NT laws and overrepresentation of Aboriginal people in the criminal justice system

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The criminal justice system in the Northern Territory operates in uniquely challenging circumstances. We are a vast geographical space with a small population. Our clients experience extreme remoteness and isolation, a lack of access to goods and services, a lack of housing and infrastructure, cultural and linguistic diversity, and economic hardship and disadvantage. These issues disproportionately affect Aboriginal and Torres Strait Islander people.

An estimated 76,500 Aboriginal people live in the Northern Territory, making up approximately 31% of the Territory population.[1] This compares to the national average where Aboriginal people make up 3.4% of the Australian population.

As a result of colonisation and dispossession many Aboriginal people experience entrenched intergenerational social disadvantage including poverty, which is endemic.

Expressed legal need can be considered by reference to the three National Agreement on Closing the Gap socio-economic outcomes relevant to the criminal justice system.

The first is Closing the Gap socio-economic outcome 10 - *Adults are not overrepresented in the criminal justice system.*

In the Northern Territory the rate of imprisonment is 5 times the national average at 1,107 prisoners per 100,000,[2] which is more than 1% of the population. 87% of prisoners are Aboriginal,[3] which is well above the national average of 32%.

[1] Australian Bureau of Statistics, Estimates of Aboriginal and Torres Strait Islander Australians, Final 2021 Census based estimates, latest Release 31 August 2023 Estimates of Aboriginal and Torres Strait Islander Australians, 30 June 2021 | Australian Bureau of Statistics (abs.gov.au)
[2] Australian Bureau of Statistics (2022) Prisoners in Australia; Aboriginal and Torres Strait Islander Health Performance Framework https://www.indigenoushpf.gov.au/measures/2-11-contact-with-the-criminal-justice-system#:~:text=5).,11.8)
[3] Ibid.

In the Northern Territory, Aboriginal men are imprisoned at 15 times the rate of non-Aboriginal men, and Aboriginal women at 14 times the rate of non-Aboriginal women.

The second relevant Closing the Gap socio-economic outcome is outcome 10 - *Young people are not overrepresented in the criminal justice system*.

In the Northern Territory the rate of children in detention is 7 times the average national rate.[4] The percentage of these children in detention who are Aboriginal is commonly 96%, and very often 100%. An Aboriginal child in the Territory is 35 times more likely to be incarcerated than a non-Aboriginal child.[5]

The third relevant Closing the Gap socio-economic outcome is outcome 13 - *Families and households are safe*.

In 2021, the rates of domestic and family violence related assault in the Northern Territory were 3 times the national average, and 5 times that of other Australian jurisdiction where data is reported.[6]

In 2021, the victimization rate for assault in the Northern Territory was the highest in the ABS' 27-year time series. Data shows that 66% of assault victims were female, 47% of assaults involved the use of a weapon, and 53% of assaults were related to domestic and family violence.[7] Aboriginal women living in the Northern Territory are more than 8 times more likely to be assaulted than non-Indigenous women or men.[8]

In 2021, the rate of domestic and family violence related homicide in the Northern Territory was 7 times the national average.

[4] Productivity Commission, *Report on Government Services 2023*, table 17A.1. The rate is 19.8 per 10,000 young people aged 10-17 years in the NT compared to an average national rate of 2.8 per 10,000. Further, in 2019-20 55% of children aged 10 to 16 who were released from detention returned to sentenced supervision within 12 months, while the national average was 51%, Productivity Commission, *Report on Government Services 2023*, table 17A.26

[5] Productivity Commission, *Report on Government Services 2023*, table 17A.7

[6] The Equality institute (2023) Evidence Snapshot: what we know about domestic, family, and sexual violence in the Northern Territory – and what we don't.

[7] Australian Bureau of Statistics, Recorded Crime - victims, Released 29 June 2023 https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release#northern-territory

[8] ibid

It is not surprising that expressed legal need in the criminal justice system is higher than in any other jurisdiction in Australia. It is consistent with the socio-demographic and economic indicators which demonstrate the Northern Territory experiences higher rates of complex and entrenched disadvantage compared to all other jurisdictions in Australia.

