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# POLICING INDIGENOUS AUSTRALIANS IN THE NORTHERN TERRITORY: IMPLICATIONS OF THE 'PAPERLESS ARREST'

by David Yaoming Yang

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## INTRODUCTION

The Northern Territory ('NT') has the highest imprisonment rate in Australia.<sup>1</sup> In 2014, the Indigenous imprisonment rate in the NT was 2390.2 per 100 000 which is 15.4 times higher than the non-Indigenous imprisonment rate of 155.2 per 100 000.<sup>2</sup> Further, while Indigenous people only account for 26.8 per cent of NT's total population,<sup>3</sup> they comprise 86 per cent of the adult prisoner population.<sup>4</sup>

Despite the crisis of Indigenous institutionalisation and dispossession, and the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'),<sup>5</sup> the NT Government still favours politically motivated "tough on crime" policies which have little empirical support. This article will examine the *Police Administration Amendment Act 2014* (NT) ('*Amendment Act*'), which commenced operation on 17 December 2014. The *Amendment Act* authorises the NT police to arbitrarily detain individuals arrested for 'infringement notice offences' for up to four hours. This is known as a 'paperless arrest'.

This article argues that paperless arrests, although applicable indiscriminately of race, will disproportionately affect Indigenous people, perpetuate cycles of institutionalisation and increase mistrust between Indigenous people and law enforcement agencies. Further, reducing Indigenous imprisonment rates and social marginalisation is an interdisciplinary task, one which cannot be achieved by police through law and order responses. The second part of this article examines the relationship between police and Indigenous people by contextualising the role of policing with reference to colonial expansion and the policies of protectionism and assimilation. Against this background, it then examines the provisions of the *Amendment Act*, the justification presented by the Government for its enactment and its likely implications.

## THE ROLE OF POLICE IN INDIGENOUS COMMUNITIES: FROM COLONISATION TO THE PRESENT

The history of police interaction with Indigenous people has been widely documented<sup>6</sup> and this article will only provide a

brief summary. Since the formation of Australian police forces in the 1830s, the role of the police in relation to Indigenous people has continually changed.<sup>7</sup> Despite this, what has remained consistent is the use of terror and violence to suppress, marginalise and criminalise Indigenous people.<sup>8</sup> Further, as the colonial processes had a profound effect on Indigenous interaction with the police, it is necessary to examine the historical development of the institution of policing in Australia.<sup>9</sup> Most importantly, as 'agents of the settler state', the police contributed to a legacy of disorganisation within Indigenous communities, institutionalised behaviour and deeply entrenched distrust and animosity towards the police.<sup>10</sup> In particular, colonial police operated as 'a paramilitary force of dispossession, dispensing summary justice and on some occasions involved in the indiscriminate massacre of clan and tribal groups.'<sup>11</sup> Their primary role was to suppress Aboriginal resistance to colonisation through tactics involving violence and terror.<sup>12</sup> The introduction of protectionist policies resulted in a shift towards rigorous control, regulation and surveillance.<sup>13</sup>

As a consequence of the severe mistreatment of Indigenous people throughout Australian history, interactions with police remain confrontational and adversarial, particularly as the memories of dispossession and mistreatment remain in those children (now adults) who were removed during the Stolen Generations.<sup>14</sup> Further, Hal Wootten emphasised that:

The deep distrust and apathy common amongst Aborigines have their roots in the terrible racial history of the last 200 years, in which Aborigines were ruthlessly dispossessed of their land and livelihood, massacred as outlaws or shot and poisoned like vermin when they resisted, and defeated remnants finally subjected to dispiriting paternalistic control.<sup>15</sup>

Despite the major political shift towards reconciliation and self-determination since the 1967 referendum, systemic racism remains entrenched within contemporary politics and police culture. Indigenous communities are often subject to over-policing which results in a net-widening effect whereby Indigenous people are subject to police attention and criminal sanctions for

trivial offending, which would remain hidden in non-Indigenous communities.<sup>16</sup> This reinforces the perception that some criminal laws are only applied to (or more regularly applied to) Indigenous populations.

