NORTHERN TERRITORY OF AUSTRALIA

CHIEF MAGISTRATE'S CHAMBERS

15 January 2010

Anne Dacre
Committee Secretary
Standing Committee on Aboriginal and
Torres Strait Islander Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Via Email

Dear Ms Dacre

RE: INQUIRY INTO THE HIGH LEVELS OF INVOLVEMENT OF INDIGENOUS JUVENILES AND YOUNG ADULTS IN THE CRIMINAL JUSTICE SYSTEM

Thank you for the opportunity to make a submission to the Inquiry and for being prepared to extend the date for submissions.

As your committee would no doubt be aware, the rates of incarceration of Indigenous people in the Northern Territory are high as elsewhere in Australia. This includes both offenders in the "Youth Justice" jurisdiction and young offenders (under 25 years) in the adult jurisdiction. Although the rates of incarceration of Indigenous people in the Northern Territory are indeed significant, when seen as a proportion of the Indigenous population, the incarceration rate is similar, or slightly less than the incarceration rate of Indigenous persons nationally. (I respectfully refer you to a paper of mine attached, "Current Legal Issues in the Northern Territory Concerning Indigenous People and the Criminal Justice System", delivered September 2009 at the National Indigenous Legal Conference, Adelaide). At pages 2 and 3 of that paper, I summarise the statistical picture.

Aboriginal people comprise approximately one third of the population of the Northern Territory. The rate of "assaults" and other offences against the person is proportionately much higher in the Northern Territory than elsewhere and as may be expected, offences against the person more readily attract imprisonment or youth detention than do other forms of offending. (See paper attached). Dealing with the conditions that lead to persons perpetrating crimes of violence, would go some way to reducing incarceration rates. Recently, Professor Peter Sutton has disclosed the high levels of violence in the Aboriginal community and the tolerance of violence to a large degree in the Aboriginal community. (See Peter Sutton, "The Politics of Suffering, Indigenous Australia and the end of the Liberal

Consensus". I have quoted very brief parts of Professor Sutton's observations in the attached paper at 9 and 10). Clearly, this will take sometime to redress.

Offences of violence and other offences are of course prosecuted on detection. The high level of repeat violent offending leads particularly and inevitably to incarceration. This is so primarily for adult offenders and also young offenders. It should be noted also that the Northern Territory has the youngest population of any jurisdiction. As crime detection tends to be in the younger population, this tends to capture the highest representative offending part of the population, both Indigenous and non Indigenous.

I appreciate that younger people, especially in the *Youth Justice* jurisdiction are also incarcerated for property crimes as well as crimes of violence, but this in my experience involves serious and repetitive offending when available alternatives to incarceration have been tried without success in controlling offending.

I also appreciate you seek submissions concerning education, welfare and behaviour – these are obviously all interconnected and our Courts are very familiar with the profile of Indigenous young people who appear as defendants. If they are repeat offenders from the major regional centres, they have often had involvement or interaction from family services due to neglect or to violence in the home; parental drug and/or alcohol abuse; lack of school attendance or encouragement to attend school; alcohol and drug use themselves; mental illness and homelessness. On the more remote communities (this Court sits in some 30 places throughout the Northern Territory), young offenders may well be subject to the same exposures to violence and drugs and alcohol – there may also be kinship and cultural obligations that are relevant. Service delivery to young people living remotely is made more problematic through language diversity (57 Indigenous languages spoken in the Top End; 48 in Central Australia). The picture for young Indigenous offenders in the Northern Territory is extremely complicated as a result of linguistic issues, distance and cultural issues.

During and flowing from the recent Northern Territory Federal Intervention, resources have tended to be directed towards the enforcement side of social problems (eg, new police stations and more police). Although there has been some consideration given to rehabilitation and community development as a result of the intervention, it is not as visible or noticeable as the enforcement and detention side of things. I am not mentioning this by way of criticism, but this factor is important as there needs to be as much effort put into rehabilitation and associated services as there is into detection.

This Court has been provided with additional judicial resources and extra capacity for "Community Courts" as recommended by the Wild/Anderson, Little Children and Sacred Report. (These points are noted in my paper, attached). This has allowed the Court to conduct more "Community Courts" involving senior people on communities. The success or otherwise of such programmes is in part reliant on how well the community functions.

I accept that once a young person is before the Courts, much of the impact of adverse life events is already evident and any remedial work that can occur by virtue of the Court process often pales compared to the difficult background and life events the young person has experienced.

In my respectful view, for young people already before the Court system, particularly those who have been resistant to community corrections orders or family service orders, there needs to be:

- More specialised youth drug and alcohol services, including residential places – currently most of these services are for adults only, or a young person accompanied by an adult – if the adult leaves, the young person may no longer have access;

- More residential services/placements are needed as young persons in need of this type of treatment are usually in chaotic home situations or unstable housing situations or homeless;

- Although there is resistance from some health professionals in the drug and alcohol area to having young people in residential rehabilitation due to concerns of institutionalisation, I am concerned that by not having specialist facilities, they may be institutionalised in any event through detention and lack of alternatives;

- I do note that some young people are amenable to community corrections programmes, but the more difficult and complex cases need residential placements – I understand there is some controversy around this issue.

- More appropriate relevant meaningful programmes for young people, both offenders and those at risk in communities – the range of "community work" projects as an alternative to detention and other penalties needs to be broadened so that potentially skills can also be gained during the community work period;

- The extent of homelessness of young people in regional towns may need further study and interventions as this group, although small in number, appear to contribute significantly to the offending population;

- The relationship between young people who are or have been in the past neglected and abused and the offending population needs further analysis and a problem solving approach. Many young offenders, relying on my own observations and some of my colleagues, have been the subject of neglect or abuse, this presents greater challenges when dealing with the offending behaviour;

- Out of session bail applications, particularly from remote communities may result in the young person being remanded in detention. Sometimes there is no verifiable safe place for the young person to be bailed to, hence they end up, for welfare/safety reasons to be remanded in detention. There may be a case for bail hostels in the major centres, specifically catering for this need: (young people who cannot stay safely in their community or have offended and are not under secure supervision).

On a brighter note, I have been involved in a number of proceedings particularly "Community Courts" (see attached paper) where broader issues and greater support is offered to the young offenders, allowing a more community oriented approach to take place. As mentioned above, I have been most grateful for the provision of extra resources to our Court to permit this to some extent. The challenge is to offer these services at a broader level, bearing in mind issues of language, distance and culture. It would be wrong to compare the Northern Territory Court situation with other processes such as "Koori Courts" in Victoria, which although a successful approach in that jurisdiction, Koori Courts are conducted in English in urban or large regional centres without the same entrenched complex issues that mark some communities in the Northern Territory. This bears little resemblance to the circumstances of the Northern Territory and should not be considered a model necessarily capable of easy modification to the Northern Territory situation, especially

given the very small percentage of Indigenous people in Victoria or before the Victorian Courts compared to the Northern Territory. The same observations could be made in relation to circle sentencing in urban situations in other jurisdictions.

