ENOUGH IS ENOUGH!

THE DARWIN JUVENILE SENTENCED TO 7 YEARS

BY NORTHERN TERRITORY CHIEF JUSTICE BRIAN MARTIN FOR

THE 'RAPE THAT WASN'T'

On 27th May, 2010, the Chief Justice of the Northern Territory announced to the media 'in words laced with anguish and despair' that he intended to resign eight years ahead of retirement age (*The Australian* 28 May 2010, page 1). Chief Justice Brian Martin said, 'You reach a point where you say enough is enough.' Explaining that he was retiring at the age of sixty-two due to family reasons and the constant pressure of being Chief Justice, he lamented the number of cases he had heard involving indigenous men committing acts of violence against women and so many repeat offenders. 'These need to be addressed at a level before it gets to the criminal court because there is a limit to what we can do,' the Judge said. 'We can put people in jail but that in itself has proved to be an ineffective way of rehabilitating people.' Justice Martin says he does not see things improving for at least twenty-five years.

Meanwhile, in Berrimah Prison a young Darwin man of Aboriginal heritage, Kyle Horace, ponders the remarks of his trial judge, Chief Justice Brian Martin, who sentenced him to seven years in Berrimah Prison on March 22nd, 2007. Now 22 years of age, Kyle was fifteen years and one month old and living in Darwin's northern suburbs when he was questioned by police on suspicion of the sexual assault of a white girl aged 13 years and 8 months. He heard no more of the accusations (which he denies) for more than 2½ years, when Kyle was almost eighteen. By the time he stood before Chief Justice Martin and an all-white jury in the Darwin Supreme Court, Kyle was a fully grown man aged 18 years and 11 months with a girlfriend and a one-month-old baby daughter.

According to the judge, the courts are 'right at the tail end of all the experiences of the life of the offender that have ultimately led to this type of offending... Being at the tail end we can't cure them. That's the problem.' The Chief Justice continued: 'We see many offenders who come from homes in which they were the victims. They end up becoming offenders. We have to break that cycle somehow.'

Judge Martin admitted that he had found some cases involving violence against women personally difficult, describing them as 'rough and demoralising'. A Canberra academic added that the unremitting nature of judicial work could take a psychological toll on many judges. He said few lawyers would dispute Justice Martin's comments that jail was an ineffective means of rehabilitation. 'The only thing that jail does is punish. Who would want to be a judge sentencing people to solutions that they don't think are going to work?'

Justice Martin admitted that he made a mistake in 2005 when he sentenced a 55-year-old Aboriginal elder to just one month's jail for the rape of his 14-year-old promised bride. 'I got the balance wrong,' he said. 'I remember thinking of all the factors – the impact of the victim and the families – then trying to balance out

the other side of the coin, which was an Aboriginal man who didn't know he was doing the wrong thing in the sense that it was permissible under the law and he didn't realise it was wrong in the wider law.'

Justice Martin's retirement comes as tensions remain high in Alice Springs over his sentencing of four young white men for the bashing-related manslaughter of a local Aboriginal man, Mr Ryder. Some Aboriginal people feel that the men should have received longer than non-parole terms ranging from 12 months to four years.

In 2009, *The NT News* published on two pages the Chief Justice's sentencing remarks to a young man convicted of sexually abusing a female cousin for two years, while she was between the ages of 11 and 13. The man was sentenced to four years imprisonment, suspended after having served 18 months. In this case, not surprisingly there was no question of consent *(NT News* Saturday Extra, 1st August, 2009).

Earlier in the month before his pending retirement announcement, the judge stated: 'If the community wants to call people who have sexual intercourse with children [who are aged] under 16 "rapists", then the community can do so.' Judge Martin was responding to a headline in the *NT News* describing a teacher who had consensual sex with a 13-year-old student as a 'rapist'. Chief Justice Martin explained that there was no such thing as 'rape' in Northern Territory law. Furthermore, in the eyes of the law a child was capable of giving consent. He clarified his remarks by saying, 'A child in the law can give consent. When there is consent, the child gives consent but the community recognises that the child is too young to give an informed consent, too young to understand the implications, so the community had said even if a child consents there is still an offence' (*NT News* 8 May 2010, p.30). According to Chief Justice Martin, the term 'statutory rape' was an Americanism that had never applied in the Northern Territory. 'It's a question of terminology ... the word rape has been used for where there is no consent, the other one (sex with a child under 16) was called carnal knowledge,' he said (*The Northern Territory News* Saturday Extra, 8 May, 2010, page 30).

Reading the Chief Justice's remarks, Kyle remembered the ABC Online news report of his case headed: 'Man Jailed for Raping 13 year-old Girl.' The report had continued:

> An 18 year-old Darwin man will spend at least five years in prison after raping a 13 year-old girl in May 2003. Kyle Horace was found guilty by a Northern Territory Supreme Court of three counts of unlawful sexual intercourse without consent. In sentencing today, the court heard Horace raped the girl in the grounds of a Darwin primary school after he approached her asking for directions. He was 15 years old at the time.

