TEN PROPOSALS TO REDUCE INDIGENOUS OVER-REPRESENTATION IN NORTHERN TERRITORY PRISONS

Anthony Pyne*

I Introduction

More than 20 years have passed since the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') report was tabled in Parliament.[1] If Australia were to be graded on how successfully it has implemented the report's 339 recommendations, it is difficult to see how it could be awarded any grade other than 'fail'. There have been some successes.[2] But, overall, the number of Indigenous people still in our prisons reflects that we have not done enough. Nowhere is that failure more apparent than in the Northern Territory.[3]

Indigenous people comprise 26.8 per cent of the population of the Northern Territory.[4] They comprised, at last count, 82 per cent of the prison population.[5] The Northern Territory has recorded some of the highest recidivism rates in the country.[6] The recidivism rate is three times higher amongst Indigenous Territorians.[7] Imprisonment rates have gone up in the 20 years since the RCIADIC.[8] They are still rising.[9] Prisons in the Northern Territory are so overcrowded that some prisoners with shorter sentences are serving them in watch-houses.[10] These rates have not gone up because of a marked increase in crime.[11] They go up because of the way we choose to respond to crime. They go up because of successive government decisions to use imprisonment as an instrument of social policy.[12] They have gone up because we, through our elected politicians, choose jail for Indigenous offenders, and choose it more frequently. That choice can be reversed, and that is what this article is about. I examine 10 ways that we can undo that choice in the Northern Territory without, I argue, drastically sacrificing our principles or being unduly 'soft' on crime.

II The Ten Proposals

A Repeal Sections 78BA and 78B of the *Sentencing Act*

Mandatory sentencing is not dead in the Northern Territory. It survives in a number of provisions, two of which have the greatest impact on the number of Indigenous people in Northern Territory jails. The first is section 78BA of the *Sentencing Act 1995* (NT) ('*Sentencing Act*'). It provides that second or subsequent unlawful assaults and first strike unlawful assaults where the victim suffers harm that 'interferes with [his or her] health' attract mandatory (not suspended, not home detention, not a community-based order) imprisonment. Assaults make up 92 per cent of the total number of recorded offences against the person in the Northern Territory.[13] Almost half of all prisoners sentenced to jail in the Northern Territory are sentenced for a violent offence.[14] For many violent offenders, the reason they are sent to actual jail is because that is the only possible sentencing option. For a first time offender, an assault where the victim requires medical treatment or is temporarily incapacitated because of pain may result in mandatory jail.[15] Any second-strike assault, including one by threatened application of force or a push, for example, will result in actual jail. This can be true even when the offender's first offence was committed when he or she was a juvenile.[16]

This is a provision that particularly affects Indigenous people. The incidence of violence, despite section 78BA, is far higher amongst Indigenous Territorians than the general population. Indigenous females are victims of assault at a rate 12 times that of non-Indigenous females; for Indigenous men the rate is twice as large as for non-Indigenous men.[17] Section 78BA creates a blunt force response to this dramatic

situation. It sets up a default and un-nuanced response of another stint in prison for violent offenders. This has a disturbing normalising effect on both violence and prison. The provision creates the most disproportionate outcomes for the people for whom rehabilitation is most important: first and second-strike offenders. Many violent offenders, particularly repeat offenders, would receive a term of imprisonment anyway because of the objective gravity of their crimes. But many of those sent to jail for violent offending are those who would benefit most from a rehabilitative approach to sentencing. The only 'escape clause' is a sentence of imprisonment that is suspended at the rising of the court. This can be difficult for Indigenous people to take advantage of because some of the factors that might tip the balance (such as full-time work) are often absent.[18] The result is that, in many unnecessary cases, the question for the sentencer is not 'how should we respond to this?' but an unedifying 'it's going to be jail – so how long for this one?'.

The second provision is section 78B of the *Sentencing Act*. This section provides that any offender convicted of an aggravated property offence must be sentenced to a term of imprisonment or a community work order, unless there are 'exceptional circumstances'. Any sentence of imprisonment can only be wholly suspended if it is to be served by home detention. Crucially, the definition of 'aggravated property offence' includes unlawful entries with intent and criminal damage.[19] Breaking into homes or businesses to steal grog – a crime that is, in the author's experience, especially prevalent amongst Indigenous people, particularly in Central Australia because of staggering levels of alcohol dependency – will attract the operation of section 78B.

This regime was preserved when the old mandatory sentencing provisions were repealed. The provisions were supposed to target offences that 'have a high impact on victims and which are the focus of community concerns'.[20] The section 78B regime is softer than section 78BA in that it requires a conviction (as opposed to a finding of guilt), contains the 'exceptional circumstances' escape provision and provides for the possibility of community work. However, despite these provisions, aggravated property offences, especially break-ins, usually attract jail. 'Exceptional circumstances' has been interpreted narrowly. Factors such as youth, limited history and steps towards rehabilitation will not usually be extraordinary enough; nor, it seems, will be the unavailability of community work.[21] At last count, 71 per cent of these offences were dealt with by imprisonment and only a comparatively small percentage of offenders received community work or home detention.[22] Home detention and community work orders are subject to a suitability assessment, which very often precludes Indigenous people (especially those in remote communities or town camps) and leaves jail as the only sentencing option.

Section 78BA and section 78B should be repealed. Mandatory sentencing has been widely condemned.[23] It is almost always a result of hollow political 'tough on crime' rhetoric and it almost always does not work to deter crime.[24] It prevents judges and magistrates from doing their job.[25] It creates disproportionately harsh outcomes that unfairly target Indigenous people.[26] It contributes to a perception amongst Indigenous people that going to court is about getting locked up, no matter what your story may be.

Imprisonment is the harshest penalty in the Australian criminal justice system and should be a punishment of last resort.[27] Recommendation 92 of the RCIADIC was that governments legislate to enforce the principle that it should be a last resort.[28] Imprisonment is a punishment of first resort for most violent offences in the Northern Territory and is high on a short list of punishments for property offences. The mandatory sentencing regime of the 1990s was repealed because, in the words of the former Northern Territory Attorney-General, it was 'a regime that operate[d] unjustly and inappropriately just for the sake of appearing to be tough on crime', it did nothing for victims and it did not reduce offending.[29] The very same criticisms can be (and have been) levelled at what remains of it, particularly in relation to these very prevalent offences.[30]

B End De Facto Mandatory Imprisonment for Driving whilst Disqualified

There is an informal mandatory sentencing regime for driving whilst disqualified in the Northern Territory. Traffic and motor vehicle offences are the second most common type of offences for which offenders receive jail.[31] This preference for imprisonment originates in case law. A great number of decided cases in the Northern Territory suggest that imprisonment will be the penalty for driving whilst disqualified unless exceptional circumstances exist.[32] Where non-custodial dispositions for driving whilst disqualified, such as community work, have been imposed, they have been rejected on appeal.[33] There have been decisions that

reinforce the idea that imprisonment must not always be the result.[34] However, the Supreme Court of the Northern Territory ('Supreme Court') recently found that 'the constant attitude adopted by this Court in relation to this offence is to indicate that unless exceptional circumstances exist, a term of imprisonment is almost inevitable'.[35]

The primary justification for imprisoning people for this offence is either that it manifests disrespect for the law or that the integrity of court orders must be maintained. These justifications are particularly hollow when one considers the barriers that Indigenous people face in navigating a foreign criminal justice system. Imposing the harshest penalty in the sentencing system for what is essentially a minor regulatory infringement has been the subject of fierce criticism.[36] These criticisms are especially relevant in a jurisdiction where people frequently travel very long distances and where huge areas are serviced by no public transport at all. Darwin has the lowest rate of public transport use of all Australian capital cities.[37] Territorians, especially Indigenous Territorians, rely mostly on cars.

