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Mandatory Sentencing and Community-Based Sentencing Options

**Danila Dilba Health Service
Submission**

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Introduction

Danila Dilba Health Service (**DDHS**) was established in 1991 as an Aboriginal Community Controlled Health Service (**ACCHS**). Our aim is to improve the physical, mental, spiritual, cultural and social wellbeing of Biluru (and Torres Strait Islander) people in the Yilli Rreung (greater Darwin) region. We provide services from eight locations, reaching more than 15,000 people, approximately 80 per cent of the Aboriginal population residing in the Darwin/Palmerston region.

The DDHS vision is outlined in our strategic plan 2017-22; 'that the health, well-being and quality of life of Aboriginal and Torres Strait Islander Australians equals that of non-Indigenous Australians.' To achieve this, we have adopted a 'whole of life' approach to the health of our clients, meaning that we look to the social determinants which drive inequities in health outcomes and strive to improve those outcomes through our services and advocacy.

Since July 2016, DDHS has been involved in supporting the social and emotional wellbeing of youth detainees at Don Dale Youth Detention Centre (**DDYDC**). DDHS's function at DDYDC has evolved over time and has developed a program now known as the Youth Social Support Program. On 1 July 2020, DDHS took over the delivery of primary health care at DDYDC, making us the first ACCHS in Australia to provide primary health care full-time from within a youth detention centre. We also provide youth diversion in partnership with YWCA.

Our involvement in this area has provided valuable insight into the criminal justice system and the particular issues facing First Nations people and those with a disability. We have conducted significant research into evidence-based ways to improve the justice system with a focus on addressing the underlying causes of people's interactions with the justice system. DDHS is grateful for the opportunity to share these insights and to provide input to the Northern Territory Law Reform Committee. The focus of this submission is on the discriminatory impact of the Northern Territory's mandatory sentencing regime on First Nations people and people with a disability in particular. We ultimately recommend that this sentencing regime be repealed in its entirety.

Executive Summary

First Nations people are grossly over-represented in prisons in the Northern Territory (NT), in which 83 per cent of the adult prisoner population and essentially 100 per cent of the juvenile corrections population are First Nations people.¹ There is a clear correlation between this disturbing data and the NT's mandatory sentencing regime. Instead of addressing the social determinants that lead to offending, mandatory sentencing simply leads to higher rates of incarceration and high recidivism rates. This is reflected in the fact that 59.4 per cent of NT prisoners return to prison within 2 years.²

Mandatory sentencing results in responses that are not tailored to meet the complex and individual needs of people coming into the justice system. Imprisonment, which is generally devoid of the appropriate therapeutic and rehabilitative services, is ineffective in reducing rates of offending and recidivism. This in turn fails to make communities safer. By increasing incarceration rates, mandatory sentencing also imposes significant costs on the justice system.

On the basis that it is a costly, discriminatory and ineffective sentencing system, DDHS strongly supports the repeal of the NT's mandatory sentencing laws, irrespective of the offence. We believe

¹ Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No 4517.0, 05 December 2019).

² Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, Report on Government Services 2020, Part C, Table CA.4 (2020).

that Courts must be allowed to tailor their decisions to meet the individual and complex needs of people coming into the justice system. This involves addressing underlying issues that lead to offending (including complex health, disability and social issues) and utilising community-based sentencing options embedded in a community justice model.

Recommendations

Based on our findings, DDHS recommends that the NT government:

1. Repeal mandatory sentencing for all offences with no exceptions.
2. Embrace alternatives to imprisonment, including community-based sentencing options, and invest in diversionary strategies that address the social determinants of incarceration .
3. Provide funding for the development and implementation of therapeutic secure facilities for children and adults with complex needs including cognitive and mental impairments. These should be developed in partnership with local Aboriginal Community Controlled Health Services.
4. Review and repeal other legislative schemes that have a discriminatory impact, including paperless arrests.

Background

Social determinants of incarceration

Marginalised population groups often experience poor social conditions, such as unemployment, poverty, homelessness, health problems and social isolation. The World Health Organisation defines the social determinants of health as:

*the conditions in which people are born, grow, live, work and age. These circumstances are shaped by the distribution of money, power and resources at global, national and local levels. The social determinants of health are mostly responsible for health inequities - the unfair and avoidable differences in health status seen within and between countries.*³

These factors, which lead to ill health also contribute to people becoming involved in the justice system. The link between poor social outcomes and high levels of incarceration has been called the 'social determinants of incarceration'.⁴ Due to the ongoing effects of colonialism, and its legacy of entrenched disadvantage and intergenerational trauma, First Nations people are unfortunately more likely to experience negative factors relating to these social determinants. Data demonstrates that First Nations people are statistically more likely to experience:

³ World Health Organisation, Social Determinants of Health, Accessed 12 December 2019 at http://who.int/social_determinants/sdh

⁴ Australian Law Reform Commission, 'Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (ALRC Report 133) (28 March 2018), [2.25].

- Overcrowded housing – 51% of First Nations households in the NT are considered overcrowded, the highest rate in Australia.⁵ First Nations people also account for 88% of the NT’s homeless population.⁶
- Low household income – First Nations households in the NT have a median household income of \$430 per week compared to \$1,247 for non-Indigenous households. This gap is significantly wider than any other state and First Nations households in the NT have the lowest median income compared to every other state.⁷
- Poverty - The poverty rate for First Nations people is 31%, while poverty is twice as high in very remote communities (54%) as in major cities (24%).⁸
- Death, grief and loss – The all-cause mortality rate for First Nations Territorians (1,519 per 100,000) is almost three times the rate for non-Indigenous Territorians (581 per 100,000) and significantly higher than for First Nations people nationally (991 per 100,000).⁹
- Unemployment – 47% of First Nations people aged 15 to 64 years were employed compared with 72% for non-Indigenous people.¹⁰
- Psychological distress – First Nations Territorians report high levels of distress at more than double the rate (22%) of that reported by non-Indigenous Territorians (8%).¹¹
- Early childhood challenge – First Nations children are 2.1 times as likely as non-First Nations children to die before the age of 5,¹² and 41% of First Nations children are considered developmentally vulnerable.¹³

The social determinants of incarceration also greatly affect people with disability, who are more likely to experience factors such as:

- Social exclusion – Over half (54%) of Australians with a disability or long-term health condition experience some level of exclusion. Over 16% experience deep social exclusion. These are twice the rates for all Australians.¹⁴
- Poverty – The rate of poverty among adults with disability is 17%.¹⁵

⁵ Australian Institute of Health and Welfare 2019. Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness. Cat. no. HOU 301. Canberra: AIHW, 21.

