterrent Effect of Custodial Penalties on Juvenile Re-Offending" (2009) 132 *Crime and Justice Bulletin* 1; Bruce A Jacobs, "Deterrence and Deterrability" (2010) 48 *Criminology* 417.

[45] Department of Justice (NT), Office of Crime Prevention, *Recidivism in the Northern Territory: Adult Prisoners Released 2001-2002* (2005), 2.

On the subject of general deterrence there are also reasons to doubt that increased penalty levels have any significant impact on crime rates.[46] Instead, the burden of the available research is that there is no strong link between heavier penalties and crime rates,[47] even for offences entailing a degree of forward-thinking.[48]

Specifically in relation to driving offences, a number of studies have confirmed that increasing the severity of sentences has little impact on crime rates:[49]

- A study of sentencing practices in the USA from 1976 to 2002 found that mandatory imprisonment, even for first time offences, did little to prevent drink driving;[50]
- A study based on 10 million drivers in New York State found that the threat of imprisonment did not create a significant general deterrent to driving offences;[51]
- A 2001 assessment of Canadian sentencing practices concluded that stricter penalties failed to significantly discourage drink driving;[52]

[46] Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Lawbook Co, 2nd ed, 2014) [7.05]–[7.65]; Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) [3.100]. Specifically in relation to the offence of driving whilst disqualified see Edney and Bagaric, n 43, 15–17.

[47] Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, Melbourne, 2011) 23; Anthony N Doob and Cheryl M Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143, 173–187; Dieter Dölling et al, "Is Deterrence Effective? Results of a Meta-Analysis of Punishment" (2009) 15 *European Journal on Criminal Policy and Research* 201, 222–223; Mirko Bagaric and Theo Alexander, "(Marginal) General Deterrence Doesn't Work and What it Means for Sentencing" (2011) 35 *Criminal Law Journal* 269, 273–277; A von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999), 47–48; FE Zimring and GJ Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1972) 29.

[48] Caleb Mason, "International Cooperation, Drug Mule Sentences, and Deterrence: Preliminary Thoughts from the Cross-Border Drug Mule Survey" (2011) 18 *Southwestern Journal of International Law* 189; Sidney L Harring, "Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs" (1991) 29 *Columbia Journal of Transnational Law* 365; Mirko Bagaric, Theo Alexander and Athula Pathinayake, "The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud" (2011) 26 *Australian Tax Forum* 511.

[49] See also H Laurence Ross, *Deterring the Drinking Driver: Legal Policy and Social Control* (Lexington Books, 1982), 96 cf António F Tavares, Sílvia M Mendes and Cláudia S Costa, "The Impact of Deterrence Policies on Reckless Driving: The Case of Portugal" (2008) 14 *European Journal on Criminal Policy and Research* 417, 425–426.

[50] Alexander C Wagenaar et al, "General Deterrence Effects of U.S. Statutory DUI Fine and Jail Penalties: Long-term Follow-up in 32 States" (2007) 39 *Accident Analysis and Prevention* 982, 992.

[51] Jiang Yu, "Punishment Celerity and Severity: Testing a Specific Deterrence Model on Drunk Driving Recidivism" (1994) 22 *Journal of Criminal Justice* 355, 362.

[52] Anindya Sen, "Do Stricter Penalties Deter Drinking and Driving? An Empirical Investigation of Canadian Impaired Driving Laws" (2001) 34 *The Canadian Journal of Economics/Revue canadienne d'Economique* 149, 162.

- A study of alcohol related road accidents in New South Wales found that the rate of such accidents may have *increased* after the statutory penalties for drink-driving offences were doubled.[53]

Naturally, the authors accept that the mere existence of the criminal justice apparatus has some effect in reducing crime rates, including the rates of driving offences.[54] If there were no policing of our roads and no possibility of detection and some type of punishment for driving disqualified then it is reasonable to assume that this offence would occur more often. However, this concession does not lead to the conclusion that imposing severe sentences will cause a reduction in the commission of this offence. Instead, the evidence-based inference is that the mere existence of a penalty has a general deterrent effect but increasing this penalty does not increase this effect. Returning to Muirhead J's reasoning in *Smith v Torney* with these issues in mind one sees that it is far from sure that severe sentences for the offence of driving whilst disqualified deter persons from committing the offence. Nor can it be said with any confidence that these harsh sentences are an effective means of preserving the potency of the disqualification order as a judicial weapon against drink driving.

Interestingly, senior members of the NT judiciary have expressed scepticism at the ability of imprisonment to achieve general and specific deterrence.[55] In *R v Lane*[56] Mildren J quoted with approval from *R v Johnston*:[57]

> The typical dangerous driver is not a hardened criminal. The thought of a prison is as frightening to him as it is to almost all citizens who are not hardened offenders. The deterrent to such a person is *a threat of imprisonment rather than the duration of the threatened imprisonment*.

Chief Justice Riley, in an extra-curial address,[58] echoed these views:

> Research reveals that increased terms of imprisonment do not affect the rate of offending and may increase recidivism … If we are to adopt a more punitive justice system it must be justified by reasons other than deterrence.

Deterrence must, it is conceded, continue to play a role in the sentencing exercise – both because empirical evidence suggests that the existence of a penalty regime (however lenient or severe) has some deterrent value on the

[53] Suzanne Briscoe, "Raising the Bar: Can Increased Statutory Penalties Deter Drink-Drivers?" (2004) 36 *Accident Analysis and Prevention* 919, 924.

[54] For a discussion of "absolute deterrence" theory see Bagaric and Edney, n 46, [7.50]–[7.55].

[55] For similar judicial utterances from other jurisdictions see also *Griffiths v The Queen* (1997) 137 CLR 293, 327 (Jacobs J); *R v Dube* (1987) 46 SASR 118, 120 (King CJ); *R v Ryan; Ex parte Attorney-General* [1989] 1 Qd R 188, 190 (Carter J), 191 (Dowsett J); *Police v Cadd* (1997) 69 SASR 150, 206 (Bleby J); *Pavlic v The Queen* (1995) 5 Tas R 186, 190 (Green CJ); *Krijestorac v Western Australia* [2010] WASCA 35, [30]–[37] (Wheeler JA, Owen and Newnes JJA agreeing).

[56] *R v Lane* (2005) 195 FLR 90; [2005] NTCCA 16, [22] (emphasis added).

[57] *R v Johnston* (1985) 38 SASR 582, 586 (King CJ). This dictum was also quoted with approval in *Baumer v The Queen* (1988) 166 CLR 51, 57 (Mason CJ, Wilson, Deane, Dawson, Gaudron JJ).

[58] Chief Justice Trevor Riley, "Victims of the System – A View from the Bench" (Paper presented at the 14th Biennial Conference of the Criminal Lawyers Association of the Northern Territory, Bali, 24 June 2013).

reduction of crime rates and because deterrence is a statutorily prescribed goal of sentencing contained in the *Sentencing Act*.[59] Yet deterrence need not be the primary factor a court takes into account; indeed it was said in *R v Renwick*:[60]

> … general deterrence is required as a matter of law, when sentencing offenders in the Northern Territory. This does not mean however that there cannot and should not be a proper balancing with other factors…

The Australian Law Reform Commission has suggested that placing too much emphasis on general deterrence can skew sentences beyond what is fair for the individual concerned.[61] Such disproportionality is inconsistent with s 5(1)(a) of the *Sentencing Act*, which requires the court to punish offenders "to an extent or in a way that is just in all the circumstances".[62] The authors contend that it is not just in all the circumstances to continue to prioritise deterrence in the sentencing exercise for driving offences when severe sentences for this offence have been shown to have little deterrent effect. If this is so, NT courts should begin reframing the sentencing approach for this offence by placing greater emphasis on the other interests prescribed in the *Sentencing Act*.