This paper will highlight three economic determinants of legal need and crime – poverty, homelessness and disability.

Data shows that by far the deepest poverty in Australia is found in the Northern Territory. Nearly 45% of all Aboriginal households live below the poverty line. Income disparity between Aboriginal Territorians and the rest of the population is nearly 35%. In 2016, the median personal income for Aboriginal people was $281 per week, just 26% of the $1,072 per week received by other Territorians.[9]

In 2021, all other states and territories had rates of people experiencing homelessness of between 37 to 47 per 10,000. By contrast the rate in the Northern Territory was 564 people per 10,000. That is, the Northern Territory has 12 times the national average rate of homelessness, equating to 6% of all people in the Territory. [10]

The rate of Aboriginal people experiencing homelessness in the Northern Territory was 1,865 per 10,000 or a total of 11,394 Aboriginal people.[11] This means that 88.5% of people experiencing homelessness in the Northern Territory are Aboriginal people, and almost half of all Aboriginal people experiencing homelessness in Australia live in the Territory.

Consistent with the findings of the Disability Royal Commission, 34.7% of Aboriginal people in the Northern Territory have a disability (estimated 25,200 people), 53.1% have a long term health condition, and 31.6% have one or more chronic health conditions.[12]

[9] Altman J (2017), *Deepening Indigenous poverty in the Northern Territory,* 14th November 2017. College of Asia and the Pacific, Australian National University.
[10] Australian Bureau of Statistics, Estimating Homelessness, Estimating Homelessness: Census 2021, Released 22 March 2023, https://www.abs.gov.au/statistics/people/housing/estimating-homelessness-census/latest-release
[11] ibid
[12] Australian Bureau of Statistics (2019) National Aboriginal and Torres Strait Islander Health Survey.

The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory commissioned multidisciplinary assessments of the children in youth detention who gave evidence. Assessment of those children found that:

- 56% of the children had FASD
- 31% had some form of brain injury
- 56% had a history of self-harm/suicidal ideation, and
- that a lack of screening of, and information about, young people entering detention meant that custodial staff often misinterpreted features of disability as bad behaviour.[13]

Access to justice for those experiencing the economic determinants of crime are compounded in the Territory by two unique characteristics. The first is remoteness and lack of access to services. The second is language, and specifically, the lack of proficiency in English, which is the language of white law.

Within the Australian Bureau of Statistics remoteness structure, the Northern Territory is classified entirely as Outer Regional, Remote or Very Remote. The ABS remoteness structure is based on a measure of relative access to services. Only Darwin, as the largest urban centre, is classified as Outer Regional. The next two largest centres, Alice Springs and Katherine, are classified as Remote and the rest of the Territory is classified as Very Remote.[14]

75% of Aboriginal Territorians live outside greater Darwin in towns, communities, and homelands across the Northern Territory in areas the ABS classifies as Remote or Very Remote. Relative access to services includes access to services which interface with the criminal justice system, such as Courts, corrective services and interpreters, and

[13] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023), Criminal Justice and people with disability.
[14] Australian Bureau of Statistics (2023), Statistical Geography Standard (ASGS) Edition 3, Remoteness Areas

ancillary services, such as disability, housing and financial support as well as public transport and access to technology.[15]

Application of the law, particularly for bail and sentencing, is often conditional on access to services, such as bail support accommodation, alternatives to custody, and drug and alcohol rehabilitation centres. It follows that people who live in Remote or Very Remote areas experience the law differently to those who do not. Where an alternative to incarceration is not available there is no option but to send the person to jail.

