

THE VICTORIAN INSTITUTE OF FORENSIC PATHOLOGY



THE FIRST VIFP ORATION

"THE AUSTRALIAN ABORIGINAL AND THE LAW: A JUDICIAL PERSPECTIVE"

DELIVERED

BY

His Honour the Administrator of the Northern Territory
The Honourable James Muirhead QC
at 4.00 p.m. on Saturday 20 October 1990
in The Great Hall, The National Gallery of Victoria



DEPARTMENT OF FORENSIC MEDICINE MONASH UNIVERSITY

FOREWORD

The Victorian Institute of Forensic Pathology is not only responsible for the provision of forensic pathology and related scientific services in Victoria, but also has statutory educational and research responsibilities. It is assisted in these by being the Department of Forensic Medicine in the Faculty of Medicine at Monash University and by being affiliated with the University of Melbourne. The Council of the Institute decided that it would host and organize an Oration to be delivered every three years. This First Oration, which was attended by three hundred registrants and guests, was the centrepiece of our International Forensic Pathology Symposium held on 20 and 21 October 1990 in the magnificent Great Hall of the Victorian Arts Centre.

At the Symposium Dinner, the first Triennial James H. Kennan Gold Medal for the most significant written work affecting the practice of forensic pathology in the previous three years was awarded to His Honour, The Administrator of the Northern Territory, James H. Muirhead Q.C. This award was in recognition of his authorship of the Interim Report of the Royal Commission into Aboriginal Deaths in Custody, published in December 1988. The Interim Report has already had a significant and salutary affect on the practice of forensic pathology in Australia.

I am very pleased that we are able to publish the First Victorian Institute of Forensic Pathology Oration. It is, I believe, an important contribution to a subject of national concern.



STEPHEN CORDNER,
Professor of Forensic Medicine, Monash University.
Director, Victorian Institute of Forensic Pathology.

INTRODUCTION OF THE ORATOR by the Honourable John Phillips Chairman of the VIFP Council

We are assembled this afternoon to hear the First Victorian Institute of Forensic Pathology oration delivered by the Honourable James Muirhead QC, Administrator of the Northern Territory.

If I may say so, our Orator has long been an ornament to his profession of the law. After a period of practice in South Australia, he was appointed a Judge of the local and district criminal courts in 1970. 1972 found him acting as a Justice of the Supreme Court of Papua New Guinea. In 1974 he was appointed a judge of the Supreme Court of the Northern Territory and in 1977 a Judge of the Federal Court of Australia. His Honour retired from that appointment in 1987 but shortly after agreed to act as Royal Commissioner inquiring into aboriginal deaths in custody. He discharged the very onerous duties of that office until he accepted his current appointment as Administrator of the Northern Territory.

Throughout his career, his Honour's conduct of his judicial responsibilities has been distinguished by his learning, unflinching courtesy and strong sense of duty. As to these matters I can personally attest and I will always remember his benign countenance and patient smile during four rather traumatic months in the Supreme Court at Darwin in 1982. So, four times a Judge, then Royal Commissioner and Administrator. Six appointments under the Crown and a lifetime spent in the honourable discharge of them.

It would seem that His Honour has taken the view that duty requires the acceptance of each new appointment offered. In this respect, and indeed in others, he resembles Lord Denning. Although Lord Denning did, in fact, refuse one appointment. This is when, having gone to the Court of Appeal, he was asked to return to the House of Lords. He allegedly told the Lord Chancellor that he would rather die than return to the House of Lords!

His Honour's topic this afternoon is "The Australian Aboriginal: A Judicial Perspective". On this subject he can speak with complete authority. His clear perception of the relationship between aboriginal people and the law and the problems of that relationship is one of long standing and he was, in this connection, a party to the famous decision of *R. v. Anunga* in 1976, which laid down guidelines for the interrogation of aboriginal suspects.

I now call upon His Honour to deliver the Oration.



