Law Council
OF AUSTRALIA

Northern Territory Opening of the Legal Year 2021

Speech delivered virtually by Dr Jacoba Brasch QC, President, Law Council of Australia at the Opening of the Legal Year 2021, Darwin.

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The Hon. Selena Uibo UU/BO, Attorney-General and Minister for Justice, the Hon. Chief Justice Michael Grant, the Hon. Justice Peter Barr, the Hon. Justice Sonia Brownhill, The Hon. Associate Justice Vince Luppino , the Hon. Judge Tanya Fong-Lim, Nikolai Christrup SC, Solicitor General of the Northern Territory, Jack Karczewski CAR/CHEF/SKI QC, Director of Public Prosecutors, Suzan Cox QC OAM, Director, Northern Territory Legal Aid Commission, Sally Sievers, Anti-Discrimination Commissioner Kenneth Fleming, ICAC Commissioner, Emma Farnell, President of the Law Society Northern Territory, Duncan McConnel, President of the Northern Territory Bar Association, Maria Savvas, former President of the Law Society Northern Territory and long-time director of the Law Council, Jacquie Palavra, with whom I have served on FLS for a number of years, Law Council of Australia President-elect Mr Tass Liveris, ladies and gentlemen.

Good afternoon,

Thank you for providing me with the opportunity to speak with you all today, to mark the occasion of the beginning of the Northern Territory Legal year. It is an honour.

I pay my deepest respects to the traditional custodians of the land on which we meet, and to Elders past, present and future. I also acknowledge all Aboriginal and Torres Strait Islander people present this morning, and Elders from visiting nations.

It is my great disappointment that I am not physically there with you, but our very recent three-day lock down reminded me how quickly things can change. It is not my risk of a 14-day hotel quarantine that troubled me, but the four-day trial I start on Monday – my client has not seen his daughter for three years. If I could not get back, or could not attend court, then the trial would be adjourned for perhaps a year or more, and that would be the end to any hope of rehabilitating the father-daughter relationship.

I hope you understand my duty to the court and to my client prevailed.

2021 brings with it a feeling of expectant optimism.

Globally, 2020 presented unprecedented challenges. The legal and justice system within which we all work, has been tested.

Changes to the way we conduct our business, whether that be with the courts or with our clients, were required. But these changes do not alter the fundamentals of our role as custodians of the rule of law – the rule of law which underpins Australian democracy.

Promoting and protecting the rule of law in Australia is at the very heart of the Law Council of Australia's remit at a federal level. It too, is the lifeblood of every bar association and law society around Australia.

But none of us would consider the rule of law a lofty, vague concept, removed from the lives of ordinary Australians.

Rather – as former Law Council President and member of the NT Bar, Duncan McConnel will confirm, along with long serving director Maria Savvas, and Law Council President-elect Tass Liveris – the rule of law consistently informs the positions that the Law Council of Australia adopts in practice, at the federal level, on concrete matters of law and policy which impacts on people and their communities.

The idea that every person is subject to the laws of the land regardless of their status – that you cannot be punished or have your rights affected other than in accordance with the law, having regard to the independent role of the court in determining punishment – is

the reason why each and every one of us, is today working within the legal and justice profession.

One of the reasons I was so keen to come to Darwin, was because my studies on some trials that were held in Darwin in 1946 became an profound lesson to me of the rule of law in action, and the importance of lawyers to uphold its values.

Almost 20 years ago, I read an article in a weekend magazine about the war crimes trials that were held here in Darwin, in March and April 1946 for war crimes alleged to have occurred on the island of Timor between 1943 and 1945.

The story was fascinating and even more interesting for me was that up until then, I had no idea any war crimes trials had been held on Australian soil.

Of course, I knew about the Nuremberg and the Tokyo War Crimes trials, and had some awareness that B and C Class trial were also convened in various locations across the Pacific.

I also knew that the President of the International Military Tribunal for the Far East – the Tokyo trials – was an Australian High Court judge, William Webb – His Honour's then Associate for the Tokyo trials, is indeed, the grandfather of one of my Chamber's colleagues.

But I had no idea that here in Darwin, Australia prosecuted 22 accused, on 24 charges.

Such was my interest, that I embarked on considerable research and then made a proposal to two different law professors, both experts in crimes against humanity and the laws of war, that I undertake a PhD on the topic. One said thanks, but politely declined – he was engaged for three years in an overseas war crimes tribunal. The other, said yes.

