
MISSED OPPORTUNITIES FOR CULTURALLY APPROPRIATE IMPRISONMENT OF APY OFFENDERS: THE CROSS BORDER JUSTICE ACT 2009 (SA)

by Peter Whellum

INTRODUCTION

Indigenous people make up only three per cent of Australia's population, but a massive 30 per cent of Australia's prison population.¹ The imprisonment of traditionally-oriented Aboriginal offenders, such as those from the Anangu Pitjantjatjara Yankunytjatjara ('APY') Lands, in mainstream prisons has been problematic for decades. In fact, in South Australia, it has been a problem since colonisation in 1836. Despite the provisions of the *Cross Border Justices Acts* in SA, WA and the NT, which allow for prisoners from one region to be imprisoned in an adjoining region, Aboriginal prisoners from the APY Lands are still being transported up to 1500 kilometres south to the Port Augusta Prison, far from their country and families, in conflict with recommendations of the Royal Commission into Aboriginal Deaths in Custody and the findings of a Coroner's Inquest into the deaths of four petrol sniffers. This article discusses the missed opportunities for the imprisonment of APY offenders at the now closed Warburton Work Camp in Western Australia.

BACKGROUND

Coroner Wayne Chivell's 2005 Inquest into the deaths of four petrol sniffers from the APY Lands recommended:

The Premier, in consultation with the Minister for Correctional Services, the Aboriginal Lands Task Force and the Central Australian Cross Border Reference Group, should consider as a matter of urgency how the development of a culturally appropriate correctional facility, on or near the Anangu Pitjantjatjara Lands, or as part of a tri-state development at some other reasonably proximate location, might be accelerated.²

The Cross Border Reference Group referred to by Coroner Chivell was formed in 2002 by the SA, WA and NT Governments for the purpose of identifying avenues of possible inter-jurisdictional cooperation within the tri-state region known as the Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara ('NPY') Lands.³ This area includes the SA APY Lands and contiguous regions in south-western NT and central-eastern WA. Aboriginal people

(Anangu) of this region are part of the western desert language group and share familial and cultural connections across this vast area of over 450 000 square kilometres.⁴

In 2009, as a direct result of the subsequently formed Cross Border Justice Project, the *Cross Border Justice Act 2009 (SA)* ('the Act') received Royal assent. Reciprocal legislation was also passed in WA and the NT, with the shared objectives of each being to facilitate the administration of justice in the cross-border, NPY regions.⁵ As commented by Dr Judy Putt et al:

Key 'drivers' for the Scheme were described as the need to reduce long-distance police patrolling within borders with limited capacity for prevention and early intervention, and lengthy delays in arrests and matters being dealt with. The Scheme was seen as potentially contributing to improved information-sharing between agencies and across jurisdictions, victim protection and a desire to meet the needs of criminal justice services ...⁶

Section 98(1) of the Act states:

A person who is sentenced to a term of imprisonment or period of detention in respect of an offence under the law of the State is liable to serve the sentence in a prison or detention centre in the State or another participating jurisdiction if the person has a connection with a cross-border region.

'Connection with a cross-border region' is addressed by section 20(2)(c) of the Act, which provides that:

At the time at which the offence is suspected of having been committed, or is alleged or was found to have been committed, the person ordinarily resides or resided in the region.

This means that Anangu who normally reside within the APY Lands and commit an offence for which they are sentenced to imprisonment can serve that sentence in either WA or the NT.

Currently, all Anangu prisoners and remandees from the APY Lands Magistrates Circuit Courts are sent to the Port Augusta

Prison or even further south to Adelaide. Port Augusta is anywhere from 1000 to 1500 kilometres south of various communities on the APY Lands, a long way from prisoners' country and family. Imprisonment so far from family and community has resulted in devastation for Anangu. These problems affect not only prisoners, but also family members who usually visit Port Augusta or further south to be near their loved ones serving time.

THE OPPORTUNITY

In 2010, the WA Government spent \$17 million constructing a prison work camp at Warburton, WA, some 250 kilometres west of Pipalyatjara in the APY Lands.⁷ One of the reasons for this facility, opened in August 2011, was the unfortunate death of Aboriginal Elder, Mr Ward, who died in 2008 from heatstroke in the back of a prison van while being transported to the Eastern Goldfields Prison near Boulder, nearly 1000 kilometres south of the NPY Lands.⁸ The prison work camp 'is a purpose-built facility that provides accommodation for up to 30 suitably selected, low-risk prisoners' and is 'hosted' by the Eastern Goldfields Regional Prison:

The camp also enables offenders on community-based orders from the Ngaanyatjarra region and surrounding areas to undertake skills-based reparation activities while receiving family and community support in their cultural lands. Priority is given to maintaining and strengthening relationships between offenders, their families and the communities they will eventually return to.⁹

