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AND YOU KNOW WHY
Compulsory Jailing and Racism

John Ah Kit

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NORTH AUSTRALIA RESEARCH UNIT
THE AUSTRALIAN NATIONAL UNIVERSITY
PO BOX 41321 CASUARINA NT 0811
TEL (08) 8922 0066 FAX (08) 8922 0055
EMAIL publish.NARU@anu.edu.au

North Australia Research Unit The Australian National University

The North Australia Research Unit (NARU) is directly accountable to the Director of the Research School of Pacific and Asian Studies, The Australian National University.

The location of the North Australia Research Unit in Darwin made it something of a frontier research post for more than two decades. Opened in the early 1970s, the variety of scholars over the years, and even today, is a reflection of the interdisciplinary nature of the research carried out at the Unit.

A large portion of that research has focused on the Aboriginal and Torres Strait Islander peoples of Australia and, in that context, on the social, cultural, political, economic and development issues which are part of northern Australia. The range of research projects which are underway at any particular time depend very much on the priorities of the individuals who locate themselves at NARU. Aboriginal and Torres Strait Islander issues are of continuing importance in northern Australia and, consequently, to NARU. The reasons for this would be obvious to anyone who visits northern Australia – outside of Darwin, indigenous people comprise the majority of the population in the north.

In addition to NARU's traditional research there is also a very strong focus on governance and development in northern Australia, and in regions further north, particularly East Asia. Scholarly interest in this regional relationship has been substantial, adding considerably to the depth and breadth of NARU's cross-disciplinary role with the ANU.

As an integral part of the ANU, and RSPAS, the Unit offers scholars from Australia and around the world a unique opportunity to conduct research in one of the most remote academic outposts in Australia – perhaps, the world. NARU has excellent resources and site facilities, including a social science library which boasts a comprehensive collection of material on northern Australia and which is networked into the ANU library system in Canberra. The library and other facilities are reserved for NARU academics, visiting fellows, and students and demand is relatively high during the 'Dry' season. Enquiries are welcome and should be directed to either the Unit Director or the Administrator.

JOHN AH KIT MLA

John Ah Kit has been the Labor Member for Arnhem since October 1995. He is currently Shadow Minister for Regional Development; Transport and Infrastructure; Resource Development and Territory Ports.

Previously he has been Executive Director of the Jawoyn Association (Katherine 1991 – 1995), Director of the Northern Land Council (1984 – 1990), Executive Director of the Katherine Kalano Association (1981 – 1984), and Katherine District Officer, Department of Social Security (1979 – 1981).

John is actively involved in local and regional community affairs, culture and sport.

YOU KNOW WHY

Compulsory Jailing and Racism

John Ah Kit

I would first like to acknowledge the Larrakia traditional owners of the land in which I am speaking. I make that acknowledgment not as an empty gesture, but as a tribute to their survival, their knowledge and strength. But I also make that acknowledgment mindful of the gravity of the subject I am speaking about. It is also a tribute that would be passionately endorsed by old Nugget were he here today.

Recently, on Groote Eylandt and here in Darwin we witnessed the inquest into the death in custody of a young boy. The boy was held in detention as the result of a mandatory sentence. Those who attended the inquest tell me it was a harrowing and distressing experience for all those involved.

This distress reminded me of the boy's funeral on Groote Eylandt in April 2000. Standing there with hundreds of others I was struck forcibly that the boy whose death we were mourning went beyond a simple tragedy. Surely it is against the laws of nature for a parent, indeed a grandparent, to survive their children? For the children to die before their elders? How can life be so cruel?

It is something that I have often thought about, as I lost a daughter to illness a few years ago. Her loss was tragic, and her daughter in turn has lost the love of a mother.

And yet, in the case of the young Wurramarba clansman, lonely, frightened, seriously disturbed and hundreds of kilometres from his kin and country, the tragedy was surely compounded for one simple reason. His death was the result not of the fickleness of nature, it was entirely avoidable. He died, without any doubt, to feed and satisfy the ambitions of a group of morally corrupt politicians.

Although the coroner is yet to bring down his findings, I believe the illness that took his life, was the illness of racism. And, although I am here today to talk about mandatory sentencing in the Northern Territory, the subject matter is in reality the subject of racism. But let me get our terms right.

