Indigenous People and Criminal Justice is Volume 445 in the ‘Issues in Society’ series of educational resource books. The aim of this series is to offer current, diverse information about important issues in our world, from an Australian perspective.

**KEY ISSUES IN THIS TOPIC**

Indigenous Australians are among the most incarcerated people on Earth. Aboriginal and Torres Strait Islanders make up 2% of all Australians, yet constitute more than a quarter of the nation’s prison population. Over-representation in the criminal justice system by Indigenous men, women and young people is a persistent and growing problem.

What are the reasons for these high imprisonment rates; and what reforms are being proposed to reduce Indigenous people’s contact with the criminal justice system? Are ‘tough on crime’ policies flouting deaths in custody recommendations and further entrenching Indigenous disadvantage before the law? After the recent Northern Territory Royal Commission, prompted by the exposure of shocking abuses, has anything changed in relation to youth detention?

This book examines the latest research and statistics on Indigenous imprisonment, and reviews progress on addressing Aboriginal deaths in custody recommendations and reforming the detention of young Indigenous people. How can governments reduce incarceration and commit to working with Aboriginal and Torres Strait Islander communities to implement overdue interventions? What will it take to unlock the problems of Indigenous inequality and over-representation in the criminal justice system?

**SOURCES OF INFORMATION**

Titles in the ‘Issues in Society’ series are individual resource books which provide an overview on a specific subject comprised of facts and opinions.

The information in this resource book is not from any single author, publication or organisation. The unique value of the ‘Issues in Society’ series lies in its diversity of content and perspectives.

The content comes from a wide variety of sources and includes:

- Newspaper reports and opinion pieces
- Website fact sheets
- Magazine and journal articles
- Statistics and surveys
- Government reports
- Literature from special interest groups

**CRITICAL EVALUATION**

As the information reproduced in this book is from a number of different sources, readers should always be aware of the origin of the text and whether or not the source is likely to be expressing a particular bias or agenda.

It is hoped that, as you read about the many aspects of the issues explored in this book, you will critically evaluate the information presented. In some cases, it is important that you decide whether you are being presented with facts or opinions. Does the writer give a biased or an unbiased report? If an opinion is being expressed, do you agree with the writer?

**EXPLORING ISSUES**

The 'Exploring issues' section at the back of this book features a range of ready-to-use worksheets relating to the articles and issues raised in this book. The activities and exercises in these worksheets are suitable for use by students at middle secondary school level and beyond.

**FURTHER RESEARCH**

This title offers a useful starting point for those who need convenient access to information about the issues involved. However, it is only a starting point. The 'Web links' section at the back of this book contains a list of useful websites which you can access for more reading on the topic.
CHAPTER 1

ABORIGINAL AND TORRES STRAIT ISLANDER PRISONER CHARACTERISTICS

A STATISTICAL SNAPSHOT FROM THE AUSTRALIAN BUREAU OF STATISTICS

At 30 June 2018:
- There were 11,849 prisoners who identified as Aboriginal and Torres Strait Islander, a 5% increase (542 prisoners) from 30 June 2017. The number of non-Indigenous prisoners increased by 4% (1,225 prisoners) in the same period.
- Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (28%) of the total Australian prisoner population. The total Aboriginal and Torres Strait Islander population in Australia aged 18 years and over in 2018 was approximately 2% (based on Australian Demographic Statistics (cat. no. 3101.0) and Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026 (cat. no. 3238.0)).
- From 30 June 2017, the Aboriginal and Torres Strait Islander imprisonment rate increased by 2%, from 2,434 to 2,481 prisoners per 100,000 Aboriginal and Torres Strait Islander population. The non-Indigenous rate also increased by 2% over the same period from 160 to 164 prisoners per 100,000 non-Indigenous population.
- The proportion of adult prisoners who identified as Aboriginal and Torres Strait Islander ranged from 9% in Victoria (691 prisoners) to 84% (1,477 prisoners) in the Northern Territory.
- The most common offence/charge for Aboriginal and Torres Strait Islander prisoners was Acts

Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (28%) of the total Australian prisoner population. The total Aboriginal and Torres Strait Islander population in Australia aged 18 years and over was approximately 2%.
Prisoner numbers up 4 per cent from previous year

On the night of 30 June 2018, there were 42,974 prisoners in custody. This was a 4 per cent increase from 30 June 2017 and represents a 40 per cent increase over the past five years. ABS Director of the National Centre of Crime and Justice Statistics, William Milne, said the majority of the increase in the Australian prison population in 2018 was the result of a rise in the number of offenders imprisoned for illicit drugs and sexual assault and related offences.

"Since 30 June 2017, there has been a ten per cent increase in the number of people imprisoned for illicit drug offences and sexual assault and related offences," Mr Milne said.

"The number of people in prison for these offences has increased over the past five years, particularly for Illicit drug offenders where there’s been an increase of over 3,000 prisoners (87 per cent) since 2013. "The offence of Acts intended to cause injury remained the most common offence or charge for prisoners over this time period."

Since 2017, the number of female prisoners has increased by 10 per cent (326 prisoners), while the number of male prisoners increased by 4 per cent (1,438 prisoners).

Further information, including state and territory data, can be found in Prisoners in Australia (cat. no. 4517.0), available for download from the ABS website: www.abs.gov.au.

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Three out of four Aboriginal and Torres Strait Islander prisoners had been imprisoned under sentence previously, compared to one in two non-Indigenous prisoners.

intended to cause injury (34% or 4,071 prisoners) followed by Unlawful entry with intent (14% or 1,679 prisoners). The most common offences/charges for non-Indigenous prisoners were Illicit drug offences (20% or 6,288 prisoners) and Acts intended to cause injury (18% or 5,583 prisoners).

• Three out of four Aboriginal and Torres Strait Islander prisoners (75% or 8,917 prisoners) had been imprisoned under sentence previously, compared to one in two non-Indigenous prisoners (50% or 15,446 prisoners).

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Australian justice system overhaul needed to address Indigenous incarceration, inquiry finds

AN ABC NEWS REPORT BY BRIDGET BRENNAN AND ISABELLA HIGGINS

Commonwealth, state and territory governments must overhaul the justice system to reduce the massive over-representation of Indigenous people in jail, a major inquiry has found.

The Australian Law Reform Commission (ALRC) inquiry, led by federal court judge Matthew Myers, was commissioned by the Federal Government to investigate whether courts, police and prisons were contributing to the over-incarceration of First Nations people.

The answer was yes, the inquiry found, because the justice system was often entrenching inequalities by not providing enough sentencing options and diversion programs for Indigenous offenders.

Shahleena Musk, a Larrikin woman and senior lawyer with the Human Rights Law Centre, said it was one of the most “crucial” inquiries she had seen.

“We’re not going to give up on this,” she said.

“This is about saving lives and saving communities, and we can’t allow this to continue – it will become a crisis.”

“The evidence is all there that governments must act now and ensure that these recommendations are implemented.”

Keenan Mundine, who had a troubled childhood growing up in Redfern in Sydney, said he encountered a discriminatory legal system when he was sent to youth detention as a teenager.

“I fell through a lot of gaps in the justice system and dealt with a lot injustices, a lot of policies that were made by non-Indigenous people that affected me as an Indigenous person,” he said.

“As a person who didn’t have much family support, most of the structures in the criminal justice system are set up for people who have a lot of support, a lot of community support.”

Mr Mundine, who is now running his own justice mentoring consultancy, said changes to the legal system were urgently needed to divert more of his people going to prison.

“I hope the system changes in the way they engage communities more around making policies and procedures that affect Indigenous peoples,” he said.

‘ONCE IN A GENERATION’ CHANCE TO REDUCE INCARCERATION

Tabled in Federal Parliament today, the Pathways to Justice inquiry made 35 recommendations to turn around the rising rate of imprisonment among Aboriginal and Torres Strait Islander men and women.

“The Government will consider the report’s relevant recommendations and respond in due course,” Social Services Minister Dan Tehan said.

All states and territories should end the practice of jail for unpaid fines and change mandatory sentencing and bail laws which are disadvantaging Indigenous people, the inquiry recommended.

“Courts [should] take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.”

Law Council chief executive Morry Bailes said the inquiry’s recommendations were “compelling” and “must not be shelved like those from the 1991 Royal Commission into Aboriginal Deaths in Custody report”.

Indigenous advocacy group Change the Record said the inquiry was a “once in a generation” chance to reduce the soaring rate of Indigenous incarceration, while the NSW Aboriginal Land Council said it was a “damning indictment of a system that is broken”.

But the Institute of Public Affairs said that while it supported some of the inquiry’s recommendations, it was troubled by suggestions that some laws should treat Aboriginal and Torres Strait Islander people differently.

KEY POINTS

- Inquiry recommends an end to the practice of jailing people for unpaid fines
- Courts should consider First Nations people’s systemic and background factors
- Governments should set criminal justice targets to reduce incarceration and violence
- Advocacy group says the inquiry provides a ‘once in a generation’ chance.
PATHWAYS TO JUSTICE REPORT

Aboriginal and Torres Strait Islander men are 14.7 times more likely to be imprisoned than non-Indigenous men. Aboriginal and Torres Strait Islander women are 21.2 times more likely to be imprisoned than non-Indigenous women.

The Australian Law Reform Commission was asked to consider laws and legal frameworks that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander people in custody.

The Report represents findings from 11 months of research, 149 national consultations and more than 120 submissions.

The 35 recommendations target the reduction of the disproportionate rate of incarceration of ATSI peoples and aim to improve community safety by:

- Promoting meaningful equality before the law for Aboriginal and Torres Strait Islander peoples;
- Promoting fairer enforcement of the law and fairer application of legal frameworks;
- Ensuring Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for ATSI people in contact with the criminal justice system;
- Reducing recidivism through the provision of effective diversion, support and rehabilitation programs;
- Making available to ATSI offenders alternatives to imprisonment that are appropriate to the offence and the offender’s circumstances; and
- Promoting justice reinvestment through redirection of resources from incarceration to prevention, rehabilitation and support, in order to reduce reoffending and the long-term economic cost of incarceration of Aboriginal and Torres Strait Islander peoples.

SOURCE

Australian Law Reform Commission (December 2017). Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report, ALRC Report 133.

Compiled by The Spinney Press.

INDIGENOUS SENTENCING COURTS PITCHED

Aboriginal and Torres Strait Islander women and men make up 27 per cent of the Australian prison population, costing the nation about $3.9 billion per year, the ALRC said.

“Over-representation is both a persistent and growing problem – Aboriginal and Torres Strait Islander incarceration rates increased 41 per cent between 2006 and 2016.”

“There has to be a change because we just cannot continue to lock up the First Nations people at the rates at which we do,” Labor senator Pat Dodson said.

The year-long inquiry received 120 submissions and was informed by a committee of Australia’s pre-eminent Indigenous legal minds.

Criminal justice targets should be set by governments to reduce rates of incarceration, and rates of violence, the commission found.

“Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities.”

The inquiry also recommends an independent justice reinvestment body be established to divert money away from the criminal justice system and into trials in local areas to drive down high rates of offending.

“Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities.”

The report said irregular employment, previous convictions for often low-level offending, and a lack of secure housing was disadvantaging some Indigenous people when they applied for bail.

But the inquiry found that magistrates and judges faced a shortage of community-based sentencing options for Aboriginal and Torres Strait Islander offenders, and said state and territories should establish specialist Indigenous sentencing courts.

“These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.”

Aboriginal and Torres Strait Islander people deserved to have greater confidence their police complaints would be investigated independently, the review said.

“Commonwealth, state and territory governments should introduce a statutory requirement for police to contact an Aboriginal and Torres Strait Islander legal service.”

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CAUSES OF HIGH IMPRISONMENT RATES

The high rate of Indigenous imprisonment in Australia is occurring in the context of multiple risk factors for becoming involved in the criminal justice system, the interrelated detrimental impacts of which often form a vicious cycle.

The reasons for the disproportionately high incarceration rates of Indigenous peoples can be separated into two main categories: socioeconomic factors, and structural bias and discrimination within the criminal justice system.

SOCIOECONOMIC FACTORS
Underlying factors that contribute to higher rates of offending include:

- Socioeconomic disadvantage and poverty
- High unemployment, low income
- Impacts of colonisation and dispossession
- Intergenerational trauma and forced removal of family members (including the Stolen Generations)
- Substance abuse (drugs and alcohol)
- Fetal alcohol spectrum disorder (FASD)
- Homelessness, inadequate housing and overcrowding
- Lack of education/poor school performance
- Family violence, including child neglect and abuse
- High rates of violence in Indigenous communities
- Rites of passage incarceration role modelling among young offenders
- Physical and mental health issues.

STRUCTURAL BIAS AND DISCRIMINATION WITHIN THE CRIMINAL JUSTICE SYSTEM
Indigenous people fare worse than non-Indigenous people at every step in a criminal justice process which generally fails to recognise cultural differences and has discriminatory practices. The existence of laws, processes and practices within the justice system that are overtly punitive and discriminate, either directly or indirectly, against Aboriginal and Torres Strait Islander peoples include:

- Indigenous people are much more likely to be questioned by police than non-Indigenous people; when questioned, they are more likely to be arrested rather than proceeded against by summons; and if arrested, they are much more likely to be remanded in custody than given bail.
- Indigenous people are much more likely to plead guilty than go to trial; and if they go to trial, they are much more likely to be convicted.
- If convicted, Indigenous people are much more likely to be imprisoned than non-Indigenous people; at the end of their term of imprisonment they are much less likely to get parole.
- Indigenous people are over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation (in Western Australia).
- Mandatory sentencing regimes have a disproportionate impact on disadvantaged, vulnerable people, notably Indigenous offenders. This is particularly the case for mandatory sentencing laws which prescribe imprisonment for property offences, as is the case for Western Australia and the Northern Territory.
- Punitive bail conditions are imposed by police in several jurisdictions, where a very high proportion of Indigenous prisoners are being held on remand for lengthy periods of time, thereby significantly inflating rates of imprisonment.
- An increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Indigenous young people on remand.
- Over-policing is a key cause of high incarceration of Indigenous people, particularly in Western Australia. Policies targeting individuals granted non-custodial sentences (e.g. good behaviour bonds) and the targeting of those on bail through frequent bail compliance checks, results in higher levels of arrest and incarceration.
- Lack of adequate alternative legal solutions such as youth conferencing, circle sentencing and Aboriginal courts as part of the restorative justice framework.
- Underfunding of specialised legal services to provide Aboriginal and Torres Strait Islander people with representation, prevention, diversion and rehabilitation facilities.
- Inadequate support for reintegrating ex-prisoners back in the community in order to reduce recidivism (re-offending).
- Diversion programs aimed at potential offenders can often be too rigid in nature and thus fail to adapt to local circumstances in individual communities, neglecting to understand the complex reality of Aboriginal and Torres Strait Islander societies.

SOURCES
The Senate, Finance and Public Administration References Committee (13 October 2016), Aboriginal and Torres Strait Islander experience of law enforcement and justice services.
La Macchia, M (17 October 2016), An introduction to over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Compiled by The Spinney Press.
Indigenous incarceration: Pathways to Justice report recommendations

Recommendations from the Pathways to Justice report by the Australian Law Reform Commission

Justice reinvestment

Recommendation 4-1 Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body. The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment.

Its functions should include:
- Providing technical expertise in relation to justice reinvestment;
- Assisting in developing justice reinvestment plans in local sites; and
- Maintaining a database of evidence-based justice reinvestment strategies.

The justice reinvestment body should be overseen by a board with Aboriginal and Torres Strait Islander leadership.

Recommendation 4-2 Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities, including through:
- Facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs;
- Supporting local justice reinvestment initiatives; and
- Facilitating participation by, and coordination between, relevant government departments and agencies.

Bail

Recommendation 5-1 State and territory bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person’s Aboriginality, including cultural background, ties to family and place, and cultural obligations. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending. The Bail Act 1977 (Vic) incorporates such a provision.

As with all other bail considerations, the requirement to consider issues that arise due to a person’s Aboriginality would not supersede considerations of community safety.

Recommendation 5-2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:
- Develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person’s Aboriginality, in collaboration with peak legal bodies; and
- Identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.

Sentencing and Aboriginality

Recommendation 6-1 Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

Recommendation 6-2 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of ‘Indigenous Experience Reports’ for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

Recommendation 6-3 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

Community-based sentences

Recommendation 7-1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islander offenders, by:
- Expanding the geographic reach of community-based sentencing options, particularly in regional and remote areas;
- Providing community-based sentencing options.
that are culturally appropriate; and

• Making community-based sentencing options accessible to offenders with complex needs, to reduce reoffending.

**Recommendation 7-2** Using the Victorian Community Correction Order regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.

**Recommendation 7-3** State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders.

**Recommendation 7-4** In the absence of the availability of appropriate community-based sentencing options, suspended sentences should not be abolished.

**Recommendation 7-5** In the absence of the availability of appropriate community-based sentencing options, short sentences should not be abolished.

**Mandatory sentencing**

**Recommendation 8-1** Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

**Prison programs and parole**

**Recommendation 9-1** State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release. These programs should be made available to:

• Prisoners held on remand;
• Prisoners serving short sentences; and
• Female Aboriginal and Torres Strait Islander prisoners.

**Recommendation 9-2** To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:

• Introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and
• Abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

**Access to justice**

**Recommendation 10-1** State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

• Establish interpreter services within the criminal justice system where needed; and
• Monitor and evaluate their use.

**Recommendation 10-2** Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

**Recommendation 10-3** Relevant Aboriginal Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.

**Recommendation 10-4** Where not already in place, state and territory governments should introduce special hearing processes to make qualified determinations regarding guilt after a person is found unfit to stand trial.

**Recommendation 10-5** Where not already in place, state and territory governments should implement Recommendation 7-2 of the ALRC Report *Equality, Capacity and Disability in Commonwealth Laws* to provide for a fixed term when a person is found unfit to stand trial and ensure regular periodic review while that person is in detention.

