IHRP Final Report

14 September 2004

Beth Tsai

Introduction

Between the months of May and August 2004, I had the privilege of working for the North Australian Aboriginal Legal Aid Service (NAALAS) in Darwin, Australia. During this time, I investigated two distinct issues that have recently come to the attention of Aboriginal rights workers in the Northern Territory. The first of these issues concerns the impact of a new series of property seizure laws on the Territory Aboriginal population; the second involves an unexpected rise in the percentage of Aboriginal offenders in custody. Below, I discuss my efforts on both these fronts.

Property Seizure

Beginning in 2003, the Northern Territory government enacted a series of laws designed to discourage the trafficking of drugs and alcohol in the Territory. This new legislation (the *Misuse of Drugs Act* and the *Liquor Act*) granted the police the power to, among other things, seize any personal property used in the commission of a drug or alcohol-related offence, regardless of whether the owner of the property was party to the crime. Seized property subsequently became forfeit to the Territory government, and the property's owner could only appeal for its return by demonstrating that she was not involved in, or did not anticipate the commission of, the offence in question.

In principle, the seizure power conferred by *Misuse of Drugs Act* and *Liquor Act* was intended to be employed to detain property (vehicles, houses, etc) used in regular, large-scale drug trafficking. In reality, however, my research found that the police are using these laws to seize property in relation to minor drug and alcohol offences. For example, in a recent case, an Aboriginal woman almost lost her house because her ex-partner was arrested on her property carrying less than one ounce of marijuana. Even though the ex-partner did not own the house (he was visiting their children at the time of his arrest), the fact that he was at the house when he was found with the drugs allowed the police to act against the property.

Such application of the seizure powers for minor offences is particular harmful to the Territory's Aboriginal population. Across the board, Aboriginal persons have significantly lower incomes and other socio-economic outcomes than any other group in the Northern Territory. As a result, the type of property that is targeted by property seizure laws (houses, cars, etc) are often the sole assets of their Aboriginal owners. Thus, the seizure of property under the *Misuse of Drugs Act* and *Liquor Act* impacts the Aboriginal population in a disproportionately detrimental way.

Fortunately, this seemingly irrational application of the property seizure laws has not gone unnoticed by the courts. At least one magistrate has questioned the proportionality of the laws as applied by the police, and even the Department of Public Prosecutions has seemed hesitant to pursue seizure orders under the legislation.

The impact of the property seizure provisions in the *Misuse of Drugs Act* and *Liquor Act* also appears to disproportionately impact Aboriginal offenders because of the unique understanding of "personal" property in Aboriginal culture. In traditional Aboriginal society, property is understood to be owned semi-communally by familial circles. That is, even though, say, a car might be "owned" by a single Aboriginal individual, the members of that individual's extended family would also have certain rights to use the vehicle; for the "owner" of the car to deny a family member the right to use it would be culturally unacceptable.

Unfortunately, these traditional familial obligations often leave Aboriginal persons more vulnerable to the Territory's property seizure laws. An example of this vulnerability is clearly illustrated in a recent case handled by NAALAS. In this matter, an Aboriginal client from the Tiwi Islands (a remote cluster of two islands approximately 100km north of Darwin) was asked by a community elder for a ride between the islands in the former's boat. The elder's age and prominence in the community prevented the client from refusing the request, despite the fact that the elder was drunk and had a can of beer with him (Aboriginal communities in the Territory are largely dry). When the police subsequently arrested the elder for bringing alcohol into a restricted area, they seized the client's boat on the grounds that it was used in the commission of the offence.

In August 2004, NAALAS represented the aforementioned client in a hearing before the Northern Territory Liquor Commission. Although NAALAS ultimately succeeded getting the client's boat returned, the hearing itself was disorganized, unstructured and inconsistent. The hearing was overseen by a committee of three members of the Liquor Commission, all of whom admitted that they had no established structure for the proceedings. Despite the fact that a format was finally agreed upon, the Committee rarely seemed to follow said format, choosing instead to haphazardly direct the parties on the fly. Furthermore, at least one member of the Committee appeared to have no understanding of the rules of administrative hearings, and, on one occasion, began cross-examining NAALAS's client in a blatantly adversarial manner. Even more shockingly, the Department of Public Prosecutions was represented at the hearing by a member of the Tiwi Islands' Police Force, who arrived in Darwin expecting to testify, not play the role of lawyer.