The language of our criminal law and the courts is English. In the Northern Territory that law operates in one of the most linguistically diverse places on Earth. More than 100 Aboriginal languages are spoken across the Territory.[16] In remote communities, 70 to 100% of people speak at least one Aboriginal language.[17] About 60% of Aboriginal Territorians use an Aboriginal language at home, and it is their first language. Many speak more than one Aboriginal language and English may be a second, third or fourth (or more) language.[18]

Research indicates that many Aboriginal adults do not have the English language skills required "to fully engage in English speaking society and work."[19]

Against our complex English language based legal system, there is a chronic shortage of interpreters in comparison with need, and this is particularly problematic in regional areas. The Supreme Court receives priority in allocation of interpreters for legal proceedings, however, trials in the Supreme Court are vacated and hearings in the Darwin Local Court are adjourned "on an almost daily basis"[20] because interpreters are

[15] Australian Bureau of Statistics, Estimates of Aboriginal and Torres Strait Islander Australians, Final 2021 Census based estimates, latest Release 31 August 2023 Estimates of Aboriginal and Torres Strait Islander Australians, 30 June 2021 | Australian Bureau of Statistics (abs.gov.au)
[16] Stephen Gray et al, *Criminal Laws Northern* Territory (The Federation Press, 3rd ed, 2021) 71.
[17] Department of Prime Minister and Cabinet (2017) Protocol on Indigenous Language Interpreting for Commonwealth Government Agencies.
[18] Australian Bureau of Statistics, *NT: Aboriginal and Torres Strait Islander population summary* (1 July 2022) https://www.abs.gov.au/articles/northern-territory-aboriginal-and-torres-strait-islander-population-summary
[19] Fiona Shalley and Allison Stewart, 'Aboriginal Adult English Language Literacy and Numeracy (LLN) in the Northern Territory: A Statistical overview', *Charles Darwin University* (11 September 2017) 43.
[20] Kristina Kukolja, Chronic shortage of Indigenous interpreters in Australia's legal system risks violating human rights, ABC (online, 11 August 2023).

not available. The Northern Territory also has significant problems with the training and accreditation of interpreters. Interpreting services are manifestly underfunded.

As a result, lawyers in the Territory are often faced with an ethical dilemma where their client is not able to fully participate in the proceedings as required by law.

In addition, there have been times when legal services in the Territory have had to suspend their services because of chronic underfunding.

Lack of legal representation is hard enough for a person who speaks English as a first language. Often people do not understand the charges they face and do not know whether to plead guilty or not guilty. They are unable to identify a defence, or conduct a defended hearing, or understand matters which the court will consider on sentencing. People may be sentenced to imprisonment who otherwise might not if they were represented. When a person does not speak English as a first language there can be a very real risk of a miscarriage of justice.

As all Territorian's would be aware, in 2021 the Northern Territory Government entered into the *Aboriginal Justice Agreement* (AJA) with Aboriginal Territorians, Aboriginal organisations and various Non-Government Organisations, committing to working in partnership to improve justice outcomes for Aboriginal Territorians.[21]

In June 2022, pursuant to a commitment under the AJA,[22] the Department of Attorney General and Justice engaged ARDS Aboriginal Corporation to review and reform legislative provisions within the *Bail Act 1982* (NT), *Sentencing Act 1995* (NT), *Juries Act 1962* (NT) and *Parole Act 1971* (NT) that are unfair, discriminatory or detrimental to Aboriginal people.

Unfortunately, the report of that review has not yet been published. However, I understand that a common perspective expressed by some of the stakeholders who were consulted during the review was the extent to which the relevant Northern Territory legislation is fit-for-purpose for the Northern Territory context.

[21] https://justice.nt.gov.au/attorney-general-and-justice/northern-territory-aboriginal-justice-agreement

[22] Aim 1 is to - Reduce reoffending and imprisonment rates of Aboriginal Territorians, and one of the commitments under this aim is to 'review and reform legislative provisions within the justice system that are unfair, discriminatory and detrimental to Aboriginal people.'

Aboriginal people are overwhelmingly the dominant 'users' of the criminal justice system - as victims, witnesses, offenders and families. However, Australian law has its roots in the English common law system which was shaped by a dominant white patriarchy in a constitutional monarchy. Although Northern Territory legislation tends to be a variation of legislation in other Australian jurisdictions, it continues to reflect its roots, and at least, as a starting point, assumes English-speaking urban contexts.

As such, our legislation does not reflect the realities of Aboriginal experience and disadvantage in the Northern Territory. Rather, those realties of poverty, homelessness and disability, geographical remoteness and lack of access to services, and language barriers work to create systemic discrimination in the application of the law.

