Justice Kriewaldt, Aboriginal Identity and the Criminal Law

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The criminal justice system continues to encounter dilemmas about how it can appropriately accommodate Aboriginal Australians. Justice Martin Kriewaldt was a judge of the Northern Territory Supreme Court from 1951 to 1960. Little has been written about his legacy. However, his influence is important and his views continue to inform current debates in criminal justice. During his period on the Bench Kriewaldt J frequently struggled with the question of how to understand and distinguish Aboriginal people in relation to the criminal law. This article examines some of the reported and unreported judgments of Kriewaldt J and focuses attention on his attempts to identify Aboriginal people in relation to the criminal law.

Introduction

Justice Kriewaldt was a judge of the Supreme Court of the Northern Territory between 1951 and 1960.1 During this period he dealt with numerous Aboriginal defendants. Although little has been written about his legacy,2 his influence remains important. He was a supporter of the policy of assimilation;3 however, the Australian Law Reform Commission Report on The Recognition of Aboriginal Customary Laws (ALRC Report)4 suggested that he introduced cultural sensitivity to the Northern Territory jurisprudence. The aspects of the ALRC Report which referred in detail to Kriewaldt J’s judgments have since been referred to in numerous recent commentaries on the interface between Aboriginal people and the criminal law.5 His judgments continue to be quoted as authority on a range of issues both in the Northern Territory and in other Australian jurisdictions.6 In a number of his judgments regarding Aboriginal people, Kriewaldt J was concerned with how to understand and specify the difference between Aboriginal people and others and, from there, how to appropriately apply the non-

* The author wishes to thank Peter Rush and Stanley Yeo for their helpful comments on this article.
1 Except for occasional visiting judges, Kriewaldt J was the only judge in the Northern Territory during the period.
2 Sawer, “Judge Martin Kriewaldt: Nine Years of the Northern Territory Supreme Court” (1960–1962) 1 Adel L Rev 148. Essentially this article presents a general survey of the cases in which Kriewaldt J presided. Note also the article written by Kriewaldt J which was published posthumously: Kriewaldt, “The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia” (1960–1962) 5 UWALR 1. Justice Kriewaldt was also considered important beyond legal circles; see, eg, his glowing obituary in the local newspaper which was written by the (infamous) commentator on Aboriginal affairs, Douglas Lockwood: Lockwood, “Big Feller Judge Dies”, Northern Territory News, 14 June 1960, p 1.
Aboriginal law, most often criminal law, to Aboriginal people in consideration of those differences. To a large degree, it is apparent that Kriewaldt J’s analysis continues to underpin Northern Territory jurisprudential understandings of the application of provocation, sentencing principles and some evidence law to Aboriginal people. Other Australian jurisdictions also continue to be influenced by his analysis.

This article analyses the way in which Kriewaldt J explored Aboriginal identity in his judgments. In a number of the cases involving Aboriginal people, he was concerned with how to understand and specify the difference between Aboriginal people and others and, from there, how to appropriately apply non-Aboriginal law to Aboriginal people in consideration of those differences. In general, the article focuses on the criminal trial reports and cases involving the consumption of alcohol by Aboriginal people. These cases were often the ones where Kriewaldt J became most caught up in the moral and political tensions inherent in applying white law to Aboriginal people, especially in the Northern Territory in the 1950s. At one point, in 1956, he commented that after five years on the Bench he feels less qualified to express an opinion about “natives” than he did five years previously and that the older he gets the less he feels he knows. This comment confirms that he was deeply involved with the questions that confronted him.

The first part of this article examines the tension apparent in the judgments between formal and substantive equality in the application of white law to Aboriginal people. Following on from this is an examination of Kriewaldt J’s views of the principles to be considered when “judging” Aboriginal people in relation to the specific areas of sentencing, evidence and liquor consumption.

Tensions between formal and substantive equality: Different outcomes while the “law” stays the same

The tension between formal and substantive equality is a recurring theme throughout the judgments of Kriewaldt J. He struggled to apply the same law for white and Aboriginal people while at the same time recognising the need for difference in the manner of application and the result in order to ensure that substantive justice was delivered. Although this tension is perhaps best illustrated through the examination of particular legal issues, which will occur later in this article, this theme is a linking bridge joining his disparate legal concerns together. Justice Kriewaldt often talked, in a general sense, about this tension in his introductory address to the jury. For example, in Jangala, a murder case, he said to the jury at the commencement of the summing up, in what is one of his classic warnings: “[D]iscard from your mind any prejudices you may have against the accused because of his colour, and similarly discard from your mind any views you have regarding the wisdom of trying natives in the same manner as white people … the law at present is that an Aboriginal native of Australia in the Northern Territory is tried according to the same laws as a white person.”

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7 Included here are drinking and supply offences under the Licensing Ordinances and sentencing.
8 Jangala v Poore (1989) 96 FLR 34; 42 A Crim R 479 (provocation); Minority v The Queen (1992) 105 FLR 180; 59 A Crim R 227 (sentencing); Anunga v The Queen (1976) 11 ALR 412 (confessions). The “Anunga Rules” developed in this last case have been referred to in many subsequent cases. For a discussion of the subsequent cases, see Douglas, “The Cultural Specificity of Evidence: The Current Scope and Relevance of the Anunga Guidelines” (1998) 21 UNSW LJ 27.
9 For example, Police Powers and Responsibilities Act 2000 (Qld), s 251 and Moffa v The Queen (1997) 138 CLR 601 (case originated in South Australia).
10 Many of the cases Kriewaldt J presided over remain unreported. However, this research examines both his reported and unreported decisions. The author is indebted to the Socio-Legal Research Centre at Griffith University for providing funds so that she could access Kriewaldt J’s unreported judgments. She thanks the staff at the Northern Territory Supreme Court Library in Darwin for their assistance.
12 The author excludes any analysis of Kriewaldt J’s comments on provocation. His examination of provocation is detailed and will be treated in a separate article.
13 Jangala (unreported, NT Sup Ct, Kriewaldt J, 1 May 1956). In this case the accused hit another Aboriginal person with a stick during a fight.
14 Jangala (unreported, NT Sup Ct, Kriewaldt J, 1 May 1956), pp 115-116. See also Patipatu (1951–1976) NTJ 18 (1951) at 19 where Kriewaldt J similarly states that there is no difference between the law relating to “white” people and the law relating to “coloured” people. Note the extended commentary on Patipatu in Centralian Advocate (Alice Springs), 30 May 1951, p 4; 6 April 1951, p 12; and 18 May 1951, p 1.

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On the one hand, Kriewaldt J was concerned to point out that the law is the same for white people and Aboriginal people, while on the other hand there is an implicit recognition within the warning that white law may not be recognised (at least by jurors) as the fairest or “wisest” way to try Aboriginal people. There is a similar warning to jurors in the murder case of *Willie* where he advised:

“[T]he law requires you to judge this case as if the accused were a white person. If the deceased and the accused had been white, and the true verdict was one of ‘Guilty’ it will be your duty to bring in a verdict of ‘Guilty’ … You are not to be influenced by any views that you may hold regarding the wisdom of trying natives at all, or by your views as to the methods and the rules according to which they are tried.”

The address from *Willie* quoted above offers a slightly different insight into considering how Kriewaldt J understood Aboriginal people should be dealt with by white law. The jury is asked here to deal with the accused as *if he were a white person*. Essentially the jury is asked to see the accused as something other than he is, and this way of seeing the accused legitimises the transport of the accused into an alien legal culture. The address goes as far as to recognise that the law being applied is not culturally neutral: it is white. It recognises that jurors may have been concerned about whether white legal rules were the most appropriate way to judge Aboriginal people and, further, jurors concerns as to whether Aboriginal people should be tried at all by a white system of law. Although in the context of an address, these comments are raised as potential juror concerns; they were concerns held by Kriewaldt J as well.

In *Wheeler*, another case presided over by Kriewaldt J, the accused was charged with murder when a payback spear in the thigh caused death. In this case, Kriewaldt J went as far as to advise the jury that it may well be able to think of a better system for trying natives than the one that had been in place for 150 years but, again, he stated that “[w]hen a native is accused of a serious crime he must be tried in exactly the same way as if he were white”.

