

# THOUGHTS ON THE THEME?

(The Alienated Generation)

(The Honourable Mr Justice J. H. Muirhead\*)



It seems to me, that those decided the theme of this conference were provocative. Framed within three words it has the merit of brevity. Posed as a question it should demand an answer, it should not raise other questions to be answered — it should mitigate against ponderous papers and discussions. But it is a nasty question as it lacks the life blood of a verb. It's only by intonation of voice we can express it as a question. We can't answer it yes or no. It's not the type of question which permits counsel or judge to say "Witness please answer the question — yes or no". So it's not really a question. Is it then a statement? Are we to assume there is some logical association between the words "alienated" and "generation". Does it require us to accept its validity and solemnly discuss the problems and the society which brought about this mournful state of affairs. If so, where do we start? Where does a generation start? Which generation are we talking about? I don't know. In the good old days when important wars were regular — you know — Napoleonic Wars, Crimean War, Franco Prussian War, Boer War, World War 1, etc. they were tragically enough measuring posts of spans of history. The turn of a century is about the only happy measuring post — others are inclined to relate to disasters. The start of a new decade means little — it just makes you feel older to wonder if you will see out the span of the next decade. In Darwin people are classified in two basic groups. Those who lived there before the bombing in 1942 or those who resided there before the cyclone 32 years later. One almost feels guilty if fate has not enabled you to share in and survive such calamities. So it is that calamities, wars, fire and flood are likely to measure the stages of our progress through life, due I suppose to our fascination for bad news — encouraged so actively by the media's exposure of nastiness. So I don't know when a generation starts and finishes. I don't even know what a generation is. I know what the word means, but the dictionary tells me that a generation is both "a single step in descent or pedigree", or a "whole body of persons born about the same time". I suppose my children are of one generation but yours are younger. Are they of another generation? Why can't I claim membership of my son's generation? I have been around the place all the time he has been here. Surely the young are not so arrogant as to deny me membership of their generation. Sure they have problems, but so have I. And what's more I haven't much time left to solve them. So it seems to me that really the human race is like a tropical river that flows on and on, flooding at times, channelled here, diverted there. But like the Mississippi "it just keeps rolling along", no stops, no starts. Even that dreaded word "dam" causes but a temporary halt in progress. And so I expect every day sees the birth of another generation. And as I do not know what generation I am supposed to be talking about how can I make a contribution? This actually would be a good time to thank you for your attention and sit down.

But I will continue. Did this fictional generation start fifteen years ago or thirty years ago? We should all be required by law to wear birthday badges — like people who work in airports wear identification plates. It would make us more friendly. I as a "nineteen twenty-fiver" would stop other "twenty-fivers" in

the street and yarn about the good old days. And we would bear our age with pride — no longer going to extreme lengths to pretend, when we are sixty, that we are only forty. But who wants to be forty? It's a silly age — neither old nor young. Middle age is so humdrum. But such honesty — a law requiring revelation of age would cause greater unemployment. Huge human resources are devoted to the industry of "age deception". The economic ramifications of a society made up of people who like to be their age and live accordingly is too hideous to contemplate. Much marketing — the thrust of advertising — is designed to ensure that we are not satisfied with our lot. The very young are told to pretend to act older, to look more mature. The "golden oldies" (as my wife calls them) or "wrinklies" (as I call them) make themselves older by worrying about acting younger — and sometimes drop dead in the process.

Well that's enough about the word "generation" — it's deceptive and meaningless. All I say is that the Nasties who selected the theme are putting forward a cliché — influenced by that other cliché that for years was so fashionable and in my view dangerous — "the generation gap" — words that created their own divisions. Those words eased the consciences of those of us who had failed to understand and wisely guide our children. It allows us to stand back, to stop trying, to stop loving — on the false premise that the gap was a fact, almost inevitable, rather than a symptom of an arrogant "too busy" society. We tended to say, "everyone is having the same worries with their children — it's a symptom of the times — there's nothing we can do about it". But it was not a symptom of those times. It's always been with us.

Well over two hundred years ago Samuel Johnson observed "Every old man complains of the growing depravity of the world, of the petulance and insolence of the rising generation". (The Rambler (1750-1752).) D. H. Lawrence is reputed to have said "we have to hate our immediate predecessors to get free of their authority" and Lewis Mumford, an American philosopher, wrote more warmly "Every generation revolts against its fathers and makes friends with its grandfathers." (The Brown Decades (1931).) And one notices in the literature (which is generally written by the mature) that it is always the young who "revolt". We forget that the old may appear, in young eyes, to behave in a "revolting" manner and the "revolt" is in fact a process of disassociation. The main comment from the young is to be found in the graffiti and anonymous remarks of the students. Those of you who have travelled in a New York subway know what I mean. "Alienation ends where yours begins" — (a call of the French Student Revolt in 1968) or "When you're all alienated together, you're not really lonely" — the words of an American College Student (quoted in The New York Times Book Review in 1966).

