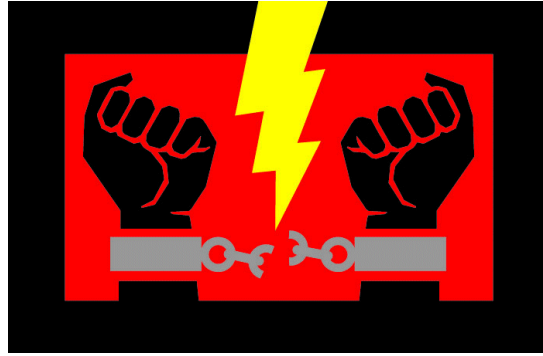




Supplementary submission by the Central
Australian Aboriginal Legal Aid Service and the
North Australian Aboriginal Justice Agency to the
Senate Select Committee on Regional and Remote
Indigenous Communities

May 2009



This is a supplementary submission to the joint submission by the Central Australian Aboriginal Legal Aid Service (CAALAS) and the North Australian Aboriginal Justice Agency (NAAJA) to the Senate Select Committee on Regional and Remote Indigenous Communities dated June 2008

1. Increased Incarceration Rates

In the past 10 years the increase in the Northern Territory adult prison population has been staggering and shamefully unsustainable.

In 2007/2008, the rate of imprisonment of adults in the Northern Territory was 568 per 100,000 adults, almost 3.5 times the national average rate of imprisonment of 164 per 100,000 adults.¹ In 2007/2008 82% of the prison population was Aboriginal.²

The figures have continued to increase since then. In the last quarter of 2008, the average daily imprisonment rate in the NT was 629 per 100,000 population.³

We anticipate that the rates for the next quarter will be even higher as in the December quarter of 2008 the daily average number of prisoners was 993 and by early February 2009 the number of prisoners was approximately 1120.

One reason for this is that in the NT over 30% of the proportion of all sentences imposed on defendants are custodial. This proportion is *more than 3 times the national average*, which has custodial sentences at 10% of all sentences imposed.⁴

¹ Northern Territory Department of Justice – Correctional Services Annual Statistics – 2007-2008, http://www.nt.gov.au/justice/policycoord/documents/statistics/NTCS%20Annual%20Statistics%202007-08_EBook.pdf, p 3

² Ibid p 4

³ Australian Bureau of Statistics - 4512.0 - Corrective Services, Australia, Dec 2008 <http://www.abs.gov.au/Ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2Dec%202008?opendocument&tabname=Summary&prodno=4512.0&issue=Dec%202008&num=&view=>

⁴ Australian Bureau of Statistics - 4513.0 - Criminal Courts, Australia, 2007-08, p. 10. See: [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2EBE862732FDD915CA2575670016BDE7/\\$File/45130_2007-08.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2EBE862732FDD915CA2575670016BDE7/$File/45130_2007-08.pdf)

This leaves the rate in the NT of non-custodial sentences as a proportion of all sentences at around 70% compared with an average for other Australian jurisdictions of 90%. So when compared with other jurisdictions, a picture emerges of a gross under utilisation of non-custodial sentences.

In our submission, there are also major issues in terms of how non-custodial sentences are being used to target the reasons underpinning offending behaviour. In the NT Magistrates Courts, 68% of the 70% of non-custodial sentences are made up of Fines (62%) and Good Behaviour Bonds (6%).⁵ That leaves community supervision and community work as accounting for just 2% of all sentencing outcomes. This rate dropped from 3% in 2007/08, which is the rate it had been since at least 2003/04.⁶ In our submission, the focus on incarceration has an equally significant corollary: the dearth of targeted, rehabilitative non-custodial sentencing outcomes.

We are also concerned about the lack of restorative justice initiatives. The only restorative justice option in the NT is the Community Courts. And despite the NT Government's promises of increased funding to enable the Community Courts to operate in 10 communities⁷, progress has been extremely slow and we are concerned about the lack of resourcing.

It is significant to recall a key recommendation in the Law and Order section of the *Report of the NTER Review Board October 2008* (the "Review"). The Review recommended "strengthened measures be put in place as a matter of urgency to address illicit drug use in remote Aboriginal communities and associated mental health issues."