His aim in these addresses was both to avoid prejudice to the accused and, if necessary, to protect the accused from such prejudice. Justice Kriewaldt’s underlying concern was that jurors’ attitudes may adversely affect outcomes for Aboriginal people. In particular, he feared jurors would think that it makes no difference if Aboriginal people kill each other. Alternatively, he was concerned that jurors may believe that white people have no business being concerned in matters between Aboriginal people.

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There is an underlying irony in this discussion. Not only did the judge apply the one set of rules in different ways depending on whether the person was Aboriginal. In some matters there were actually differences in the rules or law to be applied to white people compared with the rules or law to be applied to Aboriginal people. Justice Kriewaldt explicitly recognised such differences in his judgment in *Ross v Chambers*. The central question in this case was

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15 Kriewaldt, n 2, at 15.
16 Kriewaldt, n 2, at 14. He comments that the Welfare Department offers insufficient protection in that it tends to focus on Aboriginal people charged with crime rather than taking preventive action.
17 *Ross v Chambers* (unreported, NT Sup Ct, Kriewaldt J, 5 April 1956), p 70. The applicants were attempting to sue for damages
whether “full-blood” Aboriginal people had standing to sue. After examining a number of ordinances, he found that such individuals did have standing to sue.23 He found that adult Aboriginal people living in the Northern Territory were not deprived of rights and privileges simply because of ancestry. However, he also found:

“[T]his general principle has … been substantially modified by legislation so that, in fact, an Aboriginal today has some rights and privileges denied to white persons but, conversely he is subject to some restrictions which do not apply to the white inhabitants of the territory.”24

An especially important difference in the rules, and thus the way the law was applied, was in the ultimate penalty for murder. For white people found guilty of murder, the inevitable punishment during the 1950s was the death penalty. The only way to avoid this was in situations where the Monarch exercised mercy.25 On the other hand, for Aboriginal people found guilty of murder, the penalty was one determined by the court on the basis of the evidence.26 Thus a finding of murder could lead to a much less severe penalty in the case of an Aboriginal accused compared to a white accused. This flexibility in sentence options for Aboriginal people left open the way for customary law to influence sentences in murder cases. In fact, in situations where an accused was convicted of murder the judge was actually required to

“receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty”.27

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Justice Kriewaldt was often inclined to consider such material regardless of the charge.28 This inclination is explored further in the next section of this article. In many other respects the law in relation to evidence and drinking alcohol was different depending on whether the accused was white or Aboriginal. These issues are also discussed later in the article.

Aside from situations where the legal rules differed, Kriewaldt J generally advocated that Aboriginal people should be understood differently. His support for a differing interpretation of law depending on whether the accused was Aboriginal or white was explored to some extent in Wheeler mentioned earlier. The jury was asked to consider the question of whether there was intention to cause death or grievous bodily harm in circumstances where a payback spear in the thigh caused death. (The spear was actually driven right through the victim’s thigh on this occasion.) The question for the jury was: Did the accused have the intention required to support a murder charge?29 Kriewaldt J explained to the jury:

“It is open to a jury to say that to use a spear with sufficient force that it goes right through the thigh shows intention to kill … [I]f you come to the conclusion that the accused intended to go further than native custom permits, that is that he intended to drive a spear right through the thigh … that would be inflicting grievous bodily harm and the proper verdict would be … murder. If you think it more likely that the intent was merely to inflict a wound within the limits of native custom … you may say a wound of that kind amongst aborigines is so commonly inflicted, and has so little effect that it is not fair to regard a wound of that description as amounting, amongst aborigines, to grievous bodily harm.”30

23 There are a number of instances where Kriewaldt J exercised his sentencing discretion in murder cases where there was a “defence” of tribal law or where payback had occurred. See, eg, his discussion in Mulparinga (1951–1976) NTJ 219 (1953). This case is also referred to as Charlie (see below at 211).
24 The intention to kill or cause grievous bodily harm was required for a conviction of murder in the jurisdiction of the Northern Territory during Kriewaldt J’s time on the Bench. See also Criminal Law Consolidation Act 1876 (SA), s 5.
25 Wheeler (unreported, NT Sup Ct, Kriewaldt J, 13 August 1959), p 197.

after being assaulted by a group of white men wielding stock whips.
22 Ross v Chambers (unreported, NT Sup Ct, Kriewaldt J, 5 April 1956), p 87.
24 Criminal Law Amendment Ordinance 1939 (No 17 of 1939) (NT), s 10.
25 Criminal Law Amendment Ordinance 1939 (No 17 of 1939) (NT), s 7. See Wally (1951–1976) NTJ 21 (1951) at 27 and Wadderrawri (1951–1976) NTJ 516 (1958) at 517 for a discussion of these rules; the jury was advised of this difference.
26 Criminal Law Amendment Ordinance 1939 (No 17 of 1939) (NT), s 8.
This comment to the jury is interesting because it demonstrates an attempt by Kriewaldt J to apply the white law while at the same time encouraging jurors to recognise that cultural perceptions of Aboriginal people may influence the legal concept of intention. This illustrates an attempt by Kriewaldt J to balance formal equality with substantive equality. The formal equality aspect was that the law being applied across the board to both Aboriginal and white people was that to support a murder charge an intention to cause death or grievous bodily harm needed to be proven. However, an outcome which reflected substantive equality was encouraged by Kriewaldt J when he attempted to ensure that the accused’s intention may be construed in different ways depending on whether the accused was Aboriginal or white.

The preceding discussion essentially explains why the ALRC Report described Kriewaldt J as injecting cultural sensitivity into the Northern Territory jurisprudence. Although he was supportive of the policy of assimilation and committed to applying the same laws to all, these aims were tempered by a recognition of cultural difference.

Sentence and penalty: Towards assimilation

In many cases Kriewaldt J examined the relevance of customary law to sentence and penalty. He asked how different (customary) ways of life or different outlooks should impact on the kind of penalty or sentence handed down by the court. His concerns on these issues are echoed in the case law of the 1990s. Justice Kriewaldt was influenced in the way he sentenced Aboriginal people by several key matters. First, he believed that although, in some situations, it was appropriate to be more lenient towards Aboriginal defendants than white defendants, it was never appropriate to be more severe. Secondly, he believed that customary law should always be considered in sentencing matters and that the status of the accused in the process towards assimilation was a key aspect in the assessment of relevance. Thirdly, he struggled with the conflicts involved in using a penalty to encourage assimilation.

Leniency

In Anderson the Aboriginal accused was found guilty of attempting to rape a white woman on the banks of the Todd River in Alice Springs. When interviewed by police, the accused pointedly explained that he committed the act because he had wanted to treat a white woman the way white men treat Aboriginal women. This case represents a rare example of a case where the victim of a violent offence committed by an Aboriginal person was white. In his sentencing remarks, Kriewaldt J referred to the pressure to address community outrage in relation to the crime and thus to be particularly severe with respect to penalty. Ultimately, he refused to be especially punitive in relation to the sentence. After noting the accused’s facility with the English language, the fact that he had some formal education and that he had been described by a witness as “sophisticated” and “substantially civilised”, he said:

“In general it has been my practice … to impose on natives sentences substantially more lenient than the sentence imposed on white offenders for similar offences … [a native] by reason of his colour should never receive a sentence more severe than a white person would receive in similar circumstances. His colour may work to his advantage but never against him.”

Thus in imposing a sentence of nine months’ imprisonment, he explained that he was attempting to impose a penalty similar to that which would have been imposed on a white person charged with a similar crime. This was a situation where, according to Kriewaldt J, as a result of the accused’s

References:
31 ALRC Report, n 4, p 302.
32 Criminal Law Amendment Ordinance 1939 (No 17 of 1939) (NT), s 8, which required such assessment in unlawful killing charges.
33 Activity & Peter (1951–1976) NTJ 312.
34 For example, Minerv (1992) 105 FLR 180; 59 A Crim R 227; Munungurr v The Queen (1994) 4 NTLR 63; Miyutataway (1996) 6 NTLR 44.
level of “civilisation”, there was no leniency in penalty demanded.