(3) A public safety offence?

Once the contempt of court analogy and the deterrent justification fall away one is left only with the public safety rationale for severe sentencing of disqualified drivers. Chief Justice Asche articulated the public safety rationale in *Ebateringa v Bolidston*[63] in 1988:

> Persons who attempt to drive when disqualified are not only putting themselves at risk; for the obvious reason that they have already shown themselves to a significant extent to be incapable of driving properly. *They also put innocent members of the community at risk*.

This justification has been embraced, though not widely, in subsequent cases.[64]

The conclusion that driving whilst disqualified is an offence of special danger to the public does not withstand close scrutiny. It is instructive to compare the offence with that of driving unlicenced. In terms of *actus reus*, each requires the same "conduct" of driving a motor vehicle. The "circumstance" elements differ (one requiring the absence of a licence the other requiring the positive presence of a disqualification notice or order). Neither offence requires that the driving be erratic, unsafe or impaired.[65] Indeed the detection of both of these offences often

[59] *Sentencing Act* (NT) s 5(1)(c).

[60] *R v Renwick* [2013] NTCCA 3, [51] (citation omitted).

[61] Australian Law Reform Commission, *Sentencing*, Report No 44, (1988), 18.

[62] *Sentencing Act* (NT) s 5(1)(a).

[63] *Ebateringa v Boldiston* (1988) 8 MVR 413, 417 (emphasis added).

[64] *Stanischewski v Trenerry* [2001] NTSC 50, [22]; *Thomas v Henderson* [2001] NTSC 54, [22]; *Carcuro v Norris* [2007] NTSC 18, [24]. See also Douglas Brown, *Traffic Offences and Accidents* (LexisNexis Butterworths, 4th ed, 2006) 77.

[65] Indeed some studies suggest that disqualified drivers will drive *more* carefully than licenced drivers, in the hope of avoiding detection. See Victor Siskind, "Does Licence Disqualification Reduce Offence Rates?" (1996) 28 *Accident Analysis and Prevention* 519, 524.

occurs by way of random licence and registration checks or road-side breath tests.[66] In light of these similarities one cannot help but be struck by the marked dissimilarities in the sentencing approaches for these two offences. Driving unlicenced is not commonly treated as an offence of special danger to the public. The Supreme Court has indicated that it will rarely be appropriate to sentence an unlicensed driver to anything beyond a fine.[67] Yet driving disqualified rarely meets with anything but imprisonment. It is worth remembering that both offences carry the same maximum penalty (12 months' imprisonment).

Thankfully it is by no means widely accepted that driving whilst disqualified poses a direct threat to public safety (absent intoxication or erratic driving).[68] Indeed, certain judgments expressly reject this characterisation and distinguish driving whilst disqualified from drink driving on the basis that the latter involves a risk to the public whilst the former does not.[69]

IV. Disqualified driving and Indigenous Australians

It is a peculiar paradox of *formal* equality before the law that it rarely guarantees *substantive* equality. Laws which, on their face, apply equally to all people can, in fact, operate more harshly on certain groups. This is, unfortunately, the case for the NT laws governing licence disqualification and driving whilst disqualified, which disproportionately impact upon Indigenous people.

This is not a new phenomenon. Since at least 1991 it should have been irresistibly clear that Indigenous people were being locked up at alarming rates for low level driving offences. As much was explicitly adverted to in the final report of the Royal Commission into Aboriginal Deaths in Custody.[70] More recently, one scholar-practitioner in the Territory revisited the issue, suggesting that reforming the NT's punitive approach to driving whilst disqualified would be a meaningful way of tackling the high rates of Indigenous incarceration.[71] Notwithstanding these injunctions, the trend of disproportionately imprisoning Indigenous people for driving offences continues unabated. It falls to consider how exactly a law which is, on its face, colour-blind is achieving such a result.

(1) Language issues, legal issues

For many Indigenous Territorians English is a second, third or even fourth language. English is spoken at home by just 35% of the NT Indigenous population and only 12% of Indigenous people living in very remote locations.[72]

[66] Thalia Anthony and Harry Blagg, *Addressing the "Crime Problem" of the Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities* (Criminology Research Advisory Council, 2012) 50.

[67] *Rontji v Westphal* [2010] NTSC 67, [14].

[68] See, eg, Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge, 5th ed, 2010) 361.

[69] *Hales v Garbe* [2000] NTSC 49, [6].

[70] Royal Commission into Aboriginal Deaths in Custody, *National Report* (AGPS, 1991), Vol 3, 71 Recommendation 95.

[71] Pyne, n 24, 3–4.

[72] Bruce Wilson, *A Share in the Future: Review of Indigenous Education in the Northern Territory* (The Education Business, 2014) 44.

Schools are generally the primary source of developing English language proficiency but many Indigenous people do not progress beyond year 10 of high school,[73] thus not attaining the proficiency in English enjoyed by other Australians. A lack of English-language proficiency is especially common amongst Indigenous persons coming into contact with the criminal justice system.[74] This unfamiliarity or discomfort with English, especially formal or technical English, leaves Indigenous people vulnerable to committing offences which they would not have committed had they understood the legal significance of their actions and the possible legal consequences. To appreciate why this is true of the offence of driving whilst disqualified it is necessary to explore the various circumstances in which this offence may be committed.

A lack of English-language proficiency can lead to an Indigenous person misunderstanding a disqualification order on one of three levels. First, the effect of the order (to render criminal all driving whether it be in community, "out bush" or in town).[75] Second, the duration of the order (which can be complicated by backdating, cumulation of various orders and the intersection of blanket disqualifications and disqualifications subject to an alcohol-ignition-lock exception). Third, the consequences of driving in contravention of the disqualification order (usually imprisonment, which may or may not be served by an alternative detention order depending on the availability of correctional services supervision in the offender's community).[76]

Police-issued immediate disqualification notices[77] will most often be issued without the assistance of an interpreter, either on the roadside or at the police station. It is worth remembering, too, that these notices are usually given to a person whilst they are intoxicated (but deemed sober enough by the issuing police officer to understand the significance of the notice) or at the very least feeling the aftereffects of alcohol and a few hours spent in a police cell to sober up. For Indigenous people who cannot read English, or cannot do so confidently, the few words said by the police officer on the side of the road may be the only warning they have that they will be imprisoned if they drive again. Some people who receive police-issued immediate disqualification notices miss their subsequent court date and do not come to the attention of police for a number of months or even years. For these people the piece of paper they were given on the roadside by a police officer may begin to seem remote and it may be difficult to comprehend that driving, months or years later, could still result in imprisonment.

