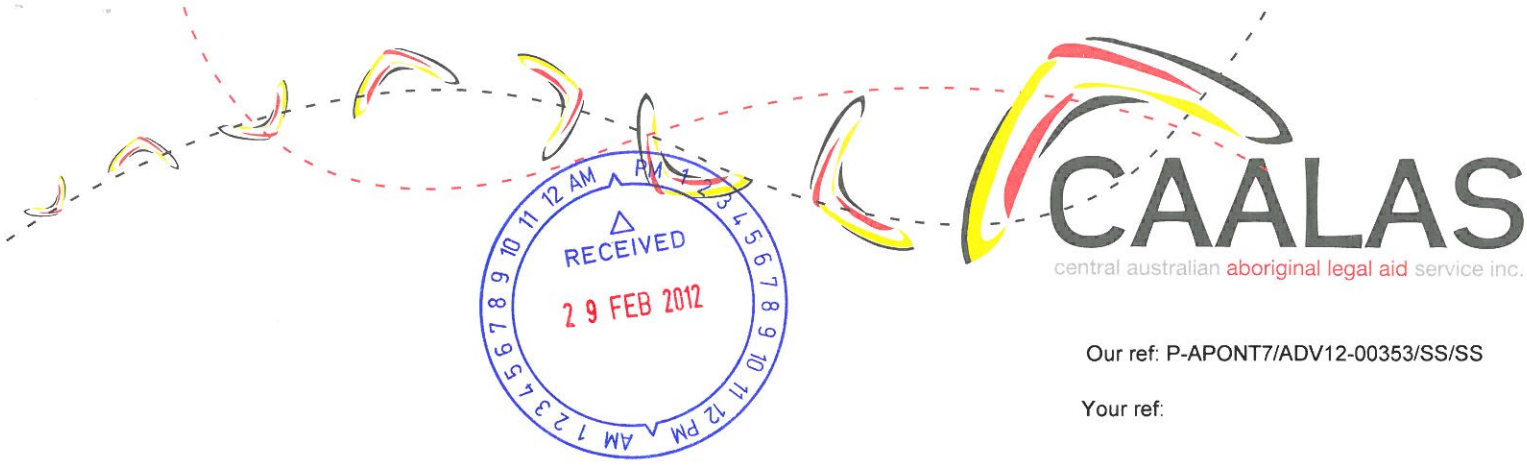

Our ref: P-APONT7/ADV12-00353/SS/SS

Your ref:

24 February 2012

Providing legal aid and assistance to Aboriginal people of the Central Australian Region:

- *Criminal*
- *Civil*
- *Family*
- *Adult Guardianship*
- *Community Legal Education*
- *Mental Health*
- *Restorative Justice*
- *Welfare Rights*
- *Youth Justice*

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

VIA EMAIL: community.affairs.sen@aph.gov.au

Dear Senator Moore,

RE: CAALAS response to questions on notice from Committee hearing

The Central Australian Aboriginal Legal Aid Service (**CAALAS**) writes to respond to questions taken on notice from our appearance before the Standing Senate Committee on Community Affairs ('**the Committee**'). CAALAS greatly appreciated the opportunity to provide evidence to the Committee to its Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills at its Alice Springs hearing on 21 February 2012.

Recent Speech of Chief Justice Riley

In the course of CAALAS giving evidence in opposition to the exclusion of considerations of cultural practice and customary law from bail and sentencing, Senator Crossin referred to a recent speech of Chief Justice Riley on the same topic. CAALAS committed to providing a copy of that speech to the Committee. Please find attached a copy of Chief Justice Riley's speech of 30 May 2011 at the Centenary Ceremonial Sitting at the Supreme Court of the Northern Territory. The speech can also be accessed at http://www.supremecourt.nt.gov.au/media/documents/Ceremonial_30052011_CentenarySCNT.pdf. Specifically, pages 15 and 16 provide commentary from the Chief Justice in relation to the impact of the exclusion on sentencing Aboriginal offenders.

Concerns about Criminal Repercussions for Disciplining Children

Senator Boyce raised that during hearings in Ntaria on Monday 20 February 2012, there was universal concern that parents could not discipline their children for fear of criminal repercussions. Senator Boyce asked CAALAS if there have been any recent cases in which clients have faced charges as a result of disciplining children.