Similarly, in the case of Panaka, Kriewaldt J noted that the parties were “sufficiently civilised” that the sentence could be imposed “almost as if they were white”.

In Anderson, Kriewaldt J set down his views on this question quite clearly. He found:

“The nearer his mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime.”

There is an implicit recognition within both of these cases that once Aboriginal people can be recognised as white, they are “civilised” or assimilated and the need for special treatment, in the sense of more lenient penalty, evaporates.

**State of civilisation relative to a white standard**

Part of Kriewaldt J’s examination of the need for leniency of the penalty related, in each case, to his assessment of how the penalty would be understood by the accused and the accused’s community. He was of the view that this understanding depended on the particular accused’s level of civilisation. Justice Kriewaldt believed that the more “civilised” an individual was, the less lenient the penalty needed to be. The judge’s argument in support of this view was that the more “civilised” the individual, the more the wrongfulness of the deed would be understood and the more civilised the individual, the more the link between penalty and wrongfulness would be understood by both the accused and his community. It appears from the cases that the judge’s understanding of who was part of the accused’s community depended on his view of the accused’s level of civilisation. For Aboriginal people who were perceived to be “uncivilised”, the community was limited to the Aboriginal community to which they belonged. For those accused who had attained a higher level of civilisation, the community may include the white community.

Thus, in the case of Panaka the penalty for manslaughter was set at six months on the basis that the Aboriginals concerned had reached a “sufficient stage of civilisation” that they could understand that the use of weapons will invite punishment. Interestingly, the accused in this case was not recognised as entirely “civilised”, his inability to comprehend the passage of time meant that there was no need for a lengthy sentence. This latter aspect of the sentence can be understood as part of Kriewaldt J’s attempt to mitigate the penalty in response to cultural outlook, or level of “civilisation”. There was thus some leniency available because the accused was not entirely civilised.

Justice Kriewaldt found that the belief in and application of payback, especially when it involved the use of physical force, demonstrated a lack of “civilisation”. For the judge this practice represented a quandary and a real conflict with white law. On the one hand, it demonstrated a lack of civilisation but, on the other hand, its potentially serious violent consequences meant that it needed to be punished in an obvious way. When violent

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44 Panaka (1951–1976) NTJ 453 (1957). The case captured local interest and was extensively reported in the *Centralian Advocate* (Alice Springs), 30 April 1951, p 4; 6 April 1951, p 12; and 18 May 1951, p 1. In this case the victim died when the accused speared him in the thigh. Although Kriewaldt J was willing to recognise the thigh as a “customary place in the native custom of payback”, he found that the spearing actually resulted from bellicosity brought about by drunkenness. See also *Wilson v Porter* (unreported, NT Sup Ct, Kriewaldt J, No 150 of 1959). In this case Kriewaldt J also accepted there was a custom of sharing prevalent amongst Aboriginal people but found that there was no “customary” relationship recognised between the Aboriginal supplier of alcohol and the Aboriginal person supplied.


46 See also Jangala (unreported, NT Sup Ct, Kriewaldt J, 1 May 1956), sentencing remarks delivered 8 May 1956, where Kriewaldt J notes in relation to a murder with a stick: “The accused has by now sufficient knowledge of white law to know that he was acting illegally.”
payback was inflicted on Aboriginal settlements staffed by government officials, the legal conflict was magnified for the judge, as illustrated in the case of Wheeler. In this case, Kriewaldt J was confronted with a particularly difficult scenario involving the accused having “little contact with white civilisation” who had inflicted deadly payback on his victim on a government-managed settlement. That the penalty was not likely to be understood by the accused was viewed by the judge as being secondary to the aim of general deterrence. He held that “the sentences must give the Aborigines at Papunya [settlement] notice that spearing will not be tolerated.”

Justice Kriewaldt was prepared to recognise the destructive impact of contact with white people on Aboriginal people. He was able to recognise that on many occasions it was precisely the “civilising” contact with the white community that led to offences being committed. This is especially evidenced in the drinking cases to be discussed below. However, this view did not result in lenient sentences in cases where Aboriginal people had developed a history of offending as a result of a sense of dispossession. In Jangala, the accused had a long list of prior convictions. On the occasion of the offence, he was involved in a fight and hit the victim with a stick, causing his death. The judge referred to a report from the Native Affairs Branch which noted the “disastrous” impact of “civilisation” and that the accused had become an outcast from his own community and was recognised as a trouble maker in the white community. He sentenced him to three years for the crime of manslaughter and commented:

“[I]t is my duty to impose a more severe sentence than I normally impose for death resulting from fights between natives. The accused has by now sufficient knowledge of white law to know that he was acting illegally. His reputation amongst his fellow aboriginals and white community deprives him of any right to ask for leniency.”

Similarly in Wilson the accused was charged with supplying alcohol to other Aboriginals and was considered to have a problem with alcohol. His law-breaking activity was considered worse because of the fact that he had been in contact with white people most of his life, and had lived in Darwin since he was a child. As a result of his contact, he was assumed to understand the law in spite of the fact that it was precisely the contact with white society which had arguably led to the offences. No leniency on penalty was granted.

This judicial approach represents a dilemma. The more “civilised” the Aboriginal defendant was found to be, the higher the penalty. However, arguably, the more “civilised” the defendant was found to be, the more likely he was to offend. Knowledge of white law often meant dispossession and other “disastrous” effects. Ironically, usually only in cases such as Jangala and Wilson, where the accused’s offending was a response to the disastrous effects of civilisation, was the aim of specific deterrence deemed to be appropriate by Kriewaldt J. These decisions can be compared to the judicial approach taken in Namatjira. In relation to a charge of “supply liquor”, the accused was considered by the authorities to be sufficiently civilised so that he was no longer a ward (he was also a very popular artist in the white community). The judge was prepared to accept the fact that the accused had not entirely adopted the mode of life of white people and was straddling both Aboriginal and white outlooks. This straddling was held to be a mitigating circumstance.

**Penalty and assimilation**

Justice Kriewaldt also struggled with the role of punishment as an aid to the process of assimilation. Essentially the judge questioned whether harsher
penalties could be used to discourage “uncivilised” behaviours such as tribal punishment. Two of the more interesting cases dealing with the role of punishment and the conflict between white law and Aboriginal law were the 1953 cases involving the accused Tiger, Captain and Charlie. The deceased, Selly, had breached tribal law by revealing secrets to women. Tiger and Captain were elders and prevailed upon a group of young Aboriginal men, including Charlie, to kill Selly as a tribal punishment. Charlie carried out the killing. Tiger and Captain were charged with murder as accessories before the fact and were eventually acquitted by a jury. Charlie was found guilty of murder. The judge noted that Charlie and other members of the Ernabella community, where the incident occurred, had had little contact with “white civilisation” and that when Charlie had killed Selly the thought of being punished under white law did not occur to him. He also noted that the missions of Ernabella and Areyonga had had the effect of weakening belief in tribal law and that such beliefs would continue to decrease. Justice Kriewaldt’s sentencing comments in Charlie’s case reveal his anxiety about the role of punishment in these circumstances:

“I have considered one further aspect, namely, whether any punishment on this prisoner is likely to hasten or retard the assimilation of the native population resolved upon by the authorities entrusted with their welfare, and whether the effect on that policy of punishment or lack of punishment is a relevant consideration for me to take into account. I have come to the conclusion that, unless the legislature prescribes that this factor shall be taken into account, it would be wrong to increase or decrease an otherwise just sentence in order to give effect to a policy of accelerating the assimilation of the native population of the Territory.”

Justice Kriewaldt did receive some evidence in Charlie’s case from Pastor Albrecht from the Ernabella mission and officers of the Branch of Native Affairs. All were of the view that punishment was required in the specific case as a general deterrent. He was unsure whether a penalty was merited at all, but he found that the final sentence of 18 months imprisonment reflected both mercy in an individual sense and the need for general deterrence.

The Wheeler case offers a slightly changed view. Heard some six years after Charlie, in Wheeler Kriewaldt J describes the sentence “as an aid in the process of the assimilation of the Australian Aboriginal into the integrated community”. Thus he later accepted that one of the roles of the general deterrence aspect of penalty was the effect of assimilation. This change of view does not appear to be associated with any legislative modification.