The Honourable James Muirhead QC

THE AUSTRALIAN ABORIGINAL AND THE LAW “A JUDICIAL PERSPECTIVE”

Immediately I put pen to paper in preparation of this address, I realised that the subject matter was too broad for the occasion, albeit that the views I express must not be interpreted as other than personal reflections. Perhaps because I worked as a Judge in the Northern Territory for many years, and was the first Royal Commissioner inquiring into Aboriginal Custodial deaths, it is thought that I have some understanding of Aboriginal experiences or perceptions of Australian Courts and our criminal justice system as it has applied to these people. Perhaps I have, but there are many others, legally trained and otherwise, who could talk more confidently because their contact with Aboriginal society in all its forms has been closer and more enduring; perhaps also their perceptions of the role of the Judiciary would be more objective.

It is difficult in view of the fact that Europeans have occupied this continent for just over 200 years to avoid some historical references. For about 160 of those years the experiences of the Aboriginal people with both the law and lawlessness were basically disastrous. The law has regarded Australia in 1788 as practically an uninhabited country, belonging to none. Despite some exhortations by authority to soldiers and settlers to respect the indigenous people, those so called nomadic people who were encountered were regarded as scarcely human and creatures of the bush destined to be either eliminated or suitably tamed. Initially, as one would perhaps expect, appreciation of Aboriginal culture, language or tribal social systems was precisely nil. There was no understanding of the relationship between those people and the land. And yet they were so often assumed to be bound by the laws which accompanied the British occupation and the assertions of sovereignty. History reveals they were in fact unprotected by the law not only as victims of misdeeds, but by reason of disqualifications imposed by lack of Christian faith, language and understanding. European settlement imposed physical suffering and social fragmentation upon the indigenous people who were unable to find protection or refuge in the law or its agencies. And when the black people made a stand or sought to exert retribution or to protect their lands, or waterholes or women or to take food, it was so often the troopers, aided by civil horsemen, and at times by black troopers, who carried out summary punishments; not of those found to be responsible, but by unselective killings. And whilst there were those who raised their voices in protest, such voices were too often neither heeded by Governments nor by settlers who with their wives and children were venturing into the great beyond and occupying traditional aboriginal lands. And when inquiries and commissions were directed the Government response to independent findings was very muted.

What is the purpose of such historical generalisation? Why (you may say) go on about it? We cannot accept responsibility for what occurred in those far gone days when social standards were so different — often so brutal. That is a reasonable reaction, but I believe it is healthy for a nation to face up in honesty to its history in endeavouring to create a just society and planning for the future. I suggest it is important to the future well-being of our country that we should understand the difficulties which it has been the lot of our Aboriginal people to endure since settlement. And today, at last, interesting histories are to be found. Professor Harry Reynolds “The other side of the Frontier” and “The Law of the Land”, Mattingley and Hamptons “Survival in our own land” are but examples. The essays entitled “Aborigines and the Law” edited by Peter Hanks and Bryan Keon-Cohen; in memory of Elizabeth Eggleston, who pioneered so much work in this field, are close to my subject matter and comprehensive. Today so much material has been gathered that it is difficult in a paper such as this to do other than reflect on a few matters.

As I have said we can really only gauge the present relationship between the Aboriginal people and the law with understanding of the past. But because that relationship is more humane and understanding today than it was, say 40 years ago, is no justification for complacency. It is not always profitable to talk only with common Anglo-Saxon type perceptions as the measuring stick, without understanding of the attitudes that history has burned into the psyche of minority groups and people of different ethnic and religious origins. History, including contemporary events in Eastern Europe surely emphasises the necessity for an objective approach; easy to say, but difficult to achieve.

In my view it is important to ensure that the histories of the Aboriginal peoples, especially over the last 200 years should be taught to our children in our schools; not only political histories, but histories of Aboriginal culture, of artistic skills, of hunting, foraging and survival skills, of the significance of Aboriginal dreaming and the association with land, of their complex, yet important tribal and family relationships. Can we hope to attain better understanding which will enable us to debate and plan, in consultation, the future of Aboriginals in Australian society in an apolitical and positive fashion. Only by bridge-building will we sweep away the suspicions and strains which remain the legacies of history I have referred to and hopefully create a society in which Australia can be proud of its social comity and cease to talk in terms of Aboriginal problems and dilemmas.

