

Session: ‘Out of sight out of mind – changes in the environment that challenge equity and fairness’

Territory Lifestyle: Behind Bars?

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In the late 1990's, I was involved in the campaign against the Territory's mandatory sentencing laws for property offences. Some of you will remember those laws - for your first property offence you got 14 days jail; for your second, 3 months; for your third 12 months. They were senseless and destructive laws. They didn't prevent or deter crime but they did see a lot of people – especially Aboriginal people - go to jail when it was clearly unjust: 14 days jail for an 18 year-old man who stole a cigarette lighter; 14 days for a woman who stole a can of beer; 12 months jail for a homeless man who stole a towel from a clothesline to use as a blanket.

At some stage in the broad campaign, a bunch of us decided that we needed bumper stickers and some catchy slogans. We picked the very 'right on' 'Mandatory Sentencing: Injustice for All'; the serious and sombre 'Mandatory Sentencing Shames the Territory' and the more populist pun of 'Mandatory Sentencing: Dollars without Sense'. Arguably the best of them was one put forward by well-known Territory artist Chips Mackinolty: 'Territory Lifestyle: Behind Bars?'

I was reminded of this by a number of developments in the last month. On 1 May we saw the commencement of a new suite of mandatory sentencing laws for violent offences. On 10 May, the Minister for Business, Dave Tollner, announced a plan to lock up 'problem drinkers' under a regime of 'Alcohol Protection Orders'. On 13 May the Government released the Alcohol Mandatory Treatment Bill. Finally, last week Chief Minister Adam Giles described the Territory's drinking culture as a 'core social value'.

So I've chosen 'Territory Lifestyle: Behind Bars?' as the title for my presentation today because it encapsulates some of the biggest challenges to equity, fairness and best practice in the NT: the Territory's culture of incarceration and our problem with grog.

Locking people up

To start, let's go directly to jail.

The Northern Territory's imprisonment rate is about 5 times the national average. Our closest rival is Western Australia and we lock people up at more than 3 times the rate they do. We lock up 826 people for every 100,000 adult population. In WA they lock up 267 people for every 100,000 adults.

We've long been the leader in this field, but the last 10 years has seen us leave our interstate rivals in our dust: our imprisonment rate has increased by 72% in that time.

Productivity Commission figures show that Territory government spending on prisons and corrections is 3.5 times higher per head of population than the national average. Victoria spends one fifth as we do on locking people up.

Our reoffending rate is the worst in Australia. The national average is about 40%. In the NT it is 48%.

We are building a new 1000-bed prison in Darwin at a cost of over \$500 million. It opens next year and is already too small.

The Department of Corrections has estimated that our prison population will double in the next 4 years. We will need another 1000 bed prison operating by 2016.

30% of the general population in the NT is Aboriginal. 90% of adult people in prison are Aboriginal. Over 95% of young people locked up in juvenile detention are Aboriginal.

When in a hole, keep digging

Having dug ourselves into this hole, our government has promised more digging.

From 1 May we have a new regime of mandatory sentencing for violent offences. It is a somewhat complicated regime, categorising offences into 5 different 'levels'. The length of the mandatory sentence depends upon the level of the offence and whether the offender has a previous conviction for a violent offence. Some first time offenders will face 12 months imprisonment, some 3 months and others will have to serve some form of sentence of imprisonment but no minimum is set.

There is a clause that will give the court a discretion if 'exceptional circumstances' can be proven. Our history with mandatory sentencing shows us that this sort of exception doesn't prevent unjust results: much crime is tragically unexceptional. So we can only hope that injustice will be limited by the inclusion of this clause.

In some – perhaps many – cases, the regime will make no difference to the outcome. Our judges and magistrates already send people to jail. Indeed, as the figures I have given demonstrate, they send a lot of people to jail. That's part of their job.

Serious violent offenders typically get serious jail time. I don't think anyone seriously suggests that they shouldn't.

Mandatory sentencing only really has an impact when it requires a court to impose a sentence heavier than it would otherwise have imposed.

For example, if a court considers a case and decides the appropriate sentence is 4 months, a mandatory sentence of 3 months is irrelevant. It is only relevant if the court decides the just sentence is less than 3 months imprisonment.

This is important to remember – mandatory sentencing is always either unjust or irrelevant.