By this stage you must be thinking "My God — he's still rambling on about the theme of the conference — when's he going to get on with it?" Well the answer to that is — "don't hurry me — it gets worse, not better". Ask any of those Jurors, who have over the years been forced to listen to my summings up.

Talking of Juries, when I was invited to talk to you I thought of a paper with which I have been dabbling for a long time and which will probably never see the light of day. Its possible title has some technical similarities to the theme of yours — three

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words and a question mark — “Discharge the Jury”? It’s absolute heresy, especially coming from a member of the legal profession who strongly supports the jury system in our criminal courts. It raises questions as to the system, a system eulogised for centuries as a cornerstone of democracy — a system some now say should be written into our Constitutions or into a Bill of Rights — so that our right to trial by jury will become an entrenched right — unassailable — not to be whittled away by discontented arms of the executive — or indeed by critical evaluation of academics. At present he who advocates abolishing the jury system or modifying it will find few supporters and probably rightly so. By tradition it’s a difficult area to research. It’s not “cricket” to investigate the Jury system to gain the views of those who have served as Jurors. It’s frowned upon; some regard it as legally contemptuous. Perhaps there is a fear that our right to trial by jury may upon examination prove, from the point of view of the community, to have a debit as well as a credit ledger.

I know jury service is regarded with mixed feelings. Some consider it’s a dreadful thing to inflict on decent citizens. It is an intruder into our independence as citizens. Jurors are forced, under pain of punishment, to leave their jobs and vocations and to listen to lawyers — and a few witnesses — for days and weeks on end. They become professional listeners. They are the classic “captive audience”. For days or weeks jurors become physically subjected to a legal system — so often inefficiently and clumsily administered — themselves suffering from its imperfections and delays — bearing frustration in polite, rather un-Australian silence. They can’t come and go as they please, they can’t doze when they are bored, they can’t fiddle, read or knit. They just sit there waiting to be empanelled, or waiting for something to happen, being instructed by Judges and lawyers as to what a great system it is, struggling to comprehend through waves of weariness the legally refined and almost incomprehensible legal notions of onus of proof, provocation, self defence, criminal intention; fascinating stuff like that, material which the law assumes they will understand because a judge instructs them concerning it. Some say realism should lead to the conclusion that there is no way in the world a jury can truly comprehend complicated principles and apply them to the facts of a case; others say the law is the ass — that courts of appeal have so refined and complicated previously simple legal concepts that the task of the Trial Judge in explaining the law to a jury in terms which they have some hope of understanding is herculean — if not impossible of performance.

My own experience with Australian Juries suggests to me, that in the Criminal area, we should not tamper with the system. It is very expensive, but it is a just system, it involves the community in the administration of justice and I do not know by what we would replace it. Can there be a fairer result than that of twelve people from diverse walks of life who have sat there watching, listening, assessing evidence and situations, and who then combine to reach a verdict? It’s becoming popular to query jury decisions, but those who do so seldom look at the entirety of the evidence and they (as opposed to member of a jury) do not have the opportunity of quiet objective total evaluation.

But I wander from my chaotic theme, still struggling in fact to find one.

All I meant to say was that when I told John Purcell I had vaguely thought of a paper to do with the Jury system there was a pregnant silence save for the crackle of the line, an embarrassed cough followed by the words “that will be interesting” said in forced polite and jolly tones. What he was actually thinking was “What the devil has a Jury system got to do with the deviant little horrors this conference is all about, who spend their early years gazing not at juries (that comes

later) but at the kindly features of the Magistrate in the Children’s Court who is about to give them their third bond”. The alienated generation is not interested in the concept of “Twelve just men and true”. Well, John got the message through and I officially advise that I won’t utter another word about juries.

