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Do not pass GO: Do not pay $200 : Go Directly to Jail: A Review of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody in the Northern Territory, 10 years on

by

Julie Condon
Lawyer, Alice Springs NT

Criminal Lawyers Association of the Northern Territory
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Do not pass Go: Do not pay $200: Go directly to Jail; a review of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody in the Northern Territory 10 years on.

Julie Condon [1]

1. Introduction

History will harshly judge all governments during the coming decade if there is any failure to give continuing effect to the recommendations. [2]

If one of the many history lessons learnt from the 339 Recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was that Aboriginal people were spending time in custody for trivial offences, then by the introduction of the mandatory sentencing laws in 1997, the NT government made clear it had learnt little from RCIADC. The laws also revealed much about the priorities of the CLP government with an election in the offing; there would be no contest between election driven law and order policies and the spirit of the Royal Commission's Recommendations.

And so with the same deference to populism that drove the push to introduce mandatory sentencing and the same dogged subversion of the philosophy underlying the recommendations, in April this year the Northern Territory government mooted the introduction of the Orwellian sounding Public Order and Anti-Social Conduct Bill. Preoccupied by an election later this year, it has no doubt escaped the authors of this document that they have chosen the 10 year anniversary of the Commission's Report to introduce a law that will see homeless and poor Aboriginal people going to jail for trivial offences.

It is not particularly surprising that the NT government continues to introduce laws that ignore the recommendations of RCIADIC. What is less obvious but equally concerning is the more subtle mechanisms found in the NT criminal justice system that inflict injustice upon Aboriginal people on a daily basis in the criminal justice system. There are two in particular that will be the focus of this paper. They are the operation of the bail forfeiture provisions of the Bail Act in combination with the Justices Act and the imposition of automatic prison sentences for fine defaulters.

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[1] Solicitor. Central Australian Aboriginal Legal Aid Service

[2] The Hon Robert Tickner MP Minister for Aboriginal & Torres Straight Islander Affairs .Media Release dated 24 June 1992

The latter is discussed in the context of the inept manner in which the NT government continues to approach the difficult issues surrounding public drunkenness and public order offences.

2. The relevant Recommendations – Lest we Forget

The Recommendations of RCIADIC are summarised as follows:

Recommendation 92 required governments to pass a law to enforce the principle that imprisonment be used as an option of last resort.

Recommendation 91(b) provided that Governments, in conjunction with Aboriginal Legal Aid Services and Police Services, give consideration to amending bail legislation to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people.

Recommendation 99 placed the onus on courts to satisfy itself that an Aboriginal defendant understands the nature of the proceedings and suffers no disadvantage as a result of difficulties in the English language. In circumstances where there is any doubt as to the Defendant's capacity to understand proceedings, then a competent interpreter must be provided to the Defendant without cost.

Recommendation 121 provided that:

(a) Where legislation does not already so provide Governments should ensure that sentences of imprisonment are not automatically imposed in default of payment of a fine; and

(b) Such legislation should provide alternative sanctions and impose a statutory duty upon sentencers to consider a defendant's capacity to pay in assessing the appropriate monetary penalty and time to pay, by instalments or otherwise.

Recommendation 84 provided that issues related to public drinking should be the subject of negotiation between police, local government bodies and the representative Aboriginal organizations, including Aboriginal Legal Services, with a view to producing a generally acceptable plan

Recommendation 85 required that:

(a) Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care; and

(b) The effect of such legislation should be monitored to ensure that the persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences.

In 1992, the Northern Territory government was required to respond to the Royal Commission's inquiry. In its response the NT government indicated its support, on paper, for implementation of each of the above Recommendations.

3. Mandatory Sentencing

The provisions of the Sentencing Act (NT) that demand the imposition of minimum mandatory sentences for property offences are a clear contravention of Recommendation 92; they are an obvious breach of the principle that imprisonment should be considered an option of last resort. Understandably, this repugnant law has received a great deal of attention in legal and political circles both within and outside the Territory. For this reason, this paper does not seek to remind the reader of what they probably already know about mandatory sentencing and the fact it subverts the spirit of the Recommendations.

Instead, it seeks to argue that the provisions of Division 6 of the Sentencing Act are not the only forms of mandatory imprisonment found in the criminal justice system of the Territory. The other forms have been effectively hidden away but share the same qualities. Similarly to mandatory sentencing, they see Aboriginal people serving time in jail for trivial offences and probably have a greater impact on the Aboriginal population as compared to the non-Aboriginal.[3] And like mandatory sentencing, when applying the law regarding bail forfeiture the courts seem to err on the side of an arbitrary approach, rather than one based on the application of judicial discretion.