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### **THE LEGISLATIVE FRAMEWORK FOR ARREST AND DETENTION IN THE NORTHERN TERRITORY THE POLICE ADMINISTRATION AMENDMENT ACT AND THE PAPERLESS ARREST PROVISIONS**

The *Amendment Act* inserted division 4AA into the *Police Administration Act 1978* (NT), which relates to the custody of persons arrested for 'infringement notice offences'. An 'infringement notice offence' is defined as 'an offence for which an infringement notice may be served and which is prescribed for this Division by regulation'.<sup>17</sup> The prescribed offences are summary offences, many of which only attract a small fine. Individuals arrested for these offences may be held for up to four hours or, if the person is intoxicated, until the police officer 'believes on reasonable grounds that the person is no longer intoxicated'.<sup>18</sup> At the conclusion of the detention, the police officer may release the person unconditionally, with an infringement notice, on bail or bring the person before a justice or a court.<sup>19</sup> Additionally, in determining which option to choose, the police officer may question the person in relation to the infringement notice offence or any other offence. During the period of time in custody, the police are not required to bring the person before a court or provide an opportunity for legal advice to be sought.

Once a person is detained under section 133AB, the police must establish the person's identity by collecting relevant information such as the person's name, fingerprints and photographs.<sup>20</sup> The police may also search the person and remove valuables or items that are likely to cause harm to the person or to other persons.<sup>21</sup> The *Amendment Act* constitutes a fundamental departure from the common law and statutory requirement to bring detainees before the courts as soon as reasonably practicable.<sup>22</sup> In *R v Echo*, Martin CJ emphasised that

[t]he requirement to bring an arrested person before a justice or a court of competent jurisdiction as soon as is practicable after a person has been taken into custody ... is a significant part of the law's armoury

to safeguard the liberty of the subject, and ensure that such a person has the protection under the law through the court.<sup>23</sup>

The *Amendment Act's* circumvention of judicial oversight essentially allows the police to act as 'judge and jury'.<sup>24</sup>

### **THE NORTHERN TERRITORY'S JUSTIFICATION**

The *Amendment Act* is part of the NT Government's 'Pillars of Justice' strategy which is a 'framework for the development of a comprehensive policing, justice and corrections strategy which ... will tackle repeat offending, violence and substance abuse'.<sup>25</sup> These provisions target public order offences. The Government's rationale seems to be twofold: firstly, it allows police officers to pre-emptively 'remove trouble makers from [the] streets before problems escalate'; and secondly, paperless arrests promote efficiency and flexibility.<sup>26</sup> The NT Attorney-General explains that these provisions will 'enable police officers to return to their patrol in a more timely fashion, as opposed to being detained for long periods preparing necessary paperwork for a court to consider the charges'.<sup>27</sup> These provisions seem to be a part of the Government's 'crime crackdown'.<sup>28</sup>

The Attorney-General's argument that paperless arrests will de-escalate social disorder situations is fundamentally flawed. As Smart AJ noted, arrest often results in 'anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police'.<sup>29</sup> This escalation is particularly common between Indigenous people and the police considering the 'ritualised confrontation' that exists as a consequence of colonisation and the policies of past governments.<sup>30</sup> Further, police already have wide powers to deal with public order offences. For example, police have the power to issue a 'move on' direction to persons 'loitering in a public place' and a failure to comply with this direction can result in a maximum penalty of \$2000 or imprisonment for six months or both.<sup>31</sup> Requiring individuals to move on would likely achieve the goal of de-escalating potentially volatile situations without resorting to the use of force. Additionally, especially after the introduction of the *Northern Territory National Emergency Response 2007* (Cth), police already have wide powers relating to Indigenous people and alcohol.<sup>32</sup>