CAALAS has reviewed its recent files from Ntaria and there are no matters that involve criminal charges being preferred against parents disciplining their children.

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CAALAS family law practitioners advise that they have not seen any matters from Ntaria in which children have been the subject of care and protection investigations or proceedings instigated by the Department of Children and Families as a result of unreasonable disciplining.

CAALAS has also spoken with the principal at the school at Ntaria (Cath Greene) who advised that she is uncertain from where these community concerns arose. She confirmed however that the community does have concerns about the risk of negative repercussions for disciplining children. Ms Greene further advised that NT Police in Ntaria have been vocal with the community in assuring them that parents are allowed to discipline their children within reason.

It is understood that there were a number of property offences in Ntaria during the school holidays. Following this offending, the community had a meeting to discuss potential community and individual responses. It has been suggested by both Ntaria school and police that this may have generated feelings in the community about the need for and incapacity of parents to discipline their children.

CAALAS spoke to the OIC at Ntaria Police station, Melissa Sanderson. Officer Sanderson, who has been in Ntaria since December, indicated that she has not previously been approached by community members who were concerned about police intervention in response to disciplining their children.

The NT Criminal Code specifically states that a parent or guardian of a child, or a person in the place of such parent or guardian, may justifiably apply force (that is not such force as is likely to cause death or serious harm) to a child for the purposes of discipline, management or control (subsection 27(p)). Additionally, that person may, either expressly or by implication, delegate that power to another person who has the custody or control of the child either temporarily or permanently (section 11).

CAALAS is unable to provide any additional information to the Committee in relation to this issue.

CAALAS welcomes the opportunity to assist the Committee with any additional enquiries. Please do not hesitate to contact the CAALAS Advocacy Manager, Shanna Satya on 8950 9343 or shanna.satya@caalas.com.au. We look forward to the Committee's report and recommendations.

Yours faithfully
CENTRAL AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC.

SUPREME COURT OF THE NORTHERN TERRITORY
STATE SQUARE, DARWIN

CENTENARY CEREMONIAL SITTING

TRANSCRIPT OF PROCEEDINGS

COURTROOM 1, MONDAY 30 MAY 2011 AT 2:58 PM

PRESIDING JUDGES

The Hon Chief Justice T Riley
The Hon Justice D Mildren RFD
The Hon Justice S Southwood
The Hon Justice J Kelly
The Hon Justice J Blokland
The Hon Justice P Barr
The Hon Justice J Reeves
The Hon Justice J Mansfield AM
The Hon Justice B R Martin
The Hon Acting Justice Trevor Olsson AO MBE RFD ED

In attendance:

The Hon Justice Susan Kiefel
The Hon Chief Justice John Doyle AC
The Hon Chief Justice Higgins AO
The Hon Justice David Ashley
The Hon Brian F Martin AO MBE QC
The Hon John F Gallop AM RFD QC
The Hon David Angel QC
The Hon Sally Thomas AM
The Hon Chief Justice Geoffrey Eames QC

Transcribed by:
Merrill Corporation

The cordiality of relationships between the Administrator as head of the Executive and the Judge, as it then was, constituting the Court has over time varied in both content and intensity.

One hundred years ago that relationship could not have been more cordial as the acting Administrator and Mr Justice Mitchell were one and the same person. It was he whom we see on the ladder in the well-known photograph of the proclamation of Palmerston as Darwin and the announcement of the transfer of the Northern Territory from South Australia to the Commonwealth. The photo is on the front page of Valerie Fletcher's book, 'Commonwealth Takeover the Northern Territory: A Hundred Years Ago'. Valerie is Justice Kelly's mother. It is also in Justice Mildren's admirable book.

Justice Mitchell was well liked and respected, having been elected one of the two members for the Northern Territory in the South Australian House of Assembly. Justice Mitchell might have expected to be the first Administrator but it was not to be. He was replaced by Dr John Gilruth as Administrator and by Mr Justice Bevan as the Court.

Ernestine Hill in her 1970 work, 'The Territory', described it thus:

> Mr Justice Mitchell thankfully handed over the pandanus strings of government. The shabby old Residency, as the new Administrator crossed its threshold, blushed under its bougainvilleas in new dignity of a Government House. Official and parliamentary parties arrived by steamer and at the courthouse, Mr Justice Bevan presented to Dr Gilruth, His Majesty's Commission.

