The Justice James Muirhead Churchill Fe

and Access to Justice for Aboriginal Young People in the Nort

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I am extremely honoured to have received the 2012 Justice James Muirhead Churchill Fellowship. Whilst on a personal level the Fellowship represents an incredible learning opportunity, it is difficult to not be mindful of Justice Muirhead's enormous legacy in making sure that something tangible comes out of my research, which is improving justice outcomes for Aboriginal young people.

The Justice James Muirhead Churchill Fellowship

Perhaps most famous for presiding over the Chamberlain trials, Justice Muirhead served as a distinguished Supreme Court Justice from 1974 to 1985 and concurrently as a Judge of the Federal Court. His Honour was the Administrator of the Northern Territory from 1990 to 1993.

Justice Muirhead not only worked tirelessly to improve outcomes for Aboriginal people upon entry into the criminal justice system, but also to addressing the systemic issues leading to Aboriginal people having increased contact with the justice system. Amongst his Honour's other numerous achievements, he was the first Royal Commissioner into Aboriginal Deaths in Custody and the Inaugural Director of the Australian Institute of Criminology.

The purpose of the Justice James Muirhead Churchill Fellowship is to undertake a project to enhance the capacity of people, communities, agencies and/or governments in the Northern Territory to reduce Indigenous contact with the Justice system (policing, courts and prisons and after-care of prisoners), and/or reduce the negative impacts of that system on Indigenous lives.

My research will consider international best-practice examples in Canada, the United States and New Zealand to find practical ways that justice processes can be more meaningful for Aboriginal people. It will look at how justice processes can be more culturally inclusive, less formal, have a greater role for Elders, and ultimately better identify and address the reasons underpinning a person's offending.

Underpinning my research are two propositions:

- Firstly, that if we want to reform our justice system to make it better equipped to meet the needs of Aboriginal Territorians; we must focus on justice *process* reform.
- And secondly, that a central part of justice process reform must be to strengthen the role of Elders and the extent to which cultural considerations is part of our contemporary process.

Justice Process Reform

Whilst the end result is obviously important, we typically haven't put enough emphasis on how we administer justice. In the Northern Territory, this is without question an enormous challenge. We face untold difficulties in delivering a justice system that meets the needs of all Territorians. These include our widely dispersed population and immense geography. It also includes questions such as how a mainstream justice system can cater for the large number of Aboriginal court participants who speak English as a third or fourth language (or not at all), and who might have little or no conceptual understanding of the mainstream justice system. And, how an over-stretched, under-resourced justice system can meet the needs and hope to overcome the dislocation, disempowerment and alienation many Aboriginal people feel.

The Northern Territory Government, to their credit, signed the National Indigenous Law and Justice Framework 2009-2015 which acknowledges deficiencies in the way our justice system meets the needs of Aboriginal people. It commits the Government to scrutinising our laws, policies and practices to see where our justice system adversely affects Aboriginal Territorians. This is the first step. Unless we are prepared to honestly examine where our system might alienate and disempower Aboriginal people, and where it might contribute to, rather than reduce misunderstandings, progress in terms of "justice outcomes" will remain elusive.

Procedural Justice is a central focus of my research. It is a concept that

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JARED SHARP GIVES HIS PERSONAL VIEWS AND NOT THOSE OF THE NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION, OR IT'S STAFF. JARED WAS AWARDED THE JUSTICE JAMES MUIRHEAD FELLOWSHIP IN JULY 2012.

has emerged in the United States, from institutions such as the Center for Court Innovation in New York. Procedural Justice considers two issues:

- First, courtroom communication - how comprehensible court proceedings are for non-professional participants. It looks at the extent to which court proceedings are understood and understandable to defendants, their families, witnesses, victims, interpreters, and other interested attendees.
- Secondly, it examines the proposition that where defendants perceive a justice process as fair, they are more likely to comply with court orders and follow the law in the future. This goes to the extent to which non-professional participants are involved in the decision-making processes in court. Do they have a voice? Do they feel part of the process that arrived at the outcome in their case? Part of my research will involve observing the Center for Court Innovation's Procedural Justice Demonstration Project and seeing if there are any lessons which can be learned in the way our justice processes operate.