Recommendation 95 of the RCIADIC was that the link between motor vehicle offences and imprisonment be identified and reduced.[38] Traffic laws are heavily policed in Indigenous communities, especially after the Northern Territory National Emergency Response ('NTER') led to more police officers looking to justify their presence.[39] Those who drive whilst disqualified are more likely to be caught if they are Indigenous. If they have a prior conviction, they are especially likely to receive a jail sentence. Those who drive unlicensed are usually dealt with by way of a fine, even if they have numerous prior offences.[40] This is a perverse outcome. Some of the poorest and most disadvantaged people in the country – who may have a very different concept of time and time management – will be fined if they drive without a licence a day after their disqualification period ends, but can at best hope to narrowly escape a prison term if they drive a day before it.

Change on this front must come from the courts. There has been, fortunately, a positive development from the legislature. Last year, the Northern Territory Government passed the *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT). This legislation created two new sentencing dispositions: community based orders and community custody orders. These orders involve intensive supervision in the community, mandatory drug and alcohol rehabilitation and can involve monitoring devices.[41] They are available for driving offences. There are provisions allowing offenders who are disqualified and whose community order requires them to do a driving program to apply for their licence while their community order is in place.[42] Whether these orders will be relevant to Indigenous people remains to be seen. They are still in their infancy. But they provide the court with two more options that are not actual jail.

C Remove the Presumption against Bail for Serious Violent Offenders

Not only is a person charged with a violent offence highly likely to receive a sentence of actual imprisonment, he or she is also highly likely to be remanded in custody until the case is determined. If a person is charged with a 'serious violence offence' and has been found guilty of another serious violence offence in the previous five years, the presumption is that he or she will not be granted bail.[43] An aggravated assault is a serious violence offence.[44] The applicant for bail must convince the court why bail should not be refused. This can be extremely difficult for Indigenous people in the Northern Territory. The Supreme Court recently considered that factors such as the youth of an offender, strong community ties, the desire to continue education and training, a cash surety, previous regular attendances at court and a negligible risk to the alleged victim were not 'sufficiently special or unusual' to overcome the statutory presumption, even when bail was not opposed by the prosecution.[45] The Court has since questioned whether such a restrictive interpretation of the presumption against bail is correct.[46] However, despite this gentle rolling back, the bar created for any applicant in these circumstances, and especially Indigenous applicants, is very high.

A large proportion of prisoners who are in custody for acts intended to cause injury are unsentenced.[47] Remand is a harsher regime than it is for most sentenced prisoners. Prisoners on remand are not able to access the same programs as sentenced prisoners and they do not have the same privileges. The physical conditions are far worse. The Supreme Court has recently recognised the harshness of remand and taken it into account on sentence. Conditions were described as follows:

> [C]rowded dormitories which lead to animosity and fights between remand prisoners that are stressed, the boredom which the prisoners suffer due to the fact that there are no

> programs for each day, a lack of services available and a lack of a proper library facilities available. There is also a lack of entertainment facilities available. Apart from one pool table, television, card games, checkers and the like there is little else for prisoners to do. Jobs in the kitchen are treated as a premier position.[48]

Hearing dates may be set three or four months in advance, especially outside of Darwin. A very significant proportion of sentenced prisoners receive sentences of six months or less.[49] The prejudice involved in being refused bail is very significant. It may be that a month or less in custody turns on the crucial question of whether the accused person actually committed the offence. The combination of these factors creates a significant incentive to plead guilty.

But this is part of a broader discussion about the purpose of bail and the utility of presumptions as a meaningful concept. Bail is primarily about getting people to court. It should be viewed in light of a recognised human right to liberty.[50] Bail conditions are about society's interest in managing perceived risks. The balance of these factors should always be construed in light of the accused person's right to liberty. The question should be about the minimum restrictions necessary to get the person to court and protect society, not the 'privilege' of bail.[51] Presumptions do not advance this construction. The New South Wales Law Reform Commission has recently recommended the abolition of bail presumptions before conviction on the basis that they unduly focus the bail inquiry on the nature of the offence charged and a person's criminal history, instead of allowing a balanced assessment of the questions that bear rationally on whether a person should be detained or released.[52] The presumption against bail for violent offenders is a stark example of this.

Getting tough on offenders through refusing bail runs contrary to the presumption of innocence because it involves using bail as a punitive measure.[53] But bail laws are an easy target for legislatures looking to get tough on crime.[54] This particular presumption creates injustices and reinforces a perception that the criminal justice system is there to lock people up. The presumption against bail for violent offenders should be abolished or, at least, returned to a neutral presumption so that the focus moves from the nature of the allegation to the factors to be considered in balancing the rights of the accused against the interests of society.

D Bring Back CREDIT and Make It Available to Alcohol-Related Offending

If it had not been going on for so long, alcohol consumption in the Northern Territory could fairly be considered a national emergency. Sixty per cent of violent assaults in the Northern Territory and 67 per cent of domestic violence incidents are alcohol-related.[55] Alcohol abuse is endemic. However, the dominant response of the criminal justice system in the Northern Territory is still (despite some worthy efforts) to criminalise the problem. Indigenous people with alcohol dependencies come into contact with the police and the courts very quickly. For a long time, it has been illegal to have alcohol in public restricted areas.[56] Moving problem drinking out of major population centres is problematic of itself: it is, arguably, discriminatory because it disproportionately targets Aboriginal drinkers.

Any ambiguity about whether it was discriminatory was removed with the NTER. The *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTER Act*') created new places where it became illegal to have alcohol[57] and then increased criminal penalties for controlling, possessing or bringing alcohol into those areas.[58] Alcohol supply was not restricted.[59] Consumption was criminalised: drinkers can get grog cheaply, but have to drink it at the boundary of the community, unsupervised and unsafe. In contrast, community action groups have called for restrictions on supply, including a minimum floor price.[60] They have met with some important successes. In Alice Springs, for example, Coles stopped selling certain types of high volume cask wine in response to community pressure.[61] But the legal system has not caught up, and clings to the criminalisation model.

Once into the court system, there is no longer a meaningful bail program for alcohol-related offences in the Court of Summary Jurisdiction, despite the fact that an apparatus for one existed. The Court Referral and Evaluation for Drug Intervention and Treatment ('CREDIT') program was a bail diversion scheme for illicit drug users. It was recently scrapped because it was thought either redundant or unsophisticated in comparison to the Substance Misuse Assessment and Referral for Treatment ('SMART') Court program discussed below. The 12-week CREDIT program involved residential or outpatient drug treatment, under the supervision of a court-appointed clinician. Successfully completing CREDIT usually led to a reduction in one's

sentence. It was often the difference between actual jail and a community-based order.

CREDIT was very successful. It recorded very high completion rates.[62] But it was available for illicit drug users only and violent offenders were usually excluded.[63] Indigenous clients with alcohol addictions frequently undertook a perverse exercise of trying to demonstrate co-morbidity with an illicit drug to try to qualify for the program (such as being asked, 'have you ever even smelled ganga?'). Now that it has been abolished, alleged offenders with alcohol addictions, especially violent offenders, are likely to be remanded in custody until their case is determined because of the presumption against bail.

Bail programs can play a very important role in creating an incentive to rehabilitate before sentence or before hearing. In a very important recognition of the significance of bail programs in rehabilitation, section 7A(2A) of the *Bail Act* removes the presumption against bail where the applicant is suitable to participate in a rehabilitation program prescribed by the regulations. Nothing has been prescribed since the exception was created, so the exclusion is largely meaningless, but it does reflect the importance of rehabilitation on bail. Despite the introduction of a specialist court, CREDIT provided a different mechanism to get people into treatment that could accommodate people who wished to do a three-month period of residential rehabilitation and, potentially, return to their communities after sentence. There was no reason why it could not co-exist with the SMART Court in the same way that similar bail programs in other jurisdictions run alongside Drug Courts. In a system that has few successes, the program should not have been abandoned.