Much has been made over the last few months over the mandatory sentencing regime in the Northern Territory and Western Australia. However, the words ‘mandatory sentencing’ obscure what has been perpetrated by the governments of those two jurisdictions. ‘Mandatory sentencing’ is meaningless really: all judges and magistrates sentence those who are found guilty even if, in their judgement, circumstances are such that a conviction might not be recorded. It is a judgement and a discretionary decision on sentence nevertheless.

What we are really talking about is not ‘mandatory sentencing’ but ‘compulsory jailing’. We are talking about a legal regime under which, across a large range of property crimes, judges and magistrates have absolutely no choice. They have been left with no discretion; they have been left without powers to take into account any single aspect of the circumstances surrounding the crime such as the mental state of the defendant, or the triviality of the offence. For juveniles, which in the Northern Territory is defined as 15—17 year olds, means compulsory jailing on a second offence of 28 days. Subsequent offences also attract a 28 day compulsory jailing. There is an empty legislative attempt at diversionary schemes. For adults, this means compulsory jailing on a first offence of 14 days; on a second offence of 3 months and a year in jail on a third offence. No second chances. No diversionary schemes.

Most of you would have heard of the absurdities which this has led to, but I’ll run through a few that were in the *Sunday Age* a few months ago. They are, as that paper stated, ten of ‘the jailings that shame Australia’.

- 1 Margaret Nalyirri Wyndbyne, 24, receiving one can of beer value \$2.50. 14 days jail.
- 2 Jamie Wurramara, 22, stealing box of biscuits and orange cordial on Christmas day value \$23. 1 year jail.
- 3 Samual Eupene, 23, goods in custody of seven pearls found on beach, value unknown. 14 days jail.
- 4 Joanne Coughlan, 27, criminal damage of an electronic till by pouring water on it. Damage bill paid by defendant. 14 days jail.

- 5 Chris of Gunbalanya, 18, receiving petrol value \$2. 28 days jail.
 - 6 Robert of Nhulunbuy, stealing two cartons of eggs value \$8. 14 days.
 - 7 Kevin Cook ,29, stealing a beach towel from a clothes line value \$15. 1 year.
 - 8 Liam Edwards 16, stealing \$20 he claimed he found. 28 days jail.
 - 9 Brett Willoughby, 19 stealing one bottle of Stoli value \$2.04. 14 days jail. And finally;
10. Wurramarrba 15, stealing textas, paints and liquid paper value about \$50. 28 days
Died in custody.

If the impact of these jailings weren't so serious, it would be laughable. But look closer at these stories; in particular that of Chris of Gunbalanya. This 18 year old received 28 days in jail for receiving - not stealing - \$2 of petrol. As far as I can find out, there are at least five other jailings of young people for theft or receiving similar amounts of petrol. Ask yourself what that petrol was for. It certainly wasn't to fuel their company cars. It was to feed their addictions as petrol sniffers.

In the Northern Territory we are jailing kids not because they are dangerous criminals, but because they are ill. And in the Northern Territory, magistrates hearing these cases are prevented by law from taking into account that these kids are petrol sniffers.

What jurisdiction in Australia, or indeed any country in the World, would jail petrol sniffers? Where in the world is there such inhumanity? The Northern Territory - that's where. And you know why? Because racism is the doctrine of first choice of the CLP regime in maintaining its power.

So the question is, surely, why has this legal regime arisen, and why has it been allowed to continue?

Professor Marcia Langton put her finger on it in a piece she wrote for the *Sydney Morning Herald* on 20 March 2000 when she wrote:

The relationship of mandatory sentencing to the electoral machinations of the CLP is to be found in the timing of its introduction by the former Chief

Minister, and now president of the Liberal Party of Australia, Shane Stone, to the Legislative Assembly of the Northern Territory.

Mandatory sentencing was introduced in 1997 and coincides with the surge of popularity of Hanson's appeal to the electorate based on the most primitive right-wing stances in 1997: racism, anti-immigration policies, anti-single parent social support, flat tax rate policies, the death penalty, RSL-style jingoism and the retarded commonsense values of the yobbo. Mandatory sentencing snatched attention from Hanson's campaign to recruit members to new One Nation branches in the CLP heartland, the northern suburbs of Darwin, Humpty Doo, Katherine and elsewhere¹.

And I clearly remember CLP members crowing that One Nation would have little support in the Northern Territory 'because we already have most of their policies'..