Even for those who do attend court and are sentenced to a period of disqualification there is no guarantee that they will comprehend the significance of the court's order. There are a number of reasons for this. First, the Northern Territory Courts are busy and sentencing remarks for driving offences are often delivered, of necessity, rapidly – especially for those being sentenced at "bush"

[73] Wilson, n 72, 45.

[74] Caroline Heske, "Interpreting Aboriginal Justice in the Territory" (2008) 33 *Alternative Law Journal* 5, 5.

[75] Anthony and Blagg, n 66, 48.

[76] Anthony and Blagg, n 66, 49, 60.

[77] *Traffic Act* (NT) s 29AAN.

(circuit) courts.[78] Second, sentencing remarks often include language unfamiliar to Indigenous people from remote communities – even when well-intentioned judicial officers are straining to use plain English. Words like "disqualification", "period",[79] "backdate" and "alcohol-ignition-lock" may not be in regular circulation in remote Aboriginal communities. Of course defence lawyers would endeavour to explain the sentence to the offender but in especially busy courts lawyers may not get a chance to see an offender after they have been sentenced and may need to rely on a "file closure letter" which may never reach, or may never be read, by the person. Third, a large portion of Indigenous people have hearing deficiencies.[80] Whilst this may not prevent them hearing every word said by a judicial officer it may result in key words being missed, especially unfamiliar words delivered rapidly.[81] Whilst it might be thought that the use of interpreters could ameliorate all of these problems interpreters are not always available.[82] Even when interpreters are available they are not always employed effectively: either by the court or the lawyers.[83] The blame for this does not lie at the feet of any one party and is a product of time pressures and miscommunication between the bench, defence lawyers, interpreters and clients. Yet, even when used well, interpreters do not solve all comprehension problems. As much is clear from the fact that in Victoria, where language barriers are not as prevalent, Magistrates have noted that many persons appearing in court for the offence of driving whilst disqualified appear to have genuinely misunderstood their disqualification.[84]

The upshot of the all the considerations just discussed is that many Indigenous people given disqualification orders do not understand the significance of those orders, at least not as well as the Territorian for whom English is a first language. This, in turn, makes these Indigenous people more likely to drive in contravention of their disqualification orders. Whilst the offence of driving whilst disqualified is only established if the person knew that he or she was disqualified[85] in practice it is very difficult to convince a court otherwise in the face of a court staffer or police officer giving evidence that he or she delivered and explained the disqualification order to the individual concerned. Perhaps all of the above is best encapsulated in the pithy response of a Walpiri survey

[78] *Campbell v Meredith* [2005] NTSC 13, [16].

[79] Anthony Pyne has noted that alternate conceptions of time and time management held by some Indigenous people is another compounding factor that contributes to misunderstanding as to the effect of disqualification notices and orders: Pyne, n 24, 4.

[80] Access Economics, *Listen Hear: The Economic Impact and Cost of Hearing Loss in Australia* (Access Economics, 2006) 17.

[81] See generally Damien Howard, et al, "Aboriginal Hearing Loss and the Criminal Justice System" (1994) 18 *Aboriginal and Islander Health Worker Journal* 9.

[82] James Lowrey, "An Error of Law: Recognising Interpreters as Officers of the Court of Summary Jurisdiction" (Paper presented at the Language and the Law conference, Supreme Court of the Northern Territory, Darwin, 29 August 2015).

[83] Lowrey, n 82.

[84] Stephen Farrow, Adrian Hoel and Felicity Stewart, *Driving While Disqualified or Suspended: Report* (Sentencing Advisory Council, Melbourne, 2009) [2.13].

[85] *Traffic Act* (NT) ss 31, 51.

participant to a researcher's questions about driving unlicenced (the comment applies equally to driving whilst disqualified): "Why do we drive without a licence? We love driving, we love car."[86]

(2) Environmental factors

There are also significant environmental factors which contribute to Indigenous Territorians driving whilst disqualified more often than their non-Indigenous neighbours. The two most significant of these factors are geographic remoteness and family or kinship pressure to drive.

Remote living

In the NT 79% of Indigenous people live in remote or very remote areas.[87] Studies have shown that people living in remote and regional areas are more likely to commit driving offences than people in urban environments.[88] Few people would be surprised by this empirical finding; people living in remote areas need to travel long distances to access the many essential services, facilities or amenities that residents of urban centres take for granted. Furthermore, traditionally-orientated Indigenous people from remote communities will frequently have to travel long distances to attend sports carnivals, ceremonies, funerals or other culturally important events. Paradoxically, it has also been observed that the imposition of large geographic "dry areas" (where the sale, possession and consumption of alcohol is prohibited) has created an additional incentive for people living in remote communities to engage in long distance road travel.[89]

What becomes apparent from the above observations is that Indigenous people living in regional or remote environments will generally have a stronger motivation to travel by road for longer distances, and more frequently, than persons residing in urban centres. Where alternate travel options are not available – because there is no public transport and few family or friends hold valid licences – these people are left very vulnerable to the temptation to drive whilst disqualified if they are lucky (or unlucky) enough to have access to a vehicle.[90]

Family or kinship pressure

Another factor causing Indigenous disqualified drivers to get behind the wheel is pressure arising from kinship or family obligations. The authors of a significant

[86] Anthony and Blagg, n 66, 47.

[87] Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006* (4 May 2010) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6E6D19F5BB55AD66CA2578DB00283CB2?opendocument>.

[88] Michelle S Fitts and Gavan R Palk, "Drink Driving Among Indigenous Australians in Outer Regional and Remote Communities and Development of a Drink Driving Program: A Summary of Findings and Recommendations" *Research Bulletin No. 2* (National Drug Law Enforcement Research Fund, 2015) 1; Committee on Law and Safety, Legislative Assembly of New South Wales, *Driver Licence Disqualification Reform*, (2013) 12–13.

[89] Fitts and Palk, n 88, 1, 5; Anthony and Blagg, n 66, 39–40.

[90] See generally C D Robinson, "Social Implications of Driver Disqualification: Reality and Road Traffic Laws" (1975) 8 *Australian and New Zealand Journal of Criminology* 174.

Queensland study of the Indigenous commission of driving offences reported:[91]

> Participants reported a strong sense of "family obligations" which referred to situations where they described pressure from members of their extended families to drive after drinking. The underlying responsibility for transporting family members appeared to be difficult to avoid and related to cultural values that involved responding to family needs as a priority.

Similarly, two researchers - who spent considerable time in the predominantly Walpiri communities of Yuendumu and Lajamanu interviewing community members, Elders and people sentenced by the court for driving offences – reported:[92]

> Walpiri people, particularly those with cultural authority, acknowledged that there were instances where Walpiri would be placed under extreme pressure – by relatives in particular – to drive while unlicenced. Younger people who had driven unlawfully spoke of pressure from Elders to be driven to the health clinic, shops and cultural and family occasions (including funerals). While Elders were critical of the failure of young people to obtain licences, they nonetheless relied on them for transportation. For young people, driving to meet cultural obligations, or where there was a special relationship with the passenger, were [sic] non-negotiable, with or without a licence.

