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INDIGENOUS AUSTRALIANS AND THE CRIMINAL JUSTICE SYSTEM

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About the author

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Executive summary

This paper provides an overview of national statistics pertaining to the high level of incarceration of Indigenous Australians and the socioeconomic background to that phenomenon. The paper goes on to consider how to address this issues by applying the traditional criminal justice principles of equal justice, personal responsibility, and fair punishment.

National averages are useful for identifying broad trends. However, these trends are not consistent across jurisdictions and communities and the below should be read with that in mind.

The incarceration of Indigenous Australians

Government data shows that when compared to the non-Indigenous, Indigenous Australians are:

- Imprisoned at more than 12 times the rate
- More likely to serve short sentences of imprisonment
- More likely to be imprisoned or charged with assault or another violent offence
- When imprisoned, more likely to have been imprisoned previously

These statistics emerge from within a context of socioeconomic disadvantage, with Indigenous Australians being:

- Less likely to finish school
- Subject to greater instability, abuse, and violence at home
- More likely to exhibit risky drinking habits
- More likely to be unemployed and to have a low income

Additionally, the demographics of the Indigenous population exacerbate some of these trends, with the Indigenous population being:

- Younger on average than the rest of the Australian population
- Much more likely to live in remote and very remote areas, often because of cultural and spiritual commitments and often with first languages other than English.

All of these factors make alternatives to incarceration, like home detention, work orders, and rehabilitation orders more difficult for government to deliver to Indigenous Australians than to the non-Indigenous.

Applying criminal justice first principles to the incarceration of Indigenous Australians

The criminal law in Australia is founded on certain principles that cannot be compromised without calling into question the legitimacy of the system itself. Among these are:

- The criminal law's authority must be universal. All Australians should know what is permitted and what is prohibited, and should be able to rely on the law constraining everyone in the same ways.
- The criminal law is inherently normative: it is connected to a particular idea of justice and the good. This can be seen in the concept of corrections, which implies that there is a correct way to behave and that society can permissibly coerce compliance with that standard.
- Protecting the universality and normativity of the law depends on equal justice, which is defined as being treated formally the same by the sovereign and the institutions of state.

Criminal justice reform must be consistent with these principles. In practice this means:

- Community safety is the highest priority. The criminal law serves to vindicate individual rights and society's interest in seeing those rights protected.
- Personal responsibility: our criminal justice system is predicated on the autonomy of individuals. While disadvantage shapes individuals' perceptions of the incentive involved in crime, it does not obviate their responsibility for their actions.
- Punishment is integral to criminal justice. Punishments should be retributive, proportional, and consistent, and take into account all the circumstances of the offending and the harm caused to the victim and society.

Governments should do more to ensure Indigenous Australians can access our system of universal justice through:

- The provision of interpreters where required
- The establishment of residential alternatives to prison in major population centres
- Providing job skills and employment programs to prisoners
- Improving the legal literacy of Indigenous communities

Finally, the limits of the criminal justice system must be acknowledged. The socioeconomic disparities seen in many Indigenous communities cannot be solved by criminal justice reform. Over the longer-term, it is the actions of Indigenous Australians within their communities that will make the most positive impact. Government can help to facilitate this work by making sure that communities are well-policed and safe and by fostering opportunities to participate in the economy through employment.

Introduction

There is growing awareness that criminal justice in Australia is not achieving the results in terms of community safety that our citizens rightly expect.

Incarceration in Australia has grown rapidly in the past decade. From 2007 to 2016, the prison population grew by 43 percent, and this year will exceed 40,000 people. The adult incarceration rate has risen 23 percent to a record high of 208 per 100,000 adults. Expenditure on prisons is more than \$3.8 billion per year, with Australia spending more per prisoner than all but three other developed countries. But recidivism rates are high: 58 percent of prisoners have been in prison before. And many Australians report in international surveys that they don't feel safe in the suburbs at night.

It is impossible to address this issue without examining the incarceration of Indigenous Australians. More than a third of the growth in the prison population over the past decade was caused by the incarceration of Indigenous offenders. Indigenous Australians offend at a higher rate, and are imprisoned at a rate that vastly exceeds even the highest rates in the developed world. These facts take place within a context of severe disadvantage. Factors known to correlate with crime, like unemployment, low educational attainment, and exposure to crime and abuse are on average higher in Indigenous communities.

In part, this disadvantage is a product of Australia's colonial history, which has been an unchosen revolution for the inhabitants of the land and their descendants. This is true notwithstanding the tremendous wealth and prosperity modern Australia affords for most of its citizens, and Australia's status as one of the world's most stable and fair liberal democracies.

For this reason, Indigenous policy is the most sensitive topic in Australian politics. But in our meetings with governments and civil society organisations working in this area, the Institute of Public Affairs has been struck by the determination of people across the country to address this issue in a considered manner.

This paper aims to contribute to this debate by providing a perspective that, while mindful of Indigenous disadvantage, does not believe it to be determinative. This paper contends that the high level of Indigenous offending and incarceration can be addressed in a manner consistent with the traditional bases of the criminal justice system: community safety, fair punishment, and personal responsibility. It contends that to do otherwise is to diminish the agency and dignity of Indigenous Australians and perpetuate a racial separatism that is not in the long-term interests of Australians and national solidarity.

This paper is in two parts:

- Part 1 provides a statistical overview of Indigenous incarceration and the socioeconomic factors correlated with it.
- Part 2 provides an application of traditional criminal justice principles to the challenge posed by the high level of Indigenous incarceration.

Part 1: An overview of the incarceration of Indigenous Australians

Australia has a rising incarceration rate overall, with the figure for the total population now at its highest since Federation, at 208 per 100,000. But the rapid increase in the national rate has been driven by the extraordinary level of incarceration among Indigenous Australians. One third of the growth in the prison population between 2007 and 2016 was caused by the incarceration of Indigenous Australians.¹

The adult incarceration rate of Indigenous Australians is more than 12 times that of non-Indigenous Australians. Despite living in one of the world's most developed countries, Indigenous Australians are incarcerated at a rate more than two and half times that of the United States incarceration rate, which is itself a massive outlier among the rich countries of the world.²

The first part of this section provides a statistical analysis of Indigenous incarceration, including the rates of incarceration, offending, reoffending, and victimisation, along with types of offending and average sentence lengths. This analysis is not intended to be comprehensive but provides clear evidence of the scale and scope of the issue.

The second part of this section provides a statistical analysis of many social factors known to be correlated with crime. These factors are more present among Indigenous Australians.³ The aim is to place Indigenous incarceration statistics within the broader social context within which many (though of course not all) Indigenous Australians live. This context will inform the discussion in Part 2 of how Australia's traditional criminal justice principles should be applied to Indigenous Australians.

This is a national overview. While there are many trends that are consistent across Australia's states and territories, the situation in each area is unique and may depart from national trends in some respects both in terms of the data and in what contributes to those results.

Finally, this is an overview of adult prisoners only, unless otherwise noted.

1 Australian Bureau of Statistics, *Prisoners in Australia 2015 and 2016* (2016a)

2 United Nations Office on Drugs and Crime, *Statistics on crime* (uploaded 13 April 2015) [accessed 27 June 2017]

3 See the discussion in Andrew Bushnell and Daniel Wild, *The use of prisons in Australia: Reform directions*, Institute of Public Affairs 2016 pp. 19-26

1-1: Incarceration and offending

1-1-1: Prison population and incarceration rate

Key statistics

Table 1: Indigenous incarceration - key statistics 2007 and 2016

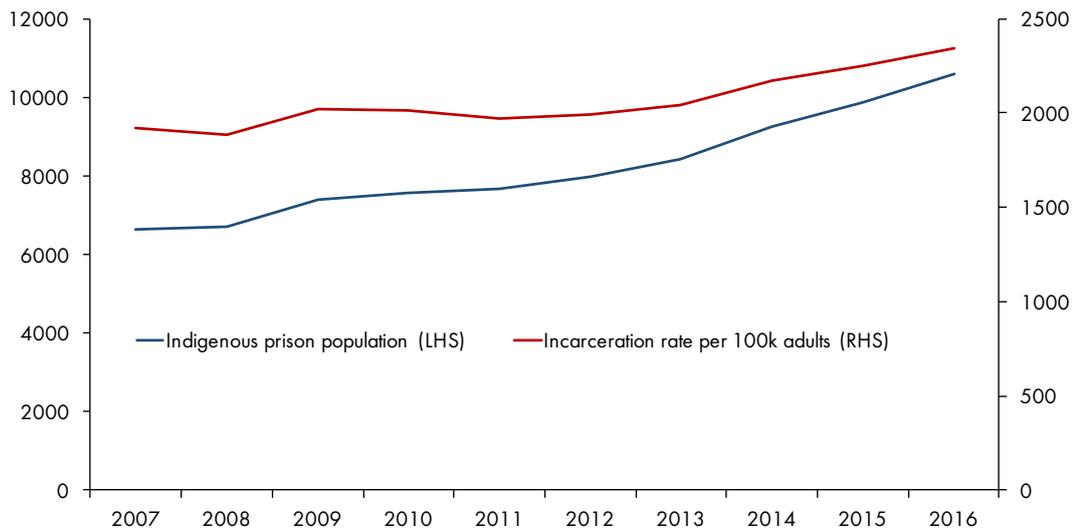
	Indigenous			Non-Indigenous			Total		
	2007	2016	% change	2007	2016	% change	2007	2016	% change
Number of prisoners	6630	10596	59.8%	20390	28216	38.4%	27224	38845	42.7%
Number sentenced	5100	7337	43.9%	15985	19297	20.7%	21128	26649	26.1%
Number unsentenced	1530	3221	110.5%	4405	8871	101.4%	6096	12111	98.7%
Percentage unsentenced	23.1%	30.4%	31.7%	21.6%	31.4%	45.5%	22.4%	31.2%	39.2%
Incarceration rate per 100k	1923.3	2345.9	22.0%	131	154.4	17.9%	169	208	23.1%
Percentage violent (total)	60	61	1.7%	49	51	4.1%	51	53.3	4.5%
Percentage nonviolent (total)	40	39	-2.5%	51	49	-3.9%	49	46.4	-5.3%
% Most serious offence was assault (total)	32.2	33.4	3.7%	14.1	17.1	21.3%	18.5	21.5	16.2%
Percentage violent (sentenced)	57.2	58.6	2.4%	47.7	50.8	6.5%	50	52.9	5.8%
Percentage nonviolent (sentenced)	42.8	41.4	-3.3%	52.3	49.2	-5.9%	50	47.1	-5.8%
% Most serious offence was assault (sentenced)	28.9	29.8	3.1%	11	13.6	23.6%	15.6	18.1	16.0%
Percentage violent (unsentenced)	68	66	-2.9%	53	51	-3.8%	56	55	-1.8%
Percentage nonviolent (unsentenced)	32	34	6.3%	47	49	4.3%	44	45	2.3%
% Most serious offence was assault (unsentenced)	43.5	41.8	-3.9%	24	24.8	3.3%	28.6	29.3	2.4%
Percentage: Prior imprisonment	74.3	76	2.3%	51.3	48.8	-4.9%	57	56.2	-1.4%
Median aggregate sentence (years)	2	2	0.0%	3.5	3.5	0.0%	3	2.3	-23.3%
Median expected time to serve (years)	1.3	1.2	-7.7%	2	2.2	10.0%	1.8	1.8	0.0%
Median time spent on remand (months)	2.2	2.4	9.1%	3.1	3.1	0.0%	2.7	2.9	7.4%
median age (all prisoners) (years)	30.5	31	1.6%	34.1	36	5.6%	33	34.3	3.9%
Percentage male	90.7	90	-0.8%	93.4	92.8	-0.6%	93	92	-1.1%
Percentage Indigenous							24.4%	27.3%	12.0%

Indigenous prison population and incarceration rate

As a proportion, Indigenous Australians are vastly more represented among the prison population than among the general population. In 2016, Indigenous Australians made up 2.8 percent of the general population, but 27.3 percent of the prison population.⁴

The level of Indigenous incarceration has been increasing in both proportion and absolute numbers for the past decade. Between 2007 and 2016, the Indigenous incarceration rate increased by 31.3 percent and the Indigenous prison population increased by 59.8 percent.