Evidence issues

Several of Kriewaldt J’s cases focused on how the evidence of Aboriginal people should be dealt with. Most importantly, there is discussion in many of his cases about whether Aboriginal people should be considered as credible witnesses. The judge consistently commented on several matters which negatively affected the credibility of Aboriginal witnesses. The first matter related to the fact that

66 Ernabella is located in the northern part of South Australia and Areyonga is located to the south-west of Alice Springs. Both are Pitjanjatjara communities and there was in the 1950s (and continues to be) regular travel between the two places.
generally Aboriginal witnesses did not present evidence on oath. The second related to the way in which Aboriginal witnesses used the English language. The third, according to Kriewaldt J, was that the “native mentality” meant that Aboriginal people tended to be less credible. He also considered the impact of the “civilising” influence of non-Aboriginal people and the extent to which the level of civilisation affected the creditworthiness of Aboriginal testimony.

The oath

The legal requirement of swearing on the four gospels (the Bible) had the effect of excluding the evidence of non-Christians for some time. Justice Kriewaldt explained to the jury in Smiler that, soon after the arrival of white people, the law was altered so that non-Christians, including Aboriginal people, could give unsworn evidence after being warned to tell the truth. The unsworn evidence of Aboriginal people remained problematic for Kriewaldt J, in spite of this law, as there was no “spiritual sanction” or “higher tribunal” to encourage the telling of the truth. Although Kriewaldt J made it clear that the evidence of unsworn Aboriginal people was not to be “disregarded”, his warnings to juries about its lesser value, as compared to sworn evidence and the scrutiny to be applied to such evidence, were strong.

In Chambers a number of white men assaulted a group of Aboriginal people with stockwhips. The only evidence of the assaults was provided by the unsworn evidence of Aboriginal people. In this case Kriewaldt J commented:

“I have made attempts to formulate some principles relating to the reception of native evidence, but I have never done so with any degree of satisfaction … [O]ver and above the fact that evidence is given by natives, regard shall be had to the fact that evidence is unsworn … one should think twice before one decides to accept the evidence of natives.”

Justice Kriewaldt was here commenting on the interpretation of the Evidence Ordinance. This ordinance allowed the unsworn evidence of Aboriginal people to be admitted to the court, as long as there was a warning given to the witness that they should tell the truth. Section 9A(5) of the Evidence Ordinance specifically required that where Aboriginal people gave unsworn testimony, the jury should decide on the weight to be given to the particular evidence. This meant that where evidence was not given on oath it could be discounted for that reason alone. In Kriewaldt J’s interpretation of s 9A(5), the jury had to consider two things: not only the fact that the evidence was unsworn but also that the evidence was given by an Aboriginal person. Thus, in his view, Aboriginal people’s evidence was doubly problematic. The fact that there was no oath was one problem with respect to weight and credibility but the fact of Aboriginality presented another compounding problem. This second factor made the unsworn evidence of Aboriginal people ultimately less credible than the unsworn evidence of other groups.

Language and evidence

Much of Kriewaldt J’s commentary about language issues in relation to Aboriginal people and the legal system underlies a great deal of the linguistic discussion held on these questions in more recent times. Issues concerning the lack of (trained) interpreters, problems of domination and injustice in the police interview scenario, gratuitous concurrence and the novel — often confusing —
use of the English language, were all explored by Kriewaldt J in his judgments.86 These various issues are all inter-related.

Training systems for court interpreters of Aboriginal languages are a recent phenomenon and certainly did not exist in Kriewaldt J’s time.87 It seems that a range of untrained individuals were called to interpret from time to time, including missionaries,88 members of the accused’s or witness’s community and trackers. In the cases of Tiger and Captain and Charlie involving the tribal killing of Selly,91 Kenny, a member of the accused’s community, was co-opted by the Native Affairs Branch (superseded by the Welfare Branch) to interpret police statements given by the three accused men. Kenny was later called as the central prosecution witness (as a result of his interpreting duties) and gave unsworn evidence.92 In Muddarabba the Aboriginal tracker associated with the investigation doubled as the interpreter in obtaining a confession (at the policeman’s office) to a killing.93 In Jangala, where the accused hit the victim with a stick, causing his death, it appears that there was no interpreter used in extracting the accused’s confession to unlawful killing. His confession in this matter was typed by a police officer and “thumbprinted” by the accused in the presence of a member of the Welfare Branch.94 It was this confession which formed the basis of the evidence for the prosecution.95 Possibly those concerned in Jangala believed that no interpreter was necessary. However, Kriewaldt J points out in relation to the defendant’s statement:

“Some of the answers are obviously not direct answers. This may be due to misunderstanding or may be due to the way the native’s mind works. It does not make much difference.”96

There was clearly great difficulty in securing interpreters. Consequently, interpreters were often not used, even where it would seem clear that they were necessary to understand the Aboriginal accused or witness. Where they were used, they were untrained.97 In Chambers interpreters were not used at the trial and after hearing evidence from Aboriginal witnesses Kriewaldt J thought:

“[I]t should be recorded that the sounds that were uttered in the witness box by the native witnesses … were not translated into words by all who were present with equal facility … [Words] might as well have been uttered in a foreign language.”98

In this trial the judge suggested that the witnesses simply may not understand their questioners and that the whole process of question and answer was unlikely to extract from the “native” what he knew.99 The Chambers trial carried on regardless of these immense language problems. In other cases Kriewaldt J identified language issues such as the limited English vocabulary possessed by Aboriginal people, an issue which was (and continues to be) linked with the lack of interpreters. He noted the “obvious difficulties” with interrogating Aboriginal people which resulted from the lack of English vocabulary, and commented that Aboriginal people simply knew very few English words.100 In one case

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88 The judge sometimes called upon Pastor F W Albrecht of the Hermannsburg Mission to interpret; see Henson, n 69, p 218.


93 Jangala (unreported, NT Sup Ct, Kriewaldt J, 1 May 1956), p 121. (This case reminds us of the consent form with the thumbprint given by Gunner’s mother which was admitted in evidence in Cabillo and Gunner’s case. The print was argued to demonstrate the mother’s consent to allowing the government authorities to take over the care of her son; see Cabillo and Gunner v Commonwealth (2000) 174 ALR 97 at 496.)

94 Chambers (unreported, NT Sup Ct, Kriewaldt J, 15 December 1955), p 303. See also Namajukira v Raabe (1951–1976) NTJ 608 (1958) at 613 where Kriewaldt J notes the “utter impossibility to reproduce in typescript the effect of the evidence given by the majority of Aboriginals”.


96 Wally (1951–1976) NTJ 21 (1951) at 23.
he also noted that the possibility of an erroneous impression of evidence being gained was heightened when the question asked contained more than one topic or included adjectives and adverbs.101

Some of Kriewaldt J’s comments in Chambers illustrate examples of what is currently referred to as “gratuitous concurrence”. Eades describes this as the tendency of Aboriginal people to respond affirmatively to a white person’s question, especially to a white person in a position of power.102 Justice Kriewaldt noted that when Aboriginal people responded affirmatively to a question it may be simply an indication that the question is understood or that part of the question is understood, perhaps even that none of the question is understood or alternatively that part of a statement is agreed with.103 In short, he recognised that questions which invoked a simple affirmative response from an Aboriginal witness or suspect would not yield reliable evidence.

