

Submission to the Australian Law Reform Commission

Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander People

Introduction

The Northern Territory Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the Australian Law Reform Commission (ALRC) on the Incarceration Rates of Aboriginal and Torres Strait Islander People.

The OPG was established under the *Guardianship of Adults Act* (the Act), which came into effect on 28 July 2016 and also provided for the statutory appointment of an independent Public Guardian, aligning the Northern Territory with other Australian jurisdictions. The Act provides a legal decision-making framework for adults with impaired decision-making capacity in relation to their personal or financial matters. The definition of impaired decision-making under the Act is broad and captures adults with cognitive impairment from any cause including mental illness, dementia, intellectual disability or acquired brain injury.

The Public Guardian may be appointed guardian for an adult with impaired decision-making capacity where there is no other person eligible for the appointment and may also be appointed jointly with one or more other guardians. The OPG teams are located in Alice Springs and Darwin and are responsible for providing guardianship services to approximately 536 represented adults who are under the authority of the Public Guardian. The Northern Territory Civil and Administrative Tribunal (NTCAT) considers 20 to 30 new guardianship applications per month. The Northern Territory is the only jurisdiction in Australia in which the Public Guardian can be appointed with financial management authority. The OPG currently manages the finances of approximately 397 represented adults.

The functions of the Public Guardian include advocacy for adults with impaired decision-making capacity by promoting understanding and awareness of relevant issues. This submission will consider specific issues relevant to the incarceration rates of Aboriginal and Torres Strait Islander peoples in the Northern Territory and who may have a cognitive impairment. (The term cognitive impairment will be used to encompass mental illness also.) It will also consider some of the challenges of the Northern Territory Unfit to Plea provisions contained in the *Criminal Code Act*.

The Northern Territory context

Compared to other jurisdictions, the Northern Territory has the lowest number of adults under guardianship orders, however has the highest percentage of the population under guardianship. Of those presently under guardianship to the Public Guardian, approximately 85 per cent are Aboriginal or Torres Strait Islander, many of whom speak English as a second or third language with a significant number living in remote communities.

In a geographic context, the Northern Territory is the third largest of the states and territories, covering approximately 18% (12.3 million square kilometres) of the Australian land mass, however with an estimated population of 244,000 residents which forms only 1% of the national population. While most Territorians live in regional centres, a significant number live in remote and very remote areas. Due to the sparse population, harsh climate and rough terrain, infrastructure in most of the Territory is limited. The Northern Territory's small population also impacts on the retention of the skilled workforce as capable individuals have many alternate options both interstate and within the Territory.

The high cost of living in the Northern Territory is an additional challenge for those in low socio-economic circumstances. Affordable housing is very limited and the Northern Territory has the highest percentage of residents living in public housing. Overcrowded housing is an ongoing problem in most remote Northern Territory communities.

Given these factors, delivering services, including health, justice and community corrections in the Northern Territory is costly, even in Darwin and other regional centres but especially in remote communities. The incarceration rates of Aboriginal and Torres Strait Islander peoples requires a coordinated approach of all service systems, significant financial resourcing and in many cases additional specialised, including cultural, expertise.

Relevance of cognitive impairment

The Public Guardian acknowledges the over representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and further notes the high incidence of cognitive impairment or mental illness among this group.

Many of the causal factors relevant to the increased interaction of Aboriginal and Torres Strait Islander peoples with the criminal justice system are equally relevant to people with cognitive impairment, including poverty, violence, discrimination, inadequate or inappropriate accommodation and poor literacy skills. The high incidence of Aboriginal and Torres Strait Islander peoples involved in the criminal justice system with a cognitive impairment is particularly concerning and warranting of systemic action to ensure access to justice for this group of Australians.

Challenges in the Northern Territory in relation to access to appropriate services

The Public Guardian supports many of the initiatives proposed by the ALRC to address the incarceration rates of Aboriginal and Torres Strait Islander peoples. Those living in regional and remote areas of the Territory can be disadvantaged due to geographic isolation. Essential services such as support, health, housing and transport are reliant on appropriate resourcing which cannot always be achieved in remote settings. To ensure the greatest chance of success for these initiatives it is important that they are considered in the context of unique and specific challenges faced in the Northern Territory.

