

## **NOT ANOTHER LAW JOURNAL?\***

**ADDRESS ON THE LAUNCH OF THE NORTHERN TERRITORY LAW JOURNAL**

**The Hon Justice Michael Kirby AC CMG\*\***

### A PROBLEM OF LAW JOURNALS

Some of those who gather to participate in the re-launch of the *Northern Territory Law Journal* may be asking themselves, how can yet another law journal be justified?

In 1936, Professor Fred Rodell wrote what was perhaps the most famous article on this subject. Titled "Goodbye to Law Reviews"<sup>1</sup>, Rodell's classic commentary suggested that journals of this kind were becoming less relevant and should be discouraged - even pulped.

Rodell's controversy was reignited for the Australian scene by the republication of his essay in the *Australian Law Journal*<sup>2</sup>. As someone who tries to read (or at least scan) most of the law journals published in

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\* Text on which was based an address at the Supreme Court of the Northern Territory, Darwin, on 28 June 2007 when the *Northern Territory Law Journal* was re-launched.

\*\* Justice of the High Court of Australia.

<sup>1</sup> (1936) 23 *Virginia Law Review* 38. See also (1962) 48 *Virginia Law Review* 279.

<sup>2</sup> (1999) 73 ALJ 593.

Australia, I felt provoked by Rodell's essay and by a commentary, written in support of his thesis, by Mr John Gava of the Law School of the University of Adelaide<sup>3</sup>. John Gava asserted that, far from becoming less relevant to the Australian legal publishing in the intervening sixty years, Rodell's criticism of the style and contents of United States law reviews in the 1930s had added significance in Australia today. He contended that law journals had become a "major problem". Especially in the age of electronic publishing, he suggested that there was no need for them - certainly most of them.

### THE CONTRIBUTION OF LAW JOURNALS

John Gava's commentary, not for the first time, provoked me into a response. In a glittering article, published by that most distinguished of Australian journals, the *Melbourne University Law Review*<sup>4</sup>, I argued that we should praise law reviews and the part they play in stimulating judicial and professional thinking in the law in Australia. I pointed to the increasing use of law reviews by judges in this country, compared to the sparse pickings of earlier generations. I suggested that this was inevitable, as judges of our tradition came increasingly to acknowledge the values that affect their decisions. When the judiciary (and the legal profession generally) escaped the belief that all answers to legal

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<sup>3</sup> (1999) 73 ALJ 597.

<sup>4</sup> (2002) 26 *Melbourne Uni L Rev* 1.

problems were to be found in studying solely the words of a statute or the texts of previous judicial opinions, the broad examination of legal principle and legal policy offered by law reviews was bound to assume greater significance.

I illustrated my thesis with a practical instance. This involved a reference to the High Court of Australia's decision in *Brodie v Singleton Shire Council*<sup>5</sup>.

In *Brodie*, the High Court was divided 3:3. It fell to me to resolve the difference. The case concerned the so-called 'highway rule'. There were many reasons for reformulating and re-expressing that rule and updating it for contemporary, especially Australian, road conditions. On the other hand, the rule had a long ancestry in English legal authority. It had been applied many times in Australia. There was a strong reason for leaving any reformulation to Parliament. Not least was this so because of the potential economic consequences of rationalising and re-expressing the rule.

In the result, I was greatly affected by reading an excellent essay on the subject written in the *Sydney Law Review* by a Sydney academic, Ms Barbara McDonald<sup>6</sup>. It helped me to conclude that an outdated rule,

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<sup>5</sup> (2001) 206 CLR 512 at 600 [227].

<sup>6</sup> B McDonald, "Immunities Under Attack: The Tort Liability of Highway Authorities and Their Immunity from Liability for Nonfeasance" (2000) 22 *Sydney Law Review* 411.

that had been formulated by judges, should be re-formulated by contemporary judges. So it was.