### **IMPLICATIONS OF THE PAPERLESS ARREST THE PROCESS IS THE PUNISHMENT**

By authorising detention in police custody for minor offences, the majority of which do not permit the courts to impose a term of imprisonment, the paperless arrest provisions 'shift the locus of punishment and central concern away from adjudication and sentencing to the preliminary stages of the process'.<sup>33</sup> The *Amendment Act* promotes a punitive process, particularly where

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individuals are arrested and detained for 'infringement notice offences' such as neglecting to keep clean yards<sup>34</sup> and playing instruments so as to annoy,<sup>35</sup> offences punishable by a fine of \$200. The exercise of a paperless arrest, at the discretion of police, in these circumstances is extraordinarily disproportionate to the maximum penalty. As Deane J emphasised:

An arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny.<sup>36</sup>

Punitive pre-trial processes, especially police custody, disproportionately affect Indigenous people. This is reflected by the 2002 national survey on police custody, which found that, in the NT, the Indigenous police custody rate was 2841.9 per 100 000, which is 12.1 times higher than the non-Indigenous rate of 234.9 per 100 000.<sup>37</sup> Further, Indigenous people account for 81.6 per cent of those in police custody. While the national rate of Indigenous over-representation in police custody reduced between 1988 and 2002, the rate in the NT has increased slightly from 10.4 to 12.1.<sup>38</sup>

Indigenous overrepresentation in police custody is a consequence of systemic discrimination which occurs during the interpretation and enforcement of laws, particularly in situations where the police are given wide discretionary powers. While discretion is a necessary part of policing, it has been identified as the primary factor and cause of Indigenous overrepresentation in police custody.<sup>39</sup> In particular, Melanie Schwartz argues that at every stage of the criminal justice system, Indigenous people are more likely to incur punitive sanctions and less likely to benefit from the exercise of discretionary decision-making (such as warning, cautions and diversionary programs).<sup>40</sup>

Since their commencement in December 2014, the paperless arrest provisions in the *Amendment Act* have been used over 700 times; and approximately 75 per cent of those detained have been Indigenous people.<sup>41</sup> Sadly, there has already been one Aboriginal death in custody associated with these provisions. On Thursday 21 May at approximately 6.00pm, a 59 year old Indigenous man was arrested for minor alcohol-related offences and held at the Darwin Watch House. After a routine cell check at 9.00pm, police found the man to be deceased.<sup>42</sup> Few details have been released and the matter has been referred to the Coroner for investigation. This was a tragic yet avoidable outcome. Over 20 years ago, the RCIADIC recommended decriminalising public drunkenness and implementing non-custodial 'sobering-up' facilities.<sup>43</sup> Further, the RCIADIC emphasised that public intoxication should not be a criminal justice issue. However, as these recommendations have

not been implemented, it is likely that further deaths in custody will follow.

### **LACK OF TRANSPARENCY AND ACCOUNTABILITY**

Policing is a 'people business' and it relies on public trust and support for its legitimacy.<sup>44</sup> These principles are inextricably linked to notions of transparency and accountability. A lack of transparency delegitimises police actions and may result in decreased public cooperation, particularly in situations where conflict between police and Indigenous people already exist.

As there is no access to the courts and no access to legal advice, the process is essentially invisible and can be utilised without public scrutiny. Paperwork is an essential mechanism for ensuring accountability. As Greg Barns from the Australian Lawyers Alliance emphasises, '[it] is not bureaucracy or paper shuffling. It is about ensuring vital information is available to courts, individuals and their families and to coroners.'<sup>45</sup> Despite this, the NT Government argues that paperwork is excessively burdensome and the *Amendment Act* prevents police 'being tied up with paperwork when their services are most needed on the streets.'<sup>46</sup> While paperwork may be burdensome, it ensures that all vital information about a person held in custody is readily available. For example, details of a detainee's physical and mental illnesses as well as any required medication is crucial and without this, it is likely that more deaths in custody will occur.<sup>47</sup> The focus should be on maximising efficiency through technology rather than by removing or reducing paperwork from the process.