4. "Monster & Stomping" – dealing with social problems the Territory way

The import of the use of the term "anti-social" in the proposed Public Order and Anti-Social Conduct Bill (the "Bill") may be lost on persons outside the Northern Territory. In the language of the government and local Councils, the term "anti-social behaviour" is an overused euphemism that can encompass a wide range of activities from public drunkenness to humbugging[4] passing tourists. As far as the government is concerned, the main perpetrators are Aboriginal people who come into the main town centers of Darwin, Katherine and Alice Springs to drink away their lives and spoil the view for "normal", law-abiding citizens. Antagonism and contempt from the government towards Darwin's itinerant Aboriginal population is nothing new. In April 1997, ex-chief Minister Shane Stone was reported to express the following view:

> Aborigines with drinking problems deserved to be monstered and stomped on by the community...and that...if Aborigines didn't behave in an acceptable manner when living in the broader community, they deserved harsh retribution. [5]

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[3] There are no published statistics available regarding the numbers of Aboriginal people serving time in custody on bail forfeiture warrants. As there is no freedom of information legislation in the Territory, obtaining access to these statistics is made difficult.

[4] A word used amongst Aboriginal people in the Territory. It has a range of (mostly innocent) connotations, it can describe a simple request for money, annoying behaviour or causing unnecessary trouble

[5] NT News Report 13/4/1997

The real evil in the behaviour complained of is that for Stone, it threatens to "highjack (his) lifestyle". In April of this year Police Minister Mike Reed echoed Stones' sentiments, albeit in more opaque and temperate language, when he insisted that:

> The community is sick of anti-social behaviour and having their quality of life detrimentally affected by a minority.... People are tired of being accosted by drunks in the street and offensive behaviour consistently emanating from some residences.[6]

In an election year, maintenance of quality of life can mean as much to a voter as protecting the hip pocket. And so it is to perpetuate the "territory lifestyle" shared by the majority that must see the Aboriginal minority monstered and stomped on. For practical purposes this means enlarging the already substantial powers of the police in relation to street offences[7] and asking the courts to declare public places "notified areas". History again appears destined to repeat itself in the Territory, as in as much as the Bill focuses on the use of public spaces, it seeks to control the same kinds of behaviour that were targeted by the TINES scheme used by the Darwin City Council.

(i) TINES - Protecting the Community from the homeless

Primarily, the acronym describes a system of on-the-spot fines for minor traffic, summary offences and council by-law infringements. Its practical effect is that it can lead to automatic imprisonment in default of payment of the fine, contrary to Recommendation 121.

In Darwin, TINES were relied upon as a method of enforcement of Darwin City Council by-laws that regulate a wide range of behaviour in public places, from prohibitions to sleeping in public places and lighting fires to the power to "move people on" from reserves and beaches. Both Council employees and police are invested with a power of arrest and removal of anyone in breach of the by-laws.

Lighting fires and making sleeping in a public place illegal has obvious consequences for an itinerant Aboriginal person. Known colloquially as "long grassers", many of them congregate around the beaches and coastal reserves of Darwin's suburbs. The Mayor of Darwin, George Brown has in the past made no secret of the fact that as far as the Council was concerned, it would prefer to see Aboriginal people in jail than spoiling the public areas of Darwin. When it was revealed to him that between December 1998 and May 1 1999, 62 homeless people had gone to jail as a result of fine defaulting under the TINES scheme, he responded in this way:

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[6] Mike Reed MLA Media Release 4 April 2001

[7] The use of this law as an election ploy is revealed by the fact that the police already have substantial powers under Council By-Laws and the Summary Offences Act (NT) in relation to public order offences. See for example sections 45D (a law which prohibits drinking in public within 2 kilometres of licenced premises), 47A, and 56 of the Summary Offences Act

I believe most of the people jailed for sleeping in public are Aboriginal people who come in from places like Groote Eylandt. A lot of people think they don't have the money to pay the fines but they do have the facility to pay. It's just that when they come into town they spend all their money on grog...We have to protect the community and that's why we have these by-laws. [8]

(ii) TINES – the procedure

Once a fine is issued, if it remains unpaid within a specified period, then a courtesy letter is sent to the defendant. Two alternatives are provided for at this point, either the defendant must write to the Clerk of Courts to have the matter dealt with by the courts (indicating they wish to plead not guilty to the allegation) or if nothing is done, a further 28 days grace is provided in which to pay the fine.

Thus far, the system makes three fatal assumptions as far as Aboriginal defendants are concerned. Firstly, it assumes that the person who receives the infringement notice is the same person who is alleged to have committed the offence. This is a dangerous assumption particularly when many Aboriginal persons do not carry any photo identification and may provide a false name when apprehended by the police or council officer. Secondly, it assumes a literacy level that is probably beyond most Aboriginal persons and thirdly it assumes a fixed address; this is especially unrealistic given the relative mobility of many Aboriginal persons between town centres and outlying communities.

Integral to the question of whether a fine is an appropriate penalty for many Aboriginal defendants is the question of capacity to pay. This may well be an illusory notion in the face of the fact that the average income for an indigenous person in the Northern Territory is about 30% of what the average non-indigenous Territorians receives[9]. In light of this statistic, it is perhaps not surprising to learn that for many Aboriginal people, a non-custodial option ends up leading to jail.

If the fine remains unpaid after the issue of the courtesy letter, an enforcement notice will issue. If the enforcement notice remains unpaid, a warrant will issue and the defendant will be arrested with no alternative but to pay the total amount or serve the imprisonment in lieu of payment. The defendant is not brought before a court prior to being imprisoned and community service is not available as an alternative to payment of the fine.