Our concern is that there has neither been urgency nor strengthened measures to address factors underpinning offending behaviour. In our experience, there is a dire

⁵ Ibid p 71.

⁶ Ibid

⁷ See NT Government *Closing the Gap of Indigenous Disadvantage Progress Report 2007-08* at p 13 and p 15: http://www.workingfuture.nt.gov.au/download/CTG_report.pdf

lack of drug and alcohol rehabilitation, psychiatric, psychological and behavioural assistance for our clients, particularly in remote communities.

And most critically, that there is a lack of strategic government policy with respect to these issues.

2. Impacts of more policing

The increase in police presence and police numbers in many parts of the NT has produced an attendant increase in police charges. Internal police statistics provided to NAAJA show that as at 29 April 2009, the extrapolated figure of police files for 2008/09 is 6471 files. This is up 25% on 2007/08 and 57% since 2006/07.

Our critical concern is that this monumental increase in police files has further contributed to the increase in incarceration rates. However, such a conclusion is difficult to draw in the absence of clear evidence establishing a connection between the particular additional charges laid in the past two years and the sentencing outcomes for these. Publicly accessible statistics do not reveal any discernible patterns as to the increase in incarceration rates.⁸ ABS Statistics show an increase in three types of offences in the 12 months to 30 June 2008:

- traffic offences
- offences against justice (breach of domestic violence orders, breach bail, escape custody, breach of orders)
- public order offences

This correlates with the experience of NAAJA and CAALAS lawyers, particularly those attending bush courts. They report two key findings: firstly, a marked increase in the volume of court lists. And secondly, that the increases in charges have been for relatively minor types of offending.

⁸ ABS statistics, NT Court statistics and internal police statistics separately record offence numbers and sentencing outcomes. There are no statistics which show trends in the types of offences attracting particular sentencing outcomes.

3. Ongoing future of the NTER

The future of many of the aspects of the NTER discussed in our June 2008 submission is unclear. The Australian Government has committed to revising the ‘core elements’ of the NTER - compulsory income management, the five-year leases, and alcohol and pornography controls - to conform with the Racial Discrimination Act by introducing legislation in the spring sittings of the Commonwealth Parliament.

We note that there has been no announcement though about how the NTER is going to be measured and that there is a continued lack of publically available information as to the impact of the measures so far.

3.1 Income Management

In our June 2008 submission, we discussed our concerns about income management (at part 3).

Although a new RDA compliant model has been promised, it appears from a press release by Minister Macklin that the Government has already decided that compulsory income management will continue.⁹

It seems extraordinary to commit to “intensive consultation with Indigenous communities across the Northern Territory”¹⁰ but yet already have made a decision about the outcome of the consultation. It is difficult to see how such consultation is in accordance with Article 19 of the UN Declaration on the Rights of Indigenous People that:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their

⁹ See

http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/closing_gap_nt_12may2009.htm

¹⁰

http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/closing_gap_nt_12may2009.htm

free, prior and informed consent *before* adopting and implementing legislative or administrative measures that may affect them.” (emphasis added)

Widespread consultation was conducted by the NTER Review Board which led to their recommendations that:

- o the current blanket application of compulsory income management in the Northern Territory cease;
- o income management be available on a voluntary basis to members who choose to have some of their income quarantined for specific purposes, as determined by them; and
- o compulsory income management should only apply on the basis of child protection, school enrolment and attendance and other relevant behavioural triggers.

NAAJA, CAALAS and other legal services have been meeting regularly with Centrelink and FAHCSIA representatives to raise operational and policy issues of concern about income management and other welfare measures, including the School Enrolment and Attendance Measures.

3.2 Australian Crime Commission

In our June 2008 submission (at 2.6), we raised concerns about racial discrimination and the Australian Crime Commission.

We note that the Australian Government has decided to continue the Australian Crime Commission’s National Indigenous Intelligence Task Force for the next 12 months.¹¹

There has been no public announcement as to whether the review will include the powers of the Australian Crime Commission.

