THE ALBATROSS

It's been hanging around my neck right from the start, ever since February 1997, when I was admitted to practice. Less than two weeks later, Part 3 Division 6 of the *Sentencing Act* (NT) ("Custodial Orders for Property Offenders") commenced, ushering in a regime of compulsory imprisonment for property offences.

Shortly thereafter, I started as a baby criminal lawyer with the Northern Territory Legal Aid Commission, where I have worked ever since. After five years of working as a law clerk, including three studying law by correspondence from Alice Springs, I had been very much looking forward to getting out from behind a desk and onto my feet, so that I could deliver hapless clients from the jaws of injustice. Instead, I now discovered, I was a tiny cog in a great grinding machine whose settings were geared so as to all but guarantee injustice.

At that time, no-one had yet served the fourteen days required by the new provisions, because various proceedings regarding their construction and validity were by then on foot, and magistrates were routinely adjourning all affected matters pending their determination.

When two itinerant young women were caught stealing cosmetics and trinkets from fellow backpackers' bags in their hostel dormitory, as the bottom of the ladder duty solicitor in the Darwin magistrates court, I got to be their lawyer. They brazenly and blithely assumed that they'd get a talking to from the beak and be sent on their feral way. Instead, they became the first two minor property offenders in Darwin to be locked up for two weeks pursuant to the new laws. They were incredulous. I was shaken.

I joined a small but enthusiastic community group to campaign against mandatory sentencing. We called ourselves Territorians for Effective Sentencing, because we didn't want to sound overly negative. We agitated for support from church groups, interstate human rights activists and Federal politicians. It seemed to us that there was simply no prospect of dislodging the incumbent CLP government, which had been insouciantly in power since self-government in 1978, but that there was a chance of getting the Commonwealth to intervene, as it had just done to override the Territory's *Rights of the Terminally Ill Act*.[1] As it transpired, we were wrong on both counts.

Meanwhile, another client was assigned to me, a teenager named Scott Schluter. Less than a week after *Trenerry v Bradley* was handed down, he entered pleas, one after the other, to a series of minor property offences committed over a period of a week or two while he had been living on the streets. The law provided that a person "once before" found guilty of a property offence was liable to three months compulsory imprisonment. The magistrate considered that in the circumstances he was bound to impose 14 days (for offences on one file) and an additional three months (for offences on a second file) on Schluter, who had never been convicted of anything before that day.

The appeal, heard on 21 July 1997, was my first appearance in the Supreme Court, carrying the books for Colin MacDonald QC, opposed to Rex Wild QC, before Martin (BF) CJ. As appeals go, it was a pretty tame affair, because the Crown joined with the submissions of the appellant, and it was all over in a few minutes: no-one involved (including the magistrate, Trigg SM, who had expressed his

[1] *Euthanasia Laws Act* 1997 (Cth), commenced 25 March 1997

dismay when imposing sentence) had any stomach for sending Scott Schluter away for months.[2] Although no-one was aware of this at the time, this lad had the terrible misfortune of being afflicted not only by the malignancy of mandatory sentencing, but also by a brain tumour, which ended his life just a few years later.

At about 4 am on 26 June 1997, the very same day as Scott Schluter would later enter his pleas of guilty, a "hitherto of 'impeccable' character"[3] university student named Joanne Coughlan was served a hot dog at an all-night Darwin fast food outlet. Coughlan complained about the poor quality of the hot dog, and became further annoyed when, on being given a refund, she believed she had been short-changed thirty cents. In her annoyance, she threw or poured or tipped some water in the direction of the sales assistant. The water damaged a cash register. I was engaged by Coughlan, and at our first conference I advised her that although the police had said to her that she was only going to get a fine, if she were convicted she would in fact go to gaol for 14 days. I also told her I was confident that she would not be found guilty of the offence of damaging property. The first part of my advice was accurate, but not the second: down, and in, she subsequently went.

On her release after her 14 days mandatory imprisonment, Joanne Coughlan was met by a TV current affairs team from down south, who gave her a bouquet of flowers and an interview. The case generated a great deal of publicity, which in turn prompted the enactment of an "exceptional circumstance" provision[4] which, had it been in force at the time Coughlan was sentenced, would have allowed her to avoid imprisonment.

However, the exceptional circumstances provisions exacerbated the already racially discriminatory effect of the mandatory sentencing laws, because very few Indigenous property offenders could meet the requisite criteria, which included the making of restitution and demonstrating prior good character.

This was the background against which, on 1 February 2000, I appeared as the first witness to give evidence to a Senate Legal and Constitutional References Committee inquiry into "matters arising from the introduction of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999", a private members Bill that had been introduced by Greens leader Bob Brown, and which, if passed by the Commonwealth Parliament, would have done to the Northern Territory's mandatory sentencing laws what the Commonwealth had previously done to the Territory's euthanasia laws.

I decided to demonstrate the absurdity and harshness of the laws to the committee (and the assembled media) by taking out of my suit pocket a pencil I announced I had just stolen from a government office elsewhere in the building, and then breaking it. By committing two property offences, I immediately placed myself outside the exceptional circumstances criteria. I dared the government to arrest me and lock me up for fourteen days, knowing of course that they would do no such thing.

At the time, I had no idea that, coincidentally, a boy who later came to be known as Wurramarrba was serving a mandatory sentence of detention in Darwin for the property offence of stealing,

[2] *Schluter v Trenerry* (1997) 6 NTLR 194
[3] *Coughlan v Thomas* (1998) JA21 of 1998 (9715912) per Kearney A/CJ delivered 9 July 1998 at 10
[4] *Sentencing Amendment Act (No 2)* 1999, commenced 4 July 1999

among other trivial items, some pens. Eight days after I had pulled my cute but effective little publicity stunt, Wurramarrba hanged himself in his cell.