The few statistics that are available reveal that for the year 1999/2000, more Aboriginal males (22) spent time in prison for fine defaulting than non-Aboriginal (3).[10] Aboriginal women are particularly vulnerable to being jailed for failing to pay fines and a recent

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[8] NT News report 21/6/99

[9] The average weekly income for an indigenous person in the Northern Territory is $167. Compare this to the non-indigenous person who has an average weekly income of $447. ABS, 1996 Census. Northern Territory "Indigenous Profiles – Population & Housing"

[10] NT Correctional Services Annual Report 1999/2000 at p. 100.

survey found for the years 1998-99, 76 % of indigenous women serving time in jail were there for fine defaulting[11].

(iii) The relevant law

The first successful challenge to the application of the TINES scheme to adult offenders was *Goyma v Moores & Ors*[12] The argument in *Goyma* focused on both the validity of the by-law prohibiting sleeping in a public place and the validity of the warrant of commitment issued because of the failure to pay the fine. Whilst His Honour Chief Justice Martin found that the by-law was valid, the method of enforcement was not. This was primarily because council by-laws could not take advantage of the enforcement provisions within Division 2A of the Justices Act, thus any imprisonment that followed as a result of a failure to pay was unlawful.

However the impact of *Goyma* on TINES that were issued for offences other than a breach of council by-laws was unclear until the matter of SD came before the courts. SD (a 19-year-old Aranda man from Alice Springs) received an infringement notice from the police for obscene language contrary to the Summary Offences Act. SD, being unable to read, had not paid the $100 fine within the relevant period. The warrant that inevitably issued came to police attention when SD's family called for the police for assistance. They were concerned by SD's behaviour as he was threatening self-harm. When they arrived to assist, the police arrested SD upon the warrant of commitment for 4 days in prison. The next day, he attempted suicide whilst in custody. Upon his family seeking legal assistance, an application was made the next day to the Supreme Court and SD was released by a writ of habeas corpus.

Subsequent proceedings on behalf of SD were commenced which questioned the validity of the entire TINES and its enforcement pursuant to Division 2A of the Justices Act. However, the substantive issues raised by SD's case were never ventilated before a court as the Northern Territory government solicitor conceded the claim for unlawful imprisonment. The NT government announced the immediate suspension of the use of TINES and undertook to conduct a review of the legislation. It is a long overdue promise and only precipitated by victory in the courts - if it had been left to the NT government to make good its promise in 1992 to the Commission, Aboriginal people would still be going to jail for sleeping in the streets.

(iv) The Fines & Penalties Bill 2000

The result of the undertaking is the Fines and Penalties Bill. It was tabled in the Legislative Assembly in November 2000 and appears a step in the right direction. Most importantly, it remedies the obvious injustice in the TINES procedure by providing for a range of alternatives for enforcement of the debt, with jail presented as an option of last resort. For example, community service is available in default of payment of an infringement notice. It

[11] Figures obtained from the Attorney-General's Department NT and quoted in Coupland, E "Women in Prison, Mandatory Imprisonment, ALJ Vol 25 No 5 October 2000 at p 249
[12] (1999) NTSC 146

also makes allowances for cases of mistaken identity and contains a provision whereby the recipient can apply to the Fines Recovery Unit (FRU) and apply to have the fine withdrawn. It also contains a provision for applying (in writing) to the FRU to have the fine withdrawn on the grounds of financial hardship. Unfortunately, access to this relief assumes a level of literacy that may be beyond many Aboriginal defendants.

The draft Bill focuses on suspension of drivers' licenses as the main mechanism for enforcement of both infringement notices and court ordered fines. This may have very little relevance to a considerable proportion of Aboriginal defendants, many of whom do not have a drivers licence or may be disqualified from driving.

(v) The proposed Public Order and Anti-Social Conduct Bill (the Bill)

There are three aspects of the draft Bill that are particularly concerning. It gives the police power to intervene and make an arrest in relation to behaviour that is non-criminal. Further, it gives them the right to enter private premises (without warrant) that have been declared a place of repeated anti-social conduct. Finally, the effect of a declaration of a public place as a "notified area "may well resemble a Territory version of apartheid.

The relevant sections for the purpose of the three areas under discussion are:

Section 4

> "anti-social conduct" means conduct, behaviour or incidents (whether amounting to criminal conduct or not) by or involving a person who, by their presence or behaviour at a place to which this Act or a section of this Act applies, is or has been:
>
> > (a) Causing anxiety, harassment, alarm or distress to a reasonable person entering, at, passing or leaving the place;
> >
> > (b) Obstructing or about to obstruct the movement of pedestrian or vehicular traffics in, on or through the place;
> >
> > (c) Interfering with trade or business at a place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place;
> >
> > (d) Disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place;
> >
> > (e) Interfering with the reasonable enjoyment of other persons using the place for the purpose or purposes for which it was intended, or a private place adjacent to the place; and
> >
> > (f) disrupting peace and good order in the neighbourhood of the place.
>
> "notified area" means a place declared under section 6 to be a notified area

"place of anti-social conduct" means a place where a continuing or repeated course of anti-social conduct has occurred at or in connection with the place

The places to which the Bill applies include shops, licensed premises, public places and a notified area.