Despite NAALAS's eventual victory in the aforementioned matter, the character of the forfeiture proceedings serves to illustrate the sheer irrationality of the Territory's property seizure laws. Unfortunately, there appears to be no movement to repeal the laws, and the majority of the NAALAS civil team has resigned itself to hoping that, at the very least, forfeiture hearings become increasingly structured and consistent.

Rising Rates of Imprisonment

In 2003, the Northern Territory witnessed a sudden increase in the number of indigenous persons in custody. Between 2002 and 2003, the number of Aboriginal prisoners jumped from 667 to 729, resulting in the highest rate of indigenous prison receptions in over 10 years. Moreover, in 2003, the percentage of indigenous offenders in Territory prisons reached a shocking 78.3%, an increase of over 8% from the previous year, and a figure surpassing even that recorded during the height of the devastating mandatory sentencing

regime.[1] This sudden increase in Aboriginal prison receptions has been surprising, to say the least. With the abolition of mandatory sentencing in mid-2001, the Aboriginal rights community expected to see a significant drop in the number of Aboriginal persons in custody over the course of the subsequent years. Such a prediction was not unreasonable, given that mandatory gaol law had caused the Aboriginal prison population to increase by almost 40% in the years immediately following its inception. Thus, there was great concern when the percentage of Aboriginal persons in custody significantly rose in the past year.

Year	**# Indig. Pris.**	**% of Prison Pop.**
1993	422	75.6
1994	455	72.7
1995	471	72.7
1996	482	74.7
1997	606	72.4
1998	635	72.6
1999	618	77.2
2000	635	60.8
2001	717	63.6
2002	667	68.8
2003	729	78.3

TABLE 1: Indigenous Imprisonments by Year[2]

In an attempt to gain some insight into the recent increase in the number of Aboriginal prison receptions, I undertook an examination of all of NAALAS's criminal cases for the past four years. I found that NAALAS observed an increase in the number of clients receiving sentences of imprisonment similar to that reported by the Australian Bureau of Statistics. At the closing of the 2003 calendar year, NAALAS had recorded a total of 535 clients sentenced to gaol, up from a total 438 imprisonments in 2001 and 516 imprisonments in 2002.[3] In addition to this rise in gaol sentences, NAALAS also saw an overall increase in the number of files opened since 2002.

A breakdown of NAALAS files according to most serious offence showed that between 2001 and 2003 the largest proportional increases in cases resulting in gaol were in the areas of Assault Female, Breach of Bond (suspended sentence), and Breach of DVO. In 2001, NAALAS recorded 38 imprisonments for Assault Female. In 2002, this number was up to 70, an increase of approximately 84 percent. The number dropped slightly in 2003, when NAALAS recorded that 54 clients had been imprisoned for assaulting a female, but still remained significantly higher than it been pre-2002.

[1] Prisoners in Australia, Australian Bureau of Statistics, No. 4517, 2003.
[2] *Id.*
[3] Detailed data available upon request.

Charge	2000	2001	2002	2003	2004
Assault Female	16	38	70	57	15
Breach Bond	8	20	26	54	38
Breach DVO	2	14	31	38	24

TABLE 2: Offences With Highest Proportional Increase 2000-2003

This increase in assaults upon women was accompanied by a significant jump in the number of clients imprisoned for Breach of DVO. In particular, between 2002 and 2003, the total imprisonments resulting from a breached domestic violence order increased by 121 percent. This increase can reasonably be attributed to the large number of Assault Female cases in the 2002-2003 period. Since most prison sentences carry subsequent good behaviour bonds of six months to a year,[4] it is probable that the high number of breached DVOs in 2003 is a result of clients failing to comply with the good behaviour bond attached to their original 2002 or 2003 conviction for assaulting a woman. Anecdotal evidence from NAALAS solicitors also suggested that the courts made a conscious effort in 2002 to crack down on offenders charged with Breach of DVO. This may have also contributed to the rise in imprisonments associated with breached domestic violence orders.