Although the above two observations relate to drink driving and unlicensed driving there is no reason to think that these pressures do not apply equally to driving whilst disqualified. In communities with only a handful of functioning vehicles and few licenced drivers there can often be significant pressure on vehicle owners to give other people "lifts" notwithstanding the vehicle owner's disqualification order. These requests are especially difficult to refuse when they are made by a person to whom the driver has a kinship obligation – to refuse the request in these circumstances might be contrary to Indigenous customary law. A number of judgments advert to these particular characteristics of remote living that put Indigenous people at special risk of driving whilst disqualified,[93] but rarely do such considerations tip the balance in favour of a non-custodial sentence.

(3) Over-policing

Commentators and academics have remarked that Indigenous people living in remote communities are more likely to be caught driving whilst disqualified than white people living in urban environments simply because there are more police per capita in remote communities.[94] The increased police presence in remote Indigenous NT communities came about with the 2007 "Emergency Response" or "Intervention". Scholars have suggested that the increase in police presence in

[91] Fitts and Palk, n 88, 5.

[92] Anthony and Blagg, n 23, 58.

[93] *Ebateringa v Bolidston* (1988) 8 MVR 413, 418; *Nabanardi v Minner* (1992) 62 A Crim R 325, 325, 329, 330; *Patterson v Materna* (unreported, Supreme Court of the Northern Territory, Mildren J, No JA 36/1996, 28 August 1996), [15]. For a discussion of the relevance of "camp dogs" to sentencing for this offence see *Campbell v Meredith* [2005] NTSC 13.

[94] Bob Gosford, *NT Government and Police – Losing the Plot on Traffic Crime in the Bush?* (17 December 2010) Crikey <https://www.crikey.com.au/2010/12/17/nt-government-and-police-losing-the-plot-on-traffic-crime-in-the-bush>; Anthony and Blagg, n 66, 37–39; Anthony and Blagg, n 23, 44, 55; Pyne, n 24, 4.

remote communities and the change in their approach to minor offences "led to a dramatic increase in the criminalisation of Indigenous people for driving-related offending".[95] The figures support this assertion, showing that the detection of driving-related offences went up 250% in the years following the Intervention.[96]

(4) Alternatives to prison? Not if you are Indigenous and from a remote community

In recent years the NT Parliament has created a tranche of legislative alternatives to actual imprisonment. This started with the "Home Detention Order" in 1999,[97] to which was added the "Community Based Order" and the "Community Custody Order" in 2011.[98] Essentially these innovations allow the court to sentence a person to a term of imprisonment but order that the term of imprisonment be served in the community, so long as the person abides by certain conditions, commonly involving monitoring, abstinence and community work. When creating these new dispositions Parliament indicated that they would be appropriate for people who are otherwise contributing to the community, for example through employment.[99] The courts have echoed this refrain.[100]

The problem with designating employment as the primary criterion of eligibility for an alternative detention order is that many Aboriginal people are unemployed, particularly those living remotely where employment opportunities are scarce.[101] The other factor that regularly precludes Indigenous offenders from avoiding prison by alternative detention order is that the Department of Corrections do not have the resources to supervise or electronically monitor people residing in many remote communities.[102] The deeply troubling result of the current approach and implementation of alternative detention orders is that you are far less likely to be eligible for one if you are an Indigenous person living in a remote community. The injustice of this situation is undeniable, and renders these legislative interventions largely irrelevant to the problem of Indigenous incarceration.[103]

[95] Anthony and Blagg, n 23, 44.

[96] Anthony and Blagg, n 23, 55.

[97] *Sentencing Amendment Act (No 2) 1999* (NT).

[98] *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT).

[99] Northern Territory, n 5. See also the comments of Ms Lawrie and Mr McCarthy in Northern Territory, Parliamentary Debates, Legislative Assembly of the Northern Territory, 8 August 2011, Parliamentary Record No 21.

[100] *Oldfield v Chute* (1992) 107 FLR 413, 417.

[101] The Australian Bureau of Statistics estimates that 51% of Indigenous people aged over 15 are not participating in the labour force: Australian Bureau of Statistics, *6287.0 Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Estimates from the Labour Force Survey, 2011*, (26 July 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6287.0?OpenDocument>.

[102] *Ross v Toohey* [2006] NTSC 92, [16]–[18].

[103] The other problem is that Aboriginal people living remotely are far more likely to breach alternative detention orders and find themselves in prison. This occurs for a range of reasons: different conceptions of time hamper reporting requirements, cultural imperatives to travel conflict with geographic prescriptions, and family pressures to consume alcohol results in contravention of abstinence requirements.

The authors are not aware of any recent figures which record the portion of actual imprisonment dispensations, as opposed to alternatives, for offenders by Indigenous status. There are, however, such statistics from a period in the 1990s. Those statistics are discussed by Anthony and Blagg[104] and bear repeating:

> Figures from 1993/1994 revealed that 92.4% (231/250) of people imprisoned for driving offences were Indigenous. By contrast only 45% of people given community service orders for driving offences were Indigenous. Furthermore, while *the ratio of Indigenous to non-indigenous people being charged for serious driving offences is 1:1, the imprisonment rate is 9:1*.

Unless and until Corrections release data on the current spread of sentencing dispositions of Indigenous driving offenders there is no reason to think that the approach today is any different from what it was twenty years ago. Such a pessimistic assumption is, in fact, lent credence when one considers the troubling reasoning in the contemporary case law, which still appears to place a premium on employment as the criterion for a disposition other than actual imprisonment.[105]

V. ANOTHER WAY?

The above discussion raises the question: is there a better way to approach licence disqualification both in its implementation and in sentencing for contravention? The answer is a resounding "yes", or rather a chorus of "yeses" as there are numerous viable alternatives, some of which are discussed below.

(1) Vehicle impoundment

One such suggestion prioritises sanctions directed to the vehicle used in the commission of the offence (often, but not always, the offender's vehicle). Vehicle impoundment[106] is an immediate but temporary and provisional sanction capable of being imposed by police but subject to confirmation or revocation by a court at a later date, not unlike the current power of NT police to impound vehicles involved in "hoon behaviour".[107] Essentially the power would allow police to seize and impound a vehicle involved in the commission of an offence until the court's determination of the merits of an application for revocation or extension of the impoundment order. The authors note that there may be issues with the capacity of remote community police stations to impound vehicles for any period of time. In such cases it may well be feasible for the vehicle to be transported to its owner's residence, wheel clamped and stored there for the duration of the impoundment period.[108]

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[104] Anthony and Blagg, n 23, 51 (citation omitted, emphasis added).

[105] Compare *Smith v Torney* (1984) 29 NTR 31 where a solid work history could not save a young man from a sentence of six weeks actual imprisonment for his first incident of driving disqualified. See also *Gokel v Hammond* [2001] NTSC 9, [20].

[106] For proponents of this measure see Farrow, Hoel and Stewart, n 84, ix, 53.

[107] *Traffic Act* (NT) ss 29AA–29AT.

[108] Another alternative would be to confiscate the registration plates rather than the vehicle itself or to impose a sticker on the car advertising the ban on its use. See Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia* (Crime Research Centre, University of Western Australia, 2003) 8–9.

