

Imprison me NT

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1. Some statistics to wake you up

It's almost a form of cheating to use statistics in a paper about imprisonment in the Northern Territory. The statistics are so shockingly bad that you can't help but grab an audience's attention.

But it's late in the day and I don't have any good jokes, so let me cheat just a little bit.

- The national daily imprisonment rate for the March quarter of this year was 194 people per 100,000. The Northern Territory's imprisonment rate was 904 per 100,000.
- Our closest rival is WA, but they are in our dust – 273 people locked up per 100,000.

And the situation is only getting worse: in 12 months to March this year the NT recorded the largest increase in the average daily imprisonment rate, from 864 to 904 prisoners per 100,000.

As a number of other speakers, including our Chief Justice, have mentioned, Aboriginal people make up 86% of the adult prison population, despite being less than 30% of the general population.

But don't worry, it gets worse. Let's look at the statistics for kids.

- The national daily youth detention rate for the June 2014 quarter was 3 young people per 10,000. The Northern Territory's youth detention rate is 6 times that, at 18 per 10,000.
- Our closest rival is again WA, but they are so far behind they are not even in our dust – they are still filling up at the servo. They lock up only 6 kids per 10,000.

And 96% of the juvenile detention population in the NT are Aboriginal kids.

The culture of mass incarceration – or 'incarcerationalism' in our CLANT President's coinage – is thriving in the NT.

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What I want to do in this paper is provide an overview of the range of ways that our love affair with locking people up had been indulged in recent years and more broadly the way in which coercive power has been concentrated in the hands of executive government.

2. Mandatory sentencing

Let me start with an old favourite. From 1 May 2013 we have had a new regime of mandatory sentencing for violent offences.² 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 an 'exceptional circumstances' provision that is drawn reasonably broadly and helps to avoid some injustices. However, we are still arguing about the correct approach to that provision in the courts, including a case currently before the Court of Appeal on a Crown appeal in which the magistrate at first instance sent a woman to jail for 3 months despite describing her circumstances as 'genuinely heart-wrenching' and offering the opinion that 'any civilised court would never send a woman in this particular situation to prison'.³

The quality of mercy is very much being strained.

Without going through the many general objections to mandatory sentencing, it remains the case that on all the evidence we have, it doesn't work to prevent crime or make the community safer. But our Attorney defines success slightly differently. In parliamentary debates, he had this to say:

There is also that reference that mandatory sentencing does not work... What are you trying to achieve? If you are trying to put people in gaol for committing serious offences it works. The person has committed the offence and gone to gaol. That works!⁴

Yes, that's right: locking people up is our measure of success. And look at the scoreboard!

Another contribution to the parliamentary debates also reflects the extent to which imprisonment has come to be seen as an end in itself for Aboriginal people. Speaking in support of mandatory sentencing, Bess Nungarrayi Price, Member for

² Part 3, Division 6A *Sentencing Act* (NT).

³ *Grotherr v Orsto* AP4/2015 (21341612); see previously *R v Duncan* [2015] NTCCA 2; *Dhammarandji v Curtis* [2014] NTSC 39.

⁴ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 12 February 2013.

Stuart and – for those not from the NT – a Warlpiri woman from Yuendumu, had this to say:

Gaol, to our people, is okay because families tell us they are happy their son, nephew, sister or cousin is in gaol for three months because they do not drink, do not get into trouble are fed three times a day, are with their family members, sleep in language groups and come out of prison much healthier.⁵

I suggest, with respect, that Bess Price has identified the problem, not the solution. When life for people is so bad that jail looks good, it's not clear to me that responding with more jail is the right response.

3. Mandatory alcohol mandatory treatment

Let me next turn to our newest 'mandatory', namely our regime of mandatory alcohol treatment.