Legislatures in many Australian jurisdictions subsequently reversed the High Court majority decision, at least in part. However, this did not undermine the principled basis of the High Court's decision. Moreover, it made the relevant legislatures face up to their responsibilities, relevantly of depriving persons of entitlements to damages for established negligence by neglect of the duty of care on the part of highway authorities. The law-makers were required, in effect, to shoulder their responsibility for depriving plaintiffs of recovery where otherwise a principled application of the law of negligence would assure it. An unjustifiable judge-made exception would no longer do so.

John Gava was afforded the chance to answer my article in the *Melbourne Law Review*<sup>7</sup>. He repeated his opinion that law journals had become a feature of "an unpleasant [and] inappropriate form of academic life". For him, writing for the journals had degraded scholars, wasted valuable resources and devalued the importance of good teaching and collegiality in law schools.

In my opinion, these are not good reasons for turning our backs on the publications that stimulate, provoke, criticise and improve the

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<sup>7</sup> J Gava, "Law Reviews: Good for Judges, Bad for Law Schools?" (2002) 26 *Melbourne Uni L Rev* 560.

legal discipline. They may be reasons for changing some of the contents of law journals. They are not reasons for abolishing them or restricting their number.

So how do we justify the revival of the *Northern Territory Law Journal*, celebrated on this lovely day in Darwin, in this splendid court complex, inspired by the vistas of Darwin Harbour and the beauties of this northern capital of the Commonwealth?

#### THE HISTORY OF THIS JOURNAL

To answer this question it is appropriate to remember the history that preceded the *Journal* and that helps TO explain its purpose and contemporary relevance.

Over thirty years ago, an earlier version of the *Journal* appeared. It had been planned before Cyclone Tracy struck Darwin. IN 1974 the Council of the Law Society of the Northern Territory resolved to produce such a journal. In the shattering aftermath of the cyclone, and the devastation it worked on Darwin and the Northern Territory, there were other urgent priorities. The *Journal* did not survive Tracy. However, tucked away in the collective memory of the leaders of the Northern Territory legal profession at that time was the hope, one day, of reviving it.

Many of those leaders are, happily, still with us. Some of them have contributed to the revival of the *Journal* and are present at this relaunch. Mr Dean Mildren, then President of the Law Society of the Northern Territory is now a Judge of the Supreme Court and Chairman of the Council of Law Reporting. It is the Council's initiative that has led to the decision to include the *Journal* in the regular publication of the *Northern Territory Law Reports*. In addition to Justice Mildren, another of the young lawyers who contributed to the first issue of the *Journal* was Mr Tom Pauling, now one of Her Majesty's counsel and Solicitor-General for the Northern Territory. I welcome the presence of Justice Mildren and Solicitor-General Pauling on this occasion. I pay tribute to the work that they and their colleagues, of Bench and Bar, perform to bring the rule of law to this part of the Commonwealth.

I also pay tribute to the service of Chief Justice B R Martin, the other judges of the Supreme Court, the Chief Magistrate and Magistrates and indeed all members of the legal profession. As the paper that I have offered for publication in the newly revived *Journal* demonstrates<sup>8</sup>, it is not always easy to play a part in remote justice. Yet the rule of law would mean nothing without the devoted professional work of the Territory members of Bench and Bar.

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<sup>8</sup> M D Kirby, "Remote Justice" (2007) 1 *NTLJ* 6.

Over the years, the Northern Territory has been able to boast of many distinguished members of the Australian legal profession who have served its community. I have known many of them. I have counted as my friends such fine lawyers as Sir Richard Blackburn, Sir William Forster, Sir William Kearney, Chief Justice Kevin O'Leary, Chief Justice Austin Asche AC, Justice Jim Muirhead, Justice John Gallup AO, Justice John Nader, Justice Bill Priestley and many others. Quietly and with devotion they have served the cause of legal principle. Even more importantly, they have served their fellow citizens and their right to justice in this part of the nation.