E Retain SMART Court and Make It More Culturally Appropriate and Open to Violent Offenders

The Northern Territory took a significant step towards adopting a more rehabilitative and restorative approach to criminal justice when it established the SMART Court early last year.[64] The SMART Court replaced the CREDIT program and the Alcohol Court for offenders with a drug or alcohol problem that contributed to their offending conduct. The old Alcohol Court legislation used prohibitions and sanctions exclusively. It was poorly drafted and represented no advancement of established sentencing powers. Under the old legislation, offenders with an alcohol dependency could be assessed for an alcohol intervention order or an alcohol prohibition order.[65] The assessment took approximately six weeks, during which time the offender was usually held on remand. An alcohol intervention order was a partly or wholly suspended sentence with a mandatory treatment condition and several other mandatory conditions, including that the offender not drink alcohol. These conditions are possible under a regular suspended sentence. The penalty for breaching this order was imprisonment for up to 14 days, or revoking the suspended sentence. An alcohol prohibition order consisted of an order that prohibited an offender from drinking or attending licensed premises. There were no breach provisions for prohibition orders, so it was not clear what happened if a breach took place.

The SMART Court was intended to be a 'therapeutic' court.[66] The Court provided a way to avoid mandatory sentencing.[67] It established a system of sanction and reward that was designed for illicit drug users in other states.[68] But it was not for most Indigenous people. SMART Orders lasted at least six months and were premised on the idea that participants could come back to court every fortnight. People who live on remote communities (many of which are accessible for large parts of the year only by plane) were often unable to make a realistic undertaking to stay in Darwin, or Alice Springs, for a minimum of six months. If they left, it was likely they would get a sanction.

The SMART Court also required participants to trust the Court and want to come back.[69] For people whose experience of Court is that it is a frightening and alienating place where people go to get locked up, this required a remarkable change in attitude. It was also premised on a non-Indigenous notion of therapy. It required a direct narrative with a magistrate and very significant and extensive personal disclosure. There was usually no Indigenous person in the room. Little account was taken of how Indigenous defendants might disclose the information that was necessary to make the court work. A great deal depended on the interpersonal skills of the presiding magistrate. Because there was no specific mechanism to make it culturally relevant, it was difficult for some Indigenous people to get the benefits.[70] The result was fewer referrals.

The Smart Court also did not deal with violence. In June 2011, the Government passed regulations that excluded certain violent offences and sexual offences from the SMART Court.[71] Aggravated assaults were excluded. We have seen

that aggravated assaults include all assaults that result in harm to the victim and all assaults where the victim is female and the offender is male, or where a weapon is used, and that the definition of 'harm' is extremely broad. The change excluded the vast majority of intimate partner violence and virtually all other assaults that come before summary courts in the Northern Territory. The majority of these matters were still dealt with in the Court of Summary Jurisdiction, where they were subject to mandatory sentences of actual imprisonment. These changes were met with disapproval from lawyers, and in particular, the Aboriginal Legal Services.[72] Again, the policy preference expressed was for imprisonment as a mandatory response to the most prevalent crime in Indigenous communities.

Another far more dramatic decision was made earlier this year. Far from reforming it, funding for the SMART Court was discontinued. At the time of writing, no new referrals can be made and the program is being wound down. Nothing is to be established in its place. The closure is ostensibly a cost cutting measure.[73] But, in effect, it represents another example of a decision which prefers imprisonment, often without any substance-abuse rehabilitation, as a response to crime.

F Expand the Use of Community Courts

In a system where the vast majority of court users are Indigenous, it is significant that none of the measures discussed above involves an increased role for Indigenous people in the criminal justice system. The RCIADIC clearly advocated an increased role for Aboriginal people in designing non-custodial sentences.[74] Every state and territory in Australia (except Tasmania) has established some sort of Indigenous sentencing court. In the Northern Territory, it is the Community Court.

Community Courts do not have any legislative basis. Its procedure is governed by guidelines and it is a Court of Summary Jurisdiction 'assisted by respected persons and family and support members for both the offender and the victim'.[75] The community representatives play a significant role. The guidelines state that they are 'the key to empowering the victim/s, offender, support persons and the community in the sentencing process by developing a shared responsibility'.[76] The process involves sitting in a circle, community members explaining who they are, a plea of guilty and a reading of the agreed facts and an invitation to all present to discuss the impact of the offending and the appropriate sentence.[77] Community Courts look and feel very different. Elders actively participate, often in language. There is often a dialogue created between the Elders and the offender and amongst the Elders themselves. It is often highly personalised. There is an element of positive shaming. The Elders' recommendation to the magistrate is a reflection of consensual decision-making. It is almost always, in the author's experience,[78] within the sentencing range for the particular offence and is almost always adopted by the magistrate.

The key and obvious difference is the participation of Indigenous people in the process.[79] Community Courts are a reflection of a unique form of hybrid justice. Like other Indigenous sentencing courts, they display elements of Indigenous justice, restorative justice and therapeutic justice, but are not solely an expression of any one of these.[80] Community Courts are not a panacea. It is extremely important that we do not judge Community Courts by their capacity to reduce recidivism alone.[81] It is not self-determination. It does not, and cannot, apply Indigenous law.[82] It relies on the idea that the 'community' is an identifiable natural entity with a unitary voice, which is problematic.[83] But it is a viable alternative. It is more culturally relevant. It is an expression of reconciliation. Where studies have been done, the strong anecdotal evidence is that it is more meaningful to offenders.[84]

But Community Courts are under-utilised. Most of the offences that have the greatest impact on Indigenous people are rarely, or never, resolved with any community input. They hear only a very limited number of matters. The guidelines specify that the offences that can be dealt with in Community Court are to be 'as broad as possible' but also specify 'caution needs to be exercised for offences of violence, domestic violence and offences where the victim is a child'.[85] In the author's experience, police prosecutors oppose referring serious matters to the Community Court. Magistrates often uphold their objections. Offences that are likely – or certain, because of mandatory sentencing – to result in a term of imprisonment are rarely referred because offenders are refused bail and there is no Community Court in Darwin. This is in contrast to other Indigenous sentencing courts, where matters are referred precisely because the offender is at risk of a custodial sentence.[86]

They also do not sit any longer for adult matters. Section 104A of the *Sentencing Act* provides that information on

Aboriginal customary law and community views may only be received from a party to the proceedings, with a notice that outlines the substance of the information, on oath or in an affidavit or statutory declaration. This discriminatory provision means that Community Courts are available for youth matters only.[87] Aboriginal people are excluded from the decision-making process for the vast majority of court matters because they (and only they) are required to provide information to the court about their culture in this highly prescribed way. Participating in an open dialogue with the presiding magistrate is not possible because of these rules.

Expanding the Community Court system requires removing this provision, and an attitudinal change from prosecutors, magistrates and government. The Yuendumu Community Court, for example, was the product of a four-year Commonwealth grant to fund the Yuendumu Mediation and Justice Group, which included the community representatives at court. This funding is no longer available. The court rarely sits. Greater commitment to these programs from government and a willingness to surrender a very small part of control over the criminal justice system would promote a process that is far more engaging and meaningful to the people it services.