⁶ Department of Local Government, Housing and Community Development, ‘Inquiry into homelessness in Australia’ (Submission 62, 2020), 6.

⁷ Australia Health Minister’s Advisory Council, ‘Aboriginal and Torres Strait Islander Health Performance Framework Report 2017’ (2017) Cat. no: IHW 194.

⁸ Davidson, P., Bradbury, B., and Wong, M. (2020), Poverty in Australia 2020: Part 2, Who is affected? ACOSS/UNSW Poverty and Inequality Partnership Report No. 4, Sydney: ACOSS, 48.

⁹ Australia Health Minister’s Advisory Council, ‘Aboriginal and Torres Strait Islander Health Performance Framework Report 2017’ (2017) Cat. no: IHW 194.

¹⁰ Australian Bureau of Statistics (2017): Aboriginal and Torres Strait Islander population 2016, Reflecting Australia - Stories from the Census.

¹¹ Australia Health Minister’s Advisory Council, ‘Aboriginal and Torres Strait Islander Health Performance Framework Report 2017’ (2017) Cat. no: IHW 194.

¹² Australian Institute of Health and Welfare 2018. Australia’s health 2018. Australia’s health series no. 16. AUS 221. Canberra: AIHW

¹³ Australian Early Development Census 2018. National Report 2018. AEDC-1602-002.

¹⁴ Brotherhood of St Laurence & MIAESR (Melbourne Institute of Applied Economic and Social Research) 2019. Social exclusion monitor. Melbourne: Brotherhood of St Laurence.

¹⁵ Davidson, P., Bradbury, B., and Wong, M. (2020), Poverty in Australia 2020: Part 2, Who is affected? ACOSS/UNSW Poverty and Inequality Partnership Report No. 4, Sydney: ACOSS, 48.

- Unemployment – Working-age people with disability (10%) are twice as likely as those without disability (4.6%) to be unemployed.¹⁶
- Psychological distress – A third (32%) of adults with disability experience a high or very high level of psychological distress (compared to 8% without disability).¹⁷

First Nations people with a disability predictably experience even greater disadvantage across the range of domains, often dealing with the compounded effects of dual discrimination. This is a considerably large population group, in which over one in three (38%) First Nations people have a disability.¹⁸ First Nations people with a disability are considered to be 14 times more likely to be imprisoned than the general population.¹⁹

In the same way that the social determinants of health contribute to health inequities, the social determinants of incarceration lead to justice disparities between population groups. These factors increase the risk of further discrimination and victimisation, and have been found to lead to subsequent entry into the criminal justice system.²⁰ In light of this, we support the adoption of a public health approach to criminal justice and corrections.²¹ Experts suggest that the criminal justice system is often used to ‘deal with’ people who experience multiple hardships, rather than supporting them to reside in the community.²²

Furthermore, these social determinants cannot be uncoupled from the history of colonial settlement and the multiple traumas resulting from dispossession, nor can solving these issues be isolated from the broader task of decolonising relationships between First Nations people and Anglo-Australian society.²³

Mass incarceration in the NT

Jonathon Hunyor notes that the NT ‘has long been a gold-medal performer when it comes to locking people up’.²⁴ The NT contains the highest imprisonment rate of all states and territories across

¹⁶ Australian Institute of Health of Welfare. People with Disability in Australia 2020, 277. Available online: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia-in-brief/contents/how-many-receive-housing-assistance>.

¹⁷ Australian Institute of Health of Welfare. People with Disability in Australia 2020, 277. Available online: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia-in-brief/contents/how-many-receive-housing-assistance>.

¹⁸ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) vol 1, 7.

¹⁹ Australian Civil Society CRPD Shadow Report Working Group, ‘Disability Rights Now 2019’, Submission to the UN CRPD Committee in response to the List of issues prior to the submission of the combined second and third periodic reports of Australia, 26 July 2019, 24.

²⁰ Eileen Baldry, ‘Disability at the margins: limits of the law’ (2014) 23(3) Griffith Law Review 370, 377.

²¹ See Gregg D. Caruso, *Public Health and Safety: The Social Determinants of Health and Criminal Behavior*. (2017) UK: ResearchersLinks Books; See also N de Viggiani, A public health approach to imprisonment, *European Journal of Public Health*, Volume 29, Issue Supplement_4, November 2019, ckz185.756, <https://doi.org/10.1093/eurpub/ckz185.756>.

²² Eileen Baldry, ‘Disability at the margins: limits of the law’ (2014) 23(3) Griffith Law Review 370, 383.

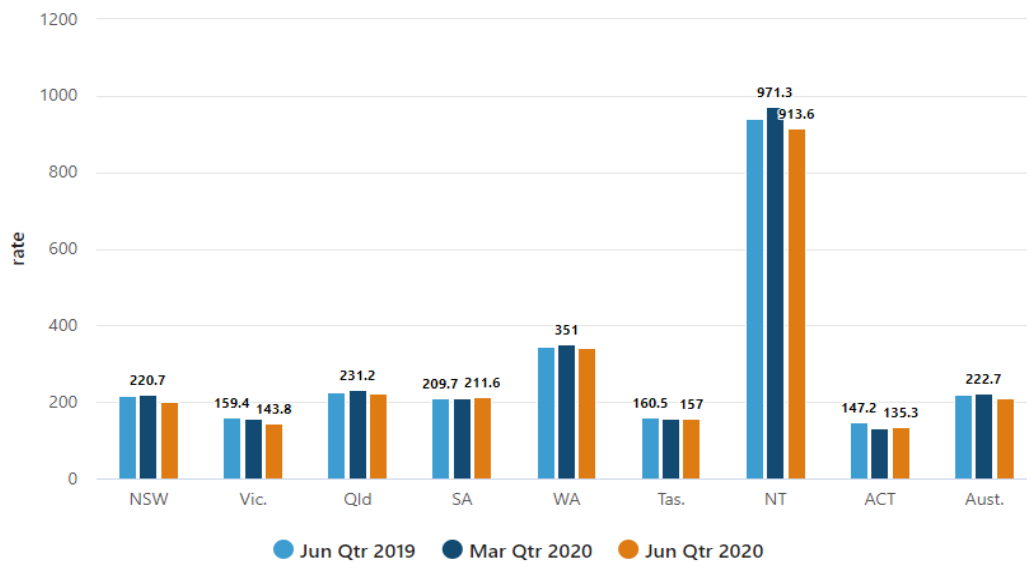
²³ Towards an Aboriginal and Torres Strait Islander Violence Prevention Framework for Men and Boys, The Healing Foundation and White Ribbon Australia, 3.