So it is hard to assess the precise impact of these laws, but we can say with certainty that they will see more people go to jail for longer. That is what they are designed to do.

There are a number of reasons why this should concern us all. I will give you three.

The first is that it won't reduce crime. We all have an interest in having a safe community and this won't make a difference. Mandatory sentencing for property offences didn't reduce crime –crime rates actually increased during the time they were in place.

In fact, mandatory sentencing may make things worse. Sending people to jail is *criminogenic*. It causes crime. The reasons for this are complex, but some are matters of common sense. Sending a young person to jail won't make it more likely for them to get a job or re-engage with education. It won't introduce them to a pro-social peer group or make them feel valued. Imprisonment is fundamentally de-humanising.

The second reason why mandatory sentencing should concern us is the price tag. Locking people up is very expensive. Estimates vary, but the Productivity Commission has calculated the cost at about \$100,000 per adult per year, and \$216,000 per juvenile.

We need to ask what else we could be spending this money on. When we hear politicians arguing about who will pay for the cost of the Gonski education reforms, we should remember where we are spending our money. When we hear about the crisis in our system of child protection and the cuts to the budget for the Office of Children and Families and to the peak body for Aboriginal children, youth and families, Stronger Aboriginal Families Together, we shouldn't accept that the mantra that these are 'tight fiscal times'. The money is there and it is being spent on locking more and more people up for no benefit.

Third, we should be very concerned about the disproportionate impact of mandatory sentencing on the most vulnerable and disadvantaged group in our community. Aboriginal people; people with disability, particularly mental illness; and people who are homeless will all feel the brunt of these laws.

Again, to return to the opportunity cost, instead of spending money on reducing the causes of disadvantage that can lead to offending, we are choosing an approach that will increase the likelihood of people who are already marginalised being locked up.

The Territory's drinking problem

I now turn to drink.

Grog is a problem for the Territory. We drink a lot. And many of those who drink too much cause trouble when they do. Alcohol-related violence is a particular problem. And it is a particular problem in Aboriginal communities.

Just what we should do about it is one of the most significant challenges facing the Territory.

It seems clear that the primary focus of NT government policy in this area is the 'problem drunk' or the 'habitual drunk' as they are keen to label people with a drinking problem.

The stated policy intention is to get ‘these people’ off the streets. Out of sight. Although I’m not sure the intention is also to get them ‘out of mind’. Like asylum seekers at the federal level, I think we can be sure that the public will be whipped into a frenzy for many years to come about people who are drunk in public places.

Mandatory rehabilitation

The first new aspect of policy is mandatory rehabilitation. There is draft legislation before parliament and NAAJA and others have had the chance to comment on the Bill. We are pleased to have been given that opportunity. While we remain opposed to the scheme for the reasons I will come to, we don’t have any desire to see it fail.

In broad terms, the plan is that people who are picked up three times in two months by police and taken into protective custody will be liable to mandatory rehabilitation.

They will be taken to an assessment facility and can be held for 72 hours while being assessed. This can be extended by another 72 if the person is too unwell to be assessed or is exhibiting ‘significant behavioural problems’. Once they are assessed, the Alcohol Mandatory Treatment Tribunal will be required to make an order either to subject them to mandatory treatment or community management or to release them. They have 7 days to make such an order.

It is important to note that if a clinician determines that a person is not suitable for a mandatory rehabilitation order, for example because they have a cognitive impairment that means they would not benefit from treatment, they cannot simply release the person. Only the Tribunal can do that.

So it is possible that people will be held for up to 14 days (including their time in police custody) before being released. These are people who are not charged with any offence. Indeed, if they have been charged with an offence punishable by imprisonment, they are not eligible for the regime.

If people are ordered into mandatory rehab it will be a criminal offence to leave. And they may be required to pay for their medication and consumables.

If this all seems heavy-handed and punitive, it should come as no surprise. Late last year, the Minister for Alcohol Policy, Dave Tollner declared that the government’s intention was to get ‘problem street drunks’ to ‘hide out in the scrub, go somewhere where they are not in the public eye’ with the threat of mandatory rehabilitation.

NAAJA opposes this approach for a number of reasons. We are not experts in alcohol policy, but we are not aware of any evidence that this approach will be effective. It will be massively costly (about \$90,000 per person on some estimates) and even the government’s most ambitious estimate of success rate in ‘curing’ people is 20%. In terms of bang for buck, this frankly seems like a dud.