My research yielded information that I found captivating – I spent weeks at the War Memorial Archives in Canberra where I found:

- the transcripts for the three trials;
- photos of the Officers' Mess, at the Larrakeyah Army base which was turned into a make-shift court;
- photos of many involved, including the accused;
- photos of the accused being required to demonstrate some of the torture techniques they had employed on our troops; and
- personal letters to home, from some of the army officers involved in the trials.

I still have copies of all these documents in my Chambers in Brisbane.

The Hansard from the Commonwealth Parliament and media reporting were other rich – but very troubling – sources of information.

I will explain why it troubled me a little on.

I also discovered the paper delivered in 1999 by a former NT Supreme Court judge Sir William Kearney who concluded the trials were conducted with "*meticulous regard for the procedural rights of the accused*."

Once I moved on from my fascination that we had had war crimes trials in Australia – no doubt known to many of you – what really came to resonate with me was that I was watching the rule of law in action:

- sentences proportionate to the crimes, and, not guilty verdicts, when parliamentarians, the media and many of the public were baying for blood;

- prosecutors not taking overly zealous advantage of the abominable section 9 of the Commonwealth's *War Crimes Act*, which could otherwise have allowed them to proceed largely on rank hearsay and no, or limited, cross-examination by counsel for the defence – the accused right to test evidence, being a hallmark of criminal proceedings.

    - I pause to make sense of my mention of section 9 of the Act, it seemed those who drafted the Act, miles and miles away from here, somewhere in a southern state took the view that a fair trial was an inviolable right for your own, but not so much for an enemy national.

- defence counsel, taking preliminary points arguing the trials were unconstitutional and illegal, and should not proceed. Those objections were overruled and so the trials began. Indeed, that argument about the location of courts martial within the defence power of the Constitution, or Chapter III has continued to the present.

- the defender, Captain Gerard Cole, who prior to enlisting was a solicitor (as best as I could ascertain), from Oakleigh, Victoria, doing his darndest to defend all the accused despite personal attacks on him in the media and the Parliament, especially when some of the accused were found not guilty. He was the subject of much public scorn, essentially for acting – as we all must as lawyers – without fear or favour.

    - I pause to note that as we all know, no matter how infamous an accused, their notoriety or the general public's revulsion toward them, such emotions must not fetter or colour how we must conduct ourselves as officers of the court – and – that every accused, no matter how monstrous the allegations – has every right to a fearless defence and a fair trial.

- and back to what I learned about the Darwin trials, I saw courts that would not be swayed by emotional sentiment. For example, when RSL leaders, exasperated with the apparently "lenient sentences," demanded that soldiers who had suffered at the hands of the Japanese be allowed to conduct the trials, President Colonel Arnold Brown rhetorically asked:

  "It is suggested that the public, 2000 miles away, which has heard nothing, knows more about the facts than the court which has heard every word and knows all the circumstances? This court will not be stampeded into wrong action by public opinion."

I am sure judicial officers and lawyers here today would share such a sentiment. Indeed, I have been in matters where the reporting in the media led me to ask had I actually been in the same court.

Overall, Australia held nearly three hundred post World War II trials. In addition to the three trials in Darwin, the other Australian trials were held in Morotai, Wewak, Labuan, Rabaul, Singapore, Hong Kong and Manus Island.

924 Japanese servicemen were accused of war crimes – 644 were convicted and 148 sentenced to death.

Eleven of those had their sentences commuted.

One of those death sentences arose out of the third and final Darwin trial.

Lt-Colonel Yujiro Yutani, was found guilty of ordering the execution of two young prisoners of war; Australian Corporal James Armstrong and British Gunner Martin – no one seems to have found his first name.

After a 14-day trial and with witnesses eventually 'breaking ranks' with the 'official story', Yutani entered a plea of guilt, but claimed the defence of superior orders.

As an aside, although many witnesses had perjured themselves when giving evidence, there was no mention of that in the transcripts, much less the suggestion of further prosecutions for doing so.

Instead, submissions went back and forth about the defence of superior orders and about the appropriate sentence.

He was sentenced to death by shooting.

That did not occur here however, but a firing squad in Rabaul.

Other death sentences were by hanging.