Pursuant to section 5, police, local government or a government entity may apply to the Minister for the declaration of a notified area. Exactly what behaviour, conduct or acts will provide the basis for a notified area is unclear as the draft Bill provides a circular definition of a "notified area."

It appears we will have to wait for the Regulations for the answer. The maximum penalty for a breach of a direction to move on from a notified area is $2000 or 6 months imprisonment or both.

Section 7 gives the power to the police to ask persons who are reasonably suspected of engaging in anti-social conduct in a public place, prescribed place or notified area under the Bill to stop the behaviour in question and move on.

Public spaces are not the only target of the Bill. Section 8 deals with the power of the courts to declare a "place" a place of "anti-social conduct" and refers to residents and occupiers of the place. Indeed, the footnote to s 8(7) of the draft legislation envisages that once a declaration of anti-social conduct is made over a place, then assuming amendments are made to residential tenancy laws, such an order would be sufficient evidence for landlord to terminate a tenancy. It is somewhat ironic that a law, which targets itinerants, may well create more homeless people.

Under the Police Administration Act, the NT police have the power to enter private premises without a warrant in specified circumstances. However, the proposed Bill represents a significant and disturbing departure from these defined scenarios. According to s 8(8) of the proposed Bill a member of the police force (without warrant) may enter a place declared to be a place of anti-social conduct "at any time and give directions to persons in or about to enter the place."

Pursuant to s.7(7) of the draft Bill, the Police also have a power to seize "any article or thing" that is contributing to the anti-social conduct. The mind boggles.

The penalty prescribed for a breach of an anti-social conduct order is $2000 or 6 months imprisonment or both. The spectre of jail may loom larger with these orders; an allegation of breach of an anti-social order is a breach of a court order and it may be that repeated breaches are considered worthy of imprisonment.

(ii) An experiment in apartheid?

The definition of "anti-social conduct" focuses on the subjective effect that the non-criminal conduct has on the complainant. This means that if the mere presence of a group of Aboriginal people in a public place causes the "reasonable person" anxiety or harassment, then they can complain to police. It is important to consider the consequences of the Bill where within the group in question some of their members may be drunk, others humbugging passing shoppers for a cigarette, and others sober and minding their own business. If the initial complaint regarding the conduct is based upon the racial stereotype of a group of drunk Aboriginal people hanging around a shop front, can we expect the police to be discerning in their application of their power under section 7?

Police in the Territory have been known to fall into the trap of dealing in racial stereotypes when dealing with Aboriginal people as the case of JV vividly illustrates. JV, an Aboriginal elder from Katherine was in the main street of Katherine. He, along with other family members, was outside the ANZ Bank. One of the family members, B was intoxicated and began arguing with bank staff. JV, who was sober and a non-drinker, sought to intervene and asked B to settle down and move on. The police arrived and despite protestation from two sober witnesses and JV, proceeded to arrest JV and take him back to the police station. Upon arrival at the cells, the police discovered JV was not intoxicated as they had assumed, and thus they had no lawful basis for their arrest. They also discovered (no doubt much to their dismay) that they had arrested the President of the local Aboriginal legal aid service and the Vice – Chairperson of the NT Aboriginal Justice Advisory Committee.

Under the new Bill, JV although an innocent bystander, is likely to be asked to move on by the police if it is assumed he is drunk. Even if the police accept he is sober, his presence alone as part of a group of Aboriginal people (one of whom is drunk and humbugging the staff) may cause sufficient anxiety to the staff or customers of the Bank that he will be asked to move on. Should he protest, then the police may lawfully arrest him for being in breach of a direction under section 7 of the Bill.

In his Law & Order statement delivered to the Legislative Assembly in June 2001, Chief Minister Burke described the Bill as "another way to deal with some of the intrusive activities we see in our streets and parks".[13] In the same breath Mr Burke made no secret of the fact that as far as the government is concerned, those who perpetrate these activities are long-grassers, a "particular and peculiar group" in the Minister's view, and a group known for its anti-social behaviour.

Mr Elferink, the Member for Macdonnell also refers to the perceived threat this behaviour poses to the lifestyle of other Territorians in the same parliamentary session. His concerns begin with the welfare state that enables "a lot of these people [to] live a lifestyle which I certainly do not find pleasant, but they do not seem to mind".[14] However, poor living

[13] Denis Burke MLA, Attorney-General, Hansard, 5 June 2001, p.2, http://notes.nt.gov.au/lant/hansard.
[14] John Elferink MLA, Hansard, 5 June 2001, p.19, http://notes.nt.gov.au/lant/hansard.

conditions and limited economic opportunities are less of a concern to the Minister than the fact that this "lifestyle also impinges on the lifestyle and freedom of normal citizens and everyday citizens going about their business".

Through the use of the "notified area" provisions under the Bill, public spaces can be "reclaimed", made off limits to itinerant Aboriginal people and become the sole preserve of "normal and everyday citizens" of the Territory.

Clearly, one cannot deny that the issue of public drunkenness presents an array of problems for the Northern Territory government. However, measures such as the proposed Bill are unlikely to provide a panacea for the social ills that result. The shortcomings of the law as an instrument of social control are well known.