Justice Kriewaldt also noted the decrease in detail of evidence with each new repetition of the story. In particular, he noted that the evidence given to police was usually the most detailed but that the detail was reduced on progression through the legal system.104 Thus the greatest amount of detail was to be found at the police interrogation stage which is, arguably, the most private and least accountable setting. Perhaps the detail was on some occasions made up or the stories were suggested by police and agreed to by accused people. The irony implicit in the judge’s comment that detail slips away as the circumstances of the narrative telling become more public and accountable appears to be lost on the judge.105 Even in situations where the judge was prepared to accept that an Aboriginal witness had a sufficient grasp of English for the court process, his acceptance was qualified. In Doyle, a white man was charged with the theft of horses and two Aboriginal men gave evidence for the prosecution. Kriewaldt J noted: “[B]oth natives showed a sufficient grasp of English language that they could convey what they wanted to say, although often only in elliptical form.”106

Presumably, by “elliptical form”, Kriewaldt J was suggesting that words were left out and sentences were peculiarly constructed or incomplete. If this is what the judge meant here, the evidence would have required some discretionary filling-in on the part of the listener. Despite the “elliptical form”, the judge was able to glean “what they wanted to say”, presumably by doing the filling-in. Similarly in Tiger and Captain’s case Kriewaldt J noted that the evidence of the two accused was “broken” and sounded “bad” when read back from the transcript.107

Justice Kriewaldt’s articulation of the difficulties Aboriginal people faced in the court process, and of white people’s problems comprehending Aboriginal people’s evidence, was pioneering in many ways. Many of the language issues he recognised continue to be noted in current case law and commentary.108 The examples noted above demonstrate that the legal narrative of language required by the legal process was such that it tended to devalue the evidence offered by many Aboriginal speakers. This is a problem that continues.

Native mentality

Justice Kriewaldt’s views about the oath may seem merely old-fashioned whereas his views on the language issues involved for Aboriginal people in the legal process might be seen as trailblazing. Ultimately though, the central problem for him in

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105 There are alternative explanations for the decrease in detail, for example that at the police interrogation the accused’s memory is the most fresh.
106 Doyle (unreported, NT Sup Ct, Kriewaldt J, 21 October 1953), p 306.
receiving Aboriginal evidence appears to have been the “native mentality”. In spite of noting all of the above matters in relation to the practical difficulties for Aboriginal people of communicating in English, he found that Aboriginal witnesses were, often, simply not very intelligent:

“I do not want to say anything unkind about them … but … generally speaking their intellect is of a comparatively low standard.”

Confusingly, in spite of this perceived lack of intelligence, natives also possessed “native shrewdness” in the witness box. The lack of direct answers in Jangala’s police statement were considered by the judge to result from how the “native’s mind works”, although it is not clear here whether he thought that the indirectness arose from either lack of intellect or shrewdness. Similarly in Doyle the judge commented on the difficulties involved in following the “processes of the native mind.” In Kunoth the victim was reluctant to give evidence in relation to a sexual assault allegedly committed by her father. This is perhaps not surprising. However, Kriewaldt J attributed the victim’s reluctance partly to the fact that she was a “native”. He noted that the victim’s “Aboriginal blood”, which he calculated at five-eighths, had some effect on her reluctance. These comments demonstrate that he believed that Aboriginal people had a distinct way of thinking and talking about the world (in the context of providing legal testimony) which was largely related to their genetic inheritance.

Justice Kriewaldt recognised particular problems with confessions. On one occasion he noted that usually confessions from a white person would be accepted but that the jury should take particular care in accepting Aboriginal people’s confessions. This assumption appears to be based on an ambiguous mixture of reasons, first that language issues get in the way of reliable confessions and secondly that the native mentality makes them unreliable. These two aspects are, of course, linked. Throughout the 1950s there was a requirement that where police wished to speak with Aboriginal people (or later “wards”) in relation to an offence, the consent of and presence of a Protector of Aboriginals or the relevant welfare officer had to be secured. Again this was a measure designed to ensure that Aboriginal people were protected (controlled) by the state. Justice Kriewaldt interpreted consent in this context broadly. He argued that consent could be inferred from silence or lack of objection of the welfare officer. His interpretation was based on the view that the assumption should be that welfare officers should allow their “charges” to be questioned by police in the interests of protection of the welfare of Aboriginal people generally. In this way the judge effectively read down any protection offered to Aboriginal people in their discussions with police.

Justice Kriewaldt’s concern with Aboriginal people’s evidence and predisposition towards the

110 Dowling v North Australian Development Co Pty Ltd (unreported, NT Sup Ct, Kriewaldt J, 28 April 1960), p 70. In this case Aboriginals were called as witnesses in relation to the theft of some cattle by way of false branding.
111 Jangala (unreported, NT Sup Ct, Kriewaldt J, 1 May 1956), p 121.
112 Doyle (unreported, NT Sup Ct, Kriewaldt J, 21 October 1953), p 305.
113 Kunoth (1951–1976) NTJ 420 (1957) at 423. (Rosie Kunoth, the victim in this case, played Jedda in the Australian film of the same name.)
114 Sawyer understood that Kriewaldt J believed that “pure-blood” Aboriginal people had a different mental make-up to white men. See Sawyer in his preface to the following: Kriewaldt, n 2, at 1.

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evidence of white people is made plain when he discusses the evidence of two witnesses in the case of Mulparinga. Pastor Albrecht from Hermannsberg Mission (who was white) is described as having “unsurpassed” experience with Aboriginal people in the Alice Springs region. In the same case Allen Abbott (who was “part native”) is described as having “superior intelligence, [is] a Christian, [and] has lived all his life amongst natives and seemed to be familiar with their ways and outlook on life”. With respect to Abbott, his Aboriginality was essentially erased, the important aspect of his character was his Christianity. Abbott’s Christianity provides him with credibility. In this way the evidence of white people — or Aboriginal people who can be recognised as white — is privileged over and above the evidence of Aboriginal people (who cannot be recognised as white). The testimony of such individuals was privileged even in relation to evidence about customary law and outlook.

Summary

Few protections were offered to Aboriginal accused and witnesses by the legal process in the 1950s. There were frequently no interpreters, “support” for Aboriginal people at police interviews was provided by white officers from the Welfare Branch and the rules in relation to unsworn evidence generally worked against Aboriginal interests. Justice Kriewaldt did recognise the language difficulties confronting Aboriginal people and often attempted to deal with evidence fairly. He believed that it was problematic that Aboriginal people did not usually understand the proceedings or the material presented as evidence and that for the most part the trial proceeded “as if the accused was not present”. However, he could see no possible way to overcome these difficulties. Ultimately his overriding message to jurors appeared to be that Aboriginal testimony was essentially difficult to understand, often unintelligent and frequently unreliable.

Licensing Ordinances and the “drinking cases”

The impact of alcohol on Aboriginal individuals and communities and the way the law was then framed in an attempt to deal with that impact was the focus of a number of the “drinking cases” over which Kriewaldt J presided. The judge was repeatedly involved with the operation of the Licensing and Welfare Ordinances of the Northern Territory during the 1950s. His comments in these drinking cases provide rich insights into his views about Aboriginal people and the law. He held strong views on the need to legislate against the distribution of alcohol to Aboriginal people. His views about the problems of alcohol in the Aboriginal community and his understanding of the “evil” of supply of liquor to Aboriginal people provided the foundation for his view on the need to legislate to protect Aboriginal people from alcohol. Of greatest interest though, was Kriewaldt J’s understanding of the identity of Aboriginal people as “wards” and “half-castes” and how that identification process was undertaken. Although the underlying problems with intoxication were raised in a number of his cases on a range of issues which continue to be raised till this day, the cases which deal with the Licensing Ordinances of the period are particularly valuable in this discussion.