**Aboriginal and Torres Strait Islander women**

**Recommendation 11-1** Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system – leading up to, during and post-incarceration – should take into account their particular needs so as to improve their chances of rehabilitation, reduce their likelihood of reoffending and decrease their involvement with the criminal justice system. Such programs and services, including those provided by NGOs, police, courts and corrections, must be:

• Developed with and delivered by Aboriginal and Torres Strait Islander women; and
• Trauma-informed and culturally appropriate.

**Recommendation 11-2** Police engaging with Aboriginal and Torres Strait Islander people and communities should receive instruction in best practice for handling allegations and incidents of family violence – including preventative intervention and prompt response – in those communities.

**Fines and driver licences**

**Recommendation 12-1** Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of, or as a result of, unpaid fines.

**Recommendation 12-2** State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop options that:

• Reduce the imposition of fines and infringement notices;
• Limit the penalty amounts of infringement notices;
• Avoid suspension of driver licences for fine default; and
• Provide alternative ways of paying fines and infringement notices.

**Recommendation 12-3** State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to identify areas without services relevant to driver licensing and to provide those services, particularly in regional and remote communities.

**Recommendation 12-4** State and territory governments should review the effect on Aboriginal and Torres Strait Islander peoples of statutory provisions that criminalise offensive language with a view to:

- Repealing the provisions; or
- Narrowing the application of those provisions to language that is abusive or threatening.

**Alcohol**

**Recommendation 13-1** All initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs.

**Recommendation 13-2** Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities that wish to address alcohol misuse to:

- Develop and implement local liquor accords; and/or
- Develop plans to prevent the sale of full strength alcohol or reduce the availability of particular alcohol ranges or products within their communities.

**Police accountability**

**Recommendation 14-1** Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.

**Recommendation 14-2** To provide Aboriginal and Torres Strait Islander people and communities with greater confidence in the integrity of police complaints handling processes, Commonwealth, state and territory governments should review their police complaints handling mechanisms to ensure greater practical independence, accountability and transparency of investigations.

**Recommendation 14-3** Commonwealth, state and territory governments should introduce a statutory requirement for police to contact an Aboriginal and Torres Strait Islander legal service, or equivalent service, as soon as possible after an Aboriginal and Torres Strait Islander person is detained in custody for any reason – including for protective reasons. A maximum period within which the notification must occur should be prescribed.

**Recommendation 14-4** In order to further enhance cultural change within police that will ensure police practices and procedures do not disproportionately contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, the following initiatives should be considered:

- Increasing Aboriginal and Torres Strait Islander employment within police;
- Providing specific cultural awareness training for police being deployed to an area with a significant Aboriginal and Torres Strait Islander population;
- Providing for lessons from successful cooperation between police and Aboriginal and Torres Strait Islander peoples to be recorded and shared;
- Undertaking careful and timely succession planning for the replacement of key personnel with effective relationships with Aboriginal and Torres Strait Islander communities;
- Improving public reporting on community engagement initiatives with Aboriginal and Torres Strait Islander peoples; and
- Entering into Reconciliation Action Plans.

**Child protection and adult incarceration**

**Recommendation 15-1** Acknowledging the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

**Criminal justice targets and Aboriginal justice agreements**

**Recommendation 16-1** The Commonwealth Government, in consultation with state and territory governments, should develop national criminal justice targets. These should be developed in partnership with peak Aboriginal and Torres Strait Islander organisations, and should include specified targets by which to reduce the rate of:

- Incarceration of Aboriginal and Torres Strait Islander people; and
- Violence against Aboriginal and Torres Strait Islander people.

**Recommendation 16-2** Where not currently operating, state and territory governments should renew or develop an Aboriginal Justice Agreement in partnership with relevant Aboriginal and Torres Strait Islander organisations.

**Pathways to Justice** is available at www.alrc.gov.au/publications. A Summary Report is also available.

Indigenous community groups have called on the Australian government to follow the “clear roadmap for change” presented by a new government-commissioned report, which examined the disproportionate rate of incarceration of Aboriginal and Torres Strait Islander peoples. By Luke Michael for Pro Bono Australia

The federal government asked the Australian Law Reform Commission (ALRC) in October 2016 to explore how the over-representation of Aboriginal and Torres Strait Islander people in prisons could be alleviated.

The final report was tabled in Parliament on Wednesday, containing 35 recommendations. These included developing national criminal justice targets to reduce indigenous incarceration rates, the creation of an independent justice reinvestment body to redirect criminal justice system resources to community-led initiatives, and the establishment of a national inquiry into child protection laws affecting Indigenous children.

The report noted that Indigenous men were 14.7 times more likely to be imprisoned than non-Indigenous men, while Indigenous women were 21.2 times more likely to be imprisoned than non-Indigenous women.

“Although Aboriginal and Torres Strait Islander adults make up around 2 per cent of the national population, they constitute 27 per cent of the national prison population,” the report said.

“In 2016, around 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated.

“Over-representation is both a persistent and growing problem – Aboriginal and Torres Strait Islander incarceration rates increased 41 per cent between 2006 and 2016, and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over that decade widened.”

Judge Matthew Myers AM, the commissioner in charge of the inquiry, said while the issues outlined in the report were complex, they were able to be solved.

“Law reform is an important part of that solution. Reduced incarceration, and greater support for Aboriginal and Torres Strait Islander people in contact with the criminal justice system, will improve health, social and economic outcomes for Aboriginal and Torres Strait Islander peoples, and lead to a safer society for all,” Myers said.

Indigenous community groups have welcomed the report, and called on the government to heed the ALRC recommendations.

Damian Griffis, co-chair of Change the Record – a coalition of leading Aboriginal and Torres Strait Islander, human rights, legal and community organisations – said the report provided “a clear roadmap for change”.

“The Law Reform Commission has built on the evidence and expertise of past inquiries. This report provides an evidence-based guide governments can follow to turn the tide,” Griffis said.

“They must act now and reform the aspects of criminal justice systems that lead to this inequality. This is an urgent human rights issue. It’s time for change.”

“We need to shift investment from expensive, ineffective prisons, into community-controlled organisations that will address the underlying drivers of Aboriginal and Torres Strait Islander people going into prison.”

Griffis’ fellow co-chair Antoinette Braybrook added: “It’s time for the federal government to commit to action and to work with Aboriginal and Torres Strait Islander communities to implement the changes the ALRC has recommended.

“We need to shift investment from expensive, ineffective prisons, into community-controlled organisations that will address the underlying drivers of Aboriginal and Torres Strait Islander people going into prison.”

Griffis – who is also CEO of First Peoples Disability Network Australia – said action was needed to protect indigenous people with disability in the criminal justice system.

“Aboriginal and Torres Strait Islander people with disability are more likely to end up in the justice system.
because of a lack of understanding of disability in the criminal justice system and absence of appropriate community-based support,” he said.

“The report has confirmed that governments need to do much more to provide appropriate community-based support for Aboriginal and Torres Strait Islander people with disability in order to avoid the criminalisation of disability.”

Just Reinvest NSW lauded the ALRC for their justice reinvestment approach to the issue, which the report labelled an “appropriate and more effective [alternative] to imprisonment for Aboriginal and Torres Strait Islander people”.

Chair Sarah Hopkins said: “Investing in prisons is investing in failure – focusing on locking people up doesn’t make sense economically or socially. Justice reinvestment projects are community-led, place-based and data-driven – this should be a critical part of policy and law reform.

“The answer to the problem of too many people in contact with the justice system won’t be found inside the justice system. We solve this by getting in front of the problem, focusing on the local solutions that strengthen communities and keep people from offending in the first place.

“It costs over $100,000 to lock someone up for a year. Analysis from the UK suggests that for every dollar invested in alternatives to incarceration, $14 worth of social value was produced for women, children, victims and society as a whole.”

Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar AO, said the Australian Human Rights Commission supported the findings of the report.

Oscar backed calls for an independent justice reinvestment body to be established to reduce the interaction between Aboriginal and Torres Strait Islander peoples and the criminal justice system.

“The Australian Human Rights Commission has long supported a justice reinvestment approach that addresses the social determinants of health and invests in the expertise provided by Indigenous organisations,” Oscar said.

“[The] commission wholeheartedly supports the report’s calls for a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children. We must embrace strategies aimed at early intervention and family supports within the child welfare and justice spaces.

“I urge all governments to work with Aboriginal and Torres Strait Islander peoples and their organisations in realising the report’s recommendations, particularly in developing justice targets, within the federal government’s Closing the Gap Refresh process.”

A number of legal bodies have also urged the government to implement recommendations from the report. Law Council president, Morry Bailes, said the Indigenous incarceration rates were a “national crisis” requiring immediate action.

“It has been 27 years since the Royal Commission into Aboriginal Deaths in Custody found that Aboriginal and Torres Strait Islander people were imprisoned at seven times the rate of the general population, yet many of its 339 recommendations remain unimplemented,” Bailes said.

“The ALRC report must not go the way of the past Royal Commission report where most of the recommendations are still gathering dust. The ALRC’s recommendations offer a renewed roadmap to end disproportionate numbers of Aboriginal and Torres Strait Islander people in incarceration.

“The proposed justice reinvestment strategies are vital to communities. For decades, research has shown that top-down approaches to social issues do not work and we know top-down approaches do not reduce recidivism, they perpetuate and often drive it.”

“Aboriginal Legal Service (NSW/ACT) CEO Lesley Turner said “an integrated response to crime, health and social services” was needed to reduce the underlying causes of offending.

“This includes implementing more culturally-appropriate early intervention and prevention programs that address the complex legal and non-legal issues faced by Aboriginal and Torres Strait Islander people including housing, disability, mental health, drug and alcohol rehabilitation and family violence,” Turner said.

The ALRC report drew its findings from 149 national consultations and more than 120 submissions.

Myers thanked all those who participated in the inquiry.

“It has been humbling to meet with the community organisations and individuals who work tirelessly to achieve justice and better outcomes for Aboriginal and Torres Strait Islander peoples,” he said.

“It is critical we acknowledge that Aboriginal and Torres Strait Islander peoples understand the problems leading to their over-incarceration.

“Facilitating Aboriginal and Torres Strait Islander peoples to develop and deliver appropriate strategies, initiatives, and programs are a feature of the ALRC recommendations.”

We need evidence-based law reform to reduce rates of Indigenous incarceration

Reducing contact with the criminal justice system is an important aspect of achieving equality and justice for Indigenous Australians, writes Elyse Methven

On March 28, the Australian Law Reform Commission report on reducing Indigenous incarceration was tabled in parliament. Its recommendations aim to decrease Indigenous contact with the criminal justice system and reform punitive laws that entrench Indigenous disadvantage.

Imprisonment statistics for Indigenous Australians are deplorable. Imprisonment of Indigenous Australians increased 41% between 2006 and 2016. In 2016, Indigenous Australians constituted 27% of the national prison population, but just 3% of the Australian population. Indeed, Indigenous Australians are the most incarcerated people on Earth.

For those who remain unmoved by these numbers, there are the economic costs. The cost of incarceration of Indigenous Australians in 2016 was estimated at A$3.9 billion. Beyond costs directly related to the justice system, the estimated cost rises to A$7.9 billion.

Governments have met these statistics not with inaction, but with the creation of more crimes, tougher bail laws, and lengthier sentences.

The recommendations

Informed by 127 submissions, 149 consultations, and earlier reports and inquiries, the report makes recommendations to improve justice for Indigenous Australians.

Notable among its 35 recommendations are:

• The establishment of a justice reinvestment body
• Review of police complaints handling policies and practices
• Consideration of systemic and cultural factors affecting Indigenous Australians in bail and sentencing decisions
• Abolition of imprisonment in lieu of, or as a result of, unpaid fines, and
• National criminal justice targets to reduce the incarceration of, and violence against, Indigenous Australians.

Minor fines create a cycle of poverty

Many Australians have received on-the-spot fines for parking offences, traffic breaches or minor offences. Such fines may be inconvenient, or place a small financial burden on some; but for those without the means to pay, fines can spiral into insurmountable debt.

Indigenous Australians, people who are homeless, and those of low socioeconomic status are more likely to receive infringement notices for public order and other minor offences. This is a result of multiple and complex factors.

Indigenous Australians occupy public space more often than non-Indigenous Australians, primarily due to socio-cultural factors and their connection to the land. People who are homeless or living in temporary accommodation must conduct their private lives, including personal disputes, in public spaces.

The cost of incarceration of Indigenous Australians in 2016 was estimated at $3.9 billion. Beyond costs directly related to the justice system, the estimated cost rises to $7.9 billion.

There is also a greater proportion of physical disability, mental illness, alcohol or drug dependency, and a history of family and domestic violence among these groups. This leads to increased police surveillance and interactions, particularly for public nuisance-type offences.

Indigenous and vulnerable Australians are more likely to fail to pay fines on time and incur further sanctions. Fines coupled with enforcement costs become impossible to pay for people on low incomes, or those who are homeless or unemployed.

Fine amounts can be prohibitive. In 2014, the NSW government increased the fine for the continuation
of intoxicated and disorderly behaviour following a move-on direction from A$200 to A$1,100. A report by the NSW Ombudsman found Indigenous Australians accounted for 31% of the 484 fines and charges issued for this offence in the review period.

Every state and territory has progressive sanctions regimes for fine default. If fines are not paid on time, people accumulate further debts, have their drivers licence suspended or disqualified, have property seized, perform community service work, and – in some cases – are imprisoned.

Drivers licence sanctions operate especially harshly on Aboriginal people living in regional, rural or remote communities. Private vehicles are often the only practical means of transport available to access work or basic services, such as health care.

Sentences of imprisonment may also be imposed as a result of secondary offending from driver licence disqualification. The ALRC has recommended governments develop options to reduce the imposition of fines and infringement notices, limit penalty amounts, and avoid suspension of driver licences for fine default.

**Imprisonment for fine default**

In many states and territories, a person can “cut out” court-imposed fines by serving a prison sentence, where that person has failed to comply with a Community Service Order, or is otherwise ineligible for a CSO.

Western Australia has the highest rate of incarceration for fine default. Between July 2006 and June 2015, 7,462 people were imprisoned for fine default in WA. The average sentence served was four days. Indigenous men represented 38% of the male defaulter prison population.

The impact on Indigenous and disadvantaged women is even more stark. Between July 2006 and June 2015, 73% of female fine defaulters in WA were unemployed when imprisoned, and 64% were Indigenous.

The injustice that may be suffered by fine defaulters was highlighted by the death of Aboriginal woman Ms Dhu in August 2014. Ms Dhu died in the custody of police officers after being taken to South Hedland Police Station for unpaid fines and enforcement penalties amounting to A$3,662. The fines, which neither she nor her father could pay, were largely for swearing at police officers.

**Repealing offensive language crimes**

Another focus of the inquiry was the policing and impact of offensive language provisions. All Australian states and territories criminalise offensive, obscene or indecent language used in or near a public place. Offensive language crimes generally target verbal speech, and predominantly the swear words “f@#k” and/or “c@#t”.

Written signs and displays (such as a person wearing a t-shirt with a swear word printed on it) are punished under offensive conduct offences.

A recent initiative allows police to issue on-the-spot fines for offensive language. These fines range from A$110 in Queensland to A$500 in NSW and WA.

Kimberly Community Legal Services has suggested that for many Indigenous people, those who are homeless, and other disadvantaged groups, the imposition of a A$500 fixed fine for swearing is “tantamount to a prison sentence”.

It is hoped the report will be not be ‘shelved’ like that of the Royal Commission into Aboriginal Deaths in Custody, and instead the government will respond promptly with evidence-based law reform.

Indigenous people are significantly over-represented when it comes to receiving fines and charges for offensive language. In the year from 1 April 2016 to 31 March 2017, Indigenous adults comprised 21% of all 1,054 adults in NSW proceeded against to court for using offensive language. Indigenous adults also comprised 15% of all 1,716 adults in NSW proceeded against by way of infringement notice.

The ALRC has recommended state and territory governments review the effect of offensive language provisions on Indigenous people, with a view to repealing them or narrowing their scope.

This recommendation is by no means novel. The review and repeal of offensive language crimes has previously been advocated by legal academics and law reform bodies. Most notably, in 1991, the Royal Commission into Aboriginal Deaths in Custody observed:

> **It is surely time that police learnt to ignore mere abuse, let alone simple “bad language”… Charges about language just become part of an oppressive mechanism of control of Aboriginals.**

**Implementation of the recommendations**

The Turnbull Government has been criticised for its underwhelming response to the ALRC report. The Coalition has so far issued a two-line statement indicating that it “will consider the report’s relevant recommendations and respond in due course.”

It is hoped the report will be not be ‘shelved’ like that of the Royal Commission into Aboriginal Deaths in Custody, and instead the government will respond promptly with evidence-based law reform.

Reducing contact with the criminal justice system is an important aspect of achieving equality and justice for Indigenous Australians. Implementation of the 35 recommendations – alongside measures to enhance Indigenous self-determination – are necessary steps on the path to achieving these goals.

Elyse Methven is Lecturer in Law, University of Technology Sydney.

**THE CONVERSATION**

As Indigenous incarceration rates keep rising, justice reinvestment offers a solution

It is a national shame that Indigenous people make up 2% of the general population, but 28% of the prison population. Sophie Russell and Chris Cunneen believe justice reinvestment offers a pathway to preventing crime and making communities safer.

The over-incarceration of Aboriginal and Torres Strait Islander Australians is one of our nation’s most significant human rights concerns. Data released last week show the number of people imprisoned in Australia has continued to rise. The rate of Indigenous incarceration has increased by 45% since 2008. It is a national shame that Aboriginal and Torres Strait Islander Australians make up 2% of the total Australian population, but 28% of the adult prison population.

Aboriginal and Torres Strait Islander men are 15 times more likely to be in custody than non-Indigenous men. Aboriginal and Torres Strait Islander women are 21 times more likely to be in custody than non-Indigenous women.