Compulsory jailing, therefore, was introduced for base political motives, and had nothing to do with the alleged threats to society of criminals. The truth of this can be found in the reasons advanced by Stone and Denis Burke, then Shane Stone's Attorney General, when the legislation was introduced. They originally claimed that compulsory jailing was to be introduced as a deterrent. The towel thieves, biscuit stealers and egg robbers would think twice before they pursued such major crimes — or so said Stone and Burke!

In Burke's words back then, compulsory jailing would lead to a 'reduction in the crime rate or property offences and a reduction of the crime rate generally, leading to an increase in community safety'. And when, as they were told at the time, there was no impact on the rate of crime, they back tracked and said that it wasn't really about deterring crime at all, it was about retribution pure and simple. Their delusional mantra — 'do the crime and do the time' — is deliberately cast to feed the fears of crime that has been encouraged by the CLP in the Northern Territory. Furthermore, compulsory jailing is explicitly seen as a method of subverting the functions of the judiciary and proper judicial process. As Burke said to Parliament in 1996, compulsory jailing was designed to:

... force sentencing courts to adopt a tougher policy on sentencing (and) encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.

As Professor Langton points out:

¹ Langton, M, Sydney MH, 20/3/2000

There is no evidence that imprisonment rehabilitates offenders. There is no evidence that imprisonment reduces crime rates ...

There are no rational, constructive reasons for mandatory sentencing, other than the electoral welfare of politicians from remote seats where racism plays an inordinate part in public life and keeps in power political parties that can only succeed by outdoing Hanson. In the most dreadful and shameful of ways, the One Nation Party has succeeded.

I stated towards the beginning of this discussion that the real subject matter was not so much compulsory jailing, but that of racism. This is firstly because the compulsory jailing laws disproportionately affect Aboriginal people. Seventy six per cent of the Territory's jail population is Aboriginal [1999], while comprising only 28 per cent of the general population. This is a rate nearly ten times that for the non-indigenous population. Despite strong recommendations from the Royal Commission into Aboriginal Deaths in Custody, which stated that imprisonment be used as a last resort, the jailing of Aboriginal people is more often than not the first resort of policing and justice in the Northern Territory. Under the compulsory jailing regime this gross over representation of Aboriginal people in jail has continued.

Secondly, and following from this, is the fact that the compulsory jailing laws were designed to be discriminatory on the basis of race. The crime clear up rate in large towns like Darwin is around 10 per cent — and this figure has not improved under compulsory jailing. On the other hand, the crime clear up rate in bush communities is closer to 90 per cent. People know who have committed offences in these communities; offenders more often than not turn themselves in. Territory policy makers knew this when they designed the compulsory jailing laws, knowing full well that it would disproportionately jail more Aboriginal than non-Aboriginal people.

Apologists for compulsory jailing, from Burke to the Prime Minister, will of course tell you that the laws are not racist; that they are not discriminatory. They say the laws apply equally to black and white. In this, they are, quite simply, not telling Australians the truth. They base their propaganda on a deliberately false use of the idea of equality. As Justice Marcus Einfeld, Federal Court Judge and former Head of the Human Rights and Equal Opportunities Commission, said in a speech he gave in March:

Many people, including many leaders and moulders of public opinion here, speak of everyone having or being given equal rights in our society. This is a glib, albeit seductively expressed, point of view. If two people commence life far apart in assets, whether personal or material, and they thereafter receive proportionately equal benefits, the gap between them actually

increases. In other words, equal treatment of people on unequal levels at the outset of the equalisation process merely perpetuates the inequality.

Hence the superficially attractive appeal of ‘everyone should be treated equally’ as from now is in fact a recipe for retaining differences, imbalances and discrepancies because of the commencing inequality. When used in relation to our Indigenous peoples or to new migrants, for example, it is also surreptitious and insidious racism. Whether conscious or unconscious, the consequences for the victims are exactly the same.

And this simple reality has been reflected in Indigenous jailing rates not just in the Northern Territory but throughout Australia. Despite the huge sums expended on the Royal Commission into Aboriginal Deaths in Custody, the jailing of Indigenous peoples has increased in every jurisdiction in the country. As Justice Einfeld pointed out, the ‘process merely perpetuates inequality (and represents) surreptitious and insidious racism’. It is clear that, in perpetuating inequality and racism, it is these laws that are the crime.