Figure 1: Indigenous prison population and incarceration rate over time

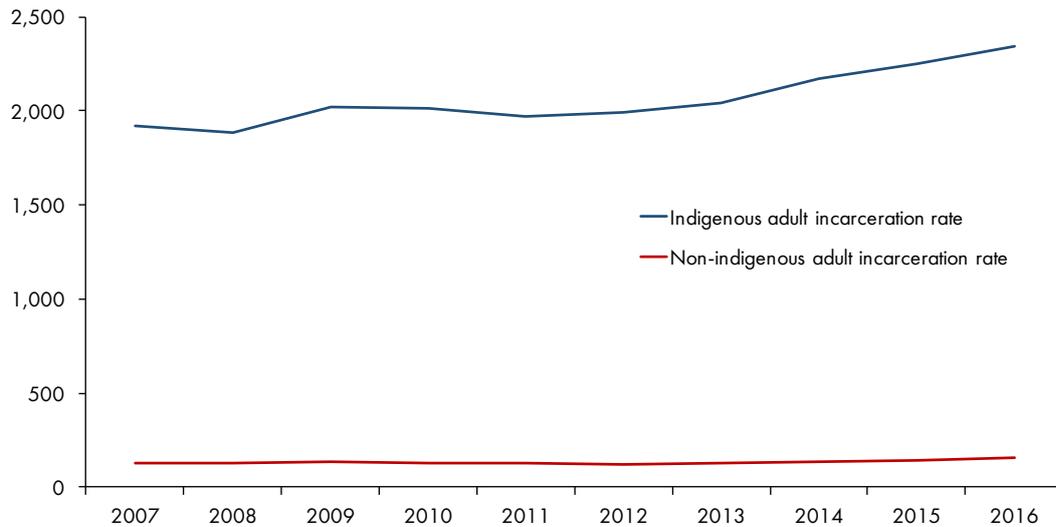


The Indigenous prison population is not only rising in absolute terms but as a proportion of the population. The incarceration rate of Indigenous Australians per 100,000 adults has risen from 1787 to 2346—an increase of 31.3 percent. This has contributed to the overall Australian adult incarceration rate rising over the same period from 169 to 208.

These numbers make plain that Indigenous Australians are vastly more likely to be incarcerated than the non-Indigenous. In 2016, Indigenous people were more than 15 times more likely to be in prison than non-Indigenous people.

⁴ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (2016b) and Australian Bureau of Statistics (2016a) *op. cit.* NB: the incarceration statistics throughout this section are from that latter source unless otherwise noted.

Figure 2: Incarceration rate over time, Indigenous and non-Indigenous Australians



As noted in section 1.2 below, Indigenous Australians are on average younger than the non-Indigenous. When the data is corrected to account for the younger age profile of the Indigenous population, the ratio of Indigenous to non-Indigenous incarceration falls slightly to 12.5.

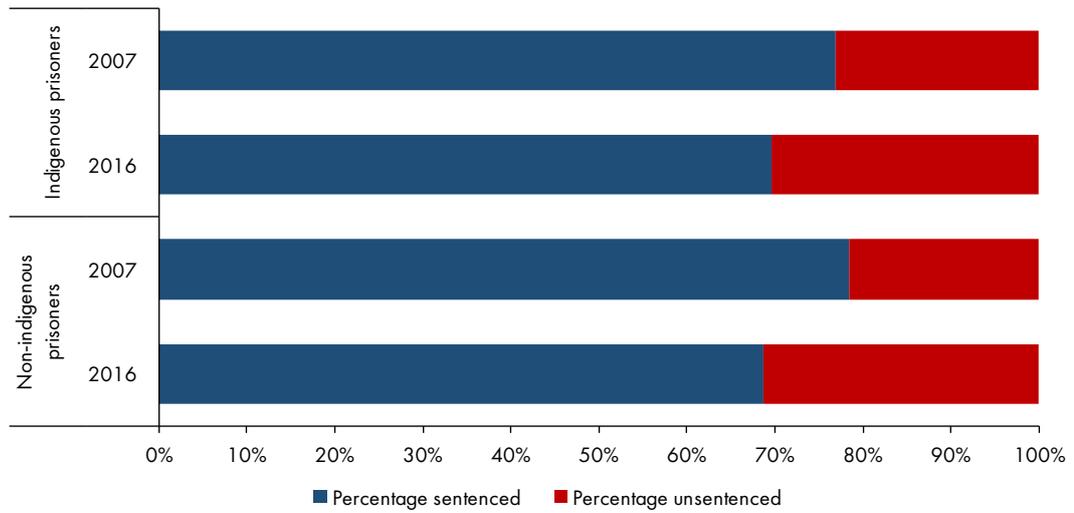
While the line in Figure 2 for non-Indigenous incarceration looks flat, this is only because of the scale used. In fact, the non-Indigenous incarceration rate rose 17.9 percent over the period, compared with a 22 percent rise among the Indigenous, indicating that Australia's growing use of incarceration affects the population as a whole.

Indigenous remandees

Across Australia, one of the main drivers of the increase in incarceration has been the rapid growth in the number of people on remand.

In 2016, there were 10,596 Indigenous Australians in prison. Of these people, 69.6 percent were under sentence and 30.4 percent were on remand awaiting trial or sentencing. In 2007, the percentage on remand was lower: 23.1 percent. These splits and the change over the ten-year period were similar for non-Indigenous Australians.

Figure 3: Growth in the remand population 2007-2016



Sentence lengths and expected time to serve

One potential cause of the prison population increasing is sentences and time served getting longer. If people are in prison for longer then there is greater overlap between their sentences and those of the newly-sentenced, meaning more people in prison at any one time.

However, for Indigenous Australians, the average sentence length has not changed much over the past decade. In 2007, the median sentence length for Indigenous prisoners was 2 years. In 2016, this figure was unchanged. The median expected time to serve for Indigenous prisoners changed from 1.3 years to 1.2 years.

As Table 1 shows, these figures were all higher for non-Indigenous Australians. This is because Indigenous Australians are more likely to receive short sentences.

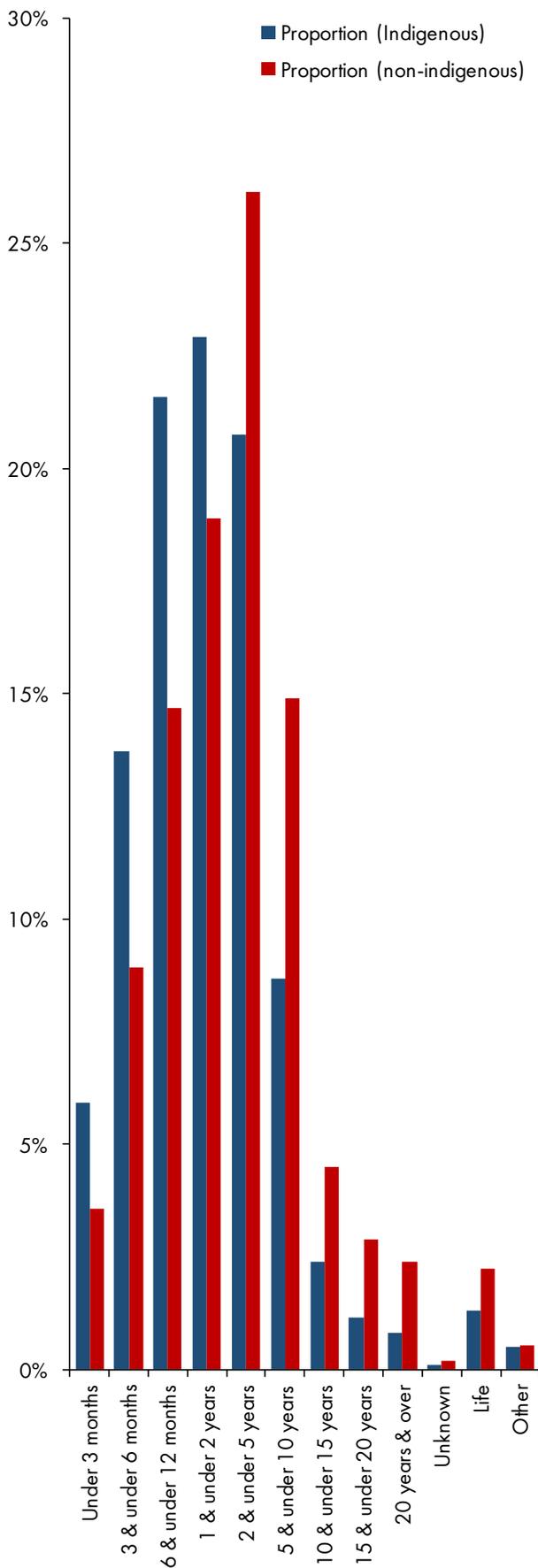


Figure 4: Proportion of prisoners by expected time to serve and Indigenous status

The difference between the distribution of the two populations on this measure is attributable to different patterns of offending. This is discussed further in section 1-1-2.

The situation is similar in regards to time spent on remand. The median time spent on remand for Indigenous prisoners increased slightly between 2007 and 2016, from 2.2 months to 2.4 months. Median time spent on remand increased across all classes of offending between 2007 and 2016 except for robbery and extortion.

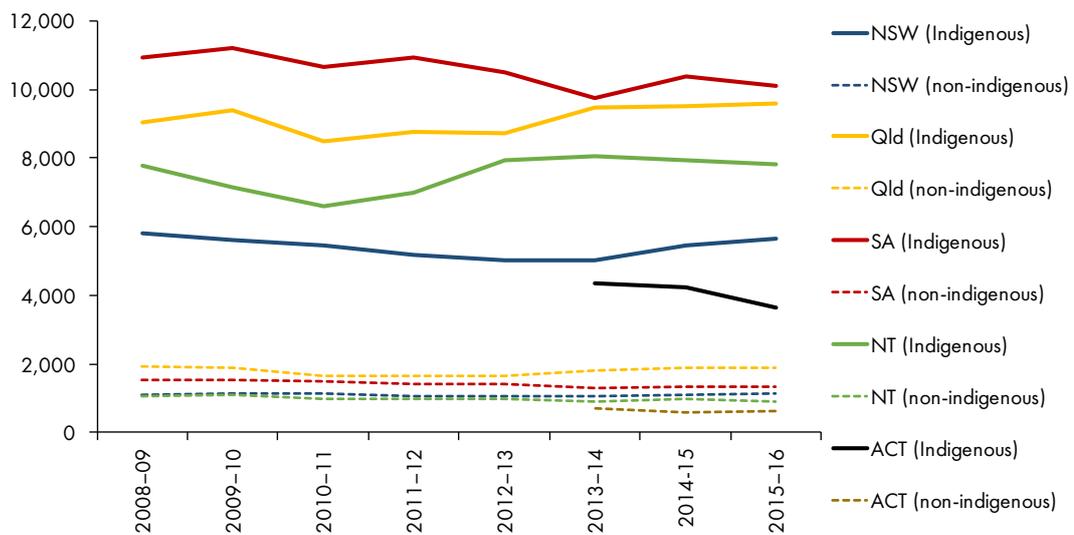
1-1-2 Types of offence and rates of offending

The level of Indigenous incarceration is inseparable from the level of offending and types of crimes committed by Indigenous offenders.

Offender rates and multiple offending

Data shows that Indigenous Australians offend at a higher rate than non-Indigenous. For states where data is available, the disparity in the number of offenders per 100,000 population aged ten years and over between Indigenous and non-Indigenous is stark and persistent.