The picture is particularly stark for Indigenous children. They make up 7% of the general youth population but 54% of those in youth detention across Australia. This ranges, on average, from 15% in Victoria to 97% in the Northern Territory.

The staggering over-representation of Indigenous people in prison was the focus of the Australian Law Reform Commission report Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People. The report was delivered to the federal Attorney-General in December 2017. A year later, the government has yet to respond.

WHAT DID THE INQUIRY RECOMMEND?

Two key recommendations involved “justice reinvestment”. Justice reinvestment is a strategy for reducing the number of people in prison by investing funds drawn from the corrections budget into early intervention, prevention and diversionary solutions in communities where many prisoners come from and return to.

Justice reinvestment involves working with a community to design local solutions to overcome the drivers of crime and incarceration.

The inquiry recommended an independent justice reinvestment body be set up with Aboriginal and Torres Strait Islander leadership. This would provide technical expertise and promote the reinvestment of resources from the criminal justice system into community-based initiatives.

The inquiry also recommended that governments...
support justice reinvestment trials in partnership with Aboriginal and Torres Strait Islander communities. This would include allowing access to local criminal justice data, supporting local justice reinvestment initiatives and facilitating participation and coordination between relevant government departments and agencies.

A small number of community-led justice reinvestment trials are taking place throughout Australia. There is widespread support for further advancing justice reinvestment.

**EVIDENCE SHOWS JUSTICE REINVESTMENT IS ALREADY WORKING**

The Maranguka Justice Reinvestment project in Bourke, New South Wales, is the most developed community-based trial. The Bourke Tribal Council, assisted by Just Reinvest NSW, directs and guides Maranguka.

The project is building a safer and stronger community. This has led to significant reductions in crime and reoffending. From 2016 to 2017, the Bourke community experienced a:

- 23% reduction in police-recorded incidents of domestic violence
- 14% reduction in bail breaches for adults
- 42% reduction in days spent in custody for adults
- 31% increase in Year 12 student retention rates
- 38% reduction in charges across the top five juvenile offence categories.

A KPMG impact assessment found the Maranguka project achieved savings of A$3.1 million in 2017. Two-thirds of that relates to the criminal justice system and one-third is the broader economic impact in the region.

The financial impact of the project is about five times greater than its operational costs. If Bourke is able to sustain just half the 2017 results, an additional gross impact of A$7 million over the next five years could be achieved.

**JUSTICE REINVESTMENT OFFERS A SOLUTION**

Community leaders, academics and representatives from businesses, non-government organisations and government attended a national justice reinvestment forum in Canberra last week. The message from the forum was clear: solutions to reduce Indigenous imprisonment need to be community-designed and driven, with government support.

Research has found a large portion of prisoners come from and return to a small number of inadequately resourced neighbourhoods and communities. It is well known that prisons are filled with people who are disproportionately disadvantaged and who have unmet social, health and disability-related needs.

Research has also shown that prison does not reduce crime. It actually perpetuates cycles of poverty, disadvantage and reoffending.

It costs almost A$300 a day to keep an adult in prison. The average cost of locking up a young person is almost five times that amount.

Aboriginal and Torres Strait Islander over-incarceration cost the Australian economy an estimated A$7.9 billion in 2016. These costs are expected to grow to A$9.7 billion in 2020 and A$19.8 billion by 2040, if we continue on the same trajectory.

Australia cannot afford the social, health and economic costs of over-imprisonment of Aboriginal and Torres Strait Islander Australians. Strong, healthy and connected communities are the most effective way to prevent crime and make communities safer. Justice reinvestment offers a pathway to achieve this.

**DISCLOSURE STATEMENT**

Sophie Russell is a member of the Australian Justice Reinvestment Network and is a volunteer mentor with the Women’s Justice Network. She works on research projects funded by the Australian Research Council. Chris Cunneen is a member of the Australian Justice Reinvestment Network. He receives funding from the Australian Research Council.

Sophie Russell is Research Associate, UNSW.

Chris Cunneen is Professor of Criminology, University of Technology Sydney.
IPA REPORT: INDIGENOUS AUSTRALIANS AND THE CRIMINAL JUSTICE SYSTEM

A report by Andrew Bushnell from the free market think tank the Institute of Public Affairs examines the very high rate of incarceration among Indigenous Australians. The report makes an original contribution through a renewed focus on core principles of justice and corrections, while being mindful of Indigenous disadvantage.

It finds that despite decades of special programs for Indigenous offenders, recidivism and incarceration rates have continued to climb, and calls for enhanced options for punishment and reform outside of the traditional prison system.

The fourth major report of the IPA’s Criminal Justice program authored by IPA Research Fellow, Andrew Bushnell, was recently incorporated into a submission to the Australian Law Reform Commission’s inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples.

“The standard of living of Indigenous Australians falls far short of the standard that the rest of the nation enjoys,” Mr Bushnell said. “Many aspects of this disadvantage are correlated, in general, with higher offending and incarceration.”

“However, these correlations also exist for non-Indigenous cultural groups, and therefore it is incorrect and counter-productive to believe that the criminal justice system must treat Indigenous Australians in an exceptional way.”

“The high level of Indigenous offending and incarceration can and should be addressed in a manner consistent with the traditional bases of the criminal justice system: community safety, fair punishment, and personal responsibility.”

“All of the tools necessary for improving Indigenous outcomes in criminal justice are known and available,” said Mr Bushnell.

The report finds that despite decades of special programs for Indigenous offenders, recidivism and incarceration rates have continued to climb, and calls for enhanced options for punishment and reform outside of the traditional prison system.

However, there are unique difficulties in finding alternatives to incarceration. Indigenous offenders are more likely than the non-Indigenous to be imprisoned for violent crimes and to have been in prison before. Moreover, Indigenous Australians are more likely to live in remote areas where the delivery of Government of alternatives to incarceration, like home detention and work and community orders, is more difficult.

But Mr Bushnell said the problems were not insurmountable.

“More should be done to fill in the spectrum of coercion that exists between release into the community and imprisonment. In particular, residential programs in larger population centres that can sustain them would make employment programs and rehabilitation services more viable.”

“The high level of Indigenous offending and incarceration can and should be addressed in a manner consistent with the traditional bases of the criminal justice system: community safety, fair punishment, and personal responsibility.”

“It is important to improve Indigenous Australians’ ability to access our universal system of justice, including alternative punishments, rather than developing parallel systems of justice than only reinforce social division,” said Mr Bushnell.

In the report, Mr Bushnell observes the search for solutions should not lead to setting aside traditional principles of justice. He said the criminal justice system must remain focused on defending individual rights and delivering retribution on behalf of victims and society, and the correction of offenders’ antisocial behaviour, for the long-term benefit of all Australians of all backgrounds.

“To view this issue through any other prism 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.”

Australia’s prison population grew by 43 per cent between 2007 and 2016, with more than one third of this growth caused by the incarceration of Indigenous Australians. Indigenous Australians make up 3 per cent of the general population, but 27 per cent of the prison population.

There is growing awareness that incarceration in Australia is rising at an unsustainable rate. In previous reports, the Institute of Public Affairs Criminal Justice Project has demonstrated the potential benefits of reforming punishment for non-violent, low-risk offenders and the importance of skills training and work to the reduction of recidivism.

The lessons of successful criminal justice reform in the United States and elsewhere apply with equal validity to the problem of rising Indigenous incarceration.

INDIGENOUS AUSTRALIANS AND THE CRIMINAL JUSTICE SYSTEM

EXECUTIVE SUMMARY FROM A REPORT Authored by ANDREW BUSHNELL FROM THE INSTITUTE OF PUBLIC AFFAIRS

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 issue 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 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

The criminal law in Australia is founded on certain principles that cannot be compromised without calling into question the legitimacy of the system itself.
• 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-policing and safe and by fostering opportunities to participate in the economy through employment.

Andrew Bushnell is a Research Fellow at the Institute of Public Affairs, working on the Criminal Justice Project. He previously worked in policy at the Department of Education in Melbourne and in strategic communications at the Department of Defence in Canberra. Andrew holds a Bachelor of Arts (Hons) and a Bachelor of Laws from Monash University, and a Master of Arts from Linköping University in Sweden.

Are Indigenous Australians the most incarcerated people on Earth?

Author Thalia Anthony and reviewer Eileen Baldry test this confronting claim in a Q&A fact check, first published by The Conversation

We’ve made progress in the last 50 years but some of the profound indicators of our problems – children alienated from parents, the most incarcerated people on the planet Earth, and youths in great numbers in detention – obviously speak to a structural problem.

– Cape York Partnership founder Noel Pearson, speaking on Q&A, 29 May 2017

During a Q&A episode marking the 50th anniversary of the 1967 referendum, Cape York Partnership founder Noel Pearson outlined some of the problems Indigenous Australians continue to face, including high incarceration rates. Pearson said Indigenous Australians are “the most incarcerated people on the planet Earth”.

Is that right?

Checking the source

When asked for sources to support his statement, a spokesperson for Pearson referred The Conversation to data from the US Bureau of Justice Statistics and the Australian Bureau of Statistics (ABS), and said:

The US has the highest rate of imprisonment (in number and by percentage of population).
In the US, the African-American people are the most incarcerated by percentage of their population (2,207 per 100,000).
Indigenous Australians are the most incarcerated by percentage of their population (2,346 per 100,000).

Therefore, the statement that Indigenous Australians are the most incarcerated people in the world is true.

What do the data say?

It depends a bit on what you mean by “people”, which is a tricky term to define and will mean different things to different audiences.

For the purposes of this FactCheck, I have confined myself to checking Pearson’s statement on Indigenous Australian incarceration rates with the best available data on national incarceration rates in other countries.

I have also checked Indigenous Australian incarceration rates against the rate at which Indigenous populations are imprisoned in other countries, as well as the rate for African-Americans.

Let’s look at the facts.

Which country has the world’s highest adult imprisonment rate?

We can compare rates of incarceration in countries around the world using the World Prison Brief, an international database hosted by the Institute for Criminal Policy Research at Birbeck, University of London. It reports the number of adults incarcerated per 100,000 of the total population in 223 jurisdictions.

Pearson’s spokesperson was accurate to say the US had the highest overall rate of imprisonment in 2010, but things have changed since then.

The World Prison Brief now names Seychelles as the country with the highest adult imprisonment rate.

ADULT IMPRISONMENT RATES PER 100,000 OF TOTAL POPULATION, 2015

<table>
<thead>
<tr>
<th>Country</th>
<th>Rate per 100,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous Australians</td>
<td>1,356</td>
</tr>
<tr>
<td>United States of America</td>
<td>666</td>
</tr>
<tr>
<td>Australia (all people)</td>
<td>152</td>
</tr>
</tbody>
</table>

Data for the United States of America is from World Prison Brief. The Indigenous Australian and Australian rates are calculated using ABS data and population estimates. The United States of America is second on the World Prison Brief ranking of imprisonment rates; Australia ranks in the 90s. Seychelles (the country currently reported by World Prison Brief as having the highest national incarceration rate) is not included because its latest data are from 2014.

Source: World Prison Brief

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rate. That’s based on data from 2014, which showed Seychelles had an imprisonment rate of 799 adults per 100,000 people.

The US is currently in second place, having reported 666 adult prisoners per 100,000 people in 2015.

As a total population – including both Indigenous and non-Indigenous Australians – Australia currently ranks 93rd on the World Prison Brief list, with an imprisonment rate of 162 adults per 100,000 of the total population in 2016.

But, as Pearson highlighted on Q&A, we get a very different result when we look at the incarceration rate for Indigenous Australians.

Comparing Indigenous Australia’s imprisonment rate to the World Prison Brief rankings

The World Prison Brief doesn’t report the adult imprisonment rate for Indigenous Australians as a subset of the Australian population. But it is possible to calculate an estimate to compare to the international figures, using ABS data and population estimates.

In 2015, the Indigenous population in Australia was approximately 729,000 people. In that year, there were 9,885 Indigenous adult prisoners. That’s an imprisonment rate of roughly 1,356 adults per 100,000 of the total Indigenous Australian population.

So, Pearson’s statement that Indigenous Australians are “the most incarcerated people on the planet Earth” is correct if considering Indigenous Australian incarceration rates alongside incarceration rates in countries listed by the World Prison Brief.

Indigenous and marginalised groups’ incarceration rates in Canada, NZ and the US

But how does Australia’s Indigenous imprisonment rate compare with those of other Indigenous and marginalised communities around the world?

Data on Indigenous imprisonment rates are not consistently measured or reported in many countries. So it’s difficult to gauge how Australia’s Indigenous imprisonment rate compares with Indigenous people or marginalised groups internationally.

But credible data are available for a number of groups in several countries: Australia, Canada, New Zealand and the US. (Note: the following figures are reported per 100,000 of the adult population, not the total population as used by the World Prison Brief.)

Starting with the US, Pearson’s spokesperson accurately quoted US Bureau of Justice Statistics that showed African-Americans were the most imprisoned racial group in the US in 2010, with an adult imprisonment rate of 2,207 per 100,000 African-American adults. In the same year, Indigenous Australians were imprisoned at a higher rate – 2,303 per 100,000 Indigenous adults.

As a total population – including both Indigenous and non-Indigenous Australians – Australia currently ranks 93rd on the World Prison Brief list ... But ... we get a very different result when we look at the incarceration rate for Indigenous Australians.

In 2015, the adult imprisonment rate of Indigenous Australians was still higher than that of African-Americans. In that year, 1,745 per 100,000 African-American adults were incarcerated, compared to 2,253 per 100,000 Indigenous Australian adults. (By 2016, the Indigenous Australian incarceration rate had risen another 4%, to 2,346 adult prisoners per 100,000 adults.)

The imprisonment rate for Indigenous Americans in the US in 2010 was 895 per 100,000 Indigenous American adults. The imprisonment rate for Canada’s Aboriginal people in 2010-11 was estimated to be 1,400 per 100,000 Aboriginal Canadian adults.

We can calculate the imprisonment rate for New Zealand’s Māori using statistics from the Department of Corrections and Stats NZ. In 2015, the Māori adult imprisonment rate was approximately 1,063 per 100,000 Māori adults.

So, Indigenous Australians were imprisoned at higher rates than Indigenous people in the US in 2010, in Canada in 2010-11 and in New Zealand in 2015, and than African-Americans in 2015.
VERDICT
Noel Pearson’s statement that Indigenous Australians are “the most incarcerated people on the planet Earth” is correct, based on the best available international data. – Thalia Anthony

Indigenous Australians were imprisoned at higher rates than Indigenous people in the US in 2010, in Canada in 2010-11 and in New Zealand in 2015, and than African-Americans in 2015.

REVIEW
This is a sound FactCheck. We do not have data for imprisonment rates of Indigenous, minority or marginalised groups in every country on Earth, so we cannot categorically state Indigenous Australians are the most incarcerated on the planet. But for countries for which we do have data, this is an accurate statement. – Eileen Baldry

The incarceration of Aboriginal and Torres Strait Islander peoples is costing almost $8 billion each year and is projected to grow to almost $20 billion per annum by 2040 without further intervention, according to a PwC Australia report, Indigenous incarceration: Unlock the facts.

Costs of Indigenous incarceration

The report also highlights the social costs of incarceration and points to the economic and social benefits of Indigenous-led, evidence-based approaches in addressing the issue.

Richmond Football Club and the Korin Gamadji Institute collaborated with PwC and Change the Record to develop the report.

In 2016, costs related to Indigenous incarceration in Australia’s justice system were $3.9 billion, and are forecast to grow to $10.3 billion annually by 2040. Welfare costs associated with the issue will rise to $110 million by 2040, while economic costs are expected to reach over $9 billion annually.

The social costs and consequences of Indigenous incarceration are also significant: Indigenous people who have been incarcerated are at greater risk of financial stress, low levels of educational attainment, poor employment prospects, and find it harder to access accommodation. As a result, they have a greater chance of recidivism, poor health and wellbeing. These impacts on individuals can also have intergenerational consequences which flow onto families and communities.

According to PwC, annual savings to the economy of nearly $19 billion could be achieved by 2040 if the gap between Indigenous and non-Indigenous rates of incarceration were closed, based on the implementation of specific evidence-based recommendations including:

- Placing Indigenous self-determination at the centre of the solution
- Establishing national targets against which progress can be measured
- Improving cultural awareness across the system
- More investment in prevention and early intervention
- Better designed throughcare and reintegration programs to reduce recidivism, and
- More investment in innovation and evaluation to more clearly identify what actually works to reduce Indigenous rates of imprisonment.

The report also highlights the social costs of incarceration and points to the economic and social benefits of Indigenous-led, evidence-based approaches in addressing the issue. Richmond Football Club and the Korin Gamadji Institute collaborated with PwC and Change the Record to develop the report.


SOURCES

Compiled by The Spinney Press.
INDIGENOUS IMPRISONMENT AND VIOLENCE: BLUEPRINT FOR CHANGE

Change the Record on the disproportionate imprisonment rates, and rates of violence experienced by Aboriginal and Torres Strait Islander people

About us
Change the Record is a coalition of leading Aboriginal and Torres Strait Islander, human rights, legal and community organisations calling for urgent and coordinated national action to close the gap in imprisonment rates of Aboriginal and Torres Strait Islander people and cut disproportionate rates of violence experienced by Aboriginal and Torres Strait Islander people, particularly women and children.