The Warburton Work Camp was welcomed by local Ngaanyatjarra people as being the ideal prison for local offenders from the region.¹⁰ Warburton is closer to the APY Lands than the Port Augusta Prison, being only 450 kilometres west of Amata, about 550 kilometres west of Ernabella, and at worst, 700 kilometres from Indulkana. From health, welfare, social and legal perspectives, the use of the Work Camp would seem an ideal prison alternative for all NPY prisoners. Importantly, the Warburton Work Camp complies with Recommendation 168 of the 1991 Royal Commission into Aboriginal Deaths in Custody:

That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision.¹¹

OPPORTUNITIES MISSED

The implementation of any multi-state scheme involves the use of inter-jurisdictional 'Service Agreements'. In particular, the tri-state Prison Service Agreement states, inter alia, that:

If the possibility of an alleged offence identified by the court could result in a custodial sentence and could be served in another jurisdiction, then there is to be a discussion to see if an agreement can be reached. If not, serving of the whole sentence is to occur in the court location where the prisoner has been sentenced.¹²

Moreover, according to Dr Judy Putt et al:

Three prisons are named in the agreement as being in the cross-border region: Eastern Goldfields Regional Prison, Alice Springs Correctional Centre, and the Port Augusta Prison — but could more properly be said to be used to hold identified 'cross-border' prisoners.¹³

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Prisoners from the whole NPY region are required to be assessed as to their suitability for the low security Warburton Work Camp by the Eastern Goldfields Prison. However, a report by the WA Office of the Inspector of Custodial Services in 2015 was highly critical of this assessment regime:

To be placed at a work camp, a prisoner must be assessed as minimum-security and also as suitable for camp placement. However, this needs further scrutiny. The Department's modified assessment and classification tool, introduced in 2009, increased the number of non-Aboriginal people at minimum-security but impacted adversely on the number of Aboriginal people reaching minimum-security and work camp suitability.

It may be true that there are too few people who currently qualify for work camp placement but technical 'explanations' of this sort are fundamentally unconvincing. Certainly, over time, changes will occur in the prison population but circumstances cannot have changed so much that facilities considered viable in 2009 could have become unviable by 2011. In fact, the sad reality is that the overall makeup of the prison population is depressingly constant, especially when looking at the circumstances of regional Aboriginal men.¹⁴

Since the implementation of the Cross Border Justice Scheme in 2009, the major emphasis appears to have been in the more

visible areas of multi-jurisdictional cooperation by the courts and the police in addressing issues related to offences committed in one region being dealt with in an adjoining region to where offenders have moved and subsequently arrested. Correctional service providers have also used the legislation to enforce inter-regional community sentencing initiatives. These include 'community based sentencing options such as home/community detention, community work, bail supervision, community based rehabilitation and other forms of intensive supervision.'¹⁵ The SA Department for Correctional Services has been involved in a Cross Borders Indigenous Family Violence Program ('CBIFVP') with assistance from their NT and WA counterparts.¹⁶ This successful and on-going programme, which commenced in 2007 and operating under the Cross Border Justice Scheme, is aimed at Aboriginal men, 'largely convicted of offences involving family violence in small and very remote communities.'¹⁷ Importantly though, one of the major aims of the scheme was associated with the shared use of cross-border custodial facilities: 'As there were not custodial facilities in the region, and given the distance to Port Augusta or Kalgoorlie [Boulder] facilities, it was recommended that the use of the Alice Springs Correctional Centre by SA and WA prisoners be piloted.'¹⁸ However, by 2013, there has been no 'trial to place low security prisoners from WA and SA in the Alice Springs facility and no business case was developed for the cross-border management of low security prisoners, although a Work Camp was recently opened outside of Warburton.'¹⁹ As of 2016, nothing appears to have changed. As mentioned, because prisoner suitability for housing at the Warburton Work Camp would need to be assessed by the Eastern Goldfields Regional Prison at Boulder, it seems this Work Camp was, unfortunately, deemed unsuitable for cross border use.

Despite the Alice Springs Correctional Centre being approximately 500 kilometres north of the APY Lands, it appears this facility has also not been further considered for use by offenders sentenced by APY Circuit Courts.

Despite the Alice Springs Correctional Centre being approximately 500 kilometres north of the APY Lands, it appears this facility has also not been further considered for use by offenders sentenced by APY Circuit Courts. Although Alice Springs is not considered as being 'in country' by APY Anangu, and despite social issues associated with larger regional centres, there are

more Indigenous-related welfare and support services available compared with Port Augusta, twice the distance away. The reasons why the prison facilities at Warburton or Alice Springs have not been seriously considered have been difficult to officially ascertain but off-the-record discussions with frontline staff from various agencies indicate ambivalence and a lack of support by senior officials in accommodating prisoners from other states. More on point though, it would appear the Alice Springs Correctional Centre is at or over capacity.²⁰ South Australian prisons are in the same position.²¹

THE RUB

Due to the high cost of maintaining prisoners and the low numbers of prisoners housed at the Warburton Work Camp, the facility was closed in November 2015 after a life of just over four years.²² There is no doubt Warburton has been expensive to operate, with a daily cost per prisoner of \$461 in 2011-12, caused by low prisoner numbers — a daily average of only eight. However, it was estimated that had the facility been operating at full capacity for that period, 'the daily cost per prisoner would have been \$152 ... well below the average operational cost of all WA prisons [of] \$171.'²³ Despite this, it is believed the WA Government is currently examining several alternative uses for the facility, including retention for its original purpose.