Vehicle sanctions have been rolled out effectively across Canada, and certain western states of the USA.[109] It must be admitted that implementation in the NT would present very different challenges from those encountered in North America, especially in remote NT communities where in many instances the vehicle involved in the commission of an offence is owned by someone other than the offender (usually a family member). Inevitably some injustice would accrue to such vehicle owners, at least until a Magistrate had the opportunity to review the impoundment.[110] Yet there is also a benefit in reposing some responsibility in the vehicle owner. If the person providing the car knew that his or her vehicle might be impounded then he or she might try harder to ensure the driver was licenced.[111]

As a safeguard against third party hardship the legislative provisions creating the impoundment power would need to require police to make all such enquiries as are possible to avoid any significant injustice resulting from the vehicle's immediate impoundment. Regardless of the outcome of those enquiries the issue would always need to be revisited in more detail by the court in its determination of whether to revoke or extend the impoundment order. Such determination would require assessment of potential injustice to innocent third parties.[112]

The Victorian Sentencing Advisory Council has reported,[113] with reference to police data, that vehicle impoundments substantially curtail reoffending rates:

> Police data suggest that there is a low rate of reoffending following vehicle sanctions. Only four per cent of people whose vehicles have been impounded are detected committing subsequent vehicle impoundment offences. This suggests that even shorter (up to 48 hours) periods of impoundment and immobilisation can have a powerful psychological impact, particularly in relation to young males.

Such short term, or "flash", impoundments may be another suitable means of limiting hardship to third parties. The authors suggest that a way to even further harness the effectiveness of the vehicle impoundment measure might be to require, as a condition of the return of the vehicle, any drinking disqualified driver to pay for the installation of an alcohol ignition lock.

(2) Restricted licences and shorter disqualifications

Another means of reducing the incidence of disqualified driving would be to more sensibly craft the disqualification orders themselves.[114] This could be achieved by making disqualification orders subject to limited use exceptions – ie, for work or cultural travel. Further, disqualification orders could be subject to temporal limits by imposing curfews to limit driving at dangerous times – ie, daylight driving only.[115] Fitts and Palk[116] have suggested that geographic limitations could be imposed, limiting residents of remote communities from

[109] Ferrante, n 108, 7–8.

[110] Committee on Law and Safety, n 88, 66–69.

[111] Farrow, Hoel and Stewart, n 84, 54.

[112] See, eg, *Road Transport Act 2013* (NSW) s 249(3)(b).

[113] Farrow, Hoel and Stewart, n 84, 53.

[114] For proponents of this measure see Fitts and Palk, n 88, 7; Farrow, Hoel and Stewart, n 84, 69.

[115] Committee on Law and Safety, n 88, 33.

driving beyond the bounds of those communities. This could be supplemented with specified speed limits, thereby permitting only low risk, low speed driving. These suggestions harmonise with suggestions from other corners for special remote area driver licences.[117] Although the NT has, in the past, tried "work licences" the authors submit that in light of the current crisis in incarceration rates it is time these options were put back on the table, especially given their continued operation in other jurisdictions.[118]

Alternately it may be time to think about imposing more achievable periods of licence disqualification,[119] especially for people who do not have the means to install an alcohol ignition lock and thus will not get the benefit of that convenience.[120] The Canadian experience suggests that 90-day roadside licence suspensions can have significant effects in reducing short-term recidivism.[121] In this respect it is important to note that long periods of disqualification are generally accepted to impede an offender's rehabilitation.[122]

VI. Conclusion

Following a national trend, the NT legislature has curtailed the judiciary's sentencing discretion in respect of a wide range of offences. Mandatory sentencing provisions now apply to violent offences,[123] property offences,[124] sexual offences,[125] breaches of domestic violence orders,[126] drug offences[127] and some driving offences.[128] Fortunately, the NT legislature has declined to impose a mandatory sentence for disqualified driving. Accordingly, there is nothing

[116] Fitts and Palk, n 88, 7.

[117] Standing Committee on Aboriginal and Torres Strait Islander Affairs, The Parliament of the Commonwealth of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) [146]; Anthony and Blagg, n 66, 63.

[118] See, eg, *Road Transport (Driver Licencing Regulations 2000* (ACT) rr 45–51; *Transport Operations (Road Use Management) Act 1995* (Qld) s 87(1); *Vehicle & Traffic Act 1999* (Tas) s 18.

[119] This was suggested 40 years ago by the Australian Law Reform Commission. See The Law Reform Commission, *Alcohol, Drugs and Driving*, Report No 4 (1976) [342]. See also Committee on Law and Safety, n 88, 74.

[120] For recent Court of Criminal Appeal consideration of the appropriate length of disqualification periods see *Demur v The Queen* [2014] NTCCA 15, [25]–[39].

[121] Tracey Ma et al, "Working in Tandem: The Contribution of Remedial Programs and Roadside Licence Suspensions to Drinking and Driving Deterrence in Ontario" (2015) 85 *Accident Analysis and Prevention* 248, 255; Mark Asbridge et al, "The Effects of Ontario's Administrative Driver's Licence Suspension Law on Total Driver Fatalities: A Multiple Time Series Analysis" (2009) 16 *Drugs: Education, Prevention and Policy* 140, 147–148.

[122] There is a line of UK case law endorsing this proposition. See, eg, *Doick* [2004] 2 Cr App R (s) 203; *Bowling* [2009] 1 Cr App R (S) 122; *Cliff* [2005] 2 Cr App R (S) 22. See also Ashworth, n 68, 366.

[123] *Sentencing Act* (NT) Pt 3, Div 6A, s 53A.

[124] *Sentencing Act* (NT) Pt 3, Div 6.

[125] *Sentencing Act* (NT) Pt 3, Div 6B, s 55.

[126] *Domestic and Family Violence Act* (NT) s 121(2).

[127] *Misuse of Drugs Act* (NT) s 37(2).

[128] See, eg, *Traffic Act* (NT) s 21(4).

preventing Northern Territory courts from rationally dismantling the judicially created "informal mandatory sentencing regime"[129] which now applies to this offence. The authors have argued that the current sentencing approach to disqualified driving is flawed: disqualified drivers are not necessarily contemptuous of court orders, the focus on deterrence in this context is misplaced, and disqualified drivers are often no more of a safety risk than unlicensed drivers. Due to multiple factors, Indigenous offenders are particularly likely to be subjected to inappropriately harsh sentences. Alternative sentencing options such as vehicle impoundment should be explored. In the meantime, sentences should simply be reduced so that first time disqualified drivers are not contributing to the already alarming rate of Indigenous incarceration in the NT.[130]

[129] Pyne, n 24, 3.

[130] See, eg, *Henda v Cahill* [2009] NTSC 63.

Ceremonial sitting

CEREMONIAL SITTING TO WELCOME THE HONOURABLE CHIEF JUSTICE MICHAEL GRANT

On 8 July 2016 a ceremonial sitting was held to welcome the Honourable Chief Justice Michael Grant as the Chief Justice of the Supreme Court of the Northern Territory.

Presiding at the ceremony were the Hon Chief Justice Michael Grant, the Hon Justice Stephen Southwood, the Hon Justice Judith Kelly, the Hon Justice Jenny Blokland, the Hon Justice Graham Hiley, the Hon Justice John Reeves and the Hon Justice Trevor Riley.

In attendance were the Hon Chief Justice Robert French AC QC, the Hon Austin Asche AC QC, the Hon Brian F Martin AO MBE QC, the Hon David Angel QC and the Hon Sally Thomas AC.

The following is an edited transcript of the proceedings.