This document is a collaborative effort of the Change the Record Coalition Steering Committee, which includes:
- Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda
- ANTaR
- Amnesty International
- Australian Council of Social Service
- Federation of Community Legal Centres (Vic)
- First Peoples Disability Network (Australia)
- Human Rights Law Centre
- Law Council of Australia
- National Aboriginal Community Controlled Health Organisations
- National Aboriginal and Torres Strait Islander Legal Services
- National Congress of Australia's First Peoples
- National Family Violence Prevention Legal Services Forum
- Oxfam Australia
- Secretariat of National Aboriginal and Islander Child Care
- Sisters Inside
- Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos

THE NEED FOR CHANGE

The year 2016 marks the 25th anniversary of the tabling of the Royal Commission into Aboriginal Deaths in Custody report in Federal Parliament. In this context we should reflect on what has been done to change the landscape of our justice system for Aboriginal and Torres Strait Islander people. The short answer is – not enough. Today, our nation faces an even deeper crisis than that interrogated by the commission in 1991.

In the past 10 years we have seen an 88% increase in the number of Aboriginal and Torres Strait Islander people in prison, with Aboriginal and Torres Strait Islander people now 13 times more likely to be imprisoned than non-Indigenous people. At the same time, Aboriginal and Torres Strait Islander people – especially women and children – are increasingly experiencing violence with Aboriginal and Torres Strait Islander women 34 times more likely to be hospitalised as a result of family violence. As a signatory to international human rights conventions, all levels of government have a responsibility to act to address this appalling situation. This is a national crisis requiring a national response.

Given the enormous cost of imprisonment and violence rates – both socially and economically – it is clear that a different approach and urgent action is required. Current approaches by governments to address ‘community safety’ largely focus on law and order policy responses and fail to address the underlying reasons why individuals come into contact with the justice system in the first place.

To change the record, all levels of government need to work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to design and invest in holistic early intervention, prevention and diversion strategies. These are smarter, evidence-based and more cost-effective solutions that increase safety, address the root causes of violence against women and children, cut reoffending and imprisonment rates, and build stronger communities.

This document sets out the Change the Record Coalition’s Blueprint for Change (Blueprint) to address this national crisis. It outlines the leadership role to be played by the Federal Government through the Council of Australian Governments (COAG) process, as well as the policy principles and solutions that should be adopted by all levels of government to support the Blueprint.

In developing the Blueprint the Change the Record (CTR) Coalition emphasises that all strategies must be grounded in a firm understanding of Aboriginal and Torres Strait Islander people’s culture and identity, and recognition of the history of dispossession and trauma experienced by many communities. Respect for the principle of community control and self-determination through participation in developing and implementing policies and programs for change is fundamental to any successful approach.

BLUEPRINT FOR CHANGE

Changing the record on Aboriginal and Torres Strait Islander people’s imprisonment rates, and experience of violence, requires federal leadership, and a national approach to drive co-ordinated action across the country. The Blueprint outlines the CTR Coalition’s core recommendations for a whole-of-government approach through COAG.

Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to forge agreement through COAG to:

a. Establish a national, holistic and whole-of-government strategy to address imprisonment and violence rates. This strategy should contain a concrete implementation plan and build on the

b. Set the following justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system:
   i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040;
   ii. Cut the disproportionately rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children.

In addition, these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets and a commitment to halve the gap in the above overarching goals by no later than 2030.

c. Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander imprisonment and violence rates.

d. Ensure that laws, policies and strategies aimed at, and related to, reducing Aboriginal and Torres Strait Islander imprisonment and violence rates are underpinned by a human-rights approach, and have in place a clear process to ensure they are designed in consultation and partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies.

e. Support capacity building, and provide ongoing resourcing of Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to ensure that policy solutions are underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people’s culture and identity, and recognition of the history of dispossession and trauma experienced by many communities.

ENDNOTES


3. It is the position of the CTR Coalition that wherever possible services should be delivered by Aboriginal and Torres Strait Islander community-controlled organisations. Where this is not possible, organisations working with Aboriginal and Torres Strait Islander communities should be guided by the ‘Principles for a Partnership-centred approach for NGOs working with Aboriginal and Torres Strait Islander Organisations and Communities’. These are accessible online at: www.acoss.org.au/principles-for-a-partnership-centred-approach

4. These sub-targets will operate as indicators to track progress against the primary goals and include, for example, child removal numbers, recidivism, and poverty and disadvantage indicators.

In order to be effective, any national framework for closing the gap in rates of imprisonment, and violence, must be supported by action at all levels of government. The below policy principles and solutions should underpin any national approach.

<table>
<thead>
<tr>
<th>PRINCIPLES</th>
<th>POLICY SOLUTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Invest in communities, not prisons</strong></td>
<td><strong>1.1 All levels of government need to prioritise budgetary and other measures to progressively invest increased resources into services and programs that strengthen communities and address the underlying causes of crime.</strong></td>
</tr>
<tr>
<td>Evidence clearly demonstrates that strong, healthy communities are the most effective way to prevent crime and make communities safe. Prisons have been shown to be extremely costly, damaging and ultimately ineffective at reducing crime. Every dollar spent on prisons is one less dollar available to invest in reducing social and economic disadvantage through education, health, disability, housing, employment and other programs. Government funding must be reinvested into initiatives that address the underlying causes of crime.</td>
<td><strong>1.2 All levels of government need to work together to improve and standardise data collection and evaluation mechanisms across jurisdictions.</strong></td>
</tr>
<tr>
<td><strong>2. Local communities have the answers</strong></td>
<td><strong>2.1 Provide long term funding to Aboriginal and Torres Strait Islander community-controlled services commensurate with need across all sectors, and their representative bodies, to ensure quality, culturally strong services for Aboriginal and Torres Strait Islander peoples.</strong></td>
</tr>
<tr>
<td>Directly affected people are best placed to identify local issues in their community and implement local solutions. Aboriginal and Torres Strait Islander community-controlled organisations have the unique capacity to provide culturally appropriate services, and are able to develop localised, tailored solutions that have the support of the community.</td>
<td><strong>2.2 Support the development of place-based, Aboriginal and Torres Strait Islander community-controlled services based on identification of need.</strong></td>
</tr>
<tr>
<td><strong>2.3 Work in partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies and State and Territory governments to support the identification and development of place-based ‘justice reinvestment’ sites.</strong></td>
<td><strong>2.4 Increase the coverage and capacity of Aboriginal and Torres Strait Islander community-controlled services to lead integrated and holistic supports for families based on their knowledge of local needs.</strong></td>
</tr>
<tr>
<td><strong>3. Recognise the driving factors of imprisonment and violence</strong></td>
<td><strong>3.1 Embed Aboriginal and Torres Strait Islander decision-making into all phases of the child protection system, in particular through Aboriginal Guardianship laws implemented in all jurisdictions. This should include:</strong></td>
</tr>
<tr>
<td>Along with the experience of poverty and disadvantage, involvement in the child protection system and family violence are two of the clearest indicators of people who are more likely to end up in the criminal justice system. Early intervention strategies to prevent crime must include measures to stop family violence and avoid exposure to the child protection system by supporting families and strengthening communities. These strategies will decrease imprisonment and violence rates.</td>
<td><strong>3.1.1 Family decision-making processes being available to all families at the earliest opportunity;</strong></td>
</tr>
<tr>
<td><strong>3.2 Provide national coverage commensurate to need for holistic, culturally strong and intensive family support services, including child support, legal and counselling services, to strengthen families before and on coming into contact with the child protection system.</strong></td>
<td><strong>3.2.1 Community-based child safety structures to drive prevention strategies;</strong></td>
</tr>
<tr>
<td>3.3 Support the development of holistic, integrated community-controlled early years’ child and family services in all communities in need.</td>
<td><strong>3.2.2 Legal, counselling and support services provided to parents and children at the earliest opportunity to assist in their engagement in the child protection system; and</strong></td>
</tr>
<tr>
<td>3.4 Establish, through COAG, a funding mechanism that prioritises early intervention investment to address the under-representation of Aboriginal and Torres Strait Islander children in the early childhood education and care system and over-representation of Aboriginal and Torres Strait Islander children in the child protection system. This should include an emphasis on funding for Aboriginal and Torres Strait Islander community-controlled organisations that provide frontline services including child support, legal and counselling services.</td>
<td><strong>3.2.3 Monitoring of child wellbeing and input into decision-making about child welfare.</strong></td>
</tr>
<tr>
<td>3.5 Implement strategies that enable communities to develop and deliver their own holistic healing approaches to respond to the impacts of the intergenerational trauma experienced by many Aboriginal and Torres Strait Islander people.</td>
<td><strong>3.3.1 Family decision-making processes being available to all families at the earliest opportunity;</strong></td>
</tr>
<tr>
<td>3.6 Establish a Commissioner for Aboriginal and Torres Strait Islander children and young people in every Australian jurisdiction.</td>
<td><strong>3.3.2 Community-based child safety structures to drive prevention strategies;</strong></td>
</tr>
<tr>
<td>3.7 Implement economic development and poverty reduction strategies designed by Aboriginal and Torres Strait Islander people, and supported by governments, to increase employment opportunities. This should be complemented by a robust social safety net, including the provision of adequate basic income support.</td>
<td><strong>3.3.3 Legal, counselling and support services provided to parents and children at the earliest opportunity to assist in their engagement in the child protection system; and</strong></td>
</tr>
</tbody>
</table>
4. Focus on safety
The impacts of crime are felt most strongly by people in that community, particularly women and children who are often the victims of violent behaviour. Successful early intervention and prevention strategies will not only cut offending and imprisonment rates, but importantly will increase safety by addressing the root causes of violence against women and children and building stronger communities.

4.1 Invest in national coverage of services commensurate with need for victims of violence, with priority for services that are Aboriginal and Torres Strait Islander community-controlled, including Aboriginal Family Violence Prevention Legal Services (FVPLS) and Aboriginal and Torres Strait Islander Level Services (ATSILS).

4.2 Invest in culturally safe and targeted early intervention and prevention strategies aimed at increasing safety and reducing the experience of violence, with a particular focus on supporting Aboriginal and Torres Strait Islander women and children.

4.3 Implement Aboriginal and Torres Strait Islander-led strategies to increase access to safe housing, including long-term secure funding for specialist homelessness services, financial assistance and access to affordable housing. Examine law reform opportunities including victims of crime compensation to assist in addressing the systemic issues that inhibit access to safe housing.

4.4 Invest in evidence-based, culturally-tailored men’s behaviour change programs that enhance safety and are funded in addition to services for victims/survivors.

4.5 Develop strategies to ensure appropriate police responses and improve access to court and other justice services for Aboriginal and Torres Strait Islander victims/survivors.

5. Services, not sentences
The criminal justice system is often an ineffective or inappropriate way to respond to people who have a disability or are experiencing poverty, mental illness, drug or alcohol addiction, homelessness or unemployment. We need a social policy and public health response to such issues, not a criminal justice one. Services like adequate health care, disability supports, employment and training, drug treatment and affordable housing cost far less than prisons, and have a substantially better record of success.

5.1 Ensure national coverage of services commensurate with need that are required to reduce violence and imprisonment rates. This includes, but is not limited to, legal assistance (ATSILS and FVPLS), prevention and healing services.

5.2 Develop a workforce plan that will enable national coverage of services. This plan should include:
- Recruitment and retention;
- Building the Aboriginal and Torres Strait Islander workforce; and
- Building the cultural competency of all relevant workforces.

5.3 Ensure that individuals with multiple and complex needs are effectively supported, including by adequately resourcing service providers to improve co-ordination.

5.4 Provide legal assistance services including ATSILS, FVPLSs, Community Legal Centres (CLCs) and Legal Aid Commissions with funding to meet the civil, family and criminal legal needs of Aboriginal and Torres Strait Islander people, with priority for services that are Aboriginal and Torres Strait Islander community-controlled.

5.5 Increase access to culturally-appropriate early intervention programs including support and programs based on voluntary participation which address:
- Family violence;
- Voluntary drug and alcohol issues;
- Mental health issues; and
- Employment and training.

5.6 Fund the development of culturally-appropriate early intervention and prevention programs targeted at women experiencing multiple needs (e.g. family violence, substance abuse and mental health issues).

5.7 Urgently finalise an official diagnostic tool for Fetal Alcohol Spectrum Disorder (FASD) and recognise FASD as a disability, whilst at the same time ensuring that mothers of children with FASD are not stigmatised or criminalised.

5.8 Support diversion programs for people with disability.

6. Community-oriented policing
Police have an enormously important and often difficult role to play in dealing with offending behaviour, responding to family violence and keeping us all safe. However, many communities describe experiences of over- or under-policing, harassment or racism, which can sometimes exacerbate the situation for already marginalised and disadvantaged communities. Changes to the ways police interact with and enforce the law in communities experiencing poverty and disadvantage, as well as a greater level of cultural awareness, can play a vital role in building trust, promoting safety, reducing crime and building stronger communities.

6.1 Develop and implement strategies which are aimed at building stronger and collaborative relationships between police and Aboriginal and Torres Strait Islander communities, organisations and their representative bodies. These strategies should improve police interaction with the community and build the capacity of police to respond to family violence, mental health issues and other complex situations, in a culturally safe way.

6.2 Establish police policies and programs that promote diversion from the criminal justice system. For example, establishing targets and incentivising smart practices, such as referrals to appropriate health or other support services.

6.3 Implement programs to increase awareness of the prevalence and impact of disability and mental health on offending behaviour/crime/contact with the justice system, and provide options for better policing and judicial administration.

6.4 Promote community-based initiatives, such as night patrols, that promote public safety measures and community empowerment.
7. Smarter sentencing
The hallmark of a justice system is fairness. Harsher sentences and laws that strip judges of their ability to make the sentence fit the crime, such as mandatory sentencing, need to be changed. A wider range of sentencing alternatives encompassing non-custodial options enables judges to ensure that sentences are tailored, fair and appropriate.

7.1 Abolish sentencing and bail laws that strip judges of the ability to consider the particular circumstances of a case, such as mandatory sentencing.
7.2 Increase availability of diversion and non-custodial sentencing options.
7.3 Set minimum standards for criminal justice legislation dealing with people with mental health-related disabilities and ensure that people with such disabilities have access to community-based assessments and treatments.

8. Eliminate unnecessary imprisonment
Many people are imprisoned due to an inability to pay fines or are convicted for relatively minor offences. In many instances, sending a person to prison is unnecessary and can contribute to further involvement in the criminal justice system. We need to rethink the costly practice of imprisonment and consider more effective community options.

8.1 End custodial sentencing for low-level offences, expand diversion schemes and community-based service orders, and ensure equitable access by Aboriginal and Torres Strait Islander people to non-custodial sentencing options.
8.2 Reduce unnecessary remand by expanding bail accommodation, case management for remand and other bail support programs.
8.3 Increase the availability of interpreters for legal and other services, particularly in remote and regional areas.
8.4 Provide adequate support to Aboriginal and Torres Strait Islander people navigating the justice system, including the provision of legal assistance. For example, additional supports should be provided to individuals with multiple and complex needs, particularly those with mental and cognitive impairments.
8.5 Move away from strict compliance models in regards to both parole and bail condition breaches, particularly relating to technical breaches or low-level breaches.

9. Adopt community justice approaches
Serious crime, particularly violent offending, damages individuals and communities, and impacts women and children disproportionately. Evidence tells us that therapeutic and restorative processes, such as Koori and Murri courts, drugs courts and healing circles, are ways in which the criminal justice system can help to rebuild relationships and deliver positive outcomes for the entire community. Investing in early intervention and prevention activities, such as community legal education, is more cost effective and prevents offending occurring in the first place.

9.1 Support the development and implementation of culturally competent and specialist courts, such as Koori Courts, Murri Courts and Drug Courts.
9.2 Support the development and implementation of community-led therapeutic and restorative justice approaches including healing circles and youth conferencing.
9.3 Support early intervention and prevention programs including community legal education and outreach programs undertaken by ATSILS and FVPLS.
10. Young people don’t belong in prison
Punitive ‘tough on crime’ approaches to youth offending and misbehaviour fail to recognise that young people are still developing and that far more appropriate opportunities for support and positive reinforcement exist than putting children behind bars. Exposure to youth detention also substantially increases the likelihood of involvement in crime as an adult. Young people at risk must be supported to maximise their chances of achieving their full potential.

10.1 Ensure legislation is in place that mandates that the principle of detention as a measure of last resort be observed at all times for any person up to and including the age of 17.
10.2 Increase the age of criminal responsibility to age 12 in all States and Territories (in line with recommendations from the Committee on the Rights of the Child), and ensure the presumption of legal incapacity continues to apply to 12, 13 and 14-year-olds.
10.3 Whilst observing the principle that detention must only be used as a measure of last resort, ensure that any person up to and including the age of 17, is detained in appropriate facilities. Youth detention facilities should be built for purpose and provide the supports that vulnerable children need in an appropriate and therapeutic environment.
10.4 Support the development of specialist youth courts.
10.5 Ensure that legislation in each jurisdiction dictating bail considerations and presumptions includes a presumption in favour of bail for young people and ensures that bail conditions take account of social and cultural factors and can be reasonably met by Aboriginal and Torres Strait Islander peoples.
10.6 Ensure that exclusion from school is used as a matter of last resort and that all appropriate supports are provided to enable Aboriginal and Torres Strait Islander children and young people to succeed at school. This should include the provision of restorative justice initiatives and healing programmes within school to enable the early resolution of issues.

11. Rehabilitation is in all our interests
A prison sentence should not be a sentence for life. Just about every prisoner will be released back into the community at some stage. It is in all of our interests to ensure that people in prison receive effective rehabilitation that includes education and programs and support services to increase their capacity to reintegrate into the community following release.

11.1 Increase access to Aboriginal and Torres Strait Islander-specific counselling services, drug and alcohol services, healthcare, disability supports and offence-specific programs (e.g. family violence). This should include both before entering custody, during imprisonment, at time of release and post-release. This should include a specific focus on increasing access to services for victim/survivors of violent crimes that are imprisoned.
11.2 Improve the accessibility and availability of Aboriginal and Torres Strait Islander-specific education/training and employment programs in prisons.
11.3 Improve detention conditions, particularly practices which can retraumatise individuals with lived experience of violence, including discontinuing routine strip searches for women and children and use of segregation facilities for prisoners experiencing mental health issues.