²⁴ Jonathon Hunyor, ‘Imprison Me NT: Paperless arrests and the rise of executive power in the Northern Territory.’ (2012) *Indigenous Law Bulletin* 8(3), 3.

Australia, at 914 persons per 100,000 adult population.²⁵ Comparatively, the second highest rate is found in Western Australia, with only 341 persons per 100,000 adult population.²⁶

These statistics, represented in the graph below, indicate that the NT’s current sentencing regime produces excessive rates of incarceration. As discussed below, First Nations people and people with a disability are particularly overrepresented within the prison system and bear the brunt of this mass incarceration regime.

Average daily imprisonment rate(a), By states and territories, Jun 2019, Mar 2020 and Jun 2020



(a) Rate is the number of prisoners per 100,000 adult population. Based on average daily number.

Figure 1 - Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2020*.

It is well-known that the majority of prisoners (43%) are sent to custody for ‘acts intended to cause injury’.²⁷ However, whilst it is well-known that sexual violence and violence disproportionately affects First Nations people, policy responses continue to be driven by a Western paradigm of domestic, family and sexual violence. This paradigm prevents a culturally appropriate response and current practice fails to achieve any preventative success as a result of this cultural ignorance.²⁸ As outlined below, First Nations-led violence prevention strategies and programs are essential in addressing this.

²⁵ Australian Bureau of Statistics (ABS), *Corrective Services, Australia, June Quarter 2020* (Catalogue No 4512.0, 17 September 2020).

²⁶ Australian Bureau of Statistics (ABS), *Corrective Services, Australia, June Quarter 2020* (Catalogue No 4512.0, 17 September 2020).

²⁷ Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No 4517.0, 05 December 2019).

²⁸ The Healing Foundation and White Ribbon Australia, *Towards an Aboriginal and Torres Strait Islander Violence Prevention Framework for Men and Boys* (2017) 3.

Discriminatory impact of mandatory sentencing

Discriminatory Impact on First Nations people

Mandatory sentencing laws disproportionately impact the NT's First Nations population by targeting offences typically committed by people from low-socio economic backgrounds, and particularly First Nations people.²⁹ Conversely, white-collar crimes such as fraud tend not to attract mandatory sentences and are not frequently committed by First Nations Australians.³⁰

As discussed above, First Nations people are more likely to be enmeshed in the criminal justice system due to a range of social determinants. By drastically increasing rates of imprisonment for those in the criminal justice system, mandatory sentences disproportionately affect First Nations people and contribute to their gross overincarceration. While the regime itself is not discriminatory on its face, as it applies to all people, its unequal effect on First Nations people make it indirectly discriminatory in operation.

In 2019, First Nations people comprised 83% of the adult prisoner population and essentially 100% of the juvenile corrections population in the NT;³¹ the highest proportion of First Nations prisoners across Australia. The NT also has the second highest First Nations imprisonment rate in Australia, with 2661 persons per 100,000 First Nations adult population.³² As a result, the NT leads the way in making First Nations Australians the most incarcerated people in the world.³³

The NT's mandatory sentencing regime has been subject to widespread criticism and condemnation by international human rights bodies, including the Committee on the Elimination of Racial Discrimination,³⁴ the Human Rights Committee,³⁵ and the Committee Against Torture.³⁶ In March 2000, the Committee on the Elimination of Racial Discrimination noted in its Concluding Observations that mandatory sentencing has a 'racially discriminatory impact on [the] rate of incarceration' for First Nations people.³⁷ But as the Special Rapporteur on the rights of Indigenous peoples noted in her visit to Australia in 2017, these 'longstanding calls for the abolishment of mandatory sentencing laws... continue to be ignored.'³⁸

²⁹ Australian NGO Coalition, Submission to the UN Committee on the Elimination of Racial Discrimination, (October 2017), 33; See also Hilde Tubex 'Mandatory sentencing leads to unjust, unfair outcomes – it doesn't make us safe' *The Conversation* (05 January 2016), available at <https://theconversation.com/mandatory-sentencing-leads-to-unjust-unfair-outcomes-it-doesnt-make-us-safe-52086>.

³⁰ Kingsford Legal Centre, Submission to ALRC Inquiry into the Rates of Indigenous Incarceration, (August, 2017),

³¹ Australian Bureau of Statistics, Prisoners in Australia, 2019 (Catalogue No 4517.0, 05 December 2019).

³² ABS above n 2.

³³ Thalia Anthony, 'FactCheck Q&A: are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (06 June 2017), available at <https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528>.

³⁴ United Nations (2000b) Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, 2410312000, CERD/C/56/Misc.42/rev.3.

³⁵ United Nations (2000), Concluding Observations of the Human Rights Committee: Australia, 28/07 /2000, CCPR/C/691 Australia.

³⁶ United Nations (2000), Conclusions and Recommendations of the Committee Against Torture: Australia, 21111/2000, CAT/C/XXV/Concl.3.

³⁷ Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia' (77th Session, 2-27 August 2010) 6 [20].

³⁸ Victoria Tauli Corpuz, UN Human Rights Council, Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 68.

The racially discriminatory effect of mandatory sentencing contravenes s 10 of *the Racial Discrimination Act 1975 (Cth)*, which provides that where a law limits members of a particular race to enjoy a right, members of that race shall enjoy that right to the same extent as any other race. By extension, mandatory sentencing breaches Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, in particular Article 2(a), which disallows State Parties from engaging in racial discrimination, and Article 5(a), which mandates 'the right to equal treatment before tribunals and all other organs administering justice'.

Discriminatory Impact on People with disability

The NT's mandatory sentencing scheme also has a discriminatory impact on people with disabilities, in particular mental health issues and intellectual disability. Mandatory sentencing not only significantly increases incarceration rates of people with disability, but also compromises their health and wellbeing without addressing the underlying causes of their offending.