How the Bill will achieve anything other than increased arrests of Aboriginal people for trifling matters is unclear. It has emerged without any consultation with the broader community in contravention of Recommendation 84. According to Mr Burke, the only organization that provided any input was the NT Police Association. The tenor of the Bill also offends Recommendation 85 (b) as it goes dangerously close to re-criminalising the offence of public drunkenness by making behaviour that may stem from drunkenness a basis for offending under the Bill. Further, the NT government has made it clear that drunks are considered a target under the new law.

Recommendations 69,70 & 80 were also directed towards developing alternative options to police custody & imprisonment when dealing with the problems associated with public drunkenness. None of them contemplate the harsh measures proposed by the Bill such as imprisonment for public order offences or increased police powers. This is because another lesson learnt from the Commission's Report was that the majority of Aboriginal persons in custody were there for protective custody reasons or public order/alcohol related offences.[15] Whilst confronting the causes of excessive alcohol abuse amongst Aboriginal persons in the Northern Territory is a task of leviathan proportions, any attempt to deal with its effects, in isolation of the causes, will inevitably lead to band-aid solutions like those proposed in the Bill.

5. Bail & Bail Forfeiture

For Aboriginal people, the grant of bail has a particular relevance. They, unlike non-indigenous participants, are much more likely to be arrested than issued with a summons, thus will need to seek bail[16]. Further, the Report of the Commission found that Aboriginal

[15] Aboriginal people, particularly males still fill police cells for protective custody reasons. The NT Police Annual Report for 1999/2000 recorded that 8530 Aboriginal males were detained for protective custody reasons. See p 94. This figure represents approximately a third of the overall population of Aboriginal males in the NT.

[16] The NT Police,Fire & Emergency Services Annual Report 1999-2000 contains no information regarding arrest rates for aboriginal people. No doubt the figures exist but in the absence of Freedom of Information legislation, access to these figures is impossible. This conclusion is based on national surveys regarding arrest rates for aboriginal people, see C Cunneen, "Conflict, Politics & Crime : Aboriginal Communities and the Police", at p 21

persons are particularly disadvantaged with respect to the operation of bail. This was due to a range of reasons, some of which included economic disadvantage and the general inappropriateness of the bail system for the lifestyles of many Aboriginal people.

In the Northern Territory, this economic disadvantage has the potential to translate into time spent in jail. This is primarily because of the bail forfeiture mechanism that comes into play each time a defendant is released upon a financial recognizance in their own undertaking.

(i) The law

The relevant provisions of the Bail Act are as follows:

Section 27 (2) One or more of the following conditions only **may** be imposed on the grant of bail;

> (c) That the accused person enter into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his bail undertaking

The amount of the undertaking is usually set in the abstract; I shall return to this practice later. Upon a failure to appear, the court has the power to order under s 40 of the Act that the amount will be forfeited and a warrant of commitment to prison will issue.

Section 40 (1) provides that where:

> (a) an accused person fails to comply with his bail undertaking; and
>
> (b) He or another person has entered into an agreement pursuant to a bail condition to forfeit an amount of money,
>
> the court before which the accused person was required to appear in accordance with his bail undertaking may order that the amount referred to in paragraph (b) be forfeited and paid to the Territory.

Section 40(4) is also important as it provides the mechanism for enforcement of the undertaking pursuant to Division 6 of Part IV of the Justices Act (NT).

Section 81 of the Justices Act provides for the calculation of the term of imprisonment pursuant to a warrant of commitment. The harshest rate is calculated on a scale of $50 per day, so if the bail is set at $500, a warrant of commitment will be issued at the rate of 10 days in jail. Until very recently, Magistrates adopted the most punitive scale of $50 per day.

Relief from the punitive effect of s 40 is found in s 41 of the Act, which states

(2) Where an order has been made under section 40(1), the court may, at any time, order-

(a) That the order for forfeiture and payment to the Territory made under section 40(1) be cancelled or suspended; or

(b) That the liability of all or any of the persons liable upon or in respect of the agreement referred to in section 40(1) (b) shall be remitted, suspended or reduced, or both.

If a defendant is in custody as a result of the warrant of commitment and the court refuses an application under s 41, community service is not available. If they are unable to pay the forfeited amount, they must serve the days in jail allocated in default.

(ii) How do the problems arise?

Given the regularity with which Aboriginal clients fail to appear in the courts in the Territory, it may be that the meaning of a grant of bail is as mysterious to many Aboriginal defendants as Aboriginal customary laws would be to the uninitiated. Although it is reasonable that the Aboriginal traditional legal system would and should remain an enigma to those who do not participate in its rituals or ceremonies, it is unreasonable that the mainstream criminal legal system remains an enigma to Aboriginal defendants (who are by far the majority of participants in the criminal justice system in the Northern Territory[17]). The problems arise from the application of a range of (mostly incorrect) assumptions about the capacity of Aboriginal defendants to understand what is happening to them.

