

## The Dingo, the Logo and Mr Briscoe

It's official: the dingo did it. Coroner Morris is to be thanked for finally putting to bed the Territory's most notorious homicide case, but her findings have raised a delicate question for the Criminal Lawyers Association of the Northern Territory. Now that our familiar logo has been authoritatively declared to be a feral felon, is it time for CLANT to ditch the dingo and adopt a more fitting icon? I, for one, think not: the CLANT dingo, as has often been represented, represents the unrepresented accused. Now that he's been conclusively convicted, he represents not just the unrepresented accused, but the representative unrepresented accused, the great majority of whom, notwithstanding the well-known presumption to the contrary, are, later or sooner, indeed, in fact and in law, found to be guilty.

Much of the media interest in this latest (and last?) chapter of the Chamberlain saga has been about the media interest in the preceding chapters of the Chamberlain saga. We all know now that back then the media behaved like a ravening, slaving pack of wild dingoes. That particular feeding frenzy had already started building when I first arrived in Alice Springs in early 1981, but the local papers at the time were in even more of a lather about another then recent violent death, the so-called "Ti Tree Incident".<sup>1</sup>

On 20 July 1980, shortly after dark on a dirt road 200 km north of Alice Springs, Constables Clifford and Warren, in what Royal Commissioner Elliott Johnston later described as "a rather extraordinarily dangerous" manoeuvre, drove their police van onto the wrong side of the road, forcing an approaching green station wagon containing about seven Anmatyerre men to stop. They had been drinking. When I say "they", I mean both the police officers, and the men in the green station wagon. After arresting the driver for drink driving, the police proceeded to unlawfully apprehend and detain some of his passengers. While doing so, officer Clifford struck one of them on the head with a baton, and threatened more of the same. In fear of being further assaulted, three of the men then attempted to escape, a struggle ensued, and Clifford was himself struck on the head with the baton. Clifford drew his privately owned pistol, and fired three shots. The first shot wounded Freddie Pepperill in the chest. The third shot killed an Anmatyerre man later referred to only by his skin name, "Jabanardi".

No criminal proceedings were initially commenced against either of the constables, but five of Jabanardi's countrymen were charged with various offences against police arising out of the incident, and committed for trial. Four days after the committal, the *Alice Springs Star* (now long since defunct) published the following editorial:

What price law enforcement? With the 'Tea Tree Incident' hearing complete and five persons charged it's high time for the people of Alice to re-think their apathy

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<sup>1</sup> The following summary of events and findings is derived from Elliott Johnston, *Report of the Royal Commission into Aboriginal Deaths in Custody: Death of Jabanardi (at Ti Tree)* (1991), which in turn relied on and adopted the findings of fact made at inquest by Coroner Galvin.

to the police and their role in law enforcement. The ‘Tea Tree Incident’ saw a lot of ‘flak’ leveled against the local police, and very little support. Police these days find themselves in the ridiculous position of having to try and uphold the law – THEN BE CRITICISED FOR DOING SO. Can the police be blamed for an increasing reluctance to act!!!

Why should the police attend a drunken and rowdy brawl, when they will have to follow the lengthy routine of arrest and charge – THEN be criticized as racist and brutal. We EXPECT the police to act – but do we ever say thanks – do we ever stand up and say ‘Well done!’? It’s high time we did.

The ‘Tea Tree Incident’ illustrates just what the police have to contend with ... interstate lawyers being brought in at massive expense to cross-examine the police for doing their best under rather uneven odds. Come on ‘Alice’, it’s high time to pay tribute to the effort of our police.<sup>2</sup>

Muirhead J found this and other similar reports in the Alice Springs media to be not only inaccurate, but also ‘disgraceful’, ‘inflammatory’, ‘mischievous’, and so prejudicial to the Anmatyerre accused that he moved their jury trial to Darwin.<sup>3</sup> Significantly, Muirhead J also found that many of the inaccuracies in this reporting must have come from police.

Following what was later found to be a seriously inadequate police investigation of the death of Jabanardi, an inquest was conducted a year after the event, resulting in Constable Clifford being committed on a charge of murder. No application having been made to move his trial to Darwin, he was tried by an Alice Springs jury. He was acquitted.

As I write this column, an inquest into the death in police custody of another Anmatyerre man draws to a close. On 5 January 2012, Kwementyaye Briscoe died in the Alice Springs watchhouse. Coroner Cavanagh’s report on the death of Mr Briscoe will not get as much media coverage as Coroner Morris’s report on the death of baby Azaria, but his findings, and more particularly his recommendations, will, I expect, be of greater practical importance.