Thank you once again for the opportunity to comment. I respectfully direct your committee to my paper attached concerning other related issues on Indigenous people and the criminal justice system in the Northern Territory.

Yours sincerely

JENNY BLOKLAND
Chief Magistrate

attachment

NATIONAL INDIGENOUS LEGAL CONFERENCE

Current Legal Issues in the Northern Territory Concerning Indigenous People and the Criminal Justice System

Jenny Blokland
Chief Magistrate Northern Territory

Introduction

I am delighted and grateful to have an opportunity to speak at the National Indigenous Legal Conference and thank the organisers for the invitation. I acknowledge the traditional owners on whose land we meet.

Mr Eddie Cubillo who kindly invited me to speak said he was hoping I would address criminal law issues relating to the "dominance of Indigenous people in the Court system in the Northern Territory".

To address this general yet complex topic I thought it would be useful to examine some of the current issues impacting on Indigenous People in the criminal justice system in the Northern Territory. Naturally I will focus on issues that arise in the Court that I work in, the Magistrates Court, and obviously in terms of legal principle, informed by the jurisprudence of the Supreme Court of the Northern Territory in criminal law matters including sentencing.

The Magistrates Court deals with 97-98% of the judicial work in the Northern Territory, the majority of those cases deal with Indigenous people in the criminal justice system presenting as either witnesses, including victims and defendants in criminal cases. (During the year 2007-2008, 64% of Defendants dealt with in the Magistrates Court (NT) were Indigenous people).

Recently significant national attention has been directed to the Northern Territory's criminal justice system and broader justice system. Well known illustrations are Crown Prosecutor Dr Nanette Roger's interview on the ABC's Lateline programme (2006) concerning sexual abuse of children, sexual assault generally and other serious harms in the Northern Territory Indigenous community; the "Little Children Are Sacred" (2007) report produced by the Northern Territory Board of Inquiry examining the extent, nature and factors contributing to sexual abuse of Aboriginal children and the subsequent measures of both a legislative and executive character under the Federal Intervention, or now often referred to as the Emergency Response.

Primarily the deep community concerns and various government responses including legislation are directed towards protection of persons vulnerable to

violence and intimidation, particularly Indigenous women and children. At the same time there is significant concern about the rates of imprisonment of Indigenous persons in the Northern Territory. As any Court must, the Magistrates Court (NT) operates within the legislative and social environment it finds itself. This tension between the very real need to ensure all persons have the protection of the law to live in safety and security balanced against the need to ensure that sentences are proportional and meet the objectives of sentencing principles is played out either expressly or implicitly on a daily basis in the Northern Territory courts. Where possible the Court utilises therapeutic approaches (some of these are mentioned below), and this is a developing area of the Court's work, however there are some limitations with these approaches when there are questions of significant violence and consequent safety, in particular to intimate partners or other close family members.

Some Further Matters of Context and Statistics

Indigenous people in the Northern Territory make up approximately one third of the total population of the Northern Territory. Nationally, Indigenous people make up approximately 2.4% of the total population (ABS 2006). A significant number of Indigenous people are influential in general public life in the Northern Territory and certainly within the many towns and communities that retain traditional Indigenous kinship structures. It is generally recognized there are 57 Indigenous language groups in the Northern Territory, 48 in the Top End and nine in Central Australia. All of this is a positive and enriching aspect of life for everyone in the Northern Territory. At the same time, the deep levels of dysfunction in terms of violence, substance abuse, mental illness and neglect experienced nationally in the Indigenous community is also reflected intensely in the Northern Territory Indigenous Community. In short, people who have experienced "an unrelenting series of adverse life effects" (cited by Elias CJ, (NZ) describing families in need of intervention in "Blameless Babes", 9 July 2009).

Currently, around 82% of persons imprisoned in the Northern Territory are Indigenous people. (Correctional Services Annual Statistics 2007-08). Similarly, 82% on persons of conditional liberty orders (bonds, suspended sentences, community work, home detention) are ordered on Indigenous Defendants. (Correctional Services Annual Statistics 2007–2008). Recidivism rates are significant: (47% of Indigenous persons returned to prison within two years in 2007-07; 18% returned to corrective services on conditional release). Indigenous prisoners and community corrections clients are both three times more likely to return respectively to prisons and community corrections that their non-Indigenous counterparts.

When measured against the Indigenous population, the Northern Territory Indigenous imprisonment rate is similar to the Australian average. The ABS June Quarter Corrective Services report states at page 6:

> "The national average daily indigenous imprisonment rate in the June quarter 2009 was 2,343 per 100,000 adult Indigenous population, an increase of 3% from the previous quarter, and a 7% increase from the June quarter 2008.
> The highest Indigenous imprisonment rate was recorded in Western Australia (3,846 Indigenous prisoners per 100,000 adult Indigenous population), followed by New South Wales (2,617) and South Australia (2,472). The lowest Indigenous imprisonment was recorded in Tasmania (619), followed by the Australian Capital Territory (945)."

The most noticeable difference in the distribution of the principal offence adjudicated between the Magistrates Court in the Northern Territory and Magistrates Courts nationally is in the category of "Acts intended to cause injury". The proportion of these offences for the Northern Territory was 17% compared to 7.6% nationally. This category of offending is a significant contributor to imprisonment.

The Northern Territory recorded the largest proportional increase in imprisonment rates from the June 2008 quarter (15%). The increase in imprisonment rates coincides with an increase in criminal matters filed in the Court of Summary Jurisdiction. Although there is some fluctuation, the Northern Territory Court of Summary Jurisdiction experienced 17½% increase in lodgements (each Defendant is counted as a "lodgement" but doesn't count multiple files and charges) in the Courts in criminal matters – effectively a 20% increase when domestic and family violence applications for orders are included. The recent sharp increase in imprisonment is most likely reflected in the fact that there are greater numbers of people before the Courts.

In my view this increase is unlikely to be due to greater rates of offending and more to do with greater detection rates as a result of greater police presence driven by increases in police numbers on the part of Northern Territory Government and also an increase in police presence all around the Northern Territory as a result of the measures taken in the Federal Intervention. Before the Intervention, the Northern Territory was serviced by 38 police stations in remote areas. Between July 2007 and February 2008 18 additional temporary police stations were built under the auspices of operation THEMIS in the prescribed communities. Since the end of June 2007 an additional 51 police (33 AFP and inter-state police and 18 Northern Territory police) were deployed to 18 remote communities: (NTER Review Board, October 2008). To return to the general theme of this paper, one of the current issues concerning Indigenous people before the Courts in the Northern Territory is dealing with the significant increase of persons before the Courts. I am sure that legal service providers in the Northern Territory, both sides of the bar table have felt the pressure of this increase.

