

In recent days, CLANT has been deluged by journos covering the issue of prison overcrowding in the NT, a chronic problem which has now become painfully acute, particularly for the prisoners who are being obliged to serve their terms in a police watchhouse. Building more prisons, training more staff and devising new programs all takes a lot of time and a lot of money. There are, however, three simple things government could do to reduce the pressure on our prisons at no cost and in next to no time: amend s48(1) of the *Sentencing Act* to permit minor violent offenders to be punished by way of community custody orders; repeal reg 3(b) of the *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Regulations*, to make the same offenders eligible for referral to the SMART Court; and amend the *Bail Act* to ameliorate some of its more draconian presumptions, which effectively prevent many defendants charged with minor violent offences from obtaining bail. Prisoners serving less than six months are generally ineligible to participate in rehabilitation programs, so why not let them serve their sentence in the community, where they can be put to work, and sent to rehab?

We've been busy beavers at CLANT lately, putting on two exceptionally well-attended events, an intensive weekend CPD on the *Uniform Evidence Act*, and, the following week, the Second Tony Fitzgerald Memorial Address, delivered by Professor Patrick Dodson. If you missed the first event, don't dismay: CLANT is planning to present a further CPD on the UEA later in the year. If you missed the second, you can listen to or download Pat Dodson's Address from the website of ABC Radio National's Big Ideas program, which broadcast the Address on 4 April 2012.

A reminder that the CLANT 25th Jubilee Dinner has been rescheduled for 29 September 2012. We are also pleased to announce that the next CLANT Bali conference will commence on 22 June 2013.

What follows is abridged and adapted from a paper I recently delivered to a conference organised by the Institute of Australasian Psychiatrists.¹

"Warning: disturbing/offensive material enclosed": inside the criminal (lawyer's) mind

A while ago, I was defending a client I'll call John who had been charged with repeatedly and viciously raping a child relative, who I'll call Jane. The jury had just finished watching the lengthy pre-recorded video of Jane's testimony, including my cross-examination of her, and the judge adjourned the court for lunch. During the lunchbreak, my accused client went home and hanged himself.

If my client had been guilty (something I will never know), as the lawyer who had put Jane through the ordeal of cross-examination, I could not but feel implicated in his crime, as an accessory after the fact. If on the other hand, he had been innocent, I could not but feel implicated in his death, as an accessory before the fact, that I hadn't done enough to protect him from the brutality of the criminal justice system. I believe I did nothing unethical, unprofessional or unlawful. And yet.

This was by no means the first time I'd found myself reflecting on the problem of lawyer's guilt. Another client, like John, had insisted on his innocence. Eventually, after a couple of years on remand, he, unlike John, was vindicated, but that prospect seemed remote when I wrote this:

Raft

Bereft

¹ The paper as originally presented dealt primarily with the topic of lawyers and vicarious trauma, an issue well covered by Balance Edition 5/2011, which focused on health and wellbeing within the profession.

Adrift

His moorings slipped

Left

Afloat

Foundering in an alien sea

On me

It seems

Now falls the task

Of being his raft

Chin up

Old chap

I'm meant to say

(Let's put to one side for a moment shall we the inedible the indelible the impenetrable facts of the matter)

Just grasp this nice piece of straw

That's it, there's a good client

Now clutch at it if you'd be so kind

Hard as you can now

With this straw

I thee take

Right across this alien sea

Over these jagged reefs

Those foaming shoals

That swarming white water

To that further shore

And there I'll set you

High

Dry

And free

(Unless the tide's agin us, or the winds aren't fair, or we strike some dark, sharp evidentiary mass and sink like a stone, but let's not speak of that, not now, not yet)

I don't mind the guilty ones

It's the innocent I can't bear

By the way, the question every defence lawyer gets asked at dinner parties, namely 'do you feel guilty when you get your guilty client off?' is drawn from the world of Boston Legal. In the world of Alice Springs Legal, clients who you know are guilty, almost invariably plead guilty. Those very few who don't are invariably found guilty anyway. I can't recall a single case of a client of mine I *know* was guilty, getting off. So, that's one thing I don't feel guilty about.

OK, perhaps that's a little glib, a little disingenuous: yes, I can't remember a client who I *know* was guilty getting away with it. But maybe my memory's conveniently faulty. Maybe next week a client I know is guilty *will* be acquitted. And besides, I have certainly had clients I strongly *believed* were guilty who were found not guilty. So do I feel guilty about that? Um, yes, a bit. But not much.

We are trained to commit to a value system in which the rule of law is paramount. If we permit the rules to be bent or broken to nail a bloke we are sure is a crook, how do we stop them being bent or broken to nail the rest of us? Rules, in the world of a lawyer, are made *not* be broken. This issue arose squarely in *Carr v Western Australia*². Police suspected Mr Carr of robbing a bank. They interviewed him on videotape in a designated interview room. He exercised his statutory right of silence. Then they took him to another less formal room where, with a videotape secretly rolling, they goaded him into boasting that he'd committed the crime. A majority of the High Court ruled that this confession was lawfully obtained, and correctly admitted as evidence before the jury which had, unsurprisingly, pronounced Mr Carr guilty. But Kirby J dissented. He said this:

It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made with enthusiasm. I can understand the tendency of human minds to resist such an outcome. ... [Mr Carr] was a smart Alec for whom it is hard to feel much sympathy. But the police were public officials bound to comply with the law. We should uphold the [accused's] rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed.³

Although it is considered unseemly in some circles for retired judges to publicly reflect on their own decisions, especially when they were in the minority, Michael Kirby has gone on to give a number of lectures which dig right down into the legal and ethical issues raised by this particular case. Some might even suggest that he has been wrestling with his conscience about it, although I should say that in his defence that he expressly states that he is "not venturing into 'pop psychology'."⁴ Whatever his motivations, his recently published paper on the *Carr* case serves as a profound and powerful response to that stock dinner party question.

² (2007) 232 CLR 138

³ *Carr* (2007) 232 CLR 138, 187–8 [168], [170].

⁴ Michael Kirby, "Statutory Interpretation: The Meaning Of Meaning" (2011) 35 *Melbourne University Law Review* 113, 119.

These days, one of the things I enjoy most about my work is my contact with freshly minted young lawyers, who from time to time I get to supervise when they come for a stint in our office. But even then, things can get awkward.

Work Experience

Well

I said
what did you learn?

I learnt

she said
that when you are reading a murder file and you see a book of photographs
you should expect to see photographs of a murder

Oh

I said
and to myself
oops

Oh

I said
come to think of it that particular murder had a particularly large amount of
blood. Didn't he have his throat cut?

Yes

she said
munching intently through her BLT

And so we made light

of this dark spreading stain
on the farewell lunch I'd bought her

This is

what she's set on
being a criminal lawyer

I remember

the boy
the jury found had cut that throat

He was

as it happens
my very first client
on my very first day
being a criminal lawyer

Black boy

shivering
in white cell

The photographs

were particularly
vivid
livid

The crimson
splashes on
his shoes undid him

We got
a hot shot QC
up from down south to defend him

To no avail
after all
the camera never lies

Are you sure
I think
you really want to get into all this?