It is hoped that the recommendation of the ARDS Review will assist in amendments to legislation which have Aboriginal experiences as a primary focus and make a noticeable impact on reducing the discriminatory outcomes experienced by Aboriginal Territorians.

It has been wonderful to see the re-introduction of Community Courts which on sentencing an Aboriginal offender, consider an Aboriginal Experience Report about the offender and the offending prepared by the appointed members of the Law and Justice Group.[23] It is a step in the right direction in addressing the realities of Aboriginal experience.

In addition, in recent times the Northern Territory has seen some significant and beneficial reforms in the criminal justice system, including raising the minimum age of criminal responsibility from 10 to 12 years,[24] the repeal of mandatory sentencing for most offences of violence, drugs and DVO breaches, and the introduction of two broad community-based sentencing orders: the community corrections order, and the intensive corrections order.[25]

[23] *Sentencing Legislation Amendment Act 2023* (NT)
[24] *Criminal Code Amendment Act 2022* (NT). The Minister has also made "a strong commitment to review the amendments to inform the next process of increasing it to 14 years of age," Keynote Address Attorney General and Minister for Justice, the Hon. Chanston Peach MLA, AIJA Indigenous Youth Justice Conference, Sydney, October 2022
[25] *Second Reading Speech, Minister Paech, 13 October 2022*

These are great developments. However, there is still a great deal to improve on. The rest of this paper will focus laws that affect children, noting the alarming rate of children in detention in the Northern Territory at 7 times the average national rate, and despite Closing the Gap socio-economic outcome 10.

In May 2021 the Northern Territory Government introduced the so called 'youth justice legislative reforms.'[26] The aim of these reforms was to 'cut crime' by automatic revocation of bail for so called 'serious' breaches of bail, by stricter access to bail, and by limited or one off access to diversion programs.[27]

The consequences of the May 2021 bail reforms were felt immediately and continue to be felt. The number of unique children detained on remand by May 2022 was almost triple the numbers before the reforms were introduced.[28] In May 2020, 31 unique children were held on remand. In May 2022, two years later, 100 children were held on remand, representing 80 % of the children in detention.[29]

These are children who have been arrested and charged but have not been found guilty and may never be convicted of the offence.

The overuse of detention for children is contrary to the principles upon which the Australian youth justice system is based - that a child should be detained only as a measure of last resort, and that a child should be detained for the shortest appropriate period. These principles are incorporated in state and territory legislation[30] and are consistent with international legal instruments.[31]

[26] *Youth Justice Legislation Amendment Act 2021*
[27] Office of the Children's Commissioner Northern Territory, Media Release, 23 March 2021, Winding back on evidence based reforms (2021)
[28] Office of the Children's Commissioner Northern Territory, *Annual Report 2022-2023*, p 9, 35. And see Annual Report *2021-2022*, p 70, in the 2 years from June 2020 to June 2022, the number of individual children entering detention for the first time in each year increased by 184%.
[29] Ibid pp 34-35
[30] ss 4(c) *Youth Justice Act 2005* (NT), ss 7(h) *Young Offenders Act 1994* (WA), Chrzanowski A & Wallis R 2011. Understanding the youth justice system. In: Stewart A, Allard T & Dennison S (eds). Evidence based policy and practice in youth justice. Annandale: The Federation Press, 7–27.
[31] United Nations Convention on the Rights of the Child, GA Res 44/25 (20 November 1989); United Nations, Standard Minimum Rules for the Administration of Juvenile Justice 'The Beijing Rules', GA Res 40/33 (29 November 1985); UN Rules for the Protection of Juveniles Deprived of their Liberty 'The Havana Rules', GA Res 45/113 (2 April 1991).

The overuse of detention for children is also contrary to national and international research providing evidence of the immediate and lasting negative effect of detention, for any period, on a child's wellbeing and rehabilitative prospects. [32]

A second legacy of the May 2021 reforms is the lack of power in the court to divert a child away from the criminal justice system. The power in the court to divert is constrained if the child was previously assessed for a diversion program or a Youth Justice Conference by the police.[33] The police routinely indicate their decision about diversion on a pro forma in the documents initiating proceeding.

