

**SPEECH BY TERRY O'GORMAN  
LIBRARY, NORTHERN TERRITORY PARLIAMENT  
THURSDAY 4 FEBRUARY 2010  
IN HONOUR OF TONY FITZGERALD**

I am most privileged to present the first Tony Fitzgerald Memorial address.

Regrettably, I never met Tony although our legal lives have a remarkable similarity. He graduated in Law and Commerce from Melbourne University in 1975.

I graduated Arts / Law in 1975 from the University of Queensland.

He worked in Aboriginal Legal Aid in 1978, a time that Alice Springs Magistrate Greg Borchers tactfully referred to at Tony's Eulogy as "*a very difficult time*".

I am not a Magistrate so I don't have to be tactful. It was a mongrel time. Throughout the country but especially in places like Darwin and Brisbane far too many police bashed and verbally abused Aboriginal clients and then smoothly told lies about their behaviour too often to a Judiciary that couldn't bring themselves to believe that a significant number of police would do such things.

Remember, this was just after the major report of the ALRC produced in 1975 by, among others, Michael Kirby later to become an outstanding Judge and Gareth Evans later to become Australia's Foreign Minister who on the defeat of the Keating Government coined a memorable phrase "Relevance Deprivation Syndrome".

The ALRC Report recommended mandatory taping of police station interviews but it was many, many years later (in Queensland not until 1989) that such a basic improvement to questioning of suspects was implemented.

Tony went on to be part of the original team that established the Northern Territory Legal Aid Commission but he is viewed as having made his greatest contribution as the Northern Territory Anti Discrimination Commission. He made such an impact in this role that the annual Australian Human Rights Award for 2009 was for the first time named after an individual and was awarded posthumously.

John Lawrence has described Tony as being often frustrated by the humbug and indifference he found in the corridors of political power.

It is that humbug and indifference as it relates to law and order and police powers that I will address tonight.

Here in the Northern Territory you have problems with the criminal justice system which are particularly bad.

The Northern Territory imprisonment rate is approximately four times that of all other States and Territories with a huge Aboriginal over-representation, namely 80 percent of the total prison population.

The present Labor Government's farsighted solution to this problem is to spend \$3M in building new jails in the Territory.

This state of affairs has been reached with no obvious change in the level of crime. There is no genuine addressing of the causes of crime.

Accompanying the often mindless and endless law and order option which occurs here as well as in many of the other States, particularly WA & SA, are continuing increases in police powers and Parliament persistently hemming in judicial sentencing discretion.

We have in various parts of Australia including the Northern Territory developed a criminal justice arms race.

There is an increasing trend towards a greater use of mandatory sentences, being tougher on parole and taking away the concept of reducing a sentence for early guilty pleas.

There is increasing pressure for naming juveniles involved in criminal offences.

Two recent newspaper articles reflect the problems in the Northern Territory.

The Weekend Australian of 28-29 March 2009 had this to say:

*"Female prisoners at Darwin's Berrimah jail are sleeping in shipping containers .... Territory prisoner numbers reached record highs this year. Last week there were 650 prisoners in Darwin and 480 in Alice. The prisons were built to house 400 and 350 prisoners respectively.*

*The Northern Territory Government is to complete a new Top End facility just south of Darwin for 1000 prisoners in 2012 to replace Berrimah. Incarceration trends suggest the new prison will be overcrowded on the day it opens.*

*The North Australian Aboriginal Justice Agency represents most Top End prisoners. Principal lawyer Glen Dooley says the Government wants to be seen as tough on crime. He says it has got its wish and can't cope.*

*There are three factors to the overcrowding according to Dooley: a toughening of the Bail Act which has led to many more people being held in remand; an unflinching Parole Board, which consistently declines applications; and an extra police presence in communities as a result of the Federal Intervention.*

*Dooley says the cops, in doing their job, are issuing traffic infringements, then finding they have outstanding warrants. As a result, he claims, there are 400 to 450 Aboriginal prisoners serving short sentences for traffic matters, the main cause of the overcrowding.*