Mercifully, with some exceptions, judges are not heard a great deal in public. That’s a good and a logical thing. We talk enough in court and it is probably better not to publicly air personal opinions too often. Over the years, especially when I was setting up the Institute of Criminology, I did my share of public speaking. The demand has now not only abated, it has completely dried up. Perhaps this is my swan song. I have talked of the Criminal Justice System, probation, parole, social injustices, children and the law, the migrant and the law, a host of subjects. But whatever the subject it is about the same dismal theme — the law in its confrontation with crime, and, more particularly, the socially disadvantaged. Organised crime is quite beyond me. All I understand about it is that the organisers are not often seen in our criminal courts and when they are, it’s all too complicated for a Jury; and when you do not comprehend, you cannot convict. But here you are implicitly inviting me to speak on the same sordid theme. I assume “The Alienated Generation” is to be all about lost and lonely kids. But the word “generation” implies a generality I will not accept.

I may be hopelessly wrong but I get the feeling that the young today are as healthy in mind and body as their forebears — they are perhaps more intelligent and caring, perhaps cynical, but surprisingly objective. Their problems are those imposed by society at large. It seems illogical to attempt to look at them as a group objectively in an attempt to determine why some of them behave as they do. Surely the simple fact is that some of them are, and feel themselves to be on the fringe, no close family ties, no respect for parents, no interests, no anchors and above all (in times of unemployment) feeling that they are not wanted and have no part to play. To a large extent these are the unhappy people who are to be seen in our institutions, drug treatment centres, courts and prisons. There is very little I suggest that the law, or its agencies can do in the realm of true crime prevention. Crime’s origins are to be found in the nature of our society and many of society’s trappings and marketing methods may be fairly described as criminogenic. And can we be surprised that when thousands are idle — and perhaps bitter in the process — that a few decide to help themselves. Crime will not be defeated by sentencing policies, by prisons, by police public relation programmes. It’s only within our social relationships and our family relationships and in our education policies that we must seek changes if we want crime to diminish.

My eldest son told me some time ago that he was anxious to educate his children in a way that would give them the opportunity of living a fulfilling life in a society which could not employ them. He was not, I think, thinking in terms of alternate life styles but of inculcating manual skills and interests which could, if necessary, be pursued when active involvement with education ceased. I found, remembering my ambitions for my own children, this to be a rather chilling concept — that a mature, reasonably sensible young couple must think in such terms. I suppose they are right in so doing. I guess I looked to my own progress in my profession — hard work — as the criteria for my children’s security. We grew up pretty assured of the opportunity to work. My son knows — in his field at any rate — that he can make very few assumptions as to his earning capacity in the future. But the care and companionship with children looms very large. Perhaps with more leisure — enforced or otherwise — there will be a growing national appreciation of what the natural resources of this country have to offer all of us — the truly great outdoors; dare we hope for a

return to a simpler and gentler life. But leaving aside such speculation it is clear that to prevent alienation by a feeling of hopelessness not only must we deal with the present problems of unemployed youth, but innovative future planning for youth must become part of present programmes.

May I develop and conclude my remarks by referring to a few matters which have in the past been of some interest to me, matters in which past hopes for progress were not altogether realised. I assume the reasons they have not been realised are to be found in our democratic, multi-structured, federal system, in social priorities and in political sensitivity to those priorities.

Progressive government requires that its agencies be not only nourished. Old wood must be pruned and new growth grafted so that all remains healthy. This is better than to allow the tree (be it a court system or a prison system) to become old and rotten so that it is consumed by termites and dies. It is better I think than felling the tree, planting another and hoping for the best — not knowing what will grow. But for one reason or another governments do not seem to be given much opportunity of pruning and grafting. I believe it goes beyond money. It just takes so long to do anything constructive about some situations all agree need early attention. There are so many conflicting pressures on government and bureaucracy.

Twenty years or so, when Australian Crime Prevention Council was founded there was an awareness that there was much to be done in the realms of after-care, probation penology, social welfare. And much was, I think, done. New ideas were put into practice. Probation and parole became realities — alternatives to imprisonment were developed. There was a feeling of enthusiasm. And the "do gooders" had their day. But crime did not go away. Perhaps it became worse. People who had been released reoffended on occasions. The public became cynical and frightened. Drugs arrived on the scene. Crime became big business. There are signs that the days of experimentation are over. We are back to more traditional methods. Parole is said to be failing — to be hated by those it was designed to help. It may be that crime would have been far worse if the new methods had not been tried. No one can say. But the pendulum is swinging back and the emphasis and the public expenditure will be on methods to detect and fight crime — not on helping and rehabilitating the offender on the basis he is thus likely to offend again. In our system we spend much time and money finding out what people think about innovative change. Often we then put aside the ideas for further consideration and nothing happens.

