Covering a multitude of sins

Chris Howse

How can the NT Office of Aboriginal Development have concluded that mandatory sentencing has little or nothing to do with rising Aboriginal imprisonment rates?

It is misleading to regard mandatory sentencing as the defining characteristic of the Northern Territory government's approach to juvenile justice. The approach taken is essentially a diversionary strategy which contains a strong orientation towards the wide ranging social needs of Aboriginal youth.[1]

A key responsibility

It's court day in Port Keats. Stepping off a plane on a wet season morning at this little community in the far west of the Northern Territory, is to step into a different country. Walking down the main street, the houses are dilapidated and old. The puddles lie in the street and it's hard to circumnavigate them all, especially with armfuls of court files and papers. There is a tightening of the stomach as we approach the cyclone wire enclosed compound of the courthouse and police station. Already there is a crowd of Aboriginal people sitting patiently on the grass, waiting to talk to the lawyer, and to go into court. Most of them are kids. Most of them are charged with property offences of a minor nature, and a lot of them will go to gaol. We would be hard pressed to find one of them who can speak English well enough to understand properly what is going on. The main language spoken here is 'Murinpatha'. There are no Murinpatha interpreters to be had at the courthouse. It is going to be a long day. It is a story being played out across the Territory ...

Misrepresentation is a strong word. When an official agency misrepresents to government a thing for which it has a key responsibility, then misrepresentation is a mighty strong fact. The Northern Territory Office of Aboriginal Development has told the Northern Territory government that the government policy of mandatory sentencing is having little or no effect on rising imprisonment rates of Aboriginal people. This advice is a sham. It is given in spite of clear information to the contrary and with an embarrassing lack of consultation.

The Office of Aboriginal Development (the OAD) is an arm of the government of the Northern Territory. It provides a focus for work in Aboriginal affairs by the government and its agencies.

In 1991, the Royal Commission Into Aboriginal Deaths In Custody, (the RCIADIC) after a good deal of inquiry, set out a comprehensive list of ideas to do something about the appalling over-representation of Aboriginal people at all levels of the justice system. There were 339 Recommendations made by the RCIADIC. Over the past nine years, each State and Territory has been obliged to keep an eye on the progress of implementation of these Recommendations.

In the Northern Territory, a key responsibility of the OAD has been to produce reports looking into the progress of these Recommendations. The final of these reports was tabled in the Northern

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Territory Legislative Assembly in July 1999 (the Report). It covers not only the period up to the 30 December 1997, but also in the opinion of this sincere critic, a multitude of sins ...

An outpost of progress

As 'Territorians', our simplest but most eloquent boast is that 'up here, we do things differently'. We are remote. The scrutiny to which public agencies are put in southern cities has never applied to us. We still do not have a Freedom of Information Act. When we consider the history of the RCIADIC recommendations in the Northern Territory, the 'doing things differently' tag is most apt.

The key objective and expectation of RCIADIC was to achieve a dramatic falling away of the over-representation of Aboriginal people at all levels of the justice system. By the mid 1990s, it was clear that this was simply not occurring. The feeling around the country was that it was time to recommit to the Recommendations and the principles underpinning them.

In 1997, a Ministerial Summit was convened in Canberra and attended by representatives of Aboriginal Communities together with Attorney-General from the Commonwealth, States and Territories.

The Summit saw sincere commitment to the recommendations from all jurisdictions of the Commonwealth. Except the Northern Territory. Everybody else agreed to sign a communiqué, which undertook in substance to:

- aim for a substantial reduction in the imprisonment rate of Aboriginal people;
- commit each State and Territory to broker a strategic plan to tackle the further implementation and monitoring of the Recommendations to address the underlying issues of the incarceration and death rate.