This process is to continue under the shabby plan cooked up between Denis Burke and Prime Minister Howard earlier this year. What happened at Kirribilli House that Sunday night was this: Denis Burke conspired with John Howard in a grubby little deal where Burke got to keep his laws. Howard in turn treated those back benchers who have worries about compulsory jailing with contempt. Those back benchers in turn have behaved with complete cowardice. In this dirty little deal, a triumphant Burke left the meeting with a bag of cash, and Howard bought off his back bench.

The compulsory jailing laws have not been changed. They are still on the statute books. Howard and Burke are claiming as some sort of major victory the change in the definition of an adult from 17 to 18 years. Nonsense. All the change reflects is that the Territory now comes into line with the International Convention on the Rights of the Child, which both Howard and Burke pretend do not apply to Australia in any case. The compulsory jailing regime applying to adults is untouched. Will Howard or Burke continue to hail this victory if there is a death in custody of an 18-year old?

And what have we got instead? Increased police powers and the dumping of the presumption of innocence. Under the announced deal police officers — many of whom are overworked, and many of whom do not support compulsory jailing — are now to be judge and jury in determining guilt and punishment before charges are even laid. The discretion once allowed magistrates and judges before compulsory jailing, is now being handed over to police and the compulsory jailing laws still remain on the books. Is that justice? It sounds more like the abandonment of the rule of law. And you know why. The diversionary programs that now seem the flavour of the month have only been able to be accessed by a handful of people

throughout the Territory. While Burke claims there are about 30 recognised diversionary programs; few have been used. And of these diversionary programs, not a single one has been able to be independently assessed. And of course, the deal has not even been enacted yet. Don't let us assume the bag of cash will go into diversionary and interpreter programs untouched. A recent investigation by former Senator Bob Collins discovered that the Northern Territory treasury ripped off 46.1 per cent of every Commonwealth dollar destined for Aboriginal education programs. The figure for health programs stands at 52 per cent.

Given the CLP government's track record, there is no guarantee the money will get to where it is supposed to go unless the Commonwealth Attorney General demands — and receives — full transparency and a full, independent audit of all funds handed over to the Territory. If the Commonwealth does not insist on this, we'll know the reason why.

Even assuming the money will go to the diversionary programs, what is to be their shape? What will happen, for example, to Chris of Gunbalanya, who was busted for receiving petrol? Well, for starters he will not be eligible, because he is an adult. Assuming, however, he was a juvenile, there are no funded community-based petrol sniffing programs in the Northern Territory, despite its huge impact across an estimated 50 affected communities. We are told, for example, there are 500 sniffers in central Australia alone. As things stand, there is a better chance of them being jailed than receiving treatment.

The real irony is that Howard's backbencher bribe may indeed fund diversionary programs that might include programs for substance abusers, including petrol sniffing, for the first time. Then we will have the bizarre situation where the only way you can get access to such programs is to offend. Does this sound like justice to you? Of course not.

Compulsory jailing is still there to be used at the whim of a Police or, more likely, the lack of a proper diversionary program. Compulsory jailing is still on the books for adults. The compulsory jailing laws in Western Australia have been untouched. The jailing rate of Indigenous Australians will continue to climb. And it is no accident.

Earlier this year, there was a by election in the seat of Port Darwin, formerly held by the architect of compulsory jailing and now Liberal Party President, Shane Stone. The CLP slogan from candidate Sue Carter was: 'I support mandatory sentencing — and you know why'. There was a simultaneous campaign to rid the local shopping centre of a St Vincent de Paul centre that is largely accessed by Aboriginal people.

The links between getting Aboriginal people off the streets in her electorate, and the jailing of Aboriginal people was perfectly clear to those who could read the code — and it is a code that the CLP has been invoking for a quarter of a century. In the US, this political tactic is known as 'dog whistling'.

Listen carefully, next time you hear people like Denis Burke. Listen when he refers to ‘Territorians’ while he launches another attack on ‘do-gooder Southerners’. It is code that is clearly understood by an electorate that has been well schooled in seeing Aboriginal people and Aboriginal rights as a continuing threat to their lifestyle.

Indeed, listen to the phrase ‘lifestyle’, that the CLP regime continually invokes. Is it the lifestyle of indigenous people whose material conditions of poverty lead them to die up to 20 years before other Australians? Is it the lifestyle of a people who disproportionately occupy our prison cells? Is it the life style of a people whose educational standards are below that of many Third World countries? One might wonder. But no. When Burke talks about ‘Territorians’ and their ‘lifestyle’, he deliberately excludes Aboriginal people. And when he refers to ‘Southerners’ he is describing anyone who doesn’t support the CLP regime, whether they live in the Northern Territory or interstate.