Figure 5: Offender rates selected states and territories by Indigenous status



Indigenous offenders are also more likely to be proceeded against more than once in a year. In all states and territories for which data is available, the ABS reports a higher mean number of proceedings per Indigenous offender than per non-Indigenous offender.⁵

Table 2: Proportion of offenders by number of proceedings and Indigenous status

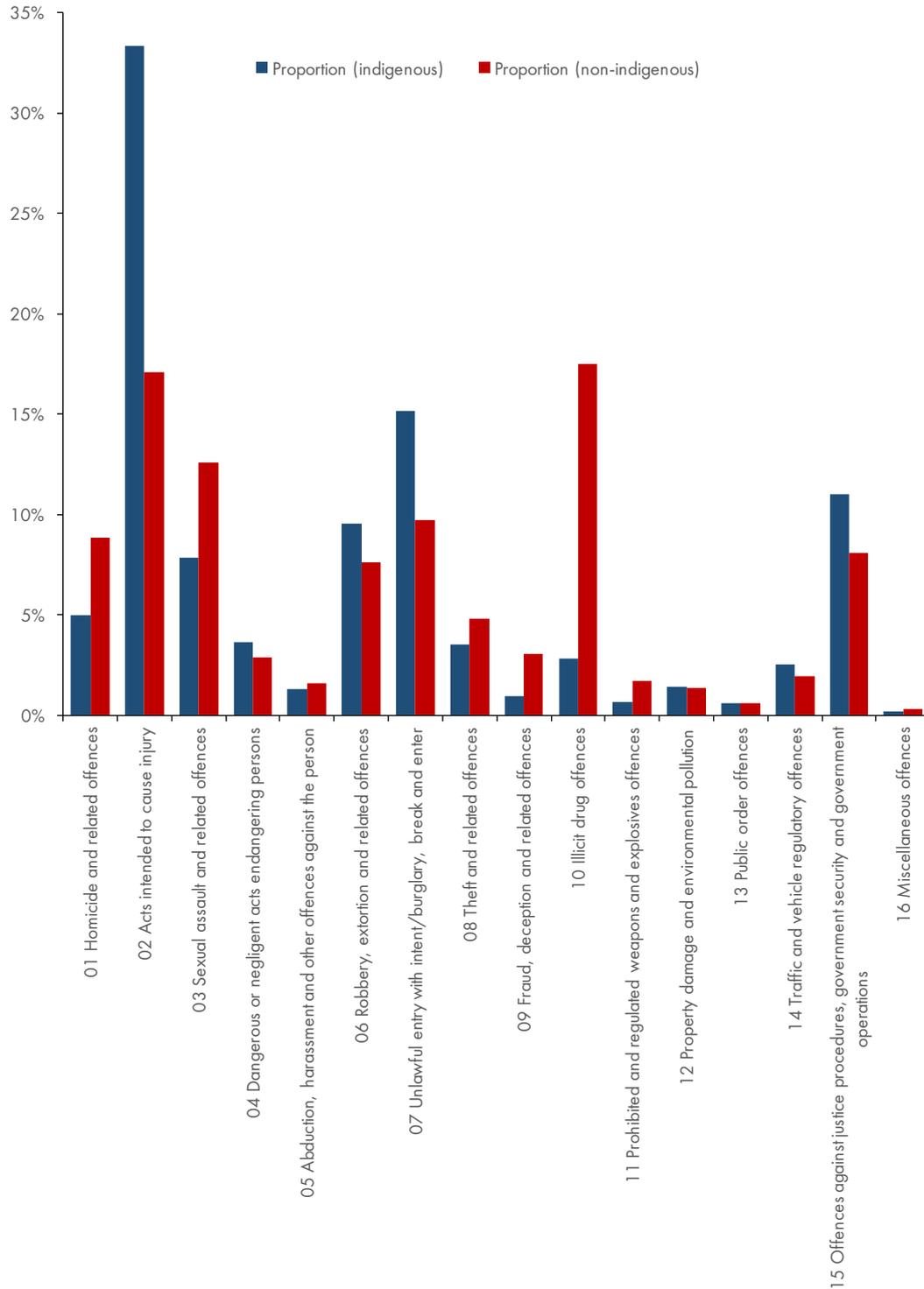
Times proceeded against	NSW		Queensland		South Australia		Northern Territory		ACT	
	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous	Indigenous	Non-Indigenous
1	51.0	71.7	49.8	66.7	58.0	73.6	55.6	75.8	68.0	83.7
2	21.2	14.6	21.4	17.2	20.0	14.7	22.0	14.1	20.6	10.7
3	11.2	5.6	10.9	7.0	10.0	5.5	9.5	5.0	5.1	3.3
4	5.7	2.8	6.5	3.7	5.0	2.9	4.6	1.9	3.3	1.4
5 or more	10.9	5.4	11.4	5.4	7.1	3.3	8.4	3.2	4.4	0.7

⁵ Australian Bureau of Statistics, *Recorded Crime - Offenders 2015-16* (2016c)

Most serious offence

Indigenous offenders are significantly more likely than non-Indigenous to have as their most serious offence acts intended to cause injury, unlawful entry with intent, and offences against justice procedure, as shown in Figure 6.

Figure 6: All prisoners (sentenced and unsentenced) most serious offence



Victimisation

This higher level of offending translates to a higher level of assault victimisation among Indigenous Australians. Indigenous Australians are also more likely to be victims of sexual assault than the non-Indigenous.⁶ Despite the higher incidence of robbery offences among Indigenous Australians, the non-Indigenous are more likely to be victims of these crimes.

Table 3: Victimisation rates—selected crimes by available state

Victimisation rate 2016

		Indigenous	Non-Indigenous
NSW	Assault	1807.8	683.0
	Sexual Assault	231.4	98.0
	Robbery	20.0	26.1
Qld	Assault	—	—
	Sexual Assault	260.8	77.0
	Robbery	15.0	22.9
SA	Assault	5128.3	858.0
	Sexual Assault	274.6	80.3
	Robbery	43.4	25.7
NT	Assault	6243.4	1057.7
	Sexual Assault	234.8	86.1
	Robbery	13.4	42.8

There is no clear nationwide trend over the available time series. Uniquely in New South Wales there has been a substantial decrease in assault victimisation, both for Indigenous and non-Indigenous, and the ratio between the two measures is lower (2.6) than in South Australia (6.0) and the Northern Territory (5.9).

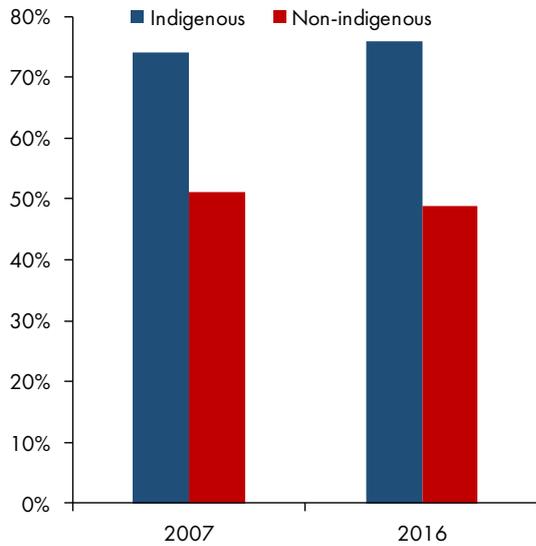
Prior imprisonment

Indigenous prisoners are more likely to have been imprisoned before than are non-Indigenous prisoners. And many studies have shown that Indigenous offenders are more likely to be recidivists.⁷

⁶ Australian Bureau of Statistics, *Recorded Crime - Victims 2016* (2016d)

⁷ Jason Payne, *Recidivism in Australia: findings and future research*, Australian Institute of Criminology 2007 pp. 90-2

Figure 7: Percentage of prisoners who have been imprisoned previously



This high number indicates that prisons are on the whole ineffective in correcting the behaviour of the Indigenous Australians who enter into them. This failure is one of the reasons often cited for why addressing the high level of Indigenous incarceration will require a change to the sorts of punishments and programs imposed upon Indigenous offenders. It is worth noting that Australian prisons are not particularly effective in correcting the behaviour of non-Indigenous prisoners either.

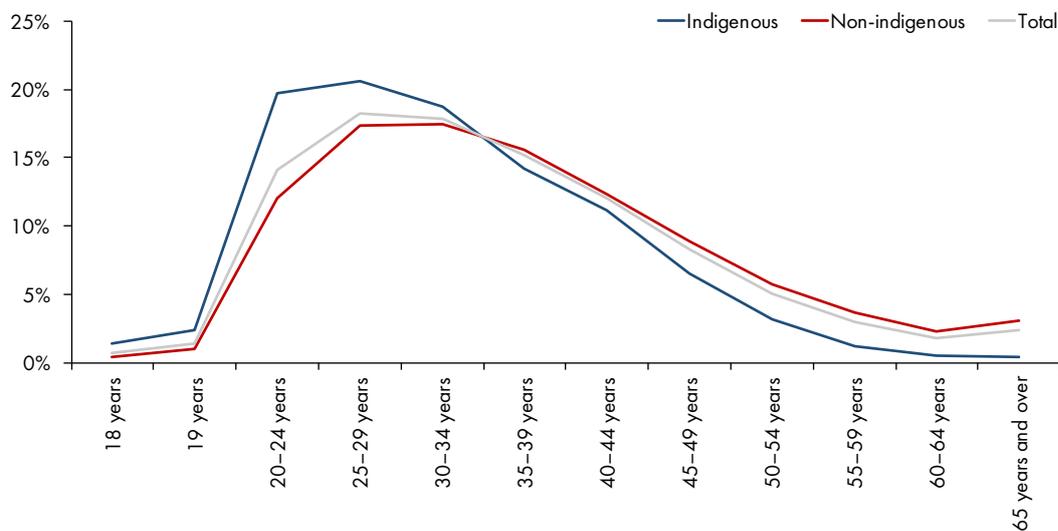
1-2: Health and welfare statistics for Indigenous Australians

The high level of imprisonment and offending seen in the previous section takes place within a context of significant social dysfunction within many Indigenous communities. This section sketches some of the indicators of this dysfunction most relevant to possible criminal justice reforms.⁸

1-2-1: Demographics

Age profile

Figure 8: Proportion of prison population by age group and Indigenous status

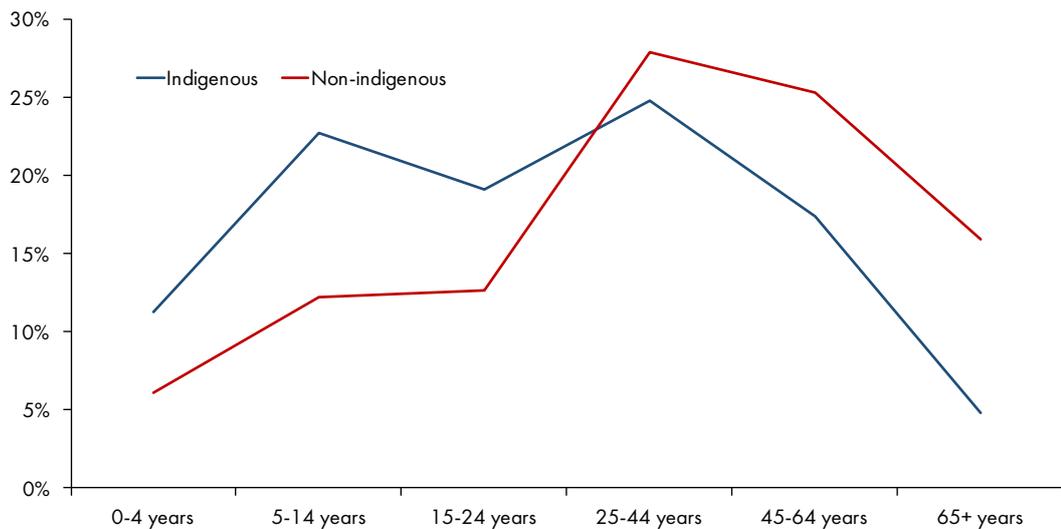


⁸ Unless otherwise noted, the data in this section is from: Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2015*

Youth is associated with criminal offending. Figure 8 shows the distribution of Australian prisoners across age ranges by Indigenous status. It shows that prisoners are more likely to be young, and this is especially true for Indigenous prisoners. Across Australia, 52 percent of prisoners are under the age of 35. This rises to 63 percent for Indigenous prisoners.

Because young people are more likely to commit crime, populations with a younger age profile will likely demonstrate more criminality. Some part of the higher level of offending and incarceration among Indigenous Australians is attributable to the younger average of this cohort.

