SUBMISSIONS AT CERMONIAL OPENING OF SUPREME COURT, ALICE SPRINGS

In the early 1950s the only lawyer between Port Augusta and Katherine was a fellow named Neil Hargrave. I suppose it's fitting, given he served as such an isolated outpost of the law, that they named a lookout after him on top of a pile of rocks in the scrub halfway between here and Haasts Bluff. Anyway, Neil Hargrave, talking about the unassuming tin-roofed bungalow across the road from where we are now, summed it up like this:

> Well, there was only one courthouse, and that was very like the average residence in Alice Springs at that time, but it was fairly large, and reasonably well set up – tables and benches for the audience to sit on… One of the main problems with it was that you were dealing in a criminal case with a jury which was about ten feet away from you, and nearly every one of whom you knew personally, and to try to put over some cock-and-bull story to them was hopeless.

Times haven't changed all that much. The foreman of the very first jury I addressed, in Alice's second courthouse, over there on the corner, was an acquaintance who lived a couple of streets away from me. He also happened to be a respected local Alderman, and there was no point trying to put some cock-and-bull story to him either. Or, come to think of it, to any of the other juries I've addressed since, many of which have included a vaguely familiar face or two. Alice is, after all, still a town like Alice, and long may we continue to be so.

I commenced work with the Northern Territory Legal Aid Commission on 6 May 1997, which means, as it happens, that this is effectively the very last day of my personal twenty year non-parole period. I was admitted to practice in the courthouse over there on the corner by Justice Mildren, and have had the privilege, and the associated challenges, of appearing before each of the Justices who has presided in this Court over the last two decades, during which our premises and facilities have become increasingly shabby, dilapidated and generally inadequate. So it's all rather momentous to be addressing Your Honours for the first time in a spanking brand new courtroom. The building, and the room, are of course, important. But what gives them life, and what gives life to the law administered in these buildings, whether they're 1920s single-story bungalow, 1970s two story brutalism or this latest five story bastion, is not their architectural style or scale, but the people in them. The judges, the lawyers, the staff, the witnesses, the onlookers, and most importantly of all the parties and, as has often been said, the losing party, which in this Supreme Court means in the vast majority of matters, the accused in a criminal proceeding.

And in the vast majority of those cases here in Alice Springs, that accused is Indigenous. And what is he, and more often than ever now, she, to make of this place, and the people who lay down the law in it? Perhaps they'll appreciate being somewhere flasher than they're used to, although I expect their families will miss not being able to sit and wait right outside in the shade of those date palms in the D D Smith Park, the courthouse lawns, as we all know them. But I doubt it will make that much difference how flash the building is, as long as the story remains the same: in this courthouse, when it comes to sentencing, and indeed in most matters, generally speaking we do not notice, we do not recognize, and we do not allow Aboriginal law. We used to, up to a point. But we don't much now.

An unprecedented number of the Northern Territory's lawmakers, six Members of the Legislative Assembly no less, are Indigenous – just about more than the rest of Australia's Parliaments put together – but we still have a law, a Commonwealth law I should add, that prohibits Your Honours from having regard to Aboriginal traditional law when assessing the objective seriousness of an offence for sentencing purposes. As Justice Southwood trenchantly observed in *The Queen v Wunungmurra*, that distorts the well-established sentencing principle of proportionality. It also means that for the foreseeable future, we

should expect that many Aboriginal people who enter this building will feel that they are entering a foreign country, where the law that matters to them doesn't matter. Perhaps it is just as well that we haven't hung paintings on the walls here that might rather misleadingly suggest otherwise.

I do not submit that we can or should depart from the jurisprudence developed over the last 15 years or so by this Court and indeed the High Court, which has set clear boundaries to the accommodation of traditional law: as the plurality stated in *Munda v Western Australia*, "courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice". But we can, and we should do better.

Previous legislators have also in their wisdom decided that judges can't be trusted to impose just sentences, and passed mandatory sentencing laws to ram home that message. But, as Justice Mildren said in *Trenerry v Bradley*, "prescribed minimum mandatory sentences are the very antithesis of just sentences". For a judge, it must be agonising to send an offender to prison for longer than is fair and just. That was the situation confronting the late Justice Bailey in the courthouse over there on the corner when he sentenced a very young petrol sniffer from Hermannsburg to life without parole for murder back in 1999. Justice Bailey was a conventional and careful judge, but he did not mince his words, calling for the reintroduction of discretionary sentencing for murder. That has since been achieved to a very limited extent, but the cruelty of our murder sentencing laws continues to produce grave miscarriages of justice and bind the hands of our judges.

And one only has to peruse their judgments to see the extraordinary combination of rigour and humanity that the judges of this court bring to bear when their hands are not tied. I cite two Alice Springs decisions by way of example. Firstly, Justice Blokland's judgment in the civil case of *Johnson v Northern Territory of Australia*, in which the unrepresented plaintiff claimed that he had been a victim of police brutality. (The defendant, on the other hand, was formidably represented, by our current Solicitor-General Ms Brownhill SC assisted by junior counsel.) Mr Johnson's action was ultimately dismissed, but what struck this reader of Her Honour's 168 page judgment was that the judge gave the losing litigant a fair hearing and a fair go. Secondly, I refer to Chief Justice BR Martin's sternly compassionate remarks when sentencing the five young men who had pleaded guilty to the manslaughter of Mr D Ryder – remarks, I might add, that attracted criticism from some sections of the media that was as shrill, strident and unfair as the remarks themselves were calm, measured and meticulous.

With great respect, I acknowledge that in these and many other cases the judges of this Court have conscientiously striven to steadily, creatively and purposefully construe and apply the law to take account of the lived reality of the people who come before them – within the limits imposed by Parliaments.

No doubt there will be many more controversial sentences and contentious rulings handed down in the years to come from this new judicial seat. Now that the executive arm has bestowed on the judicial arm the gift of a new courthouse, one can only hope that the legislative arm will press ahead with the reforms urgently required to let Your Honours do your job properly and justly, and remove the unnecessary and unfair fetters imposed by statute on the exercise of your judicial discretion.

If it please the court.

Russell Goldflam
5 May 2017