### 1. Practices and Procedures of the Law.

I have been qualified now to practise law for about 34 years. But if in 1950 I had been projected ahead in time I would have found myself standing in the same court, appropriately garbed in wig and gown — appearing before the same attired judge — my work, be it in the civil or criminal jurisdiction, based on the same forms and procedures, the civil form of pleadings much the same, sitting the same hours. There would be a few improvements in the transcription of evidence — and if I was instructed in divorce or family law matters I would have to walk elsewhere into more cheerful surroundings, where I could still be seen without wig and gown. Perhaps these things do not matter, perhaps they are part of the dignity, the ceremony of the law.

But behind it all people are still suffering unacceptable delays, expense and frustration — much the same situation as they confronted 33 years ago. True there may be greater legal aid funds available to some, true in some places we have seen the demise of the civil jury — but the changes are few. The law still no doubt attempts to do justice — but its facilities and procedures are so slow and thorough that the very delays and passage of time jeopardises the efficiency of Crown prosecution and the tasks of the jury are made the more

difficult. If one looks at technological development in most areas over that 33 years this sameness, these delays are disappointing. The more so, as I can tell you there is not the same degree of sameness in the large commercial solicitor's office. The flicker and chatter of computers and word processors have truly replaced the law clerks high stool and desk. So the law has lagged. Law Reform is a growth industry and you all know much of the work of the Australian Law Reform Commission under its indefatigable chairman M Justice Kirby. But the implementation of proposals — especially where national consensus is required — is so often a long drawn out business. You may be interested to know that the first research project being carried out by the Australian Institute of Judicial Administration is entitled "Delays and Efficiency in Civil Litigation". Let's hope, if I stand before you in another 33 years (then a young ninety years of age), I will be able to report more progress. Not only the substantive law — but the administration of the law to you the customer — requires careful updating and it may be fruitful to encourage closer appraisal of the systems and operations of the court. The work of the courts and judges should not be beyond examination and (at the proper time) fair criticism.

Secondly, may I talk of my disappointment at the rate of penal reform over the years since Australian Crime Prevention Council was set up. I do not wish to express personal views as to Australian prisons and the use we make of them. As the gravity and dimensions of crime increase, sentences get longer. I think we all agree prisons promote crime. It's a cat chasing its tail. But the law accepts the concept of deterrence and retribution and punishment. I believe we have ceased to believe any good can be done to the individual who is gaoled — but the discretion of trial judges is frequently severely limited by courts of appeal who talk in terms of "condign punishment" and probably reflect the view of the community in so doing. I believe 20-25 years ago many of us believed the Pentridges and the Yatalas and the Bathursts would soon be things of the past. There was acceptance that gaols were criminogenic and a quiet belief that something would be done. But the main dismantling seems to have been from within, we continue to have large and unhappy prisons in our closely settled areas, and the problems in the large high security prisons seem to me to be as bad or worse. This is not good. As a society we can rip down city squares and raise sophisticated towers. We can rebuild — and handsomely rebuild and reforest and re-garden a place like Darwin — virtually destroyed about eight years ago (including a new prison), yet we still have our big prisons, we still have our fires, and no doubt we still have those plans — albeit a little dusty to build smaller institutions — many better fitted to contain (and perhaps help) those who are not security risks. I hold a personal view that the association between our outdated prisons and the form and incidence of modern crime may be a real one. In this field we hear so much of plans.

In an address delivered to the Sydney University Law School Institute of Criminology entitled "To treat or punish", the late Mr Justice McClemens for so long president of and the moving force in Australian Crime Prevention Council had this to say, the address being published in Volume 43 of the Australian Law Journal, p. 358:

"I turn now to the various theories on which the court sends men to gaol. Basically the proposition is that punishment deters others and the offender himself, a proposition which is I think unprovable both positively or negatively. Whether the theory of deterrence is valid or not and should be replaced by one of social defence we will, I believe, have the deterrent theory of imprisonment with us for a long time and the grey stone walled century old places of incarceration show no sign at the moment of being replaced. These will remain with us well into the twenty-first century and longer

as practically indestructible monuments.”

It is sad that time has not destroyed the apparent validity of his Honour's prognosis.