It is profoundly demoralising to all of us who work in the criminal justice system that the nightmare of needless Aboriginal deaths in custody continues. However, we shouldn’t lose sight of very substantial improvements in the conduct of the media in reporting matters such as these. It would be unthinkable for a newspaper today to print the sort of poisonous rubbish that was published by the *Alice Springs Star* in 1980. Local media coverage of the Briscoe death and inquest has been prominent without being sensational, and consistently fair and measured.

Similarly, the response of police to a death on their watch is a world away from their disgraceful performance 30 years ago in the Ti Tree Incident. In the Northern Territory

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<sup>2</sup> Cited in *The Queen v Pepperill* (1981) 54 FLR 327, 331.

<sup>3</sup> The accused were subsequently acquitted on most counts, and sentenced to modest penalties on the remainder.

today, it is still the police (and not an independent body, which would be preferable) who investigate deaths in police custody. However, the police investigation of the death of Mr Briscoe was a far cry from the police investigation of Jabanardi. As was acknowledged by the parties at the inquest, it was prompt, punctilious and professional.

At the Jabanardi inquest, conducted in an atmosphere of open hostility, the two officers involved declined, as was their right, to give evidence. By contrast, all of the police involved in the Briscoe case elected to go into the witness box, and several of them wept in distress and remorse as they admitted their failure to adequately care for the man in their custody. Likewise, the Commissioner of Police attended the inquest and extended his personal apology to the family. Earlier this year I criticised Commissioner McRoberts for rushing to defend the conduct of Alice Springs police who had briefly pursued a car which sped away and crashed shortly afterwards, killing the driver and one of his passengers. But John McRoberts and the police are to be commended for their constructive, compassionate and courageous approach to the Briscoe inquest.

Having said this, I declare an interest. I recently accepted an invitation by Commissioner McRoberts to participate, at the expense of police, in the first “COP NT” program, a community orientation weekend course at which we were shown various aspects of police training and operations. Was this a public relations exercise? Of course it was. Did it give participants a better idea of what police do and how they go about it? Of course it did. Most usefully, it provided us with a valuable opportunity to build relationships. No doubt, cops will continue to cop criticism by people like myself from time to time. But for my part, any future criticism will be better informed.

Royal Commissioner Johnston inquired into and reported on the death in custody of Jabanardi a decade after the event. By that time, the rancour of the associated two trials and an inquest had given way to a spirit of co-operation between the parties, who jointly submitted that his Commission should focus on the underlying issues, rather than revive the bitterness of faded factual disputes. For that reason, Elliott Johnston opined that the Ti Tree Incident “was in many ways a turning point for race relations in the Northern Territory”. Nevertheless, we still have a long hard road to travel. Disturbingly, many of the underlying issues addressed by Commissioner Johnston in his inquiry in 1991 were raised again before Coroner Cavanagh in his inquest in 2012.

Significant measures to improve police watchhouse conditions and procedures were implemented shortly after the death of Mr Briscoe, and others are in train. At the conclusion of the inquest, senior counsel for the Commissioner of Police made the following bold submission: “genuine confidence can be held that the deficits which created unacceptable risks for [Mr Briscoe] have been addressed and the risks to vulnerable persons in protective custody which can never be eliminated have been very substantially reduced.” We’ve heard assurances like this before. If they’d all been kept, it is likely Mr Briscoe would not have died that night. I hope – we all hope – that events over the next few months will show that the Commissioner’s confidence is well-founded.

To eliminate avoidable deaths in police custody not only requires leadership from the top, but also commitment from rank and file police officers. The importance of the heartfelt apologies given from the witness box by the men and women on duty the night Mr Briscoe died should not be underestimated. While I was on the COP NT course I mentioned above, I fell into conversation with one of the constables tasked to show us around. Without prompting, he told me that the big problem for police on the street is the booze, and with quiet conviction, he spoke of the urgent need to change the Territory drinking culture. What he said struck me more powerfully than the formidable TRG arsenal I was supposed to be admiring at the time. In the same vein, the Northern Territory Police Association focused on grog in their submissions to the Coroner in the Briscoe inquest:

The answer does not only lie in policing, but in changing social policy... [There] is a divide in which social policy accepts that alcohol is at the heart of indigenous disadvantage and that that disadvantage is best addressed by having Police clean up the daily mess – or one might say, slide it under a carpet daily and nightly swept by Police.

The Police Association then went on to call for a broad range of measures predominantly aimed at restricting the supply of alcohol. And that's a fair cop.

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26 June 2012