Our Court places a high value on access to justice and we sit in approximately 30 places in the Northern Territory, all within the heart of Indigenous communities, large or small or in regional towns on or near large Indigenous

populations. We are examining whether it will be necessary to increase the number of places we sit as a result of requests from communities where there is now a police presence and therefore a need to make Court accessible to that community. For instance, the Magistrates Court (NT) sits in the following centres:

The Top End
Administered from the Darwin Court

- Alyungula (Groote Eylandt)
- Daly River (Nauiyu)
- Galiwin'ku (Elcho Island)
- Jabiru
- Milikapiti (Snake Bay)
- Nguiu (Bathurst Island)
- Nhulunbuy
- Numbulwar
- Oenpelli (Gunbalunya)
- Wadeye (Port Keats)
- Pirlingimpi (Garden Point)
- Maningrida

Central Australia
Administered from Alice Springs Court

- Herrmansburg
- Ali Curung
- Elliot
- Kalkaringi
- Kintore
- Lajamanu
- Mutitjulu
- Papunya
- Ti Tree
- Tennant Creek
- Yuendumu

Administered from Katherine Court

- Barunga
- Borroloola
- Timber Creek
- Ngukurr
- Mataranka

The Northern Territory National Emergency Response Act 2007 (Cth) ("NTNERA")

The NTNERA as a whole legislated over a wide range of issues with the objective stated (*s 5* NTNERA) "*to improve the well being of certain*

communities in the Northern Territory." The significance of this legislation has been widely discussed, particularly in relation to Part 4 NTNERA concerning arrangements for the acquisition of five year leases over certain Aboriginal towns or communities as well as dealing with town camps. The parts of the NTNERA that potentially impact on the administration of criminal justice include the creation of the further regime of the regulation of liquor in prescribed areas (Part 2); the regulation of publicly funded computers in the prescribed areas to prevent access to pornography (Part 3) and Part 6 that amends Northern Territory law in relation to granting bail and sentencing in certain circumstances. Of these, there are reasonably regular prosecutions under the (Part 2) (bringing or consuming liquor in a prescribed area), although in my experience these have usually been at the level where they are appropriately dealt with by way of fine; they are also closely connected with a number of the *Liquor Act* (NT) regimes. Similarly, so far as I am aware, there have only been very few prosecutions concerning possession of and access to pornography under Part 3.

Prior to the enactment of s91 NTNERA (in relation to taking customary law into account) His Honour Chief Justice Martin (BR) had previously noted:

> "The other potential way in which Aboriginal customary law has a role to play concerns the moral culpability of the offender. If the unlawful conduct was carried out in the belief that it was, by reason of customary law, lawful and appropriate, such a belief formed for that reason relates directly to the moral culpability of the offender. How much weight can be given to the influence in this regard must depend upon the circumstances of the offending, particularly the gravity of the crime. This will range from very little weight in the case of extremely serious crimes to, perhaps, quite significant weight when minor crimes are committed. It is a matter of balance.
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> ...
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> Ultimately, the critical task is to balance the many competing factors and get the balance right.
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> ...
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> While law and order and appropriate penalties are important, they do not address the root causes of the violence about which we are all so concerned. Directing courts to ignore customary law considerations will, in effect, operate unfairly upon a relatively small number of offenders in Aboriginal communities and upon other offenders whose criminal conduct is influenced by their cultural background or beliefs. Significantly, it will have absolutely no impact whatsoever on the root causes of the crimes in the affected communities. In particular, as the vast majority of crimes of violence in these communities are fuelled by alcohol and have nothing to do with customary law, abolishing

considerations of customary law will have no effect whatsoever on this violence which is so prevalent".

(Speech given 15 September 2006, South Australian Press Club)

Section 91 (Part 6) NTNERA has received some attention in the Supreme Court (NT) that is of interest: *The Queen v Dennis Wunungmurra* [2009] NTSC 24; 9 June 2009, Southwood J. Section 91 provides as follows:

> Matters to which court is to have regard when passing sentence etc.
>
> "In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
> (b) aggravating the seriousness of the criminal behaviour to which the offence relates."

"criminal behaviour" is defined as including "*any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question*"; and "*any fault element relating to such a physical element*" . His Honour noted this legislation came at a time when sentencing courts in the Northern Territory "took traditional Aboriginal law and cultural practices into account when such laws or cultural practices were relevant in determining the objective seriousness of an offence or the level of moral culpability of an offender was lessened because he or she had acted in accordance with traditional Aboriginal law or cultural practices. Such matters were taken into account in accordance with established sentencing principles and the sentencing purposes and guidelines contained in the Sentencing Act (NT). "In this case, a senior Yolgnu woman sought to give evidence that the accused, (who had indicated a plea of guilty to one count of cause serious harm with intent and one count of aggravated assault against his wife), acted in accordance with traditional law "carrying out his duty as a responsible husband and father and he was acting in accordance with his duty as a Dalkarra man." (para 8) In as much as the proposed evidence was being led for the purpose of determining the objective seriousness of the crimes alleged, His Honour ruled against its use. However, it was permitted to be led for other purposes, namely, to provide context and explanation for the crimes, to establish lack of pre-disposition to engage in domestic violence or re-offend; to establish good prospects of rehabilitation and character. (paras 3 and 28). The conclusion on the effect of the provision was "that when sentencing courts are determining the objective seriousness of an offence in which the section is applicable,

proportionally greater weight will be given to the physical elements of the offence and the extent of the invasion of the rights of the victim of the offence. Less weight will be given to the reasons or motive for the committing the offence."

During Sentencing Remarks (14 August 2009) His Honour stated:

> "The fact that the offences were committed in accordance with traditional Aboriginal law and customary practices does not lessen the offender's moral culpability nor does it reduce the objective seriousness of the offending. The Criminal Code of the Northern Territory has been enacted for the protection of all people in the Northern Territory including women in Aboriginal communities. Like all citizens, women in Aboriginal communities are entitled to be safe. They are entitled to live free of violence. The time has well and truly come when men in Aboriginal communities must totally abandon such violent customary laws and practices. There is no reason why Aboriginal customary laws and practices cannot be developed in other ways. Such a change will in no way weaken the strong traditional culture on Elcho Island."

What His Honour was prepared to take into account in mitigation was that:

> "Violent crimes associated with traditional Aboriginal customary law are not nearly as common as crimes of drunken violence in Aboriginal communities".

And that

> "...he is prepared, in consultation with other members of his community, to try and change Aboriginal customary law in this regard".

So far as I am aware there are no other decisions that directly deal with this section. Section 91 is in the same terms as the *Crimes Amendment (Bail and Sentencing) Act* (Cth), s 16A(2A). Commenting on that section, (prior to the enactment of the NTNERA), His Honour Mildren J noted that if such a provision applied specifically to Northern Territory law, it may not be of effect. For example, when provocation is being utilized as a mitigating factor where provocative conduct results from an issue based in a customary practice, the mitigation lessening the gravity of the offence is the provocation rather than the customary law or cultural practice: (see paper, "*Customary Law – Is It Relevant?*", paper delivered to Criminal Lawyers Association NT Conference, July 2007, Bali, pages 12-13).

The application of section 91 NTNERA may prove to be less straight forward than it appears at first blush and requires analysis of motivation beyond what on the face of it is said to be the operation of customary law or practice.