The Attorney-General for the Northern Territory did not commit the government of the Northern Territory to this communiqué. He said among other things:

> We are being sidetracked if we continue complaining about the fact that when someone commits a crime and is convicted by a court that they are sentenced to gaol. At that point, race, sex, country of origin is irrelevant. All that matters is that the person has broken the law and the court has decided the penalty is a period of detention. There is no point dragging into this debate the Territory's mandatory minimum gaol sentences for certain crimes. It has nothing to do with the issue.[2]

The path of progress in dealing with bad rates of imprisonment and deaths of Aboriginals was thus expressed by the Attorney-General. Two years passed, bringing us to the present day. Nothing of consequence has happened since, save that both the death rate and the imprisonment rate of Aboriginal people in the Territory have increased.

It is against this background, that we now come to examine the final report of the implementation of the Recommendations. This Report was tabled in the Northern Territory Parliament in July 1999 and will be the last time the government will receive such a Report. The Report is, in part, advice to the government about the impact of the Territory's laws on Aboriginal people.

Herein lies an important query. Mandatory sentencing laws have been passed in the Northern Territory which would seem to go somewhat against the grain of the RCIADIC Recommendation. The question arises: what does the Report say about the impact of these laws? Furthermore, what is the quality of advice that is given to the government of the Northern Territory by the office? It will be argued that:

- the Report misrepresents key facts;
- the quality of consultation in preparing the report was embarrassingly poor.

A key recommendation

Recommendation 92 of the RCIADIC's findings is as follows:

> That governments that have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.

The Report states that this Recommendation is supported by the government of the Northern Territory. This support might be queried given that no such legislation has appeared on the statute books of the Northern Territory over the nine years since that Recommendation was made. Moreover, it appears the mandatory sentencing laws run directly counter to this Recommendation.

The mischief

While the support expressed in the Report (p.32) is open to question, the advice to the government of the Northern Territory set out in the Report would seem to be based on errors of a far more serious nature. The suspect advice goes to the impact of mandatory sentencing with respect to the imprisonment of both Aboriginal adults and Aboriginal juveniles. The nub of that advice from the OAD is that the law has little effect on either category of Aboriginal people.

Let us examine the advice in detail.

Signs and tokens: in which direction do they really point?

The important signs and tokens, which shed light on the impact of this law, are whether with respect to Aboriginal adults and juveniles, since its passing:

- arrest rates are rising or falling;
- imprisonment rates are rising or falling;
- there has been a significant change in the type of offence for which people are being incarcerated;
- conditional release dispositions are rising or falling.

Evidence from the 'coal face' — the courts in the bush and in the towns — is gathered by consultation with the people who know it best: the Aboriginal Legal Services.

The following figures are based on data published in the Report, unless otherwise indicated.

Figure 1: Arrest rates

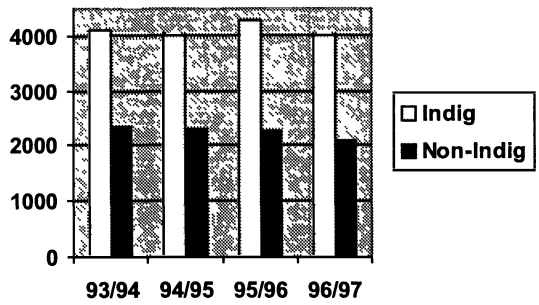


Figure 1 shows little change in the arrest rates of Aboriginal adults.

The OAD Report says

There is insufficient information to support any firm interpretation of the figures, however it is relevant to consider that the size of the Northern Territory Police force has increased by approximately 9% since June 1995, in line with publicised policy emphasis on reducing property crime — in particular break and enter offences.
(p.123)

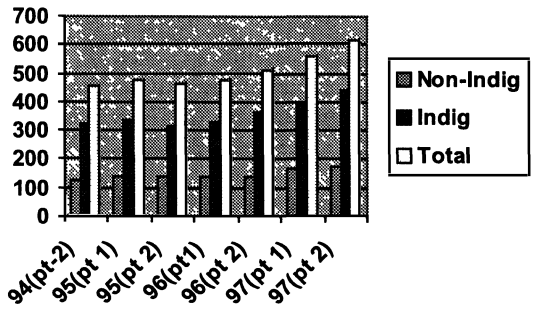
The acknowledgement that the arrest rate has remained high is correct given that government policy has singled out for attention, property crime. We point out in passing that the keystone of that policy has been the passing of the mandatory sentencing law.