12. Reintegration not recidivism
Unfortunately, far too many people fall back into crime soon after being released from prison. This tells us that not enough support is being provided to people while in prison and during their transition back into the community. Better support needs to be provided to assist people to lead productive lives and fulfill their potential, which includes the provision of affordable housing, health care, and training and employment.

12.1 Provide intensive wrap-around support programs both pre- and post-release. This should include appropriate:
- Family, health and disability services;
- Employment and training programs; and
- Supported affordable housing/accommodation for individuals post-release.
12.2 Ensure support programs are specifically designed by and for Aboriginal and Torres Strait Islander people, and in the first instance provided by Aboriginal community-controlled organisations.

Change the Record Coalition Steering Committee (November 2015).

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INDIGENOUS DEATHS IN CUSTODY: 25 years since the Royal Commission into Aboriginal Deaths in Custody

Australian Institute of Criminology statistical bulletin by Alexandra Gannoni and Samantha Bricknell

CHAPTER 2
Aboriginal deaths in custody

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established in 1987 in response to growing concern over the deaths of Indigenous people in custody.

The RCIADIC (1991) found Indigenous people were no more likely than non-Indigenous people to die in custody but were considerably more likely to be arrested and imprisoned. The RCIADIC (1991) recommended an ongoing program be established by the Australian Institute of Criminology (AIC) to monitor Indigenous and non-Indigenous deaths in prison, police custody and youth detention.

In response, the National Deaths in Custody Program (NDICP) commenced in 1992. Since then, the NDICP has collected comprehensive data on the extent and nature of all deaths in custody in Australia.

The purpose of this paper is to provide a picture of trends and characteristics of Indigenous deaths in prison and police custody in the 25 years since the RCIADIC. A key focus is to describe the circumstances of Indigenous deaths in custody and how these compare with those reported by the RCIADIC and over time.

WHAT IS A DEATH IN CUSTODY?
The final report of the RCIADIC outlined the types of deaths that would require notification to the NDICP (recommendation 41, RCIADIC 1991).

They are:
• A death, wherever occurring, of a person who is in prison custody, police custody or youth detention;
• A death, wherever occurring, of a person whose death is caused or contributed to by traumatic injuries sustained, or by lack of proper care, while in such custody or detention;
• A death, wherever occurring, of a person who dies, or is fatally injured, in the process of police or prison officers attempting to detain that person; or
• A death, wherever occurring, of a person attempting to escape from prison, police custody or youth detention.

Deaths in police custody are further divided into two categories:
• Category 1: deaths in institutional settings (e.g. police stations, police vehicles, or in hospitals, following transfer from an institution) and other deaths in police operations where officers were in close contact with the deceased (e.g. most raids and shootouts by police).
• Category 2: other deaths in custody-related police operations where officers were not in close contact with the deceased (e.g. most sieges, pursuits).

METHODOLOGY
Data used in this study were extracted from the NDICP database. The information held in the NDICP database is derived from two main sources: data provided by state and territory police and corrective service agencies; and coronial records (e.g. autopsy, toxicology and finding reports) obtained via the National Coronial Information System. For more detail on the NDICP and its methodology, see Ticehurst, Napier and Bricknell (2018).

Data were drawn from deaths occurring in prison and police custody across Australia between financial years 1991-92 and 2015-16. Excluded from the analysis are the small number of youth detention deaths recorded during the reference period (n=10) and five cases in which Indigenous status was not recorded. A total of 2,044 deaths in custody were included in the analysis.

Table 1 shows the breakdown of deaths in custody by jurisdiction, custodial authority and Indigenous status. It should be noted that custody populations vary greatly across the jurisdictions, which affects the number and distribution of deaths recorded.

INDIGENOUS DEATHS IN PRISON CUSTODY
There were 247 Indigenous deaths...
in prison custody over the 1991-92 to 2015-16 period, accounting for 19 per cent of all prison deaths (n=1,303; Table 1). Between 1991-92 and 2015-16, the number and proportion of Indigenous prison deaths fluctuated (range: 11% to 30% each year), while the number and proportion of Indigenous people in the prison population increased (from 14% to 27%; ABS 2000-2016). Since 2003-04, the proportion of Indigenous deaths in prison custody has been smaller than the relative proportion of prisoners.

Figure 1 shows prison death rates by Indigenous status. While there has been some variation, the death rate of Indigenous prisoners decreased overall by 85 per cent from 1999-2000 to 2005-06 (from 0.34 to 0.05 per 100). Over the same period, the death rate of non-Indigenous prisoners decreased overall by 54 per cent (from 0.28 to 0.13 per 100). The decrease in the death rate of Indigenous prisoners was proportionately greater than the decrease for non-Indigenous prisoners. This resulted in a widening in the gap between Indigenous and non-Indigenous prison death rates.

For example, between 1991-92 and 2002-03, the average death rate of non-Indigenous prisoners was 1.1 times the Indigenous rate, increasing to 1.6 between 2003-04 and 2015-16. More recently, there has been a narrowing in this gap, largely due to an increase in the death rate of Indigenous prisoners (up 63% since 2013-14). Despite this, the death rate of Indigenous prisoners has been lower than that of non-Indigenous prisoners since 2003-04.

**Legal status**

Seventy-three per cent (n=181) of Indigenous prison deaths between 1991-92 and 2015-16 involved sentenced prisoners, and 27 per cent (n=66) involved unsentenced prisoners (Table A1). These proportions were relatively similar for non-Indigenous prison deaths (69% vs 31%).

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**Table 1: Deaths in custody by jurisdiction, custodial authority and Indigenous status, 1991-92 to 2015-16**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Indigenous (n)</th>
<th>Non-Indigenous (n)</th>
<th>Total (n)</th>
<th>Proportion (%)</th>
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</table>

Death rates by Indigenous status and legal status were calculated using available prison population data for the period 2004-05 to 2015-16 (ABS 2005-2016). Despite considerable variation, from 2004-05 to 2015-16, the death rate of Indigenous unsentenced prisoners decreased overall, from 0.26 to 0.16 per 100, while the death rate of non-Indigenous unsentenced prisoners decreased overall, from 0.37 to 0.17 per 100. On the other hand, from 2004-05 to 2015-16, the death rate of Indigenous sentenced prisoners increased slightly overall, from 0.11 to 0.19 per 100. The death rate of non-Indigenous sentenced prisoners also increased overall, from 0.11 to 0.25 per 100.

Since 2011-12, the death rate of Indigenous unsentenced prisoners has been lower than that of Indigenous sentenced prisoners. In comparison, the death rate of non-Indigenous unsentenced prisoners has generally been higher than that of non-Indigenous sentenced prisoners, with a narrowing in this gap in recent years.

Demographic characteristics
Male prison deaths consistently outnumbered female prison deaths over the 1991-92 to 2015-16 period – 96 per cent (n=236) of all Indigenous deaths and 96 per cent (n=1,018) of all non-Indigenous deaths (Table A1). The over-representation of males in prison deaths is representative of the gender composition of the wider prison population (ABS 2000-2016).

The age profile of Indigenous prison deaths was younger than non-Indigenous prison deaths. This reflects, in part, the younger age profile of Indigenous prisoners, compared with non-Indigenous prisoners (ABS 2000-2016). Over the period 1991-92 to 2015-16, the mean age at death for Indigenous prisoners was 37.8 years, compared with 45.3 years for non-Indigenous prisoners (Table A1). Eighty-nine per cent of deaths among Indigenous prisoners occurred before the age of 55, compared with 69 per cent of deaths among non-Indigenous prisoners. Almost one in five (18%; n=45) Indigenous deaths involved a prisoner less than 25 years of age.

The mean age at death for Indigenous prisoners increased over the 25-year period, from 27.3 years in 1991-92 to 42.7 years in 2015-16. The mean age at death for non-Indigenous prisoners also increased, from 36.6 years in 1991-92 to 58.6 years in 2015-16. Increases in age at death for prisoners appear indicative of the ageing prisoner population (ABS 2000-2016; Baidawi et al. 2011).

Cause of death
The majority of Indigenous prison deaths from 1991-92 to 2015-16 were due to natural causes (58%; n=140), followed by hanging (32%; n=78; Table A1). Twelve deaths (5%) were due to drugs and/or alcohol and nine (4%) were due to external trauma. For each year from 1991-92 to 2002-03, the leading cause of death among Indigenous prisoners was either natural causes or hanging. For each year from 2003-04 to 2015-16, deaths due to natural causes surpassed hanging deaths. This pattern was similar for non-Indigenous prison deaths.

Deaths from natural causes
Figure 2 shows natural death rates in prison custody by Indigenous status. Between 2003-04 and 2015-16, the natural death rate of Indigenous prisoners varied between 0.08 and 0.15 per 100 each year. The average natural death rate of Indigenous prisoners was 1.5 times the non-Indigenous rate between 1991-92 and 2002-03. From 2003-04 to 2015-16, the pattern reversed, with the average natural death rate of non-Indigenous prisoners 1.4 times the Indigenous rate.

Hanging deaths
As shown in Figure 3, hanging death rates among Indigenous and non-Indigenous prisoners present a very different picture. From 2000-01 to 2005-06, the hanging death rate of Indigenous prisoners dropped from 0.16 per 100 to zero deaths. The hanging rate of non-Indigenous prisoners also decreased during this time, from 0.10 to 0.03 per 100. From 2005-06, the hanging death rate for Indigenous and non-Indigenous prisoners remained at 0.05 or less per 100.

Hanging death rates decreased substantially among Indigenous

Figure 2: Natural deaths in prison custody by Indigenous status, 1991-92 to 2015-16 (rate per 100 relevant prisoners)
prisoners, which resulted in changes to the rate ratio of Indigenous hanging death rates.

For example, from 1991-92 to 2002-03, the average hanging death rate of Indigenous prisoners was 1.2 times the non-Indigenous rate, while from 2003-04 to 2015-16, the average hanging death rate of non-Indigenous prisoners was two times the Indigenous rate.

Indigenous hanging death rates by legal status were calculated using available prison population data for the period 2002-03 to 2015-16 (ABS 2003-2016). Despite considerable variation, from 2002-03 to 2015-16, the hanging death rate of Indigenous unsentenced prisoners decreased overall by 93 per cent (from 0.41 to 0.03 per 100). Hanging death rates of Indigenous sentenced prisoners followed a more stable pattern over the period 2002-03 to 2015-16 (range: 0.06 to 0.00 each year).

Since 2011-12, the hanging death rate of Indigenous sentenced prisoners has been similar to that of Indigenous unsentenced prisoners.

Cause of death by gender
Figure 4 shows the cause of prison death by Indigenous status and gender for the period 1991-92 to 2015-16. Similar proportions of Indigenous and non-Indigenous male deaths were caused by hanging – 31 per cent (n=72) and 32 per cent (n=327) respectively. However, a larger proportion of Indigenous than non-Indigenous male deaths resulted from natural causes – 59 per cent (n=137) and 49 per cent (n=494) respectively. However, the majority of deaths among prisoners aged 40 to 54 years (83%; n=57) and those aged 55 years and over (96%; n=26) were from natural causes.

Manner of death
While the cause of death refers to the medical cause of the death, the manner of death refers to the accountability of the death or how the death came about. For example, if a person dies from natural causes (e.g. heart attack), the manner of death is also natural causes. If a person dies from other causes of death (e.g. external/multiple trauma), the manner of death is recorded as one of the following: self-inflicted, justifiable homicide, unlawful homicide, or accidental.

The manner of death in 58 per cent (n=140) of Indigenous prison deaths was natural causes, equal to the 58 per cent of Indigenous prison deaths attributable to natural causes (Table A1). A further 35 per cent of deaths (n=86) were self-inflicted. Eight deaths (3%) were accidental, six
(2%) were classified as an unlawful homicide, and one (<1%) was a justifiable homicide. For each year from 1991-92 to 2001-02, the leading manner of death was either natural causes or self-inflicted. For each year from 2002-03 to 2015-16, deaths from natural causes surpassed self-inflicted deaths as the leading manner of death. This pattern was similar for non-Indigenous prison deaths.

**Self-inflicted deaths**

Nearly all self-inflicted deaths among Indigenous prisoners over the period 1991-92 to 2015-16 were due to hanging (90%; n=77). Four were due to external/multiple trauma (5%) and three were due to drugs and/or alcohol (3%). Therefore, trends in self-inflicted deaths largely parallel trends in hanging deaths as described above. Almost half of Indigenous self-inflicted deaths (47%; n=40) during the 1991-92 to 2015-16 period were of persons who had previously attempted suicide, and almost one in three (30%; n=26) were of persons who had been identified as being at risk of self-harm or suicide.

The self-inflicted death rate of Indigenous prisoners decreased from 0.16 per 100 in 2000-01 to zero deaths in 2005-06. Over the same period, the self-inflicted death rate of non-Indigenous prisoners also decreased, from 0.11 to 0.05 per 100. The average self-inflicted death rate of Indigenous prisoners between 1991-92 and 2002-03 was 1.1 times the non-Indigenous rate, while from 2003-04 to 2015-16 the average self-inflicted death rate of non-Indigenous prisoners was 2.4 times the Indigenous rate.

**INDIGENOUS DEATHS IN POLICE CUSTODY**

It should be noted that it is not currently possible to calculate rates of death in police custody, due to the absence of reliable data on the number of people placed in police custody each year and the number of people who come into contact with police in custody-related operations.

There were 146 Indigenous deaths in police custody over the 1991-92 to 2015-16 period, accounting for 20 per cent of the total police custody deaths (n=741; Table 1). The number of Indigenous deaths in police custody each year was relatively small, with no clear trend over the reference period. The largest number (n=11) of Indigenous deaths occurred in 2002-03 and 2004-05, and the lowest (n=1) in 2013-14.

Just over half (56%; n=82) of Indigenous deaths in police custody during the 1991-92 to 2015-16 period were classified as category 2 deaths – that is, deaths in which officers were not in close contact with the deceased. The remaining 44 per cent (n=64) were classified as category 1 – that is, deaths in which officers were in close contact with the deceased. A similar proportion of non-Indigenous deaths in police custody were classified as close and non-close contact deaths (44%; n=262 and 56%; n=333 respectively).

**Demographic characteristics**

Male deaths in police custody generally outnumbered female deaths in police custody over the 1991-92 to 2015-16 period, with male deaths comprising 86 per cent (n=125) of all Indigenous and 95 per cent (n=563) of all non-Indigenous deaths.

While police custody population figures are not available, this gender ratio is likely representative of the gender composition of the arrestee population.

The age profile of Indigenous deaths in police custody was younger than non-Indigenous deaths.

Indigenous deaths in police custody most commonly involved those aged less than 25 years (40%; n=59), followed by those aged 25-39 years (38%; n=55). Non-Indigenous deaths in police custody most commonly involved those aged 25-39 years (43%; n=256). The mean age at death for Indigenous persons in police custody was 29.9 years, compared with 34.6 years for non-Indigenous persons in police custody.

**Cause of death**

Over half (51%; n=74) of Indigenous deaths in police custody over the 1991-92 to 2015-16 period resulted from external/multiple trauma, the majority of which were due to injuries sustained during motor vehicle pursuits (MVPs; 62%; n=46).

Deaths resulting from MVPs accounted for almost one third (32%; n=46) of Indigenous deaths in police custody during the 1991-92 to 2015-16 period. This proportion was similar for non-Indigenous deaths in police custody (30%; n=176).

The next most common cause of Indigenous deaths in police custody over the period 1991-92 to 2015-16 was natural causes (21%; n=30). Most of these were due to heart disease or related cardiac ailments (73%; n=22), as was the case for deaths in prison custody. A small number of...
deaths were due to stroke (13%; n=4), respiratory conditions (7%; n=2) and epilepsy (3%; n=1).

Indigenous deaths from natural causes most commonly occurred among those aged 25-39 (43%; n=13) and 40-54 (37%; n=11). A higher proportion of Indigenous compared with non-Indigenous deaths in police custody resulted from natural causes (21%; n=30 vs 8%; n=47).

Less than 10 per cent of Indigenous deaths in police custody over the 1991-92 to 2015-16 period were due to hanging (9%; n=13).

No Indigenous hanging deaths have occurred since 2008-09. Non-Indigenous hanging deaths decreased, from 20 during the first half of the reference period (1991-92 to 2002-03) to nine during the second half (2003-04 to 2015-16). Similarly, no non-Indigenous hanging deaths have occurred since 2009-10.

The number of Indigenous deaths resulting from gunshot wounds was low over the 1991-92 to 2015-16 period (range: 0-2 per year).

Of the total 13 Indigenous deaths resulting from gunshot wounds, eight (62%) were police shootings and five (38%) were self-inflicted. Nine per cent of Indigenous deaths in police custody were caused by gunshot wounds, compared with 35 per cent of non-Indigenous deaths.

**Manner of death**

Almost half (47%; n=68) of Indigenous deaths in police custody over the 1991-92 to 2015-16 period were accidental, 57 per cent (n=39) of which were due to MVPs and 19 per cent (n=13) to some other type of pursuit (e.g. foot pursuit).

The next most common manner of death was natural causes (21%; n=31), followed by self-inflicted deaths (19%; n=28). Less than 10 per cent were due to justifiable homicide (7%; n=10) and unlawful homicide (5%; n=8).

**CONCLUSION**

In 1991, the RCIADIC concluded Indigenous people were no more likely to die in custody than non-Indigenous people but were significantly more likely to be arrested and imprisoned. The same remains true today.

Indigenous people are now less likely than non-Indigenous people to die in custody, largely due to a decrease in the death rate of Indigenous prisoners from 1999-2000 to 2005-06. Since 2003-04, non-Indigenous people have been, on average, 1.6 times more likely to die in prison custody than Indigenous people.

More recently, there has been a narrowing in this gap, largely due to an increase in the death rate of Indigenous prisoners from 2013-14. Yet the death rate of Indigenous prisoners has been consistently lower than that of non-Indigenous prisoners since 2003-04.

