A CONTEMPORARY SNAPSHOT OF TWO ISSUES UPON WHICH THE RCIADIC REPORT COMMENTED: YOUTH JUSTICE AND THE OVER-INCARCERATION OF ABORIGINAL YOUNG PEOPLE, AND ALCOHOL-RELATED OFFENCES AND OFFENDING

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I Introduction

In 2001, a Northern Territory ('NT') Magistrates Court sentenced a man to 14 days imprisonment for possessing a five litre cask of moselle in the Aboriginal community of Hermannsburg. The sentencing Magistrate remarked: 'On 18 June, when I was last here at Hermannsburg, I said that anyone who was found to have liquor in their possession in a restricted area of Hermannsburg would be sentenced to a term of imprisonment, and so it will be in this case.'[1]

The NT's culture of mass imprisonment is evidenced in both the judicial propensity to overlook community based dispositions in favour of incarceration, and in the 'lock 'em up' ethos underpinning mandatory sentencing and other punitive laws in the NT.[2] Against this backdrop, it is unsurprising that incarceration statistics emerging from the NT are alarming.

The NT has the highest incarceration rate in the country, and the third highest in the world.[3] The NT imprisons approximately 748 adults for every 100,000.[4] By comparison, Western Australia has the second highest incarceration rate: 262 people for every 100,000.[5] The NT has seen a 41 per cent increase in incarceration rates over the last decade,[6] the largest percentage increase in the country. Of the people incarcerated in the NT, over 81 per cent are Aboriginal,[7] despite Aboriginal people representing only 32 per cent of the population.[8]

Reducing Aboriginal incarceration rates was the central theme of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') report. Incarceration rates in the NT have more than tripled in the 20 years since the tabling of the RCIADIC.

This article provides a contemporary snapshot of two issues upon which the RCIADIC report commented: youth justice and the over incarceration of Aboriginal young people, and alcohol related offences and offending. Both issues have come under recent policy and legislative scrutiny in the NT. Twenty years on, consideration of the RCIADIC report provides a platform from which to analyse whether NT Government practices in these areas are effective in engaging with the ongoing issue of Aboriginal people being incarcerated at exponential and disproportionate rates.

II Youth

The RCIADIC told us unequivocally that '[i]ncarceration as a deterrent has been shown to be an ineffective means of dealing with the issue of Aboriginal juvenile offending'.[9] The RCIADIC went on to conclude that prison may actually be crime producing, rather than crime preventing.[10] This notion that contact with the criminal justice system may result in entrenchment within it is a significant finding. It is also in contrast to the finding that young people diverted are less likely to have further involvement in the criminal justice system.[11]

The NT currently has the highest youth incarceration rate in the country: 101 per 100,000 people.[12] Although statistics were not as readily available at the time of the RCIADIC, the report concluded that approximately 55 per cent of young people incarcerated in the NT were of Aboriginal descent.[13] Now, Aboriginal young people represent 97 per cent of the NT youth detention population,[14] and only 47 per cent of the general youth population.[15]

The NT has traditionally responded to youth offending with a 'tough on crime' approach. This is in obvious contrast to the

emphasis the RCIADIC attached to early intervention and diversionary strategies. The importance of early intervention and diversionary strategies in reducing youth incarceration rates was also later reiterated in the 1997 *Bringing Them Home* report,[16] the National Indigenous Law and Justice Framework,[17] and most recently in the *Doing Time – Time for Doing* report.[18]

A The Promise of Diversion

Diversion is an essential ingredient of an effective youth justice system. The philosophy of diversion recognises the negative consequences of exposing young people to the criminal justice system, and offers young people a pathway out of crime, without exposing them to the stigma and alienation of the criminal justice system. Diversion also recognises the reality that most young people 'grow out of crime' when exposed to positive interventions.[19]

The NT Government of the times' attitude towards diversionary strategies was illuminated in the final Government Implementation Report for the RCIADIC.[20] The report lamented that public debate in relation to mandatory sentencing had 'misleadingly characterised the NT Government's approach to juvenile justice',[21] explaining that mandatory sentencing was 'essentially a diversionary strategy with a strong orientation towards the social needs of Aboriginal youth'.[22] Although mandatory sentencing no longer features in the NT youth justice system, it is interesting that it was against the backdrop of the 'stop mandatory sentencing' campaign that youth diversion was introduced.[23]