This issue is particularly problematic in the area of violence between intimate partners or family members. As noted already, the Northern Territory has a particularly high rate of offending comparable to other jurisdictions of "acts intended to cause injury". Sadly, my experience and I am sure the experience of practitioners who appear regularly in the Magistrates Court is that the overwhelming proportion of these offences are committed by Indigenous men on their intimate partners or other members of the family. In as much as I contribute to imprisoning people, it is the offending that most often attracts imprisonment in my experience in the Magistrates Court. I am not saying I rule out other sentencing options in these cases, often orders are made in relation to alcohol treatment or attendance at an Indigenous Family Violence Offender Programme – but these orders must be made with some realistic assurance of the safety of the victim. Sometimes it is just not possible. These are the cases that involve repeat offending, often on the same victim or a subsequent partner, often, although not exclusively associated with alcohol consumption. In mitigation the issues of poverty, mental illness, alcoholism and general community dysfunction are frequently put surrounding the circumstances of offending, however, given the corrosive nature of this type of violence, this is currently an area that attracts high levels of imprisonment. (A significant collection of NT Supreme Court decisions in this area are supportive of sentencing emphasising deterrence due to prevalence of this offending although moderated by the acknowledgment of the need for more than imprisonment): See eg. *The Queen v Roddenby,* Sentencing Remarks Martin CJ, 12 December 2008:

> "I need to add this. Among too many men and boys in our community there is an underlying anger that is often unleashed in unconstrained violence following consumption of alcohol and other drugs. When that anger is unleashed, all too frequently the violence is perpetrated against vulnerable victims, particularly women with whom offenders are in a relationship and about who they are supposed to care.
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> There is a limit to what the Courts can do to prevent this type of offending because the Courts are at the end of the cycle of life experiences and events that lead to violence. Courts can only react to violence that has already occurred by imposing sentences that will, hopefully, assist in deterring others from committing similar acts of violence in the future.
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> Contrary to the misleading impression conveyed by some politicians and other commentators, in recent years the Criminal Court has responded to the increasing frequency of crimes of violence and to community concern. Penalties for crimes of violence have increased. In cases of violence causing serious injury, the Criminal Court rarely imposes a sentence other than a term of imprisonment, part of which is to be served either before the suspension of the balance of the sentence or before the offender is eligible for parole.

> Although penalties have increased, it must be recognised and understood that many offenders are not deterred by the prospect of imprisonment because they commit crimes when they are severely intoxicated and incapable of thinking rationally about the consequences of their actions. More than punishment through imprisonment is needed.
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> The community spirit and well-being is diminished by every act of violence and there is an urgent need to address the underlying causes of violence in order to prevent it occurring. A fundamental change in attitude by men like you, Mr Roddneby, is required".

The eradication of this form of violence is the challenge for the whole community, especially for those of us who work in the Courts, or in services dealing with offenders and victims. I am not here ignoring the issue of crimes against children to which so much energy and attention has rightly been directed to, but primarily in the Magistrates Court, aside the care jurisdiction, the vast majority of cases of violence concern violence between intimate partners. I am also of the view that if this type of offending could be reduced, the situation would naturally improve for children.

Although each sentencing occasion is unique and a Court relies on the information or evidence presented in a particular case, complicating the picture is a lack of clarity around what drives the violence. For a number of years debates have continued on whether violence was "traditional' or not; whether there is an explanation in "culture" for cruelty to children or to women in particular. Peter Sutton, in his recent work "The Politics of Suffering, Indigenous Australia and the end of the liberal consensus" challenges a great deal of the academic, bureaucratic and legal responses to violence in communities. He concludes a particularly challenging chapter "Violence Ancient and Modern" with this observation (at 114):

> "Violence occupies a very different place from that of illness in traditional Aboriginal systems of value concerned with the bodily person. Violence was not seen as having any inherent negativity; it depended on the circumstances. This was rarely so for illnesses, and it is well known that everywhere in Australia Aboriginal people had a bush pharmacopeia, healing practices and doctors. Strangely in parallel with this, in the post 1970's era until the 2000s, the problems of community and family violence were seriously neglected by the Aboriginal affairs industry. In the mean time, enormous efforts and increasingly heroic amounts of funding were being concentrated on Aboriginal health in all of its aspects, apart from generic research. Far too often, violence was abandoned to the administration of the criminal law and, in the aftermath of violence, the nursing and doctoring in the wards or the cemeteries."

At one level, whatever the reason for the violence is not the point, it has to be deterred, however having more information about the background of the violence would equip the Court and indeed all of us about how its reoccurrence could be prevented. We have to know what we are dealing with in each case to properly address it, or at least prevent its re-occurrence. As I will refer to later, the Community Courts have some potential for conveying this information.

Therapeutic Programmes Offered by the Court

Although therapeutic approaches refer to a broader philosophy than specific programmes, I will briefly address the more structured programmes offered in the Northern Territory. Like other summary courts, the Northern Territory Magistrates Court offers a number of therapeutic programmes including CREDITNT, a drug bail programme for persons whose criminality is connected to drug addiction. Although it occasionally runs in other regional centres (this is dependent on whether clinicians are available, currently it is available in Tennant Creek), it is primarily taken up in Darwin and Alice Springs. Although alcohol is the primary drug so often associated with criminality, there is a significant problem with cannabis in the Indigenous Community and a significant percentage of CREDITNT clients are Indigenous: (41% of 654 persons referred to the programme). The *Alcohol Court Act* (NT) was introduced in 2006, and is a more structured programme than CREDIT NT and from 2006 approximately 380 people had been referred for treatment. 80% are Indigenous persons. Its operation has been criticised because it tends towards the stick rather than the carrot approach (Russell Goldflam, "*Oh We've Got Some Bloody Good Drinkers in the Northern Territory*", paper presented to the Criminal Lawyers Association NT, Bali (2009)). There is a high level of breaching orders; and the prohibition orders (rather than the intervention orders) are not enforceable by the usual procedures. The *Alcohol Court Act* is currently under consideration by Department of Justice (Policy). There is no doubt that Defendants subject to the Alcohol Court find the process difficult – but that is something that is common with serious alcohol rehabilitation and the (generally) easy access to alcohol. Never-the-less, it is a programme that has seen a number of seriously addicted persons access treatment who most likely would not have done if not for the *Alcohol Court* option. I am also advised by the Court Clinicians that being part of the Court programme and being monitored by the Court means people tend to "do better" than being released on a bond or other orders simply with "no drinking" conditions. If placed on an Alcohol Intervention Order, Defendants are not subject to mandatory sentencing where it applies to assaults as it is not an order under the *Sentencing Act* (NT).

The *Volatile Substance Abuse Prevention Act* (NT) also allows the Court to make orders for treatment for inhalant abuse, usually petrol and 345 people ('06-'09) have been referred for treatment since its introduction. Here the treatment is mandated, although it follows essentially a civil process with

capacity for warrants in the event of non-compliance. (Regrettably referrals may not have always been timely enough to avoid tragedy although the Coroner (NT) noted the improvement in availability for treatment in Central Australia following the suicide of a young girl: *Inquest into the death of Kunmanara Forbes* [2004] NTMC 024. This case was also referred to in a recent speech by the Attorney General, the Hon Robert McClelland, "Indigenous Young People Crime and Justice Conference" 31 August 2009, stressing the need for coordination between services to properly staff these programmes to avoid such tragedies.