Figure 9: Age profile by Indigenous status



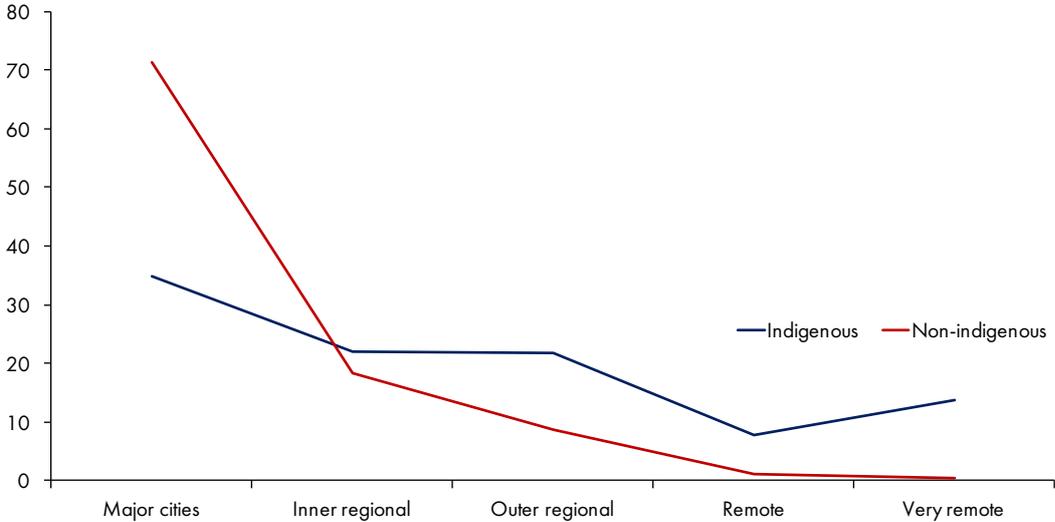
Prisoners are overwhelmingly male: 90 percent of Indigenous prisoners, and 93 percent of non-Indigenous prisoners, are male. It is crucial for public safety that young people, and in particular young men, are channelled into productive activity, reducing the incentive to commit crime.

Remoteness and culture

Indigenous Australians are more likely to live in remote and very remote areas. As shown in the previous sections, socioeconomic factors relevant to crime are more present in these communities. The presence of Indigenous Australians in these areas is often a product of cultural and familial attachments.

Indigenous Australians are more evenly spread across the nation's cities, regions, and remote areas. 34.8 percent live in major cities, less than half the rate of non-Indigenous. And 13.7 percent of Indigenous Australians live in very remote areas, compared to just 0.5 percent of non-Indigenous. Such is the difference in distribution that in very remote areas, Indigenous Australians, who are 2.8 percent of the total population of the country, are 45 percent of the population in those areas. The greatest numbers of Indigenous Australians living in remote and very remote areas are in the Northern Territory, Western Australia, Queensland, and South Australia. In the Northern Territory more than half live in very remote areas.

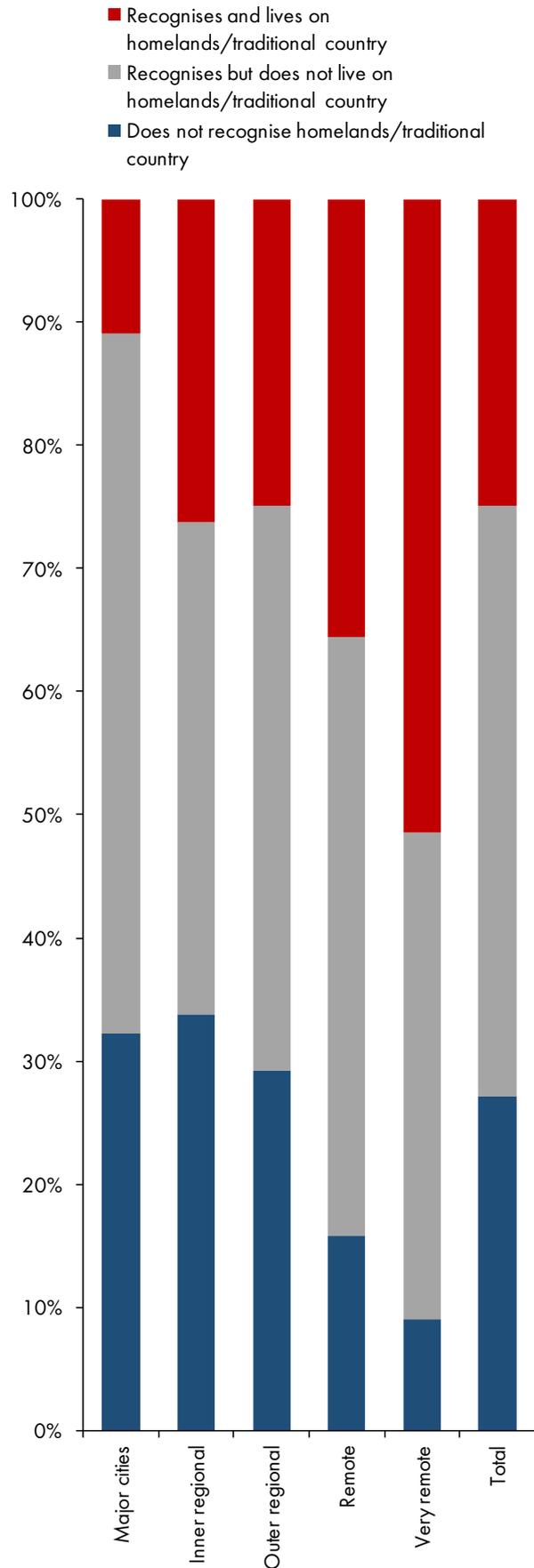
Figure 10: Proportion of population by remoteness



Across the country, 72.8 percent of Indigenous Australians report that they recognise their traditional homelands, with 24.9 percent still living on such lands. In very remote areas, these figures are 90.9 percent and 51.7 percent. The cultural significance of country, especially for those Indigenous Australians who still live there, is a complicating factor for criminal justice: incarceration separates Indigenous offenders from the practice of their culture, which some argue is counterproductive for their rehabilitation. Remoteness also makes the delivery of non-custodial punishments and rehabilitation services more difficult.

The continuation of culture includes the use of languages other than English as primary languages. Eleven percent of Indigenous Australians speak a language other than English as their main language at home. This figure is 60 percent in the Northern Territory.

Figure 11: Cultural ties

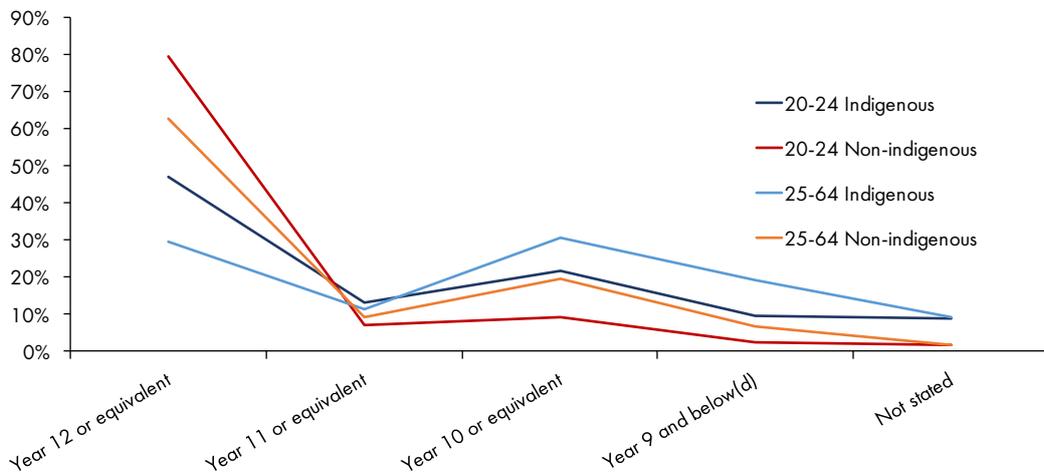


1-2-2: Socioeconomic factors

Educational attainment

Unfortunately, many Indigenous Australians are not finishing school. The reasons for this are complex, and some relevant statistics are discussed below. It is apparent that the energies of young Indigenous people are not being directed towards education and the benefits that it brings later in adulthood. However, some improvement has been made, with today's 20-24 year-old cohort more likely to have finished school than those in the 25-65 cohort, with the Year 12 retention rate rising since the turn of the century.

Figure 12: Highest year of schooling completed by Indigenous status and age cohort



While at school, Indigenous children are more likely to be developmentally vulnerable than non-Indigenous children, meaning that they score in the lowest 10 percent in one or more domains of testing, and have lower attendance rates.

Home life

Educational achievement is strongly-linked with a child's home life. Some of the strongest predictors of children's performance at school are out-of-school factors like home environment, socioeconomic status, parental involvement, and family structure.⁹ These factors are also themselves linked with offending.¹⁰

Unfortunately, Indigenous families are more likely to underperform on measurements of these factors.

Studies have shown that criminals are more likely to come from single-parent households. Indigenous families are more likely to be single parent—in 2015, the Australian Institute of Health and Welfare found that 21 percent of Indigenous households are one-parent with dependent children, compared to 6 percent of non-Indigenous households.

Indigenous households are also more likely to contain multiple families. The 2016 census showed that 5.1 percent of Indigenous households had multiple families, compared to 1.8 percent of non-Indigenous households. Relatedly, the 2011 census found that 13 percent of Indigenous households were overcrowded, compared to 3 percent of non-Indigenous households.¹¹

An ABS survey in 2014-15 found that Indigenous people are more likely to be in rental accommodation, and therefore have less stable housing arrangements, and their homes are more likely to be missing important amenities. A 2014-15 survey of Indigenous Australians found that 67 percent over the age of 15 were living in rented properties, more than double the rate (29 percent) for non-Indigenous. Twenty-eight percent of Indigenous Australians lived in properties with major structural problems, and 15 percent lived in houses that lacked at least one basic component of a healthy environment, such as a washing facilities, clothes and bedding, waste disposal, and the safe storage and preparation of food. All of these issues were more present in remote communities than in urban and regional centres.¹²

The problems in these households are related to, and compounded by, the increased likelihood of alcohol abuse and domestic violence.

According to the 2012-13 Health Survey, Indigenous Australians are more likely than non-Indigenous to abstain altogether from alcohol. But Indigenous Australians who do drink are more likely to drink in ways that pose a risk to their health in the long-term:

- 37 percent of Indigenous Australians exceeded national binge drinking guidelines, exposing themselves to higher risk of short-term harm (compared to 27 percent of non-Indigenous).¹³
- While Indigenous and non-Indigenous exceeded the long-term risky drinking guidelines at the same rate, Indigenous Australians were more likely to be in the "high risk" category (6.3 percent to 4.6 percent).¹⁴

9 Visible Learning, "Hattie Ranking: Home effects," accessed 4 September 2017 <https://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/hattie-ranking-home-effects/>

10 Bushnell and Wild 2016 *op. cit.* pp. 19-22

11 Australian Institute of Health and Welfare, *Housing circumstances of Indigenous households: Tenure and overcrowding* 2014 p. 18

12 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014-15*

13 Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey 2012-13* Table 14.3

14 Australian Bureau of Statistics (2013) *op. cit.* Table 13.3

A 2010 study found that harmful alcohol abuse was twice as prevalent among Indigenous Australians as among the non-Indigenous.¹⁵ A separate AIC study found a clear link between alcohol and violence.¹⁶

The abuse of alcohol is linked with offending generally. In a 2012 study by the Australian Institute of Criminology (AIC), 30 percent of detainees reported a link between drinking and the offences they had committed.¹⁷ A 2017 study by PriceWaterhouseCoopers put this figure at 90 percent for Indigenous offenders.¹⁸

The higher level of alcohol abuse in Indigenous communities is a factor in the higher level of offending by Indigenous Australians. More specifically, it is also a factor in the high level of family and domestic violence seen in those communities.

Indigenous males and females are both vastly more likely to be hospitalised because of family violence than non-Indigenous Australians. A 2006 AIHW survey found that Indigenous males were 22 more likely to be hospitalised for this reason, and Indigenous females 35 times more likely. A 2016 opinion piece by Curtin University academic Hannah McGlade put the female rate at 37 times that of non-Indigenous Australians, which figure rose to 86 in the Northern Territory and 95 in central Australia.¹⁹

Indigenous children are four times more likely to be subjected to abuse as non-Indigenous children.²⁰ Moreover, this is a study by the Australian Crime Commission found that much of the child abuse and domestic violence in Indigenous communities was “undisclosed and under-reported”.²¹

Exposure to family violence and being subject to abuse are linked with children offending both as juveniles and later as adults.²²

Employment and income

Indigenous Australians have a higher unemployment rate and lower earnings.

In the 2014-15 National Aboriginal and Torres Strait Islander Social Survey, it was reported that the unemployment rate for Indigenous Australians was 20.8 percent, far higher than the 5.8 percent rate for non-Indigenous. 38.9 percent of Indigenous Australians were not in the labour force, compared to 22.9 percent of non-Indigenous.²³

For Indigenous Australians, unemployment and labour force participation were worse outside of the major cities. The opposite was true for non-Indigenous Australians, reflecting that they are likely to live in remote and very remote areas because that is where they work. Indigenous Australians, by contrast, are more likely to have non-economic reasons for living in those areas, as described in Section 1-2-1 above.