What then of the prison population?

Northern Territory average prison population

Figure 2 shows the average daily prisoner population based on monthly daily averages generated by Northern Territory Department of Correctional Services. The figures represent half-yearly average daily numbers in gaol from 1994 to 1997. The mandatory sentencing law began on 8 March 1997. The last group of columns shows that the average daily population jumped significantly in the last half of 1997. Aboriginal Legal Aid services report that a significant number of Aboriginal people were imprisoned in the last six months of that year pursuant to the mandatory sentencing law, people who would not have ordinarily been gaoled. The OAD suggests a different scenario (p.131):

Figure 2



The OAD Report says

The existence of mandatory sentencing legislation does not explain the increase in the daily average prisoner population. The legislation was introduced in March 1997 and only came into full effect in 1998 following various appeals.

The two most likely explanations for the increase in the daily average prisoner population are:

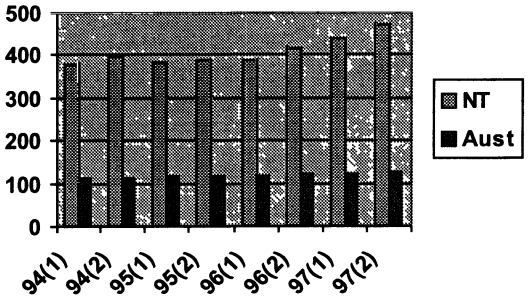
- an increase in the likelihood of offenders being apprehended (owing to greater police numbers and efficiency); and/or
- an increase in the levels of crime.

The suggestion that the law did not have full force and effect until various appeals were heard is misleading. While there were a number of appeals to the Supreme Court of the Northern Territory and one to the High Court, there were no stay applications brought by either the Aboriginal Legal Aid Services nor the Northern Territory Legal Aid Commission. It is correct to say though that a number of defendants did wait to have their matters disposed of till after the High Court considered the matter. However, from June 1997 onwards, defendants were pleading guilty to property offences under the law and being gaoled, according to inquiries with the Northern Territory Legal Aid Commission and the North Australian Aboriginal Legal Aid Service.

The claim that the increase in gaoled Aboriginal adults in 1997 is due to improved policing and/or higher crime levels is unsupported by any evidence. The OAD's failure to consult with police or Legal Aid Services before making this claim is deplorable.

Figure 3 shows imprisonment rates per 100,000 population (p.133).

Figure 3



The OAD report says

Both the National and the Northern Territory imprisonment rates have increased steadily over the period examined, however the Northern Territory imprisonment rate has increased far more rapidly than the National rate. The comparatively high rate in the NT is fully explained by the over representation of Aboriginal people in custody...

What is not explained is that in remote Northern Territory communities, a very large number of Aboriginal people charged with criminal offences will be caught because:

- traditional Aboriginal people will readily tell police who was responsible for a particular offence, into which police are inquiring. The story will have 'gone around' the community rapidly and people are most willing to tell it.
- when arrested, traditional Aboriginal people will readily make admissions on tape. A caution read to the Aboriginal suspect is often understood poorly and disregarded.

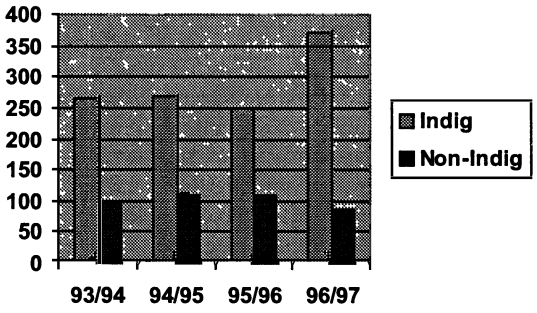
For these reasons, police report a clean up rate of 90% and more on bush communities in the Top End. Aboriginal Legal Aid Services report that in the last half of 1997, particularly in the communities of Groote Eylandt and Port Keats, a number of people were gaoled under the mandatory sentencing law, and suggest a jump in the imprisonment rate directly attributable to this cause.