For example, the conditions attached to a bail form will be explained to an Aboriginal defendant in English. This is largely a meaningless task as a large proportion of Aboriginal defendants have a rudimentary grasp of English.[18] Literacy levels are also very low amongst Aboriginal persons in the Territory so it is most unlikely they will be able to read their bail undertaking. Furthermore, the assistance of an interpreter is a relatively new concept as the battle against the Northern Territory government's past refusal to fund and provide interpreters for Aboriginal defendants has only very recently been won[19].

Communicating the concept of bail and its inherent obligations is but one of many obstacles. There are more to follow. Even assuming that with the assistance of a qualified interpreter, your client understands what the grant of bail means, its conditions and importantly, the punitive consequences should they fail to appear, further difficulties arise

[17] According to the 1999/2000 NT Correctional Services Annual Report aboriginal people represented 67% of the prison population in the Territory

[18] In its 1999 report, Inquiry into the Provision of an Interpreter Service in Aboriginal Languages, the Commissioner reported that 74.5% of the aboriginal people in the Territory speak an indigenous language(s) and have a very poor or limited understanding of English.

[19] Recommendation 99 insisted that aboriginal interpreters be made freely available to aboriginal defendants who required their assistance. The NT Governments stance regarding the provision of interpreters is not consistent with the spirit of Recommendation 99. For some background to the battle waged against the government see Blundell, H " A Long Fight for a Basic Human Right." ALJ Vol 25, No 5 October 2000

the moment your client leaves the court. These are the ones that highlight why bail can be inappropriate for the lifestyle of many Aboriginal defendants.

Firstly, there is the tyranny of distance. Many Aboriginal defendants live in remote communities. Very few, if any, of these communities have a public transport infrastructure and as a result cars are a precious commodity. This, combined with extreme climatic changes that make many roads impassable throughout the Territory, means that often Aboriginal defendants simply cannot get to court.

Secondly, there are the cultural obligations that are part of daily life in Aboriginal communities. Aboriginal defendants often cite their reason for failing to appear at court as attendance at "sorry business", "ceremony" or a funeral. The weight accorded these explanations will vary amongst Magistrates and Judges in the Territory. Indeed, as long as the Bail Act fails to acknowledge the cultural reality of many Aboriginal defendants, reasons advanced for absence such as "ceremony" and "sorry business" risk being viewed by the Bench as an excuse for absence as opposed to a legitimate reason. Obtaining legal recognition of the right of an Aboriginal defendant to be granted bail to receive payback, as part of customary law obligations, has so far been a failure. However the decision in *Barnes*[20] is no obstacle to legal recognition of a grant of bail that enables a defendant to pursue cultural obligations that do not involve payback.

Problems are also created by the imposition of unrealistic and onerous bail conditions. Some examples of the kinds of conditions that are regularly attached to bail for Aboriginal defendants are ones which injunct the consumption of alcohol and prevent entry into a particular township or community. A ban on entry into a community is particularly problematic when viewed in light of the reality of the cultural and ceremonial obligations of many Aboriginal defendants. Bail conditions, like these, which have the potential to set the defendant up for failure, were disapproved by RCIADIC, and are an inappropriate mechanism for social control.

(iii) How forfeiture leads to jail

The setting of bail without a financial undertaking is rare. Section 27 of the Bail Act is discretionary in its terms, however the lower courts in the Territory appear to treat it as a mandatory requirement. No consideration is given to whether on the merits of the case in question a financial undertaking should be required. This is arguably improper. Analogous to the approach traditionally adopted by the courts when considering the question of whether a surety should be imposed, the imposition of a financial undertaking should only be imposed after a consideration of a range circumstances. If, for example, the offence is particularly serious and the defendant has a history of failing to appear then an additional incentive to appear may be justified. Otherwise, each person should be bailed in his or her own undertaking.

Secondly, in keeping with an approach that discards discretion in favour of the rubber stamp, prior to setting the amount, no submissions are invited from counsel as to the

[20] Steven Barnes (1997) 96 A Crim R 593

capacity to pay of the defendant. Thus the amount (usually anywhere between $500 and $1000) is determined in the abstract and each Magistrate tends to favour setting the same amount for each defendant. While it may appear a benign approach on its face (because each defendant appears to receive equal treatment), it masks assumptions regarding income levels among Aboriginal and non-Aboriginal defendants and capacity to pay. The gulf in average incomes between the indigenous and non-indigenous simply cannot sustain this approach.

Whilst the argument may be raised that the capacity to pay the amount is not relevant because it is an undertaking that only arises upon a failure to appear, this is both artificial and spurious. Bail is an undertaking by the defendant to the court. Any criteria that are set down by the court in the event of default of the obligation must be based on the party's ability to meet those criteria[21]. Recommendation 91 stated that any criteria that may inappropriately restrict the granting of bail to Aboriginal people should be subject to review. For Aboriginal defendants who are likely to occupy the lowest rung in the financial ladder, it is inappropriate to impose a monetary obligation unless absolutely necessary.

(iv) Bail forfeiture – how does the punishment fit the crime?

The real sting in the Bail Act lies in the power of the court to order forfeiture in the absence of the defendant. In effect, this means that a warrant of commitment will issue to imprison the defendant for the days that are set in default of the forfeited amount. One would think, that consistent with principles of natural justice and in light of the terms of Recommendation 92, this would be a power that should exercised sparingly by the courts in the Territory. However, it is not.