### **PUBLIC ORDER OFFENCES AND THE 'TRIFECTA'**

The RCIADIC recommended that arrest should be a sanction of last resort. Deaths in custody relating to detention for minor offences such as possession of a small quantity of a prohibited substance, public urination, perceived disorderly conduct and offensive language have been well documented.<sup>48</sup> Paperless arrest provisions will lead to further over-policing of trivial public order offences committed by Indigenous people. Police intervention in relation to these may result in the escalation of offending, particularly as criminal behaviour by Indigenous people may be labelled 'resistance non-Indigenous institutions and authorities.'<sup>49</sup> This results in what is commonly known as the 'trifecta' wherein minor offences such as offensive language (usually directed at a police officer) escalate to serious charges of resist arrest and assault police.<sup>50</sup>

Interestingly, ten years after the RCIADIC, the NT claimed to have fully implemented the arrest as a last resort recommendation.<sup>51</sup> However, the 'catch and release' objective of the paperless arrest scheme<sup>52</sup> essentially incentivises arrest and detention as a first

resort rather than a last resort. Under these provisions, relationships between police and Indigenous people will continue to deteriorate. Importantly, these provisions fail to consider or address the underlying social, economic and historical causes of criminal behaviour by Indigenous people.

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## CONCLUSION

The paperless arrest provisions introduced by the *Amendment Act* epitomise the NT Government's "tough on crime" mentality which disproportionately affect Indigenous people. They constitute the antithesis of the recommendations provided by the RCIADIC and, evidently, the NT has failed to effectively implement the recommendations of the RCIADIC, particularly as it has the highest imprisonment rate in Australia. Instead, as Anthony Pyne emphasises, the increase in Indigenous imprisonment and police custody rates is a consequence of 'the way we choose to respond to crime', especially as politicians 'choose jail ... and choose it more frequently'.<sup>53</sup>

The provisions should be declared constitutionally invalid or repealed as they fundamentally infringe upon the central tenet of the criminal justice system that punishment should only follow an adjudication of guilt by a competent court. The right to liberty and freedom from arbitrary arrest and detention is protected under numerous international instruments.<sup>54</sup> Domestically, it has been recognised as 'the most elementary and important of all the common law rights'<sup>55</sup> and derogations of this right 'are viewed by courts with heightened vigilance'.<sup>56</sup> The North Australian Aboriginal Justice Agency ('NAAJA') is challenging the constitutional validity of the *Amendment Act* on the grounds that 'traditionally only a court can detain people' and that 'the laws undermine or interfere with the integrity of the courts of the Northern Territory'.<sup>57</sup> The case will be heard before High Court in September.<sup>58</sup>