This is perhaps a complicated way of saying that it is only during recent decades that justice has touched the lives of Aboriginals. I use the word "touched", not "enveloped". Perhaps compared to the past recent developments have been brisk, but they are occurring at a time when many other problems bedevil aboriginal society, not the least of which is alcohol, which in some parts of our country is a comparatively recent affliction.

We must recognize, I think, that few indigenous people who have lost their lands and life style by reason of occupation by the stronger, especially of another race, are likely to be enthusiastic about 'justice'. If you go to Redfern or other depressed areas in this country where Aboriginals gather and say, "What do you think about the Law" you may get a sharp response, moulded by history and contemporary experiences, not so much of the courts, but of police and prisons. British perceptions of justice were based on sanctity of property (including grazing stock) and carried with it strange assumptions that the philosophies and morals of Old England would be absorbed by, or at least understood, by the natives. It was the white man's law which came to govern the lives of those whose tribal groups were broken up, who lost their culture, their land and their history and who were thus subjected to a code which had no relevance and which was in conflict with much of their own traditions. And they had the added disadvantage that the majority of white men considered it neither possible nor important that the Aboriginal should understand the law and its agencies. So it was against these contrasting perceptions, some of which still survive, that the Courts endeavoured to administer justice in cases involving Aboriginal people (whether as witnesses or defendants); in earlier days a virtually impossible task. And it remains an ongoing challenge which cannot be divorced from the struggle for social justice; you cannot exclude health, educational and housing disadvantages in pondering the great over representation of Aboriginals in our prisons and lock ups — the imbalance is not just a legal problem. But I can say that in my lifetime I have seen advances.

Over recent years there has been much discussion concerning recognition of Aboriginal cultural laws and separate tribunals for Aboriginal people. I do not wish to become involved in this debate, if it is still a debate. Obviously the courts must have discretion to pay regard to culture and tradition, tribal laws and morality; but to attempt to apply a different code, different standards or penalties between black and white would, I consider, be positively harmful.

Next door to the modern Court complex in Alice Springs one finds the old Police cells with iron rings set in the floors, rings used in past years to chain not only accused persons, but also the witnesses brought in to testify; a reminder of the historical difficulties of the law in those early days when, despite the absence of common language, the Trooper, often alone, but generally with an Aboriginal Tracker, would ride for hundreds of miles to arrest an accused person and witnesses in the hope that the crime in question would be dealt with by the courts. But the courts over the years were beset with problems; the lack of interpreters, the inaccuracies implicit in dialogue in station pigeon, the lack of comprehension by the accused as to the law itself, as to the nature of the proceedings, and as to the wrongfulness of the conduct alleged to be criminal. Difficulties in the administration of an oath or affirmation and the caution that had to be exercised in admitting so called admissions or confessions in evidence exacerbated the difficulties. Whilst you may find the following a little amusing, it is not recited for that purpose. I refer to it as it truly illustrates the difficulties in those days. Let me read you a form of affirmation used by an Alice Springs Sheriff with I assume, the approval of the Judge to administer to Aboriginal witnesses in the early 1950's.

"Jacky, you bin see that big boss fella, in same judge, bin sit longa there?" — pointing to the judge.

Jacky replied, "You-eye."

"Now you bin tellum all same judge fella all about the trouble bin come up longa Yuendumu. You bin tellum all same true fella what you bin see longa your own eye, not what some bugger bin tellum longa your ear. No more gam, no more humbug?"

Jacky replied, "You-eye."

"Now you bin tell him all same judge big loud voice, all same corroborree?"

Jacky replied, "You-eye."