This prosaic description is not historically correct as Mitchell had left on the SS Montero and passed the SS Mataram carrying Dr Gilruth and his family at Thursday Island. Gilruth's private secretary was Henry Ernest Carey who, along with Gilruth, Justice Bevan and later Carey's replacement as Government Secretary, RJ Evans, were to form a clique, a coterie and become a source of great trouble in the administration.

This, as you might rightly assume, is covered in commendable detail by Justice Mildren in his just-launched history of the Court on its centenary which will amply fill out the brief tale I will recount.

Dr Gilruth sacked the very popular Government Secretary, Nicholas Holtz, and replaced him with HE Carey who, as I noted earlier, had been Gilruth's personal secretary. Judge Bevan had stayed at Government House for some weeks following his arrival in Darwin and had formed a strong friendship with Dr Gilruth.

Bevan advised the Administrator on some legal matters and under protest drafted some ordinances. He had a hot line to the Administrator's office which raised suspicion as to whether he was the Administrator's instrument and not an instrument of justice.

His findings were trenchantly criticised by those affected and, having reviewed the whole matter the Solicitor-General, Sir Robert Garran, found most of the unfavourable findings were not supported by evidence and many were blatantly contradicted. Included in the criticism was a finding that when Judge Bevan had worked on the wharf to break a strike, he was paid by the stevedore. In fact he was not paid by the stevedore for his labour, but what the Judge was thinking being there is beyond me.

Curiously Nelson, who was at the centre of things in both the rebellion and the ejection of Bevan, Carey and Evans, put himself forward to be appointed and was appointed as community representative on the Ewing Royal Commission and escaped criticism. He was however prosecuted for obstructing a Commonwealth officer in the execution of his duties, but acquitted on appeal and later represented the Territory in Federal Parliament.

His son, Jock, who witnessed the events at Government House in 1918, later became, himself, the 12th Administrator of the Northern Territory and he also represented the Northern Territory in the House of Representatives.

Closeness between the Administrator and the Judge was the seed of great suspicion and discontent in the case of Gilruth and Bevan. The relationship between Administrator CLA Abbott, and Justice Wells, however, before, during and after the World War II was nothing short of acrimonious.

There is, in Justice Mildren's book, an amazing account of the trial of a Major Darroch, charged after the bombing of Darwin with stealing certain items from the loot store. I was not personally aware of this nor of the confrontation between Judge Wells and Mr Abbott which included the Judge accusing the Administrator of lying in a report to the High Court on appeal. In Wells' own words refuting an alleged conversation with Abbott he reported:

> Relations between Mr Abbot and myself have been anything but cordial for a very considerable time so that I should not have discussed any difficulties that confronted me with him as a friend.

As Justice Mildren observes:

> I think this must be the only occasion when a Judge of the Supreme Court has been forced to put in writing an allegation that the Administrator is a liar and has sworn a deliberately false affidavit. I can think of no parallel in Australian legal history.

Your Honours, that unhappy time has well passed although Mr Abbot's term as Administrator is still the stuff of rumour and criticism. Nothing since then has been a cause for concern as the relationship of the Administrator and the Court and I am happy to join in the celebration of the centenary by speaking as Administrator, knowing I do so with your good will.

role of the Courts in the maintenance of democracy is universally accepted by our political institutions. The relationship between the political executive and the judiciary is one of mutual respect and cooperation. It is not a relationship in which the two arms of government will always agree on all issues and nor should it be.

I have been particularly fortunate in that respect to have enjoyed cordial and effective working relationships with the former Chief Justice, Brian Martin QC whom I am delighted to see here today and subsequently with your Honour, Chief Justice Riley.

It is both possible and necessary for the executive, the legislature and the courts to work in partnership in order to address social issues that manifest in criminal behaviour. Among other things, this involves equipping our courts with powers to adopt a problem-solving approach to the challenges of disadvantage, to address the causes of crime, to identify rehabilitation paths and to make innovative use of judicial authority.

Alcohol reform is presently at the forefront of our endeavours in that respect with legislation which is designed to address a range of social issues relating to the misuse of alcohol and other substances without resorting to criminalisation recently passed through the Assembly. It includes measures to prevent the commission of alcohol-related offences and the establishment of a specialist alcohol and drugs tribunal with power to make orders for the benefit of people who misuse alcohol or drugs. The character of this new framework is preventative and therapeutic, rather than punitive.

