

## IS THE LAW AN ASS?

I am not the first to harbour doubts. A quick 'Google' will reveal:

The phrase, 'the law is an ass' has its origins in a play from the 1600s, and was popularised by Charles Dickens in *Oliver Twist*; it references the mythical obstinacy and stupidity attributed to donkeys, and calls out the legal system for rigidly and stubbornly applying the law in a one-size-fits-all way.

Australia's imprisonment rate of Indigenous peoples is a domestic embarrassment and causes international condemnation and shame. Other countries around the world imprison people from the lower economic ranks disproportionately, but our problem is acute.

And it is shockingly expensive and ineffective. This argument will be further developed later.

I have thought seriously about whether it is wise to be raising issues about the administration of **law** during a crime crisis in the Northern Territory that has attracted negative international attention, businesses closing, people leaving, tourism dropping, in an election campaign fought on reducing crime.

Well, let me Quote 'Mr Google' again:

'Insanity is doing the same thing over and over again and expecting different results.' According to a large number of inspirational mugs and posters, this famous quote comes from none other than Albert Einstein.

So not to raise the **elephant in the room** would amount to remaining silent. Acquiescing. Accepting. We are certainly not delivering best practice and I have a duty to join the chorus.

**Maintaining law and order** is a complex problem, yet on the street corners of every city around the world you will find people with all the answers. And it is the same here in the Northern Territory.

It is a national problem. Indigenous people in NSW are imprisoned at ten times the rate of others, and the statistics are even worse in other States including SA, WA, and the NT.

An abundance of solutions will be put before us in the next few months, because we have elections looming in August for the Northern Territory Legislative Assembly. Of course, 'law and order', crime, will feature prominently in the election campaign. It happens every time. It is what we do.

We know there is an election campaign underway, because of the appearance of aspiring politicians replete with fold up chairs and beach umbrellas positioned along busy roads waving frantically at passing motorists. What do they stand for? It is like the annual migration of birds from the Northern Hemisphere – fortunately, we have fixed term elections, and this phenomenon occurs only at four-yearly intervals.

## The root causes?

We will never agree on the answer to this question. Some want to blame the British invasion, or Captain Cook, or Colonialism. As a nation we shy away from the uncomfortable truths in the reports of the Royal Commission into Aboriginal Deaths in Custody on the underlying causes.

Others want to blame the Australian Government. A former Northern Territory Attorney General once said:

“The Commonwealth creates the problem, and it is left to the Northern Territory to mop up.”

I am certain he was referring to our generous system of welfare benefits and the social consequences. More than \$200 billion annually. The mix of Youth Allowance, Job Search Allowance, Supporting Mothers Benefit most with no mutual obligation requirements attached. Free money in other words.

An individual's entitlement to benefits usually exceeds the starting wage for someone entering the workforce. A disincentive to work! Seriously. And a household's entitlement to the full range of benefits can be astonishing. Then in some cases add royalties from mining operations on their land. About forty years ago a Remote Area Exemption (no work test) on eligibility for unemployment benefits was introduced. In other words, one could decline a job.

The combined effects of these measures led to a belief that there is 'no need to work because the government will keep me for life,' children who grew up having never seen either parent working abandoned school because they did not need an education as government would give them free money too.

Even so, at every budget time, there is a clamour to increase the unemployment benefit. Increase the disparity between wages and welfare? Further disincentivise people from moving from welfare dependency into work? (I am not entirely heartless – I can guess how hard it is to survive on welfare benefits in the cities.)

The fundamentally flawed structure of our welfare benefits and wage rates creates intergenerational welfare dependency.

Most other government programs evaluate whether the program is meeting targets. That cannot be the case here. Processing huge payments year in year out that are causing social mayhem, and then looking the other way, is not the mark of a compassionate society. It resonates of neglect.

We have unintentionally created idleness. A questioning of self-worth. An erosion of self-responsibility. And all the associated negative social fallout.