As discussed, and as highlighted by the *Pathways to the AJA Report*, people with disability have higher entry points into the criminal justice system due to the social determinants of incarceration. Evidence also suggests high rates of systemic discrimination, in which criminal justice agencies (police, Courts, Correctional services) treat behaviours related to a person's disability as dangerous and offensive.³⁹ This often occurs where a person has an undiagnosed disability, particularly cognitive impairments, for example where failure to follow direction is often misinterpreted as wilful disobedience. This can have far reaching consequences for people with behaviours that are seen as 'challenging' by criminal justice agencies.

As a result, people with disability are more likely to be in contact with the criminal justice system and are overrepresented within prison populations.⁴⁰ A 2018 report by Human Rights Watch indicated that almost half of all people entering prison have a disability, particularly cognitive or psychosocial disabilities.⁴¹ When comparing the same age groups, the AIHW found that of those aged 18-34, 1 in 4 (26%) prison entrants reported a disability compared to 1 in 12 (8%) people in the general community.

It is also known that people in prison often have significant and complex health needs, with higher rates of mental health conditions, chronic disease, communicable disease, and acquired brain injury.⁴² A recent study at Banksia Hill Detention Centre in Western Australia (**The Banksia Hill Study**) found that 89% of young offenders have a severe neurodevelopmental impairment, and 39% were diagnosed with FASD.⁴³ This is the highest prevalence of neurodevelopmental impairment in a custodial context to have been found in the world. Though a similar study has not been undertaken in the NT, it is likely that there is a very high prevalence of FASD among children in the youth justice system, and by extension the adult prison system.⁴⁴

³⁹ Royal Commission into Disability, Issues Paper 'criminal justice system'.

⁴⁰ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) vol 1, 418.

⁴¹ Human Rights Watch, "'I needed help, instead I was punished": Abuse and neglect of prisoners with disabilities in Australia' (Report, February 2018), 1–2.

⁴² Australian Institute of Health and Welfare (AIHW) 2019. *The health of Australia's prisoners 2018*. Cat. No. PHE 246. Canberra: AIHW, vi.

⁴³ Carol Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' *BJM Open* (19 February 2018)

<http://bmjopen.bmj.com/content/8/2/e019605>.

⁴⁴ Final Report of the Royal Commission into the Protection and Detention of Children in the NT (2017), Chapter 15, 351.

Research has continued to emphasise the need to divert or find alternative arrangements for these young people with FASD and neuro-disability from contact with the justice system, to prevent indefinite entrenchment in the criminal justice system.⁴⁵ The inability of the prison system to properly meet the individual and complex needs of people with disability is further explored below.

The discriminatory operation of mandatory sentences contravenes Australia's obligations under the Convention on the Rights of Persons with Disabilities. In particular, it breaches Article 4(1)(b), which mandates State Parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. Similarly, mandatory sentencing breaches Article 5, which guarantees equality and non-discrimination under the law, and Article 13, which ensures effective access to justice in legal proceedings.

Efficacy of mandatory sentencing

Ineffective deterrent

Research has well established that mandatory sentencing is an ineffective deterrent to offending, as imprisonment increases rates of future imprisonment.⁴⁶ This is reflected in the fact that the NT and WA, the only two jurisdictions with broad mandatory sentencing regimes, have the highest levels of imprisonment in Australia. In the NT, nearly two thirds of prisoners (59.4%) return to prison within 2 years, the highest rate nationally.⁴⁷ Comparatively, there is no conclusive evidence to suggest that mandatory sentencing deters people from offending.

Enforcing mandatory sentencing as a crime deterrent assumes that offending is the result of rational choice. However, the nature of the targeted offences is often alcohol-fuelled and impulsive, committed by vulnerable and marginalised community members, who (as outlined above) often experience overlapping vulnerabilities. Many are also from remote communities and so often have limited understanding of the criminal justice system.⁴⁸ These factors render mandatory sentencing an ineffective deterrent.

Exacerbating underlying vulnerabilities

The Australian Law Reform Commission has suggested that mandatory sentencing may 'in fact increase the likelihood of reoffending, as periods of incarceration diminish employment prospects, positive social links, and other protective factors that help prevent recidivism'.⁴⁹

⁴⁵ See e.g Harry Blagg, Tamara Zulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession: Indigenous Youths With Foetal Alcohol Spectrum Disorders in a White Settler Justice System' (2017) *Social and Legal Studies* <https://doi.org/10.1177/0964663916676650>

⁴⁶ David Harding et al, 'Short- and long-term effects of imprisonment on future felony convictions and prison admissions' (2017) *Proceedings of the National Academy of Sciences* 114(42) 11103.

⁴⁷ Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, Report on Government Services 2020, Part C, Table CA.4 (2020).

⁴⁸ Tubex above n 8.

⁴⁹ ALRC above n 9, 78.

Negative effects on First Nations people

By entrenching First Nations people in the criminal justice system, mandatory sentencing sustains high levels of disadvantage and contributes to the victimisation of First Nations people.⁵⁰

First Nations people have special needs arising from their distinct and diverse history, culture and language. This is recognised and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory, which provides that First Nations people have the right to maintain their own languages,⁵¹ cultural practices and identity,⁵² and freedom from all forms of discrimination.⁵³ Imprisonment, and by extension mandatory sentencing, jeopardises these rights by displacing First Nations people from Country and community.

People in detention facilities are often held in locations far from their home communities (including people from urban and regional centres). As a circumstance of their detention, First Nations people are often denied access to their families, language, culture, kinship structures and community. Cultural discontinuity has been linked to high rates of depression, alcoholism, suicide and violence among First Nations people, with the most profound impact on youth.⁵⁴

Further, a 'heavy handed' sentencing regime premised on retribution may serve to exacerbate the distrust felt by First Nations people towards the justice system and compound the effects of intergenerational trauma – a legacy of the Stolen Generation, black deaths in custody and over-policing of First Nations people.

Negative effects on people with disability

Prisoners with disability face rampant ableism throughout their time in detention and prison.

Being in prison significantly impacts a person's access to proper diagnostic assessments, medical treatments and adequate services that effectively meet the individual and complex needs of people with disability. Prisoners are denied access to Medicare-funded services and pharmaceutical benefits, severely limiting their capacity to receive comprehensive primary health services. In general they are also denied access to disability supports under the NDIS.