One of the major initiatives of the Court, in co-operation with a number of members of Indigenous Communities and the Aboriginal Legal Services along with police and prosecutors has been the development of Community Courts. These Courts have some similarities with other Indigenous Courts, but the fact that they sit in very remote areas often conducted in a number of languages with interpreters mean they are quite complex proceedings. For difficult problems, the Community Courts provide something of the engagement Elias CJ speaks of when she says "But what is clear is that it isn't enough to leave such thinking to those working in the criminal justice system. We have to get wider social engagement and buy-in if we are to find answers". Although the Community Court hears the views of members of the Community, the Magistrate takes responsibility for the sentence under the *Sentencing Act* (NT). Although specific cultural issues can arise, the Court is still bound to apply the NTNERA and s104A *Sentencing Act* (NT) which reads:

> **104A Information on Aboriginal customary law and community views**
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> (1) This section applies in relation to the receipt of information about any of the following matters by a court before it passes a sentence on an offender:
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> (a) an aspect of Aboriginal customary law (including any punishment or restitution under that law) that may be relevant to the offender or the offence concerned;
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> (b) views expressed by members of an Aboriginal community about the offender or the offence concerned.
>
> (2) The court may only receive the information:
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> (a) from a party to the proceedings; and
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> (b) for the purposes of enabling the court to impose a proper sentence or to make a proper order for

restitution or compensation (as mentioned in section 104(1) and (2)).

(3) In addition, and despite any other provisions, the court may only receive the information if it is presented to the court as follows:

(a) the party to the proceedings that wishes to present the information (the first party) gives notice about the presentation to each of the other parties to the proceedings;

(b) the notice outlines the substance of the information;

(c) the notice is given before the first party makes any submission about sentencing the offender;

(d) each of the other parties has a reasonable opportunity to respond to the information;

(e) the information is presented to the court in the form of evidence on oath, an affidavit or a statutory declaration.

(4) In this section:

Aboriginal community includes a community of Torres Strait Islanders.

Aboriginal customary law includes a customary law of the Torres Strait Islanders.

The "Little Children are Sacred" Report recommended the establishment of dialogue with Aboriginal communities aimed at developing language group-specific Aboriginal courts in the Northern Territory (Recommendation 74).

Community Courts sit regularly at various centres on the Tiwi Islands, Nhulunbuy and Elcho Island. There have also been a number of Community Courts conducted at Wadeye and Groote Eylandt (Alyangula), Numbulwar as well as Yuendumu and Tennant Creek. (For reports on proceedings about the Yuendemu Mediation and Justice Group (2007) and the Community Court (2008), see Bob Gosford's blog "The Northern Myth" at Crikey.com). Initially Community Courts were held relatively regularly in Darwin but the demand is now much stronger "out bush". The Court received additional funding to pursue the initiative (including.7 Magistrate funding and a Community Court Coordinator, and an Indigenous Liaison Officer. Since then, positions for two further Magistrates have been established. Administratively within the Court,

two Magistrates have been appointed Community Court Coordinating Magistrates: Ms Melanie Little SM and Mr Greg Borchers SM). As well as permitting greater involvement of the family and senior persons in the particular community, the victim (if they choose) and Defendant, holding a Community Court when there is a particular Community concern can focus and link service providers to become involved in a situation calling for support.

As a recent example, in March this year I dealt with seven Yolgnu youths in the Community Court sitting as the Youth Justice Court at Nhulunbuy for serious property offences effectively against the Yirrkala Community school and Lanapuy Homeland Centre. Some were repeat offenders; petrol sniffing was an issue. Panel members were Senior Yolngu clansmen and women who sat as the Community Court. The panel determined they wanted the young defendants to go to a nearby Island where they could be cared for by extended family away from the dangers of substance abuse. Through the Community Court Coordinator, it was ascertained the school on the island could attract funding if the youths attended. The school was re-activated through funds and resources provided by Yirrkala Homeland Schools. I am advised the youths who were diverted are doing well, going to school and participating in hunting and fishing and other pursuits. Two of the youths who went to another outstation were not doing as well but their orders have now been changed and attempts are being made towards their rehabilitation at another homeland.

Recently a case was heard at Groote Eylandt (Alyangula) by my colleague Ms Sue Oliver SM concerning a husband and wife charged with assaulting police. Community were in attendance and the police who were the victims spoke at the Community Court. What was a very difficult situation ended with police and Defendants shaking hands. Police were reported as saying "that's the best outcome and experience we have ever had." (Thanks to Ray Morrison, Community Court Coordinator for this information on recent cases in new areas). Further reports from our Community Court Coordinator indicate that the first Community Court at Numbulwar involving a youth ended in a positive outcome with the young person being offered a Motor Mechanic Apprenticeship with Roper Gulf Shire. When Community Courts work well, it does appear that everyone involved is more satisfied with the process and the outcome. The difficulty is that for the foreseeable future it will only be a small number of cases that can realistically be dealt with via the Community Court process, given the time they take in both preparation and hearing in otherwise busy lists.

Impressions vary from case to case on whether Community Courts appear to be having the desired effect on defendants, victims and the rest of the community however the process generally has led to some positive outcomes.

In some Nhulunbuy cases that I have dealt with local Yolngu procedures were utilized for dealing with offenders, in particular the incorporation of a

procedure late 2006 and early 2007 involving a ceremony concerning men who were in trouble with both the Yolngu law and the NT law. In a small number of cases of aggravated assault on partners those processes involved public admissions of guilt and denunciation in front of 300 people and the procedure was witnessed by the victim. Mr Peter Bellach (solicitor from NAAJA) arranged affidavits (as required by s104A *Sentencing Act* NT) that various people spoke to. It was encouraging to hear of a traditional process being utilized for community denunciation of acts of violence against partners. The then police prosecutor in Nhulunbuy attended part of one of the ceremonies and also reported back to the Court on what had occurred. Below is an extract from one of the affidavits prepared by the NAAJA lawyers concerning one of these matters:

"1. I am Djuŋgaya for the Dhalwaŋu clan nation through my mother (nändi) who was a Dhalwaŋu woman. Through this position I have responsibility and legal authority in relation to the Ŋärra ceremony as well as other public ceremonies for the Dhalwaŋu clan. I am also responsible for running the Ŋärra ceremony day to day.

2. A Ŋärra Men's Ceremony was held at Gän Gan Homeland for approximately 2 weeks, finishing on 26 November 2006. the Ceremony required preparation over a 6 month period prior to the Ceremony.

3. The Ŋärra Ceremony involved 6 Yirritja clan nations from around Arnhem Land. These clans are Dhalwaŋu from Gän Gan and Gurrumuru, Yithuwa from Blue Mud Bay, Nunggurrgaluk from Numbulwar, Gupapuyngu from Galiwin'ku.