*In any other jurisdiction, he says, any sentence of less than 6 months would attract community service.*

*Dooley says pre-release programs are almost non-existent. But it's a farcical catch-22. Dooley says 'My clients say they're knocked back for parole because they didn't do courses that didn't exist'."*

*"There's such little money put into post release plans. There's no money into halfway houses to help people make the transition. No one is getting out on parole."*

The Australian on June 22, 2009 in an article headed "Northern Territory Jail Rate Among the World's Worst" had this to say:

*"The Northern Territory's incarceration rate is now the third highest in the world, while prison services in the State have been slammed for lack of alcohol programs and sex offender treatment programs for inmates."*

A report by West Australia's former head of custodial services, Richard Harding, said there was a lack of mental health screening of prisoners, appalling conditions in Darwin's Berrimah Prison, and a critical lack of drug and alcohol rehabilitation services in the Territory.

Details of the report come as figures for the March 2009 quarter, published by the Australian Bureau of Statistics, reveal the Territory's imprisonment rate has ballooned to 629 prisoners per 100,000 of the adult population.

That places the Territory third in prisoner numbers relative to population behind the US, with 760 prisoners per 100,000 people and the Caribbean nation of Saint Kitts and Nevis.

The imprisonment rate is more than two and a half times that of Western Australia which is the country's second highest rate of imprisonment.

The report on prison services in the Northern Territory was commissioned by the Department of Justice in 2007.

The report said it was of "great concern" that alcohol programs and sex offender treatment programs in Northern Territory prisons were "few in number".

*"Given the reported prevalence of sexual offences within the convicted prison population and the recent Commonwealth intervention to deal with child abuse, we were disappointed to find that, as with alcohol programs, sex offender treatment programs were few in number, poorly evaluated and not integrated with other health and reducing re-offending agendas."*

The report also slammed the lack of mental health screening for prisoners entering jail. The only attempt at analysing a new inmate's mental state was a "smiley face" test where prisoners were asked to look a series of smiling or frowning faces and asked to identify how they feel upon entering prison.

"As an identifier of 'at risk' state, this is ludicrous", the report said. Senate estimates hearings in Darwin last week revealed that only six prisoners completed a sex offender treatment program in NT prisons in 2008 – 2009. Only 111 prisoners completed an alcohol rehabilitation program.

You as Territorians don't need to be told that the imprisonment rate here is startlingly bad. A new approach needs to be undertaken not only because of the gross human rights implications of having one of the western world's worst rates of incarceration but Territorians should be considering long and hard what is the effect of pouring so much money into jails, having as it does the result that that money could be better put into more worthwhile areas of public expenditure such as health and education.

And let's be clear. There is an alternative and it goes by the name of justice reinvestment, a somewhat unwieldy term which has been simply and effectively described by the Director of the New South Wales Bureau of Crime Statistics and Research, Don Weatherburn as a reconsideration of the balance between investment in prison on the one hand and investment in prison programs to try to reduce offending, on the other.<sup>1</sup>

Weatherburn says:

*"Since 2000 whether the tabloid media acknowledge it or not, crime rates have been coming down quite dramatically. There's plenty of scope for shifting resources from the custodial side of things to the rehabilitative side of things and it would pay big dividends if we did."*<sup>2</sup>

Weatherburn's ideas on this point have also been given considerable support by the UK House of Commons Justice Committee which is appointed by the House at Commons to examine the expenditure, administration and policy of the UK Ministry of Justice which encompasses Ministries dealing with police, corrective services and probation.

The Committee (which did not consist of agitators, bleeding heart liberals, defence lawyers or civil libertarians) but does consist of Labor, Conservative and Liberal

<sup>1</sup> See SMH 27-28 June 2009

<sup>2</sup> Ibid

Democrat members, produced a landmark report in December last year which deplored the arms race between the two major parties in the UK on being tough on crime which dates back to the early 90's. The Committee held that means must be found for encouraging and informing sensible, thoughtful and rational public debate and policy development on the appropriate focus and balance of resources directed towards imprisonment on the one hand and rehabilitation on the other.<sup>3</sup>

These comments are equally applicable to the Australian law and order and criminal justice scenario and are especially relevant to the Northern Territory.