Coinciding with the overall decrease in the death rate of Indigenous prisoners is the decrease in the hanging death rate of Indigenous prisoners, falling below the natural death rate from 2002-03. Since 2003-04, the hanging death rate of Indigenous prisoners has been lower or the same as that of non-Indigenous prisoners. In contrast, the natural death rate of Indigenous prisoners has remained relatively stable across the years.

The mean age at death for Indigenous prisoners has been increasing over the years yet remains lower than that of non-Indigenous prisoners. Based on available prison population data from 2004-05 to 2015-16, the death rate of Indigenous unsentenced prisoners decreased overall, while the death rate of Indigenous sentenced prisoners increased slightly.

While less can be said about the trends for Indigenous deaths in police custody (due to the relatively small number of Indigenous deaths in police custody each year) and rates cannot currently be calculated, some clear patterns have emerged.

Between 1991-92 and 2015-16, 146 Indigenous deaths in police custody...
Joint response to review of implementation of deaths in custody recommendations

A joint statement was released in December 2018 outlining concerns with the 2018 Deloitte Access Economics review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody. Following is an edited summary of the response and its conclusions:

- The statement was endorsed by 33 academic and professional experts across twelve academic institutions in the policy areas examined by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).
- The statement suggests that the scope and methodology of the Deloitte review misrepresents governments’ responses to RCIADIC, and has the potential to misinform policy and practice responses to Aboriginal deaths in custody.
- The group also states that the Deloitte review is further evidence of current Indigenous Affairs policy-making approaches in Australia, which ignore the principles of self-determination and the real impacts of policy on the experiences of Aboriginal and Torres Strait Islander peoples.
- The joint statement calls for the development of national independent monitoring of the implementation of the recommendations of RCIADIC, for the Federal Government to fully embrace and enact the intent of the RCIADIC recommendations, and for the Federal Government to provide a response to the Australian Law Reform Commission’s Pathways to Justice report (2018) from their inquiry into Indigenous incarceration rates. The 2017 inquiry demonstrated the lack of government action towards implementing the recommendations of RCIADIC and is a sobering reminder of the tragic implications of this failure.
- The expert group supports the development of national independent monitoring of the implementation of the recommendations of RCIADIC, with strong terms of reference drawing on Indigenous community concerns, and a rigorous methodology centred on input from Aboriginal and Torres Strait Islander peoples, organisations and peak bodies to establish whether governments are making progress towards meeting the recommendations.

SOURCE

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REFERENCES
URLs correct as at November 2018
Change the Record has questioned the report released by the Minister for Indigenous Affairs Nigel Scullion, which claims that the majority of recommendations from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) have been implemented.

In 2015, Clayton Utz and Amnesty International found that the implementation of most recommendations had been inadequate,” said Damian Griffis, Co-Chair of Change the Record.

“The report released by the Minister yesterday is only based on self-reported actions by government agencies. This report seems to be a whitewash of the inadequate, half-hearted response to RCIADIC over the last 27 years. It doesn’t show a meaningful picture of the whole response to the Royal Commission because it excludes the voices of Aboriginal and Torres Strait Islander communities,” said Mr Griffis.

“Incarceration rates and deaths in custody are increasing, which the report acknowledges,” said Mr Griffis.

“It shows that the actions reported have fallen short of the intentions of the Royal Commission, especially where it comes to ensuring self-determination,” he said.

“It’s extraordinary for the Government to claim most recommendations are implemented. Unfair laws and policies remain on the books that disproportionately target Aboriginal and Torres Strait Islander people, like mandatory sentencing and imprisonment for unpaid fines,” said Cheryl Axleby, Co-Chair of the National Aboriginal and Torres Strait Islander Legal Services.

“The Federal Government is yet to respond to the 35 recommendations of Australian Law Reform Commission, many of which echo earlier Royal Commission findings. In our view, there’s a long way to go before the Royal Commission’s recommendations are implemented.”

In 2015, an Amnesty International commissioned review by Clayton Utz found that “the development of strategic plans to incorporate the RCIADIC Recommendations as well as the reporting on the implementation of these strategic plans by justice agencies has been highly inconsistent.”

“We challenge some of the claims in the report,” said Mr Griffis. “It cites initiatives like the Indigenous Advancement Strategy (IAS) as examples of self-determination, when several inquiries and reviews have shown that IAS disadvantaged Aboriginal and Torres Strait Islander community-controlled organisations, and the Government didn’t even consult sufficiently with Aboriginal and Torres Strait Islander communities when establishing the IAS,” he said.

“The Royal Commission into Aboriginal Deaths in Custody was silent on Aboriginal and Torres Strait Islander women,” said Antoinette Braybrook, National Convenor of the National Family Violence Prevention Legal Services Forum.

“Since the Royal Commission, the rates of Aboriginal and Torres Strait Islander women being imprisoned have skyrocketed by nearly 250 per cent, but there has been no action by Government to put solutions in place to prevent this. Claiming that most of the Royal Commission’s recommendations have been implemented does nothing to help the women in our communities being criminalised,” said Ms Braybrook.


Minister Scullion commissioned Deloitte Access Economics in 2017 to undertake an independent review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission).

The report, Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody, is available here: www.pmc.gov.au/resource-centre/indigenous-affairs/review-implementation-royal-commission-aboriginal-deaths-custody
Aboriginal and Torres Strait Islander deaths in custody: a national shame set to worsen

According to the Human Rights Law Centre, Australian governments must put in place life-saving Custody Notification Services in every state and territory to address one of the most significant human rights issues in Australia – the preventable deaths in custody of Aboriginal and Torres Strait Islander people.

Guardian Australia today revealed that 147 Aboriginal and Torres Strait Islander people have died in custody in the past decade and 407 have died since the end of the Royal Commission into Aboriginal Deaths in Custody in 1991.

Shahleena Musk, Senior Lawyer at the Human Rights Law Centre, said that this shameful number will continue to rise whilst Australian governments fail to bring in life-saving measures like a Custody Notification Service.

“We know that the lives and safety of Aboriginal and Torres Strait Islander peoples can be placed at risk in police custody. One call to an Aboriginal-led service could change that. Twenty seven years ago the Royal Commission recommended that. Twenty seven years later we’re still faced with politicians dragging their feet while people continue to die,” said Ms Musk.

Custody notification systems require police to contact an Aboriginal Legal Service whenever an Aboriginal or Torres Strait Islander person is taken into police custody – a key recommendation of the Royal Commission into Aboriginal Deaths in Custody. Custody Notification Services ensure a person is checked for both legal and welfare needs. To date, only NSW has properly implemented this service.

Six months ago, the Australian Law Reform Commission also confirmed this as a key recommendation in addition to 35 comprehensive reforms to address the over-imprisonment of Aboriginal and Torres Strait Islander peoples, including to:

- Abolish mandatory sentencing;
- Stop imprisoning people for unpaid fines;
- Fix bail and sentencing laws so that a person’s cultural experience can be taken into account; and
- Increase access to culturally appropriate community-based alternatives.

Ms Musk said these recommendations, and in particular the call for a fully funded and legislated custody notification service, should be actioned immediately.

“There is no room for mandatory sentencing in a modern and fair justice system. Every single government in Australia can today choose to cut the number of Aboriginal and Torres Strait Islander people being forced into prison by wiping these unfair laws from their statute books,” said Ms Musk.

“Four years ago, Ms Dhu, a young Yamatji woman, died in police custody because she couldn’t pay some fines. Today, the WA Government continues to put people’s lives at risk by using prisons and police watch houses to further punish and lock up vulnerable people. Nobody should be locked up simply because they are poor,” said Ms Musk.

Progress on deaths in custody questioned

PROGRESS A “WHITENWASH”

- The Indigenous incarceration rate has doubled since the Royal Commission into Aboriginal Deaths in Custody. Reducing Aboriginal over-representation in the prison system was the major finding of the Royal Commission.
- A government audit of deaths in custody reform has been described as a “whitewash” by critics, including the Change the Record coalition.
- The investigation’s final report was delivered in 1991, but a government audit tabled in parliament in October 2018 showed Indigenous incarceration rates have doubled since then; 64% of the Royal Commission’s 339 recommendations have been fully implemented, while a further 30% have been mostly or partially implemented.

DEADLY NUMBERS

- According to a Guardian Australia database (Deaths Inside, launched in August 2018), more than 400 ATSI people have died in custody since the end of the Royal Commission into Aboriginal Deaths in Custody in 1991.
- The investigation found that while 44% of deaths in custody were of sentenced prisoners, 56% were people held after being charged with a crime, people who died in a police pursuit or during arrest, or people who died in protective custody.
- More than half of the Indigenous people who died in custody since 2008 had not been convicted of a crime.
- In contrast, the majority of non-Indigenous people who died in custody (51%) were serving a prison sentence.
- Most of the Indigenous people who had not yet been charged were suspected of non-indictable offences which typically carry sentences of less than five years, ranging from public intoxication to evading police.

SOURCES

The Guardian Australia (29 August 2018), More than half of 147 Indigenous people who died in custody had not been found guilty, www.theguardian.com

Compiled by The Spinney Press.
How ‘tough on crime’ politics flouts deaths in custody recommendations

A HARSH CRIMINAL JUSTICE SYSTEM HAS APPARENTLY BECOME A HALLMARK OF GOOD GOVERNMENT, NOTES CRIMINOLOGIST CHRIS CUNNEEN

Whatever might be said about its successes and failures, it’s clear that 25 years after the Royal Commission into Aboriginal Deaths in Custody tabled its final report, Australia has become much less compassionate, more punitive and more ready to blame individuals for their alleged failings.

Nowhere is this more clear than in our desire for punishment. A harsh criminal justice system – in particular, more prisons and people behind bars – has apparently become a hallmark of good government.

This wasn’t always the case. But it just so happened that the Royal Commission handed down its findings at a time when the politics of law and order was rapidly changing.

REFORM TO INTOLERANCE

The 1970s through to the late 1980s was a period of criminal justice reform. Decriminalisation of certain types of summary offences, such as public drunkenness and prostitution; a commitment to reducing prison numbers through the introduction of community service orders and other non-custodial sentencing options; the development of mental health services for offenders; specific programs for women prisoners; and improved conditions for prisoners more generally: these were key parts of the political agenda.

But, by the late 1980s and early 1990s, changing political conditions were no longer conducive to effective reform of the criminal justice system. By the 1990s, state and territory governments no longer spoke of reducing prison numbers, but rather of the need to lock more people away.

This move toward “law and order” responses manifested in:

- Increased police powers, particularly in relation to public order;
- “Zero tolerance”-style laws that increased the use of arrest or detention for minor offences;
- Mandatory prison sentences for various offences (particularly in the Northern Territory and Western Australia);
- Controls over judicial discretion through the introduction of mandatory minimum terms of imprisonment;
- A growing use of remand and restrictions on bail eligibility;
- Longer terms of imprisonment for a range of offences, most recently New South Wales’ so-called “one-punch laws”;  
- More people sentenced to prison than non-custodial options; and
- Changes to parole and post-release surveillance, which have made parole more difficult to obtain and easier to revoke.

There was both a judicial and political perception of the need for “tougher” penalties, often based on political expediency and media-fuelled public alarm over particular crimes.

While these administrative, legal and technical changes contributed to increasing prison numbers, they also reflected a less tolerant and more punitive approach to crime and punishment.

Put bluntly, the last 25 years have seen a spectacle of punishment most graphically illustrated in climbing imprisonment rates. And these changes were directly in opposition to the fundamental findings of the Royal Commission, which advocated a reduction in Indigenous imprisonment rates.

SELF-FULFILLING PRACTICES

The Australian prison estate now costs well over A$3 billion a year to operate. And building a prison can cost between $500 million and $1 billion, depending on its location, security level and size.

Such is the financial cost of our commitment to a system that’s widely ineffective in reducing re-offending, and significantly contributes to the further marginalisation of those who are incarcerated.

These increases in imprisonment in Australia have been paralleled in other countries such as the United Kingdom, the United States, New Zealand and, more recently, Canada. It is arguably their embrace of the neoliberal agenda that has led these countries down the path of a harsher approach to crime and punishment.

In contrast, European jurisdictions that have more
social democratic and corporatist forms of government have sustained more moderate criminal justice policies and have relied less on exclusionary and punitive approaches to punishment.

But states that experienced a decline in principles and policies reflecting the welfare state and embraced neoliberal notions had a realignment of values and approaches that emphasised “deeds over needs”.

Their focus shifted from rehabilitative goals to an emphasis on deterrence and retribution. Individual responsibility and accountability increasingly became the core of the way justice systems responded to offenders.

Privatisation of institutions and services; widening social and economic inequality; and new or renewed insecurities around fear of crime, terrorism, “illegal” immigrants and racial, religious and ethnic minorities have all impacted the way their criminal justice systems operate.

Completing the cycle, these changes, in turn, fuelled social demands for authoritarian law-and-order strategies.

**HUMAN WAREHOUSES**

In understanding the use of imprisonment, one of the most important points to grasp is that a rising imprisonment rate is not directly or simply related to an increase in crime.

The use of prison is a function of government choices; it reflects government policy and legislation, as well as judicial decision-making.

Imprisonment rates in Australia are not the result of increased levels of crime, since increases in imprisonment rates have continued while crime rates have levelled or fallen in many categories of crime from 2000. Similar patterns are seen internationally.

The growth of the law-and-order agenda has also resulted in far weaker ideological differentiation between major political parties on criminal justice policy. The most politically expedient response to crime is the promotion and implementation of the “toughest” approach.

Put bluntly, the last 25 years have seen a spectacle of punishment most graphically illustrated in climbing imprisonment rates. And these changes were directly in opposition to the fundamental findings of the Royal Commission, which advocated a reduction in Indigenous imprisonment rates.

While conservative political parties may have traditionally appeared to be “tougher” on crime and punishment, many Australian states and territories, such as New South Wales and the Northern Territory, have sustained large increases in imprisonment rates under Labor governments.

In the process, prisons have become human warehouses for marginalised peoples, and most particularly Indigenous people. This point is graphically illustrated by the fact that Indigenous men are now more likely to be sitting in a prison cell than in a university classroom.

**DISCLOSURE STATEMENT**

Chris Cunneen receives funding from the Australian Research Council competitive research grants scheme.

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DETENTION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER YOUNG PEOPLE

Following is an extract from an Australian Institute of Health and Welfare bulletin which looks at the numbers and rates of young people aged 10 and over who were in youth detention in Australia due to their involvement, or alleged involvement, in crime. More than half of those in detention were Aboriginal or Torres Strait Islander; Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night. Over the 4-year period, this fluctuated between 21 and 28 times the non-Indigenous rate.

NUMBERS

Young Aboriginal and Torres Strait Islander people made up more than half (527 young people or 54%) of all those in detention on an average night in the June quarter 2018 (Figure 4.1).

Indigenous young people in detention outnumbered non-Indigenous young people on an average night in every quarter throughout the 4-year period, but showed no clear trend over time.

On an average night each quarter, 416-527 Indigenous young people, and 376-457 non-Indigenous young people were in detention.

Figure 4.1: Young people in detention on an average night, by Indigenous status, Australia, June quarter 2014 to June quarter 2018 (number)

Average nightly population

0 100 200 300 400 500 600 700

Jun 2014 Sep Dec Mar Jun Sep Dec Mar Jun Sep Dec Mar Jun

Indigenous

Non-Indigenous

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young people were in detention. When only young people aged 10-17 are considered, about 3 in 5 (59%) of those in detention in the June quarter 2018 were Aboriginal or Torres Strait Islander, and this was fairly consistent over the 4-year period, at 55%-62%. Over the same period, Indigenous young people made up 5%-6% of the general population aged 10-17.

Indigenous young people aged 10-17 were the largest group in detention throughout the 4-year period (Figure 4.2).

A higher proportion of Indigenous young people in detention were aged 10-17 than non-Indigenous young people – in the June quarter 2018, 92% of Indigenous young people in detention were aged 10-17, compared with 74% of non-Indigenous young people.

Similar proportions of Indigenous and non-Indigenous young people in detention were male (89% and 92%, respectively, in the June quarter 2018). These proportions were relatively stable throughout the 4-year period.

On an average night in the June quarter 2018, 58% of young people in unsentenced detention, and 48% in sentenced detention were Aboriginal or Torres Strait Islander.

Over the 4-year period, Indigenous young people made up a higher proportion of those in unsentenced detention (51%-59% each quarter) than those in sentenced detention (45%-54% each quarter).

Over the 4-year period, the number of Indigenous young people in unsentenced detention rose – from 268 in the June quarter 2014 to 340 in the June quarter 2018, while the number of those in sentenced detention...
ion fell – from 222 in the June quarter 2014 to 187 in the June quarter 2018.

**RATES**

Indigenous over-representation in youth detention can be expressed as a rate ratio, which compares the rate of Indigenous young people to the rate of their non-Indigenous counterparts.

Nationally, on an average night in the June quarter 2018, 38 per 10,000 Indigenous young people aged 10-17 were in detention, compared with 1.5 per 10,000 non-Indigenous young people. This means that Indigenous young people aged 10-17 were 26 times as likely as their non-Indigenous counterparts to be in detention on an average night in the June quarter 2018.

The rate of Indigenous young people in detention on an average night showed no clear trend over the 4-year period, with a low of 29 per 10,000 in the September quarter 2016, and a high of 38 per 10,000 in the March and June quarters 2018.

Between the June quarter 2014 and the June quarter 2018 the rate of Indigenous young people in unsentenced detention rose from 21 to 26 per 10,000, while the rate for those in sentenced detention fell from 15 to 12 per 10,000.

Over the 4-year period, the level of Indigenous over-representation fluctuated, at 21-28 times the non-Indigenous rate.