The Territory is also in the process of established a Substance Misuse and Referral for Treatment Court known as the SMART Court. The purpose of this measure is to reduce the offending and antisocial behaviour associated with substance abuse and to improve the health and social outcomes for people whose offending is related to substance abuse. The program will enable the SMART Court to offer assessments and access to programs and empower the Court to make banning and treatment orders.

A review has also been established to examine all facets of youth offending in the Northern Territory from early intervention strategies through to drug and alcohol rehabilitation, alternative education programs and tailored responses for young offenders in the criminal justice system.

Of course, one of the greatest challenges we face is the reduction of incarceration rates. The Territory is presently introducing a package of complementary reforms designed to reduce the prison population and curb the rate of recidivism. This will include the introduction of new sentencing options allowing for community based supervision and prescribed programs directed to drug and alcohol rehabilitation, the development of life skills, remedial driving and anger management. In adopting these measures we recognise that traditional mechanisms are not always successful. We demonstrate that the law is adaptable rather than static and we signal our

My very first Supreme Court case following admission in February 1959 was to defend an Aboriginal on a charge of murder arising out of a knifing incident at a card game at Bagot. Tiger Lyons and Dick Ward were both still on holidays, so the defence fell to me. Although as a one man firm I practised extensively before the Court for several years and have been a litigant on a few occasions, for most of those 55 years my association with the Court has merely been as an admitted practitioner of the Court.

Over its 100 years the Court has had five different locations. From 1911-1942 it was situated in the stone building on the Esplanade. Over and immediately following the war years from 1942-1948, it was based in Alice Springs. From 1948-1965 it operated from a set of Sidney Williams huts on the Esplanade; temporary premises which endured for 17 years.

The Courthouse on the corner of Mitchell and Herbert Streets was officially opened in 1965. It had a rather long gestation period. I recall Mr Justice Kriewaldt carrying on a lengthy correspondence with the architects about the design in my time with him which ended in June 1958. As Mr Justice Mildren recounts in his book:

> The official opening by the then Commonwealth Attorney-General, Billy Snedden, was the occasion of an amusing prank.

As many of you will recall, the facade of the Court carried a sculpture of Justice with one arm across his body and the other arm aloft, administering justice to a kneeling supplicant. Someone had scaled the facade and placed a large serving napkin on the horizontal arm and a tray with bottles and glasses on the raised arm. As I recollect, Billy Snedden thought it was an amusing but childish prank.

And now the Court has been situated in these salubrious premises for 20 years and they should last for a while yet.

It is interesting to note that at one period of its existence, 1927-1931, the Court endeavoured to emulate the Holy Trinity by existing as a judicial duality. The Commonwealth Northern Australian Act (1926) divided the Territory into two territories; the territories of Northern Australia and Central Australia. The Supreme Court then existed as the Supreme Court of Northern Australia and as the Supreme Court of Central Australia with the same judge. The Court only ever sat in Darwin as Alice Springs was considered too small and too remote. In 1931 the Northern Territory was reconstituted as one.

I suppose the period of my closest involvement with the Court was during my two and a half years as associate to Judge Kriewaldt. In the latter half of 1958 leading up to my admission as a barrister of the Supreme Court of Queensland, I sought employment with the firm of RC Ward for the purpose of finding out how a solicitor's office worked in those days. I might add that my admission fee of £50 was financed by a loan from the judge, which was promptly repaid with interest in the sum of one bottle of Scotch.

> The plaintiff will say that the doctrine of the resident inspector loquitur applies.

This was of course an error in shorthand transcription by his secretary and indicated a somewhat cursory, if any, checking of the document by Tiger. I might add that Dick Ward subsequently filed a defence, a paragraph of which stated somewhat tongue in cheek:

> The defendant will say that there is no such doctrine in law as the resident inspector loquitur.

Kriewaldt was at pains to maintain the majesty of the law to the extent, again I am told as it was before my time, that he sat, I think, at Anthony Lagoon Station on some cattle duffing case, the details escape me, exhibit 1 consisting of a large number of cattle being kept in the yards there, fully attired in wig and red robes. I am also told that for many years after, the local Aboriginals incorporated in their corroboree repertoire one featuring that 'whitefella judge in big red dress with flour bag long head.'