Lack of access to these services deteriorates the physical and mental health of people with disability and exacerbates the extraordinary stresses of incarceration. For example, prisoners with an intellectual disability are more likely to be socially isolated, to have difficulty coping with the prison environment and therefore experience a higher rate of comorbid mental health disorders and physical health conditions than those without intellectual disability.⁵⁵

People with disability are also at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings.⁵⁶ A recent report by Human Rights Watch found that in all 14 prisons the organisation visited, people with disability were considered 'easy targets' by staff, carers and other

⁵⁰ Russell Hogg and Julia Quilter, Submission to ALRC Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander People, (2017) 87.

⁵¹ United Nations Declaration on the Rights of Indigenous Peoples, Article 14(3).

⁵² United Nations Declaration on the Rights of Indigenous Peoples, Articles 8 and 11.

⁵³ United Nations Declaration on the Rights of Indigenous Peoples, Article 2.

⁵⁴ Kirkmayer, LJ, Brass M, and Tait CL (2000) 'The Mental Health of Aboriginal Peoples: Transformations of Identity and Community Canadian Journal of Psychiatry' 2000; 45:607-616

⁵⁵ AIHW above n 11, 77-78.

⁵⁶ Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) Griffith Law Review 370.

prisoners, resulting in repeated incidents of sexual, physical and verbal abuse. Entering the prison system therefore presents a significant danger to the health and wellbeing of people with disability.

Individualised justice

Employing a uniform response to a range of unique circumstances fetters judicial discretion by preventing the court from considering the individual circumstances of each case. This inevitably leads to excessively harsh sentencing, as well as sentences that fail to appropriately address the underlying causes of offending.

Not only is this inconsistent with fundamental sentencing principles of proportionality and parsimony, but it restricts the rehabilitative utility and overall efficacy of sentencing. In order to ensure effective rehabilitation and specific deterrence, it is necessary for a sentence to reflect and cater for the individual needs of the offender, including cultural needs, health requirements and any other unique circumstances.

Comprehensive Assessments

For sentencing to be effective, courts must identify the individual needs and circumstances of each offender and address these considerations when sentencing. While a deprived background is a consideration under the *Bugmy* principle,⁵⁷ the First Nations status of an offender and their cultural needs should be paramount in sentencing so that First Nations justice principles and culturally therapeutic approaches are employed.

Many international jurisdictions have begun implementing culturally appropriate sentencing practices that are tailored to the individual needs of the offender. In Canada, for example, the courts utilise Gladue Reports, which provide holistic depictions of offenders from a First Nation perspective. The courts are then mandated to consider ‘all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community [...], with particular attention to the circumstances of Aboriginal offenders’.⁵⁸ Judges must also take judicial notice of colonialism, displacement and disadvantage impacting First Nations people.

Comprehensive, holistic, culturally appropriate assessment is a key part of the New Zealand approach that has delivered positive results. New Zealand has developed a tool called *Tuituia* which is based on detailed work to develop and validate measures across domains that are important in directing action to support, service and hold young people and families accountable.⁵⁹ Through this process, every child or young person’s needs, strengths and risks need to be assessed at an early point of contact with child protection or youth justice.

The assessment will:

- identify risks affecting the child or young person that make them more vulnerable to abuse and neglect, or more likely to have conduct problems, offending, and poor life outcomes;
- Identify the strengths and resources available to the child or young person within family and community;

⁵⁷ *Bugmy v The Queen* [2013] HCA 27.

⁵⁸ S 718.2(e) of the *Criminal Code (R.S.C, 1985)*.

⁵⁹ <https://practice.mvcot.govt.nz/policy/assessment-and-decision-making/resources/understanding-the-tuituia-domains-kaitiaki-mokopuna.html>

- Look at the hopes and dreams of the child or young person.

Such an assessment gives children’s caregiver’s capacity to nurture their wellbeing, and the social, cultural and environmental influences surrounding them.⁶⁰ The assessment allows the system to respond in ways that reduce risks of abuse and neglect and reduce the likelihood of conduct problems and offending continuing. It is undertaken or updated at various decision points during the child or young person’s contact with the system. If a child or young person has further or ongoing contact with the system, the assessment will remain with them and can be updated if circumstances change.

Sentencing, which is informed by proper comprehensive assessments and tailored to address the underlying causes of offending will help to reduce recidivism and in turn, make the community safer.

Exceptional circumstances

The exceptional circumstances provision is said to ameliorate the harsh effects of mandatory sentencing, however its restrictive application means that it merely acts as a tokenistic symbol of fairness. Indeed, Professor Chris Cunneen went so far as to say that, “Exceptional circumstances’ were introduced purely to avoid the embarrassing situations where middleclass, respectable and non-Indigenous people were inadvertently caught-up in mandatory sentencing regimes’.⁶¹

What constitutes exceptional circumstances remains so narrow that it does not actually allow for genuine judicial discretion. This was exemplified in the case of *Orsto v Grotherr*⁶², in which the magistrate reluctantly sentenced an Aboriginal woman to imprisonment in ‘heart wrenching’ circumstances.⁶³ The magistrate went on to note that ‘any civilised court would never send a woman in this particular situation to prison, actual prison. The law as it currently stands fetters that discretion.’⁶⁴ This clearly demonstrates that the exceptional circumstances provision does not allow for more proportionate or equitable sentencing in situations that mandate it, and highlights the unjust effect of mandatory sentencing in general.

Recommendation (1)

The NT government should repeal mandatory sentencing for all offences with no exceptions.

Alternative sentencing options

Aboriginal-led violence prevention

As noted above, assaults and offences against the person are a major cause of First Nations incarceration, particularly under mandatory sentencing provisions. Despite this, programs and education campaigns have failed to understand and address the foundational causes of violent behaviours in some First Nations people. As outlined above, these causes are a complex layering of

⁶⁰ See: <https://practice.orangatamariki.govt.nz/our-work/practice-tools/the-tuituia-framework-and-tools/the-tuituia-framework-and-domains/#what-is-tuituia>

⁶¹ Chris Cunneen, ‘Contemporary Comments: Mandatory Sentencing and Human Rights’, *Current Issues in Criminal Law* 13(3), 324.

⁶² [2015] NTSC 18.

⁶³ Ibid 28 [46].

⁶⁴ Ibid 8 [17].

disadvantage brought about by the continuing colonisation and ensuing cultural breakdown as well as the impacts of alcohol and other drugs, mental health issues, poverty and overcrowded housing.