The level of Indigenous over-representation, measured by the rate ratio, was higher in sentenced detention than in unsentenced detention in almost all quarters in the 4-year period, up until the December quarter 2017 (*Figure 4.3*).

In sentenced detention, the rate ratio fluctuated between 19 (December quarter 2017) and 32 (March quarter 2016) times the non-Indigenous rate.

In unsentenced detention, the rate ratio ranged from 19 to 28 times the non-Indigenous rate each quarter (27 times in the June quarter 2018). The Indigenous rate of unsentenced detention rose in the last 2 quarters (March and June quarters 2018), while the non-Indigenous rate remained relatively steady.

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**Fewer under youth justice supervision, but Indigenous over-representation rising**

The over-representation of Aboriginal and Torres Strait Islander young people under youth justice supervision has increased, despite overall rates of youth justice supervision falling, according to a report from the Australian Institute of Health and Welfare

The report, *Youth justice in Australia 2016-17*, shows that around 5,400 young people (aged 10 and older) were under youth justice supervision on an average day in 2016-17 – this equates to around 1 in 500 young people aged 10-17 in Australia.

“The overall rate of supervision for young Australians aged 10-17 fell by about 18% over the last 5 years,” said AIHW spokesperson David Braddock.

While the overall rate has fallen, this has not been seen equally across all groups of young people.

“Over the 5-year period to 2016-17, rates of both Indigenous and non-Indigenous young people under supervision fell, although the fall was greater for non-Indigenous young people,” Mr Braddock said.

This has resulted in even greater Indigenous over-representation in youth justice supervision.

“Indigenous young people are now 18 times as likely as non-Indigenous young people to be under supervision, up from 15 times as likely in 2012-13,” Mr Braddock said.

Rates of supervision also varied across the states and territories.

“The rate of young people under supervision on an average day in 2016-17 was lowest in Victoria and highest in the Northern Territory, with rates falling over the 5-year period to 2016-17 in all states and territories except the Northern Territory,” Mr Braddock said.

The rate fell most markedly in Tasmania, dropping by about 43%, while in the Northern Territory, the rate rose by about 4%. Variations in the rates of supervision among the states and territories reflect differences in legislation, policy and practices in the respective youth justice systems, including types of supervision orders and options for diversion that are available.

“With data available from 2000-01 to 2016-17, the collection can provide a long-term view of the youth justice system and the young people involved, forming an evidence base that will help us better understand their pathways and outcomes,” Mr Braddock said.

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The Royal Commission into the Protection and Detention of Children in the Northern Territory’s final report, which was handed down on Friday, revealed “systemic and shocking failures” in the territory’s youth justice and child protection systems.

The commission was triggered following ABC Four Corners’ broadcasting of images of detainee Dylan Voller hooded and strapped to a restraint chair, as well as footage of children being stripped, punched and tear-gassed by guards at the Don Dale and Alice Springs youth detention centres.

The commission’s findings demonstrate the need for systemic change. However, the commission will not, in itself, bring about that change. Its capacity to make lasting change lies with the government implementing its recommendations.

What did the commission find?
The commission found that the NT youth detention centres were not fit for accommodating – let alone rehabilitating – children and young people.

It also found that detainees were subjected to regular, repeated and distressing mistreatment. This included verbal abuse, racist remarks, physical abuse, and humiliation.

There was a further failure to follow procedures and requirements under youth justice legislation. Children were denied basic human needs, and the system failed to comply with basic human rights standards and safeguards, including the Convention on the Rights of the Child.

The commission also found that the NT child protection system has failed to provide appropriate and adequate support to some young people to assist them to avoid prison.

Importantly, the commission found that isolation “continues to be used inappropriately, punitively and inconsistently”. Children in the high security unit:

... continue to be confined in a wholly inappropriate, oppressive, prison-like environment ... in confined spaces with minimal out of cell time and little to do for long periods of time.

What did the commission recommend?
Based on these findings, the commission recommended wide-ranging reforms to the youth justice and child protection systems.

Not surprisingly, a central focus of the recommendations relate to detention. They ranged from closing the Don Dale centre to significant restrictions on the use of force, strip-searching and isolation, and banning the use of tear gas, spit hoods and restraint chairs.

There is a focus on greater accountability for the use of detention through extending the Commissioner for Children and Young People’s monitoring role. Recommendations also cover health care (including mental health and fetal alcohol spectrum disorder screening), education, training and throughcare services for children exiting detention.

Among its suite of proposed reforms, the commission recommended developing a ten-year strategy to tackle child protection and prevention of harm to children, and establishing a Northern Territory-wide network of centres to provide community services to families.

Youth justice reforms include improving the operation of bail to reduce the unnecessary use of custodial remand; expanding diversionary programs in rural and remote locations; and operating new models of secure detention, based on principles of trauma-informed practice.

Adequate and ongoing training and education for police, lawyers, youth justice officers, out-of-home-care staff and judicial officers in child and adolescent development is also recommended.

The commission also emphasised the importance of developing partnerships with Indigenous organisations and communities in the child protection and youth justice systems. Several organisations in written submissions to the commission identified the importance of appropriately resourcing community-controlled, and locally-developed and led, programs for Indigenous young people.

Increasing the age of criminal responsibility a good place to start
One of the commission’s most significant recommendations is to increase the minimum age of criminal responsibility to 12 years, and only allowing children under 14 to be sentenced to detention for serious off-
In 2017 the Royal Commission into the Protection and Detention of Children in the Northern Territory – a $54 million inquiry, prompted by ABC’s Four Corners report on the Don Dale Youth Detention Centre – investigated conditions in the territory’s detention centres.

- The ABC program highlighted the treatment of Dylan Voller, who was shown hooded in a restraint chair while in detention.
- The investigation found “shocking and systemic failures occurred over many years and were known and ignored at the highest levels”.
- The inquiry recommended the immediate closure of the high security unit at Darwin’s Don Dale Youth Detention Centre and that there should be a plan for closing the entire centre within three months.
- The inquiry also recommended that the age of criminal responsibility be raised from 10 to 12.
- NT Chief Minister Michael Gunner apologised for the failings of successive NT governments and announced a comprehensive overhaul of the youth justice and child protection systems.
- Key recommendations from the inquiry include:
  - Only allowing children aged under 14 to be detained for serious crimes
  - Banning the use of tear gas and force or restraint being used to discipline children
  - Introducing body-worn video cameras in youth detention centres
  - Prohibiting extendable periods in isolation over 24 hours, or its use as a punishment
  - Requiring youth justice officers to have demonstrated experience in working with youth
  - Developing a 10-year generational strategy to address child protection and prevention of harm to children
  - Increasing engagement with, and involvement of, Aboriginal organisations in child protection, youth justice and detention.
- The Royal Commission found the NT Government had failed to comply with the statutory requirements that all children in out-of-home care have timely care plans, and found there was a major shortage of available foster and Aboriginal kinship care placements.
- The commissioners called for a greater use of youth diversion, and an end to detention for children under 14, unless there were exceptional circumstances.
- Indigenous children are around 7 times more likely to end up in out-of-home care and 26% more likely to end up in youth detention.

Compiled by The Spinney Press.

A positive outcome from the commission will require political will and leadership to respond effectively to broader systemic issues. Raising the minimum age of criminal responsibility is a good place to start.

Nationally, 73% of children placed in detention and 74% of children placed on community-based supervision in 2015-16 were Indigenous.

Raising the minimum age of criminal responsibility opens the door to responding to children’s needs without relying on criminalisation, given its short- and long-term negative impacts.

It enables a conversation about the best responses to children who often – as the commission’s findings acknowledged – have a range of issues. These can include trauma, mental health disorders and disability, coming from highly disadvantaged backgrounds, having spent time in out-of-home care, and – particularly among Indigenous children – being removed from their families and communities.

A positive outcome from the commission will require political will and leadership to respond effectively to broader systemic issues. Raising the minimum age of criminal responsibility is a good place to start.

DISCLOSURE STATEMENT
Sophie Russell is employed by the Community Restorative Centre, and is affiliated in a voluntary capacity with Glebe House and the Women’s Justice Network. Chris Cunneen receives funding from the Australian Research Council.

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THE CONVERSATION


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One year on from Royal Commission findings on Northern Territory child detention: what has changed?

THE ROYAL COMMISSION’S RECOMMENDATIONS HAVE STILL NOT BEEN ACTED ON, OBSERVE KATE FITZ-GIBBON AND FAITH GORDON

A change of government in the Northern Territory has done little or nothing to address the underlying issues relating to abusive practices inflicted on young offenders in detention – captured in images that sent shockwaves around Australia, and the wider world, more than two years ago.

On July 25, 2016, the ABC Four Corners investigative programme aired Australia’s Shame, a documentary featuring disturbing imagery and footage of children being abused while held in the Don Dale Juvenile Detention Centre in Darwin.

‘HOODED, SHACKLED, STRAPPED TO A CHAIR AND LEFT ALONE’

The evidence of abuse included accounts of detained boys who had been exposed to tear gas and the use of spit hoods while being held in isolation. This shone a national spotlight onto the violence perpetrated within juvenile justice institutions against some of society’s most vulnerable.

After the documentary aired, then prime minister Malcolm Turnbull announced plans for a Royal Commission into the Protection and Detention of Children in the Northern Territory. The then NT chief minister, Adam Giles, of the Country Liberal Party whose federal representatives vote with the Nationals, responded to the Don Dale allegations, stating: “I was shocked and disgusted … A community is judged by the way it treats its children.”

Since the Don Dale allegations emerged, there has been a change of NT government, with Michael Gunner now chief minister of a Labor government. A question emerges though: what changes have occurred for children in detention?

ONE YEAR ON

We have just marked the one-year anniversary of the findings and recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

The Royal Commission confirmed that over the past decade, children detained in the NT had been mistreated, verbally abused, humiliated, isolated or left alone for long periods, among other human rights breaches. At the sharp end of rights breaches, the commission stated that many children held in detention had been assaulted by staff, who either wilfully ignored rules or were unaware of the rules. Either way, they clearly acted in breach of Australia’s international human rights obligations and some domestic laws.

It is now more than 25 years after the Royal Commission into Aboriginal Deaths in Custody. For many, the lack of progress since that 1998 Royal Commission casts doubt over the potential for this Royal Commission to achieve meaningful change to the lives of young Indigenous Australians in the NT.

The Royal Commission found that senior government members were aware of, but chose to ignore, these abusive practices. The report made substantial recommendations for reform.

One year on, Don Dale continues to be in operation despite the Royal Commission recommending it be closed as soon as possible. The ongoing use of the facility continues to arouse significant concerns among legal practitioners, human rights advocates and youth justice stakeholders. It raises a critical question of what has been achieved in the 12 months since the com-

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Indigenous People and Criminal Justice
mission reported – and in over two years since the ABC exposed "Australia's shame".

WHAT HAS BEEN ACHIEVED?
The NT government asserts that “Territory Families (an NT government department) is undertaking extensive reform of youth detention”, with the development of “an operating model that better considers the needs of young people”.

It states that in 2017-2018 enhanced and specialised training has been completed, along with the hiring of 23 new recruits, the introduction of the ‘Australian Childhood Foundation’s Trauma Informed and Strength-Based approach’ and Restorative Practice training. These developments represent important progress but recent high-profile incidents at the Don Dale detention centre pose further serious questions about the extent to which the problems at the heart of the Royal Commission remain unaddressed.

Earlier this month, Don Dale dominated the media headlines again following reports of riots, fires within the detention centre and staff assaults. Reports stated that tear gas had been deployed. Other allegations reported include young women “showering and using the toilet under the watchful eye of security cameras which are recording and monitoring on site”.

These reports act as an unwelcome reminder of the continued broken state of NT’s juvenile justice system and the ongoing and urgent need for change to ensure better protections for young people held in detention.

THE CONTINUED FAILURE TO PROTECT CHILDREN'S RIGHTS
It is nearly 30 years since Australia ratified the 1989 Convention on the Rights of the Child. Yet we still do not have a national strategy or measures to ensure the implementation of appropriate protection of children’s rights in Australia.

Serious concerns about the state of children’s rights in Australia were highlighted in the latest national coalition NGO report to the United Nations Committee on the Rights of the Child. The Children’s Report, published by UNICEF on November 1, draws on 58 consultations with 527 children and young people in 30 locations around Australia. Its findings draw significant attention to Australia’s gross violations of the rights of children held in detention.

The report makes a substantial number of recommendations that build and give national standing to those previously made by the Royal Commission. They include: that the government immediately review and amend youth justice legislation, policies and practices to ensure that all children are treated consistent with the UNCRC and the Beijing Rules.

It also recommended that governments prioritise detention centres where children are placed as requiring immediate action as part of the implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Another recommendation was that all governments prohibit the use of solitary confinement other than as a last resort; prohibit the use of restraints against children and routine strip searches, unless all other options have been exhausted. Importantly, the report also recommends that governments ensure the existence of child-specific, independent inspectorates and complaint mechanisms.

The Children’s Report explicitly calls for governments to be held accountable to the children and young people affected by state failings in the provision of juvenile justice, and calls out the failure to implement the recommendations of the Royal Commission.

MECHANISMS FOR ACCOUNTABILITY
The lack of substantive progress in the year since the commission reported highlights the need for accountability and independent implementation monitoring. Scepticism over the degree to which the commission will represent a moment of change is understandable. It is now more than 25 years after the Royal Commission into Aboriginal Deaths in Custody. For many, the lack of progress since that 1998 Royal Commission casts doubt over the potential for this Royal Commission to achieve meaningful change to the lives of young Indigenous Australians in the NT.

The Northern Territory government has allocated $70 million for the construction of two new detention centres in Darwin and Alice Springs. It is expected that these will be completed in mid-2020.

The Royal Commission established that the present situation is unacceptable. UNICEF’s report reaffirmed this on the international human rights stage. Change in this area cannot be slow and cannot be incremental. We have the evidence, the commission has laid out the road map, and now action is needed.

We call on the NT government to act to better protect the rights of the children within its care.

DISCLOSURE STATEMENT
Kate Fitz-Gibbon is a member of the Monash Gender and Family Violence Research Program. Kate receives funding for family violence-related research from the Australian Research Council, ANROWS, and Family Safety Victoria. Kate contributed to, and endorsed, the UNICEF 'Children’s Report’ (2018). Faith Gordon does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond her academic appointment.

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THE CONVERSATION
The Change the Record coalition has launched an eight-point plan to transform the youth justice system and prevent abuse of Aboriginal and Torres Strait Islander children in prisons

Our political leaders have a responsibility to make sure children grow up safe and are supported to meet their full potential, in their communities: free to be kids.

Yet across Australia, children are being abused in prisons by authorities meant to protect them. Overwhelmingly the children being imprisoned and abused are Aboriginal and Torres Strait Islander children.

While Aboriginal and Torres Strait Islander children make up less than 6 per cent of children aged 10-17 years, they make up 54 per cent of children in prison. Aboriginal and Torres Strait Islander girls are also far more likely to be in prison than non-Indigenous girls, and their needs are often overlooked.

We cannot allow this national tragedy to continue. We need national leadership to drive change across the country. The Change the Record Coalition calls on the Federal Government to adopt and report on this 8-point National Plan of Action to end the abuse and over-representation of Aboriginal and Torres Strait Islander children in prison.

These reforms to youth justice would complement the clear call for national action outlined in Change the Record’s Blueprint for Change. This must be adopted in full as a comprehensive response to the broader over-imprisonment of all Aboriginal and Torres Strait Islander people.

As outlined in the Redfern Statement, Aboriginal and Torres Strait Islander communities, their organisations and representative bodies must be directly involved in the development of laws, policies and practices and in decision-making about matters that affect them. These principles must apply to the development, implementation and monitoring of this National Plan of Action.

1. Support children, families and communities to stay strong and together

There are many reasons why Aboriginal and Torres Strait Islander children are so over-imprisoned. The disadvantage experienced by many Aboriginal and Torres Strait Islander children means that, by no fault of their own, they are more likely to end up in prison.

Further, research has pointed to bias by police against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly children.

To give children the best chance to thrive, more needs to be done to support and strengthen families to stay together, keeping kids in their communities. The most effective way to do this is for governments to invest in targeted programs to support children and their families that are focused on addressing the causes of their disadvantage.

These factors include:
• Intergenerational trauma through past and present policies and practices;
• Racism and systemic discrimination by institutions and service systems;
• The increasing removal of children through child protection policies and practices;
• Homelessness;
• Drug misuse;
• Intergenerational lived experience of poverty;
• Family violence;
• Disability; and
• Poor health outcomes.6

All of these factors impact upon the general emotional health and wellbeing of Aboriginal and Torres Strait Islander children.

Aboriginal and Torres Strait Islander leaders and organisations have consistently highlighted that their organisations and communities must be supported and resourced to design and deliver holistic programs and services that are centred upon cultural strengths, language and connection to land. Investment in these programs has proven critical to preventing children from coming into contact or becoming entrenched in the youth justice system, including by preventing family violence and child removal.7 Where community-led and appropriately resourced, justice reinvestment can be an effective mechanism to reduce the disproportionate levels of Aboriginal and Torres Strait Islander children in prison, as demonstrated by programs in Bourke and Cowra in New South Wales.8

Change The Record’s recently commissioned study found closing the justice gap between Aboriginal and Torres Strait Islander people and non-Indigenous rates of imprisonment would “generate savings to the economy of $18.9 billion per year in 2040”.9 It is critical that the Federal Government makes up the shortfall between expenditure on children’s prisons and community-based justice services (in 2015-16 this was $252.2m10) with a fund for community-based early intervention, prevention and diversion programs. This should preference Aboriginal and Torres Strait Islander-designed and run programs and be delivered over 10 years.