B The Decision to Divert a Young Person

The decision to divert a young person is a loaded one. The RCIADIC articulates this point: 'The police decision to arrest a juvenile marks the point of entry into the juvenile justice system from whence it is often difficult to disentangle oneself'.[24] Research consistently tells us that Aboriginal young people are less likely to be diverted compared with non-Aboriginal young people.[25] The consequence of this is Aboriginal young people have a higher rate of entrenchment in the more punitive aspects of the criminal justice system.[26]

Police have an unfettered power to administer all aspects of diversion in the NT. Section 44 of the *Youth Justice Act 2005* (NT) gives police an absolute and unappealable discretion over both the decision to divert a young person, and to determine whether they have successfully completed diversion. The court only has a referral power through section 64, and the prosecution (an arm of police in summary jurisdiction proceedings) must consent for a court referral to be valid. This gives police a veto power over the magistrate's decision to refer a young person to diversion. Police power over the diversion process, from start to finish, is accordingly absolute.

Police should not be the gate-keepers of whether or not a young person enters into the criminal justice system. The North Australian Aboriginal Justice Agency ('NAAJA') and Central Australian Aboriginal Legal Aid Service ('CAALAS') advocate for both police and the judiciary to have diversion referral and decision making powers.

> The evidence suggests that the greater the police control of the referral process the less likely it is that Indigenous young people will benefit from [diversionary] conferencing. In states where there is the possibility of the Children's Court, as well as police, referring young people to a conference, there is less adverse discrimination. Courts appear more willing than police to refer Aboriginal youth …[27]

The reasons for this inequity are complex, a full discussion of which is beyond the scope of this paper. Academics such as Chris Cunneen and Harry Blagg have long argued against police being the sole institution invested with diversion referral and decision making powers.[28]

For diversion to be effective in the NT, it needs to take into account the fraught relationship many Aboriginal people have with both the police and the criminal justice system. It also needs to be culturally relevant and accessible for Aboriginal young people.

C 'Youth Justice' in the NT?

Currently, youth justice in the NT can be characterised by its deficiencies. Many Aboriginal young people are alienated by the youth justice system because it ignores, rather than actively engages with, their sociocultural identity and reality.

There are no youth specific magistrates in the NT. The same magistrates sit in both adult and youth jurisdictions, putting on and taking off their youth justice hat when appropriate. Whilst some magistrates may have a specific interest in the youth jurisdiction; and a concurrent commitment to

maintaining a youth friendly court, other magistrates choose to hold the youth justice court in the same fashion as the adult jurisdiction, treating youth court users as 'mini-adults', as opposed to a category of offenders who have independent and specific needs.

There is, similarly, no specific youth justice division of NT Community Corrections. This means that young people are assessed, treated, and supervised by Community Corrections officers who may not have any youth specific training or an appreciation for the specific criminogenic and developmental needs of young people in the criminal justice system.

NAAJA and CAALAS maintain that youth offending requires a unique and specialised criminal justice response. This is because young offenders are distinct from adult offenders criminogenically, psychologically, sociologically, and biologically.[29] Having a specialist youth justice system in the NT would allow for practices and practitioners who are responsive to young people and their sociocultural needs. It would go some distance to rectifying current patterns of Aboriginal young people cycling through a system tailored towards adult offenders, which fails to meaningfully address the underlying causes of offending.

D Policy Promises

Current NT youth justice policy direction is multifaceted. On the one hand, it appears that policy is attempting to address rising incarceration rates, on the other, the only recent legislative reform impacting young people has been punitive: making breach of bail a criminal offence.[30]

(i) Bail

The implications of making breach of bail a criminal offence are worrying. Most notable is the increased criminalisation of young people and the potential for significant increases in remand rates. Most young people in custody in the NT are held on remand.[31]

The long term consequences of remanding young people include: social isolation and alienation; family and community disharmony; stigmatisation; reduced opportunities to form pro-social, community-based friendships; increased disruption to education and employment prospects; reduced opportunities to participate in important cultural initiations and ceremonies; and reduced opportunities for rehabilitation. The New South Wales Youth Justice Review recently commented that:

> Evidence indicates that the remanding of youth is often associated with a range of negative consequences including increased recidivism, poor conditions in remand facilities as a result of overcrowding and far greater costs in comparison with alternatives such as bail and community supervision.[32]

Most importantly, there is no evidence to suggest that high remand rates correlate to a reduction in crime rates. Conversely, research indicates that remand is a significant recidivism risk factor.[33]

NAAJA and CAALAS support the insertion of pro-bail considerations into either the *Youth Justice Act 2005* (NT), or the *Bail Act 1982* (NT). Exposing young people to the risk factor of remand should be avoided, except in rare and exceptional circumstances. Bail and community based supervision should *always* be preferred over remand and this should be explicitly legislated. We suggest that the option for courts to remand a young person be removed where the young person is unlikely to receive a term of imprisonment, unless exceptional circumstances apply.