SOUTHWOOD J: [A] warm welcome to all of you on this happy occasion when we formally welcome Chief Justice Grant as the seventh Chief Justice of the Supreme Court of the Northern Territory.

His Honour, Chief Justice Grant's appointment has been received with much enthusiasm and warmth by all of the Judges of the Supreme Court. As his Honour is home-grown, we are all very proud of his appointment. A number of us on the Court claim to have had a hand in his progress. It makes us seem rather old, but three of us lectured Chief Justice Grant while he was at university.

Justice Riley and I lectured him in Civil Procedure and Chief Justice Grant went on to write the loose-leaf service on Civil Procedure for the Northern Territory. Justice Blokland lectured him in Evidence and, she believes, International Law. Her Honour is confident, as evidence is everything in the criminal jurisdiction, that the Chief Justice is extremely well-qualified to sit in that jurisdiction. Also, Chief Justice Grant has had the benefit of being my junior counsel on one or two occasions when I was at the Bar, and Justice Hiley's instructing solicitor.

Otherwise, he is unspoiled.

While we have been on the court, we have all had the opportunity to see his Honour become an outstanding advocate. As his Honour was born in the Northern Territory, he has a deep understanding and appreciation of the history and the people of the Northern Territory and their great diversity, which is one of the best features of the Northern Territory. His Honour has all of the qualities to be an outstanding Chief Justice.

In the last paragraph of his book on the history of the Supreme Court of the Northern Territory, the Honourable Dean Mildren QC, who was then a Judge of the Supreme Court, wrote:

> Finally, it may be surprising to realise that, although the Court has been in existence for a century, and there were Judges of the Northern Territory for 25 years before that, there has never been a Territory-born Judge. The closest we have come is having two Judges who have spent some of their childhood in the Territory and one Judge whose mother was born in Darwin. Not that long ago, the first Territory-born barrister took silk and we are still waiting for the second. I hope that, too, will change.

That has now happened. On behalf of the members of the court, I warmly welcome your Honour as the seventh Chief Justice and we wish you well for the future.

Chief Justice, do you present your Commission?

GRANT CJ: Your Honours, I present my Commission as Chief Justice of this honourable Court. I took the prescribed oath before his Honour, the Administrator, on Tuesday, 5 July 2016.

The Master read the Commission and the court was addressed by the Solicitor-General, Ms Sonia Brownhill SC, the President of the Northern Territory Bar Association, Mr Ben O'Loughlin and the President of the Law Society of the Northern Territory, Mr Tass Liveris.

GRANT CJ: Your Honour the Administrator, ladies and gentlemen, I thank you for the honour you do me by your attendance here today and by the warmth of your welcome. Although I know it is tradition on these occasions, I am embarrassed by the over-exaggeration of my qualities and successes in the welcome speeches, and by the very diplomatic omission of any mention of my failings.

Madam Solicitor, we have had a long and close working relationship and I am extremely gratified that you have been able to address the Court on this occasion in your new role as Solicitor-General. Your appointment is a tribute to you personally, and a boon to the office.

Mr O'Loughlin, I am grateful for your kind words. You have been a close associate since I moved from Crown practice to the private Bar, some 18 years ago now. You welcomed me to William Forster Chambers and helped make my time there a very enjoyable experience from the outset, as you have done for so many others since. I am also very pleased that you have been able to deploy my personal idiosyncrasies for their comedic value here today. I will make sure I thank you much more robustly for that at some other time.

Mr Liveris, your appearance here today also gives me much satisfaction. I have known you since you were a young law student, and today you not only represent the profession but you also reflect the very significant and positive contribution the Greek expatriate community has made to the Northern Territory, particularly in the Top End.

In this role I follow a Chief Justice who has given great service over many years to the Northern Territory, and not just on this Court. Justice Riley was sworn in as an Additional Judge of this Court this morning and we are pleased that service will continue. That I am following Justice Riley into this role as he leaves is broadly representative of our professional relationship over the years.

I started working at the then Crown Solicitor's Office at about the same time Justice Riley left practice as a solicitor and went to the private Bar. I then joined the private Bar on the very same day that Justice Riley left to take appointment to this Court. And then, on Monday this week, Justice Riley's term as Chief Justice concluded as mine commenced. We have had a very productive and convivial relationship throughout that time, but I still have the nagging feeling that he structured his entire career in order to avoid working in the same place as me.

Whatever his career motivations may have been, Justice Riley has left behind a strong, happy and united court and that is a legacy that I will strive to continue. In terms of legacy, I also register my complete agreement with the former Chief Justice's public comments concerning the importance of adequate legal aid funding for the proper administration of justice; the need for courts to be able to sentence offenders having regard to all relevant considerations, including matter of traditional

law and practice; the propensity of mandatory sentencing regimes to produce unjust results; and the manner in which alcohol abuse feeds tragically and catastrophically into offending in the Territory community. There is not a cigarette paper between us on those issues.

I am also honoured by the presence here today of former Chief Justices Austin Asche AC QC and Brian Frank Martin AO MBE QC, and former Justices David Angel QC and Sally Thomas AC.

I am particularly honoured by the presence here today of the Chief Justice of Australia, the Honourable Robert French AC. Chief Justice French has been a tireless supporter of State and Territory court systems and legal professional associations throughout Australia. Throughout his term, he has been just as likely found addressing the annual dinner at the Albury-Wodonga Law Society as found walking the corridors of power in Canberra. He has been the very model of a national Chief Justice.

During a trip here some years ago to address the Bar Association, Chief Justice French also displayed a rather esoteric knowledge of the robust dealings in the early days of the Northern Territory legal profession. He reminded us in very amusing terms that in the 1920s Ross Mallam distinguished himself as probably the only practitioner in Australian legal history to be suspended from practice for misconduct and then appointed as a judge of the Supreme Court shortly thereafter. He also reminded us that in 1926 another practitioner called Bateman set the formidable record of being struck off within four days of his admission. But the Chief Justice was kind enough to observe in conclusion that things seem to have improved a bit since then.

It is true that following its separation from South Australia in 1911, the Territory community quickly demonstrated its unique character. In December 1918, the Administrator was chased out of town for refusing to unload the Christmas beer ration. As a good friend of mine who knows more than anybody should told me the other day, it has been the only peacetime civil rebellion in Australia's history as a nation.

After that, the leader of the rebellion was briefly gaoled for refusing to pay taxes, and then almost died of dehydration while attempting to ride his motorcycle from Darwin to Adelaide. Keen to reward such rare talent, the people of the Territory elected him as the inaugural Member for the Northern Territory in the Australian House of Representatives. Rather intriguingly, his name was HG Nelson. That was the Territory into which I was born.

My earliest memories are of life in Pine Creek with its eclectic mix of Aboriginal, Chinese and European inhabitants. It was the place in which Xavier Herbert worked as a fettler in the 1920s, and later described so colourfully in his novel *Capricornia*. I always felt comfortable in and part of this community, and I remain so today.

The Territory and its institutions have developed at some pace since then. Of course, the most significant development was the grant of self-government in 1978, and on that grant the Territory became a separate body politic and took its place alongside the States. Just as in the Commonwealth and State contexts, the Territory enjoys strong parliamentary, executive and judicial institutions and the people of the Territory should take pride in those institutions. As many before me have observed, courts and judicial independence exist to serve the people, not the other way around. They protect and promote the system of values to which we subscribe as a community and we have been well-served in that respect by our judiciary.