Again, we must consider the opportunity cost. There is a dire need for rehabilitation services in remote Aboriginal communities. In most communities there is nothing available. Instead of looking to find ways to support local communities to be involved in dealing with the problem of grog, the plan is to lock people up in town.

We also oppose this approach because it is punitive and will have a heavy impact on Aboriginal people. A particular concern here is the potential for deaths in custody. A lot of work has been done

since the Royal Commission into Aboriginal Deaths in Custody to make sure that places where people are detained, like police and prison cells, are safe. Facilities are now designed to avoid hanging points and ensure adequate monitoring. It is not clear to us that the facilities that are going to be used to lock people up for rehabilitation will have these safeguards. This is a recipe for tragedy and needs to be taken very seriously.

Criminalising a core value?

The policy of mandatory rehabilitation must also be understood in light of the proposal to introduce Alcohol Protection Orders. This reinforces the punitive underpinnings of the government's approach to grog.

We are yet to see draft legislation in relation to these, but we have been told that Alcohol Protection Orders will apply to anyone who is charged with an offence carrying a penalty of 6 months imprisonment or more – which includes offences such as loitering and unreasonably causing substantial annoyance –where alcohol was a factor.

The police will be able to issue an Alcohol Protection Order that will prevent a person from possessing or consuming alcohol, or from attending licensed premises. For a first offence you can be banned for 3 months; for a second 6 months and for a third 12 months.

If you breach the order it will be a criminal offence. Minister Tollner has made it clear that he expects that people will be locked up if they breach these orders.

People will, of course, breach these orders. If you are addicted to alcohol, you are going to drink. It is disingenuous to suggest that people who have a grog problem might comply with these orders. They will not.

And that's really the point. If you have a grog problem – if you are a little too committed to the core values of the Territory - the government wants to lock you up.

Again, this will have its most significant impact on Aboriginal people. The vast bulk of the people who regularly come to the attention of police when drinking are Aboriginal.

The central message of the Royal Commission into Aboriginal Deaths in Custody was that to reduce the number of Aboriginal people dying in custody, we needed to lock up less Aboriginal people less often. We need to find ways to reduce Aboriginal people's contact with police and the criminal justice system.

The Royal Commission made specific recommendations that drunkenness should be de-criminalised and that the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain *non-custodial* facilities for the care and treatment of intoxicated persons.

In the NT we are doing the opposite.

Let me emphasise that I am not suggesting we turn a blind eye to alcohol-related violence and the harm that grog is causing. I hope that nothing I have said suggests that this isn't a serious problem that requires serious action.

But punitive policies that make criminals out of people who are addicted to grog are not the answer.

Out of sight and out of mind

I want to touch finally – and very briefly - on the indefinite detention of people who are unfit to be tried or found not guilty of crimes because of mental impairment.

There is a critical shortage of supported places or facilities in the community where people with serious cognitive impairment and mental illness can be safely accommodated. The result of this is that people are placed on custodial supervisions orders and held in prisons indefinitely. It is not uncommon for people to spend much longer in prison than they would have served under any sentence for their conduct.

Aside from the unfairness of holding people who are not criminally responsible in jails designed to punish people, the conditions in which people with very high needs are held in Darwin prison are nothing short of disgraceful. For about 2 years a client of mine was held in solitary confinement for 18 hours a day, with access only to an enclosed exercise yard for periods when he was not locked alone in his cell. His treating psychiatrist and an independent psychiatrist both expressed concern about the effects of sensory deprivation on his mental health. Despite this he remains locked up.

For a time it looked like it might be possible for him to be moved into the new secure care facility 'Yirra House' in Darwin. Plans for this transition were well-advanced and he has been having 'day release' there. However, this is no longer an option as government has decided in this last week that the Darwin facility will be used exclusively to house young people. The Alice Springs secure care facility will remain able to accommodate adults, but its suitability for my client, who comes from a Top End Aboriginal community, is at best unclear. As a result, there is no end in sight to his incarceration.

These cases are hard ones, but in some respects the answer is fairly simple. We need a commitment by government to properly resource a range of options other than prison to accommodate, supervise, manage, support, treat and care for, this group of people.

Unfortunately the NT's reliance on prisons as the response to complex social problems means that this is unlikely to happen soon.

If I'm wrong about this, it's my shout.