Health and support services

Delivering health and support services to remote areas of the Northern Territory presents challenges not faced in urban areas and many other regional centres across Australia. The impact of climate, distance and lack of infrastructure combined with the sparsity of population creates financial hurdles which necessitate creative methodology to maximise service options. On many occasions creative methodology will still fall short of the physical and mental health support needs of Aboriginal and Torres Strait Islander peoples living in remote communities.

The multiple and complex health needs of Aboriginal and Torres Strait Islander peoples involved in the criminal justice system has been well documented, including the causal nature of these needs on offending and reoffending. Ensuring existing and future community health and support services have the capacity to provide the requisite health care to Aboriginal and Torres Strait Islander peoples is essential. This will not only benefit remote communities, but improve the success rate of alternatives to incarceration such as returning to the community for the purpose of bail support, diversion options or to serve community based sentences.

The Public Guardian acknowledges where there has been a link between alcohol consumption and offending the risk of recidivism can only be minimised with the existence of alcohol and drug rehabilitation programs. The timely and effective delivery of such programs is compromised in remote communities of the Northern Territory by climate, distance and limited transport infrastructure.

As already noted, approximately 85% of adults who are under the guardianship of the Public Guardian are Aboriginal and Torres Strait Islander. This figure may be attributed to the chronic health problems arising from poverty, social and geographical isolation, poor literacy and drug and alcohol related conditions. The flow on effect for the guardianship system is an increased number of adults who may require formal guardianship to assist them to make decisions in relation to their personal and/or financial matters.

Human Resourcing

The Public Guardian acknowledges the evidence and rationale in support of non-custodial sentences and community based sentences. The success of these initiatives, especially in relation to Aboriginal and Torres Strait Islander peoples with cognitive impairment, will be dependent upon appropriate resourcing to reduce the risk of recidivism. This resourcing must necessarily involve expertise relevant to the person's physical and mental health, behavioural needs and culture. Such resourcing is challenging in the Northern Territory due to the sparsity of population and the significant workforce issues, including the transient nature of the workforce, already being experienced in urban, regional and remote settings. Consideration must be given to how to address these challenges and build sector capacity within communities.

The Public Guardian acknowledges the essential service currently being provided by the Australian Interpreter Service in the Northern Territory. All personnel working with Aboriginal and Torres Strait Islander peoples should be culturally trained and skilled to work with interpreters. This would ensure that the circumstances of the individual may be fully understood and any requirements of them in relation to bail, parole programs and/or rehabilitation are comprehensively communicated.

Housing

Causal factors of homelessness and transiency to offending and reoffending are compounded in the Northern Territory by the absence of appropriate and affordable housing in Darwin, regional centres and remote communities. The lack of stable and appropriate housing in all centres and remote communities across the Northern Territory presents challenges to planning of bail supports, diversion options, parole and non-custodial sentences for Aboriginal and Torres Strait Islander peoples.

Additionally, a person's ability to effectively engage in non-custodial or community sentences, including bail and parole will be adversely affected if they do not have access to stable, affordable and appropriate housing.

Transport

A significant number of Aboriginal and Torres Strait Islander peoples living in the Northern Territory live in remote or very remote communities or have cultural or family ties to others living in remote or very remote communities. Travel to and from these communities is negatively impacted by limited or non-existent public transport options and poor accessibility during wet weather conditions.

Remoteness and limited transport infrastructure in the Northern Territory pose the following challenges:

- The ability of Aboriginal and Torres Strait Islander peoples to simultaneously meet bail conditions in a regional centre and fulfil cultural or family obligations in their community which may be hundreds of kilometres apart from each other.
- The timely and regular attendance of corrections, allied health or other personnel at the Aboriginal and Torres Strait Islander person's community to deliver culturally appropriate bail and diversion options.
- Limited corrections and health resources being consumed by lengthy travel periods to communities delivering services to a small client group.
- Aboriginal and Torres Strait Islander peoples serving repeated short-term prison sentences being released in Darwin or Alice Springs with limited transport options to return to their home communities and possibly increasing the chance of recidivism.
- The ability of Aboriginal and Torres Strait Islander peoples with cognitive impairment to be supported by family and community when they are held on remand or imprisoned in Darwin or Alice Springs, possibly many of hundreds of kilometres from their home community.