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123 Justice Kriewaldt often consulted with white experts. In this way the customs of Aboriginal people were referred to with respect while at the same time elders were not noted as being called in the cases to give evidence of local customs. Cowlishaw refers to similar problems and notes that this response leads to both “erasure and affirmation”: see Cowlishaw, Rednecks, Eggheads and Blackfellas (Allen & Unwin, 1999), p 147. Given the previous discussion of language difficulties, it is likely that elders, even if they had been called, would have been unable to give evidence in a legally recognisable (“regular”) form, thus calling anthropologists (and pastors) provided a way of hearing about “irregular things in regular terms”: see Geetz, “Local Knowledge: Fact and Law in Comparative Perspective” in Local Knowledge (Basic Books, 1983), p 224ff.
125 Kriewaldt, n 2, at 23.
126 Kriewaldt, n 2, at 23.
127 See, eg, Daniel (1997) 94 A Crim R 96, especially at 97 per Fitzgerald P. See also Langton "Rum, Seduction and Death: ‘Aboriginality’ and Alcohol” in Cowlishaw and Morris (eds), Race Matters (Aboriginal Studies Press, 1997), pp 77, 79, where Langton examines the construction of the drunken Aboriginal.
128 The most famous of the drinking cases is Namatjira v Raabe (1951–1976) NTJ 608 (1958) at 629. This case was later appealed to the High Court: Namatjira v Raabe (1959) 100 CLR 664.
Development of the Licensing Ordinances in the 1950s

Justice Kriewaldt’s cases relating to the supply of alcohol to, and the consumption of alcohol by, Aboriginal people were usually appeals from the police courts in relation to sentence. There was no jury involved in these cases and on some occasions the judge’s examination of the relevant law was quite complex. During his time on the Bench there were essentially two available supply or selling alcohol offences. The first was a general offence of selling liquor while unlicensed to do so. This offence, as a first offence, encountered maximum penalties of a £50 fine or six months’ imprisonment.129 The other relevant offence was that of selling or supplying liquor to an Aboriginal or half-caste Aboriginal person130 which was later changed to supplying alcohol to a ward.131 The penalties for the offence of supplying liquor to Aboriginal people, “half-castes” or wards changed several times during the 1950s. Between 1939 to 1952 there were three changes to penalty and on each occasion the penalty was increased.132 In 1951 the offence of supplying liquor to an Aboriginal or “half-caste”, as a first offence, would have incurred a sentence of imprisonment for one to three months.133 In 1952 the penalty for selling or supplying to Aboriginal people increased to a minimum term of six months’ imprisonment for a first offence.134

Later, in 1952, in order to emphasise the seriousness of supplying alcohol to Aboriginal people, there was a specific subsection added, to amend the offence. The new amendment stated that the penalty could not be mitigated.135 In the same year the only defence to such a charge was that the alcohol was required for medicinal purposes.136 It was not until 1957 that mitigating circumstances were added to the Licensing Ordinance along with another defence to the charge. As a result of the 1957 amendments, the Supreme Court (but only the Supreme Court) could recognise extenuating circumstances or the youth of the seller or the supplier in mitigation of the penalty on a first offence.137 The defences available in 1957 included a defence that the supplier or seller “had no reason to believe and did not believe that the person to whom the liquor was supplied was a ward”.138 This short history suggests changing attitudes but, ultimately, throughout the 1950s, serving alcohol to an Aboriginal person entailed great risk to the supplier.139

In 1950 and 1951, the first two years of Kriewaldt J’s period on the Northern Territory Bench, the judge appears to have had a more sympathetic attitude with respect to mitigation of penalty. In the 1951 case of Stokes v Pryce he had allowed mitigation to the penalty associated with a supply charge, finding that a general power to mitigate sentences existed under the Justices Ordinance.140 However, for the majority of his years on the Bench, Kriewaldt J regarded suppliers of liquor “to a native as a disgrace to the community and as [people] entitled to no consideration”. He was unsympathetic to offenders and hence ungenerous in accepting pleas in relation to mitigation of sentence. In Rasmussen, the white

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129 Licensing Ordinance 1939–1949 (NT), s 131.
130 Licensing Ordinance 1939–1949 (NT), s 141. Note it was also an offence for an Aboriginal person or a ward to drink or be in possession of intoxicating liquor: see Aboriginals Ordinance 1918–1933 (NT), s 49A.
131 Mathews v Stokes (1951–1976) NTJ 59 (1951) at 60; Dowling v Bowie (1951–1976) NTJ 100 (1952) at 102. In these two cases legislated penalty increases are noted to have occurred in 1941, 1949 and 1952.
132 Mathews v Stokes (1951–1976) NTJ 59 (1951) at 60; Dowling v Bowie (1951–1976) NTJ 100 (1952) at 102. In these two cases legislated penalty increases are noted to have occurred in 1941, 1949 and 1952.
133 Licensing Ordinance 1939–1949 (NT), s 141. The selling of alcohol to Aboriginal people was usually undertaken by unlicensed individuals so the police practice in 1951, early in Kriewaldt J’s period on the Supreme Court Bench, was to charge both matters concurrently: see Mathews v Stokes (1951–1976) NTJ 59 (1951) at 61
134 Licensing Ordinance 1939–1952 (NT), s 141. See Dowling v Bowie (1951–1976) NTJ 100 (1952) at 101 for some discussion of this change.
135 Licensing Ordinance 1939–1952 (NT), s 141(3). This amendment probably resulted in response to Kriewaldt J’s judgment in Stokes v Pryce (unreported, NT Sup Ct, Kriewaldt J, No 89 of 1951). See also Dowling v Bowie (1951–1976) NTJ 100 (1952) at 102 for Kriewaldt J’s views of his influence on the change.
136 Licensing Ordinance 1939–1952 (NT), s 141(2).
137 Licensing Ordinance 1939–1957 (NT), s 141(5)(a) and (b).
138 Licensing Ordinance 1939–1957 (NT), s 141(2)(b). This defence was likely to have been developed in response to the arguments discussed by Kriewaldt J in Dowling v Bowie (1951–1976) NTJ 100 (1952).
139 Dowling v Bowie (1951–1976) NTJ 100 (1952) at 110.
140 Justice Kriewaldt found that a general power to mitigate sentences existed under the Justices Ordinance 1928 (NT), s 75(7); see Stokes v Pryce (unreported, NT Sup Ct, Kriewaldt J, No 89 of 1951).
acquitted convicted of supply was very young and drunk at the time of offering alcohol to an Aboriginal man in exchange for a “lubra.” Justice Kriewaldt did not accept that there were extenuating circumstances of youth. Ignorance of the legislation pleaded by a white supplier from another State was not a mitigating factor; even where the supplier was an Aboriginal person ignorance did not mitigate penalty. In fact, his strong position on penalty existed regardless of whether the supplier was white or Aboriginal. Although he recognised his sentencing task in this context as one of reconciling “the need for the protection of the aborigine against alcohol with the instinctive repugnance against excessive punishment,” the appeals where mitigation was accepted to reduce sentence were rare.

Justice Kriewaldt’s position in the drinking cases can be contrasted to his views in relation to other offences involving Aboriginal people. In the drinking cases the judge rarely found that leniency was appropriate. The “state of civilisation” of the Aboriginal supplier was rarely raised. Perhaps one of his reasons for this contrasting position with respect to the drinking cases resulted from a view that Aboriginal people involved in drinking alcohol must have reached a certain “state of civilisation” where they would understand the punishment being meted out to them. There may have been other reasons though, and these are discussed below.

Legislate or Aboriginal people will perish: The evil of supply

It appears that there were two main reasons why Kriewaldt J supported the prohibition on the supply and sale of alcohol to Aboriginal people and a strict upholding of the sentencing regime. First, he accepted that the majority of the violent crimes involving Aboriginal people that came before him involved alcohol and that alcohol use amongst Aboriginal people created a social problem. Secondly, he believed that alcohol was assisting the Aboriginal population to decline in number. He does not clarify how he understood the link between alcohol and population decline; it may be as a result of the deadly violence inflicted whilst under the influence, disease resulting from alcohol consumption or some other matter. In considering the Licensing, Aboriginal and Welfare Ordinances in the supply case of Namatjira, he noted:

“[T]hose of us who have lived for more than a year or two in the Territory realise that legislation for the protection and advancement of Aborigines is essential if they are to escape extinction.”

Justice Kriewaldt passionately believed that the prohibition legislation had the protection of Aboriginal people as its core aim. He was shocked at the thought that some did not seem to see the absolute necessity of the legislation. In his view:

“[T]he objects intended to be achieved are not limited, in my opinion, to the evil effects of the supply of alcohol on the occasion of any particular offence, but extend to the creation of conditions in the community which will minimise, as far as possible, the number of occasions on which alcohol is supplied to aborigines.”