G Expand the Operation of the Indigenous Family Violence Offenders Program

We know a lot more about the causes and nature of anger and violence than we did a generation ago.[88] We have extremely valuable research into the nature and causes of Indigenous anger and violence. We know that the discrepancies between the way things are and the way they ought to be may precipitate anger that manifests itself in violence; we know that the collective Indigenous experience of trauma and grief provides fertile ground for these discrepancies.[89] Interviews with Indigenous men who have come into contact with the criminal justice system reveal a complex narrative of emotional issues, including powerlessness, always set against the counterpoint of the non-Indigenous experience.[90] Some commentators point to the criminal justice system itself and, particularly, the role of entrenched authority figures within it, as an independent cause of anger.[91] We know something of the role of jealousy in intimate relationships, family feuds and intoxication.[92] We are coming to a greater and more nuanced understanding of the Indigenous experience of family violence and the importance of violence programs that are local, based in the community, culturally relevant and linked to other service providers.[93] It has been forcefully argued that a domestic and family violence system built on non-Indigenous feminist values may not serve Indigenous women.[94] It has been suggested that, in some contexts, Indigenous women may respond differently to violence, may be violent themselves and may make very different uses of refuges to non-Indigenous women.[95] Leaving a community and family after a physical fight is often simply not an option and creates difficulties for a system premised on separation.

The criminal justice system in the Northern Territory responds to this complexity imperfectly. Its first response will typically be imprisonment. The alleged perpetrator will be arrested and, most likely, refused bail. He or she will receive a domestic violence order. The content of this order may impose any restraints the issuing authority considers necessary or desirable to prevent domestic violence, to ensure that the defendant accepts responsibility for any domestic violence or to encourage the defendant to change his or her behaviour.[96] In practice, the police pro-forma includes three categories of orders: 'non-violence', 'non-contact while intoxicated' and 'non-contact'. The defendant will almost certainly receive an order in these terms. He or she will then be sentenced, mostly to imprisonment, and may be required to attend the Indigenous Family Violence Offenders Program ('IFVOP') as a condition of a partly suspended sentence.

This is the context for the IFVOP. There is a strong emphasis on attendance and breaching because of this context. The Department of Correctional Services administers the 50-hour program on an ad hoc basis. But the program, when it works, can display many of the characteristics that are associated with successful anger management. They are locally based, run by Indigenous Elders and they can focus on healing and well-being but at the same time confront attitudes that may lead to violence.[97] The environment is intended to be non-threatening and supportive. It may be the only time that an offender will be told that their conduct is unacceptable by someone from their own community. We should encourage the development of these programs. Diverting money away from jails to programs like these is the central premise of 'justice reinvestment', which has proven very successful in over-represented and marginalised communities in the United States and the United Kingdom.[98] There is no reason for the program to operate only after sentence. The program could be incorporated into the domestic violence order regime. If a non-contact domestic violence order were downgraded (taking due account of the wishes of the victim) after completion of the program, a meaningful

mechanism might be developed to promote relationships with no violence, in circumstances where neither party can, realistically, simply leave the community to escape the other.

H Reform Parole, Completely

Once Indigenous offenders are sentenced to a term of imprisonment, the chances are high that they will serve their entire sentence in custody. A sentencing court is required to consider a non-parole period only for sentences of one year or longer.[99] The most recent figures available reveal that 1,673 of 1,878 Indigenous prisoners were serving sentences of fewer than 12 months.[100] The court is the gatekeeper of supervised release for these prisoners. Early release is possible as a condition of a partly suspended sentence, but the court must be convinced that suspension is appropriate. It is not the default position. This contributes to the churn of short-term imprisonment, which is a particularly ineffective deterrent because fewer programs are available to short-term prisoners.[101] This churn effect normalises prison stints in Indigenous communities.

Where an Indigenous person is sentenced to a term of imprisonment with a non-parole period, he or she is still less likely to get parole. Cultural and linguistic barriers mean that many Indigenous prisoners will not apply for parole if they have been refused at first instance, because they do not understand the process or may not complete the programs that might increase their chances of getting parole.[102] If they do apply, it is more likely than not that they will be refused.[103]

Generic reasons for refusing parole are communicated to the prisoner in jail. Interpreters are used at the discretion of the parole officer. Decisions of the Parole Board of the Northern Territory ('Parole Board') are made in secret. There is no established review mechanism. The Parole Board has the power to direct release to parole and the Chairperson has the power to vary the conditions of parole or revoke parole at his or her absolute discretion.[104] The rules of natural justice, including procedural fairness, are excluded from all actions of the Parole Board.[105] There is no hearing, applicants for parole are not represented when a decision is made, no public reasons are given for any decision in relation to parole and there is no right of review.

An effective system of supervised release is likely to reduce reoffending. While importing systems from interstate must always be treated with some caution, the system of parole in New South Wales contains important advances on the system in the Northern Territory, especially in relation to accountability. In New South Wales, where a court imposes a sentence of more than six months but less than three years (and does not decline to set a non-parole period), it must make an order directing release to parole.[106] For sentences over three years with a non-parole period, the New South Wales Parole Authority must consider release to parole in the months before the prisoner is eligible.[107] It applies a public interest test, assisted usually by a report from the Probation and Parole Service that must include a post-release plan.[108] If parole is refused, the offender may request a hearing, at which he or she can make submissions and be represented.[109] The system reflects the importance of supported release and, more importantly, reflects a policy preference for it, over imprisonment. The system is not a panacea, but it is far more transparent and people who participate in it have a far greater level of agency. The system of parole in the Northern Territory is unduly restrictive and operates unfairly by removing Indigenous agency from its procedures and outcomes.[110]

This lack of access, fairness and accountability for Indigenous people was the justification for commencing the Indigenous Throughcare Project at the North Australian Aboriginal Justice Agency in 2010. Prison-based Throughcare workers and lawyers work with Indigenous clients to develop post-release plans and provide case management. This service won the Australian Crime and Violence Prevention Award from the Australian Institute of Criminology last year.[111] But it is not a substitute for systemic reform. It cannot safeguard against injustice in the same way that is possible in an open and accountable system.

I Reform Sections 77 and 78 of the *Mental Health and Related Services Act*

An awkward, time-consuming and underutilised summary diversion process exists for those suffering from mental illnesses in the Northern Territory. It is only possible to guess how many Indigenous people who are suffering from mental illnesses are sentenced to jail with little or no account taken of their illness. A primary reason for this is that fewer resources are available to get mental health information that is relevant to sentence before the court because Aboriginal Legal Services in the Northern Territory are not adequately funded.[112] Offenders suffering from mental illnesses may be less morally culpable for their actions, may be inappropriate

vehicles for sending a message to deter others, may have a condition that means that a harsh sentence will not have a significant deterrent effect on them and may suffer more greatly if they are imprisoned.[113] A sentence other than actual imprisonment, or a far shorter sentence, may be appropriate. Undiagnosed mental illnesses mean a greater risk of jail.

However, even those with diagnosed conditions face a difficult time in the Northern Territory. The existing summary diversion process is unwieldy. Diversion into voluntary treatment requires both a plea of guilty and the consent of the prosecution.[114] If this is not forthcoming (the author has never seen anybody diverted this way), it leaves the summary dismissal proceedings. If an accused person appears to the court to be suffering from a mental illness, the court may request a certificate from the Chief Health Officer stating whether the person carrying out the impugned conduct was suffering from a mental illness at the time of the alleged offence and whether that illness is likely to have materially contributed to his or her conduct.[115] The matter is referred to a 'designated mental health practitioner' who provides a report to the Chief Health Officer. A delegate of the Chief Health Officer then considers the report and provides certificate to the court, which contains a check-box indicating whether the person was suffering from a mental illness or mental disturbance at the time of the offence and whether that condition is likely to have materially contributed to his or her conduct. The process of getting the certificate usually takes about two months. The legislation then provides that after receiving the certificate, the court must dismiss the charge if it is satisfied that the person did not know the nature and quality of his or her conduct, did not know it was wrong, or could not control his or her actions.