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- 1 829.4 prisoners per 100 000 adults compared to the national imprisonment rate of 185.6 prisoners per 100 000. The adult imprisonment rate (per 100 000) in other states and territories is 181.7 in NSW, 134.4 in Victoria, 192.9 in Queensland, 187.9 in SA, 264.6 in WA, 112.0 in Tasmania and 130.4 in the ACT: Australian Bureau of Statistics, 'Prisoners in Australia, 2014' (Catalogue No 4517.0, 11 December 2014).
- 2 Ibid.
- 3 Australian Bureau of Statistics, 'National Regional Profile: Northern Territory, 2007–2011' (Catalogue No 1379.0.55.001) <<http://www.abs.gov.au/AUSSTATS/abs@nsp/Previousproducts/LGA7Population/People12007-2011?opendocument&tabname=Summary&prodno=LGA7&issue=2007-2011>>.
- 4 Australian Bureau of Statistics, above n 1.
- 5 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) ('RCIADIC').
- 6 See, eg, Ibid ch 10; Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).
- 7 Mark Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994) 111.
- 8 Cunneen, above n 6.
- 9 Ibid 46–9.
- 10 Christine Jennett, 'Policing and Indigenous Peoples in Australia' (Paper presented at the History of Crime, Policing and Punishment Conference, Canberra, 9–10 December 1999) 4.
- 11 Cunneen, above n 6, 50.
- 12 Ibid 60–2.
- 13 Ibid 63.
- 14 Cunneen, above n 6, 77.
- 15 Hal Wootten, cited in Jennett, above n 10, 11.
- 16 Melanie Schwartz, 'Redressing Indigenous Over-Representation in the Criminal Justice System with Justice Reinvestment' (2013) 118 Precedent 38, 39.
- 17 *Police Administration Act 1978* (NT) s 133AA. Regulation 19A of the *Police Administration Regulations 1994* (NT) prescribes the following as an infringement notice offence: (a) offences prescribed by reg 3 of the *Summary Offences Regulations 1994* (NT); (b) offences prescribed by reg 7(1) of the *Liquor Regulations 1981* (NT); and (c) offences prescribed by s 20A of the *Misuse of Drugs Act 1990* (NT). Thus, 'infringement notice offences' for the purpose of div 4AA include those such as undue noise; playing musical instruments so as to annoy; neglecting to keep clean yards; consumption of liquor at regulated place causing nuisance and failure to leave premises when requested. For a full list, see NAAJA, *NAAJA and CAALAS' Concerns with Paperless Arrests* <<https://www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf>>.
- 18 *Police Administration Act 1978* (NT) s 133AB(2).
- 19 Ibid s 133AB(3).
- 20 Ibid s 133AC(1).
- 21 Ibid ss 133AC(2)–(5).
- 22 Ibid s 137(1); *Williams v The Queen* (1986) 161 CLR 278.
- 23 (1997) 6 NTLR 51, 59.
- 24 ABC Radio National, 'High Court Challenge to NT Arrest Powers', *The Law Report*, 5 May 2015 (Ruth Barson) <<http://www.abc.net.au/radionational/programs/lawreport/high-court-challenge-to-nt-arrest-powers/6445466#transcript>>.
- 25 Adam Giles, 'Pillars of Justice' (Media Release, 15 May 2013) <<http://www.abc.net.au/radionational/programs/lawreport/high-court-challenge-to-nt-arrest-powers/6445466#transcript>>.