142 In this case the word “lubra” appears to refer to the Aboriginal man’s Aboriginal wife.
143 Rasmussen v Hook (unreported, NT Sup Ct, Kriewaldt J, 5 April 1956), p 66.
144 Sinclair v Kelly (unreported, NT Sup Ct, Kriewaldt J, 9 May 1956).
145 Tobey v Porter (unreported, NT Sup Ct, Kriewaldt J, March 1959), where the Aboriginal person was from Western Australia and did not think the law applied to him.
146 Wilson v Porter (unreported, NT Sup Ct, Kriewaldt J, No 150 of 1959), p 295.
147 Lewis v Metcalfe (1951–1976) NTJ 639 (1959) at 643, where alcohol was provided as a reward for catching crabs. Compare this with Namatjira v Raabe (1951–1976) NTJ 608 (1958) at 629 where the fact of existing between two cultures was considered in mitigation.
148 The author’s researches have located two cases where mitigation was accepted: Stokes v Pryce (unreported, NT Sup Ct, Kriewaldt J, No 89 of 1951) discussed previously and Namatjira v Raabe (1951–1976) NTJ 608 (1958) at 629, where the straddling of two cultures was seen to mitigate penalty.
149 Note the earlier discussion of sentence and penalty in this article.
151 See Welfare Ordinance 1953 (NT) to be read with Licensing Ordinance 1939–1957 (NT), s 141.
153 Wilson v Porter (unreported, NT Sup Ct, Kriewaldt J, No 150 of 1959), p 294; “[I]t is a matter of some surprise to me that there are persons in Australia, professing to have the welfare of aborigines at heart, who are not in agreement with the prohibition of the supply of liquor to wards.”
154 Lewis v Metcalfe (unreported, NT Sup Ct, Kriewaldt J, 5 May 1959), p 3. See also Wilson v Porter (unreported, NT Sup Ct,
The legislative attack on consumption of alcohol by Aboriginal people was two pronged: the creation of offences for supplying alcohol to Aboriginal people and the disallowance of Aboriginal people from drinking liquor.\(^{155}\) Prohibition did not seem to be considered by Kriewaldt J as an inevitably permanent state of affairs. It seems that it was akin to a “special measure” to assist Aboriginal people to get through the difficult phase of assimilation. Presumably once assimilation was complete, such restrictions would become irrelevant. He noted in _Lewis_, where a white publican had supplied liquor to an Aboriginal ward:

“[I]n the present state of assimilation of aborigines, it is essential that, so far as legislation can achieve that object, all avenues of supply of liquor to aborigines be regarded as dangerous.”\(^{156}\)

Thus prohibition was a necessary but temporary measure to reduce violence between Aboriginal people and to check the destruction of the Aboriginal population. Fundamentally, Kriewaldt J viewed the alcohol prohibition as a protective mechanism.

### Classifying identities

The _Licensing Ordinance_ was required to be read with the _Aboriginals Ordinance_ and later the _Welfare Ordinance_. The _Licensing Ordinance_ made it an offence to supply alcohol to an Aboriginal or “half-caste” Aboriginal person (from 1957, to supply to a “ward”). Justice Kriewaldt was on the Northern Territory Supreme Court Bench during three shifts in the legislative defining of Aboriginal people. Until 1953 it was an offence to supply alcohol to an Aboriginal or half-caste Aboriginal. For the purposes of the _Aboriginals Ordinance_ until 1953, a half-caste referred to “any person who is the offspring of parents, one but not both of whom is an Aboriginal and includes any person one of whose parents is half-caste”.\(^{157}\) In order to decide whether a person was a half-caste, a supplier (or at a later stage in the process, a judge) could decide by a personal inspection of the individual.\(^{158}\) This understanding reflected conceptions related directly to calculation of “blood” mix and the visible appearance (darkness of skin) of the Aboriginal people involved.\(^{159}\) The Chief Protector of Aborigines had power to deem a person not a half-caste and thus they would not be subjected to the range of prohibitions confronting Aboriginal people in relation to alcohol.\(^{160}\) Essentially the Chief Protector had power to erase a person’s aboriginality for all practical purposes relating to white law.

In 1953 the word “half-caste” was no longer utilised in the _Aboriginals Ordinance_ but this change in terminology would have made little difference to the application of the prohibition on supply of alcohol to Aboriginal people under the _Licensing Ordinance_.\(^{161}\)

The _Welfare Ordinance_ came into effect in 1957 and repealed the _Aboriginals Ordinance_. This was the legislative source of restrictions for those deemed to be wards. Although this legislation was on its face neutral, soon enough it became clear that wards were Aboriginal people. In _Namatjira_’s case the defence counsel argued that the amendments to the _Welfare Ordinance_ in 1957 had led to 15,211 Aboriginal people being declared wards in the _Government Gazette_ through administrative channels.\(^{162}\) Only six Aboriginal people were not

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\(^{155}\) _Licensing Ordinance_ 1939–1957 (NT), ss 140 and 141.

\(^{156}\) _Lewis v Metcalfe_ (unreported, NT Sup Ct, Kriewaldt J, 5 May 1959), p 3.

\(^{157}\) _Aboriginals Ordinance_ 1918–1947 (NT), s 3.

\(^{158}\) _Aboriginals Ordinance_ 1918–1947 (NT), s 60. Justice Kriewaldt carried out such assessments from time to time in various judgments: see _Kunoth_ (1951–1976) NTJ 420 (1957) at 423: “She is fairly dark in colour but she is obviously not a full-blood.” See also Read, _A Rape of the Soul so Profound_ (Allen & Unwin, 1999), p 21 for a discussion of the problems associated with this approach.

\(^{159}\) Remnants of this attitude appear in some of Kriewaldt J’s judgments, for example _Kunoth_ (1951–1976) NTJ 420 (1957) at 423 referred to previously. See also _Namatjira v Raabe_ (1951–1976) NTJ 608 (1958) at 621.

\(^{160}\) _Aboriginals Ordinance_ 1918–1947 (NT), s 3A.

\(^{161}\) _Aboriginals Ordinance_ 1953 (No 2) (NT), s 3. “Aboriginal” was defined as “(a) an aboriginal native of Australia, (b) a person who lives after the manner of … persons described in paragraph (a), … (d) a person, at least one of whose ancestors was a person described in paragraph (a).”

\(^{162}\) They were declared wards pursuant to the _Welfare Ordinance_ 1953–1957 (NT), s 14(1). See _Namatjira v Raabe_ (1951–1976) NTJ 608 (1958) at 617; _Walters v Fay_ (1951–1976) NTJ 466 (1957) at 471.
declared wards.163 People could be declared wards if, by reason of manner of living, inability to manage affairs, standard of social habit or personal associations, they stood in need of special care. The process was not clearly described in the legislation.164 In circumstances where the person was not deemed to be a half-caste or declared a ward, the person was no longer caught under the *Aboriginal Ordinance* or the *Welfare Ordinance*. The most obvious practical effect of this exclusion was that the Aboriginal person was allowed to consume alcohol. The broader underlying message of exemption from the *Aboriginal Ordinance* or the *Welfare Ordinance* was that the person was considered “civilised”, or civilised enough that their aboriginality could be erased.

In the period before 1957, exempted Aboriginals sometimes carried with them exemption certificates (or “dog collars”165) signed by the Chief Protector, which they used to purchase alcohol. After 1957 similar certificates were often carried which stated the person was not a ward and these were signed by the Director of Welfare.166 Sometimes exemption certificates were not carried and the Chief Protector and later the Director of Welfare (and the police) kept lists of “privileged” individuals which they would use to determine whether a person was exempt and thus whether the supplier of alcohol should be charged.167 In *Dowling* the publican argued that he thought that the person he had supplied alcohol to was an exempt Aboriginal and that he believed this because he had seen the person’s name on one of the police lists.168 The person was actually non-exempt (and part of a police entrapment operation) and Kriewaldt J found the publican guilty of supply by applying a strict liability test to the supply charge.169

More commonly, and tragically, there were many case examples of exempted Aboriginal people charged with supplying alcohol to non-exempt family and friends.170 Justice Kriewaldt’s strict adherence to the letter of the law in the drinking cases can again be contrasted with his attitudes towards other offences. While he was prepared to take a view which favoured Aboriginal defendants in relation to, for example, sentencing in unlawful killing cases171 or the intent required to establish murder,172 this kind of favourable treatment was much more rarely present in the drinking cases. He clearly supported the *Licensing Ordinances* and this support inevitably meant that he, at least tacitly, supported the *Aboriginal* and *Welfare Ordinances*.