The amenities of the Court and the Judge's Chambers were in those days almost as far from the relatively luxurious, hermetically sealed judicial environment of today, as a stockman's camp is to the Hilton Hotel. Air-conditioning was unknown. All public servants were equipped with their own pedestal fans located under the fronts of the desks to direct a stream of air onto them via their nether regions. The judge had an overhead fan in his Chambers and over the Bench and there was another over the Bar table. With the elevation of the Bench, there was disconcertingly little clearance between the Judge's head and the fan when he stood up on entering and leaving the Bench. I venture to think that Austin Asche may have been in serious trouble.

One afternoon the atmosphere in the Court was decidedly soporific. On more than one occasion I gave the Judge a bum steer on being rudely awakened with a request for the number of the next exhibit. It fell to me as associate to swear in or affirm witnesses and I well recall the Pidgin admonition used - I would not call it an affirmation - for Aboriginal witnesses. It was not quite as elaborate as that of Magistrate Nicholls, as outlined in Mr Justice Mildren's book, but broadly similar and delivered with suitable sternness of countenance and, I suspect, to the bewilderment of the witness.

There was one bizarre concession to the Judge's comfort in that at 8:30 every morning a tall, elderly Aboriginal known as Big Arm Charlie, would enter the Judge's Chambers, flush the toilet and remove any frogs which may otherwise have threatened the judicial dignity.

When I commenced practice in January 1959, the legal profession in Darwin consisted of seven practitioners; three private one-man firms and four lawyers in the Commonwealth Crown Solicitor's Office, one of whom was the legislative council draftsman. I shudder to think of the number that a census

pro bono work undertaken without publicity. Reform in any area is usually painfully slow, but great advances have been made and hopefully will continue apace.

So me and the Court, we have been together now for 55 years. It has been an interesting time and there is no doubt that we have both changed out of all recognition. It only remains for me, on behalf of the legal profession generally, and myself personally, to congratulate the Court on the anniversary of its birth and to wish it well.

RILEY CJ: Thank you, Mr Cridland.

Today I am proud to say we celebrate the one hundredth anniversary of the founding of the Supreme Court of the Northern Territory of Australia.

The first sitting of a Superior Court in the Northern Territory occurred in 1875 at Palmerston which is the original settlement to the north-east of Darwin. It was a Circuit Court sitting of the Supreme Court of South Australia in what was then known as the Northern Territory of South Australia. The sitting lasted just two days.

As we have been reminded during these celebrations, regrettably on the return journey to Adelaide the vessel that carried the presiding judge, Justice Wearing and his staff foundered, resulting in their deaths. Thereafter and perhaps unsurprisingly the South Australia Parliament passed legislation authorising the holding of criminal and civil sittings of the Supreme Court of South Australia in the Northern Territory presided over by a commissioner.

In 1884 the relevant legislation was amended to create the Office of the Judge of the Northern Territory and allowed for offences to be tried locally by a qualified legal practitioner.

The Northern Territory was surrendered to the Commonwealth by South Australia in a process which took some years. The surrender began with negotiations in 1901. In South Australia in 1907, the Northern Territory Surrender Act was passed. The Commonwealth eventually passed the Northern Territory Acceptance Act in 1910. The handover date was fixed by proclamation to be 1 January 1911 and on that date the Northern Territory was declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth.

The Supreme Court of the Northern Territory was established by the Supreme Court Ordinance 1911 which came into force on 30 May 1911. This is the occasion we celebrate today, 30 May 2011.

The first Judge of the Court was Judge Mitchell. He was appointed for a term of five years subject to sooner determination and on six months notice being given should the Northern Territory be taken over by the Commonwealth; a condition of limited tenure which would be not acceptable today. In fact Judge Mitchell remained in office only until 1912 when he was

they had given their evidence for their own protection and to prevent them getting away.

Although Aboriginal accused had legal representation, they mostly did not have access to an interpreter. They took little part in the process and, as has been observed by Justice Kriewaldt, may as well have been tried in their absence. If an Aboriginal accused was not present, 'no-one would notice this fact'.