4. The Ŋärra was held at Gän Gan because it is the Dhudiŋärra, meaning the political legal centre for the Dhalwaŋu clan.

5. One part of the preparation for the Ŋärra involved digging white clay from a sacred area at Gän Gan and delivering parcels of the while clay to the clans which were requested and required to attend the Ŋärra. This process is similar to issuing a summons requiring a person to attend Court proceedings.

6. A second method of summonsing each clan involved sending a sacred dili bag (Gän) to each clan.

7. Other preparation for the Ŋärra over the preceding months involved the making of sacred objects like arm bands and sacred dili bags.

8. The Djuŋgaya for the Dhalwaŋu clan were responsible for delivering the clay and Gän to the Djuŋgaya for each of the other clans.

Reasons for the Ŋärra Ceremony

9. There were 3 reasons that the Ŋärra ceremony was organised. Firstly, it was a ceremony for the old men who's time was getting close (gupa ŋamatham). In this way it becomes the last ceremony for the old men who pass over responsibility to the next generation of leaders.

10. Secondly, it was a ceremony for the young men who were in trouble with Yolŋu and Balanda law.

11. Thirdly, it was a ceremony for the initiation and teaching of youth.

The Ŋärra Ceremony

12. The Ŋärra ceremony involved an external part which was witnessed by all members of the 6 clans and an internal part. The internal part is sacred and secret (Madayin').

13. "D" attended the internal Ŋärra process for one week.

14. As part of the Ŋärra "D" underwent raypirri within the internal sacred Ŋärra process. Raypirri means learning to understand and respect Yolŋu law but also to be personally disciplined to continue to strive to live according to law.

15. On the second last day of the Ŋärra "D" underwent a particular ceremony involving an admission of guilt by "D" and a public denunciation of his wrongdoing witnessed by approximately 300 male members of 6 clans. It then involved a public undertaking, again witnessed by the Yolŋu present, that "D" would not re-offend.

16. Following the internal Ŋärra, "D" attended the external Ŋärra which was held around the Karrarak Tree. This included a public buŋgul (ceremony and dancing). "D" emerged from the internal Ŋärra wearing a sacred dili bag (Gän) and arm band symbolising publicly that he had been through raypirri, and had been disciplined for his wrongdoing. The victim in this matter, "D's" wife was among those present to witness this".

Other forms of sentences that have been ordered at the conclusion of Community Court in Nhulunbuy include taking part in traditional apology processes; living on outstations and being counselled by senior clansmen and women; restitution of various types; community work – especially if it involves cleaning up sites to be used for ceremony. Many of these orders could be made without going through the Community Court process but when there is family or community support for an order of the court, there is more confidence that the orders might be complied with.

The "Little Children are Sacred Report" notes that "Most jurisdictions in Australia now have exclusive Aboriginal Courts. The Northern Territory is an obvious exception." (at 186) This part of the report notes favourable evaluations of the Koori Courts (Victoria), and Nunga Court (Port Adelaide). It acknowledges that "Aboriginal Courts" are more resource intensive than mainstream courts and can deal with fewer matters. The Report notes that with better utilisation of government resources and cooperation of various government agencies and NGOs, these problems can be overcome (at 187). When drawing comparisons across jurisdictions, it does not however address in a substantive way how the major differences in the demographics of the Northern Territory that result in the majority of people before the criminal courts being Indigenous as opposed to a very small minority in other jurisdictions might be managed in the context of specialised courts.

The Report also acknowledges there needs to be a procedure concerning possible "conflict of interest" in relation to "Elders or respected persons" but does not indicate what issues ought to be regarded as a conflict of interest in the context of an Indigenous Community. If it is envisaged that similar rules in relation to conflict of interest apply to respected persons as to judicial officers, it would be rare to ever find an Indigenous person who can sit on a case in that capacity. On most Indigenous Communities in the Northern Territory, everyone is related or has a relationship via the kinship system. It is the fact of that relationship that may make them an appropriate person to sit. The very opposite of the general legal system where any relationship would disqualify a person from sitting. This is one of the current major cross-cultural legal issues that needs serious analysis. The flip side of this issue is the fact of avoidance relationships of varying degrees preventing participation of people in court proceedings, whether as witnesses in the general jurisdiction or participants in a sentencing process. So far as I am aware, there is no serious analysis done of how courts and associated services ought to deal with obtaining information from people who may be constrained by avoidance relationships. It remains a current problem in the Northern Territory: (*Chambers v Kerr* [2007] NTMC 055 Alyangula Court of Summary Jurisdiction). (Other important facets of violence and avoidance relationships are dealt with by Dr Stephanie Jarrett, Violence: An Inseparable Part of Traditional, Aboriginal Culture, Occasional Paper The Bennelong Society, June 2009.)

One specific area that I would like to see developed is a diversion programme for repeat drink driver and drive disqualified offenders. There are a number of programmes in the prison for longer term prisoners, and I am aware of various delinquent driving courses in other jurisdictions. Last year persons imprisoned for essentially the combination of drink driving and drive while disqualified made up around 20% of the prison population at any one time. (Table 20, page 24 Adult Sentenced Episode Commencements; Northern Territory Department of Justice Correctional Services Annual Statistics 2007-2008). It was second only to "acts intended to cause injury". Last year there were 17% more sentences of imprisonment for traffic offences, primarily these two offences. The vast majority of these offenders are multiple medium to high level drink driving combined with multiple drive disqualified counts. These offenders pose a serious risk to themselves and others. There is also, as in most jurisdictions, binding case law indicating that an offence of drive disqualified alone could attract a term of imprisonment let alone coupled with further drink driving: (Cases cited within *Gokel v Hammond* [2001] NTCS 9). These defendants are unlikely to obtain their license again within five years or longer. Some of the driving courses available in other jurisdictions would not necessarily be appropriate for Indigenous offenders in Central Australia where most of the repeat offending occurs. Although the sentences are usually short, it does not appear to be changing behaviours. I have begun to speak to Court Clinicians about this group of offenders, apparently resistant to change. It is possible that some offenders could receive counselling about driving offences while in alcohol treatment centres. This is an area I will be pursuing.

Further Alcohol Programmes and Management Plans

A number of specific Alcohol Management plans are now in operation in the Northern Territory. As mentioned, there are new Prescribed Areas under the NTNERA as well as an expansion of "Dry" Areas under the *Liquor Act* (NT). What appears to be having some effect are the *Alcohol Management Plans* (NT) that in some instances involve photo id system for purchasing alcohol (Alice Springs) as a mechanism to enforce prohibition orders and other orders limiting purchasing alcohol by problem drinkers. Restricted alcohol trading times are in place with photo id for problem drinkers and similar measures have been introduced in Katherine and Tenant Creek. East Arnhem and Alyangula now have a system of Liquor permits for the purchase of take away alcohol. No permit- no take away. This is super-imposed on other statutory restrictions and regimes. Although yet to be tested against the latest statistics, it is certainly the impression that the number and severity of assaults on women have declined in at least Groote Eylandt and Nhulunbuy. (Thanks to Pippa Rudd and her colleagues at the Department of Justice for providing me with a comprehensive set of "Fact Sheets" on the programmes. I will have them with me at the Conference should any delegate require more information.)