15 Department of Prime Minister and Cabinet, “2.16: Risky alcohol consumption” in *Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report*

16 Anthony Morgan and Amanda McAtamney, *Key issues in alcohol-related violence*, Australian Institute of Criminology 2009

17 Jason Payne and Antonette Gaffney, *How much crime is drug or alcohol related? Self-reported attributions of police detainees*, Australian Institute of Criminology 2012

18 PWC, *Indigenous incarceration: Unlock the facts 2017* p. 65

19 Hannah McGlade, “Indigenous women subject to horrifying levels of violence”, *The Australian* June 20, 2016. McGlade was quoting a figure cited by Josephine Cashman, a member of the Prime Minister’s Indigenous Advisory Council, in an address to the United Nations.

20 Jennifer Macy, “Increase in Indigenous child abuse reports ‘tip of the iceberg’, advocate says” *ABC News* 25 July 2013

21 Helen Davidson, “Child and domestic abuse in Indigenous communities ‘chronically undisclosed’” *Guardian Australia* 30 March 2015

22 For example see James RP Ogloff et al, *Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study*, Australian Institute of Criminology 2012

23 Australian Bureau of Statistics 2014–15 *op. cit.*

Figure 13: Unemployment by location and Indigenous status

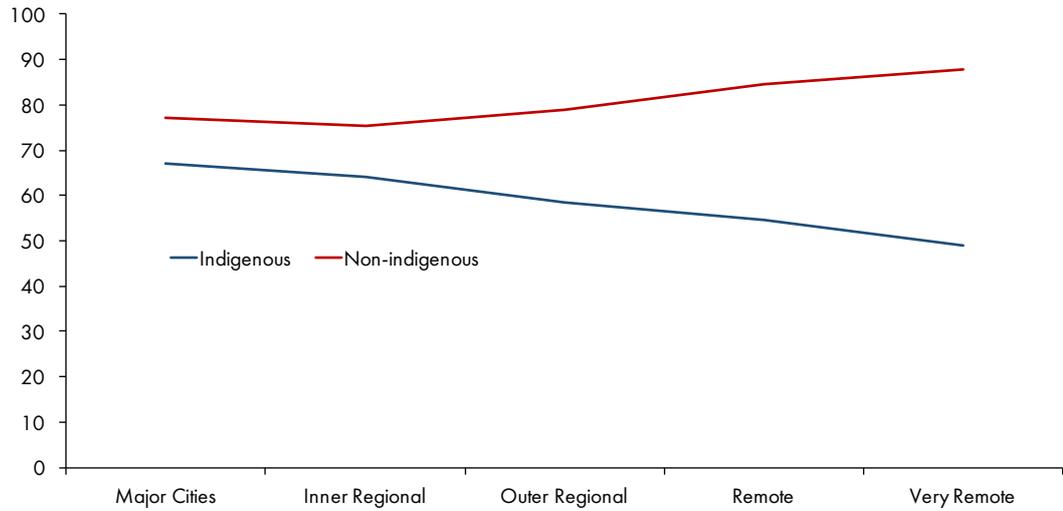
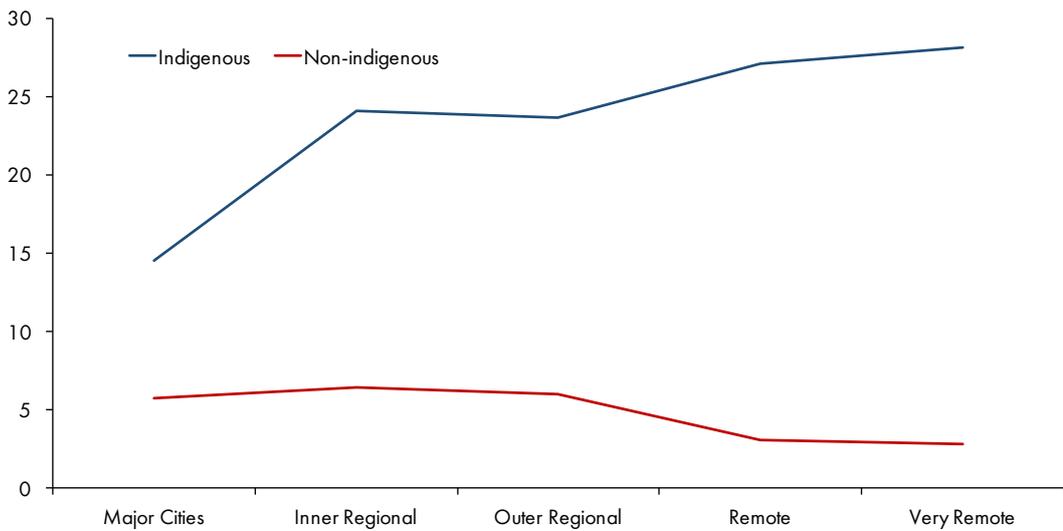


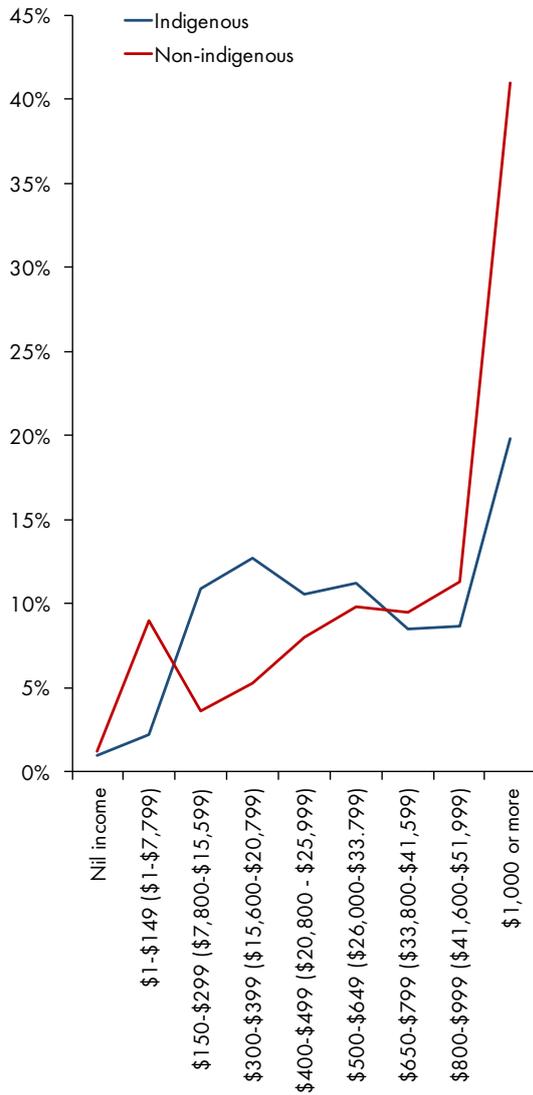
Figure 14: Labour force participation by location and Indigenous status



Unemployment contributes to lower average earnings for Indigenous Australians. Only 19.8 percent of Indigenous Australians earn more than \$1000 per week, compared to 41 percent of non-Indigenous. 26.8 percent of Indigenous Australians earn less than \$400 per week; the equivalent figure for non-Indigenous is 11 percent.²⁴

²⁴ Australian Bureau of Statistics 2016b *op. cit.* NB: figures exclude those whose incomes were only partially or not stated)

Figure 15: Weekly income by Indigenous status



Unemployment and low incomes are linked with crime. This is because they increase the marginal benefit to individuals of crime, and reduce the marginal cost—unemployed and low-income people have more to gain and less to lose by committing crime, so crime can seem a more attractive choice for them than for others.

Part 2: Applying criminal justice first principles to the incarceration of Indigenous Australians

The high levels of incarceration, offending, and socioeconomic disadvantage in Indigenous communities are related. Disadvantage is not the cause, however, of crime, and therefore it is not exculpatory. Indigenous Australians, like everyone else, are the ultimate authors of their actions—to believe anything else is to strip them of their dignity.

Instead, the relevance of the deprivation seen in Indigenous communities is that it changes the perceived costs and benefits of crime. For people who live in poverty, the marginal benefits from crime is higher, and the costs of being caught are lower. This is compounded by lower education and substance abuse, which make perceiving longer-term costs more challenging, and by cultural differences, which make anticipating the normative context of the law more difficult.

For the criminal justice system, the task is to take account of the often vastly different living circumstances of Indigenous Australians without compromising the fundamental principles of justice. Australian criminal justice is founded on personal responsibility and fair punishment. Individuals have rights, and violators of those rights must be punished in a way that fits the harm they have caused. Any departure, much less exemptions, from this basic creed will undermine the integrity of the system and fail to gain widespread support in the general community.

The purpose of this section is to outline how Australia's traditional criminal justice principles apply to Indigenous crime and punishment, with the aim of providing a framework against which proposed reforms addressing Indigenous incarceration can be assessed. It makes the case that:

- The criminal law is normative and reflects particular values. Separatism in the criminal law undermines those values, including the principle of equal justice before the law. Indigenous-only sentencing courts and programs violate this principle.
- Retribution is inherent in a system based on individual rights and personal responsibility. The goal of correcting and rehabilitating offenders should be achieved within this context. Alternative punishments, such as home detention and work orders, should be imposed on low-risk and nonviolent offenders where it is safe to do so. Government should do more to make these options more available to Indigenous offenders.
- Personal responsibility is not obviated by socioeconomic disadvantage. The proper way to account for the circumstances of a crime is through the traditional principles of individualised justice, bounded by the need for proportionality and consistency in sentencing. The circumstances of Indigenous offending should be considered in line with the same rules by which such circumstances are always considered.
- Many of the problems of Indigenous communities, like housing and alcohol abuse, are upstream from the criminal justice system and cannot be addressed through criminal justice reform. Over the longer-term, government's role is to enable local communities to resolve these issues for themselves.

2-1: The universality of the criminal law

The legitimacy of Australia's criminal justice system rests on its universality: all Australians know, or should know, which behaviours are prohibited, what the punishment is for transgression, and which interests the law protects, and they know, or should know, that everyone is subject to the law in the same way.

It is not coherent to say that the history of the settlement of Australia vitiates the claim to sovereignty of the Australian Crown and its subjects. Were that the case, the criminal justice system would not have any authority at all. The legitimacy of Australia's government is assumed by the criminal justice system, and this means that it is legitimate for all Australians equally. For this reason, the criminal law—and the law generally—should not distinguish between Australians based on their race.

The rule of law seeks to limit arbitrariness by binding the government with inviolable principles and by granting all subjects rights against the state to ensure their interests are protected. A government that treats subjects inconsistently based on their race is exercising power unjustly.

In the context of the interactions between the criminal law and the Indigenous peoples of Australia, the meaning of this principle in practice is disputed. Because the Crown exercises authority that is not derived from nor endorsed by the traditional cultures of Indigenous Australians, it is often argued that there is a fundamental inconsistency between the norms encoded in the criminal law, and especially in our system of sentencing, and the values of traditional Indigenous cultures, with the implication that the normal operation of the criminal justice system is inherently discriminatory against Indigenous people and that therefore there must be implemented alternative procedures that are more reflective of the Indigenous people who come into the system.

However, while it is true that the criminal law of modern Australia does establish certain moral claims, the authority of the criminal justice system to take into account competing moral or cultural ideas is limited.

2-1-1: The criminal law and norms

The law's authority is not merely positive. It is not derived simply from the assertion of the lawmaker's prerogative, but depends upon its connection to absolute justice. That is, the law's authority depends upon its being a good faith attempt to realise the universal ends of justice.²⁵ Even on a strictly positivist interpretation of legal authority, the meaning of the law must be interpreted in light of common standards.²⁶

However, the law's connection to standards (moral or otherwise) that exist in the political system and culture of which it is part does not mean that it is simply an ideological construct or expression of political power. That would render the law inherently uncertain, always changing to reflect the interests of the powerful.²⁷ But the law is much more stable than that. The law is derived

²⁵ Gustav Radbruch, "Five Minutes of Legal Philosophy", *Oxford Journal of Legal Studies* Vol. 26, No. 1 p. 14

²⁶ HLA Hart argues, in the positivist tradition, that the law's authority depends on its certainty, but allows that because of the uncertainty of language, judges must have discretion to interpret the meanings of words. By contrast, Ronald Dworkin argues that when judges need to exercise their discretion they must draw upon their understanding of the rights of individuals embedded in the political system within which legal rights are created.