The next Judge, Kriewaldt J, a fine lawyer took a different view. He was a strict Lutheran and he deplored Mission educated aboriginal witnesses being treated like children. He instructed his Associate to administer an oath in simple form to such witnesses. But inevitably problems continued. Let me read you an episode recited by Mr Justice Rice, now a judge in the Territory but a young lawyer practicing in Alice Springs in the 1950's:

"After the new swearing-in procedure had been adopted for some time, the Crown was called upon to prosecute the Chambers brothers on an indictment for malicious wounding of Aborigines who had taken up a position on the roadway, blocking the entry of station vehicles to the homestead on their property. The Crown allegations were serious and there was a great need to ensure a conviction in order to put an end to what was considered to be extreme maltreatment of Aborigines. The Crown were instructed by Professor Bailey, the then Commonwealth Solicitor-General to brief H. G. Alderman Q.C., as he then was, to lead for the prosecution, especially as the Minister for Territories, Mr Paul Hasluck, as he then was, had the responsibility of accounting to the United Nations for these alleged acts of atrocity.

When the case came on for trial at Darwin the Courthouse was still an army-type Sidney Williams hut located on the Esplanade. Mr. Justice Kriewaldt directed his Associate to swear in the first witness. In the meantime, Harry Alderman Q.C., who was leading counsel for the prosecution, left his seat at the right-hand end of the bar table and moved to a position outside the courtroom and lit up a cigarette. Billy the witness, was asked whether he was a Christian and upon his answering that he was, the judge directed that he take the oath. The oath was administered by the associate whereupon Travers Q.C., for the two accused, arose and applied to the trial judge for leave to examine the witness on the *voir dire*, ie as to his understanding of the oath. His Honour reluctantly granted this application because it involved the competency of a witness and the examination went something like this:"

"Now you have told the court, Billy, that you are a Christian boy?"

"Yes"

"And you know what that book is that you held in your right hand?"

"Bible?"

"And you know what the Bible is all about, Billy?"

"Yes"

"Now will you tell his Honour what the Bible is all about?"

"God!"

"Now, Billy, tell us who God is?"

Billy hesitated, looked up at the Bench, then around the court and then along the Bar table, and seeing the vacant chair, said:

"Him bin that fella him bin go out for a smoke."

May I now make a few remarks based on my experience since about 1970 when I first sat as a Judge at Port Augusta, in the north of South Australia. Amongst my customers were tribal aboriginals. I recall a typical case of a man charged with a wounding offence, the wounding of another Aboriginal. He inevitably pleaded guilty through a local solicitor who was then known in the legal fraternity as "Plead Guilty Bill". It is doubtful whether the accused understood the charge, save perhaps that he had stabbed someone and the police said that was wrong; in his eyes the wounding may have been necessary; no understanding of "unlawfulness", "intention", "self defence". Concepts of his 'rights' before the courts, of the functions of Judge, counsel, witnesses etc. would have baffled him. But his Counsel (whose dialogue with his client was probably limited) told me that he admitted the offence, was a tribal Aboriginal (which was obvious), regretted the offence (which was doubtful) and was unlikely to offend again — the usual and in those days very brief submissions in mitigation of penalty. No interpreter, just an assumption that as the accused was legally represented (however inadequately) that all was according to the law. And of course it was not. But I recorded a conviction and sentenced the man. In so doing I accepted an understanding on his part that the prisoner almost certainly did not have. I was probably wrong but that was the system. It would not happen today — 20 years on. I suspect the State did not have the resources to do more and there was no such body as Aboriginal Legal Aid. It was considered better that a few assumptions should be made rather than exclude Aboriginals and their society from the protection and sanctions of the criminal law. Rough justice was better than no Justice.

Let me read you an excerpt from a paper prepared by Mr. Justice Kriewaldt in the late 1950s and edited after his death by Professor Geoffrey Sawyer, BA, LL.M Professor of Law at Australian National University at the time. The Judge, a very experienced Territory judge in very difficult days said:

"The plain fact is that in the Northern Territory the trial of an aborigine in most cases proceeds, and so far as I could gather, has always proceeded, as if the accused were not present. If he were physically absent no one would notice this fact. The accused, so far as I could judge, in most cases takes no interest in the proceedings. He certainly does not understand that portion of the evidence which is of the greatest importance in most cases, namely, the account a police constable gives of the confession made by the accused. No attempt is made to translate any of the evidence to him. If a jury is present the accused certainly does not understand the summing up nor could it be explained to him. If there is no jury, the accused in most cases has no comprehension of the addresses made by counsel to the Judge sitting as the fact-finding tribunal. If the rule requiring substantial comprehension of the proceedings were applied in the Northern Territory, many aborigines could simply not be tried.