As is recorded at the Darwin Military Museum,

> *"such was the Australian inexperience that it was necessary to ask for British advice on gallows and firing squads."*

Captain Cole, doing his job without fear or favour for the defence, and other lawyers within the military hierarchy railed against the *War Crimes Act*, despite the prevailing public opinion. Australian Judge-Advocates General, Bowie Wilson KC and then Justice Simpson of the ACT Supreme Court were scathing, and publicly so, of the legal framework in which these trials were to operate.

Sometimes, we must speak truth to power.

Now, after all of that research, I presented my proposal to my PhD supervisor. His response was to the effect, "*that's a history book, but not a PhD*."

I was a little disappointed.

Earlier, I said that I still have the box of all my research in Chambers – one day, I might just write that history book.

Nevertheless, that journey of research, early in my career as a barrister, instilled in me what it means to be a lawyer and what it means to be a defender, protector, and promoter of the rule of law, an obligation and responsibility we all hold:

- principle, not popularity;
- without fear, without favour;
- the law be applied equally and fairly for all, not just for the popular; and

- the law and its administration ought be robust enough to accept and respond to fair criticism.

And on that last point, that is a critical role played by state and territory bar associations and law societies and at the federal level, by the Law Council of Australia and Australian Bar Association. And so, we find ourselves at odds with the Commonwealth on, say, the proposed Family Law merger, but at the same time, largely supportive of the proposed streamlining to SME insolvency reforms.

Still with the theme of the rule of law, but to a contemporary view, it always staggers me that in a country such as Australia, with its apparent wealth and values of equality, justice and democracy, how there appears to be tacit acceptance that legal representation is beyond the reach and means of thousands of vulnerable Australians and in circumstances where:

- our First Nations People are proportionally the most incarcerated people on earth – 3 per cent of the population, but 29 per cent of the jail population.

- where children as young as 10 – who can't lawfully sign on to Facebook or fly unaccompanied on some airline carriers – can be arrested, placed in handcuffs, transported in the back of a paddy wagon, held in watchhouses, subjected to strip searches, interviewed by police, charged with criminal offences, made subject to bail conditions, held in custody, made to stand trial, and jailed.

- where it is normal for almost all young people detained in the Northern Territory to be Indigenous.

And in Australia, there is an unfortunate fact that breaches of the rule of law occur, and in plain sight.

Let's consider mandatory sentencing – a direct violation of the rule of law pertaining to ***the existence of an independent, impartial and competent judiciary***.

That is why the Law Council consistently speaks out against the existence of mandatory sentencing laws for criminal matters.

Judges should not be required to impose such sentences.

It interferes with, and fetters, the ability of the judiciary to determine a just penalty, fitting individual circumstances and the individual crime, resulting in arbitrary and unjust outcomes, undermining community confidence in the justice system.

Such schemes also disproportionately affect Aboriginal offenders, including in the Northern Territory – where 85 per cent of the adult prisoner population and 95 per cent of youth detainees are Indigenous.

And mandatory sentencing contributes to an ongoing cycle of intergenerational over-incarceration.

It is no wonder that the Australian Law Reform Commission has called for their repeal.

While the Law Council does not refute that legitimate concerns about community safety exist, evidence does not support the use of mandatory sentencing as a kind of 'tough on crime' response.

Instead, evidence points towards other policy responses that includes community-based sentencing, diversion and localised, wrap-around program responses.

This debate is particularly timely, given that the Northern Territory Law Reform Committee is shortly to report to Attorney-General Selena Uibo regarding possible law reform in relation to mandatory sentencing.

The Law Council stands with its Northern Territory constituent bodies in supporting the repeal and reform of such laws, and I urge all those in the legal profession to back this call.

The rule of law also provides that *no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being.*

This is so sadly pertinent to the Northern Territory, as well as other parts of the country.

The Law Council, alongside its constituent bodies, has strongly supported the full implementation of the recommendations of the Royal Commission into the Protection & Detention of Children in the Northern Territory, whose stark 2017 findings included amongst others that youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people.

And yet three years after the shocking findings, reforms have been painfully slow.

In August 2020, a national webinar held by the Law Council examined the implementation of the Royal Commission's recommendations, heard that while some progress had been made, there were worrying indications of backsliding and delay in implementing certain core recommendations.

We must remain vigilant and continuously scrutinise that progress is being made in responding to the Royal Commission.

One of these recommendations include raising the minimum age of criminal responsibility. While this was accepted by the Northern Territory Government progress on its implementation has been worryingly slow – not just here, but around the nation – the Law Council calls for quick action in raising the minimum age to 14 years.