May I in conclusion refer but briefly to the situation of the Australian Aboriginal in his relations with the law, particularly the young — as it may be said by some they constitute an alienated group. I would not delude myself by pretending (as I am afraid many do) any deep understanding of any section of this group of people, so important in the Northern Territory, nor of their attitude or aspirations. As a race they are over represented in our prisons, and over the years in most areas of the law they have been the subject of much of the work of the Supreme Court of the Northern Territory. In so far as the operation of the law is concerned I have witnessed advances. No longer, thanks to the advent of the Central Australian Aboriginal Legal Aid Service and North Australian Aboriginal Legal Aid Service schemes are they disadvantaged in legal representation. In the Territory those bodies have functioned in a caring and efficient fashion. None of us are perfect but the adequacy of Aboriginal representation is of tremendous help to the courts. It is a legal aid scheme the necessity for and the importance of which is misunderstood and attacked by many who neither understand legal aid functions or who are apt to include traditional solicitor and client relationships in their critical approach. I personally am satisfied that without an efficient Aboriginal legal aid scheme — and I believe it must be separate from Australian Legal Aid Office — the work of both the courts and the police would be more difficult and less effective. The Magistrates work in many areas in close consultation with tribal elders and council members. The question of interpreters is a problem — but we appear to be making progress. I believe the areas of misunderstanding between Police and Aboriginals is being narrowed and Aboriginals are joining our police force in capacities other than as trackers. From time to time there are and will be incidents. If people think fairly of the problems and the situations which confront both Aboriginals and police at times this is not to be wondered at. As one gains a better understanding of Aboriginal communities in one part of the Territory or another, of their customs, ties to land, culture and attitudes to education, one gains some comprehension of their consultative methods and their essential honesty. The courts endeavour to mould the law and its policies in ways which may be understood which may do justice to these people.

But the news is not all good. The consumption of alcohol and (with the young) petrol sniffing continue — possibly at increased tempo — to threaten the continuance and viability of Aboriginal society, possibly in the long term to abort that which is now being done. Alcohol and crime go hand in hand in any culture — but the Aboriginal for a host of reasons is especially vulnerable to its consequences. It is alcohol that lies at the root of practically all Aboriginal crime and violence, be that violence upon reserves or in towns or on the fringes. As I have said it is true that alcohol is “crime-inducing” in any section of the community, but Aboriginal crime is practically **all** due to liquor. I doubt, in my ten years in the Territory, whether I have more than two or three Aboriginals in the criminal court charged with offences in which liquor has not played a part. The nexus is more than significant — it is startling. At the request of Aboriginals certain reserves are dry. Efforts are made to police this. It is fraught with difficulties. Penalties for breach are substantial. The old laws which prohibited the consumption and supply of liquor to Aboriginals are no more. Drunkenness is no longer an offence, we rely on a system of taking people into protective custody. Liquor intrudes into so many aspects of Aboriginal life. The safety and well being of whole groups are threatened by liquor. Drunkenness is likely to intrude into

ceremonies — its impact upon Aboriginal health and education is well documented. It distorts traditional attitudes to tribal and family relationships. It threatens retention of old skills. It creates problems which Aboriginal law did not have to cope with, it leads I fear to abuse of women, it interrupts and jeopardises the education of children. And the young Aboriginal is faced not only with the inevitable dilemma of growing up in an essentially western oriented society subject to the stresses of conflicting cultures but he is a captive witness to alcoholic aberration. Whilst in the years I have worked in the Territory I have seen great advances — the recognition and granting of land rights, a new recognition of the Aboriginal, his culture and his capacity, increased funding in many areas and gradual understanding of the optimum ways to assist in employment, Aboriginal radio and the like. I fear that all the efforts may be frustrated by the flagon and the can and the worrying incidence of petrol sniffing amongst the young does not augur well for the future. It is a problem which has been recognised by all concerned for years and the worry is that a large contributing factor has been the legitimisation of drinking and the increases in funding, so much of which goes straight to the bars and liquor takeaways.

At times when I hear evidence of situations in which crime is committed I fear that Aboriginal aspirations are under threat and that all the apparent advances will wilt because drinking becomes a pre-occupation, if not continually, with disheartening regularity. The problem must not be pushed under the mat as though it is just an embarrassment or as though it is something Australian society accepts as inevitable, well established or acceptable. I wonder whether we really know the incidence of alcoholism? Do we understand its long term consequences? I don't believe it can be successfully tackled piecemeal by States and Territories, by Aboriginal bodies, by churches. It's a task which involves a host of factors, including advertising and marketing, sales control, outlet controls and legislation. I submit it justifies a carefully composed national task force to identify and report on critical problem areas and to make recommendations as to ways and means by legislation or otherwise whereby we do and are seen to be doing something in a positive manner to safeguard a race of Australian people.

I do not regard this as a parochial matter. It is an issue which in my view is of importance to all Australians. It's bad enough to talk of an alienated generation. It's more critical to envisage an alienated people.

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