When a defendant fails to appear, a Magistrate has two options under the Bail Act. He or she can proceed under s 39 of the Bail Act and issue a warrant of apprehension for the defendant and make no determination with respect to the question of bail forfeiture. Alternatively, he or she can proceed under sections 39 and 40, a step that will trigger automatic forfeiture of the undertaking. There is no discretion in this regard; once a decision is made to proceed under s 40, there is no alternative but to order immediate forfeiture and set the period of imprisonment in default. The principles of natural justice and procedural fairness do not apply to the exercise of the power pursuant to s 40. This is justified by reference to the remedial nature of the discretionary powers found in s 41 of the Bail Act which ameliorate the harsh and punitive effect of the power under s 40.

There appears no logical reason as to why a Magistrate would favour an approach that demands forfeiture in the absence of the defendant over the fairer and more equitable course of issuing a warrant for the apprehension of the defendant. However, this has increasingly been the practice of most Magistrates – although anecdotal evidence suggests this is a relatively new trend.

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[21] This argument is supported by the observations of His Honour Justice Angel in Kingsley v Pryce Unreported 30/6/200 Supreme Court NT at p 2

(v) The relevant law

The case law on the question sheds little light on the subject. *Birdwood v Murphy*[22] is authority for the proposition that a defendant has no right to be heard on the question of forfeiture at the time the power is exercised. However, it does not bear directly upon the question of whether the court is compelled to proceed under s 40 every time a defendant fails to appear. Similarly, the more recent decision of *Hale v Yates*[23] resolved a related question that had vexed many Magistrates. This related to the power of a Magistrate to review the question of forfeiture once the warrant was executed upon the defendant. His Honour Justice Angel held that the power to set aside the warrant was implicit in the terms of s 41 of the Act. It made no observations as to the practice of forfeiture in the absence of the defendant and it was certainly not authority for the proposition that it should be arbitrarily adopted in every case.

The common practice of Magistrates setting the default period at the most punitive scale of $50 per day is also one that has jettisoned the exercise of judicial discretion and been arbitrarily applied. The recent decisions of the Northern Territory Supreme Court in *Newcastle v Coffey*[24] and *Kingsley v Pryce*[25] make it clear this is incorrect. When considering the question of the default period for either court imposed fines or bail forfeiture, Magistrates must exercise their judicial discretion and take account of the circumstances of the defaulter and the nature of the default.

(vi) DC's case – doing time for a non-existent crime

The case of DC is a good example of how circumstance can conspire to make answering bail for Aboriginal defendants a difficult task. The final result in DC's case also highlights how the system of bail forfeiture produces absurd results. DC, a 19-year-old Aboriginal man had been charged with a number of separate offences between October 1999 and November 1999. He was known to be addicted to petrol sniffing and at the time of being charged with these offences had already served his second strike sentence under the mandatory sentencing regime.

The November offences alleged that he stole meat and seafood sticks worth five dollars from the Jilkminggan community store and assaulted the storeowner in the process. He was a resident of the Jilkminggan (Duck Creek) community which lies 110 kms south of Katherine. The October 1999 offences alleged that he consumed liquor within a restricted area contrary to the Liquor Act. When arrested for the November offences he was placed on bail (in relation to both offences) of $1000 in his own undertaking and was required to appear at Katherine Court of Summary Jurisdiction on the 16 December 1999. On that day, he failed to appear and his bail was forfeited in his absence and a warrant of commitment was issued for 20 days jail.

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[22] 117 NTR 27
[23] Unreported Angel J 23/10/2000 Supreme Court NT at p 30
[24] (2000) NTSC 21
[25] Unreported 30/6/2000 Supreme Court NT

On the 3rd February 2000, he was arrested and charged with criminal damage. At the same time, the warrant of commitment for 20 days was executed upon him. An application was made to set aside the warrant of commitment. The reason proffered to the court for his absence was his involvement in the celebration of the handover of a parcel of land known as Old Elsey Station back to the traditional owners (of which he was one) of the Jilkminggan community. The Magistrate took the view he had no discretion to set aside the warrant and DC was ordered to serve 20 days imprisonment.

The November offences were set down for a contested hearing, thus he sought and was granted fresh bail in respect of these and the October offences. He was required to appear at court on the 26th May 2000 at Katherine. On the 26th May he obtained a lift into Katherine with a person driving a council car. There is no public transport service between Katherine and Jilkminggan. DC had neither car nor a driver licence. At around 11.00 am that morning, his matters were called on. There being no appearance, a warrant for his arrest was issued and his undertaking was again forfeited in his absence triggering the issue of another 20-day warrant for imprisonment. He then arrived at court at 11.30 am and spoke to his lawyer. DC indicated that he was on his way to the hospital to visit a sick relative and would return to court at 2.00pm to arrange for recall of the warrant and disposal of the substantive matters.