I acknowledge that criminal law is largely a state and territory issue, but as the President of a federal body, the Commonwealth, in addition to their being Commonwealth crimes, has a role in complying with our international obligations and treaties, including for example, the UN's Committee on the Rights of the Child, borne out of the same named convention. I thus feel comfortable about making comment.

It defies any sense of morality, that in this century – here in this first world country – children as young as 10, can be found to be criminally responsible, charged with a crime and kept in detention. Doli incapax is simply an insufficient safeguard to keep children – particularly Indigenous children – out of the criminal justice system at such a young age.

Just recently – at the United Nations Universal Periodic review of Human Rights held in Geneva on 20 January - more than 30 countries called on Australia to raise the age of criminal responsibility to 14, in line with international human rights standards.

We are failing our children, and especially, our indigenous children.

Last year's decision by Commonwealth, state and territory attorneys-general to defer a decision on raising the age and calling for more details on the adequacy of services for children exhibiting offending behaviour is an opportunity missed.

The evidence strongly suggests that having a low minimum age of criminal responsibility of 10 years old does not work. It criminalises children – children often with underlying issues of poverty, disability and disadvantage.

And, we all know that the earlier a child comes into contact with the criminal justice system, the more prolonged their involvement will be, and the less positive their life choices.

Rehabilitation of these young minds, not punishment, ought be our goal.

Supporting children to grow into their best selves must be our objective.

The Law Council has worked hard at the national level to build the evidence base, legal, medical and social science, for raising the minimum age of criminal responsibility to 14 years.

I turn now to the rule of law that ascertains … *the law must be both readily known and available, and certain and clear*.

You may recall that in the Law Council of Australia's seminal Justice Project inquiry, headed by former Chief Justice of the High Court, Robert French AC, found that the scarcity of Aboriginal language interpreters across Australia, including in the Northern Territory was a major and consistent concern.

Of the existing pool of interpreters, few are trained and qualified to the professional level required for court legal assignments.

Such shortages of interpreters have a direct impact on the justice system, resulting in delays, extended times in custody and misunderstandings.

It may lead to a plea of guilty without cause.

These findings informed the Law Council of Australia's recommendations that a National Justice Interpreter Scheme be developed, with an emphasis on addressing Aboriginal and Torres Strait Islander needs, and, were also reflected in findings of the Productivity Commission and Australian Law Reform Commission.

Yet, these reforms are still to be taken up in a comprehensive manner by governments.

This also intersects with another essential component of the rule of law – *the right to a fair trial*.

The Law Council and its constituent bodies continue to work with Indigenous legal experts, our partners in the legal sector including Change the Record, as well as federal, state and territory governments to ensure First Nations peoples are equal before the law – both in form and in substance.

The new justice targets announced under the 'refreshed' National Closing the Gap Agreement in July 2020, while not going far enough, did at least set the scene for concerted national efforts in this distressingly overlooked area.

Time is crucial – pandemic or not – to set in train wide-ranging, multifaceted frameworks of law, policy and program reform to achieve these targets. Federal, state and territory governments all have significant roles to play.

In the Northern Territory, the work being done to finalise the Aboriginal Justice Agreement presents a vital current opportunity in this regard.

Such work must, of course, be properly resourced but the cost of not acting is critically expensive.

The Northern Territory is also, of course, the home of the Uluru Statement from the Heart, which received the Law Council's full and unqualified support for the Referendum Council's recommendations.

The Law Council has been disappointed by the current Co-Design Voice proposals, which may be dismantled at the whim of subsequent Parliaments and provides only a flimsy guarantee. Though I do acknowledge that, during the Universal Periodic Review process, the government has committed to continue to work toward a referendum to recognise Aboriginal and Torres Strait Islander Australians in the Australian Constitution, when it has the best chance of succeeding.

At a time where governments are looking to reset the relationship with our First Nations people in genuine partnership – through symbolic measures, such as amending the National Anthem to provide for Australians 'one and free'– a better, stronger response is needed. It is up to all of us to support the call for a constitutional Voice in the Uluru Statement, which must not go unheeded any longer.

In the simplest terms, I hope the year ahead is one of healing, consolidation and advancement.

I wish you well for 2021.

I thank you for your time today, and I look forward to what I know we shall achieve together over the coming year.

It leaves only for me to declare the Northern Territory Legal Year open.

Thank you.

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