The situation with juveniles

Arrests of juveniles

The proportion of Aboriginal juveniles has increased over the last four years. *Figure 4* shows Northern Territory juvenile arrests from 1993/94 to 1996/97.

Figure 4



The OAD Report says

The upward trend ... is due to a large increase in the number of Aboriginal youths arrested during 1996/97. This jump is difficult to interpret, although one argument could be that the increasing number of police is causing a greater proportion of offenders to be apprehended. It is important to recognise that the overall number of arrests is very small so not too great a significance should be placed on the trend line. (p.144)

What is not commented on here in the report is the alarming situation created by the arrest of a significantly higher number of juveniles, the law having been in place since March 1997. The potential to affect juveniles is drastic because:

- by far the most common offence for which juveniles are gaoled is one of property (see Figure 6);
- the incidence of relatively minor property offences among juveniles is particularly high on some communities.

Accordingly, *Figure 4* suggests the mandatory sentencing law has significantly contributed to the high number of juveniles arrested in the year 1997.

Most common offence for Aboriginal juveniles

By far the most common offence type for both Aboriginal and non-Aboriginal juveniles ending in detention is a property offence. *Figures 5 and 6* show the pattern (pp.150-1).

Figure 5: Non-Aboriginal Juveniles 1995–1997

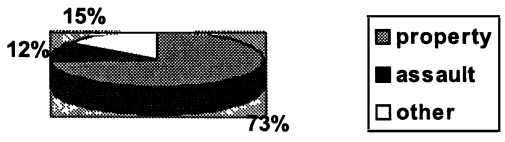
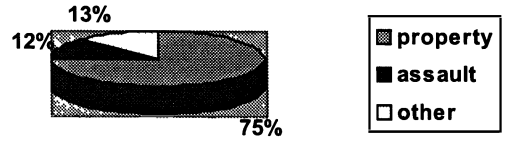


Figure 6: Aboriginal Juveniles 1995–1997



The OAD Report says

Given the similar offending patterns of Aboriginal and non-Aboriginal juveniles, mandatory sentencing legislation would not be expected to have a greater impact on either of the two groups. It is also apparent that prison sentences were most commonly used for offences prior to the introduction of (the law) so its effect on the administration of justice may be minimal ...

The offences for which juveniles were most commonly sentenced to imprisonment are those now covered by mandatory sentencing legislation. Recent trends have shown a decline in the number of such offences committed since the introduction of the legislation, which may, in part, be the result of the deterring effect of mandatory sentencing and the publicity surrounding it. While this information suggests that mandatory sentencing legislation may have a minimal or even a positive impact on the administration of justice, it is considered too soon to perform any rigorous assessment of the overall effect of the legislation. (pp.150–1)

The comments above are open to serious question on a number of grounds.

- The comment that the law would not be expected to have an impact on either of the two groups is unsustainable. Juveniles are ending up in custody for property offences over and above anything else. It follows that there must be a very large proportion of juveniles before the courts for property offences who, prior to the advent of the law, had their matters disposed of in ways other than detention.
- The claim that detention was most commonly used for property offences is unsustainable merely by an examination of the above figures. Legal Aid sources report that the use of conditional release for property offences was widespread among magistrates in the Juvenile Court.
- The claim that the law may be having a deterring effect is irresponsibly made. Again, Legal Aid sources report that by far the largest number of juveniles charged with property offences come from the bush where English is regularly a second language. Here juveniles have difficulty even understanding the process of a court, let alone the nature of the laws under which they are charged.

What has happened since 30 December 1997?

Conditional release dispositions

A query that could be posed at this stage is whether other non-custodial dispositions available to the court prior to mandatory sentencing have shown a marked decrease. After all, if the advent of the mandatory sentencing laws means that more Aboriginal people are being gaoled for property offences, we would expect there to be a corresponding drop in the use of non-custodial options by the courts.