It is established by the *Alcohol Mandatory Treatment Act*, the effect of which is that people who are taken into protective custody by police three times in two months can be subject to detention for three months to undergo mandatory treatment for alcohol addiction.⁶ Matters must go before a Tribunal for an order for treatment. Amongst other things, the Tribunal must be satisfied that a person's alcohol misuse is a risk to the safety and welfare of themselves or others, they will benefit from mandatory treatment and there is no less restrictive intervention to deal with the risk to themselves or others caused by their alcohol misuse.

Following changes to the law in December 2014, it is no longer an offence to abscond from a treatment centre. And many people do, many times.

Although there is a paucity of publicly available information on the regime, we know that people subject to orders have been almost all Aboriginal.

There are a range of concerns that might be raised in relation to this regime. It is enormously expensive, costing \$40 million per year. It was not designed based on any evidence and equally concerning is that it is not apparently subject to any serious qualitative evaluation. Or if it is, we have no reason to believe the government is about to let anyone know the results.

There was a review of the law undertaken after about a year of its operation, but it is important to note that the review was not tasked to consider whether the regime was actually getting outcomes – the review was just into the technical operation of the legislation.

⁵ The Hon Bess Price, Parliamentary Debates, 12 February 2013.

⁶ *Alcohol Mandatory Treatment Act 2013* (NT), ss 8-10.

What the regime does seem to achieve, at least when people are not running away, which they often are, is 3 months off the booze for some very sick people. I accept that's something, but when we have no rehab facilities available in our remote communities, I question the value of detaining people in town at great expense to force them to rehabilitate when we know that forcing people to change doesn't work.

There is no evidence that the regime has kept even one person off the grog after their release and the failure to invest in aftercare is nothing short of disgraceful, not least of all because it means any gains are quickly – if you will pardon the vernacular - pissed up against the wall.

But in the Territory there is no problem so complex that a bit of detention can't help. In late 2012, the then 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.

4. Paperless arrests

Let me move on to another topic and start with a quote:

[H]aving studied law and political science I get the concept of liberty. But in the practical, real world of Mitchell Street when people are standing on street corners with their pants around their ankles blaring out expletives or baring their buttocks to passing cars, expectorating, fornicating, urinating, defecating and doing all the other things they do when they have a skin full of juba juice, we can now say to the police, "Go out, lift them, pull them out of circulation"⁷

So says our Attorney-General of the so-called 'paperless arrest' regime that commenced in the Northern Territory on 17 December 2014.

How it works

The regime is contained in division 4AA of the *Police Administration Act*, which provides for taking persons into custody for an 'infringement notice offence'.

If police arrest you because they believe on reasonable grounds that you have committed or were about to commit an 'infringement notice offence',⁸ they can now hold you for up to 4 hours, or until you are no longer intoxicated.⁹ They don't need any reason to hold you. At the end of the period they can release you

⁷ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 26 November 2014.

⁸ Section 133AB(1).

⁹ Section 133AB(2).

unconditionally, issue you with an infringement notice, release you on bail, or bring you before a court.¹⁰

An 'infringement notice offence' is defined to include a range of offences for which an on-the-spot fine can be issued under the *Summary Offences Act*, the *Liquor Act*, and the *Misuse of Drugs Act*.

This includes such outrages as failing to keep a front yard clean; singing an obscene song; abandoning a refrigerator or ice chest (considered particularly serious if it contains beer); playing a musical instrument so as to annoy; and the popular leaving dead animals in a public place.

More to the point it also includes offences such as consuming liquor within a public restricted area; offensive conduct; using profane language; attempting to re-enter a licensed premises within 12 hours of being removed; and possessing a small amount of cannabis oil, resin or seed.

If you are taken into custody police must still process you at the watch house and are required to take and record your name as well as identification information.¹¹

In the first 3 months of the year, the law was used to arrest 500 people. About 70% were Aboriginal people.

Some thoughts about it

'Paperless arrests' is, of course, a misnomer. The power of arrest is completely unchanged. And there is nothing that makes such arrests less 'papery'.