### **The gaols are full.**

Do we need some more analysis of the reasons? (I suspect that the work has been done, and the figures are on a shelf somewhere gathering dust.) I would like to see:

- A comparison with interstate experience on the scale of seriousness of the crimes committed by our inmates. (There is a suggestion that we gaol for trivial reasons.)
- how many are inside because of fine default?
- what was the financial capacity of that household to pay the fine?
- How many are on remand, and for how long?
- How does the length of remand compare with other states?
- Why is there a delay in the Courts processing these cases?

- Are the Director of Public Prosecutions or the Police manipulating delays?
- Or are these two crucial agencies overworked and under-resourced?
- What is the connection between idleness and incarceration?
- The connection between idleness, and health status, substance abuse, domestic violence, child neglect, school absenteeism

I imagine that this work would now be categorised under the new, enlightened, title of **Justice Reinvestment** (see later section). You spend a \$ now to save even more in the future.

I am quite sure that if we had reliable data on this interconnectedness, we would stop providing **FREE MONEY** every fortnight, year in year out and congratulating ourselves on our generosity.

Two former Police Commissioners said “You can’t arrest your way out of this problem “. And obviously nor will spending huge sums on more prisons help.

### **The adequacy of judicial sentencing**

I suspect that statistics will confirm many of our trivial convictions would not result in a custodial sentence interstate.

Yet all too often a light sentence that defies logic is handed down in a serious case. That fails to pass the pub test. We are told that we were unaware of all the mitigating circumstances. Perhaps so. But when the Director of Public Prosecutions appeals a sentence as ‘manifestly inadequate’ (Sunday Territorian May 2024), something is clearly wrong.

Whatever, the perceptions of soft sentencing renew the crescendo for mandatory sentencing.

Mix in the controversial (excessive) use of bail provisions, and you can really get an argument going.

So, on the one hand there is a view that the courts are **too harsh**. The social reformers, a few academics, and the unaffected in the suburbs of our major capital cities subscribe to this view, I suspect. And on the other hand, the victims of repeated break-ins, or home invasions, regularly by repeat offenders on bail, believe the courts are **too lenient**. The victims of crime are screaming at the politicians to extend mandatory sentencing. There is no doubt that the police are frustrated at arresting the same offender multiple times.

I repeat. In a nutshell, social reformers are appalled by Mandatory Sentencing, but the victims of crime are disgusted by soft penalties, and bail, handed out by the Courts.

How do you begin to reconcile those o opposite, deeply held views?

Parliaments are in the middle, and it is quite easy to see how the Legislatures arrive at **mandatory sentencing**.

### **The cost of incarceration**

A couple more ‘copy and pastes’ from Google:

**“Australia spends more than \$5 billion per year, which amounts to over \$330 per prisoner per day.”**

“The Department of Communities and Justice have today revealed in NSW Budget Estimate hearings that the per day cost of keeping a person under 18 in prison is \$2700, totalling an annual cost per child of \$985 500 and with 212 young people presently in custody in NSW, the

State is currently spending \$208 million per year on young people in prison. The Department also disclosed that of the 212 children in custody, 129 are First Nations young people. “

Now governments, and their Treasuries are funny things. They can produce money out of a hat to meet the ever-expanding costs of imprisonment, and hospitalisation.

If an unfortunate is sentenced by a court to prison, or hospitalised by a doctor, government just meets the cost of prison or hospital. It is non-discretionary. It cannot be denied or deferred until next year or the one after. There seems to be a bottomless impress account. In other words, not programmed, therefore not ‘expenditure.’

It is extremely difficult to get approval to SPEND money in anticipation of a SAVING later. Like immunisation programs to save hospital costs. Or diversion programs to save gaol costs. Try asking for \$10,000 now to fund a program that will save you \$100,000 next Financial Year, and you strike the closed minds of money managers. People who deal in numbers that add up and balance NOW do not think like that.

Not only are the costs of incarceration draining our finances, but the ineffectiveness of this practice as a deterrent is obvious.