The cumulative impact of dispossession, child removal, family breakdown, substance misuse and exposure to violence has given rise to a cycle of intergenerational trauma. The manifestation of these causes is found in disadvantages in education, employment, housing, health, legal representation and life expectancy which in turn drive poor outcomes in early childhood, youth offending including sexual offending.

The World Health Organisation Report on Violence Prevention stated that it was important to change perceptions of what is acceptable and unacceptable behaviour by modifying the attitudes, beliefs and understandings that enable sexual violence. The report outlined that programs need to:⁶⁵

- Explore what is acceptable and unacceptable behaviour
- Explain body ownership
- Modify beliefs of male sexual entitlements
- Reduce attitudes and beliefs that are supportive of sexual violence
- Address gender norms
- Curb bystander behaviour
- Change gender inequalities
- Change attitudes towards problem sexual behaviours
- Avoid labels that feed racial stereotypes

Programs and campaigns designed to change the attitudes and understandings of the community should be designed, developed and delivered by Aboriginal controlled organisations where possible. This is because Aboriginal controlled organisations are more likely to have an intimate understanding of the current knowledge, culture and attitudes of that community, and moreover the community is more likely to accept and support the intervention activities.⁶⁶

First Nations communities have long advocated for the incorporation of traditional cultural mechanisms in responding to offending. Research shows that using First Nations Law and Culture that carry legitimacy in community can provide safe resolutions to crime more effectively than a criminal justice response.⁶⁷

This is also consistent with the NT Royal Commission's recommendation that the NT Government 'engage with communities, government bodies and relevant organisations about how to address sexual issues relating to children and young people, including the need for and implementation of a

⁶⁵ World Health Organisation, *Global Status Report on Violence Prevention* (Report, 2014).

⁶⁶ Antonia Quadara and Liz Wall, 'What is the effective primary prevention in sexual assault? Translating the evidence for action' (2012) *Australian Institute of Family Studies*.

⁶⁷ Australia's National Research Organisation for Women's Safety. (2020). Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence: Key findings and future directions (Research to policy and practice, 19/2020). Sydney: ANROWS, 6.

comprehensive community education strategy.⁶⁸ This recommendation has not been fully implemented.

While the NT Government has made commendable efforts to address the prevalence of sexual violence through both the Domestic, Family and Sexual Violence Reduction Framework 2018-2028 and the Sexual Violence Prevention and Response Framework 2020-2028, both frameworks fail to recognise Aboriginal understandings and input as being key to addressing and solving such issues. Similarly, both frameworks neglect to mention the necessity of partnering with Aboriginal Community Controlled Health Services in creating effective and impactful strategies.

A restorative justice model that affords respect to traditional First Nations justice mechanisms while retaining some of the key principles, and safeguards, of judicial modernity appears to be an appropriate vehicle to achieve such change.⁶⁹ Restorative justice aims to bring together those involved in, or affected by, a criminal act, to resolve the hurt caused, offering a more humane, fair and person-centred system of justice.

Further efforts also need to be made to incorporate First Nations male leaders in the development of these programs and services, and in working with First Nations men, in particular young men, to address the normalisation of violence towards women.

Community-based sentencing

The NT has the highest rates of custodial sentencing nationally. In 2018-2019, 48% of defendants proven guilty received a custodial order and 60% of First Nations defendants proven guilty were sentenced to custody.⁷⁰

However, evidence suggests that alternatives to custody are more effective in reducing recidivism than a sentence of imprisonment.⁷¹ In particular, community-based sentencing options that combine unpaid community work with rehabilitation services to address the underlying causes of offending are often the most successful models that reduce reoffending.⁷² As such, DDHS strongly supports the utilisation of non-custodial community-based sentencing orders coupled with rehabilitative and therapeutic support programs.

Community healing programs

Research highlights the need for a cultural framework that engages communities to develop community healing from intergenerational trauma.⁷³ There is a particular need for this to occur on-Country, and for First Nations men to be supported to lead and work with other men and boys, to reconnect men to their core cultural practices and protocols as a central factor to create change.

⁶⁸ NT Royal Commission(above n 7) Recommendation 36.1.

⁶⁹ Ibid, 107.

⁷⁰ Australian Bureau of Statistics, *Criminal Courts, Australia, 2017-18* (Catalogue No 4513.0, 28 February 2019).

⁷¹ Jose Cid, 'Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) *European Journal of Criminology* 6(6), available at <<https://doi.org/10.1177/1477370809341128>>.

⁷² Department of the Attorney-General and Justice, 'Pathways to the Northern Territory Aboriginal Justice Agreement' (2019) available at <https://justice.nt.gov.au/__data/assets/pdf_file/0009/728163/Pathways-to-the-northern-territory-aboriginal-justice-agreement.pdf>.

⁷³ Mackean, T. (2009). A healed and healthy country: Understanding healing for Indigenous Australians. *Medical Journal of Australia*, 190(10).

International research has highlighted the positive impacts that ‘Healing’ can have. Programs like the Canadian Community Holistic Circle Healing Program (**CHCH**) served a restorative justice function in an Indigenous community that suffered high rates of child sexual assault.⁷⁴

In the Canadian Indigenous community of Hollow Waters, Researchers found that 75% of Hollow Water residents were victims of child sexual assault, with 35% being perpetrators.⁷⁵ Furthermore, intergenerational child sexual assault could be attributed to abuse that began when Indigenous children were removed from their parents and placed in institutions where children were subsequently abused.⁷⁶

In 1987 the CHCH was created, coordinating child protection workers, a community health representative and people from the school division and community churches. In addition, an insider knowledge base was utilised:

‘Almost everyone on the community team has been a victim of long standing intra-familial child sexual assault, which allowed them the ability to empathise with the victim at hand [and] understand the complexities of child sexual assault’.⁷⁷

The program worked whereby once criminal charges are laid, the offender can undergo the traditional criminal justice route or enter a guilty plea, assume full responsibility and enter the Healing program.⁷⁸ The team then requests a delay in sentencing so they can begin their healing work and prepare a pre-sentence report. This report comprehensively assesses the offender’s state of mind, chance of rehabilitation, and also takes into account the role of the victim, the non-offending spouse and the families of each offender.⁷⁹ An action plan is proposed based on a Healing Contract spanning 2-5 years. Failure to adhere to the contract will result in the offender being subject to criminal prosecution.

