Is it time for Deferred Prosecution Agreements in the NT?

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Every cohort of law students at Charles Darwin University (CDU) have needed to consider the intersections between customary law and 'whitefella' law. Whilst efforts are made to hold summary jurisdiction courts in remote communities and better utilise interpreter services, courts are still very white and Indigenous people are still locked up in alarming numbers. The situation is at crisis point as the Territory has to cope with a rising prison population and disaffected and uneducated Indigenous youth. Most criminal matters involving Aboriginal people do not include consideration of traditional Aboriginal law, even if that law may be of relevance. There are a number of barriers currently in place that work against the possible inclusion of relevant Aboriginal law. Some of those barriers are legal, more relate to the cultural practices of whitefella lawyers. Nasty types of payback and underage sex are not all there is to the historically significant Aboriginal legal systems. The NT is failing to be culturally sophisticated as complex customary law systems are largely ignored and the consequence is an appalling sense of genocide in relation to Aboriginal communities. It seems to us that it is time for an alternative solution and oddly, one possible cure may be by way of a system developed to cope with corporate greed known as Deferred Prosecution Agreements (DPAs).

DPAs were introduced in Schedule 17 of the *Crime and Courts Act 2013* in England and Wales after sustained pressure from the US to deal with corporate fraud in a cheaper and more efficient way. The Serious Fraud Office outlines the procedure as follows:

> Under a DPA a prosecutor charges a company with a criminal offence but proceedings are automatically suspended. The Company agrees to a number of conditions, such as paying a financial penalty, paying compensation and cooperating with future prosecutions of individuals. If the company does not honour the conditions, the prosecution may resume. DPAs can be used for fraud, bribery and other economic crime. They apply to organisations, not individuals. A DPA could be appropriate where the public interest is not best served by mounting a prosecution. Entering into a DPA will be a transparent public event and the process will be supervised by a judge[1].

In the foreword to the consultation in 2013, signed off by then Solicitor General Edward Garnier QC and Justice Minister Crispin Blunt, it was recognised that "[c]orporate economic crime causes serious harm to its direct victims and grave damage to [the] economy. In 2012, the National Fraud Authority estimated that fraud committed by all types of offenders costs the UK £73 billion per year."[2] It was also conceded that previous attempts to prosecute economic crime have "only been intermittently successful." Originally designed to tackle youth crime, the system of deferring a prosecution enables an accused corporation to confess and avoid a criminal record and is intended to improve corporate culture. The system has enormous reach. In February this year, the US Securities and Exchange Commission (SEC) charged "a former officer at a Tampa, Fla.-based [Florida-based] engineering and construction firm with violating the *Foreign Corrupt Practices Act* (FCPA) by offering and authorising bribes and employment to foreign officials to secure Qatari government contracts."[3] At the same time, the SEC also announced that the complaint would be the subject of a DPA, deferring the charges for a period of two years and requiring the company to pay $3.4 million in financial remedies as part of the agreement. It was said that this "reflects the company's significant cooperation with the SEC investigation." Essentially an SEC investigation uncovered an offer "to funnel funds to a local company owned and controlled by a foreign official in order to secure two multi-million Qatari government contracts." Bribes were disguised as 'agency fees' and employment was offered in return for assistance. The scheme was not exposed at an early stage but once discovered, the company self-reported. The global success of this agreement was due to negotiation, agreement and some active measures.

The legislative introduction of DPAs in England and Wales comes with a statutory code of practice which requires prosecutors to have regard to the Code when negotiating DPAs, applying to the court for the approval and overseeing DPAs variation, breach, termination and completion.[4] One could debate for a very long time whether it is appropriate to allow corporate greed to escape prosecution and how such agreements will work transnationally but such a debate would have less force when one is considering the seemingly endless incarceration of vulnerable people in the NT.

Of course, with the increasing development of northern Australia and transnational business engagement, it may only be a matter of time before someone considers a commercially orientated DPA to be a good idea in the NT. However, in the meantime, it may have much more utility in its original form by being aimed at youth crime or crime by vulnerable adults rather than as an economic tool to avoid detailed economic investigation. It is the realm of Indigenous crime that we suggest the DPA may be capable of having the most positive impact. News in July 2015 that "first time low level criminal offenders will have their prosecutions dropped if they meet the terms of a four-month agreement under a West Australian trial programme … to tackle Aboriginal over-representation in the justice system,"[5] is good but not good enough. What the US and UK models demonstrate is that DPAs can be used for more serious crime and repeat offenders. It all depends on what can be negotiated, agreed, provided and achieved.

The concepts of negotiation and agreement are not altogether new to criminal justice but here the agreement can lead to active engagement by an alleged offender.

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There need not be punitive economic measures but agreed action could be taken to engage in services or treatment or other restorative processes. Judicial oversight of such an agreement can also ensure that such services are not only attended but available and effective. It is a two-way process and much cheaper than imprisonment.