#### THE ROLE OF LAW TEACHERS

I also pay tribute to the generations of law teachers who have taught and analysed the law of the Northern Territory. In conjunction with the visit for this launch, I paid a call today on the Law Faculty at THE Charles Darwin University. There, I spoke to the students and answered their searching questions concerning my work on the High Court of Australia. In a beautiful environment, I joined in a dialogue with the leaders of the Law Faculty. I learned of some of their challenges. After my talk to the students, I engaged in an exchange on the internet with law students who are studying law by that new means of distance education. At the one moment I was in dialogue with law students elsewhere in the Territory. But I quickly discovered that some of those who were logged on were taking their course in far-away Canberra. Others were overseas - one of them in Dubai.

In the present age, physical distance has become less important than it previously was. Just as the High Court of Australia leaps remoteness through the use of videolinks, to span our continental country, so legal education today reaches out over huge distances. It brings minds together across continents. I pay tribute to the Charles Darwin University, and its law teachers, for expanding their outreach in this way. Stimulated by the specific needs of the Northern Territory of Australia, they have developed techniques to give fine instruction in the legal discipline to students linked to Darwin by the internet. It is my understanding that, in this respect, the Charles Darwin University is in the forefront of this technique of legal instruction. Only one other Australian university has comparable facilities for distance education.

With its marvellous position on the edge of Asia, Darwin, and its university and legal profession, have huge opportunities to influence Australia's relationships with its neighbours. This includes the important symbol that we provide of a rule of law society with democratic legislatures, uncorrupted officials and independent judicial officers.

Just as legal education reaches out through the internet so, today, must law journals. The newly re-arisen *Northern Territory Law Journal* may, in the future, be completely on-line as new generations of lawyers

arrive who are entirely comfortable with the new electronic media<sup>9</sup>. Doubtless this medium will affect the content and needs of law journals<sup>10</sup>. In the meantime, it is good to have the hard copy and to see the variety of the contributions to first edition of the *Journal*.

### SPECIAL FEATURES OF LAW IN THE TERRITORY

The hopes that are evident in the revival of this enterprise are clear from the contents of the first issue. They retain the high ambition that accompanied the initial publication of the *Journal* in 1975. The Northern Territory is, legally speaking, a most interesting jurisdiction. It combines a high level of federal law with an active local legislature, fully accountable to the people of the Territory. Law in this Territory serves a large proportion of indigenous people, who make up such a significant and precious element in the life of the Territory. Serving indigenous people in the law calls forth special skills of lawyering and the application of principles in some ways different from those applicable elsewhere in Australia.

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<sup>9</sup> See eg H Hibberts, "Last Writes? Reassessing the Law Review in the Age of Cyberspace" 71 *New York University Law Review* 615 (1996); H Wallace, "the future of legal publishing" (2003) 11 *Australian Law Librarian* 293; T Carter, "Revising Law Reviews" (2006) 9(2) *ABA Journal* 20-21; M Russell and J Teadwell, "Global legal platforms and national legal identities [2005] *New Zealand Law Journal* 34 at 40.

<sup>10</sup> M D Kirby, "Eightieth Anniversary of the Australian Law Journal" (2007) 81 *ALJ* (forthcoming).

Much has and should be written concerning the development of the law to respond to the needs of such a unique and interesting society. Because, until now, there has been no local journal for law in the Northern Territory, the reality is that few examinations of the local law have been preserved. Controversial constitutional and political questions have passed without appropriate detailed examination. The record of debates and controversies has often been lost.

Even the biennial conferences of the Criminal Law Association of the Northern Territory (CLANT) have sometimes passed without the excellent papers prepared for them being published in a permanent form. This is a pity because, as I know from my own experience, the CLANT conferences are generally of a very high quality. They now attract lawyers interested in criminal law, from all parts of Australia and beyond. They have become an established feature of discourse in criminal law. It would be my hope that in the future the CLANT conferences will include papers on the interesting and challenging legal developments that are occurring on our doorstep. I would include in these the decisions of the Constitutional Court of Indonesia which are helping that country to build a rule of law society. I would also mention the decisions of the courts of Timor Leste, struggling to reflect the distinct values of that society, also newly restored.