The problem is that magistrates balk at the process. They receive this certificate on the court file and then hear submissions from a defence lawyer to the effect that the matter should be dismissed without penalty. It appears to relegate the decision about what may be a serious criminal matter to an administrator, assisted by a psychologist, registered nurse, occupational therapist, Aboriginal health worker, social worker or an ambulance officer.[116] The Supreme Court has remarked that this process leading to dismissal is 'less than rigorous'.[117] Until only recently, it was not clear what inquiry, if any, the court is entitled to make as to whether dismissal is appropriate. It has recently found that the words 'if the Court is satisfied' mean that the Court of Summary Jurisdiction can 'go behind' the certificate and conduct its own inquiry by hearing evidence.[118] But this inquiry is, essentially, into questions of fitness and whether the matter should be completely dismissed. There is no possibility of diversion into treatment without a plea and consent of the prosecution.

Because of this all-or-nothing enquiry into whether somebody should be 'let off' (which, of course, is very often entirely appropriate) magistrates may refuse to hear the matter summarily to avoid it or prosecutors may withdraw consent to summary jurisdiction to avoid it.[119] This is obviously highly undesirable. The question of jurisdiction should not be invoked as an 'escape clause' where there otherwise would not be an issue that the summary court was the correct forum. This is even less so when section 77 of the *Mental Health Act* itself specifies that summary jurisdiction is a precondition for ordering the certificate in the first place.[120]

If the matter is not dealt with summarily, it is referred to the Supreme Court, to be determined under schedule 1 part IIA of the *Criminal Code*. These provisions govern mental impairment and unfitness to plead. They involve questions that must be resolved by a jury. If the jury resolves that a person is unfit to plead, the person may, particularly if there is a risk of violence, become the subject of a custodial supervision order. This involves committing the person to an 'appropriate place' or, if none is available, to prison.[121] There are very few appropriate places in the Northern Territory. There is one in greater Darwin and a new facility near Alice Springs Correctional Centre that looks very much like a low security prison.

Persons found unfit to plead or mentally impaired are committed to either prison or a secure facility far from family if their assessment is unfavourable, often for periods far in excess of what they would have received for the incident that brought them into custody.[122] In one recent case, a defendant arrested on a charge of unlawful assault by threatened application of force on a person involved in his care was found unfit to plead. He is unlikely to have received a sentence of more than six months in the Court of Summary Jurisdiction. He has been in custody at Alice Springs Correctional Centre since 16 August 2007. This creates a very real and tremendously significant risk for defendants who are ill and significant ethical problems for their lawyers. It has received national attention.[123]

These sections need to be reformed. The court must be able to divert people into treatment in appropriate cases without the

requirement for a plea of guilty or consent of the prosecution, in the way that it does in other jurisdictions.[124] Section 77 of the *Mental Health Act* could be reformed to include this possibility or the requirements for a plea and prosecutorial consent could be removed from section 78. The requirement for a certificate should be abolished in favour of simply providing the report on which it is based. This report is almost always subpoenaed and tendered. But the process of requesting the certificate, then obtaining the report, then listing the matter for a hearing on the section 77 application may take months, during which time a person may be in custody. Finally, both the court and the prosecution need to commit to this diversion process in the summary court (and many already do) and accept it as a legitimate part of the criminal justice system.

J Decriminalise Breaching Bail and Establish a Juvenile Justice Department

In the March quarter of 2011, a staggering 98 per cent of detainees in juvenile detention were Indigenous.[125] Even allowing for the volatility of statistics relating to young people, this is a remarkable number. A great deal has been written about the shortcomings of the criminal justice system and its response to Indigenous young people.[126] This article will consider the question of bail laws and attitudes only. Why? Because this article is about reducing the number of Indigenous people in custody in the Northern Territory and the reason that most Indigenous young people are in custody is not because they have committed a crime but because they have been refused bail.[127] Indigenous young people are less likely to be diverted than non-Indigenous young people.[128] If a young person is refused police diversion, the police have veto power over whether the court can refer the matter back for diversion.[129] They usually exercise it. Indigenous young people are more likely to enter the youth justice system as a result.

Once in the youth justice system, a young person is likely to be placed on bail. Bail conditions for young people are often more onerous than they would be for adults. They frequently amount to de facto home detention, with insufficient review of whether the conditions are truly necessary. Curfews are frequently imposed. Non-association conditions are often very extensive. Place restrictions are frequent. Bail is used inappropriately to achieve welfare outcomes, such as school attendance. More conditions mean a greater chance of breaching bail. Any subsequent breaches lead the court quickly to the view that no conditions are suitable and bail is refused.

This situation has worsened with the creation of the offence of breach of bail.[130] The amendment was enacted in 2011 in response to an increase in juvenile offending in Alice Springs and police frustration that the bail laws were ineffective.[131] The law reflects a disappointing 'get tough' attitude to juvenile offending and stark example of the process as punishment. The RCIADIC reported that incarceration was ineffective as a deterrent for Aboriginal juveniles and recommended a series of diversionary approaches.[132] It is highly unlikely that the net result of the new laws will be anything other than a harsher regime for young people.

In addition, the new offence of breach of bail does little for Indigenous adults, either. The effect has been simply creating a new file for each failure to appear or conditional breach. Breach of bail files are usually dealt with by a fine or a discharge without penalty if the offender has been remanded in custody as a result of breaching his or her bail. Creating the new charge, which requires a plea of guilty, and the new file really achieves very little. It is possible to fine people for breaching bail by estreating the recognisance on their bail. Discharges without penalty are simply recognition of a penalty already served. Warrants, bail estreatments and conditional breaches are recorded on a person's antecedent record, so the new offence does not even serve the purpose of documenting a person's failure to comply with bail. The law should be repealed.

However, repealing the new law is only one step in reducing the number of Indigenous young people in detention. A broader attitudinal change is required. The Northern Territory youth justice legislation recognises the principle that detention should be a punishment of last resort.[133] This needs to be more than lip service. Recently, the Northern Territory Government conducted a review of the youth justice system, which recommended introducing a government department responsible for providing support to young people in the criminal justice system.[134] This reform is long overdue. The recent high-profile parliamentary inquiry into Indigenous youth in the criminal justice system found the concept of bail 'to reside as directed' by the relevant Juvenile Justice Department was problematic because accommodation could be difficult to find and kids would languish in custody.[135] In the Northern Territory, there is no department to do the looking. The task falls to busy lawyers and field officers at

busy Aboriginal Legal Services. The new department needs to be established with a presence in court and it needs to be staffed with local Indigenous people, who are often in the best position to provide realistic alternatives to detention. The attitudes of the bench and the police need to change to create a culture of granting bail.

III Conclusion: Why It's Important

The RCIADIC was firmly grounded in the notion that we cannot divorce modern realities from their historical context. It was prefaced on the idea that the key to addressing the alienation experienced by Indigenous Australians and their contact with the criminal justice system lies in 'the recognition of the Aboriginal people as a distinct people, the [I]ndigenous people of Australia who were cruelly dispossessed of their land and until recent times denied respect as human beings and the opportunity to re-establish themselves on an equal basis'.[136] The uncomfortable truth is that the laws I have targeted in the Northern Territory are racially discriminatory because of the way they operate against Indigenous people. They are in conflict with international human rights standards.[137] They take precious little account of Indigenous decision-making. They still reflect non-Indigenous values and non-Indigenous solutions. They also reflect the difficulty of change.

However, my proposals do not envision a wholesale review of the system. It is no sacrifice of principles to repeal the discriminatory and unjust practice of mandatory sentencing. Taking such a hard line on licence disqualification and imprisonment is hard to justify. Restricting access to treatment for alcohol-related violent offenders by remanding them in custody and ensuring they are imprisoned will not prevent further incidents. There is no point to parole if it is inaccessible. The place for people who are mentally ill is in treatment, not in prison. Is there any reason not to create hybrid spaces where Indigenous people participate in the justice process, when they are so frequently involved in it?