I can see no possible way by which this difficulty can be overcome. It matters not what changes may be made in the composition of the tribunal before which aborigines are tried or what alterations are effected in the rules of procedure regulating trials, or what alterations are made in the law of evidence, the fundamental fact that most accused aborigines do not understand the proceedings will not be affected for many years to come. There is no solution. If the criminal law is to be applied at all to aborigines, it must simply be accepted that, for some years yet, many aborigines will not understand, even to a limited extent, the method whereby it is decided whether they be guilty or not."

In the same paper the author made references to the high rate of acquittals by Darwin and Alice Springs jurors, who felt it was no business of the law to adjudicate over killings and violence within Aboriginal society and who registered protests by unjustifiable acquittals. In fact he referred to a petition of Darwin jurors in 1933 relating to tribal crime which read "We therefore pray to seek a remedy for such a state of things by the establishment of a tribal court." Clearly Kriewaldt J suspected the petition was in fact drafted by the Judge to whom it was allegedly directed Acting Judge Sharewood.

Bear in mind he worked and wrote in days when he administered justice in a lonely environment, few facilities, no real support from Canberra and in days when there was an expectation that the Aborigines would either assimilate or die out. He wrote he was the sole judge, working in a Territory which occupies a sixth of the continent. The Department of Aboriginal Welfare, the bureaucracy committed to the care of Aborigines under the statutory "Protector", endeavoured to assist the Courts.

But however well meaning those involved may have been, a system which tried people without understanding of trial processes or the law itself may objectively and by modern standards be said to have ignored what is today referred to as 'natural justice'.

It is easy to be critical today but Mr. Justice Kriewaldt knowing the deficiencies saw it from a different perspective. He said:

"If the ordinary rule requiring comprehension of the nature of the proceedings were consistently applied, the result would be that the white community would have to overlook entirely many crimes committed by aborigines. If the law were to adopt that attitude, there would be a reversion, I think, where the victim is white, to a policy of reprisals, and that would be worse than to continue with the present system. Where the victim is another aborigine, the white community, taken as a whole, would probably not be greatly concerned if there were no trial. Only the more discerning would see that failure to punish crimes is a serious reflection upon our capacity to assimilate the aboriginal part of our community and inconsistent with the duty we owe to the aborigines."

In its role, which may have been regarded as partly educative, the law saw no alternative at times but to proceed against Aboriginal people who had no comprehension of what it was all about, no effective communication with the courts nor often with their own counsel. Those in authority no doubt determined that accepting these deficiencies it was preferable, in the community good, to proceed with these problems rather than to do nothing. It illustrates the difficulties the law faced only a few years ago.

Aboriginal society is very complex. Kinship, family responsibilities, cultural do's and don'ts are a mystery to most. Apparently inoffensive words or conduct may in Aboriginal society be of grave importance. Factors which may provoke a reaction in Aboriginal society may appear irrelevant to non Aboriginals. Payback and sorcery remain concepts of some significance. To sing forbidden words in the hearing of women or to display art or photographs of some rituals may cause community dismay and the law in its application to people of different culture and race must be cautious. When I went to the Territory over 16 years ago I felt disadvantaged in my lack of knowledge of Aboriginal people their environment, life styles, social standards and aspirations. The responsibility of judging and sentencing people under these disadvantages concerned me. Gradually I learned a little more — I was given the opportunity of visiting outlying settlements. I learned from experience.