I read the front page story in *The Australian* about Wurramarrba's death in custody while on holiday, in a cabin on an island beach, a thousand miles from home and care. By now, having carried it around for three years, I was on familiar terms with the albatross, but on that day it seemed much heavier, and much smellier, than ever before.

A month later, on 13 March 2000, I took leave and flew to Canberra as a member of a delegation to lobby for the enactment of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill*. I have previously written about the four extraordinary days which followed.[5] We came within a whisker – a single vote, to be precise – of helping to procure a Coalition backbench revolt that would have resulted in the Howard government being defeated on the floor of the House of Representatives. The following month, the Commonwealth and Territory governments struck a deal which resulted in the repeal of the mandatory sentencing laws for youths which had seen the detention of Wurramarrba, and, lo and behold, funding for an Aboriginal Interpreter Service, another issue that, before I had gone into law, I had agitated about for years. Slowly, it appeared, mandatory sentencing was being whittled away.

For a time it looked like Howard would be defeated at the next Federal election, and that Prime Minister Beazley would overturn the Territory laws. But then Federal Labor's commitment evaporated in the face of the Western Australian Labor government's unwavering allegiance to its own version of mandatory sentencing. And in any event, then there was Tampa, and Howard cruised back in. But out of the blue, Clare Martin clawed her way into power at the Territory elections, and the first thing her incoming Labor government did was repeal mandatory sentencing, on 22 October 2001.

This did not mean, however, that I was now free of the albatross. I had by then become involved in more serious cases, including homicide matters, and I had realised that there was an even more serious mandatory sentencing problem, as I described in my very first contribution to *Balance* in October 1999.

> Much spleen has been vented… over the continuing embarrassment of mandatory sentencing in the Northern Territory. From a strictly arithmetical perspective, however, a thousand times more severe than the fourteen days handed out to first time property offenders is the mandatory sentence of life imprisonment imposed on a young person convicted of murder in the Territory. In August 1999 at Alice Springs, Sean Hudson, a 19 year old Hermannsburg petrol sniffer, became one such statistic.
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> In reluctantly sentencing Hudson to a sentence which, in 'the circumstances of this case, I consider… to be less than satisfactory', Bailey J called for 'the reintroduction of discretionary sentencing for murder, coupled with the abolition of the partial defence of diminished responsibility'.
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> The approach of the NT to punishment for murder is doubly unique. Firstly, we are the only jurisdiction in the Commonwealth which purports to effectively exclude the judiciary

[5] R Goldflam "There ain't no fat lady: A Northern Territory delegation visits Canberra to oppose mandatory sentencing" [2000] AltLawJl 88

> altogether from the sentencing process for murder. Even in those States (WA, SA and Queensland) where the mandatory sentence of life remains on the books for this most serious of crimes, the courts are either permitted to fix a non-parole period or, in the case of indeterminate sentences, review cases after a specified period. And secondly, the actual period served by murderers in the NT far exceeds the time served elsewhere in Australia, where it generally averages 10 to 16 years.

At the time, not only was life imprisonment the mandatory penalty for murder in the NT (as of course it still is), but there was no power for the court to fix a non-parole period. As I went on to say in that article, there was no public outcry about any of this, because no-one cries out for murderers. Nevertheless, in 2004, following persistent campaigning by the legal profession, this appalling regime was somewhat mitigated by the enactment of the *Sentencing (Crime of Murder) and Parole Reform Act*, still in force, which maintains the requirement that a person convicted of murder be punished by the imposition of a lifelong head sentence, but permits the fixing of a non-parole period of at least twenty years, save in rather narrowly specified exceptional circumstances.

In the meantime, mandatory sentencing, this time for a broad range of violent offences, was re-introduced by the Mills CLP government shortly following its election in August 2012.[6]

Unlike in 1997, there was no concerted community-based campaign against this latest tranche of mandatory sentencing laws. Having itself gone to the polls on the issue, the government was able to plausibly claim to have a mandate to pass this law, and the Opposition, having just been voted out of office, was poorly placed to make too much of a fuss about it.

So here I am, 19 years on, and the rotten carcass is still hanging around my neck. On 6 November 2015, the evening I commenced my third and final term as CLANT President, newly elected life member Richard Coates addressed our members. We had made him a life member for his exceptional services to the profession and the Association, not least being the work he had done to bring about the 2004 reform of the murder sentencing laws.[7] He could have used the occasion to regale us with amusingly self-deprecating war stories, along the usual lines. He did not. Instead, he challenged CLANT to renew its campaign against the Territory's mandatory sentencing laws for murder. He reminded us that they have caused untold misery, cost and injustice.

On 1 January 2016, CLANT announced the appointment of Justice Dean Mildren as our new patron.[8] In *Trenerry v Bradley*, one of the 1997 mandatory sentencing test cases, His Honour had made this pungent observation: "Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences."[9] They were then, and they are now.

It's about time we cut off this bloody albatross and cleaned ourselves up. It stinks to high heaven.

Russell Goldflam 12 January 2016

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[6] *Sentencing Amendment (Mandatory Minimum Sentences Act) 2013* (Act No 1, 2013) commenced 1 May 2013

[7] See, for example http://tinyurl.com/j78844j

[8] See http://clant.org.au/index.php/news/176-happy-new-patron

[9] *Trenerry v Bradley* (1997) 6 NTLR 175 at 187