(ii) A Review

In a more positive direction, the NT Government is undertaking a review of the Youth Justice system. NAAJA and CAALAS are stakeholders in the review process and have provided submissions in support of a youth justice system which focuses on early intervention and diversionary strategies, and which is rehabilitative rather than punitive.

Similar to the RCIADIC recommendations, we espouse initiatives which are culturally relevant, and developed within a 'community-up' approach. In particular, we support the development of Youth Community Courts, Youth Camps, and the increased involvement of Elders and Aboriginal Communities in the dispensation of youth justice.

NAAJA and CAALAS remain optimistic that the current Youth Justice review will herald a change for youth justice in the NT. Certainly, we will be recommending that, 20 years later, the NT Government re-engage with the discussion and recommendations contained in the RCIADIC report.

III Alcohol

The NT has the highest rate of alcohol consumption in Australia.[34] The NT consumes 50 per cent more than the national average.[35] The RCIADIC commented on alcohol as an underlying social dysfunction in Aboriginal communities: 'What has occurred, it appears, is that drinking as itself a meaningful activity has been incorporated into the broader culture of some Aboriginal groups – again, young men are easily identifiable – and carries within itself, therefore, the processes of its own reproduction.'[36]

The RCIADIC considered the interrelated relationship between alcohol and high Aboriginal incarceration rates. This section of the article explores two features of this relationship: punitive alcohol related laws which disproportionately impact Aboriginal people, and the intersection between alcohol, violent offending, and incarceration rates.

A Protective Custody

Most of the deaths which the RCIADIC investigated occurred in police custody, as opposed to prison. This is in contrast to non-Aboriginal deaths in custody, which predominately occur in prisons. It is for this reason that the RCIADIC report urged the governments to reduce the over-exposure of Aboriginal people to police custody.

Section 128 of the *Police Administration Act 1991* (NT) provides for protective custody–apprehension without arrest or warrant–where police have reasonable grounds for believing a person is seriously and apparently substance affected, and the person is in a public place or trespassing on private property. Police can hold a person in custody until police reasonably believe the person is no longer intoxicated.[37]

The RCIADIC considered the operation of protective custody provisions. It concluded that '[a] reasonable belief that a person is intoxicated should not, of itself, be sufficient to warrant police intervention',[38] as it unnecessarily escalates custody numbers. Instead, the RCIADIC proposed that legislation governing protective custody be amended to only enable apprehension and detention of people intoxicated to the extent that they are incapable of taking proper care of themselves, or if they are likely to cause harm to others or damage to property.[39]

The RCIADIC recommended the establishment of alternative, non-custodial facilities for the care and treatment of persons apprehended solely due to intoxication.[40] Moreover, the RCIADIC report recommended there be a statutory duty on police to utilise alternatives to protective custody, such as sobering up shelters, or taking a person home.[41]

Despite the RCIADIC report's analysis and recommendations, legislation and practice in the NT remain unchanged. In 2002, the NT retained a significantly higher proportion of police custody incidents due to public drunkenness (nearly 70 per cent) than any other Australian jurisdiction. In 2007–08, Aboriginal people accounted for 93.4 per cent of NT protective custody incidents.[42]

B Public Consumption of Alcohol

The use of public space by Aboriginal people often results in Aboriginal people having increased contact with the police.

Section 45D of the *Summary Offences Act 1978* (NT) introduced in 1983 what is commonly referred to as the 'two kilometre law'. The two kilometre law prohibits alcohol consumption in a public place or on unoccupied private land within two kilometres of licensed premises, unless the owner or occupier of the private land gives express permission. The RCIADIC report, along with later reports such as the Race Discrimination Commissioner's 1995 *Alcohol Report*,[43] recommended the two kilometre law be reviewed[44] and repealed.[45] Section 45D remains, and a recent review of the *Summary Offences Act 1978* (NT) by the NT Department of Justice recommended that the section continue.[46]

The declaration of town camps in the NT, and other locations heavily populated by Aboriginal people, as restricted and prescribed areas,[47] where alcohol is not permitted, has effectively prohibited many Aboriginal people from consuming alcohol in their private homes.