A series of eye-opening reports published in March 2024 by the **Justice Reform Initiative** (which includes four former high court justices, three former police ministers and four former state premiers) said that gaoling people was deeply misguided:

“ . . . the assumption is dangerously wrong. The idea that by dispatching men, women, and children to prison we are preventing them from committing further crime is deeply misguided. Instead, gaol is too often a training ground for violence, populated by a ready network of future co-conspirators.”

If the reader needs further convincing, please read a recent paper in this publication titled ‘*The real truth telling*’. It is about the infamous Don Dale Juvenile Detention Centre in Darwin.

It is imperative that we change.

### **What are the alternatives?**

I will outline the obvious examples:

**Aboriginal Customary Law** reported on forty years ago by the Australian Law Reform Commission focussed the States justice processes of the States. It resulted in various efforts around the country to adopt different structures, or to coopt senior Indigenous authority figures, into judicial proceedings. More study, and more work is needed.

**Restorative Justice** work has been done in various locations around the country, but the approach has not got a decent foothold despite success. It makes so much sense to make the offender face the victim (and vice versa).

**Justice Reinvestment** is another thoughtful attempt to divert people from the penal system. (The Australian Law Reform Commission said a justice reinvestment approach to criminal justice reform involves a **redirection of money** from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration.)

**Family Responsibilities Commission** is a spectacular example of justice reinvestment developed by an extraordinary man in North Queensland, Noel Pearson.

It directly addresses the concerns I expressed earlier in this paper about the Australian government processing huge payments fortnightly then looking away. He convinced both the Queensland and Australian Governments to legislate to create the Commission.

The ultimate tool available to the Commission is a Community Income Management (CIM) order. Commissioners can determine what proportion of welfare payments is managed on the persons behalf.

It also overcomes the fatal flaw in the former Basics Card approach (in various guises) where ALL residents in a remote locality were put on the Card. It had the effect of penalising those community members who led an exemplary life and left no incentive for those who did not to improve their ways. The Basics Card also saw the development of ingenious ways to navigate around it.

### **Justice Reform Initiative – jailing is failing.**

The Northern Territory News on 23 May 2024, in an article clairvoyant in its timing, posted a story titled:

#### **CLP forced to backflip after repeated digs at NT Deputy Chief Minister Chansy Paech over “Jailing is Failing” T-shirt**

What generated this latest heat is a **Justice Reform Initiative Group**. At the risk of being repetitive I want to stress that this is a serious group of professionals. It is Chaired by one of my former Federal Ministers, includes several more, along with a who's who of politics, the legal profession and Indigenous leadership. (In other words this is not a group of contrarians likely to show up at every protest demonstration.)

The group has said:

“The evidence is very clear that jailing is failing as a deterrent, it is failing to reduce crime, and it is ineffective at addressing the drivers of criminal justice involvement.” Governments cannot simply dismiss these people.

Check out their website: [Justice Reform Initiative | Jailing Is Failing](#)

All these alternatives lend themselves for adoption as easy cultural fits into Indigenous cultural practices. They are bound to produce better outcomes than ‘*Correctional Services*.’

Internationally, the Jury is in! Through the adoption of more modern thinking like this Norway has been able to reduce the re-offending rate from 70 to 20%.

### **Other obvious anomalies with the administration of the ‘law’**

Our horrific rates of **Domestic Violence** have dominated the news this year, yet it is regularly reported that the offender was on a Domestic Violence Order (DVO) (are they useful?).

And in May 2024 there were up the four-month delays in providing counselling services to offenders around Australia. There is clearly a disconnect here.

## **Immigration detention**

Of course, the High Court stepped in. It is **common sense** that you cannot keep a person in detention indefinitely without trial or conviction. Charge or deport. Amend the legislation if necessary to enable these processes to be fast tracked.

## **Whistle-blower protection?**

People with information on illegal activity are in a terrible quandary on whether to come forward with the evidence. Governments have spent years in orgies of self-congratulations about protections offered to whistle-blowers and encouraging them to report wrongdoing.