Russell Goldflam has tracked the reduction of Alice Springs liquor sales since 2006 and linked it directly to a reduction of serious assaults, (causing bodily, grievous or serious harm). (From 109 in 2006 to 85 in 2008). It is thought that the reason for no corresponding decrease in less serious assaults is due to the fact that the reporting protocols were changed by police that led to the reporting of assaults when they previously wouldn't have been reported, whereas more serious assaults were always recorded. (See paper, Russell Goldflam "Oh We've Got Some Bloody Good Drinkers in the Northern Territory", at 28 and thanks to Stephen Jackson, DOJ, statistician for information about the reporting changes). This trend of reduction in significant assaults is promising.

Goldflam commences his thought provoking paper with a quote from His Honour Riley J in sentencing remarks, R v Green, 20 February 2009 that received wide coverage:

> "It seems plain that something must be done to curb the level of alcohol consumption in Tennant Creek. The courts regularly hear evidence of alcohol being consumed in Tennant Creek in quantities beyond comprehension. It seems that the excessive consumption of alcohol continues for so long as alcohol is available. People drink until they can drink no more and then get up the next day and start all over again. The frequency with which drunken violence occurs is unacceptable and the level of violence is likewise completely unacceptable.
>
> For the good of the town, for the good of the victims, for the good of the offenders and for the good of the innocent children of Tennant Creek, it seems to me obvious that a system must be devised to limit the amount of alcohol made available to the people whose lives are being devastated in this way and to educate and rehabilitate those already abusing alcohol. The people of the Northern Territory cannot sit on their hands and allow what is occurring in Tennant Creek to continue. I accept that it is a complex issues but it is an issue that must be addressed and must be addressed sooner rather than later. Hard decisions must be taken".

Mandatory Matters

The Northern Territory is well known for a history of legislation on mandatory sentencing. Mandatory sentencing for property crime was introduced and came to attention in the late 1990's and was repealed on the change of Government in 2001. The earlier mandatory sentencing for property crimes specified minimum terms. The mandatory sentencing provisions for repeat assaults and first time sexual assaults that were not repealed on the change of Government do not specify minimum terms (s78BA, 78BB *Sentencing Act* (NT)). Further in 2008, the Northern Territory Government extended

mandatory imprisonment to first time assault cases where the injury is significant in that it either interferes with the victim's health or serious harm results: (s78BA *Sentencing Act* (NT)). Although this form of mandatory sentencing does not specify a minimum term and the Court may, if it is appropriate suspend a sentence at the rising of the court, the difficulty in terms of rehabilitation of the defendant is that not all community based orders can run concurrently with a term of imprisonment or consequent on a term of imprisonment. For example, it may be that a particular defendant ought to be considered for home detention as an alternative. That is not possible under the current structure of the *Sentencing Act* (NT) even if the Court determines it is appropriate to release the defendant on the day. This is a consequential practical difficulty of mandatory sentencing.

Over a number of years the presumption in favour of bail has been reversed by statute or neutralised: (ss 7A,8 *Bail Act* (NT)). Although the presumption is one of many matters to be weighed, it has some influence in more people being refused bail and therefore remanded in custody.

Mandatory Reporting of Domestic Violence

In March 2009 the Northern Territory Government passed legislation amending the *Domestic and Family Violence Act* to provide for an offence for failing to report violence that has caused or is likely to cause harm; or there exists serious threat of harm on the life or safety of another person because domestic violence. Section 124A *Domestic and Family Violence Act* reads as follows:

> **124A Reporting domestic violence**
>
> (1) An adult commits an offence if he or she:
>
> (a) believes on reasonable grounds either or both of the following circumstances exist:
>
> (i) another person has caused, or is likely to cause, harm to someone else (the ***victim***) with whom the other person is in a domestic relationship;
>
> (ii) the life or safety of another person (also the ***victim***) is under serious or imminent threat because domestic violence has been, is being or is about to be committed; and
>
> (b) as soon as practicable after forming the belief, does not report to a police officer (either orally or in writing):

(i) the belief; and

(ii) any knowledge forming the grounds for the belief; and

(iii) any factual circumstances on which that knowledge is based.

Maximum penalty: 200 penalty units.

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant has a reasonable excuse.

(3) Without limiting subsection (2), it is a reasonable excuse if the defendant establishes 1 or more of the following:

(a) the defendant reasonably believed someone else had, under subsection (1), reported the same belief about the circumstances mentioned in subsection (1);

(b) the defendant was engaged in planning for the removal of the victim from the circumstances mentioned in subsection (1) and intended to report his or her belief as soon as practicable after the removal;

(c) in relation to the circumstances mentioned in subsection (1)(a)(i) – the defendant reasonably believed that, if the report of his or her belief about the circumstances were made as soon as practicable after the belief was formed as mentioned in subsection (1)(b), a serious or imminent threat to the life or safety of any person may result.

(4) On receipt of the report, the police officer must take reasonable steps to ensure the report is investigated.

(5) This section has effect despite another law of the Territory.

(6) In this section:

belief means a belief mentioned in subsection (1)(a).

harm means physical harm that is serious harm.

physical harm, see section 1A of the Criminal Code.

serious harm, see section 1 of the Criminal Code.

Section 125 provides that a person shall not be liable for breach of any professional code in making such a report. Although this places a significant obligation on health workers and others who may not have previously felt able due to their circumstances to report domestic violence, at the same time it offers protection as the law compels the person to report. This provision may also have implications for anthropologists and other professionals working in the Northern Territory often with Indigenous persons. As noted above, Peter Sutton, in "The Politics of Suffering" sets out many of the findings of scholars and eminent anthropologists who have documented and studied violence, some of it personal violence both in the past and reasonably recently. Although many of the scholars mentioned have reported the violence in the literature, some of the material obtained from their sources (if current) may well fall within the definition of reportable domestic family violence and therefore may need to be reported to police.

Mandatory Reporting of Sexual Offences

I have mentioned briefly that in the Magistrates Court, apart from committals (where children cannot be called as witnesses), our most significant exposure to child sexual abuse is in the child protection area pursuant to the *Care and Protection of Children Act* 2007 (NT). The *Care and Protection of Children Act* until recently included a section that provided that any person who believes a child is likely to be a victim of a sexual offence or otherwise is likely to suffer harm or exploitation must report it. As amended section 26 *Care and Protection of Children Act* reads as follows:

> **26 Reporting obligations**
>
> (1) A person is guilty of an offence if the person:
>
> (a) believes, on reasonable grounds, any of the following:
>
> (i) a child has suffered or is likely to suffer harm or exploitation;
>
> (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence;
>
> (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and
>
> (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a

police officer:

(i) that belief; and

(ii) any knowledge of the person forming the grounds for that belief; and

(iii) any factual circumstances on which that knowledge is based.