There is no publicly available data on the use of diversion for children in the Northern Territory. At the time of the Royal Commission into the Protection and Detention of Children in the Northern Territory, when court diversion remained an option, data for 2015-16 showed that only 35% of children were diverted, even though 85% of children who participated in a diversion program did not reoffend.

While data was not disaggregated by police and court diversion, the Royal Commission heard that police referral and practices lead to underuse of diversion, causing children to be excluded for technical reasons.[34] In addition, the Royal Commission heard evidence from staff of the NT Office of the Director of Public Prosecutions, the North Australian Aboriginal Justice Agency, the Central Australian Aboriginal Legal Aid Service and Legal Aid NT that many young people had come before the courts without diversion having been properly considered as required by the Act.[35] This is consistent with the views of current Legal Aid NT lawyers.

As long ago as March 2017, in an attempt to address the youth offending on bail, the Northern Territory Government amended the Bail Act to allow electronic monitoring as a condition of police bail.[36] The May 2021 bail reforms built on this development,

[32] The Carney Review of the NT youth justice system in 2011 and the Royal Commission into the Protection and Detention of Children in the Northern Territory in 2017 demonstrated the negative effect remand periods have on children. Both demonstrated that remanding children in custody is ineffective in improving community safety and instead, increases the likelihood of a life entrenched in the criminal justice system. Northern Territory Government, Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) vol 2b, 292
[33] s 64(3) *Youth Justice Act*, with reference to Part 3 which deals with diversion by police.
[34] Northern Territory Government, Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) vol 2B, 265
[35] Ibid, 266
[36] *Bail Amendment Bill 2017*(NT)

empowering the police to attach an electronic monitoring device on a young person who has been granted court bail before the finalisation of a court ordered assessment report determining whether the young person is suitable for electronic monitoring. At the same time, the reforms introduced the concept of a serious breach of bail, which results in automatic revocation of bail until the next court date and a presumption against bail. A serious breach of bail is defined to include a breach of an electronic monitoring or curfew condition.

A concern about the increased use of electronic monitoring was that young children would find it difficult to comply with the requirements, such as remembering to keep the device charged, and this would lead to more breaches. Unfortunately, there is no published data on this point. However, we know electronic monitoring has not worked to reduce the remand population.

Some would share the view that the fact of the constant surveillance of people, particularly children, by devices fixed to their body raises serious civil liberty and ethical concerns, and legal considerations.

The use of electronic monitoring of children in the Territory is not confined to exceptional circumstances but instead is commonplace. To that extent it raises issues of individualised justice - whether it is proportionate or an unjustifiable infringement of the human rights of that individual, and the issue of whether the young person has the capacity to give informed consent to the attachment of the device to their person.

The device is cumbersome and visible and tells the world that the child is facing criminal proceedings. To that extent, it is a punishment in itself. And it is a punishment that can be imposed not only judicially but by a police officer.

In my view, the concept of "tagging" children, like cattle with the capability of invasively tracking their daily movements is legally, ethically and morally questionable.

At the end of 2022 the Northern Territory conducted an evaluation of the May 2021 bail reforms. The evaluation report, which provides evidence for future decision making, is yet to be published.

While a child must now be 12 to be charged with a criminal offence in the Territory, there is presumption that a child under 14 lacks the capacity to be criminally responsible.[37] The child is said to be *Doli Incapax*. The presumption may be rebutted by evidence that the child knew their otherwise criminal conduct was "seriously wrong" as opposed to being naughty or mischievous.[38]

Defence lawyers face very practical difficulties in achieving justice for children under 14 when they seek to invoke the presumption of *Doli Incapax*. The eminent Phillip Boulton SC, who is Sydney based but a frequent visitor to the Territory has observed:[39]