The Healing Circle program was evaluated in 2001 with significant health and wellness improvements reported by the community. Similarly, recidivism was substantially reduced, with only 2 out of 107 offenders reoffending.⁸⁰ Research attributed the program’s success to its cultural sensitivity and access to financial and human resources.

Lessons from the Hollow Waters experience and other restorative justice projects globally, based on traditional notions of healing, could be used to develop similar programs for youth and adults in the Northern Territory. In Australia, there is already an emergence of on-Country healing programs that provide a total cultural immersion for young people and families, where people can receive proper

⁷⁴ Myvanwy Hudson, ‘Speaking through the silence: Adult female survivors of intra- familial child sexual assault envisioning justice and resistance in Australian criminal justice systems’ (2013) *University of New South Wales* 60.

⁷⁵ Rupert Ross ‘Aboriginal Community Healing in Action: The Hollow Water Approach’ in Wanda D McCaslin (ed) (2005) *Justice as Healing: Indigenous Ways* 187.

⁷⁶ Christine Sivell-Ferri, *The Four Circles of Hollow Water: Aboriginal Peoples Collection* (1997) Ministry of the Solicitor General, Ottawa.

⁷⁷ Rupert Ross ‘Aboriginal Community Healing in Action: The Hollow Water Approach’ in Wanda D McCaslin (ed) (2005) *Justice as Healing: Indigenous Ways* 187

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Robert Cormier, *Restorative Justice: Directions and Principles –Developments in Canada* (2002) Ottawa: Solicitor General Canada.

mental health support.⁸¹ What is clear is that there is strong global evidence to support cultural responses to sexual violence as an effective way to improve outcomes for victims and reduce the likelihood of recidivism by offenders.⁸²

Community justice

Community-based sentencing is most effective when embedded in a 'community justice' model; a public safety framework that transforms high-crime, socially disadvantaged places into neighbourhoods fit for people to live, work and raise families.⁸³ Community justice aims to redress the criminal justice system in communities with high rates of crime and recidivism, prevalent conditions that lead to crime, and the intense use of justice intervention systems (police, courts, prisons). Having met all these conditions, the Northern Territory is ripe for a community justice framework.

Crucially, community justice models are proven to be effective. An evaluation of the Neighbourhood Justice Centre in Yarra (Victoria) conducted by the Australian Institute of Criminology found that since its establishment in 2007:

- Crime in the community has reduced by 31%, with property crime decreasing by 40%;
- Offenders completed 105 hours of unpaid work on average compared with a state average of 68 hours;
- 25% lower rate of reoffending than other Magistrates' Courts;
- NJC offenders 3 times less likely to breach Community Corrections Orders (23.1% of high-risk offenders breach their orders compared to a state-wide average of 59.9%); and
- NJC offenders demonstrate lower breach rates for intervention orders (ranging from 4.6% to 6.3% compared to 8.73%-8.77% state-wide).⁸⁴

Implementing a community justice model would therefore be a more effective way to rehabilitate offenders, repair harms caused by crime and prevent crime from occurring.

Family Group Conferencing

New Zealand has incorporated Family Group Conferencing (**FGC**) into child protection and youth justice proceedings, to allow for greater participation and agency in decision making and to hold young people and their families to account. It is a family decision-making model that promotes the wellbeing and safety of children involved with the care and protection and youth justice systems. The principles of FGC are based on collective responsibility and shared interest, with the process emphasizing the importance of family and community in finding the best solutions that will support the safety and wellbeing of the child.

⁸¹ Harry Blagg, Tamara Tulich & Suzie May (2019) Aboriginal youth with foetal alcohol spectrum disorder and enmeshment in the Australian justice system: can an intercultural form of restorative justice make a difference?, *Contemporary Justice Review*, 22(2), 115.

⁸² Shirley Jülich et al, 'Project Restore NZ: An exploratory study of restorative justice and sexual violence' (2010) *Auckland University of Technology*.

⁸³ For more information, see Neighbourhood Justice Centre website available at <https://www.neighbourhoodjustice.vic.gov.au/knowledge-centre/about-community-justice/how-community-justice-works>.

⁸⁴ Stuart Ross, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program' (2015) *Trends & issues in crime and criminal justice* no. 499. Canberra: Australian Institute of Criminology, available at <https://www.aic.gov.au/publications/tandi/tandi499>.

Where a child has been referred to a FGC by police or through the youth justice setting, the purpose will be to recommend whether the young person should be prosecuted or dealt with in another way; to make a determination regarding custody; where proceedings have commenced, to make a decision as to whether they should continue; to determine if the charge is admitted; and where a charge is admitted or proved, to recommend how the young person should be dealt with.⁸⁵

The Royal Commission heard evidence that demonstrated the positive benefits of FGC. In New Zealand, FGC is “the primary decision-making process in the Youth Court; it is not an adjunct to the court process and it is mandatory, irrespective of consent, in the Youth Court when a charge is not denied or proved after denial.”⁸⁶ Most cases in the Youth Court are resolved through a plan agreed through FGC, without the need for a formal court order. In 2013 only 26% of Youth Court appearances resulted in a formal order.⁸⁷ FGC is seen as being more effective at addressing the underlying causes of offending and preventing recidivism.

Justice reinvestment

The most effective way to address the underlying causes of criminal behaviour and to achieve rehabilitation is through a justice reinvestment strategy. Justice reinvestment diverts funds from incarceration to community-based programs that reduce criminal behaviour and rates of reoffending.⁸⁸ It aims to invest in preventative programs that address the underlying causes of crime so as to save money in the long run dealing with the outcomes of crime.

In the NT, it costs \$321.59 per day to incarcerate an adult prisoner.⁸⁹ Nationally in 2018-19, expenditure (net of revenues) on corrective services was \$3.64 billion for prisons and \$0.71 billion for community corrections.⁹⁰ This cost will continue to expand due to a system that perpetuates high rates of recidivism. A portion of these funds could be better used to address the chronic shortage of programs that reduce criminal behaviour, particularly in remote First Nations communities.⁹¹

The consultation paper notes that ‘in regional and remote areas of the Northern Territory, access to supervision, work, counselling and treatment programs is limited’.⁹² These are exactly the types of services and programs that need further investment in order to guarantee their success.