²⁷ For a discussion of this, see Christine Synowich, "Law and Ideology", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.)

from a broader socio-cultural context but aspires to be as certain and consistent as possible by formalising universal procedural rules.

The knowledge that judges draw upon when interpreting the law is situated within the culture and traditions that gave rise to the political system of which the law is part. For Australian law, this means that the law is inseparable from the basic tenets of our liberal democracy, such as equality before the law and the right to participate equally in political decision-making. These tenets in turn rest upon a notion of the individual as someone who holds rights against other individuals and against the state. Whether these are objective principles or products of a particular tradition is, from the point of view of the law, immaterial. Australian law is bound by its very nature to impose itself on all its subjects in the same way, always drawing upon the same ideas.

The connection between the criminal law and the culture of its authors and subjects can be seen in the very notion of corrections. Both retributive and rehabilitative approaches to dealing with criminals have as one of their aims the correction of criminals' behaviour. This implies that there is a norm of behaviour to which criminals must conform if they are to participate freely in society. Whatever one takes the philosophical basis of the criminal law to be, there can be no doubt that the criminal law's operation is normative.

For Indigenous Australians who continue to live within their own ancient traditions, this normative content of the law is, at least to some extent, alien. The question, however, is whether the law can take into account values that are not part of the system within which it resides without compromising its legitimacy. That is, can Australia's criminal law justly treat Indigenous Australians differently from everyone else, or is doing so in derogation of Australians' equality before the law?

2-1-2: Equal justice before the law

One of the bedrock principles of liberal democracy is the equality of individuals before the law. As traditionally understood, this principle means that the procedures by which the law interacts with a subject should be the same regardless of any of the characteristics of that individual. Notwithstanding the great diversity among individuals within our society, it is the intention of the law to treat them as all the same. Their equality is a formal stipulation, independent of their identities.

In recent years, the law's emphasis on formal equality has come under sustained critique. It is asserted that formal equality is not possible absent substantive equality, and that the absence of the latter in society means that formal equality works—whether intentionally or not—to reinforce social hierarchies. To take just one example of this kind of argument in the Australian context, the Hon John von Doussa, then-President of the Australian Human Rights and Equal Opportunity Commission said the following in 2005:

Assertions of equality usually imply positive connotations, but may disguise hidden vices. Differences of race, ethnicity, religion, sex and economic and cultural circumstances can mean that 'one law for all' protects the values and interests of a majority of citizens at the expense of minorities. It does so by privileging unity and formal equality over cultural diversity and substantive equality.²⁸

²⁸ The Hon John von Doussa, "One law for all" speech to the Australasian Law Teachers Association Conference, 6 July 2005 <https://www.humanrights.gov.au/news/speeches/one-law-al> [accessed 4 September 2017]

Efforts to account for the diversity among individuals and groups in society in the criminal law have led to the creation of specialist Indigenous courts in New South Wales, Victoria, Queensland, and South Australia, specialist facilities for Indigenous Australians in custody, and agreements between states and Indigenous community groups regarding the administration of criminal justice. The 2017 Australian Law Reform Commission discussion paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* contains 35 separate references to “culturally appropriate” procedures and services, whether actual or proposed, indicating how dominant this line of argument has become within Australia’s legal community.

With so many race-based services already in existence and the Australian criminal justice system still functional, concerns about the effect of formal inequalities in the name of substantive equality on the legitimacy of government in this country might seem unfounded or overblown. But the utilitarian argument for abandoning formal equality fails: the rising Indigenous incarceration rate over the past decade has taken place within the context of race-specific policy. The evaluation of specific programs for Indigenous offenders is often made more difficult by the lack of data,²⁹ but at the macro level, it is clear that decades of incipient racial separatism have done nothing to arrest the growth of the Indigenous prison population.

And of course, separate legal processes for Australians based on their race is offensive in principle. The logical end point of the materialist critique of formal equality is separatism: if the Australian Crown has no right to govern Indigenous Australians, that can only be because either its sovereignty is illegitimate or because Indigenous Australians are not formally Australian. As noted by von Doussa in the same speech:

The courts have consistently held that Aboriginal people are subject to the laws of the Commonwealth and of the States and Territories in which they respectively reside. In *Walker v State of New South Wales* Mason CJ observed that to hold otherwise would offend the basic principle that all people should stand equal before the law.³⁰

As such, the principle of equality before the law depends on equal subjection to the sovereign of the nation. The law’s force rests on its equal application to its subjects. Departing from that formal equality undermines the sovereignty of the law.

Criminal justice reform for Indigenous offenders is limited by the need to ensure consistency across the country in the treatment of offenders who have committed the same crimes. Reform should focus on improving the ability of Indigenous Australians to interact with the law, rather than trying to create a parallel system.

This means improving Indigenous legal literacy and providing the tools that Indigenous people need to access justice, such as interpreters and counsel. Indigenous Australians who come into contact with the criminal justice system should be able to understand the processes and procedures of criminal justice. This may require interpreter services and the state should work with civil society to make interpreters available.

Additionally, the principle of judicial discretion and the need for punishment to fit the crime provide some scope for the circumstances of offenders to be taken into account—this is true for Indigenous offenders as for everyone else. The scope of these principles is discussed in more detail in section 2-2-3 below.

²⁹ Closing the Gap Clearinghouse, “Diverting Indigenous offenders from the criminal justice system”, 2013 p. 2

³⁰ von Doussa *op. cit.*

2-2: Criminal justice reform principles

The Institute of Public Affairs has consistently argued for criminal justice reforms that align with the traditional principles of personal responsibility, fair punishment, and fiscal discipline, with an emphasis on lowering crime and improving community safety over the long-term.

There is a considerable body of evidence from the United States that it is possible to safely reduce incarceration and criminal justice spending while reducing offending and reoffending. Our April 2017 paper *Criminal justice reform: Lessons from the United States* identifies the following principles for addressing over-incarceration:

- Punishment reform for nonviolent offenders: increasing the use of non-prison corrections and rehabilitation services for those who are of little risk to the community
- Justice reinvestment: redirecting money slated for incarceration to other parts of the criminal justice system more likely to reduce crime and recidivism (without abandoning the concept of punishment or rolling criminal justice into the welfare state)
- Reduce recidivism by emphasising employment: reentry services should include jobs training and removing barriers to employment for ex-prisoners
- Criminal justice programs should be evidence-based, with reliable data collection and performance tracking.³¹

The application of these principles to the particular situation of Indigenous Australians is complex. As shown in Part 1, the preponderance of violent crime in many Indigenous communities, and their remoteness and lack of amenity, makes the delivery of non-custodial punishments and rehabilitation programs more challenging. But that difficulty should not preclude an attempt to create reforms that cohere with traditional principles of criminal justice and with the evidence base for what works to reduce crime and incarceration.

2-2-1: Community safety

Incapacitation

The foremost concern of the criminal justice system is maintaining and improving community safety. Reducing incarceration must be done safely. This means that violent and recidivist criminals should continue to be imprisoned.

Incapacitation is a viable way to reduce crime. International research shows that imprisoning repeat offenders saves their communities from the many crimes they would have otherwise committed.³² If the criminal justice system is to take community safety seriously, prison is a vital tool.

Alternatives to prison

There is widespread agreement that even where the incarceration rate is very high, as with Indigenous Australians, reforms intended to reduce that rate should not increase the crime risk of the community. The ALRC acknowledged this in its discussion paper on Indigenous incarceration, stating:

³¹ Adapted from Andrew Bushnell, *Criminal justice reform: Lessons from the United States*, Institute of Public Affairs 2017 p. 2

³² Rucker Johnson and Steven Raphael, "How much crime reduction does the marginal prisoner buy?" *Journal of Law and Economics*, Vol. 55, No. 2 (May 2012) pp. 275-310

It is the intention of the ALRC that the questions and proposals in this Discussion Paper should not be read as extending to those who would place community safety or the safety of individuals at risk. Further, the ALRC does not suggest that criminal behaviours should be excused or ignored as a means to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples.³³

With the high rates of violent crime, especially assault and family violence, in Indigenous communities, and the high percentage of Indigenous prisoners who have been imprisoned before, the safe reduction of the Indigenous prison population will be a long-term process.

Preventative measures, such as better policing and higher legal literacy among Indigenous Australians, will lower the number of people entering into the criminal justice system. And reducing reoffending by using custodial sentences to prepare Indigenous prisoners for work and life outside of prison will lead to a gradual reduction in the number of prisoners.³⁴

Many of the Indigenous Australians currently in prison will not be eligible for community-based programs if a history of violence is determinative. Facing a similar issue, American reformers have attempted to distinguish between criminals we are “mad at” and those we are “afraid of”.³⁵

With appropriate selection controls, there is some potential for allowing violent offenders to participate in residential programs, but not in community-based programs. Currently, “last chance” programs tailored to Indigenous offenders like the Balund-a residential diversionary program in New South Wales do accept violent offenders who have demonstrated an ability to benefit from the service.³⁶ However, this does mean that Indigenous offenders from remote communities will need to be relocated to population centres that can sustain residential programs or, like Balund-a, are working farms.

Lastly, while governments should work with civil society and with employers to design and implement community-based punishments and work programs, it should not outsource the administration of those programs. There is potential for corruption and abuse in the non-standard administration of justice. Moreover, there is an equal justice concern if the nature of these community-based programs is significantly different from the programs administered elsewhere in the jurisdiction. Programs for like offenders should be similarly rigorous.

Parole

It has been proposed that parole should be granted automatically unless it can be shown there is good reason to revoke it.³⁷

However, automatic court-ordered parole would undermine the concept of corrections. The purpose of incarceration is, apart from the isolation of dangerous and antisocial people, to incentivise prisoners to change their behaviour to better conform to the norms of society.

33 Australian Law Reform Commission, *Incarceration rates of Aboriginal and Torres Strait Islander people* 2017 pp. 26-7

34 Unemployment is strongly correlated with offending - see discussion in Bushnell and Wild 2016 *op. cit.* p. 20
American states have emphasised job training as part of criminal justice reform, and studies in Australia show similar programs to be effective in reducing reoffending - Bushnell 2017 *op. cit.* pp. 13-15

35 Bushnell 2017 *op. cit.*

36 NSW Corrective Services, “Balund-a (Tabulum)” [accessed 4 September 2017] http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/Community%20Corrections/offender-management-in-the-community/balund-a_tabulam.aspx

37 See for example, ALRC 2017 *op. cit.* p. 99

Research indicating that parolees reoffend less than those who serve their full sentence merely reflects that those who can demonstrate good behaviour while imprisoned are more likely to demonstrate good behaviour once released. Making parole easier to obtain would likely remove this difference, as the parolee population would contain people who had not changed their behaviour at all.

Providing a mechanism by which automatic parole can be set aside would not resolve this issue. The onus should be on the prisoner to demonstrate that he or she can behave properly, not on the criminal justice system to show why a convicted criminal should complete his or her punishment. Reversing this onus would send the wrong message about the purpose of incarceration.

Data-based programs

In discussions with American reformers, the Institute of Public Affairs was consistently informed that reliable data and robust evaluation were vital to the successful implementation of non-prison punishments.³⁸ In the United States, criminal justice reform has typically begun with a top-to-bottom review of programs by the Pew Charitable Trusts. In a previous paper, the Institute of Public Affairs suggested that a similar role could be provided by the states' ombudsmen, and that the Council of Australian Governments should coordinate the consistent recording of crime statistics across the country.

The Closing the Gap Clearinghouse has acknowledged that the evaluation of Indigenous diversion programs is hampered by a lack of data:

There is little by way of in-depth data and objective evaluations to determine the medium and long-term effectiveness of Australian diversionary programs.³⁹

The safe reduction of Indigenous incarceration depends on the ability of criminal justice policymakers and administrators to identify successful programs. From a utilitarian point of view, it is not yet known or knowable whether race-specific programs are more effective than universal programs.

This point was also acknowledged in the Council of Australian Governments' report *Prison to Work*.⁴⁰

³⁸ See discussion in Bushnell 2017 *op. cit.* pp. 16-17

³⁹ Closing the Gap Clearinghouse 2013 *op. cit.*

⁴⁰ Council of Australian Governments, *Prison to Work* 2016 p. 9

2-2-2: Personal responsibility

Individual autonomy

The criminal justice system is predicated on the belief that individuals can justly be held to account for actions they take that harm other people or society generally. Underpinning this belief about justice is a belief in individual autonomy: that individuals are, in the end, the authors of their own actions and therefore responsible for them.