These are legitimate subjects of examination in a law journal for this Territory. Potentially they have great significance for Australia. The new *Journal* could play an important role to inform and instruct

Australian lawyers everywhere about the legal happenings amongst our closest neighbours. We should not be so proud of our institutions that we forget the possibility that we might sometimes learn from the different ways in which others, of different legal traditions, approach similar problems.

The Supreme Court of the Northern Territory sponsors the Kriewaldt Lecture. It has been delivered for many years in memory of a former judge of the Northern Territory of much significance. The papers presented in that series could also form an important annual contribution to the *Journal*. So could the writings of members of the Law Faculty of the Charles Darwin University.

In addition to these contributions, I hope that, as in its first edition, the *Journal* will always contain newsworthy items. It is a joy of possessing the past volumes of the *Australian Law Journal*, to be able to look through the pages of "Current Topics" and to see the issues that concerned the legal profession and Australia over the years. As the *Northern Territory Law Journal* becomes a regular feature of legal life in the Northern Territory, it can be expected that it will become a record and a kind of diary for the intellectual and social events of the judiciary and legal profession of the Territory. As we know, law is an interesting, vibrant and highly relevant profession. Its controversies come and go. So we do well to record and sometimes to remember the chief of them.

In the current environment, there can be little doubt that the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007)<sup>11</sup>, in which the former Director of Public Prosecutions, Mr Rex Wild QC took the leading part, is of great local concern. It is also of national and international importance. As the responses to that report unfold and bring their own controversies, it will be important to record them in the pages of the *Journal*. Doubtless this will be a time of much legal and social attention to a considerable national problem, that is far from theoretical, for in this part of Australia.

#### THE ADVISORY BOARD

The Advisory Board that has been established to keep the new *Journal* to high standards includes not only some of the most distinguished legal practitioners and academics of the Northern Territory. I am glad that other distinguished Australian lawyers are contributing as Board members. I welcome the presence at this launch of Justice Patrick Keane of the Court of Appeal of Queensland. His own background as Solicitor-General of Queensland and his present role as a Judge of Appeal in the Supreme Court of Queensland mean that the *Journal* will be able to draw for guidance (and I hope contributions) from his most distinguished experience.

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<sup>11</sup> Northern Territory, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse *Ampe Akelyernemane Meke Mekarle ("Little Children are Sacred")*, Darwin, 2007.

A law journal is only as good as the contributions it receives. In a busy life, it is easy to neglect the obligation to give back to others and to offer for publication viewpoints, analyses, commentary, criticism and proposals for law reform. In my view, it would be better if the *Journal* contained many brief articles, offered from lawyers of different interests, viewpoints and experience, than if it became a depository for lengthy but unread essays of the kind that John Gava criticised. I hope that every lawyer in the Northern Territory over time will contribute to the life of this *Journal*. The unique legal problems of the Territory are incontestable. Now they can be shared with the whole nation through the pages of the *Journal*.

I congratulate Cameron Ford for assuming a responsibility additional to that of publishing the law reports. I encourage everyone to support this new enterprise and to make sure that, this time, it does not fade but goes on to make its mark in the legal consciousness of our Commonwealth. As a society, the Northern Territory has special things to teach other Australians. This *Journal*, likewise, has unique experiences to share with other Australian lawyers.

### ENSURING SUCCESS

I launch the *Northern Territory Law Journal* in the confident expectation that it will grow in strength. By putting a spotlight on the law, it will help us to improve the administration of justice in this Territory. Of

course, law alone is not enough. Nazi Germany and Communist Russia had plenty of law. The rule of law implies a concern with justice and principle and with access to that most precious individual in a free and confident society: an independent judge and a professional lawyer. In future years, I will watch closely the progress of this *Journal*. Now that it is re-launched, I encourage everyone to join in ensuring its success.

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