Importantly as a DPA is a discretionary tool in relation to alleged criminal conduct, it enables the prosecutor to invite negotiation and to agree terms as an alternative to prosecution. Under the Statutory Code in England and Wales, the evidential test for a prosecution can be applied in the usual way but also in cases where "there is at least a reasonable suspicion based upon some admissible evidence (here that the child or vulnerable adult) has committed the offence", and "there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test." At the public interest stage prosecutors can consider if the "public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA."

In the NT imprisonment and detention rates are inhumanly high. Men, women and children (mostly Indigenous) are being locked up at an alarming rate and largely for short periods of time giving no opportunity for intervention or rehabilitation. The Northern Territory Department of Correctional Services Annual Statistics 2013–14[6] set out the depressing figures as follows:

- The rate of imprisonment of adults in the Northern Territory for 2013–14 is estimated to be 847 per 100 000 adults, which continues to be more than four times higher than Australia as a whole. On 30 June 2014, sentenced prisoners represented 72% of those in custody. Of these, 38% had a sentence of less than 12 months.
- The 2013–14 estimated rate of imprisonment of Indigenous adults in the Northern Territory was 2880 persons per 100 000 Indigenous adults, which is 34% more than the national average. The estimated 2013–14 Northern Territory non-Indigenous rate of imprisonment was 155 per 100 000 non-Indigenous adults, compared with the national rate of 135 per 100 000.
- The average age of distinct prisoners received into custody during 2013–14 was 33 years.
- The estimated Northern Territory female imprisonment rate for 2013–14 was a staggering 133 per 100 000 adult females, an increase of 20% from the previous year. The estimated Australian rate for the same period was 28 per 100 000 adult females.
- Most significant has been the sharp increase in the annual daily average number of detainees held in youth detention centres. The estimated detention rate for the Northern Territory was 178 per 100 000 youths aged between 10 and 17 years. There were 468 receptions into youth detention centres in the Northern Territory in 2013–14, which involved 249 distinct youths. Most youths are un-sentenced at the time of reception into a detention centre.
- During 2013–14, 429 (92%) of the 468 youth receptions involved Indigenous detainees. Of the 100 sentenced youth receptions 96 (96%) were Indigenous.
- The most common offences for youths received into detention during 2013–14 were 'Acts intended to cause injury' (38% of all receptions) and 'Unlawful entry with intent/burglary, break and enter' (31% of all receptions). There was a 16% increase in the number of youths received into detention for 'Acts intended to cause injury' (from 153 offences in 2012–13 to 177 offences in 2013–14).
- Of the 249 distinct detainees who commenced at least one episode in a youth detention centre during 2013–14, a breathtaking 32% were aged less than 15 years.
- Most of the detainees received in to a youth detention centre during 2013–14 were males. Only 14% of the receptions were for female detainees, which was 12% more than the previous year's figure.

Notwithstanding the extremely high incarceration rates in 2013–14, offending remained high. Offence data extracted from the NT Police PROMIS system on 1 June 2015 is as follows:

Offence statistics

CRIME	1 MAY 2013 – 30 APRIL 2014	1 MAY 2014 – 30 APRIL 2015	% CHANGE
Assault	7 468	6 993	-6.4
Domestic violence related assault	4 567	4 138	-9.4
Alcohol related assault	4 532	3 848	-15.1
Sexual assault	388	377	-2.8
House break-ins	1 509	1 855	22.9
Commercial break-ins	1 589	1 619	1.9
Motor vehicle theft	1 995	2 469	23.8
Property damage	6 164	6 527	5.9

CRIME AGAINST	1 MAY 2013 – 30 APRIL 2014	1 MAY 2014 – 30 APRIL 2015	% CHANGE
Crime against the person	8 578	8 135	-5.2
Crime against property	17 677	19 825	12.2

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Rates of offending per 100 000 population

Arguments have been made for a restorative approach similar to the recent approaches in New Zealand[7] and in the NT, restorative justice can already be used to divert offenders away from court or by courts as a sentencing outcome.[8] In particular it is recognised that diverted youths will be significantly less likely to reoffend than those who were sent to court.[9] For those who did ultimately reoffend, the time taken to reoffend was longer for diverted youths than non-diverted youths.[10] Youth justice processes can allow for the involvement of victims, family members and crucially, community Elders but do not apply to adults and have no formality. A recent project at CDU School of Law identified the influence of powerful women within communities who can control issues such as sureties and places for offenders to reside. Such research can identify how communities can be involved in the justice system but perhaps more importantly, how the NT as a whole can avoid mass incarceration and employment limiting criminal histories. The Mutual Respect Agreement between the Yugul Mangi Elders of Ngukurr and police provides clear and culturally appropriate community policing guidelines and could be a template for a DPA procedure. Other ongoing collaborations with the Burnawarra Elders dispute resolution and justice group in Maningrida have enabled police to be clearly informed of local restorative and diversion options. However, these solutions are ad hoc, not funded or underfunded, and rarely utilised by police despite their high potential for reducing crime and imprisonment rates.