The transition from feudalism to liberal democracy released us from despotism, and one of the fundamental planks of that evolution was the development of an independent judiciary to stand between the citizen and what would otherwise be the untrammelled power of the state. As has been observed before, nobody can truly appreciate just how important an independent judiciary is until the Tax Commissioner comes after you claiming you owe money when you do not think you do, or until you are arrested and prosecuted for something that you did not do.

Allied to the essential role and character of the judiciary is the structural, constitutional, historical and political process by which appointments to the judiciary fall to be made by the Executive; by which the Executive is responsible to the Parliament for those matters; and by which the Parliament is ultimately responsible to the people. The success of that model is reflected in the aptitude and learning of the women and men who sit with me on the Bench today.

I have worked with all my fellow judges in various capacities over many years and, on the basis of those dealings, I have the utmost respect for them and a clear certainty of their dedication to the task and of their continuing ability to serve the people of the Territory well. The capacities in which I have worked with my fellow judges have included instructing them as barristers when I was a solicitor; junioring them as silks when I was a barrister; appearing before them as they constituted various courts and tribunals in the Territory system; and on some occasions, advising and acting for them as clients in professional roles. In all of those relationships, it struck me as I thought about it the other day, the dynamic has been one of them telling me what to do; and if the last three days are anything to go by, it appears that is a dynamic which will thankfully continue.

Justice Barr is the only permanent member of the court not present here today.

This morning he sent me an email from Mount Etna in Sicily. The purpose of his email was to suggest that as significant as today might be, the highlight of my legal career was undoubtedly receiving the Peter Barr Prize in International Law during the course of my university studies. I remember the occasion vividly. It was the first time I had met Peter. I could not understand what he said as he presented me with prize because he insisted on delivering his speech in French. However, I do remember being impressed by his *savoir faire* and I remain so to this day.

In noting the successes which the Territory has enjoyed in its evolution, I do not seek to paper over the very significant failures and challenges. Many of them remain as identified by Herbert in his polemic 80 years ago. There is a clear disjunct between legitimate Aboriginal entitlement and aspiration, and what is actually experienced in many remote traditional communities. Herbert railed against a bureaucracy which was hampered by inflexibility in dealing with those issues.

Although self-government has brought government closer to the people, it has not been successful in addressing those issues satisfactorily.

Of course, the tools available to the judiciary to address those matters are extremely blunt in nature. As a newly appointed Judge I will not presume to speak yet on matters in which those who precede me have had far greater experience. I would observe, however, that the Territory courts have been in the vanguard of ensuring such things as proper interpreting services; attention to matters of traditional law and practice; and the development of principles such as the Anunga Rules to prevent unfairness to Aboriginal people in the justice system. The Court's focus going into the future will remain on such matters, together with a continued consideration of alternative sentencing regimes for Aboriginal defendants, an examination of the utility of general deterrence in sentences for Aboriginal defendants, and the involvement of communities in sentencing outcomes.

Of course, the courts can only deliver justice in partnership with the practitioners who appear before them. I echo the comments made recently by the Chief Justice of New South Wales that the dialogue between the Bench and a well-prepared advocate, aided by focused submissions, provides the best mechanism for quickly identifying the real issues in a matter and aiding in its just disposition. The relationship between the courts and their practitioners should be marked on both sides by hard work, courtesy and collaboration, and that is the model I will strive to achieve.

As is apparent from the speeches delivered earlier today, my path to this point has been somewhat circuitous and there have been a number of significant influences along that road. My time at boarding school in Sydney was probably instrumental. It exposed me to a more cosmopolitan life than Pine Creek somewhat earlier than I might otherwise have been, and it gave me the benefit of a highly traditional education which focused on core subjects such as Mathematics, English Literature and Latin.

It was also a place in which I made enduring friendships and I am both gratified and honoured that three of those friends have been able to attend today from far- distant places. Two of them were the other members with me on the school debating team. They were far more accomplished public speakers and critical thinkers than me, but both chose paths other than in the law.

My employment in the Crown Solicitor's Office, as it then was, and the resumption of my studies in Law was, obviously, also a turning point. I enjoyed the benefit of many mentors too numerous to name here, but I would make special mention of Professor Ned Aughterson for his outstanding academic leadership. I also had the good fortune to be dragged through the degree by my two study mates, Greg Macdonald and Eric Hutton. They sought to demonstrate by example the virtues of industry and humility. I eventually picked up the first, but the second remains a work in progress.

I also record the presence here today of Samantha Miles and Karen Christopher who were with me from the start of that journey so many years ago, as fellow members of the inaugural class. My time at William Forster Chambers was obviously crucial in my professional development. I enjoyed the collegiate atmosphere immensely, and particularly the friendship and support of Alderman, Barr, Bruxner, Christrup, Kelly, McNab, O'Loughlin, Reeves, Silvester and Young, amongst others. Although located in other Chambers at the time, Southwood was also an important mentor to me, both during my time at the Bar and as a solicitor. I also make particular mention of my dear, departed friend, Ian Morris, and note the presence of Jill Morris here today.

My time as Solicitor-General has been, without doubt, the most rewarding experience in my professional career thus far. The quality of the work is unparalleled and my relationship with the other Solicitors-General over the years has given me great professional and personal satisfaction. I am honoured by the presence in court here today of the Solicitors-General for the Australian Capital Territory, Queensland, Tasmania and Victoria.

I also note that four of the five people who have held office as Solicitor-General for the Northern Territory are in court here today; only Ian Baker is missing. I make special mention of Tom Pauling AO QC who was my predecessor and went on to the office of Administrator. I will always have the deepest gratitude to him for his recommendation. I was also fortunate to have two strong, hardworking and competent Attorneys for most of my tenure as Solicitor-General; first in Delia Lawrie, and more recently in John Elferink. Although they did not always follow my advice, I am grateful to them for always giving it appropriate consideration.

I also want to acknowledge the invaluable assistance and friendship which I have received from Debra Carr. She has been working with me for approximately 15 years

now, since her time as Clerk at William Forster Chambers, and has done me the honour of coming to the Supreme Court with me. When I first asked her to come to work with me following my appointment as Solicitor-General, she said she would as long as I understood two things clearly: the first was that her family was more important than my job; and the second was that she didn't make coffee for anyone. That understanding has formed the bedrock of our working relationship since and will, no doubt, continue to do so into the future.

I want to pay tribute to my mother for the love and support she has provided throughout my life, and to my two brothers on that same account. It is a matter of great regret for all of us that my father is not with us today, but we are reminded of him by many of the people here for this occasion, including his former colleague and friend, Mick Palmer; the Chin family; and Benny and Sandra Lew Fatt.

I thank my three daughters, Courtney, Jamie and Hannah for their love and good humour; even though that humour is usually exercised at my expense. You have been the greatest joys in my life and you continue to be so. Four of my nieces are also in court here today, and they are like surrogate daughters to me and bring me the same joy.

Most importantly, I thank my wife Marita. We have been together for almost 29 years now, and those of you who know me well will understand how significant an achievement that is on her part. She has always supported and looked after me and our daughters, putting our needs above hers. She understands the depth of my appreciation and gratitude.