These proposals envision a movement away from what has been called the 'waste management' model of criminal justice.[138] They require a commitment from government and the courts to rolling back the culture of imprisonment in the Northern Territory. The proposals highlight the tension between the type of law and order arguments that lead to discriminatory laws, such as bail laws and excluding violent offenders from rehabilitative programs, and the type of proposals that may reduce the number of Indigenous people in custody, such as the availability of new community based orders. This essay began with a discussion of imprisonment as a policy choice. These are examples of such choices. Implementing the recommendations of the RCIADIC and significantly reducing the number of Indigenous people in Northern Territory prisons requires a series of other hard choices. This essay provides 10 examples of the kinds of decisions that need to be made to truly claw back some of the nation's most damaging statistics.

At the time of writing this article, Indigenous people in the Northern Territory will be hit very hard, again, by yet another policy choice that will result in them being locked up in even greater numbers. In 2012, the new Northern Territory Government introduced the Sentencing Amendment (Mandatory Minimum Sentencing) Bill 2012 (NT) into Parliament. When it passes into law, it will create five 'levels' of violent offences and prescribe mandatory minimum terms of actual imprisonment for each, from three to 12 months. Expect these amendments to create injustices. A 'Level 5' offence, for example, includes all aggravated assaults that result in harm that 'interferes with health' and where a weapon is used. Throwing something in the context of an argument and causing a bruise, for example, may attract three months' actual imprisonment for a first offence and 12 months for a second offence. Whether the offender was provoked, or was the victim of domestic violence, or demonstrates any of an incalculable number of mitigating circumstances will not matter if their case is not 'exceptional' enough to escape the new laws.

More and more people will be imprisoned because of these provisions. More families will be disrupted. More Indigenous people will be taken from their communities. Fewer people will get treatment because incentives to participate in rehabilitation programs will be removed. Conditions will get worse because the jails are already full. And, in doing so, we will have again failed to learn the most important lessons from the RCIADIC.

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* Anthony Pyne has been a criminal lawyer with the North Australian Aboriginal Justice Agency since 2011. He previously worked for the Central Australian Aboriginal Legal Aid Service in Alice Springs. The views expressed here are his own.

1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) ('RCIADIC *National Report*').

2 Larissa Behrendt, 'Deaths in Custody Still Haunt Indigenous Communities', *The Sydney Morning Herald* (Sydney), 15 April 2011, 12.

3 The national average daily imprisonment rate in the June quarter of 2011 was 166 prisoners per 100,000 adult population. In the NT it was 748 per 100,000. Second highest was WA with 262: Australian Bureau of Statistics, *Corrective Services, Australia: June Quarter 2011*, Cat No 4512.0 (2011) 4.

4 Australian Bureau of Statistics, *2011 Census QuickStats: All People – Usual Residents: Northern Territory* (23 May 2012) <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/7>.

5 Department of Justice (NT)*, Quarterly Crime and Justice Statistics, Issue 35: March Quarter 2011* (2011) 91.

6 48% of prisoners released in the NT between 1994 and 1997 returned to prison within 10 years. The national average was 39%: Australian Bureau of Statistics, *Repeat Imprisonment*, Cat No 4102.0 (2010) 3.

7 45% of Indigenous Territorians released between 2001 and 2002 returned to prison within only five years. Only 15% of non-Indigenous prisoners returned during this period: Department of Justice (NT), Office of Crime Prevention, *Recidivism in the Northern Territory: Adult Prisoners Released in 2001–02* (2005) 2.

8 See Chris Cunneen and David McDonald, 'Indigenous Imprisonment in Australia: An Unresolved Human Rights Issue' (1997) 3(2) *Australian Journal of Human Rights* 90.

9 The NT recorded the highest proportional increase in the Aboriginal and Torres Strait Islander imprisonment rate between June 2010 and June 2011. The increase was 11%: Australian Bureau of Statistics, *Corrective Services, Australia, June 2011*, Cat No 4512.0 (2011) 7.

10 Lindy Kerin, 'NT Prisons Described as Third World', *ABC* (online), 23 April 2012 <http://www.abc.net.au/news/2012-04-23/nt-prisons-described-as-third-world/3967114>.

11 The number of recorded assaults ranged between 504 and 588 offences per month over the nine quarters prior to March 2011. A decrease of six per cent was recorded from the same quarter the previous year. The average level of sexual assault remained stable over the same nine quarters. A decrease of three per cent was recorded from the same quarter the previous year. The average level of house break-ins ranged between 127 and 181 offences per month over the same nine quarters. A decrease of 18% was recorded from the same quarter the previous year. The average level of commercial or other break-ins remained stable, but increased one per cent from the same quarter the previous year. Similar results were returned for motor vehicle theft, other theft and property damage: Department of Justice (NT), above n 5, 2–3.

12 See Chris Cunneen, 'Fear: Crime and Punishment' (2010) 29 *Dialogue* 44.

13 Department of Justice (NT), above n 5, 2.

14 The most recent figures available reveal 45% of prisoners sentenced to jail were sentenced for an act intended to cause injury. The number was 47% for Indigenous prisoners: Department of Justice (NT), *Correctional Services Annual Statistics: 2008–2009* (2009) 24.

15 'Interferes with health' is not meaningfully defined in s 78BA. What it means is not settled. It is a question of degree to be decided on the facts of the case. However, whether an injury requires medical treatment, whether it interferes with the functioning of the body, even temporarily because of pain, will be relevant: see *Wayne v Boldiston* (1992) 108 FLR 252.

16 See *Scrymgour v Moore* (2006) 206 FLR 347.

17 Department of the Attorney-General and Justice (NT), *Northern Territory Annual Crime Statistics, Issue 1: 2011–2012* (2012) 11.

18 See *James v Turner* (2006) 15 Tas R 375.

19 *Sentencing Act* s 3.

20 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2001 (Peter Toyne).

21 *Sanderson v Rory* [2012] NTSC 6, [59]–[60].

22 71% of break-ins and 72% of property damage cases resulted in actual imprisonment. 14% of break-ins and nine per cent of property damage cases resulted in a community work order. One per cent of break-ins and six per cent of property damage cases resulted in a home detention order. About 14% of aggravated property offences were dealt with in a way that implied exceptional circumstances: Department of Justice (NT), above n 5, 101–2.

23 For an overview of the arguments against mandatory sentencing and reasons for its popularity see Peter A Sallmann, 'Mandatory Sentencing: A Bird's-Eye View' (2005) 14 *Journal of Judicial Administration* 177. See also Berit Winge, 'Mandatory Sentencing Laws and their Effect on Australia's Indigenous Population' (2002) 33 *Columbia Human Rights Law Review* 693.

24 See Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – And What it Means for Sentencing' (2011) 35 *Criminal Law Journal* 269.

25 Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process' (2000) 22 *Sydney Law Review* 585.

26 See Chris Cunneen, 'Contemporary Comments: Mandatory Sentencing and Human Rights' (2002) 13 *Current Issues in Criminal Justice* 322.

27 See the NT authorities of *Gumurdul v Reinke* (2006) 161 A Crim R 87 and, more recently, *Ryan v Malogorski* [2012] NTSC 55 and

Lalara v Malogorski [2012] NTSC 53. See also *Parker v DPP* (1992) 28 NSWLR 282, 296 (Kirby P).

28 RCIADIC *National Report*, above n 1, vol 3, 64.

29 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2001 (Peter Toyne). The Attorney-General also said in his speech at the second reading of the Sentencing Amendment Bill (No 3) 2001 (NT) that 'the simple fact is that Territorians do not feel safer in their own homes under mandatory sentencing'.

30 See Stephen Barlow, 'Back to the Future in the Northern Territory – The Return of Mandatory Imprisonment for First Offenders' (2009) 33 *Criminal Law Journal* 231.

31 The most recent figures available put the figure at 12% of sentences for prisoners in the NT and 13% for Indigenous prisoners: Department of Justice (NT), above n 14, 24.