Justice Kriewaldt was aware of the controversies surrounding the passage of the various reincarnations of the *Aboriginals Ordinance* and *Welfare Ordinance* and had made a point of engaging with the debate surrounding them.173 He had the chance to attack the *Welfare Ordinance* in *Namatjira’s* case where the key argument of the appellant was essentially a constitutional one. The defence counsel questioned the process of declaring wards and argued that the *Welfare Ordinance* 1953–1957 was ultra vires because it was not a law for the peace, order and good government of the Northern Territory.174 Justice Kriewaldt did not accept this proposition in spite of appearing to accept the questionable processes that led to wardship. It was his view that, when the *Welfare Ordinance* was passed, it was concerned with helping and guiding Aboriginal people and with the welfare and protection of Aboriginal people while they were being assimilated.175

The 1957 shift from the *Aboriginals Ordinance* to the *Welfare Ordinance* was brought about by a change in thinking about Aboriginal people. No

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163 They avoided wardship by invoking the exception clause under the *Welfare Ordinance* 1953-1957 (NT), s 14(2). See *Namatjira v Raabe* (1951–1976) NTJ 608 (1958) at 617.
165 Such certificates were known as dog collars. See *Dowling v Bowie* (1951–1976) NTJ 100 (1952) at 105.
167 *Dowling v Bowie* (1951–1976) NTJ 100 (1952) at 107. See also *Welfare Ordinance* 1953–1957 (NT), s 16(1).
169 Note this case arose before the 1957 amendments to the defences. *Dowling v Bowie* (1951–1976) NTJ 100 (1952) was appealed to the High Court where the conviction was quashed on the basis that the prosecution had not proved that the person supplied was non-exempt; *Dowling v Bowie* (1952) 86 CLR 136. The judges of the High Court noted (at 136) that there were, at this time, some 500 names on the police lists.
170 See, eg, *Potts v Porter* (unreported, NT Sup Ct, Kriewaldt J, March 1960) where Potts (who was not a ward) supplied alcohol to his uncle (who was a ward).
longer were Aboriginal people to be identified as a result of the percentage of Aboriginal blood they possessed or their racial ancestry. From 1957 they were categorised according to the level of civilisation they had attained. In 1957 Kriewaldt J was able to recognise three classes of Aboriginal people:

“[T]here was a small proportion [who] had not had any or very little contact with white civilisation … a small proportion who had substantially adopted a way of life more nearly resembling that of white persons than the way of life their ancestors followed ... [F]inally there was an overwhelming majority who, although affected by white people, still retained a good deal of the outlook on life of their ancestors and followed their manner of living.”

Presumably only those Aboriginal people who had substantially adopted a white lifestyle would escape wardship, although this decision was apparently completely discretionary.177 It is possibly Kriewaldt J’s judgments in the drinking cases that most clearly set out his understandings of Aboriginal identity and thus his view of the relationship of Aboriginal people to white law.

Lessons to be learnt from Kriewaldt J

Justice Kriewaldt’s judgments document an important period of legal history from which a great deal can be learnt. The judge was well aware of the fact that Aboriginal people were being subjected to a law that was essentially alien. He attempted, in many ways, to ensure that Aboriginal people were not unfairly dealt with as a result of this subjection. The judge was particularly concerned about the prejudices of juries. In the 1950s (and, as a practical reality, even now)178 Aboriginal people were not (and are currently rarely) members of juries. One method that Kriewaldt J used to try to ensure a fair response from juries was to urge them to deal with Aboriginal accused as if they were white. Although this type of direction is unlikely to be considered appropriate today, his judgments do demonstrate the continuing need to recognise the possible prejudice of white (or non-Aboriginal) jurors towards Aboriginal defendants.

Justice Kriewaldt made an effort to contemplate aspects of customary law in consideration of a just sentence in all matters. This was an indication of his understanding of the foreignness of white law to Aboriginal people and his striving to make the impact of the law fair. There were tensions inherent in his approach to sentencing in that he often used considerations of customary law to encourage both substantive equality and assimilation. However, in spite of these tensions, his judgments remind us of the importance of considering customary law as part of a just sentencing process and the current need to resolve the position in relation to the inclusion of customary law in sentencing.

Justice Kriewaldt was uncomfortable with Aboriginal evidence as a result of lack of oath and language difficulties. However, his main problem with the evidence of Aboriginal people was the “native mentality”. Fundamentally, he believed that Aboriginal defendants thought incompatibly with the white legal system and frequently did not understand the legal process in which they were involved.179 There are two main issues which he was concerned with here. The first is that in order to promote justice, Aboriginal people should be provided with properly trained interpreters. The problem of lack of interpreters continues in spite of efforts to address it. The second issue is that even with interpreters, some Aboriginal people will not understand their involvement in the criminal justice system.180 Despite Kriewaldt J expressing this concern, formal practice has yet to be established which requires tribunals to ensure that Aboriginal defendants understand the legal process in which they are involved, especially in the lower courts.181

The three classes of Aboriginal people Kriewaldt J identified in Namatjira’s case, and

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178 See, eg, ALRC Report, n 4, paras 586–595.
discussed earlier in this article, continue to inform modern legal understandings of Aboriginal identity. His judgments are precursors to the current situation whereby the way tribunals treat Aboriginal people is defined by their perception of how “civilised” an Aboriginal person is in relation to white society. In this sense, the judgments help to explain the basis of many current views about Aboriginal difference in the criminal law.

Conclusion

In spite of the fact that Kriewaldt J’s views were often rooted in assimilationist discourse, it is clear that he articulated the foundations of many contemporary accounts of Aboriginal difference in relation to the criminal law. A careful study of those views is therefore invaluable in informing and gaining further insights into those contemporary accounts. There is, however, still much more to be learnt about the way he viewed Aboriginal people and the impact that such views have had upon current criminal law. For example, since the judge was actively involved in the social debates about Aboriginal people during the 1950s, it would be invaluable to learn more about his communications with Aboriginal people, legal practitioners, academics and anthropologists who may have influenced him. Frequently, Kriewaldt J’s judgments sparked controversy in local newspapers of the era and it may also be beneficial to analyse this dialogue.

Considering the ongoing discussion about Aboriginal identity in the criminal law and wider social debates about the Stolen Generations, further research of Kriewaldt J’s legacy is likely to assist in addressing many current concerns about how to provide just legal responses to Aboriginal people who are caught up in the criminal justice system.

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183 *Jabarula v Poore* (1989) 96 FLR 34; 42 A Crim R 479 (provocation); *R v Minor* (1992) 105 FLR 180; 59 A Crim R 227 (sentencing); *R v Anunga* (1976) 11 ALR 412 (confessions). The “Anunga Rules” developed in this last case have been referred to in many subsequent cases: see Douglas, n 8. See also Leader - Elliott where he notes that enclave Aboriginal communities may be treated differently to other communities: Leader - Elliott, n 5, at 89.
184 For specific examples of Kriewaldt J’s assimilationist views see his examination of the definition of “ward” in *Namatjira v Raabe* (1951–1976) NTJ 608 (1958), his comments on sentence in *Wheeler* (unreported, NT Sup Ct, Kriewaldt J, 13 August 1959), and his discussion about the creditworthiness of Aboriginal witnesses in *Mulparinga* (1951–1976) NTJ 219 (1953).
185 See *R v W* [1988] 2 Qd R 308 at 319 in relation to defining Aboriginal people as “tribal”, “semiregional” or “urban” for the purpose of applying the Anunga Rules. See also *Cubillo and Gunner v Commonwealth* (2000) 174 ALR 97 at 496 where the judges preferred other evidence over the testimony from Aboriginal witnesses. This preference is discussed in Ransley and Marchetti, “The Hidden Whiteness of Australian Law: A Case Study” (2001) 1 GLR 139 at 146. In relation to sentencing, see, eg, the judgment of Fitzgerald P in *R v Daniel* (1997) 94 A Crim R 96 at 97–129, where he refers to a number of recent sentencing cases involving Aboriginal defendants. Some of the examples he quotes take similar approaches to Kriewaldt J with respect to matters involving alcohol.