Charge	2000	2001	2002	2003	2004
Assault (incl. Agg. Assault, Assault Police)	0	3	3	6	2
Assault Female	1	1	7	5	8
Driving Offences (incl. Unlawful Use MV)	2	1	3	5	0
Drug Offences	0	1	0	0	1
Escape Custody	0	0	1	0	3
Fail to Report/Obey Conditions	1	3	1	4	2
Possess Weapon	0	1	0	1	1
Property Offences (excl. Unlawful Use MV)	4	6	12	23	9
Threatening/Disorder Behaviour	0	0	2	2	1
Other	0	0	0	0	1
Unknown	0	3	5	8	10

TABLE 3: Breach Suspended Sentence by Most Serious Offence

Although the role of breached DVOs in the rising number of Aboriginal imprisonments was presumed by NAALAS, the contribution of other Breach of Bond offences was not. In 2003, 54 clients were sent to gaol for breach of suspended sentence, an approximately 108 percent increase from the 26 clients receiving imprisonment for the same reason in 2002. A breakdown of these breach charges according to their precipitating most serious offence indicates that the majority of suspended sentences were breached through the commission of property offences, with Unlawful Entry, Stealing, and Criminal Damage being the most prominent among these.

One possible reason for the increase in breached suspended sentences may be an accompanying rise in the number of suspended sentences handed down by the courts. According to NAALAS records, the number of clients receiving fully or partially suspended

[4]Based on manual examination of all NAALAS cases between 2001 and 2004 resulting in fully or partially suspended sentences of imprisonment.

sentences increased by approximately 12 percent between 2001 and 2002, and by another 13 percent between 2002 and 2003. This figure is supported by the Northern Territory Department of Justice's annual statistical summaries, which report a 13 percent increase in the total number of adult offenders (both indigenous and non-indigenous) on probation between 2001 and 2002,[5] and a subsequent 37 percent increase between 2002 and 2003.[6]. Since most fully or partially suspended sentences carry an operational period of six months to a year, it seems reasonable to assume that clients receiving suspended sentences in 2002 or 2003 constituted the majority of Breach Bond offences in 2003.

Type of Sentence	**2000**	**2001**	**2002**	**2003**	**2004**
Fully Suspended	NA	81	121	176	41
Partially Suspended	NA	171	161	144	35
Total	NA	252	282	320	76

TABLE 4: Suspended Sentences by Year

It was also interesting to note that the rise in the number of suspended sentencing appears to follow the abolition of mandatory sentencing in late 2001. This suggested that the increased number of suspended sentences handed down by the courts beginning in 2002 may be connected to corresponding renewed judicial discretion in sentencing property offenders.

Finally, it was difficult to judge from the evidence collected here whether the rising trend in the number of Aboriginal imprisonments resulting from breached DVOs and breached suspended sentences would continue through the 2004 calendar year. NAALAS records to this point suggested that the numbers are, at the very least, on track to be the same as last year. That said, however, anecdotal evidence from both NAALAS solicitors and the Northern Territory Office of Crime Prevention suggested that the number of Aboriginal clients receiving gaol sentences has slowed and may ultimately plateau by the year's end.

[5]Northern Territory Department of Justice Statistical Summary 2001-2002. Accessed online 16 July 2004 at http://www.nt.gov.au/justice/graphpages/depart/coporate.shtml, pp. 17.

[6]Northern Territory Department of Justice Statistical Summary 2002-2003. Accessed online 16 July 2004 at http://www.nt.gov.au/justice/graphpages/depart/coporate.shtml, pp. 29.