Youth Diversion

In addition to programs that address targeted offences, there is a real need to invest in preventative programs that divert youth away from the criminal justice system. There is strong evidence that

⁸⁵ His Honour Judge Andrew Becroft, Principal Youth Court Judge for NZ, ‘It’s all Relative: the Absolute Importance of the Family in Youth Justice (a NZ Perspective), 2015, p15

⁸⁶ Ibid, p13

⁸⁷ Ibid, p13

⁸⁸ North Australian Aboriginal Justice Agency (NAAJA), ‘Making Justice Work, Factsheet: Mandatory Sentencing’ (2014), 5.

⁸⁹ Productivity Commission, Report on Government Services 2018-2019 (2020) Volume C: Justice, Correctional Services, Chapter 8, Figure 8.10. Note: this includes total net operating expenditure and capital costs.

⁹⁰ Ibid table 8A.1.

⁹¹ North Australian Aboriginal Justice Agency (NAAJA), ‘Making Justice Work, Factsheet: Mandatory Sentencing’ (2014), 5.

⁹² Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-Based Sentencing Options* (Consultation Paper, October 2020) 41.

early intervention programs targeting at-risk children and youth are cost-effective ways to reduce crime.

Entering the criminal justice system at a young age often sets a young person up for a life in and out of correctional facilities. Preventative approaches are therefore crucial to reduce rates of crime and to nurture the proper development of at-risk young people. Due to the high prevalence of First Nations young people in the criminal justice system with complex health needs, Aboriginal community controlled organisations are often best placed to manage and deliver culturally appropriate diversionary programs.⁹³

In partnership with YWCA, DDHS currently runs a youth diversion program for young people engaging with the justice system. The program looks at the contributing factors as to why the young person has committed the offence, and supports them to implement positive lifestyle changes, re-engage with the community and reduce re-offending.

Recommendation (2)

The NT government should embrace alternatives to imprisonment, including community-based sentencing options, and invest in diversionary strategies that address the social determinants of incarceration.

Secure therapeutic facilities for people with cognitive impairments and disabilities

There is a dire need for secure therapeutic residential facilities in the NT to accommodate and rehabilitate young people and adults with FASD, neurodevelopmental, cognitive and other complex impairments that are implicated in the justice system. This was exemplified in a recent Supreme Court decision, *The Queen v K*.⁹⁴ KG suffers from significant intellectual disability and severe functional impairment due to FASD. He was found unfit to stand trial based on psychiatric evaluation and was declared liable to supervision. In determining whether KG should be committed to custody in a custodial correctional facility or some other appropriate place under s 43ZA, Grant CJ observed:

“The Court is entirely reliant on the Executive to make appropriate facilities and services available for the custody, care or treatment of accused people who continue to present the relevant level of risk to either themselves or the community. There is in this jurisdiction a dearth, or at least a shortage, of appropriate secure accommodation outside the custodial correctional context to house supervised persons subject to custodial supervision orders.

In the absence of those facilities or services in some other appropriate place, an accused person who does present that form of risk must necessarily be committed to a custodial correctional facility. As this Court has observed on many previous occasions, that situation is far from ideal.” (emphasis added)

There are also many cases in which adults found unfit to plead or not guilty by way of mental impairment are kept in custody due to a lack of appropriate alternative living options. As the *Pathways to the AJA Report* identified, people with cognitive disabilities can be subject to indefinite detention if charged with a serious offence and found unfit to plead or not guilty by reason of

⁹³ Harry Blagg, Tamara Tulich, and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising alternatives’ (2015) *Alternative Law Journal* 40(4) 257, 257.

⁹⁴ [2020] NTSC 24.

mental impairment.⁹⁵ The vast majority of these people are detained in adult correctional facilities. This is contrary to the legislative requirement that a person who is not guilty by way of mental impairment must be accommodated in an ‘appropriate place’, namely a therapeutic facility.⁹⁶

People detained in correctional facilities without adequate medical treatment and support services inevitably end up reoffending, as outlined above. Conversely, secure therapeutic facilities with highly trained, multidisciplinary teams can help address the causes that lead to reoffending through individually tailored therapeutic support and interventions. As there is very little evidence of best practice in this area in Australia, we believe we should look carefully to effective international approaches.

We are particularly drawn to the evidence based therapeutic secure care units developed by the Diagrama Foundation. Diagrama have a proven track-record of working with young people with complex needs. These needs are identified through Diagrama’s comprehensive case management and assessment processes. The assessment then informs the development of a suitable plan for each young person and informs how staff – a highly qualified team of social workers and educators – work with young people in order to meet their needs. Diagrama’s centres have therapeutic units both for those with significant mental health conditions and for young people in the justice system who have mental health issues.

In the NT, there have been some attempts to implement a therapeutic secure residential care model in the out-of-home-care context. This is relevant as many of the children in detention are also in care of Territory Families. In April 2009, the Department of Children and Families (now Territory Families) announced a commitment to fund the establishment and operation of secure care services for children with complex needs. However, the model was never properly implemented.

Recommendation (3)

The Northern Territory Government should provide funding for the development and implementation of therapeutic secure facilities for children and adults with complex needs including cognitive and mental impairments. These should be developed in partnership with local Aboriginal Community Controlled Health Services.

Other legislative schemes

DDHS urges the NT Law Reform Committee to look beyond the scope of the Terms of Reference and consider similarly discriminatory legislative schemes in the NT. In particular, the Paperless Arrest regime, which disproportionately impacts First Nations people, is in dire need of reform.

The regime, contained in Div 4AA of the Police Administration Act (NT), allows the police to detain people for up to 4 hours, or more if intoxicated, on the belief that they may commit a minor offence. This includes common street and ‘public order’ offences, such as making undue noise, singing an obscene song, and drinking alcohol in undesignated areas.

In the first seven months of its operation, paperless arrests were used to detain 1295 people, of which 70 per cent were Aboriginal.⁹⁷ Following the death of an Aboriginal man in custody detained

⁹⁵ Pathways to the Northern Territory Aboriginal Justice Agreement, p 31.

⁹⁶ See s 43ZA(2A) Criminal Code.

⁹⁷ Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 16, [66].

by paperless arrest, Coroner Greg Cavanaugh labelled the regime 'manifestly unjust' and found that it 'perpetuates and entrenches Indigenous disadvantage'.⁹⁸

In line with similar considerations regarding mandatory sentencing, paperless arrests and other discriminatory legislative schemes must be repealed to reduce the over-imprisonment of First Nations people and allow for equality before the law.

Recommendation (3)

The NT government should review and repeal other legislative schemes that have a discriminatory impact, including paperless arrests.

⁹⁸ Ibid.