An examination of the latest report published by the Northern Territory Department of Correctional Services shows that there has been a dramatic decline in the use of conditional release dispositions and a corresponding

increase in the imprisonment rate of both Aboriginal adults and juveniles.[3]

Figure 7: Juvenile conditional liberty as at 30 June 1998

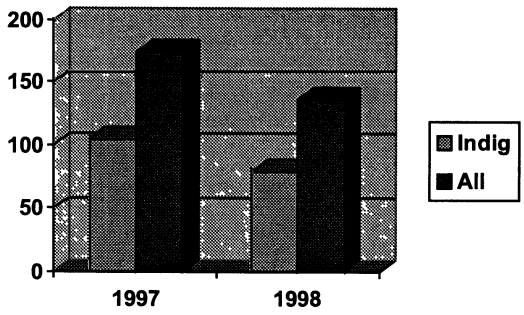
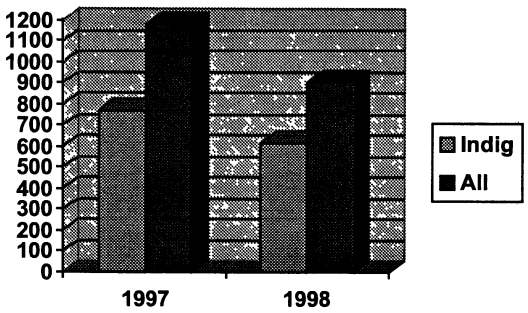
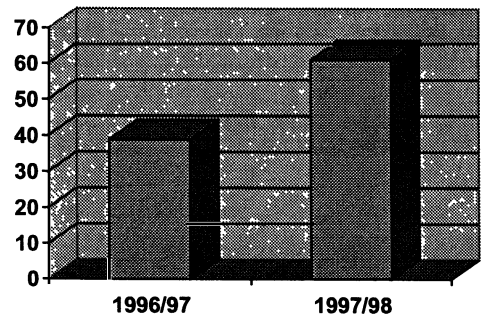


Figure 8: Adult conditional liberty as at 30 June 1998



With respect to juveniles, it will be remembered that we suggested that if there were a large proportion of juveniles being gaoled for property offences and an increase in the arrest rate, we would expect that there would be an increase in the number of juveniles gaoled for property offences. Again, looking at the figures in the latest report from the Department of Correctional Services, we see the trends clearly.[4] *Figure 9* shows that numbers of juveniles being detained increased significantly in 1998.

Figure 9: Juvenile detention commencements in 1997 and 1998 (as at 30 June 1998)



The OAD report says

It is misleading to regard mandatory sentencing as the defining characteristic of the Northern Territory government's approach to juvenile justice. The approach taken is essentially a diversionary strategy which contains a strong orientation towards the wide ranging social needs of Aboriginal youth.

It is of serious concern that in compiling its Report, the OAD apparently failed to check whether there has been a decline in the most readily available diversionary strategy to magistrates and judges. Namely conditional release sentences. These are such dispositions as good behavior bonds, 'no further trouble' orders, suspended sentences and community service orders. The facts are that they are declining in use, while detention is rapidly increasing in use.

Conclusion

The Office of Aboriginal Development has advised the government of the Northern Territory that the mandatory minimum sentencing law is having little effect on the imprisonment of either juveniles or adults. This is false. The Office has misrepresented the picture with consequences that are potentially dire for bush communities. As a result of mandatory sentencing, two communities where minor property crime is most prevalent may be effectively emptied of young men between the ages of 15 and 30.

An examination of the data available to the OAD in compiling its Report to the government shows that the mandatory sentencing law is having a marked effect on Aboriginal people. The embarrassing lack of consultation evident in this Report would be quickly pointed out as culpable in a jurisdiction where such reports are more readily open to scrutiny.

The OAD has conspicuously failed in its responsibility to properly consult and advise.

It has failed to tell the truth, where the truth desperately needs to be told.

References

1. Royal Commission into Aboriginal Deaths in Custody Northern Territory Government Implementation Report 1996/97, p.175, Northern Territory Office of Aboriginal Development.
2. Ministerial Summit on Indigenous Deaths in Custody (4 July 1997) 'Speeches and Papers', p.146.
3. Northern Territory Correctional Services Annual Report 1997/98, pp.82–3.
4. Northern Territory Correctional Services Annual Report 1997/98, p.81.