Legislation establishing the Australian Securities and Investment Commission, and the new National Anti-Corruption Commission (to name just a couple of provisions) both contain specific measures to protect people who are brave enough to come forward.

Yet internationally Mr Assange has occupied the headlines for two decades, and Nationally the Government pursued Witness K and Mr Collaery through the courts for about the same length of time. And in May 2024 Mr McBride was sentenced to over five years in gaol.

In the same month Mr Assange's lawyer, Jennifer Robinson, describes the long, meandering court process he has faced as "punishment by process." In a decision that may have saved Assange from being immediately extradited to the United States, the British High Court ruled it will hear one more appeal against his extradition – but not until later this year.

So, is pub talk going to encourage people with the dirt to come forward?

## **Respect for our Institutions**

One struggles to understand the 'Trump' phenomenon in USA, even allowing for possible bias in reporting. Occasionally a commentator will catch my eye with their analysis that Trump attracts the protest votes at the 'establishment' and the ruling class families.

And then one turns their eye to what is happening at home. In recent weeks in the Northern Territory serious allegations were levelled against our Chief Minister, Minister for Police, Commissioner of Police, and the Independent Commissioner Against Corruption. Allegations only, but very damaging.

The last thing I want to be accused of is spreading these stories. But if I failed to mention the obvious, I would be accused of a cover-up.

Unfortunately, coming as this does in the aftermath of the failure of The Voice Referendum, Indigenous confidence in the 'establishment' is at its lowest point ever.

## **CONCLUSION**

I titled this paper with the rhetorical question **"IS THE LAW AN ASS?"**

As well as the matters discussed above, I also had in mind the **(mis)trial of Bruce Lehrmann**, and my repeated astonishment at the regular revelations of ineptness. To the casual onlooker it seems about everybody who had any involvement is tainted – The ACT Government, Director of Public Prosecutions, Australian Federal Police, a Federal Minister, a former Queensland Supreme Court Judge and of course the alleged victim and accused.

And just when you think the case has finally run out of fuel, there is more!

- The Australian Capital Territory Integrity Commission announced an investigation into the conduct of Walter Sofronoff KC during an inquiry into the prosecution of Bruce Lehrmann. (Mr Sofronoff KC was a former Solicitor General for Queensland, and President of the Queensland Court of Appeal).
- Five members of the Australian Federal Police are suing the former Director of Public Prosecutions in the ACT, Mr Drumgold, for \$1.42 million over critical comments he made over their handling of the investigation.

**What is the total cost of the entirety of this omnishambles?** (Thank you, Justice Michael Lee, for the word.)

**The Robodebt Royal Commission**, and the associated investigations that preceded it and followed it, is another spectacular case. Recently, the National Anti-Corruption Commission has wiped its hands of the case. Is now the time to open the sealed section of the Royal Commission Report? Else, all this effort, and cost, and no consequences?

**Can any connections be made between the diversions of resources into cases like these and the unreasonable delays in conducting court cases?**

Will anybody claim these are examples of 'the law' working effectively? What have cases done to destroy the confidence of the person in the street?

### **The Northern Territory**

By now readers may be questioning whether I have swept our problems under the carpet. No. But the topic lends itself for someone to write a book, rather than incorporate a paragraph or two in this paper. The book might cover:

- Aboriginal Customary Law (Lore) and the banning of practices considered barbaric
- The Anunga rules
- Court interpreters
- Yuendumu shooting and murder trial of a police officer
- Role of the Office of Public Prosecutions, Independent Commissioner Against Corruption (ICAC), Chief Minister, and Commissioner of Police
- Duration of the Inquest (the death occurred in November 2019, and in May 2024 the Inquest is ongoing – I am not pointing the finger at the Coroner, but at the processes of the 'Law')
- The ICAC finding of serious racism within NT Police force
- The broader role of the Independent Commissioner Against Corruption over the life of the Office

### **Final questions**

Are we going to maintain the pretence that **'Everybody is equal before the law.'**?

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**Bob Beadman**