The regime operates following an arrest without a warrant under the existing s 123 of the Police Administration Act.¹²

After holding you for 4 hours (or longer until you are no longer 'intoxicated'), the police have the same options as they have always had: release you unconditionally (for example with a warning); release you with an infringement notice; release you on bail; or bring you before a justice or court for the offence. The amount of paperwork involved in each option is the same as it always has been.

In fact, for the first two of the options (release without charge or release with an on-the-spot fine), the regime involves *more* paperwork, not less.¹³ Because a person arrested under this regime still has to be processed into the watch house, there is 'paperwork' to be done which could be avoided if you simply gave someone a warning or an on-the-spot fine at the outset.¹⁴

¹⁰ Section 133AB(3).

¹¹ Section 133AC(1).

¹² Section 133AB(1)(a).

¹³ It also involves more paperwork than bringing a person to court on a summons.

¹⁴ See s 133AC(1).

Requiring people to be processed upon arrest may seem like an apparent concession to avoiding incommunicado detention, but it is worth noting that it does serve the useful purpose of enabling (indeed requiring) the police to obtain and record a person's name, and 'information relevant to the person's identification, including photographs, fingerprints and other biometric identifiers' to be taken and recorded. This is a handy opportunity to harvest personal information beyond that required for the purpose.

But what is 'paperless' – and what this law is *really* all about - is the apparently unqualified power police now have to hold you for 4 hours, to 'take you out of circulation'. To hold you, the police don't need to charge you or be prepared to take you to court. They don't need to justify in any way, to anyone, your detention during those 4 hours. You don't have the right to apply for bail or be taken before a justice or court as soon as practicable.¹⁵ You most certainly don't have the right to a lawyer.

It may seem ironic that the trigger for these new powers is an offence that would otherwise have been able to be dealt with by way of on-the-spot fine. The summary infringement notice regime was introduced to allow for minor offences to be dealt with and punished without the need for arrest. But it's only really ironic if you are not setting out to undermine the original purpose of the summary infringement notice regime. Our Attorney-General, himself a former NT police officer, is no ironist:

I am not really that warm toward summary infringement notices because of what the *Summary Offences Act* enabled police to do. It was a clean-up Act. It was an Act that enabled police to arrest a person and take them into custody and out of circulation.¹⁶

Our Attorney remembers what he describes as those 'Jurassic' days fondly and says that 'to a degree it is back to the future': 'Modern policing can look back to us reptiles and know we remember a time when we used to arrest people regularly, put them in cells and control the streets effectively.'¹⁷

And so it has come to pass that in the Northern Territory if police suspect you have played a musical instrument so as to annoy, your liberty has less protections than if they suspect you have killed someone.

Perhaps most remarkable of all, the regime applies to offences for which the only penalty is a fine. A court could not lock you up for the offence, but the police can hold you for 4 hours – or longer if you have a 'skin full of juba juice'.

Our Attorney-General has described the regime as a form of 'catch and release.'¹⁸ But the man we now call Kumanjaji Langdon did not get the opportunity to be

¹⁵ Section 137 *Police Administration Act*.

¹⁶ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 26 November 2014.

¹⁷ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 26 November 2014.

¹⁸ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 26 November 2014.

treated like game. On 21 May, he became the first person to die in a police cell having been held under a 'paperless arrest'. That matter will be the subject of a coronial inquest on 10 August in Darwin.

Challenge in the High Court

NAAJA is challenging these laws in the High Court. We will argue that the law is invalid, because it confers a power on police to detain which is punitive or penal in character and is accordingly contrary to the Constitution. I won't go into the details of the challenge, not least because I am no expert in Constitutional law.

But it is worth noting that an important threshold question arising is whether the separation of powers doctrine applies at all in the Northern Territory. The Northern Territory Government will argue that it does not. We obviously hope to convince the High Court otherwise.