32 The origins of this position can be found in *Daniels v Nichol* (Unreported, Supreme Court of the Northern Territory, Forster J, 13 August 1976); *Smith v Torney* (1984) 29 NTR 31; and *Pryce v Forster* (1986) 38 NTR 23.

33 See, eg, *Pryce v Sawtell* (1988) 32 A Crim R 111.

34 See *Oldfield v Chute* (1992) 107 FLR 413, where Mildren J reinforced, in obiter, that 'I would not wish it to be thought that there *must*, as the learned magistrate put it, be a prison term "in the absence of any valid reason or justified excuse". … [T]hat is an incorrect statement of the law': at 416 (emphasis in original).

35 *Breadon v Nicholas* [2010] NTSC 70, [25] (Mildren J), citing *Pryce v Forster* (1986) 38 NTR 23, 28 (Rice J).

36 See, eg, Richard Edney and Mirko Bagaric, 'Imprisonment for Driving while Disqualified: Disproportionate Punishment or Sound Public Policy?' (2001) 25 *Criminal Law Journal* 7.

37 Department of Lands and Planning (NT), *Journey to Work Data for the Northern Territory* (2011) 1.

38 RCIADIC *National Report*, above n 1, vol 3, 71.

39 Bob Gosford, 'NT Government and Police – Losing the Plot on Traffic Crime in the Bush?', *Crikey* (online), 17 December 2010 <http://www.crikey.com.au/2010/12/17/nt-government-and-police-losing-the-plot-on-traffic-crime-in-the-bush>. The author notes the forthcoming research by Thalia Anthony on this topic.

40 In *Club v Westphal* [2010] NTSC 66, a suspended sentence of 14 days' imprisonment for a sixth offence of driving unlicensed was overturned on appeal and a fine was substituted.

41 *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT) ss 39E–39G contain the provisions for community based order and ss 48E, 39F–39G contain the provisions for community custody orders.

42 *Justice (Corrections) and Other Legislation Amendment Act 2011* (NT) ss 25L, 25K.

43 *Bail Act 1982* (NT) s 7A ('*Bail Act*').

44 A 'serious violence offence' means a violent offence punishable by five years imprisonment or more: *Bail Act* s 3. An aggravated assault is punishable by five years' imprisonment. An unlawful assault contrary to s 188 of the *Criminal Code Act 1995* (NT) will be aggravated if the person assaulted suffers harm (which includes pain and 'any physical contact … that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time') or if the offender is a male and the victim is a female: *Criminal Code Act 1995* (NT) sch 1, ss 1A, 188(2) ('*Criminal Code*').

45 *R v Wilson* (2011) 29 NTLR 83, [18].

46 *R v Williams* (2012) 32 NTLR 97.

47 The most recent statistics available reveal that 132 of a total of 426 prisoners held for an act intended to cause injury were unsentenced: Department of Justice (NT), above n 14, 17.

48 Transcript of Proceedings, *R v Bradbury* (Supreme Court of the Northern Territory, 21106029, Mildren J, 22 September 2011) 7.

49 The most recent statistics available show that of the total 819 prisoners in NT prisons in 2009, 16 received a sentence of less than one month, 71 of between one and three months and 144 of between three and six months: Department of Justice (NT), above n 14, 15.

50 The right is recognised in foundational international human rights treaties (to which Australia is a party) and at common law. The High Court has referred to the right to liberty as 'the most elementary and important of all common law rights': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9; *Foster v The Queen* (1993) 113 ALR 1, 8.

51 The NT Government recently legislated to create an offence of breaching bail, largely in response to a perceived increase in youth offending in Alice Springs. In her speech at the second reading of the Bail Amendment Bill 2011 (NT) the Attorney-General said that 'this government is sending a clear message to defendants on bail: bail is a privilege not a right. Abuse that privilege and there will be consequences': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 23 February 2011 (Delia Lawrie).

52 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 123.

53 See *R v Roberts* (1997) 97 A Crim R 456, 459.

54 See Alex Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' (Paper presented at the Australian and New Zealand Critical Criminology Conference, Melbourne, 8 July 2009).

55 See Department of Justice (NT), above n 5.

56 The Northern Territory Licensing Commission has the power to declare lands to be restricted areas and imposed penalties for bringing, possessing, consuming, selling or supplying liquor in those areas: *Liquor Act 1978* (NT) ss 74, 75.

57 'Prescribed areas' under s 4 of the *NTER Act* are all major remote Aboriginal communities and community living areas and all town camps in Alice Springs, Borroloola, Darwin, Elliot, Katherine and Tennant Creek.

58 *NTER Act* s 12.

59 John Boffa, 'It's Very Cheap, and It Costs a Lot', *New Matilda* (online), 7 March 2011 <http://newmatilda.com/2011/03/07/its-very-cheap-and-it-costs-lot>.

60 Russell Goldflam, 'Alice Violence Has One Cause: Alcohol', *New Matilda* (online), 28 February 2011 <http://newmatilda.com/2011/02/28/alice-violence-has-one-cause-alcohol>.

61 People's Alcohol Action Coalition, '"The Right Thing to Do": Coles Chooses Community over Grog Profits in Alice Springs' (Media Release, 23 June 2011) <http://www.paac.org.au/html/publications.html>.

62 In 2006, the program won the NT Government Chief Minister's Award for Excellence in Public Sector Management in the Cross Government Collaboration category. The Government noted that the completion rate at that time was 78.5% and that the success of the program had 'surpassed expectation': Northern Territory Government, *New Awards Recognise Excellence in NT Public Sector* (Media Release, 13 September 2006) <http://newsroom.nt.gov.au/www.newsroom.nt.gov.au/index4afa.html?fuseaction=viewRelease&id=217&d=5>.

63 Department of Justice (NT), *CREDIT NT Program Guidelines* (2007) <http://www.nt.gov.au/justice/ntmc/documents/CREDIT%20guidelines.pdf>.

64 See *Alcohol Reform (Substance Misuse and Referral For Treatment Court) Act 2011* (NT) ('*SMART Court Act*').

65 *Alcohol Court Act 2006* (NT) ss 20, 28, 34, as repealed by the *SMART Court Act* s 39.

66 The Attorney-General referred to it as 'a court of therapeutic justice' in her second reading speech: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 March 2011 (Delia Lawrie).

67 *SMART Court Act* ss 30–1.

68 *SMART Court Act* s 25.

69 The SMART Court guidelines list 'demonstrating responsibility' as a type of behaviour that will be rewarded and provide 'demonstration of trust in the SMART Court by notifying problems as they arise' as an example of this behaviour: Department of Justice (NT), *SMART Court – Guideline* (2011) 1.

70 The author is not aware of any meaningful evaluations of the SMART Court. These conclusions are my own. They are based on my own experiences and those of my colleagues.

71 *Alcohol Reform (Substance Misuse and Referral for Treatment Court) Regulations 2011* (NT) reg 3.

72 Rick Hind, 'Lawyers Brand SMART Court Changes as Dumb', *ABC* (online), 2 June 2011 <http://www.abc.net.au/news/2011-06-02/lawyers-brand-smart-court-changes-as-dumb/2742862>.

73 Jano Gibson, 'Jobs Go, Costs Soar in Mini-Budget', *ABC* (online), 4 December 2012 <www.abc.net.au/news/2012-12-04/mini-budget-preview-robyn-lambley/4406964>.

74 Recommendation 111 was that: '[I]n reviewing options for non-custodial sentences governments should consult with Aboriginal communities and groups'. Recommendation 113 was that:

> [W]here non-custodial sentencing orders provide for a community work or development program as a condition of the order the authorities responsible for the program should ensure that the local Aboriginal community participates, if its members so choose, in the planning and implementation of the program.