Importantly, a DPA could be easily formalised within the existing criminal justice process and crucially, unlike a community order or some other restorative process, the DPA allows terms by agreement and brings the benefit of judicial scrutiny through monitoring by a court. The element of agreement between parties, as opposed to an order, is consistent with notions of proper process and justice in traditional Aboriginal jurisprudence. It allows for parameters and scrutiny with the independent oversight of a judge.

It is here that the concept of integrating whitefella law and customary law could also be effective. For example in the Ngarra legal system of Arnhem Land, the settlement of criminal matters, including any punishment, is by negotiation and agreement.[11] The overriding preoccupation guiding dispute resolution in Ngarra is to re-establish a state of peace in the community.[12] In Ngarra "there need be no attempt to satisfy an outraged principle—only a concern with peacemaking, restoring the status quo, getting back the social balance which has been disturbed by intolerable behaviour."[13] In addition to achieving peace, Ngarra aims to educate Aboriginal people about Ngarra law.[14] Therefore, a DPA that includes a Ngarra element, has real potential to result in community peace and increased awareness of expected norms of conduct under both Ngarra and NT law.

This condition of community peace, known as magaya in the Yolngu language, we suggest must become a goal of NT criminal legal processes if a full sense of justice is to be achieved in Aboriginal communities. Arnhem Land customary law leader Gaymarani George Pascoe writes that magaya is "a state of people living in peace with each other and their environment."[15] Magaya is considered as foundational to the Yolngu legal and governmental system.[16] DPAs can enable magaya to be accomplished whereas traditional court orders cannot, simply due to the lack of agreement in the latter.

Aboriginal legal systems are able to collaborate with the NT legal system in relation to DPAs because in both the traditional context[17] and the post-colonial context[18], the Aboriginal systems are pluralistic in outlook to other normative systems. Renowned anthropologist Professor Berndt has termed the syncretic process allowed by this relative quality of Aboriginal law as "a rapprochement between the alien and the Indigenous: the one is in the process of being adapted to the other."[19]

It follows that the concept of DPAs has real potential in the NT, not only in relation to corporate greed and transparency in international agreements at a commercial level, but also on the societal front. In particular, if short sentences can be avoided and effective agreements achieved then it may be that the NT can demonstrate an innovative way to achieve a more peaceful future.

We hope this suggestion will meet with a collaborative response and invite interested parties to get in touch through CDU's pilot innocence project by emailing felicity.gerry@cdu.edu.au

1 Deferred Prosecution Agreements: Code of Practice and Consultation Response accompanying press release 14 February 2014 (last accessed 20 July 2015) < http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements-code-of-practice-and-consultation-response.aspx>

2 Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements. Consultation Paper CP9/2012 (last accessed 20 July 2015) <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf>

3 SEC Charges Former Executive at Tampa-Based Engineering Firm with FCPA Violations. U.S. Securities and Exchange Commission press release 22nd January 2015 (last accessed 20th July 2015) http://www.sec.gov/news/pressrelease/2015-13.html

4 *Deferred Prosecution Agreements Code of Practice for Crime and Courts Act 2013* undated. Produced by the UK Crown Prosecution Service and Serious Fraud Office (last accessed 20 July 2015) <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>

5 The Australian 20 July 2015, p.2

6 Northern Territory Department of Correctional Services Annual Statistics 2013-2014 Northern Territory Government (last accessed 20 July 2015) http://www.justice.nt.gov.au/justice/policycoord/researchstats/documents/2013-14%20NTCS%20Annual%20Statistics.pdf

7 Defining restorative justice. Last modified 24 April 2015 Australian Institute of Criminology (last accessed 20 July 2015) <http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp127/04_defining.html>

8 Restorative Justice in Australia Last modified 24 April 2015 Australian Institute of Criminology (last accessed 20 July 2015) http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp127/05_restorative.html

9 Ibid.

10 Ibid.

11 Nancy Williams, Two Laws: managing disputes in a contemporary Aboriginal community (1987) 85; George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 Northern Territory Law Journal 283, 285.

12 Gaymarani, above n 11, 286.

13 W Clifford, An Approach to Aboriginal Criminology (1982) 6-13, reproduced in Williams, above n 11, 95.

14 Gaymarani, above n 11, 286.

15 Ibid.

16 Aboriginal Resource and Development Services Inc, 'Information Papers on Yolngu Culture: Papers 1 to 8 (Information Paper Number 2: Magayamirr – a foundational principle of the Yolngu legal and governmental systems, Aboriginal Resource and Development Services Inc, 1993, revised 2002) 7.

17 Ronald Berndt, Djanggawul: An Aboriginal Religious Cult of North-Eastern Arnhem Land (Philosophical Library, 1953), xvii.

18 Gaymarani, above n 11, 299–300.

19 Ronald Berndt, An Adjustment Movement in Arnhem Land, Northern Territory of Australia (Cashiers de L'Homme, Mouton, 1962) 14.