Strengthening the Role of Elders and Cultural Considerations in our Justice Process

The second proposition underpinning my research is that procedural justice reform must include strengthening the role of Elders and the capacity of courts to incorporate cultural considerations into justice processes.

With Aboriginal people comprising over one third of our population, we have the opportunity to set the standard nationally as to how a contemporary justice system can best meet the needs of Aboriginal people.

The tragedy is that, whereas we have this unique opportunity, policy responses such as 'Stronger Futures' and the Northern Territory Emergency Response have directly undermined our ability to attain this goal. Section 91 of the Northern Territory National Emergency Response (NTNER) Act (Cth) provided that a court in determining sentences:

> 'must not take into account any form of customary law or cultural practice as a reason for … lessening the seriousness of the criminal behaviour to which the offence relates'.

This has meant that Northern Territory Courts, unlike every other State and Territory jurisdiction, have been precluded from taking customary law and cultural practices into account in determining the gravity or objective seriousness of an offence. And, as pointed out by his Honour Chief Justice Riley, a consequence of this is that:

> "Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community. It seems to me this is a backwards step."

As if this extraordinary consequence was not bad enough, an arguably even more insidious impact has been how this enactment has added to the sense of disempowerment felt by many Aboriginal people. A constant message from Aboriginal people is that we need to create space for Aboriginal voices in our justice processes if we want to make the justice system work for Aboriginal people. The authors of the 'Little Children are Sacred' report heard this message loud and clear:

> "During community consultations, there was an overwhelming request from both men and women, for Aboriginal law and Australian law to work together instead of the present situation of misunderstanding and confusion."

The 'Little Children' authors also heard of the need to develop:

> "new structures, methods and systems that see Aboriginal law and mainstream law successfully combined and bringing a newfound strong respect to Aboriginal people, law and culture that will benefit the whole of the Territory."

My research seeks to advance this finding. Put simply, we need to start empowering Aboriginal people (especially Elders) to share ownership of law and justice issues affecting Aboriginal defendants and their wider community. We also need to send a message to Elders, community leaders and other members of the Aboriginal community that they have an integral role in our justice system. And we need to acknowledge that Elders and Community leaders have expert information that no-one else has.

My research will focus on the types of structural change that are possible to make it the norm for Elders to have an ongoing, meaningful role in criminal justice proceedings.

The critical question in the Northern Territory is what model(s) will best suit our unique context. Of course, local solutions are needed to address local issues. But that is not to say that international best-practice examples cannot have some application in the Territory. We can (and must) learn by how other jurisdictions enhance the capacity of First Nations peoples to participate in justice processes.

As part of my Fellowship, I will have the opportunity to observe first-hand some of the innovative justice responses from jurisdictions which have somewhat similar linguistic and cultural challenges to those faced in the Northern Territory. I will observe different First Nations Court models in Canada and the United States, including the Tsuu T'ina First Nation Court in Alberta, Canada, the Aboriginal (Gladue) Courts in Toronto, Canada and the Peacegiving Court in Deschutes County, Oregon in the United States.

Each of these First Nations Courts and processes operate uniquely. Most incorporate cultural practices into their formal proceedings. Some are in urban settings, others remote. Some are conducted in first language, others in English. Some have Elders having a more pronounced role in sentencing, others with more of a Peacegiving or mentoring role, with a peacegiver handpicked to guide a defendant through an agreed upon plan to help them back on track.

I will also have the opportunity to observe Family Group Conferencing proceedings in New Zealand. Incredibly, almost every criminal and child protection matter involving youths must proceed by way of family group conference. I will be especially interested in how these processes have been adapted to have specific application and relevance to Maori and Pacific Islander young people.