In any event, we will find out one way or another after 1 September when the case is to be heard by a Full Court in Canberra. Until then, I will leave the last word on the topic to our Attorney-General:

I encourage the police to pick up the cudgels of this new power and use it for the proper maintenance [of] law and order and for the true welfare of the people of the Northern Territory.¹⁹

5. Alcohol Protection Orders

Getting back on to the booze, Alcohol Protection Orders ('APOs') are another novel nasty.

Police can issue you with an APO if you are charged with an offence punishable by more than 6 months in prison – as most things are in the NT - and the officer believes that you were affected by alcohol.²⁰

Once on an APO:

- It an offence for you to possess or consume alcohol.²¹ Drinking is criminalised.
- Police are given extraordinary powers under the law to stop, search and arrest you.²²
- It is an offence for you to enter licensed premises²³ except for work or residence.²⁴ Given that you can buy a beer in most places in the Territory, this

¹⁹ The Hon Jon Elferink, Attorney-General, Parliamentary Debates, 26 November 2014.

²⁰ *Alcohol Protection Orders Act 2014* (NT), s 6.

²¹ Sections 5(1)(b) and (b).

²² Sections 18-19.

makes it an offence to go to the football stadium, the entertainment centre, almost all small local supermarkets and the area of the airport from which interstate and international flights depart. There is a defence of a 'reasonable excuse', but that's little comfort if a police officer decides to arrest you and says you can explain it to the court.

- You can seek a reconsideration by a senior officer of the decision to issue an APO in writing within 3 days.²⁵ There is a further right of review within 7 days to the Local Court but only if the first avenue has been pursued.²⁶

Impact of the laws

NAAJA obtained figures earlier in the year that showed that over 85% of APOs have been issued to Aboriginal people.

It is perhaps unnecessary to remind this audience that the law is contrary to the basic recommendations of the Royal Commission into Aboriginal Deaths in Custody, by criminalising drinking and exposing many Aboriginal people to an intense cycle of police contact and arrest.

Challenge under the RDA

In the case of *Munkara*,²⁷ NAAJA has sought to challenge the law as being racially discriminatory and contrary to s 10 of the *Racial Discrimination Act* on the basis of its disparate impact.

Given my involvement, it wouldn't be appropriate to offer comment on the case, but its background provides a sense of how the regime works on the ground.

The plaintiff is a homeless Aboriginal man. His first language is Tiwi and he requires an English interpreter. He has very limited English literacy.

He was given his first three-month APO having been arrested for stealing a bread roll, silverside and an orange juice worth \$4.20 from a Coles supermarket while apparently intoxicated. Those charges were ultimately withdrawn.

Three days after being placed on an APO, he was arrested when he was found by police intoxicated. He was issued with a further six-month APO. A week later he was again arrested for drinking and was issued with a further 12-month APO. He was banned from drinking until January 2016. At the time of the litigation he had been arrested for breaching the APO on a total of 20 occasions, but had committed no other offences in that time.

²³ Section 5(1)(b).

²⁴ Section 5(2).

²⁵ Sections 9-10.

²⁶ Sections 11-13.

²⁷ *Munkara v Bencsevich and Others*, 77/2014 (21437457).

His case is far from unique. We have another client who has been arrested 30 times now for drinking in contravention of his APO.

The central issue in the case is whether s 10 of the RDA, which seeks to provide for equality before the law, applies to a facially neutral law that has a disparate impact on people of a certain racial group. Now is not the time to delve into the intricacies of the RDA, but in the case of *Maloney*, the High Court looked at liquor restrictions on Palm Island and held that disparate impact could found a claim under s 10. The Court affirmed that the section looks to the *effect* of a law, not simply its purpose.²⁸

We have argued that the effect of the APO Act is to disproportionately limit the rights of Aboriginal people to possess property, enter public places, enjoy their privacy and, by reason of the law's extremely limited review provisions, equality before tribunals administering justice. It may also be that similar arguments could be made in relation to the Alcohol Mandatory Treatment regime.