Notwithstanding the recommendations of a 25 year-old Royal Commission, a Coroner and the broad vision of the Cross Border Justice Project itself, traditionally-oriented Anangu prisoners from the APY Lands are still being inappropriately housed at the Port Augusta Prison, an unreasonable distance from their country. With the legislative framework and physical infrastructure already in place, particularly at Warburton, the opportunity for a satisfactory solution to the removal of APY Anangu prisoners is one that should be urgently considered.

Peter Whellum is a law graduate and retired police officer with a long held interest in Indigenous legal issues, particularly those relevant to the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands in north west South Australia. He is a PhD candidate at the University of Adelaide.

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- 2 *Inquest into the deaths of Kunmanara Ward, Kunmanara Ken, Kunmanara Ryan And Kunmanara Cooper* (Unreported, Coroner's Court of South Australia, State Coroner Wayne Chivell, 2005) 101.
- 3 Judy Putt et al, 'Evaluation of the Cross-border Justice Scheme: Final report' (Report, University of Tasmania, 28 August 2013) 38.
- 4 Ibid 37.

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- 5 *Cross Border Justice Act 2008* (WA); *Cross Border Justice Act 2009* (NT).
- 6 Putt et al, above n 3, 38.
- 7 Government of Western Australia, 'Builder appointed for new work camp at Warburton' (Media Release, 15 September 2010) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2010/09/Builder-appointed-for-new-work-camp-at-Warburton.aspx>>.
- 8 Office of the Inspector of Custodial Services, Government of Western Australia, *Report of an Announced Inspection of Work Camps in Western Australia* (2015); see also Kristyn March and Rebecca Brewin, 'Warburton Work Camp Underutilised while Lands Prisoners are sent away: Elder' *ABC Goldfields* (online), 3 July 2014 <<http://www.abc.net.au/local/stories/2014/07/02/4037934.htm>>.
- 9 Department of Corrective Services (WA), *Warburton Work Camp* <<http://www.correctiveservices.wa.gov.au/prisons/work-camps/warburton.aspx>> (emphasis added).
- 10 *Ibid.*
- 11 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5.
- 12 Putt et al, above n 3, 220.
- 13 *Ibid.* 220.
- 14 Government of Western Australia, above n 8, 7.
- 15 Putt et al, above n 3, 41.
- 16 Mathew Willis and Sarah Holcombe, 'Evaluation of the Cross Borders Indigenous Family Violence Program' (Consultancy Report, Australian Institute of Criminology, November 2014) 4.
- 17 *Ibid.* 35-36.
- 18 Putt et al, above n 3, 41.
- 19 *Ibid.* 42.
- 20 Craig Dunlop, 'Claims Holtze Prison is filled to capacity', *NT News* (online), 9 August 2016 <<http://www.ntnews.com.au/news/northern-territory/claims-holtze-prison-is-filled-to-capacity/news-story/afc141f960e119e165991eb7222a1896?nk=39bd6b80e46612ac093b16124f3f558c-1474601944>>.
- 21 Staff Reporter, 'Prisoners to exceed beds', *The Advertiser* (Adelaide SA), 22 September 2016, 4; see also Angelique Donnellan, 'SA Budget 2016: Overcrowded prisons to get \$56.1m for new beds', *ABC News* (online), 6 July 2016 <<http://www.abc.net.au/news/2016-07-06/sa-budget-2016-prison-beds-boosted/7573962>>; see also Steve Rice, 'New jail to alleviate state's overcrowded prisons will not be considered for at least a year', *The Advertiser* (online), 5 March 2016 <<http://www.adelaidenow.com.au/news/south-australia/new-jail-to-alleviate-states-overcrowded-prisons-will-not-be-considered-for-at-least-a-year/news-story/cf6ebcfb26ffdaeba9dffcc2a9f7bfad>>.
- 22 Phoebe Wearne, '\$17 million remote work camp mothballed', *The West Australian* (online), 23 December 2015 <<https://au.news.yahoo.com/thewest/wa/a/30429038/17-million-remote-work-camp-mothballed-at-warburton/#page1>>.
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Snake 1
Kamahi Djordon-King

650mm x 350mm