In jail, Kyle wondered why the news report described him as a man of 18 when the girl remained 13 in the report, almost four years later? The judge had also referred to Kyle as a 'man' as he stood in the dock before the jury, when in fact he was a 15 year-old boy when he was first questioned. It was

of no consolation for Kyle to now read his sentencing judge's remarks that the media is free to describe consensual under-age sex as 'rape' if they choose to do so.

Glenn Dooley, a criminal lawyer in the N.T. for more than twenty years, disagrees with imprisonment as a solution. He told the ABC, 'You can see where the [Northern Territory Emergency] intervention went off the rails from day one with the emphasis on police and the punitive approach. Justice Martin has seen that has brought nothing to solve any of the problems and the whole process of getting young Aboriginal kids up and running as young people that can get a job and get out of jail has got to start now.

Mr Dooley said that he is disappointed the Chief Justice has not used his position to bring about changes. Mr Dooley added:

> It's amazing the different comments that are made once a person says I'm out of this job, now I'll let you know what I really think ...While he was in the job I think there could have been much more done from his lofty mantle to point out to the Government that things were failing badly with the criminal justice system in the NT and generally the approach taken to dealing with the underprivileged people. The Chief Justice's sentencing could have been much more of a tone that would have put Correctional Services on notice that they needed to lift their game ... they needed to get proper support for offenders in the community and proper rehabilitation going.

In defence of a punitive approach and the N.T. Intervention, Rosemary Neill wrote a strident article to accompany news of the judge's retirement in *The Australian* (Friday, May 28, 2010, p.10). Referring to the case when the Chief Justice 'sentenced an Aboriginal elder to one month's jail for raping his 14-year-old "promised wife,"' Ms Neill commented: 'Yesterday, [the Chief Justice] again admitted that he'd "got the balance wrong." – a serious understatement. It would be extremely damaging if Justice Martin's comments about courts not being a remedy for violence committed by indigenous men, encouraged lighter sentencing of serious offenders.' Ms Neill wondered if the Chief Justice's remarks will 'send a message to already violence-scarred communities that the bashing, rape and murder of Aboriginal women should be regarded less seriously than the violence towards non-indigenous women – as it often was in the recent past.' Could similar demands for harsher penalties be the reason that Kyle has become a scapegoat, a sacrificial lamb in the justice system? That is, the male is always in the wrong in complaints of sexual assault, even though Kyle was under sixteen at the time and the evidence strongly suggests the complainant lied.

Reading the press reports in his dimly lit cell, Kyle Horace finds no reassurance in the judge's remarks that at times he 'got the balance wrong' in his sentencing. Nor does Kyle concern himself about the 'demoralising' toll taken on judges by 'sentencing people to solutions that they don't think are going to work'. For young men like Kyle it is not the judge but the prisoners who suffer 'right at the tail end' of the legal system - in Kyle's case contemplating how life might have been if justice had been rightfully served in

the beginning. Behind bars, daily mulling over his innocence, Kyle has little sympathy for the 'psychological toll' on the judge who sentenced him. Rather, Kyle shares the view of Glenn Dooley that the Chief Justice is speaking in hindsight when he should have got things right in the first place.

More puzzling to Kyle are the Chief Justice's remarks that a child is capable of giving consent and that sex with a girl under age is not rape but 'carnal knowledge.' Amongst Kyle's teenage Darwin friends in 2003, promiscuous sex was common. Were all his friends committing a crime by having sex with girls under sixteen, or did he as an Aboriginal boy make the mistake of having an encounter with a white girl while both of them were under the age of consent? Certainly Martin had made it clear at Kyle's trail that a crime had been committed on the grounds of age alone 'because a child was incapable of giving consent' (Note: the complainant looked older than her 13 years and 8 months). As the judge has now said, 'The community recognises that the child is too young to give an informed consent, too young to understand the implications, so the community had said even if a child consents there is still an offence' (*NT News* 8 May 2010, p.30). Was Kyle sentenced to seven years for something commonly done amongst his teenage peers? And if there is 'no such thing as rape', what was he doing in Berrimah Prison? Penetration was not even proven, let alone without consent. The evidence of every eyewitness contradicted that of the complainant but Justice Martin chose to believe the girl.

Kyle's misfortune was to appear in the Supreme Court soon after Chief Justice Martin had been 'at the tail end' of severe criticism for the light sentence given to the Aboriginal elder. Even so, what was Kyle doing in an adult court in the first place when he was first questioned as a 15-year-old boy as a child under the law? If he was an offender, why was he free to roam the Darwin streets without restraint for almost another four years before eventually going to trial? Are not these years of good behaviour worth considering? Before announcing his sentence, Chief Justice Martin expressed surprise to learn that Kyle had served no time in prison since the complaint. But the judge did not criticise the police for delaying the prosecution due to the investigating officer's family problems. Nor express regret at trying a case in the Supreme Court that belonged in the Children's Court. Instead, the Chief Justice chose to believe the girl who spiced her evidence with 'memories' recalled in dreams more than three years after the events of 2003.

A more detailed 19-page analysis of Kyle's case is available from the contacts below:
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ENOUGH IS ENOUGH! FREE KYLE HORACE!

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