A good example of this was the hysterical response of Burke a few weeks ago to the ‘do-gooder Southerner’, Malcolm Fraser. Instead of showing respect to a Liberal elder and, perhaps, listening to someone older and wiser, Burke put the boot in — condemning his age and deriding his views as ‘stodgy’ and ‘out of touch’. This is, — mind you, from a man who only moved to the Northern Territory in 1994 from down South! But of course, this is also from a man who — along with his Prime Minister— seems perfectly happy to see the Northern Territory, and Australia, as many prominent critics have said, lumped into the same basket of human rights abusers as the military regime in Burma or the Taliban of Afghanistan. For Burke, it’s not just Fraser that should ‘butt out’, but also the United Nations. For both of these men, the standards of civilised society are benchmarks we can do without — and certainly should not be the subject of international scrutiny. And you know why.

It is perhaps unfashionable to speak about racism, as I have today, but in the current climate of deliberately manipulated hatred being directed against Indigenous Australians, I believe it is time to speak up clearly, and not in the coded language of racism.

You might remember, for example, John Howard claimed back in 1996 that ‘political correctness’ had silenced ordinary Australians, thus justifying the rise of Pauline Hanson and her views in the name of free speech. Not surprisingly — as a past master of such language himself — Howard was silent on the coded racism that has dominated Territory life for so long. He has certainly made no mention of the consistent silencing of Indigenous views.

But Howard himself misunderstands — deliberately — what free speech entails. Again, as Marcus Einfeld pointed out:

The rationale of free speech is the search for truth through an honest generation and open exchange of ideas. Rank untruths and sheer prejudice should not be tolerated as elements of free speech. There is no human right to lie or mislead or to be ignorant, whether deliberately or by omission to find out the facts. There is no human right to offend Holocaust survivors or stolen Indigenous children yet again.

Make no mistake about it, the current regime in the Northern Territory has no interest in freedom of speech as the search for truth and enlightenment Einfeld describes. Uniquely, the Northern Territory has no Freedom of Information legislation. Again, under Shane Stone, changes were made to the *Evidence Act* that allow the Northern Territory government to apply the equivalent of Cabinet privilege to virtually any government document it likes.

There is a climate of fear in the Northern Territory whereby few are prepared to raise their voices against the CLP regime. For example, those who opposed the referendum on statehood a couple of years ago, were described as ‘un-Territorian’ — indeed some people were threatened with legal action for producing material questioning statehood. The phrase ‘un-Territorian’ was echoed in recent months in similar statements from John Howard and Jocelyn Newman referring to people critical of the policies of the Howard government on Indigenous affairs as ‘un-Australian’. It is McCarthyism pure and simple. And you know why.

So, what have we seen as a result of compulsory jailing in the Northern Territory?

- In the first year of compulsory jailing, the imprisonment for indigenous women exploded by 223 per cent
- The jailing of scores -- perhaps hundreds -- of people for trivial offences.
- The abandonment of the rule of law whereby the judiciary, not parliaments and politicians, have discretion over sentencing.
- An increase in police powers, and a reduction in the rights of defendants.
- The abandonment by the current Federal government of international treaty obligations.
- The alienation of indigenous families from their children.
- The death of a boy, far from his kin and country.

- And the demise of the standards of a civilised society. And we know why.

The kind of racism I have spoken about is the same ideology that Nugget Coombs fought against for so many years and it is the kind of racism that continues to be perpetrated — albeit in a different code, by the CLP.

The ‘old man’, as he was known throughout indigenous Australia, would have been appalled, as we all are, at the racist policy of compulsory jailing that has been embraced by the CLP regime.

I am a member of the Labor Party representing the seat of Arnhem, including the Aboriginal community from which the young boy came. Labor, nationally and locally, has fought against these compulsory jailing laws, as we have fought against racism and disadvantage in the Northern Territory for years. Our policies include the restoration of discretion to the courts and provide a sense of responsibility and genuine opportunities for offenders.

Compulsory jailing is an intolerable stain not just on the Northern Territory, but on the whole nation, and we should not rest until these hateful and hate inspired laws are removed from the statute books.

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