Against the vision of individual autonomy is the criminological perspective, which sees crime as a natural product of the complex interactions of a number of influences on a person, including exposure to crime, socioeconomic disadvantage, and drug use.

However, whether or not humans have free will, a concept notoriously difficult to define, their every action is made in a context of potential alternative actions. It is enough for the criminal law that a person's actions indicate disordered thinking, where order is determined by the law (and its cultural and political context). And by its very existence, the law assumes its own power to influence human action, with part of this influence coming from the threat of corrections.⁴¹ That is, the criminal law itself is inseparable from personal responsibility.

The economic perspective of crime

The economic perspective of crime is that individuals commit to break the law in the same way that they commit to do anything else: they weigh the perceived costs and benefits and act accordingly. Their actions reveal their preferences.

This framework makes it possible to understand how factors like unemployment, low educational attainment, socioeconomic disadvantage, and exposure to crime make crime a more attractive choice for individuals exposed to them. People exposed to these factors see lower costs for committing crime, as their legitimate earnings now and in the future are lower, their ability to see beyond the immediate payoff of crime to longer-term benefits of obeying the law is diminished, and the likelihood that crime is something they see as normal is higher. This analysis also helps to explain why criminals are more likely than others to adopt behaviours associated with immediate gratification rather than delayed benefits, like alcohol and drug use, and less likely to adopt behaviours with distant benefits, like participating in education.⁴²

The economic view implies that raising the immediate costs of law-breaking is the most effective deterrent. This is best achieved by increasing the chance of detection, rather than by increasing the severity of punishment, which is a less immediate cost.⁴³ It also means decreasing the immediate benefit of crime by ensuring that people have more to gain by obeying the law, which can be achieved through increasing people's chances of employment.

For Indigenous Australians' interactions with the criminal justice system, the implications of this analysis are that improved relations between communities and the police, so that police are better able to detect and prevent crime, and employment opportunity are crucial factors for reducing Indigenous offending and incarceration. For those individuals who come into the corrections system, the goal should be to prepare them for productive society. Programs like the Northern

41 David Terracina, "Criminal Law Issues", Chapter 6 in E. Picozza (ed.) *NeuroLaw*

42 Bushnell and Wild 2016 *op. cit.* pp. 29-31

43 *Ibid.* p. 63

Territory's 'Sentenced to a Job'⁴⁴ and the New South Wales Government's decision to redirect prison spending towards literacy and numeracy are in line with this goal.⁴⁵

Mental health

Adverse circumstances change individuals' perception of incentives. But they do not entirely obviate personal responsibility. For all mentally-fit individuals, these influences coexist with more positive influences that point the way to better choices.

Indigenous Australians are more likely to be assessed by general practitioners as presenting with mental health problems.⁴⁶ Indigenous Australians also have higher rates of Foetal Alcohol Spectrum Disorder than the general population, which affects the mental fitness of many Indigenous offenders.⁴⁷ Where such health concerns are present, culpability may be reduced. But community safety concerns would remain. Mentally unsound offenders should continue to be detained in appropriate facilities for treatment.

Intergenerational effects of crime

Crime is known to be strongly intergenerational. The children of criminals are more likely to commit crime, along with developing other behavioural problems, not completing school, and being unemployed. These factors are all related.⁴⁸

Uniquely among Australians, many Indigenous people's lives are shaped to some extent by the ongoing effects of the dispossession and cultural breakdown caused by colonisation. Apart from the contribution that this has made to the perpetuation of poverty in these communities by denying Indigenous Australians the ability to build wealth over time, the disestablishment of tradition and custom contributes to a sense of what has been called, in United States research, "despair". The recent reversal in long term reductions in mortality among the white American working class has been attributed to rising self-destructive behaviours such as opiate abuse, alcoholism and suicide, which in turn are linked with worse outcomes in education and employment.⁴⁹ The health crisis confronting white Americans highlights that the collapse of traditional ways of life contributes to intergenerational disadvantage, regardless of race or colonisation. The situation of disadvantaged Indigenous Australians is akin to the situation of other disadvantaged individuals.

Intergenerational disadvantage does not obviate the personal responsibility of individual actors. But it is one more factor shaping the ability of actors to determine the true costs and benefits of their actions. Moreover, the elements of despair exist in many communities for different reasons. Because such an effect is impossible to quantify, the principle of equality before the law ought to proscribe the use of history in determining culpability and punishment. Otherwise the court would be obliged to examine the totality of any given offender's family history. Clearly, a measure like a blanket sentencing discount for Indigenous Australians is antithetical to the principle of equality.⁵⁰

44 Northern Territory Government, "Employing prisoners in your business" [accessed 4 September 2017] <https://nt.gov.au/law/prisons/employing-prisoners-in-your-business>

45 NSW Department of Justice, "Improving inmate literacy and numeracy" [accessed 4 September 2017] <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/improving-inmate-literacy-and-numeracy.aspx>

46 Australian Institute of Health and Welfare 2015 *op. cit.* p. 80

47 Closing the Gap Clearinghouse, "Fetal alcohol spectrum disorders: a review of interventions for prevention and management in Indigenous communities" 2015

48 Bushnell and Wild 2016 *op. cit.* p. 9

49 Anne Case and Sir Angus Deaton, "Mortality and morbidity in the 21st century" 23 March 2017 [accessed 4 September 2017] <https://www.brookings.edu/bpea-articles/mortality-and-morbidity-in-the-21st-century/>

50 Mirko Bagaric, "Crime: Indigenous Australians and African Americans deserve a 'sentencing discount', *Guardian Australia* 5 April 2016

So too are existing legislative instruments, such as Victoria's Bail Act 1977, that require consideration of Aboriginality in decision-making. To the extent that bail conditions should take into consideration cultural and family expectations, it should do so for all who are granted bail. The decision to grant bail should be based on the willingness and ability of the applicant to abide by bail conditions. The relevant considerations are whether the applicant has shown a tendency toward violence, the risk of reoffending while on bail, and the risk of bail conditions being breached. Neither Indigeneity nor disadvantage has specific relevance to these considerations.

2-2-3: Fair punishment - making the punishment fit the crime

Retribution is integral to justice

Punishment is inherent in the concept of rights. It does not make sense to assert that individuals have rights if no negative consequences follow for those who violate them. Just as the criminal justice system's very existence implies a belief in individual autonomy, it implies that punishment is integral to justice. The relevant question for criminal justice reform is not whether to prefer a retributive or rehabilitative approach, but how to deliver retribution through punishment while achieving rehabilitation and the other ends of justice.

There are two more reasons to emphasise that such reforms retain a retributive character.

The first is that emphasising the therapeutic benefits of non-prison punishments is to neglect the interests of victims. Seeing justice done is an important part of the healing process for many victims. The desire of victims to see more severe punishment is not dispositive but it is also far from meaningless. Moreover, it is important that society see in the criminal justice system greater respect and care for those who have been harmed than for those who committed harmful actions. One of the reasons for the public prosecution of criminals is that they offend against the norms of society, and in so doing take advantage of everyone who abides by the law. The persistence of the norm of obedience to law is secured through punishment. As Gerard V. Bradley has argued:

Civil society punishes in its own name for its own sake because, in truth, civil society is the victim of each and every crime.⁵¹

Second, and relatedly, studies have shown that our concept of justice is inseparable from retribution. Even where people state that they are more influenced by utilitarian concepts such as deterrence and rehabilitation, their behaviour in tests indicates that they are motivated more by retribution - that is, by a desire to see bad behaviour punished.⁵² This finding accords with game theory experiments that show people are willing to sacrifice some measure of their own personal wellbeing to make sure that bad behaviour is punished. Individuals effectively price in the value they get from maintaining social norms. And games where bad behaviour is disciplined early led to better results for participants. Jonathan Haidt summarises this point as:

Punishing bad behaviour promotes virtue and benefits the group.⁵³

For criminal justice reform, this clearly implies that attempts to redesign the criminal justice system so that it is tailored to treating crime as a natural social pathology will fail to gain public support.

51 George V. Bradley, "Retribution: the central aim of punishment", *Harvard Journal of Law and Public Policy* Vol. 27, No. 1 2003 p. 25

52 Livia B. Keller et al "A closer look at an eye for an eye" in *Soc Just Res* Vol. 23 pp. 99-116

53 Jonathan Haidt, *The righteous mind: Why good people are divided by politics and religion*, Pantheon Publishing 2012 p. 179

The desire for retribution is deep-seated. This is perhaps one reason why successful criminal justice reform in the United States has been led by conservatives.⁵⁴

There is no reason to believe that criminal justice policy regarding the punishment of Indigenous offenders should be, or could ever be, separated from the inherent value of retribution and its essentiality to Australian criminal justice. The relevant question is how to design and impose non-prison punishments on suitable offenders while satisfying public demands for retribution and the reinforcement of social norms.

Punishment and disadvantage

Criminal justice should impose punishments that are retributive, consistent with punishments given for similar offences, and proportionate to the harm caused by the offender. It is in the assessment of this last requirement that judges have scope to consider the particular circumstances of the offence and the characteristics of the offender. These factors are not relevant to the harm caused to the victim—it does not, for example, matter who stole your television, only that it was stolen—but they are relevant to how severely the offender has transgressed against social norms and thus harmed society generally. This principle is why crimes have traditionally required *mens rea* (guilty mind) in the form of intention or recklessness, and it is why certain circumstances may count in mitigation against punishment.

In what ways might disadvantage, and specifically the disadvantage faced by Indigenous Australians, plausibly diminish the seriousness of the transgressive element of a crime?

There is generally no direct causal connection between any criminal act and the socioeconomic characteristics of an offender. Even in an incentive environment shaped by disadvantage, criminal actions are not usually necessary. Although we can think of a scenario in which, say, the only choices are stealing a loaf of bread or starving, these do not usually exist in the real world. Moreover, even in adverse circumstances like those in many Indigenous communities, many people do not commit crime. For this reason, it cannot plausibly be argued that disadvantage always plays a material role in the offending of disadvantaged people. Therefore, in punishing disadvantaged offenders, there can be no presumption that their socioeconomic circumstances are or should be considered mitigatory.⁵⁵

When the High Court considered this question in *Bugmy v R*, it found that while disadvantage is relevant to individualised justice, Indigeneity *per se* is not. The court held that such a presumption would actually offend the principle of individualised justice.⁵⁶ To this it should be added that assuming being Indigenous is a disadvantage sufficient to diminish culpability expresses a denial of the agency, and thus dignity, of disadvantaged individuals, and risks portraying all Indigenous communities as inherently disordered.

Because the factors associated with Indigenous offending are the same as those associated with offending generally, it is inappropriate to draw attention to Indigeneity in and of itself. The only purpose of doing so would be to separate Indigenous Australians from non-Indigenous to further call into question the authority of the Crown to administer justice to the former group.

⁵⁴ Bushnell 2017 *op. cit.*

⁵⁵ The jurisprudence of the Canadian Supreme Court in *Gladue* and *Ipeelee*, and legislation requiring courts to take into specific consideration is therefore misguided. See ALRC 2017 *op. cit.* Chapter 3

⁵⁶ *Bugmy v The Queen* [2013] HCA 38 [29]-[31]

It would also offend the principles of fair punishment to take into consideration the high level of Indigenous representation in Australian prisons. There can be no causal connection between that statistic and the acts of any individual. It could likewise not be argued that the historically high level of incarceration in Australia should count in mitigation for all Australian offenders.

One of the purposes of punishment is to deter others from committing similar acts. Deterrence is closely tied to retribution: both are justified by the concept of society being one of the victims of crime. But in sentencing, deterrence must be subsidiary to other considerations, like proportionality and consistency. At a certain point, deterrence goes beyond reinforcing social norms and punishes particular people for the potential acts of others. Taking into consideration punishments already visited upon others is similar: it ties the offender's punishment to the actions of others, distorting the proportion between the harm caused and the punishment.

Judicial discretion

The inherently retributive nature of our criminal justice system does not preclude some measure of individualisation of punishment. But the principles by which individual punishments are tailored must themselves have general application. Judges have, and should retain, discretion to consider how a specific offenders actions have harmed society, and the proper role of specific punishments in addressing that harm, but this discretion is bounded by the demands of equal justice and proportionality and therefore does not include racial considerations.