At 2.00pm DC failed to appear. On the 1st June 2000, he appeared before the Katherine Court of Summary Jurisdiction after having been arrested and charged with trespass. The issue of the warrant of commitment for 20 days was raised before the court. The reason for DC's absence was explained on the basis that he had told by the driver of the council car that he (the driver) would be returning to Jilkminggan at 2.00pm that day. Rather than face the prospect of being stranded in Katherine, with no money and no-where to stay, he opted to return to Jilkminggan.

Like most Aboriginal defendants, he did not have the $1000 necessary to stay out of jail. However, given the reason for his non-appearance had been adequately explained, an application was made to either set aside the order for forfeiture, or in the alternative adjust the default period. On this occasion, the Magistrate exercised his discretion, granted DC bail again and he was released immediately. After attendance at a local alcohol and drug rehabilitation center for three weeks, DC's matters were again before the court. On the 22nd June 2000, he pleaded guilty and was sentenced for each of the charges before the court and received a total of 24 days imprisonment; only 4 days more than what he had already served in February 2000 for an offence that does not exist in the Criminal Code nor the Bail Act.

Given this absurd result and the harsh consequences of a non-appearance under the current regime, it is ironic that defendants would be better served if charged with the offence of breach of bail. This way, a fine upon proof of the charge and conviction would result. Further, if the defendant were, like many Aboriginal persons, indigent then at least community service would be available.

(vii) BM's case – going directly to jail

In the case of BM (a 45-year-old Aboriginal man from Numbulwar- a small community in the South East corner of Arnhem Land) in the court at Katherine, the Prosecution withdrew charges of stealing, criminal damage and trespass against the defendant. The charges had been laid in 1986 thus did not fall within the dragnet of the mandatory sentencing regime. The facts alleged that the defendant (with two co-offenders) had broken into a caravan behind a supermarket in Darwin and stolen some beer. It was a trivial offence and one not worthy of a prison sentence. On the day of the application to withdraw the charges, the defendant was not present in court but had been bailed to appear on that day. Whilst the Magistrate dismissed the charges, over objection from counsel for the defendant, he also forfeited the defendants bail ($500) and issued a warrant of commitment for imprisonment for10 days. It is important to note that no warrant of apprehension was issued.

Given the staleness of the charge here, this may have been an appropriate situation where the Magistrate should have exercised his discretion and either reserved the question of forfeiture or declined to make an order. If he had chosen only to issue a bench warrant under s 39 of the Bail Act then the defendant has an opportunity to explain his absence to the court. Given the age of the charges and the defendant's age, the possibilities are many and varied. It may be that given the offence was alleged to have occurred over 14 years ago, he may have forgotten his obligation to appear. Given his age and the plethora of health problems experienced by many Aboriginal persons (particularly those in the remoter parts of the Territory), it may be that he is sick or infirm and cannot get to court. Alternatively, he may be involved in ceremonial obligations that do not enable him to travel to Katherine for court. On the other hand, it being the end of the wet season in the Top End, the Roper River (which must be crossed to get to Katherine) may have peaked and made crossing treacherous.

The real unfairness in the approach adopted here lies in the fact that once BM is arrested upon the warrant of commitment, there is no legal instrument which will bring the matter before a court for reconsideration of the question of forfeiture. No warrant of apprehension was issued. Access to relief under s 41 assumes the existence of a legal instrument that is independent of the warrant of commitment. There is no mechanism found under the Bail Act or the Justices Act that requires the prison authorities to bring BM before a court to re-visit the question of forfeiture. Given the seriousness of the consequences of default, one would think it imperative that such mechanisms would exist.

It is probably at this point that the provisions are at their most insidious. Unless BM commits a fresh offence or has an outstanding warrant of apprehension which would require him to be brought before a court, or alternatively, he has a spare $500 (highly unlikely given he has been charged with stealing a case of beer) he will be taken straight to prison and serve 10 days for failing to appear in relation to a criminal charge that no longer exists.

6. Conclusion -Too Many, Too Often

At the conclusion of the Royal Commission's investigation, Commissioner Elliott Johnston made this telling observation:

> The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. But this occurs not because Aboriginal people in custody are more likely to die than others in custody but because the Aboriginal population is grossly over represented in custody. Too many Aboriginal people are in custody too often.[26]

In other words, the Recommendations that were designed to reduce the amount of Aboriginal people in custody are just as crucial as those designed to prevent the deaths from occurring. Yet, 10 years on, little has changed in the Northern Territory. Aboriginal people still fill jails in the Territory in a manner that is disproportionate to their number in the population.[27]

Most of the Recommendations discussed in this paper have either been ignored or thwarted by the NT government. Similarly, the courts are overlooking some of the Commission's concerns and Recommendations. Judges, Magistrates and practitioners in the criminal justice system in the Territory who deal with Aboriginal people on a daily basis must remind themselves and each other of what the Commission told us. The courts have a role to play in reviving the Recommendations. Judicial discretion can and should be used to greater effect because as long as the NT government continues to ignore certain Recommendations for the sake of political expediency, there will be too many Aboriginal people in custody too often.

[26] RCIADIC National Report Overview & Recommendations. See paragraph 1.3.3 at p 6

[27] Whilst aboriginal people make up 67% of the jail population, they make up only 28.5% of the overall population in the Northern Territory. ABS 1996 Census figures