The thing that saved the laws in *Maloney* was that they were considered to be a 'special measure' designed to protect Aboriginal people from the damage caused by grog. But neither alcohol regime in the NT has been designed or described as a 'special measure' and no claim to that effect was made in the case.²⁹

The matter was heard in February before Southwood J and we lost. Reasons have not yet been provided, but an appeal has been filed. Watch this space.

6. Parade of Horribles

The last few years have also seen a number of other laws and policies that continue in a similar coercive, punitive vein or otherwise have significance for the way that power is shifting and being exercised in the NT. I don't have time to go into detail for each of them, but let me give a quick parade of horrors.

a. Indefinite detention of serious sex offenders

Despite usually being ahead of the game in the lock-em-up stakes, the NT was reasonably late in introducing a regime to indefinitely detain serious sex offenders. It allows for the Attorney-General to make an application within 12 months of their release for the offender's continued detention or ongoing supervision. There are a range of objections to the regime that can be found in the submission that CLANT has on its website, but I just want to touch some of the practical problems that impact upon how the regime operates in practice.

²⁸ (2013) 87 ALJR 755, [11], [38]-[39] (French CJ); [68], [84] (Hayne J); [112] (Crennan J); [148], [167] (Kiefel J, in obiter); [201], [204], [224] (Bell J); [338] (Gageler J).

²⁹ In the matter of *Munkara*, above n 27, the Northern Territory has not sought to argue that the APO regime is a special measure.

There has been a lack of effective sex offender programs and when programs are available, they are provided only in English. This is a very big problem if you are an Aboriginal offender – as most offenders in NT prisons are. If you are a young man under 40 living in Wadeye, for example, the NT's largest Aboriginal community, you will almost inevitably need an interpreter. But instead of providing an interpreter to try to make sure that rehabilitative programs are actually effective, Corrections prefer to simply put a bunch of people from the same language group into the course at the one time, so they can effectively interpret for each other. The fact that this may only serve to compound misunderstandings and render the program useless is apparently of no concern. The laziness and sheer blockheadedness of this is staggering.

There is a similar problem for people with cognitive impairment, who can expect no reasonable adjustment. If their impairment is such that they can't undertake a program, they are simply assessed as 'unsuitable' to complete the program.

The government has also shown that it will be very reluctant to spend money on post-release options that may allow a person to be supervised and monitored in the community. In the first case in the NT, the offender, a man from Central Australia, was required to live in a caravan on the Darwin prison grounds for want of somewhere suitable within the community.

b. Changes to bail laws

Our bail laws have been changed to expand the range of offences for which there is a presumption against bail. You can be as innocent until proven guilty as you damn well please, but you'll have to do it from within a cell, thanks very much.

c. Temporary Beat Locations

The first act of the new Country Liberal government was to scrap the Labor government's 'Banned Drinkers Register'.

The BDR operated by requiring everyone to show id when buying takeaway grog. The id was scanned by the vendor. Those on the BDR, because of various triggers including alcohol-related offending, were unable to buy grog. It was an offence to buy grog for a person on the BDR.

This regime, said the Country Liberals, treated licensees like 'heroin traffickers' and good honest Territorians like criminals.

Instead, we have the much less invasive Temporary Beat Location. This involves police stationed outside bottle shops, asking you where you intend to consume your alcohol. If you can't provide a good answer, you are warned against making a purchase and if you ignore that warning the alcohol is seized. Bear in mind that very many places where Aboriginal people now live – including all communities and town camps – are restricted areas. But the rest of us, we have nothing to worry about.

I should note, however, that TBLs – unlike much else in NT grog policy – do seem to work. It is generally accepted that there has been a reduction in violent crime in the NT and this is attributable to the reduction in supply that TBLs have effected. This is welcome. Now is not the time to delve into grog policy, but let me make it clear that my critique here is limited to the means, not the end and to observe that, again, we have a shift in power that I think should be noted.

d. Summary Procedure Reforms

We are also about to see a range of criminal ‘summary procedure reforms’ in the next 6 months which are intent on telling Magistrates how to run things, will require defence disclosure and punish those defendants who don’t just cop I sweet. It seems that not only can we not trust our courts to impose appropriate sentences, but they can’t even run a court.

e. New drug search powers

On 16 June, the government also announced new ‘drug transit route’ powers that will give police additional ‘tough new powers’ to search vehicles for drugs at checkpoints to be set up on main roads. This is said to be a response to the proliferation of ‘ice’ and an attempt to stop it being smuggled into the NT. It’s unclear whether there will be much to complain about in this, but again, it’s more powers to police.