The committee undertook its inquiry into justice reinvestment because of three linked issues – and when you examine these linked issues they are equally applicable in the Australian law and order landscape, including the Northern Territory.<sup>4</sup>

The **first** issue is that the criminal justice system is a complex network of agencies with substantial public funding operating under increasing pressure but the different parts of the system do not seem to be pursuing the same goals. Ditto here in Australia and the Northern Territory.

**Second**, the committee found that the UK government's main answer to the current overcrowding of prisons and the predicted rise of the prison population which is already at a record high is to spend valuable public monies on more prison places rather than seek to address the causes of the seemingly incessant growth in prisoner numbers.

The committee noted that the root causes of this increasing imprisonment include:

- A toxic cocktail of sensational or inaccurate reporting of difficult cases by the media.
- A relatively punitive overall public opinion (compared to much of the EU).
- A self-defeating over-politicisation of criminal justice policy.

**Third**, the committee noted that it was clear that agencies outside the criminal justice system could take more effective action to reduce both the number of people entering the criminal justice system in the first place and the likelihood of re-entry after serving a sentence.

The Committee noted that the UK imprisonment rate which is 169 / 100,000 was the highest proportion of jailing in Western Europe.

Remember the figures I quoted earlier concerning the Northern Territory jail rate from the ABS:

<sup>3</sup> See House of Commons Justice Committee "Cutting Crime: The Case for Justice Reinvestment" First Report of Session 2009-2010 Volume 1 page 7

<sup>4</sup> Ibis page 5

- NT 629 / 100K (two and a half times the rate of WA)
- US 760 / 100K
- UK 169 / 100K

The UK bipartisan committee which heard from a range of experts including law enforcers and victims group came to this conclusion:

- *Prison is a relatively ineffective way of reducing crime for other than serious offenders who do need to be contained for the protection of the public.*
- *For others, prison is a very expensive way of dispensing justice and seeking reform.*
- *We are concerned that an unthinking acceptance has evolved of punishment for its own sake.*
- *The committee found that members of the public when asked to determine the appropriate sentence for a particular type of offence are generally quite close to the sentence given by the courts, an experience replicated in those jurisdictions in Australia which have conducted similar citizen sentence survey generally under the aegis of a Sentencing Council.*

Before considering the final conclusions of this committee, let's look at some of the submissions made by non-bleeding hearts / miscellaneous agitators / defence lawyers and civil libertarians.

The Chair of the UK Prison Governors Association distinguished between what demand dictates and what is actually needed in determining the size of the prison population.

He said:

*"There are a number of drivers of demand which include the popular press, political rhetoric and to some extent the business lobby as private prisons now exist and there is a difference between the demand created in that way and what communities, victims and offenders need."*

The former highest UK Judge Lord Chief Justice Phillips submitted to the Committee that sentencing can itself be influenced by a number of factors.

He stated that rises in the use of custody and increases in the length of sentences may well be attributed in part to media pressure and he related this to the fact that it is part of a sentencer's job to reflect, at least to a degree, the public's view as to the proper response to crime. He also suggested that as a result of negative media coverage of individual bail and parole decisions, both Courts and the Parole Board have become more risk averse in their decision-making.

So there it is. What we were taught at university (at least people of my age) that judges are utterly immune from media pressure is not true! As if those of us as practising defence lawyers did not already know this.

The Committee therefore concludes that the UK government faces a tough choice – to continue with the expenditure trajectory the current administration is embarking upon with its prison building plan or to reinvest the public's money in an attempt to reduce the need for prisons in the first place.

This is the same choice the NT government faces.

The Committee observes that when public spending needs to be cut in light of the global financial crisis, major expenditure commitments such as the prisons building program require even more rigorous scrutiny than usual.

But the Committee observes that such scrutiny also offers the opportunity to rethink the model of current spending in relation to imprisonment.