While the transport system in the Northern Territory continues to mature, there remains much room for development. In the urban context, there is limited transport choice when compared to other jurisdictions and there is very limited to no options in remote communities.

Additional considerations for Aboriginal and Torres Strait Islander peoples with cognitive impairment

The consideration of an Aboriginal and Torres Strait Islander person's ties to family and place and cultural background is particularly relevant if the person has a cognitive impairment and requires these family supports for decision-making. Family or community supports that are not available in the regional location to which bail conditions attach may be especially important to the Aboriginal and Torres Strait Islander person. This is particularly important at the time that they are interacting with the justice system to assist the person to understand and meet their bail conditions and/or effectively participate in diversion options. This may also impact the risk of recidivism.

The Public Guardian notes that imprisonment resulting from fine default has the consequence of targeting Aboriginal and Torres Strait Islander peoples with cognitive impairment who may lack the requisite decision-making ability to pay multiple and/or significant fines without appropriate supports. Additionally, offensive language provisions may also target those with cognitive impairment who have poor impulse control, behavioural management issues and immature language skills. Imprisonment for this group without intervention or support is unlikely to address the underlying causes for the offending behaviour.

The documented impacts of all forms of imprisonment upon Aboriginal and Torres Strait Islander peoples, including community isolation and homelessness are compounded when that person also has a cognitive impairment. Significant and multidisciplinary resourcing is relevant during any periods of imprisonment of an Aboriginal and Torres Strait Islander person with cognitive impairment, including periods of remand and short or long-term sentences. Interventions, including prison programs, alcohol and drug rehabilitation and behaviour management are essential to identify and address underlying reasons for offending and reoffending and develop supports for the person upon release from custodial sentences. Consideration must be given to the extra resourcing needed to deliver these interventions appropriately to people with a cognitive impairment.

In relation to parole options, the Public Guardian notes that parole may be beneficial for Aboriginal and Torres Strait Islander peoples with cognitive impairment. Such an option provides an opportunity for them to serve a period of their sentence supervised and supported in the community rather than being released without supervision and support and where arguably the risk of recidivism is increased.

Specific challenges of the Unfit to Stand Trial provisions in the Northern Territory

The Public Guardian welcomes discussion into the indefinite detention of persons who are found unfit to stand trial. These adults may have significant, multiple and complex needs arising from combinations of cognitive impairment, mental health issues and/or brain injury, serious health issues, drug and alcohol problems, behavioural issues and frequent interaction with the criminal justice system. These issues are often combined with experience of homelessness or transiency, exclusion from services and limited or no social networks.

A significant concern for Aboriginal and Torres Strait Islander peoples found unfit to stand trial is the indefinite nature of their detention with unidentified exit points into the community. This must be addressed with co-ordinated, specialised expertise in the delivery of capacity building programs, alcohol and drug rehabilitation and behaviour management. Through care is essential to support the adult in the community after their release from detention and ensure they have adequate housing, family, community and service supports and provision of health services.

The retention of a skilled workforce with expertise in supporting individuals with complex health and behavioural needs is a substantial challenge in the Northern Territory. However this is essential in ensuring Aboriginal and Torres Strait Islander peoples who have been found unfit to stand trial are able to exit detention in a proportionate or equal time to that which they would have served in prison if they had not been found unfit to stand trial.

Conclusion

Many of the issues identified by the ALRC in relation to the incarceration rates of Aboriginal and Torres Strait Islander peoples are shared across all jurisdictions. Application of various initiatives and the associated resourcing, sector capacity and implementation are being discussed and critiqued across the country. Rather than echo common concerns, the points raised above are aimed at highlighting the unique considerations of some initiatives in the Northern Territory.

Yours sincerely,



Public Guardian
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