7. So what’s the problem with all of this?

In their ground-breaking and celebrated paper at this conference in 1999 entitled ‘Mandatory Sentencing and the Concentration of Powers’, the learned authors Goldflam and Hunyor said of the Territory’s then fairly novel mandatory sentencing laws:

the laws operate to concentrate executive power, and further... exemplify a style of governance characterised by punitive and socially divisive targeting of already disempowered groups in the community.

Since nobody seems to have listened to our cautionary words, I thought I’d have another go this year.

Back in 1999 we mischievously sought to rub salt into the wounds of the then recent loss of the Northern Territory’s Statehood referendum, suggesting that ‘Territorians themselves showed they had misgivings about the way they’re governed when they rejected Statehood in 1998’.

Perhaps we were unwise to crow, as while Statehood remains off the agenda, becoming a Police State seems very much within reach.

The point Russell and I made in 1999 remains, with respect, an important one. Power in the NT is increasingly being concentrated in the hands of the executive, with the judiciary increasingly having their powers circumscribed.

Our mandatory sentencing regime not only takes power from the courts, but gives significant power to police and prosecutions, whose discretionary decisions can have a bigger impact on whether a person goes to jail and for how long than do the decisions of judges and magistrates. An obvious example in the current regime relates to whether physical harm is to be alleged, a factor that can trigger a 'level 5 offence'. It can make the difference between a 12 month mandatory sentence and 3 months.

The power given to police by laws such as Alcohol Protection Orders and paperless arrests is also extraordinary and the potential for policy impunity is a particular cause for concern. The courts are dealt out of the game, and police can hold you without charge and without any effective right to challenge your detention.

The laws will have their heaviest impact overwhelmingly upon Aboriginal people. I'll avoid an argument about whether Aboriginal people are the target of laws such as paperless arrests, alcohol protection orders and alcohol mandatory treatment. What is incontrovertible is that Aboriginal people bear the brunt of the coercive power they bestow on police and this was known when the laws were introduced. You can join the dots if you wish.

One reason for the disparate impact that bears repeating is that history shows us that police discretion is exercised less favourably for Aboriginal people. And it is simply the fact that Aboriginal people are more likely to come to the attention of police for offences and while under the influence of alcohol.

We pride ourselves in the Territory on our cultural and social diversity. We like to portray ourselves as 'practically reconciled'. But what does this latest marshalling of the powers of the state against Aboriginal people, in ways that are designed to avoid scrutiny, accountability and transparency, say about the character of our society and the place of Aboriginal people in it? What damage does it do to our social fabric?

I am pointing out the obvious to note that Aboriginal people already feel deeply the history – and in the Territory it is particularly recent history – of colonisation, frontier violence and laws and policies that were explicitly discriminatory against Aboriginal people, not least of which were the policies of child separation that gave us the 'Stolen Generation'.

As we engage in our national 'conversation' about Constitutional recognition of Aboriginal people, we might ask ourselves how meaningful that will be when we continue to lock up blackfellas for drinking in public.

I share with you now a distressing image. It is a lithograph by a colonial artist Augustus Earle, depicting a scene from George St Sydney in 1830. When I first saw

this image, what took my breath away was its grim familiarity. Almost 200 years later, the same scene can be found at the Darwin GPO, at Fannie Bay shops, at the Nightcliff foreshore...



This image confronts us with so much of the history of our nation that we do not wish to see.

So perhaps it is no surprise that our response is to send in the police.