It is only in relatively recent times that things have improved. A new jurisprudence regarding Aboriginal issues began to emerge in the time of Justice Kriewaldt. In 1976, Judge Forster delivered his judgment in *R v Anunga* which led to the so-called Anunga Rules, providing guidance in relation to the cautioning of Aboriginal witnesses, the provision of prisoners' friends to assist with interviews and the provision of an interpreter, where necessary. Those rules have consistently been applied by the courts ever since. They have underpinned a fundamental change in how the police and the courts deal with Aboriginal people.

In the early 1970s came the introduction of Aboriginal legal aid agencies, both in Central Australia and in the Top End. The agencies which today are continuing to evolve are at the very forefront of providing appropriate representation to their Aboriginal clients.

There has also been a significant improvement in the provision of interpreting services for Aboriginal people, both in the Courts and in the wider community. There is now a dedicated Aboriginal Interpreter Service providing appropriately-trained interpreters for both accused and witnesses in court proceedings.

Although there has been much innovation and vast improvement in the way in which the courts deal with Indigenous Australians, there remain issues to be resolved. There is a long way to go.

One area of concern is the manner in which courts are required to deal with the issue of customary law and cultural practices. Over the period to 2007, this Court developed an approach to the sensitive area of conflict between the law of the Northern Territory and the customary law and cultural practices of some Aboriginal communities. The courts accepted and asserted the primacy of the law of the Northern Territory. Subject to that law, issues of customary law and cultural practice were given appropriate weight in determining the culpability of an offender in all the circumstances of the offence.

In 2007 the Northern Territory experienced what has been called 'the Intervention'. Legislation passed in support of that process included s 91 of the *Northern Territory National Emergency Response Act* which provided that a court, in determining sentence, must not take into account any form of customary law or cultural practice as a reason for lessening the seriousness of the criminal behaviour to which the offence relates.

that the courts are 'soft on crime' and then to the phenomenon we now know as 'law and order auctions' in the lead-up to any election. Many politicians, at least publicly, feel the need to be perceived as being tough on crime and promise ever more punitive responses.

However, behind the rhetoric I sense a growing awareness amongst politicians, the media and the wider community of the need to identify and address the underlying causes of crime. There is, it appears to me, an increasing understanding that if we are to reduce crime and enjoy a safer community, our attention needs to be focussed upon addressing the reason for the criminal activity in an endeavour to ensure such activity does not occur or does not occur again.

The earlier a problem is identified and addressed, the greater is the prospect that it will not lead to criminal activity. If alcohol is a problem or if drugs or gambling or anger management or some form of mental illness is a problem, then it is cheaper and more effective to endeavour to deal with the problem before any crime is committed rather than in the sentencing process after a crime is committed. Once a crime has been committed there is an even greater need for a focus upon rehabilitation as a part of the response.

Commenting on the Productivity Commission's 2010 Government Services Report which recorded the Northern Territory as having the highest recidivism rates in the country, the responsible minister is reported to have promised 'a stronger focus on rehabilitation, education and training in a new era in Corrections'.

Whilst public denunciation, punishment and the need to protect the community will continue to be necessary and significant elements in determining an appropriate sentence, issues of prevention and rehabilitation are increasingly recognised as being important factors for consideration in our endeavour to reduce crime. The wider, and the more effective, the rehabilitation programs delivered, both in custody and in the community, the greater the prospect that recidivism will be reduced.

In the Northern Territory, as in many parts of Australia, new sentencing options are being explored. We actively pursue a policy of diversion for juvenile offenders in appropriate cases. Wherever reasonably possible we seek to keep juveniles out of the criminal justice system. We are now identifying offenders with drug problems and encouraging them to undertake appropriate rehabilitation programs. We reward such offenders with reduced sentences when they succeed. We are experimenting with ways of identifying people with problems with alcohol and endeavouring to direct them into rehabilitation programs. We have an Alcohol Court to deal with offenders who have an alcohol dependency. We are trying new approaches.

In recent times a fresh and wide ranging initiative to address the vexed problem of alcohol abuse has commenced. It is as yet too early to measure the impact of the initiative. However, the fact that the issue is being discussed

RILEY CJ: Mr Stewart, do you move?

MR STEWART QC: May it please the Court.

RILEY CJ: Are there any motions from the Bar? Thank you.

Thank you, ladies and gentlemen for your attendance here today on this very important occasion. That completes the formal ceremony. I invite you to join us in the foyer for refreshments.

Adjourn the Court, please.

ADJOURNED 3:48 PM INDEFINITELY