My ambitions for this court going into the future are as first advanced by Sir Gerard Brennan many years ago now, and recently reiterated by Chief Justice French. The reference points for the Court's success are as follows:

First, the Court must be seen by the community as impartial, independent and fearless in applying the law.

Secondly, the work of the Court must be undertaken by judges and practitioners who know the law and its purposes, and who are alive to the connection between abstract legal principle and its practical effect.

Thirdly, the Court must accept and observe the limitations on judicial power and, within those limitations, develop or assist in developing the law to answer the needs of society as they present from time to time.

Finally, the Court must, within the limits of its resources, be reasonably accessible to those who have a genuine need for its remedies.

I am grateful for the opportunity to serve on this Court and I thank all present for doing the Court, and me, the honour of being here today.

Generalia

RETIREMENT OF CHIEF JUSTICE TREVOR RILEY

Chief Justice Trevor Riley resigned as Chief Justice of the Northern Territory on 4 July 2016, having been appointed to the Bench on 1 February 1999 and Chief Justice on 4 October 2010. His Honour was from Bruce Rock in Western Australia, studied at the University of Western Australia and moved to Darwin to work for Withnall & Baker shortly before Cyclone Tracy in 1974. After the cyclone he moved to Ward Keller until 1985 when he went to the independent Bar at William Forster Chambers. He took silk in 1989 and is reported to have appeared in approximately 121 cases before the Supreme Court in his time at the Bar.

His Honour appeared in the High Court in cases such as *Marion's Case* (1992) 175 CLR 218, *Northern Territory v GPAO* (1999) 196 CLR 553 and *Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1.

He has lectured extensively on advocacy and written the *Little Red Book of Advocacy*. He was appointed an Additional Judge on his retirement when Mr Ben O'Loughlin, President of the Northern Territory Bar Association, observed that behind every successful man stands a surprised woman. With Justice Riley stands his wife Jan and their two children and three grandchildren.

APPOINTMENT OF CHIEF JUSTICE MICHAEL GRANT QC

Michael Grant QC was appointed as the Chief Justice of the Northern Territory on 5 July 2016 upon the retirement of Justice Trevor Riley. Chief Justice Grant had been Solicitor-General of the Northern Territory since 2007 prior to which he had a broad and busy practice at the private Bar at William Forster Chambers. His Honour obtained a Law degree with first class honours from the University College of the Northern Territory while working at the Department of Law. During his time at the Department, his Honour spent 18 months on secondment to Freehill Hollingdale & Page in Sydney working on a large Federal Court proceeding. His Honour resisted their offer of employment and returned to the Territory, becoming solicitor and then solicitor-advocate. In 1998 he was appointed Director of Litigation in the Attorney-General's Department and in 1999 was called to the Bar.

His Honour has appeared many times in the High Court including in *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 326 ALR 16 and *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532. He has a wife, Marita, and three daughters.

APPOINTMENT OF SONIA BROWNHILL SC AS SOLICITOR-GENERAL

Sonia Brownhill SC was appointed Solicitor-General of the Northern Territory on 5 July 2016 on the appointment of Michael Grant QC as Chief Justice.

Ms Brownhill is the first woman to be appointed to the role. She was born in Adelaide and moved to Darwin with her family when she was eight years old. She obtained her Bachelor of Commerce and Bachelor of Laws degrees from the University of Western Australia. She completed articles of clerkship with Mallesons Stephen Jacques and was admitted in February 1995. She returned to Darwin in 1997, working for the Solicitor for the Northern Territory in the Aboriginal Land Division with conduct of a number of significant native title cases in the Federal Court and the High Court including *Fejo*, *Yarmirr* and *Western Australia v Ward* (2002) 213 CLR 1. After being seconded to the Solicitor-General's chambers in 2002, Ms Brownhill regularly appeared as junior counsel to the Solicitor-General in the High Court and as lead counsel in trial and appeal courts and in the High Court in *Wainohu v New South Wales* (2011) 243 CLR 181. She was appointed as Crown Counsel and continued in that role until being called to the independent bar at William Forster Chambers in February 2011. Ms Brownhill was appointed as Senior Counsel in September 2015.

Northern Territory Law Journal

Submission guidelines

1. The Northern Territory Law Journal is a refereed law journal with an editorial board of eminent jurists and academics, with the Hon Michael Kirby AC CMG as its Patron.
2. The journal publishes articles, commentary, case notes, legislation notes and practice notes which are of relevance to practice in the Northern Territory. Letters to the editor will also be considered for publication.
3. Articles should be of appropriate academic quality to be published in a refereed law journal.
4. Submissions of all lengths will be considered but preference is given to those falling within the following categories:
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   - commentary etc of 2,000 to 5,000 words (which will not be refereed);
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   - Number spans should be spaced with hyphens, not en-rules.
   - Ideally, full case citations should be set out in footnotes rather than the body of the text.
   - In footnotes do not use ibid or op cit. Repeat author surname and add footnote reference to first mention.

     [3] R Trindade and R Smith, "Modernising Australian Merger Analysis" (2007) 35 ABLR 358.

     [4] Trindade and Smith, n 3, 358-359.
5. Submissions should be emailed in Word format to the Executive Editor, Cameron Ford at cseford@hotmail.com and to the journal mailbox at LTA.ntlj@thomsonreuters.com.
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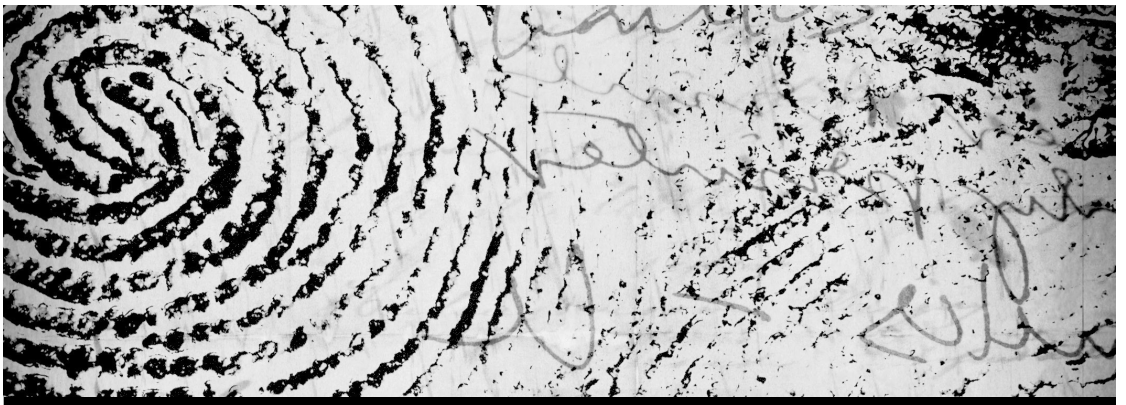

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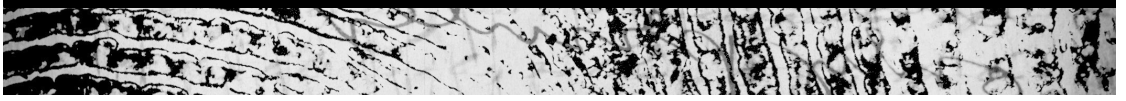

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