For Aboriginal people living within restricted or prescribed areas, the effect of prohibiting consumption of alcohol in certain places has been to 'force many Aboriginal drinkers to drink on the outskirts of town in improvised, hidden, unsupervised, unserviced, and, most importantly, unsafe locations'.[48] Importantly, restricting the places people can consume alcohol has not been shown to reduce alcohol consumption.[49]

C Alcohol Consumption and Crime

Alcohol consumption is a significant factor in criminal offending in the NT. According to the *Little Children are Sacred* report, between 2001 and 2004 there were an average of 2000 assaults and 110 sexual assaults per year known to involve alcohol and, for each year, an average of 65 per cent of the prison population were serving sentences for alcohol related offences.[50]

NT Police statistics indicate that alcohol is often involved in the most harmful and violent offending. Alcohol is associated with 52 per cent of family violence offences and in 2008–09, 96 per cent of all homicide related offences were associated with alcohol.[51]

In light of this, CAALAS and NAAJA support constructive NT Government efforts to address dangerous levels of alcohol consumption, reduce alcohol-related harm, and deliver safer communities.

D Policy Promises

The NT Government has recently sought to address alcohol related offending with the introduction of the 'Enough is Enough' alcohol legislation, and 'New Era in Corrections' policy framework. Given the rise in violent offending and its role in exponential increases in incarceration in the NT, NAAJA and CAALAS recognise the importance of taking action to address the problem.

Amongst other initiatives, the 'Enough is Enough' alcohol reforms create a new, therapeutic court program: the SMART Court. Based on therapeutic jurisprudence, and successful drug court models in other jurisdictions, the Court's aim is to deal with offenders' underlying issues through case management and therapeutic court processes. The SMART Court regime has some promise, but its potential has been undermined by the NT Government's decision to exclude violent offenders from it.

The NT Government's 'New Era in Corrections' promises to reduce the NT's incarceration rates to the national bench mark. One method of achieving this is through the introduction of two new community-based, rehabilitative sentencing dispositions: community-based orders and intensive treatment orders. But again, violent offenders are excluded from eligibility for both of these dispositions.

Rehabilitation options whilst incarcerated are also minimal. The Darwin and Alice Springs Correctional Centres provide limited rehabilitative opportunities for prisoners, requiring a prisoner to be sentenced for at least 12 months to qualify for participation in most programs. Moreover, courses support very limited numbers and are offered sporadically. Compounding this, few Aboriginal prisoners are given the opportunity of a supported release through being granted parole.

Excluding violent offenders from policy initiatives and rehabilitation opportunities designed to reduce alcohol related harm, results in violent offenders continuing to escalate already high recidivism rates. 'Tough on Crime' approaches to the complex issue of alcohol related violent offending is not the answer. In advocating for supply reduction and minimum floor prices as a means of 'damming the rivers of grog', Russell Goldflam comments:

> In dealing with offenders who have committed crimes of violence in a haze of alcohol, our courts often say they're applying the principle of general deterrence, that a tough punishment must be imposed to put off other people from committing similar crimes. Sentences have been ratcheted up accordingly. But there does not appear to be any evidentiary basis that general deterrence does in fact generally deter. On the contrary, our levels of incarceration are so high that it is, I would argue, readily apparent that we are imposing further costs and causing further harm by gaoling more offenders, more frequently, for longer periods.[52]

CAALAS and NAAJA welcome policy responses which focus on reducing alcohol related crime through supply reduction, the introduction of floor prices,[53] and increasing community based rehabilitation for offenders with alcohol misuse issues. We applaud the recent allocation of additional funds for drug and alcohol rehabilitation services. We also reiterate recommendation 287 of the RCIADIC report: that provision of alcohol and other drug prevention, early intervention and treatment programs for Aboriginal people should remain a high priority.[54] More funding of rehabilitation is needed to address the current alcohol related problems in the NT.

IV Conclusion

Twenty years on from the RCIADIC report, it appears that successive NT Governments have done little to address

the ultimate RCIADIC report finding that '[t]oo many Aboriginal people are in custody too often'.[55]

Addressing high Aboriginal incarceration rates will require the NT Government to meaningfully grapple with the two issues discussed in this article: the over-exposure of Aboriginal young people to the criminal justice system, and alcohol fuelled offending. The RCIADIC report should inform policy development in these areas.

NAAJA and CAALAS support policy approaches which include Aboriginal people and Aboriginal communities in discussions and solutions. The NT needs to move away from traditional 'tough-on-crime', generalised responses. Rather, we need to embrace effective justice initiatives which engage with the underlying causes of offending, and in doing so, achieve a reduction in Aboriginal incarceration rates.

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