The Committee's concluding observations are equally applicable to the Northern Territory where the Committee said:

- *We believe the government faces a choice of risks: either muddle through with the current plans hoping that commitments made under the predict and provide model of penal policy will prove affordable and not merely become a self fulfilling prophesy.*
- *Or the alternative route can be taken namely to make more radical decisions, and investments, putting the system on a substantial footing over the longer term by shifting resources away from incarceration and towards rehabilitation.*

So, if most of the UK Committee recommendations are directly attributable to Australia and the NT in particular, what is the first step to be taken?

I say set up a Sentencing Council based on the Victorian model where independent experts including victims' representatives can conduct ongoing research in the sentencing area so that the public debate about sentencing generally and about a particular sentence is not hijacked by the most rabid lowest common denominator in the media.

In this regard I note that the Queensland Royal Commissioner, Tony Fitzgerald QC who now lives in New South Wales and some other retired judges were recently quoted in the media as having banded together to attempt to having amended in New South Wales the Committee's recommendations in relation to justice reinvestment.

Also your Criminal Law Association should regularly put out press releases commenting on a particular sentence controversy so there is another contrary point of view available to the media.

You can point out that the prosecution can appeal sentencing decisions if they think it is too lenient.

You can point out that there is no need to tie judges and magistrates' hands by forcing them to impose mandatory minimum sentences. All the Eastern States criminal law regimes work very well without such a minimum sentence regime particular where in the Eastern States the prosecution frequently appeals perceived lenient sentences.

In Australia, including the Northern Territory there is the never ending mindlessness of politicians on both sides exploiting law and order issues for crass vote catching in the continuous law and order option that is now the feature of the Australian political landscape. This mindlessness on the part of politicians must be confronted by the Criminal Law Association frequently and often.

The way your Bail Act has been constantly changed so as to minimize the presumptions in favour of bail and maximize the number of charges where bail is denied is a major unnecessary driver of the soaring NT prison population.

Queensland has not gone down that route. Nor has Victoria, Tasmania or the ACT.

That is because Labor Governments in those States has resisted the political temptation to regard law and order as their own plaything in order to gain political advantage by posturing as tough guys.

The Labor Governments in the North Territory, Western Australia and South Australia have prostituted themselves in the continuous law and order auction because individual Premiers, Attorneys, General and Chief Ministers lead from behind and exploit media moral panic rather than provide leadership from the front and explain that media and often police inspired law and order campaigns should be seen for the shallow exploitative exercises they are.

The mandatory minimum sentence regimes which have been brought in by the current Labor Government in the Northern Territory in the areas of violence and sexual offences were and are not needed.

They were and are a gutless and spineless exercise in political opportunism.

I know defence lawyers in the audience are busy and unlike the police who have large numbers of full-time staff employed to do nothing but write legislation for continually increasing police powers, but you should insist on being consulted at policy formulation stage.



Unfortunately, there is no Civil Liberties Council in the Northern Territory. The only organizations who can oppose the relentless whittling away of these rights such as taking away bail rights and forcing judicial officers to be part of miscarriage of justice sentencing regimes is the Criminal Law Association and the Law Society.

You need to get out there and expose the politicians' intellectual dishonesty for what it is.

Point out to the media that there is no need to remove presumptions in favour of bail.

Point out that the prosecution can appeal a bail decision if they think it is too lenient.

Point out that there is no need to tie judges and magistrates' hands by forcing them to impose mandatory minimum sentences when all the Eastern States criminal law regimes work very well without it particularly where the prosecution frequently appeals perceived lenient sentences and frequently enough loses such appeals.

Point out that in the context of the never ending increase in police powers pushed by the police lobby and supported by media outlets frequently interested only in ratings rather than reason, that all politicians are doing is tapping into and using for their political purposes what they believe is the public's (as supposedly reflected by the media) punitive stance.

Insist that politicians lead from the front and explain why the rule of law and fairness and balance in the criminal justice system is so important.

And insist that politicians explain and remedy why the Northern Territory jail rate is not just by far the worst in Australia but among the world's worst.