Maximum penalty: 200 penalty units.

Note for subsection (1)(a)(iii)

The victim of an offence against section 128 of the Criminal Code is a child who is of or over the age of 16 years and under the offender's special care as mentioned in that section (for example, because the offender is a step-parent or teacher of the victim).

(2) A person is guilty of an offence if the person:

(a) is a health practitioner or someone who performs work of a kind that is prescribed by regulation; and

(b) believes, on reasonable grounds:

(i) that a child aged at least 14 years (but less than 16 years) has been or is likely to be a victim of a sexual offence; and

(ii) that the difference in age between the child and alleged sexual offender is more than 2 years; and

(c) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer:

(i) that belief; and

(ii) any knowledge of the person forming the grounds for that belief; and

(iii) any factual circumstances on which that knowledge is based.

Maximum penalty: 200 penalty units.

Example for subsection (2)(b)(ii)

A health practitioner believes, on reasonable grounds, that a child who has just turned 14 is likely to be a victim of a sexual offence committed by someone aged 16 and a half.

(3) It is a defence to a prosecution for an offence against subsection (1) or (2) if the defendant has a reasonable excuse.

(4) This section has effect despite any other provision in this Act or another law of the Territory.

There had previously been much criticism of the reporting law from both health professionals, teachers and parents: ("see "Underage Sex Laws put Romeo and Juliet "at risk"). (ABC news 16-09-2009). The concern was that young people involved in any sexual activity who were under 16 years would have to be reported and amongst other objections, health professionals said this would stop them accessing medical services such as STI checks and contraception advice. Balanced against this is the obvious need for investigators to be informed of child exploitation or the risk of it.

In August of 2009 amendments (as set out above) were passed exempting health professionals from reporting underage sex between 14 and 15 year olds where the age difference between their consensual partners is two years or less.

There are indications that the related evidential issue of access to medical records for investigation purposes is likely to be ongoing. With older adolescents it is a difficult issue. Recently, in the context of intelligence gathering by the ACC this subject has been litigated in the Federal Court: (*Australian Crime Commission v NTD8* [2009] FCAFC 86, 10 July 2009). There the Full Court ruled that an ACC Examiner was required by law to take into account the concerns of a health provider when issuing a notice requiring production of medical records of eight female Aboriginal children. The Full Court said however it was not established that the examiner failed to take those concerns into account. The respondent health provider had expressed concerns about the breach of trust and confidentiality of the girls and the potential impact in a more public sense on whether producing the records would mean that other children and young persons would avoid treatment and advice, especially for sexually transmitted diseases, contraception and ante natal care. The Court noted the examiner had relied on the Northern Territory Government Department of Health and Community Services "Guidelines on the Management of sexual health issues in children and young people" and the mandatory reporting of sexual abuse, (which as noted, has since that decision been modified, making certain exceptions for 14 and 15 year olds). The decision is not clear on whether the subject children were very young children or older adolescents. The Court also noted the Convention on the Rights of the Child in the formulation but not the implementation of the Amendment of the ACC Act to include matters relevant

to Indigenous child abuse. The Court still held however the examiner was obliged to consider the interests of the eight children, although the question of weight in accordance with principles of judicial review was not amenable to review. Ultimately the ACC's appeal against a ruling to the contrary by the primary judge was successful in terms of production.

Potentially this decision could be influential in relation to the issue of warrants, production of documents and oral evidence under Northern Territory law albeit under different statutes and for different purposes. Although there would be no question in relation to most children, older adolescents may be in a different category bearing in mind their evolving capacities and the amendments since made to the reporting regime. Although obligations under the Convention are phrased in general terms, the General Comments are more specific. General Comment No. 4 (2003) from the Committee on the Rights of the Child is specifically directed to Adolescent health and development. Worthy of some reflection on this difficult issue with competing considerations are the following General Comments:

> "Violence results from a complex interplay of individual, family, community and societal factors. Vulnerable adolescents such as those who are homeless or who are living in institutions, who belong to gangs or who have been recruited as child soldiers are especially exposed to both institutional and interpersonal violence. Under article 19 of the Convention, States parties must take all appropriate measures to prevent and eliminate: (a) institutional violence against adolescents, including through legislation and administrative measures in relation to public and private institutions for adolescents (school, institutions for disabled adolescents, juvenile reformatories, etc.), and training and monitoring of personnel in charge of institutionalized children or who otherwise have contact with children through their work, including the police; and (b) interpersonal violence among adolescents, including by supporting adequate parenting and opportunities for social and educational development in early childhood, fostering non-violent cultural norms and values (as foreseen in article 29 of the Convention), strictly controlling firearms and restricting access to alcohol and drugs.
>
> In light of articles 3, 17 and 24 of the Convention, States parties should provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STD's). In addition, States parties should ensure that they have access to appropriate information, regardless of their marital status and whether their parents or guardians consent. It is essential to find proper means and methods of providing information that is adequate and sensitive to the particularities and specific rights of adolescent girls and boys. To this end, States parties are encouraged to ensure that adolescents are

actively involved in the design and dissemination of information through a variety of channels beyond the school, including youth organisations, religious, community and other groups in the media.

Adolescent girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who become pregnant should have access to health services that are sensitive to their rights and particular needs. States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents. Young mothers, especially where support is lacking, may be prone to depression and anxiety, compromising their ability to care for their child. The Committee urges States parties (a) to develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law, adequate and comprehensive obstetric care and counselling; (b) to foster positive and supportive attitudes towards adolescent parenthood for their mothers and fathers; and (c) to develop policies that will allow adolescent mothers to continue their education.

Before parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention. However, if the adolescent is of sufficient maturity, informed consent shall be obtained from the adolescent her/himself, while informing the parents if that is in the "best interest of the child" (art. 3).

With regard to privacy and confidentiality, and the related issue of informed consent to treatment, States parties should (a) enact laws or regulations to ensure that confidential advice concerning treatment is provided to adolescents so that they can give their informed consent. Such laws or regulations should stipulate an age for this process, or refer to the evolving capacity of the child; and (b) provide training for health personnel on the rights of adolescents to privacy and confidentiality, to be informed about planned treatment and to give their informed consent to treatment".

According to one newspaper report, the ACC has uncovered 652 pieces of information concerning criminal activity – and more than 1,200 intelligence reports. Thirteen intelligence assessments had been produced on "situations or persons of interest". ("The Australian", "Extent of child abuse far worse", 28 May 2009). What is not revealed is whether these reports involve very young children or those who are older of whose capacities may have developed to a point of being able to give informed consent to the production of what for an adult may be confidential information.

Today I have attempted to outline some of the current issues concerning criminal justice and Indigenous people in the Northern Territory, from the perspective of a Magistrate. I trust the heightened activity and attention to these issues will result in substantial improvement for Indigenous people generally and specifically before the Courts.

I would like to record my thanks to Malika O'Keil and Chris Cox (Court Support Services, DoJ) for their assistance in providing statistical material.