- www.territorystories.nt.gov.au/bitstream/10070/244864/1/Giles-150513-Pillars\_of\_justice.pdf/>.
- 26 Adam Giles and John Elferink, 'Pre-emptive Strike against Trouble Makers Becomes Law' (Media Release, 26 November 2014) <<http://newsroom.nt.gov.au/#mediaRelease/10279>>. See also Northern Territory, Parliamentary Debates, Legislative Assembly, 22 December 2014 (John Elferink, Attorney-General and Minister for Justice) <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/5899FC78C3A6F20B69257DB000206486?opendocument>>.
- 27 Northern Territory, above n 26.
- 28 Adam Giles and John Elferink, 'Crime Crackdown Delivers Results' (Media Release, 21 November 2014) <<http://newsroom.nt.gov.au/mediaRelease/10248>>.
- 29 *DPP (NSW) v Carr* (2002) 127 A Crim R 151, 159 [35] (Smart AJ).
- 30 Jennett, above n, 10, 16.
- 31 *Summary Offences Act 1923* (NT) s 47A(2).
- 32 For example, s 18 extends the powers under pt 7, div 4 of the *Police Administration Act 1978* (NT) to all 'prescribed area[s]'.  
 33 Malcolm Feeley, *The Process is the Punishment: Handling cases in a Lower Criminal Court* (Russell Sage Foundation, 1979) 30-4.  
 34 *Summary Offences Act 1923* (NT) s 78.  
 35 *Ibid* s 76.  
 36 *Donaldson v Broomby* (1982) 60 FLR 124, 126. See also *DPP (NSW) v Carr* (2002) 127 A Crim R 151, 159 [35] (Smart AJ).  
 37 Natalie Taylor and Michael Bareja, '2002 National Police Custody Survey' (Technical and Background Paper No 13, Australian Institute of Criminology, June 2005) 22. More recent statistics are unavailable because of the lack of reliable data on the total number of persons place into police custody.  
 38 *Ibid* 23-4.  
 39 Byron Davis, 'The Inappropriateness of the Criminal Justice System – Indigenous Australian Criminological Perspective' (Paper presented at the 3<sup>rd</sup> National Outlook Symposium on Crime in Australia, Canberra, 22-23 March 1999) 5 <[http://www.aic.gov.au/media\\_library/conferences/outlook99/davis.pdf](http://www.aic.gov.au/media_library/conferences/outlook99/davis.pdf)>.  
 40 Melanie Schwartz, 'Redressing Indigenous Over-Representation in the Criminal Justice System with Justice Reinvestment' (2013) 118 *Precedent* 38, 39. See also Rick Sarre, 'Police and the Public: Some Observations on Policing and Indigenous Australians' (2005) 17 *Current Issues in Criminal Justice* 305, 307.  
 41 ABC, 'NT Arrest Powers under Scrutiny after Death in Custody', *ABC Radio*, 25 May 2015 (Ruth Barson) <<http://www.abc.net.au/am/content/2015/s4241656.htm>>.  
 42 *Ibid*; Northern Territory Police, Fire and Emergency Services, 'Death in Custody' (Media Release, 22 May 2015) <<http://www.pfes.nt.gov.au/Media-Centre/Media-releases/2015/May/22/Death-in-Custody.aspx>>.  
 43 RCIADIC, above n 5, recommendations 79-85.  
 44 Joseph A Schafer, 'The Role of Trust and Transparency in the Pursuit of Procedural and Organisational Justice', (2013) 8 *Journal of Policing, Intelligence and Counter Terrorism* 131, 133-5.  
 45 Australian Lawyers Alliance, "'Paperless' Death in Custody Shows Lack of Police Accountability' (Media Release, 28 May 2015) <<http://www.lawyersalliance.com.au/news/paperless-death-in-custody-shows-lack-of-police-accountability>>.  
 46 Adam Giles and John Elferink, above n 26.  
 47 Australian Lawyers Alliance, above n 45.  
 48 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Indigenous Deaths in Custody: 1989 to 1996' (Report, Australian Human Rights Commission 1996) <<https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-6-police-practices>>.
- 49 Cunneen, above n 6, 42.
- 50 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 48.
- 51 *Ibid*.
- 52 Eddie Cubillo, 'Aboriginal Deaths in Custody: NT's "Paperless Arrest" Police Powers Need Urgent Review', *The Age* (online), 31 May 2015 <<http://www.theage.com.au/comment/aboriginal-deaths-in-custody-nts-paperless-arrest-police-powers-need-urgent-review-20150531-ghdf8u.html>>.
- 53 Anthony Pyne, 'Ten Proposals to Reduce Indigenous Over-Representation in Northern Territory Prisons' (2012) 16(2) *Australian Indigenous Law Review* 2, 2.
- 54 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 9; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) arts 3, 9.
- 55 *Trobridge v Hardy* (1995) 94 CLR 147, 152 (Fullagar J); *Foster v The Queen* (1993) 113 ALR 1, 8-9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
- 56 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 663 (Kirby J).
- 57 Human Rights Law Centre, *High Court Case against NT Government: Background Information* (27 March 2015) 2 <[http://hrlc.org.au/wp-content/uploads/2015/03/Background\\_NTHighCourt\\_case\\_March2015.pdf](http://hrlc.org.au/wp-content/uploads/2015/03/Background_NTHighCourt_case_March2015.pdf)>.
- 58 Transcript of Proceedings, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCATrans 135 (3 June 2015) <<http://www.austlii.edu.au/au/other/HCATrans/2015/135.html>>.