¹¹ The Australian Government will provide \$5.5 million to continue the work of the Australian Crime Commission’s (ACC’s) National Indigenous Intelligence Task Force for 12 months – see http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/indigenous/Pages/14_NationalIndigenousViolenceChildAbuseIntelligenceTaskForce.aspx

The suspension of the RDA and the NT's Anti Discrimination Act does not apply to the powers given to the Australian Crime Commission.¹²

However, the powers that have been granted to the Australian Crime Commission are discriminatory. For instance, a Aboriginal defendant who commits an assault against a non Aboriginal victim, which results in harm which could consist of a bruise or a scratch could be questioned by the Australian Crime Commission. It would be an offence for this Aboriginal defendant to reveal to anyone (other than his or her lawyer) that they have been brought before the ACC¹³ and the Aboriginal defendant commits an offence if he or she does not answer the questions posed by the ACC¹⁴.

However, the Australian Crime Commission would not have these powers where a non Aboriginal defendant commits exactly the same type of offence against a non Aboriginal victim.

There has been almost no public debate about these powers, in part because the secrecy provisions prevent any disclosures by individuals that the powers have been used.

There have been two cases in the Federal Court where health clinics have refused to provide their health records to the ACC, arguing that this is not in the best interests of their patients. The court has found in favour of the health clinics, however these cases have both been appealed.¹⁵

3.3 Customary Law

¹² Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 s 4(3) and 5(4)

¹³ Australian Crime Commission Act 2002 s 29B

¹⁴ Australian Crime Commission Act 2002 s 30(2)(b)

¹⁵ NTD8 v Australian Crime Commission (No 2) [2008] FCA 1551 (17 October 2008); C Incorporated v Australian Crime Commission [2008] FCA 1806 (28 November 2008); for information on the appeal see http://www.fedcourt.gov.au/ctlsts/ctlsts_appeals.html;

In our June 2008 submission, we discussed our concerns about the amendments with respect to raising customary law in bail and sentencing proceedings (at 2.8).

We understand that these provisions are being reviewed and we again state that we believe that the provisions should be repealed because they:

- a) were not an appropriate policy response to a properly understood situation;
- b) result in the law applying inequitably and unjustly; and
- c) create complexity and confusion.

The suspension of the RDA and the NT's Anti Discrimination laws does apply to amendments with respect to raising customary law in bail and sentencing proceedings.¹⁶

As the Law Council has commented "(t)he consequence of preventing a court from considering 'cultural background' will be that a person (usually white Anglo-Saxon) whose 'culture' accords with mainstream beliefs and values will be at an advantage when compared with a person who has lived their entire life according to a different culture, with different values and beliefs"¹⁷.

This issue is important in light of the increased prosecutions for what we term "teenage relationships" (at 2.9). This continues to be an issue and there have already been cases where the court was unable to take into account evidence that the defendant's relationship with the victim was viewed by the defendant and others (including both sets of parents) as a traditional marriage and "as correct within their beliefs as to cultural considerations".¹⁸

¹⁶ Northern Territory National Emergency Response Act 2007, ss 132 and 133

¹⁷ Law Council of Australia *Recognition of Cultural Factors in Sentencing* Submission to the Council of Australian Governments 10 July 2006 www.lawcouncil.asn.au p 17

¹⁸ *R v Leroy Gibson* NTSC 17 March 2008 per Martin CJ
http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2008/03/20080317gibson.html

4. Funding

The workload of the ATSILS has increased greatly, in line with the increases in incarceration rates, court lodgments and police prosecution files.

The operational funding for NAAJA and CAALAS is totally inadequate and we have only been able to “survive” because we received NTER funding for the last two years.

In the recent Federal Budget funding of \$7.6 million for legal assistance services and \$3.0 million for Northern Territory Welfare Rights Outreach Project was announced.¹⁹ We understand that this announcement includes funding for NAAJA and CAALAS but despite our many inquiries, we have not been advised about the level of this funding.

This continued lack of certainty makes it extremely difficult for us to plan our service delivery and retain experienced staff members given that the end of the financial year is only a few weeks away.

¹⁹

http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/indigenous/Pages/24_NT_LawOrder.aspx