> More often than not, *Doli* is reduced to a merely theoretical construct. The exigencies of gathering evidence of a child's cognitive development are legend – especially in the Northern Territory and more especially in bush courts.
>
> A child's ability to engage meaningfully with psychologists and psychiatrists is very limited. The neuropsychological testing and assessment for cognitive functioning are expensive. Funding is woefully inadequate. When a lawyer can access testing, the history taking is hampered by language difficulties, inadequate or non-existent interpreting services, geographical isolation, parents who are unable to provide accounts of the child's upbringing, and lack of health and education records.
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> Diagnosing foetal alcohol spectrum disorder (FASD) requires complex assessments and accurate reports from early childhood and an accurate history of the mother's alcohol consumption during pregnancy. This type of assessment is a luxury for most children – especially first nations' kids represented by busy, over-stretched ALS and Legal Aid lawyers.
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> But this is just part of the picture. Actually, in many (if not most) cases where *Doli* is sought to be invoked, it is the defence lawyer who needs to actively chase the evidence that points towards their child client lacking the capacity to know

[37] s 38(2) and 43AQ of the *Criminal Code NT 1983* incorporates the common law presumption.
[38] see *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53
[39] Phillip Boulton, *A New Architecture for Youth Justice*, (2022) 46 Crim LJ 121, 122-123

that their actions were seriously wrong. This takes time and effort and money – actually, public money.

In my experience, among the wicked consequences of this presumption are that when children seek to rely on it, they can be held on remand for many months, often for a longer period than a sentence for the alleged offence if it was ultimately proved. That consideration can persuade lawyers and their clients to give up their right to require proof of criminal responsibility and instead, enter guilty pleas, particularly where the prosecution offers to accept a plea to a lesser charge.

Legal Aid NT has had two recent cases that graphically illustrate the harm caused by the *Doli Incapax* regime.[40] In both cases, the children were between 12 and 14, and representations were made by their lawyer to the prosecutor at an early stage that the charges be withdrawn because it could not be established that the defendants had the mental capacity to commit the offences. Those representations were not accepted, and the cases were fixed for hearing with the sole matter in dispute being whether the child was *Doli Incapax*.

In one case, the hearing proceeded, and the child was found not guilty on the basis that the presumption of incapacity had not been rebutted. By the time these protracted proceedings drew to a close, the child had been formally diagnosed with significant cognitive impairments. In the case of the other child, the charges were withdrawn by the prosecutor on the listed hearing date.

Between the date of their initial apprehension and when their matters were finally resolved, each of these children served a total of 45 days in custody. One of these children was seriously assaulted while in detention, requiring hospital treatment. In addition, Legal Aid NT estimates the direct cost of detaining each of these children to have been $207,000.[41]

[40] This analysis was undertaken by Russell Goldflam, Policy Officer, Legal Aid NT

[41] The average daily cost per young person subject to detention-based supervision in the Northern Territory is $4,600.81: Productivity Commission, Report on Government Services (2021), Chapter 17, Table 17A.20. accessed at https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/community-services/youth-justice/rogs-2021-partf-section17-youth-justice-services.pdf.

The harsh treatment of Aboriginal children in NT Youth detention centres and the NT government's consequent exposure to civil claims was address by the government in 2022 when it amended the *Personal Injuries (Liabilities and Damages) Act* 2003 (NT)[42] to introduce section 33E. Section 33E caps compensation claims for both adult "offenders" and youth "detainees" for assaults and batteries, including unlawful strip searches, as well as capping unlawful isolation claims.

An overarching limit on claims for compensation for "a series of related civil wrongs" is set at 15,000 monetary units,[43] which makes such claims impossible to conduct due to adverse costs consequences.

On the global stage, the UN Committee on the Rights of the Child has stated that the age of criminal responsibility should be at least 14. Many members of the international community have already moved to raise the age – and that age is at least 14 in scores of countries including those whose justice systems are comparable to ours. It would be wonderful if the Northern Territory could again lead the way for all Australian jurisdictions in introducing this reform.

[42] Amendments commenced on 30 September 2022, provoked in part by a $35m settlement of a class action that claimed compensation for 1,000 young detainees for strip searches and other assaults and false imprisonment.
[43] A monetary unit is $1.19: *Monetary Units Act 2018* (NT)