Recommendation 114 was that:

> [W]herever possible, departments and agencies responsible for non-custodial sentencing programs for Aboriginal persons should employ and train Aboriginal people to take particular responsibility for the implementation of such programs and should employ and train Aboriginal people to assist to educate and inform the community as to the range and implementation of non-custodial sentencing options.

RCIADIC *National Report*, above n 1, vol 3, 96–7.

75 Department of Justice (NT), *Community Court Darwin: Guidelines* (2005) cl 4.

76 Ibid cl 13.2.

77 Ibid cl 22.

78 The author worked for the Central Australian Aboriginal Legal Aid Service between 2009 and 2011 and appeared in the Community Court at Yuendumu, 300km northwest of Alice Springs.

79 For one observer's impression of the process in its early stages, see Bob Gosford, 'Just Another Day of Cold Justice at Yuendumu' *Crikey* (online), 15 June 2007 <http://www.crikey.com.au/ 2007/06/15/just-another-day-of-cold-justice-at-yuendumu>.

80 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.

81 This has been the focus of most evaluations of similar programs in other states. The author is not aware of any formal NT evaluation of Community Courts. See, Elena Marchetti, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, 5 December 2009) 3–4.

82 The *NTER Act* prevents courts from considering customary law or cultural practices in sentencing: *NTER Act* s 91.

83 See Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australian and New Zealand Journal of Criminology* 292.

84 Kathleen Daly and Gitana Proietti-Scifoni, '"The Elders Know … The White Man Don't Know": Offenders' View of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17.

85 Department of Justice (NT), above n 75, cl 14.

86 See, eg, reg 36(1)(e) of the *Criminal Procedure Regulation 2010* (NSW) which provides that a criterion for eligibility for circle sentencing is that

> the court considers that the facts, as found by the court, or as pleaded to by the person, in connection with the offence, together with the person's antecedents and any other information available to the court, indicate that it is likely that the person will be required to serve, or be subject to, a relevant sentence.

87 Section 4 of the *Sentencing Act* provides that it does not apply to youth matters. Young people are sentenced under the *Youth Justice Act 2005* (NT) ('*Youth Justice Act*'), which does not contain the prohibition.

88 See Andrew Day and Kevin Howells, 'Psychological Treatments for Rehabilitating Offenders', in Andrew Day, Martin Nakata and Kevin Howells (eds), *Anger and Indigenous Men* (Federation Press, 2008) 6.

89 Ruth McCausland, 'Indigenous Trauma, Grief and Loss', in Day, Nakata and Howells (eds), above n 88, 56.

90 Martin Nakata et al, 'Beneath the Surface of Anger: Understanding the Context of Indigenous Men's Anger', in Day, Nakata and Howells (eds), above n 88, 101.

91 Chris Cunneen, 'Indigenous Anger and the Criminogenic Effects of the Criminal Justice System', in Day, Nakata and Howells (eds), above n 88, 35.

92 Peter Mals et al, 'Indigenous Service Providers' Perspectives on Anger Programs', in Day, Nakata and Howells (eds), above n 88, 31, 32–3.

93 See Paul Memmott, Rachel Stacy, Catherine Chambers and Catherine Keys, 'Violence in Aboriginal Communities' (Report to the Crime Prevention Branch, Attorney-General's Department, 2001).

94 Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000).

95 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008) 148–50.

96 *Domestic and Family Violence Act 2007* (NT) s 21.

97 See Blagg, above n 95, 150–2. The author is not aware of any formal evaluation of the IFVOP.

98 See Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2.

99 *Sentencing Act* s 53.

100 Department of Justice (NT), above n 14, 25.

101 The NSW Sentencing Council recently examined the complex arguments regarding short-term sentences and concluded that there was merit in abolishing them, as long as the net effect was diversion into community based orders and not 'sentence creep': NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4–5.

102 The Aboriginal Resource and Development Services recently published a paper after surveying 200 Yolngu Matha speakers about their understanding of 30 frequently-used legal terms like 'charge', 'conditions', 'comply', 'breach' and 'failure' and found evidence of widespread, serious communication problems. See, Aboriginal Resource and Development Services, *An Absence of Mutual Respect* (2008) 36.

103 Only 31% of applications for parole were granted in 2010. It is not clear how many applications were from Indigenous prisoners: Parole Board of the Northern Territory, *Annual Report 2010* (2011) 12.

104 *Parole of Prisoners Act 1971* (NT) s 5.

105 *Parole of Prisoners Act 1971* (NT) s 3HA.

106 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

107 The NSW Parole Authority must consider release at least 60 days before the prisoner's eligibility date, but may defer this until not less than 21 days before: *Crimes (Administration of Sentences) Act 1999* (NSW) s 137.

108 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 135, 135A.

109 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 139, 140.

110 Chris Cunneen, 'Racism, Discrimination and the Over-representation of Indigenous People in the Criminal Justice System' (2006) 17 *Current Issues in Criminal Justice* 329.

111 See Australian Institute of Criminology, *2012 Australian Crime & Violence Prevention Awards* (4 December 2012) <http://www.aic.gov.au/crime_community/acvpa/2012.html>.

112 Chris Cunneen and Melanie Schwartz, 'Working Cheaper and Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19.

113 See *R v Verdins* (2007) 16 VR 269.

114 Section 78 of the *Mental Health and Related Services Act 2004* (NT) ('*Mental Health Act*') contains this diversion into a voluntary treatment plan. The prosecution veto power is contained in s 78(2)(d).

115 *Mental Health Act* s 77.

116 These people may all be 'designated mental health practitioners'. The Supreme Court expressed concern regarding this situation: *Taylor v Bamber* (2011) 28 NTLR 173, [9].

117 Ibid [12].
118 *Munungurr v Gordon* (2011) 30 NTLR 45.
119 *Justices Act 1974* (NT) s 121A.
120 Section 77(1) provides that the provision applies only if a person is charged with proceedings before a court and the court is exercising summary jurisdiction.
121 *Criminal Code* sch 1 s 43ZA.
122 *R v Leo* [2009] NTSC 61.
123 Kristy O'Brien, 'Mentally Impaired Aborigines Held in Territory Jails', *ABC* (online), 4 August 2011 <http://www.abc.net.au/news/2011-08-04/20110804mentalprisons/2824386>.
124 This is possible under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). The court applies an 'appropriateness' test. See, *DPP v El Mawas* (2006) 66 NSWLR 93.
125 Department of Justice (NT), above n 5.
126 See generally House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011); Chris Cunneen, 'Changing the Neo-colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 43.
127 The most recent statistics available reveal that, of the 201 young people who entered juvenile detention, 166 were on remand. Remand orders were 83% of new commencements: Department of Justice (NT), above n 14, 28.
128 Kelly Richards, Australian Institute of Criminology, *Police-referred Restorative Justice for Juveniles in Australia* (Trends and Issues in Crime and Criminal Justice No 398, August 2010).
129 Referring the matter back to diversion requires the consent of the prosecution and the young person: *Youth Justice Act* s 44.
130 *Bail Act* s 37B.
131 The Attorney-General in her second reading speech said that 'the police reported that defendants arrested for breaching bail – whether it be for failing to appear in court, failing to abide by conditions such as being of good behaviour, or abiding by a curfew – are being released again on bail': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 23 February 2011 (Delia Lawrie).
132 RCIADIC *National Report* (1991) vol 4, 183–5.
133 *Youth Justice Act* s 4(c).
134 Northern Territory Government, *Review of Youth Justice System Released* (Media Release, 24 October 2011) <http://www.newsroom.nt.gov.au/index.cfm?fuseaction=printRelease&ID=8781>.
135 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 224.
136 RCIADIC *National Report*, above n 1, vol 1, xix.
137 See James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: The Situation of Indigenous Peoples in Australia,* UN Doc A/HRC/15 (4 March 2010).
138 Blagg, above n 95, 18.