It should not be forgotten that mandatory sentencing and other attempts to limit judicial discretion have developed in response to the perception of the public and their representatives that the judiciary is too lenient. It is possible for a sentence to be disproportionately lenient.

Judges must remember that the purpose of the criminal law is to deliver retribution on behalf of victims and society, and to correct the behaviour of offenders so that they conform to society's norms. An unfortunate move away from the language of punishment and corrections has created the impression that criminal justice is no longer concerned with reinforcing public standards. The discretion of judges to individualise sentencing needs to be exercised within the bounds of proportionality and equal justice.

Similarly, it is inconsistent to advocate the abolition of mandatory sentences in the name of judicial discretion and to advocate removing the discretion of judges to impose short sentences. Judges should retain the discretion to impose short sentences if alternatives are not deemed suitable.

Proportionality guides punishment

One of the maxims of criminal justice is that the punishment should fit the crime. While the proper proportion between the harm caused by the offender and the severity of the punishment proposed can never be determined with absolute precision, the principle carries obvious intuitive force.⁵⁷ Other relevant considerations in sentencing are that the sentence should be no more than required by justice, consistency between punishments for like offences, and taking into consideration any mitigating circumstances of the crime in light of the characteristics of the offender. This latter principle is subordinate to the others: unlimited discretion to tailor punishment to the offender would render the other considerations moot.

Incarceration is not always the punishment that best fits a crime. Prison delivers the greatest retributive effect and is the strongest deterrent (among punishments) but is not the best method by

⁵⁷ Bushnell and Wild 2016 op. cit. pp. 56-7

which to achieve the other ends of justice, like rehabilitation and, over the long term, community safety.

Implementing punishment reform for low risk offenders can achieve better results in terms of recidivism, while maintaining sufficient retributive, deterrent, and immediate community safety effects. A combination of home detention, community service, fines, restitution orders, and work orders can deliver a sufficient deprivation of liberty to satisfy the demands of retribution but are more strongly correlated with changes in behaviour. In the United States, conservative states like Texas and Georgia have diverted offenders from prison to residential and outpatient rehabilitation, among other reforms, and seen crime and costs go down.⁵⁸

The goal is to fill in the spectrum of coercion between release and incarceration. Recent reforms like the abolition of suspended sentences in Victoria and New South Wales and the expansion of home detention in South Australia show the potential for innovation in the way punishment is delivered.

Lastly, for those who cannot pay fines, schemes like that in Western Australia allowing offenders to work off their debts are considerably better than incarceration as a solution to that problem.

Tying the discharge of fines to the completion of work and training is a good way to discipline offenders who cannot otherwise pay their fines. Work and development orders enable courts to impose a proportionate amount of coercion to fine-defaulters. Rigorous, data-based oversight of programs involved in work and development orders is necessary to make sure that they impose real conditions and maximise results. Public scepticism about community service in particular needs to be addressed by demonstrating that these programs operate as advertised.

For non-compliant offenders, there should be the possibility of earnings and benefits being garnished.

Punishing breaches of release conditions

One area in which disproportionately severe punishment is often seen is in technical breaches of bail and parole. In the United States, “swift, certain, and fair” punishments for minor breaches have been introduced in many states.⁵⁹ Instead of either ignoring minor breaches or imprisoning people because of them, case officers are empowered to impose administrative penalties such as tightening reporting requirements or other conditions of release.

In Australia, the New South Wales Government has recently moved in this direction. Along with the hiring of new district court judges to speed up the processing of those on remand, measures such as this will help to reduce the growth of the remand population, which will benefit Indigenous Australians without singling them out.⁶⁰ Similarly, that state’s recent reform of penalties for driving with a suspended licence will likely disproportionately benefit the state’s Indigenous people.⁶¹

58 Bushnell 2017 op. cit. pp. 8-13

59 Ibid. pp. 9-10

60 Andrew Bushnell, “NSW reforms point way to reducing high rate of Indigenous incarceration”, *The Australian* 28 July 2017

61 NSW Department of Justice, “Driver licence disqualification reforms” [accessed 4 September 2017] <http://www.justice.nsw.gov.au/Pages/Reforms/driver-licence-disqualification.aspx>

2-3: The limits of the criminal justice system

Part 2 of this report has provided a discussion of some of the key considerations for reformers looking to improve the interactions of the criminal justice system with Indigenous Australians in light of cultural distinctiveness and socioeconomic disadvantage. Such is the complexity of this situation, however, that the criminal justice system is a limited tool for addressing it.

2-3-1: Upstream from the criminal justice system

Most of the problems described in Part 1 are upstream of the criminal justice system. For example, the overcrowding in Indigenous households will not be affected by criminal justice policy. While Parts 2-1 and 2-2 make an argument for how the criminal justice can ameliorate some of the effects of Indigenous disadvantage on crime and punishment without compromising on the traditional principles of Australian justice or the system's internal coherence, even a perfectly-ordered criminal justice system will not eliminate the circumstances and patterns of behaviour that drive Indigenous disadvantage. Indeed, more radical measures to reduce Indigenous incarceration will also not address the reasons why crime is committed in the first place.

That the underlying socioeconomic phenomena are beyond criminal justice is recognised by the Council of Australian Governments' Closing the Gap targets, which do not include a criminal justice target and instead focus on improving health and education.⁶²

Governments continue to fund programs to raise Indigenous living standards. Around \$5.9 billion is spent each year on Indigenous-specific programs. Total transfers to Indigenous Australians rise to \$30 billion per year if Indigenous receipt of benefits from universal programs is included.⁶³ This is considerably more than is spent on prisons in total in Australia each year, which is around \$3.8 billion.⁶⁴ Only one of the six Closing the Gap targets is currently on track.

2-3-2: Remoteness, residence, and alcohol

One of the enduring challenges of Indigenous policy is the remoteness of many Indigenous communities. This remoteness, and the communities' small population size, make delivery of services more difficult and costly. It also makes the communities more difficult to police and community-based punishments harder to deliver. Often this means that offenders are not caught and not deterred or they are imprisoned, often for want of better options, in distant population centres. Realistically, this will continue to be the case. Traditional Indigenous culture is tied to country, which all but precludes for many people a move to more prosperous economies. (As shown in 1-2-1, Indigenous people in remote areas are more likely to recognise their traditional kinship and live on traditional country.)

It should go without saying that law-abiding Indigenous Australians in remote areas should not be coerced into moving. But for those who, by their actions, place themselves into the corrections system, connection to traditional country should not mean that the only option is incarceration.

62 Department of Prime Minister and Cabinet, "Closing the Gap: Executive Summary" [accessed 4 September 2017] <http://closingthegap.pmc.gov.au/executive-summary>

63 Nicholas Biddle, "FactCheck Q&A: is \$30 billion spent every year on 500,000 Indigenous people in Australia?" The Conversation 5 September 2016 [accessed 4 September 2017] <https://theconversation.com/factcheck-qanda-is-30-billion-spent-every-year-on-500-000-Indigenous-people-in-australia-64658>
Sara Hudson, Mapping the Indigenous Program and Funding Maze, Centre for Independent Studies 2016

64 Productivity Commission, Report on Government Services 2017

When Texas redirected money from incarceration to substance abuse treatment, a significant portion of that money went towards residential rehabilitation facilities, halfway houses, and intermediate sanctions facilities for those who make technical breaches of their release conditions.⁶⁵ Similar facilities could provide for non-prison punishments for some Indigenous offenders. These types of facilities can only operate in large population centres from which they can draw staff and which will provide inmates with opportunities to carry out work orders and job training. If separation from home is the price that an offender must pay to avoid prison, then that should be considered fair enough (for Indigenous and non-Indigenous alike).

A system of residential facilities for those serving community-based punishments would also ameliorate another of the main difficulties in managing Indigenous Australians' interactions with the criminal justice system: unstable housing situations. The lack of stable housing contributes to low grant rates of bail and parole as well as to the socioeconomic problems associated with dysfunctional families, defective housing, and overcrowded homes. Housing supply and maintenance is not an issue that the criminal justice system can resolve. For this reason, though, it is important that the criminal justice system make provision for suitable offenders to be punished in the community through residential programs.

Lastly, the abuse of alcohol is a problem that the criminal justice system can only manage, it cannot solve it. The reasons that people choose to drink are complex and will need to be addressed by communities and individuals from the bottom-up. In remote communities, cooperation between private businesses and civil society may be the best way to manage the supply of alcohol. Accords are a proper exercise of market power, so long as membership is voluntary. However, Indigenous Australians retain the right to purchase alcohol wherever it is legally sold, just as all Australians do. Across-the-board prohibition will not work and is not desirable. Alcohol bans will not address the reasons that people choose to drink.

2-3-3: Community action

The cycle of abuse, disadvantage, and crime needs to be broken. This means making sure that children are safe and can attend school, that Indigenous Australians know the protections to which they are entitled by law and how the country's criminal justice system operates and how it can protect their interests, that the police operate effectively and with the trust of Indigenous communities, and that more broadly, Indigenous Australians share in the normative basis of the law and respect its role in defending those norms. It also means making crime less attractive and easy, through detection and through the provision of a path to productive society via employment. While criminal justice policy, and government generally, can help to facilitate this vision, ultimately it will be the work of Indigenous civil society to create shared institutions of meaning that engage Indigenous people in self-improvement and morally-fulfilling lives.

This is a sustainable vision of self-determination. Not separatism or sovereignty, but the opportunity for communities to work for their own benefit. A renewed spirit of subsidiarity would likely benefit all Australians, but it would certainly enable those Indigenous communities and leaders with the requisite will to build their own futures.

⁶⁵ Bushnell 2017 op. cit. p. 9

Conclusion

The Institute of Public Affairs visited a number of people working on this issue in the Northern Territory in August 2017 and has had discussions with representatives from across the political spectrum. We have been consistently impressed by the amount of good will that exists in Australian politics in relation to resolving this vital national issue. This paper is offered in good faith as a contribution to this debate, resting on a firm belief that the vindication of individual rights is to the long-term benefit of all Australians and that the universality of our liberal democratic institutions is an expression of our national solidarity.

As the statistics detailed in this report show, the factors influencing the high rate of Indigenous offending and incarceration are associated with crime for all people. The unique historical circumstances of Indigenous disadvantage do not change the analysis that it is the shocking extent of those influences in Indigenous communities that make crime a more appealing choice for many people living within them.

Making crime less attractive means giving people more to live for, through education, employment, participation in the community and in spiritual organisations, the creation of stable families, and physical safety. These are the basics of a good life in a modern society.⁶⁶

Considerable effort has gone into advocating for the law and the institutions of government to be made more “culturally appropriate” for Indigenous Australians. But one does not have to believe that such institutions can ever be perfectly rational and culturally-neutral to believe that this is misguided. The institutions are themselves a part of modern Australian society: they have emerged over centuries of English-speaking civilisation to protect the interests of individuals so that they can operate in a liberal democracy. They are appropriate to the modern life of the nation of which Indigenous Australians are part, and their legitimacy depends on their universality. For Indigenous Australians, who cannot opt out of those institutions any more than other Australians can, this means finding a way to live and perpetuate their cultural ideas within the ordered liberty that our institutions create.

But insisting on the formal equality of Australians does not mean pretending that material inequalities do not exist. Plainly, there are many Indigenous Australians whose living standards fall far short of what everyone else in this country rightly expects. There is a role for the criminal justice system to play in making sure that it does not exacerbate these problems through over-punishment or neglecting the need for all citizens to be able to understand the law, to be protected by it, and to participate meaningfully within the system when necessary.

⁶⁶ See for example the analysis of factors correlated with positive socioeconomic outcomes and opportunity in Jennifer A. Marshall (ed.), *2017 Index of culture and opportunity*, Heritage Foundation 2017.

Just as the factors influencing Indigenous offending and incarceration are versions of those present in other disadvantaged communities, so too should the criminal law approach reform with the same principles that have worked elsewhere:

- punishment reform for those criminals who can safely be punished outside of prison
- data-based recidivism programs
- job skills training, and
- residential rehabilitation for addicts.

The paramount concern is to improve community safety by reducing crime. This cannot be done by abandoning the retributive approach, which is inherent in our criminal justice system founded on the defence of individual rights and personal responsibility.

All of the tools necessary for improving Indigenous outcomes in criminal justice are known and available. The radical redesign of criminal justice away from individual autonomy towards a deterministic criminological analysis is unnecessary and risks diminishing the agency and standing of the very disadvantaged people it aims to help.

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