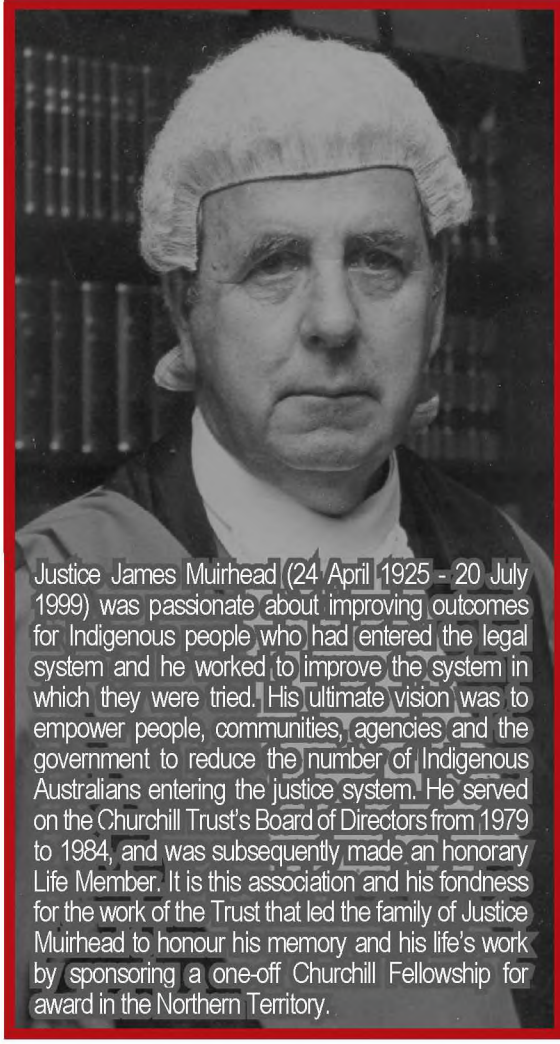
I hope through my Fellowship to contribute some ideas which might have some application in the Northern Territory. This might be in relation as to how we can ensure that the 'right people' (which family members should be involved? Who has responsibility for mentoring, supporting, teaching this defendant? Should the victim have a role? If so, what should that be?) are involved in sentencing and bail proceedings. Or it might be as to how Elders can provide expert information in relation to rehabilitative or restorative aspects of a sentence or bail proposal. Or how Elders and significant family members can play a crucial role to assess the extent to which Aboriginal defendants are understanding and engaged in justice processes that directly affect them.

Conclusion

Justice Muirhead's often-cited comments in *Putti v. Simpson* (1975) 6 ALR 47 read as true today as they did 37 years ago:

> "I am not unaware of the difficulties faced by all involved in the administration of justice in remote areas, of poor communications, of the problems encountered in obtaining instructions, in arranging legal representation, of arranging for interpreters and for the attendance of witnesses. There are many problems such as distance and weather which jeopardise transport arrangements. Yet neither these matters, nor crowded lists to be coped with on hurried court itineraries, should be allowed to jeopardise an individual's right to the most careful presentation and consideration of his case".

I hope that this Fellowship can lead to some possible opportunities for Aboriginal people to have the 'careful presentation and consideration of their cases' in the Northern Territory justice system that Justice Muirhead championed. ●



Justice James Muirhead (24 April 1925 - 20 July 1999) was passionate about improving outcomes for Indigenous people who had entered the legal system and he worked to improve the system in which they were tried. His ultimate vision was to empower people, communities, agencies and the government to reduce the number of Indigenous Australians entering the justice system. He served on the Churchill Trust's Board of Directors from 1979 to 1984, and was subsequently made an honorary Life Member. It is this association and his fondness for the work of the Trust that led the family of Justice Muirhead to honour his memory and his life's work by sponsoring a one-off Churchill Fellowship for award in the Northern Territory.