Then arrived what I regard as the greatest step towards the attainment of justice for these people, the Aboriginal Legal Service. Barriers of language and misunderstanding were reduced as field officers, anthropologists, linguists, hardworking and effective young lawyers entered the scene. In a few years the Northern Territory Aboriginal became the recipient of a legal service which became the envy of many white people, especially prisoners. It has from time to time been controversial. It is not surprising that those who work with Aboriginals are inclined to become politically orientated in their anxiety to right wrongs. I am satisfied that, for some years at any rate, any alternative legal aid scheme not specifically designed for, or devoted to, Aboriginals is unlikely to prove as effective.

Alcohol remains the primary tragedy which particularly plagues Aboriginal Society. The challenge to Governments and to Aboriginal Society is to find the will to tackle the matter head on. It will remain to haunt us, until we grasp that we are talking about the survival of thousands of Australians. It is sad on visiting a settlement to find the beer club or canteen as the only apparent progressive and viable activity. It is sad to recall that Magistrates and Judges, medical people, police and other workers have been preaching this message for years. We shake our heads and do too little. Aboriginal communities are trying.

In my Interim Report released less than two years ago we recommended as follows:

“All Governments should combine to set up a national task force to examine the social and health problems created by alcohol and confronted by Aborigines in many localities, to assess the needs and the means to fulfil the needs, including legislative action, and the establishment of appropriate facilities for short and long-term care, education and training. The Aboriginal Health Services and other medical resources should be well represented in such a project which should be essentially health-oriented.”

I doubt if this national approach will ever come to pass but until we accept the tremendous vulnerability of Aboriginal people and give this situation the priority it deserves, progress will be limited.

Today there is I think little reason to fear in the Northern Territory that Aboriginals suffer disadvantages before the Courts. The Magistrates who sit in outlying areas (often in consultation with Aboriginal elders) are well aware of the situation under which people live. They have, I believe, the confidence of the people. Language difficulties are being overcome. More and more of those Aboriginals who are imprisoned are likely to find some time served in bush type settings. Experiences on places such as Groote Eylandt indicates that the influence of tribal elders is of prime importance in combating crime, generally the consequences of drink. Aboriginal problems can often best be served by Aboriginal intervention and in the sentencing procedures the views of people from the communities are often sought. The legal defence of Aboriginal persons is today generally in skilled hands; under the Bail legislation, bail is seldom denied and a large number of offenders are conditionally released. Vast cultural gaps between white and black remain, but progress is being achieved. The Aboriginals now have title to vast and growing areas of land; their skills as hunters, dancers and artists today receive world wide recognition. They do not, as I understand their spokesmen see joy or future in being welfare recipients. The development of Aboriginal education has been slow, but I sense a gathering of momentum accompanied by a recognition that education is the key to the management of problems and resources.

I sense that on the national scene the consequences of dispossession remain to threaten the residue of Aboriginal culture and the gap of misunderstanding between Aboriginals and non Aboriginals is too wide.

The work of the Royal Commission into Aboriginal custodial deaths revealed and continues to reveal appalling past neglect, lack of training and inadequate facilities. The over-representation of Aboriginals in custody has in my opinion been an indictment of our society. Fortunately Governments appear to have heeded many of the recommendations of the interim report and I am told constructive steps are taking place. Recent experiences give some reason for guarded optimism. Australia's methods of handling drunk people, social misfits — of using the police stations to accommodate sick and disturbed people are being reviewed. Australia spent \$60 million in Aboriginal Legal Aid between 1983 and 1988 yet the number of Aboriginals in custody increased. One hopes that the work of the Royal Commission will reverse that trend without endangering the community. There are indications it might.

The law can operate only as a bandaid — the problems run much deeper. If Australia cares to read and listen quietly, unemotionally and unselfishly I believe the final report of the Royal Commission will be a document of historic social importance with its emphasis on underlying issues. I look to the day when the history of our black people will be regarded by Australia, not with guilt, and not only with pride, but as an integral part of the Australian heritage and history which did not all start in 1788.

To achieve that we need, I believe, to depoliticise our thinking, start building bridges, review our spending priorities and build a society where the health needs, the nourishment and the education of young aboriginal people are matters of priority. And this will require many changes and some pragmatism.