2. Raise the age of criminal responsibility to 14

Governments right across Australia are imprisoning kids as young as 10, and four out of five 10 and 11 year olds in prison are Aboriginal and Torres Strait Islander children.11 When children enter the system at this young age they are highly likely to return as adults, especially those who spend time in custody.12

Australia has been repeatedly criticised by the UN Committee on the Rights of the Child for having an age of criminal responsibility which is unreasonably low.13 Children under the age of 14 are undergoing significant growth and development such that they may not have the required capacity to be criminally responsible.14 Children should not be in prison, as the institutions, conditions and separation from family can be extremely harmful to their health and development.15

This is why the Federal Government must work with all State and Territory governments to raise the age of criminal responsibility to at least 14 years of age in all Australian jurisdictions.

3. Get children who are not sentenced out of prison

On an average day, 60 per cent of Aboriginal and Torres Strait Islander children in prisons are not sentenced or are awaiting trial (‘on remand’).16 Time on remand can have a severe and damaging impact on a child, leading to longer-term harm and ongoing contact with the justice system.17

There are steps governments can take to stop this. First, the Federal Government must implement the Family Matters Roadmap18 across Australia, as a measure towards preventing Aboriginal and Torres Strait Islander children being denied bail on the basis of welfare concerns.

Further, there must be more community-based accommodation and support services. The Federal Government must work with all State and Territory governments to support local community-driven solutions including accommodation and support services. These must be safe and culturally appropriate (preferably Aboriginal and Torres Strait Islander community-controlled), and directed to preventing a child’s further entrenchment in the youth justice system.19

4. Adequately fund Aboriginal and Torres Strait Islander community-controlled legal and other support services

Aboriginal and Torres Strait Islander community-controlled legal service providers are best placed to provide legal support to Aboriginal and Torres Strait Islander children in contact with the justice system.20 In 2014, the Productivity Commission called for Government to meet the significant unmet legal need among Aboriginal and Torres Strait Islander people, recognising that the “inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system.”21

The Federal Government must provide adequate and consistent funding to Aboriginal and Torres Strait
Islander Legal Services and Family Violence Prevention Legal Services so that children, and their families, are provided with necessary culturally safe support and legal advice.

Similarly, it is vital to support Aboriginal and Torres Strait Islander-controlled services in health, education and disability, among other areas, to holistically address the disadvantage that results in the over-imprisonment of Aboriginal and Torres Strait Islander children.

5. End abusive practices in prisons

Governments at every level have a responsibility to ensure the abuse and mistreatment of children across Australia (as we have seen at Don Dale, Cleveland, Banksia Hill, Barwon, and Bimberi) will not be repeated. Currently there is a litany of inquiries into the practices and the mistreatment of children in prisons across Australia, including the use of solitary confinement, strip searching, physical violence, inappropriate use of dogs and restraints. Australia is breaching its obligations under international law to ensure that every child deprived of their liberty is protected and treated with humanity. Locking children in prison is harmful to their growth and wellbeing, and can compound mental illness and trauma. The Federal Government must immediately end the abuse (including torture, cruel, inhuman or degrading treatment or punishment) of all children in prison.

All states and territories must have fully resourced and independent inspectors with unimpeded access to child prisons. As Australia moves towards ratification of the United Nations Optional Protocol on the Convention against Torture, we recommend governments build upon the Western Australian model of the Independent Inspector of Custodial Services as best practice, with the additional need for it to extend to police lock-ups, secure care and mental health facilities.

Children belong in their communities, not in prison. The imprisonment of children is ineffective, abusive, and needs to be overhauled. Our children need community-based programs designed from a cultural and therapeutic approach that uphold the best interests of the child and support children to reach their full potential at home or in a small, home-like environment. This means that everything from the overarching philosophy, design and layout, to staffing and programs must reflect and respond to the unique needs of children, whilst also being responsive to differences in culture, gender, age and disability.

6. Set targets to end the over-representation of Aboriginal and Torres Strait Islander children in prison

The failure to include the over-representation of Aboriginal and Torres Strait Islander people in prisons and disproportion of Aboriginal and Torres Strait Islander women and children as victims of violence in the Closing the Gap framework remains a glaring omission. Targets are a proven mechanism to achieve real progress and accountability for change, where they have national reporting obligations and measures of transparency.

The Federal Government must heed the continued calls of Aboriginal and Torres Strait Islander leaders and experts, and commit to:

- Include justice targets as part of COAG’s Closing the Gap targets “refresh” process to:
  - Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, and
  - Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.
- Establish a National Agreement which includes a reporting mechanism, as well as measurable sub-targets relating to children and a commitment to halve the gap in the above overarching goals by no later than 2030, and
- Establish measurable sub-targets relating to children, as part of the justice target, that focus on providing adequate resourcing to Aboriginal and Torres Strait Islander community-controlled organisations.

7. Improve collection and use of data

Data collection and publication on youth justice in Australia is not sufficient in all states and territories to provide an evidence base for a fully informed policy approach. Better coordinated data collection, mapping of services and programs, and analysis across states and territories will help to identify priorities and track progress against targets to close the justice gap. To help to get to the bottom of the reasons for the over-representation of Aboriginal and Torres Strait Islander young people in the justice system, all Australian governments need to collect better data that protects the identity of children but helps us to understand the trends of different age groups, genders, disability, socio-economic groups, and geographic locations.

We call on the Federal Government to establish or task a national body, with Aboriginal and Torres Strait Islander representation, to coordinate a national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander imprisonment and violence rates.

8. Work through COAG to reform state and territory laws that breach children’s rights

The Royal Commission into the Protection and Detention of Children in the Northern Territory has proposed clear and considered solutions to the human rights abuses of children in prison in the Northern Territory. The Royal Commission builds on a long history of research and inquiries into the solutions needed to end the over-representation of Aboriginal and Torres Strait Islander children in prison.

There is a range of state and territory laws that are in clear breach of children’s rights. For example, the United Nations Committee on the Rights of the Child has repeatedly recommended that Western Australia’s mandatory minimum sentencing laws be abolished because they are inconsistent with imprisonment being
a last resort for children. In the Northern Territory, Queensland and, until recently, Victoria, children are being held in adult prisons despite this being a clear violation of the UN Convention on the Rights of the Child.

To end this national tragedy, the Federal Government, through COAG, must lead a national overhaul of juvenile justice systems, laws, policies and practices. This work must be done in partnership with Aboriginal and Torres Strait Islander leaders, organisations and communities. It must build on the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory, with a strong focus on keeping children out of prison with a view to developing national minimum benchmarks for laws and policies to underpin this National Plan of Action.

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1. Australian Institute of Health and Welfare (AIHW), *Youth Justice in Australia 2015-16* (2017), Table S75a: ‘Young people in detention on an average day’ by sex and Indigenous status, states and territories, 2015-16.

2. *Ibid*, Table S76a: ‘Young people aged 10-17 in detention on an average day’ by sex and Indigenous status, states and territories, 2015-16.

3. See Aboriginal and Torres Strait Islander Peak Organisations, *Redfern Statement* (2016), http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June_Final.pdf. The Redfern Statement is a call for a more just approach to Aboriginal and Torres Strait Islander affairs from government, with a central platform of self-determination, adequately resourced and supported through Aboriginal and Torres Strait Islander Community-Controlled Organisations, as vital to achieving better outcomes for Aboriginal and Torres Strait Islander people and communities.


9. PriceWaterhouseCoopers, above n 5, 57, Table 9 ‘Annual and total avoided costs attributed to closing the gap’.

10. Productivity Commission, *Report on Government Services 2017* (2017), vol C, Table 17A.1 ‘State and Territory government recurrent expenditure on youth justice services, 2015-16 dollars’, total government expenditure on community-based youth justice services ($216.4m); Table 17A.2 ‘State and Territory government recurrent expenditure on youth justice services, 2015-16’, figure for expenditure on detention-based supervision ($468.6m).

11. AIHW, above n 1, Table S78b: ‘Young people in detention during the year by age, sex and Indigenous, Australia, 2015-16’.


16. AIHW, above n 1, Table S109a: ‘Young people in detention on an average day(a) by legal status, detention type and Indigenous status, states and territories, 2015-16’.

17. K Richards, above n 11.


19. For issues with bail accommodation, including further criminalisation, see AIHW, above n 6, 22.


24. AIA, above n 3, 25.

25. Ibid, 23.


27. See E Johnson, above n 5, recs 111-121 on alternatives to imprisonment for adults, and recs 234-245 on reducing the disproportionate rates of imprisonment of Aboriginal and Torres Strait Islander children.

Change the Record Coalition Steering Committee (November 2017). 
A brighter tomorrow: keeping Indigenous kids in the community and out of detention in Australia

EXECUTIVE SUMMARY FROM A NATIONAL OVERVIEW REPORT ON INDIGENOUS YOUTH DETENTION BY AMNESTY INTERNATIONAL

Children are vital to any community. Under the Convention on the Rights of the Child, Indigenous children, like children everywhere, have the right to “develop their personalities, abilities and talents to the fullest potential, to grow up in an environment of happiness, love and understanding”. The Convention recognises each child as an individual and a member of a family and community.

The Declaration on the Rights of Indigenous Peoples recognises the right of the right of Indigenous families and communities to secure the wellbeing of their children and to have greater control over decision-making about their own lives and futures. Community is everything when it comes to ensuring all young people have what they need to enjoy their rights as children. “We know what works best for our communities,” as Mr Gooda says in the foreword to this report.

Indigenous youth detention in Australia is a national crisis – and the crisis is getting worse. Indigenous young people are “more likely to be incarcerated today than at any other time since the release of the Royal Commission into Aboriginal Deaths in Custody final report in 1991”, said the Australian House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 2011.

The most recent data, from 2013-14, shows that Indigenous young people are 26 times more likely to be in detention than non-Indigenous young people.7 Aboriginal and Torres Strait Islander young people make up just over 5 per cent of the Australian population of 10-17 year-olds but more than half (59 per cent) of those in detention. The situation is bleaker still among the youngest Indigenous children, who made up more than 60 per cent of all 10-year-olds and 11-year-olds in detention in Australia in 2012-13.

The Aboriginal and Torres Strait Islander population has more people in younger age brackets than the non-Indigenous population, with larger proportions of young people. In light of this, the National Congress of Australia’s First Peoples noted in 2013 that “unless the rate of increase in youth detention can be reduced, rates of incarceration across the Aboriginal and Torres Strait Islander population are likely to continue to increase into the future.”

This report details the nature of this crisis, and makes practical recommendations on ways the Australian Government can reduce these escalating rates. It is based on field and desk research carried out between 2013 and early 2015 by Amnesty International.

In Australia, each state and territory government is responsible for its own laws, policies and practices for dealing with young people accused of committing, or convicted of, offences. However, it is the Federal Government (Australian Government), as a signatory to international human rights conventions, which bears ultimate responsibility for fulfilling the rights of Indigenous young people in all states and territories. In 2012 the UN Committee on the Rights of the Child expressed regret that, despite its previous recommendations, “the juvenile justice system [of Australia] still requires substantial reforms for it to conform to international standards.”

This report highlights state and territory-based laws that breach international human rights obligations. The Australian Government should invalidate these laws, or work with the states and territories to have them repealed. Importantly, across all Australian states and territories children are held criminally responsible from just 10 years of age, despite the Committee on the Rights of the Child having concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.

The Western Australian Criminal Code Act 1913 (WA) requires magistrates to impose mandatory minimum sentences on young offenders in a number of circumstances. The Committee on the Rights of the Child in 2012 again recommended that the Australian Government take steps to abolish this practice. Far from accepting this recommendation, at the time of writing,
the West Australian Legislative Assembly had in fact just passed a Bill that will increase the number of offences attracting a mandatory minimum sentence.

Queensland treats 17-year-olds as adults in its criminal justice system. In 2012 the Committee on the Rights of the Child again recommended that Australia remove children who are 17 years old from the adult justice system in Queensland. Ignoring this recommendation, in 2014, the Queensland Government amended its Youth Justice Act 1992 to require all 17-year-olds with six months or more left of their sentence to be transferred to adult jails. This is contrary to Article 37(c) of the Convention on the Rights of the Child. In 2014 the Queensland Government introduced a further law that is in direct conflict with the Convention on the Rights of the Child, which says that the court must disregard the principle that detention must be a last resort.

This report sets out further actions that the Australian Government should take to comply with international legal obligations across all states and territories. For example, Australia should withdraw its reservation to the UN Convention on the Rights of the Child, as this reservation has been justified to detain children with adult prisoners where separation is not “considered to be feasible having regard to the geography and demography of Australia.” The Committee on the Rights of the Child has repeatedly noted that the reservation should be withdrawn.

The Convention on the Rights of the Child says that every child deprived of their liberty must be treated with humanity, taking into account the needs of a person of that age. In the course of this research, Amnesty International heard from legal representatives in the Northern Territory that youth detention conditions do not appear to comply with the international human rights standards. The Committee on the Rights of the Child has commented that Australia needs “an effective mechanism for investigating and addressing cases of abuse at [Australia’s] youth detention centres.” The Optional Protocol to the Convention Against Torture provides an avenue for doing so and should be ratified by Australia.

**Funding uncertainty, shortfalls and cuts mean that many Indigenous young people do not get the culturally sensitive legal assistance they need which likely contributes to their rate of over-representation in the justice system and in detention.**

Australia should also sign and ratify the Third Optional Protocol to the Convention on the Rights of the Child, which came into force in 2014 and establishes an individual complaints mechanism for children about alleged violations of their rights under the Convention on the Rights of the Child.

The report further outlines that funding uncertainty, shortfalls and cuts mean that many Indigenous young people do not get the culturally sensitive legal assistance they need which likely contributes to their rate of over-representation in the justice system and in detention. The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Preven-
tion Legal Services (FVPLS) provide specialised, culturally-tailored services for Indigenous people, including young people. Numerous inquiries have concluded that both of these Indigenous legal services are significantly underfunded, and the Committee for the Elimination of Racial Discrimination has encouraged Australia to increase this funding.

In March 2015 the Australian Government reversed cuts to the state and territory-based ATSILS, which were to take effect from June 2015. However the national peak body, National Aboriginal Torres Strait Islander Legal Services (NATSILS) will be completely defunded from 30 June 2015, which means governments and organisations will not have coordinated access to locally-informed, evidence-based advice about how the Australian justice system impacts on Indigenous people across the country.

The FVPLS play an essential role in preventing family violence and improving community safety, which stops many matters from escalating into criminal justice issues. Since August 2014, Australian Government funding for the FVPLS has been uncertain because they are no longer recognised as a stand-alone program or core service providing frontline legal assistance.

While the FVPLS heard in March 2015 that their funding will be maintained, 60 per cent of the FVPILS centres are only funded for one year. Given the identified levels of unmet legal need and no guarantee of funding beyond mid-2016 in most cases, the future remains highly uncertain for these crucial services.

This report highlights the inconsistencies and gaps between states and territories in collection and availability of data relating to contact with the youth justice system. The inadequacy of this information is one of the barriers preventing policy makers from responding to the over-representation of Indigenous young people in detention. The Australian Juvenile Justice Administrators (AJJA) are making an effort to improve data collection and use. However, the Australian Government must do much more to better collect and use data across Australian states and territories.

This report outlines the role that the Australian Government should play through the Council of Australian Governments (COAG) in adopting a justice target within the ‘Closing the Gap’ strategy. COAG has a strategy and specific timeframes for achieving six ‘Closing the Gap’ targets, relating to Indigenous life expectancy, infant mortality, early childhood development, education and employment. The Australian Government should immediately develop a dual target to close the gap between Indigenous and non-Indigenous Australians, in incarceration rates and rates of experienced violence.

This report then outlines the need for the Australian Government to take the lead, through a coordinated COAG approach, on adopting justice reinvestment in Australia. Justice reinvestment invests in communities as an approach to address expanding prison populations.

The UN Committee for the Elimination of Racial Discrimination has recommended that Australia “dedicate sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system” and encouraged Australia to adopt “a justice reinvestment strategy”.

One promising example of such a community-led approach is in Bourke, a town in north-west New South Wales which is working towards adopting a justice reinvestment approach. The Australian Government should work with the states and territory governments to ensure that community-designed and led solutions are embedded in a coordinated COAG approach for implementing justice reinvestment in Australia.

The report also highlights particular issues that fetal alcohol spectrum disorders (FASD) present for some Indigenous young people, which make contact with the criminal justice system more likely. FASD is an umbrella term used to describe a range of impacts caused by exposure to alcohol in the womb. An official diagnostic tool must urgently be finalised, and FASD should be formally recognised as a disability, so that people affected by FASD and their carers can access adequate funding and support.

Community-designed and led programs must be better resourced so that young people affected by FASD get the early support they need, so that their behaviour does not get dealt with as a criminal justice issue. Diagnosis is also essential to ensure a fair trial for people affected with FASD and who are prosecuted for criminal offences. The current process for making diagnosis is time consuming, which can lead to young people being held in detention on remand awaiting a diagnosis for longer than they otherwise would.

This report finds many areas where the Australian Government can improve its efforts to reduce the numbers of young Indigenous people incarcerated across the country, and to support Indigenous-led initiatives to keep young people, in their communities, in school and with their families.

In July 2014, the Australian Government announced $9.2 million to fund the National FASD Action Plan. Amnesty International welcomes this step, but notes that the plan does not undertake to recognise FASD as a disability nor include a budgetary allocation to assist the families of young people who are at risk of contact with, or already enmeshed in, the justice system.

This report outlines the need for better Australian Government support for bail accommodation options to prevent Indigenous young people being unnecessarily held on remand. International human rights standards require that detention for persons awaiting trial must be the exception rather than the rule. But between June 2013 and June 2014 Indigenous young people were 23 times more likely than their non-Indigenous
counterparts to be in unsentenced detention on a per capita basis. The Australian Government must ensure that Indigenous young people are not held in detention on remand solely due to homelessness, or a lack of suitable accommodation and support to comply with bail conditions.

In summary, this report finds many areas where the Australian Government can improve its efforts to reduce the numbers of young Indigenous people incarcerated across the country, and to support Indigenous-led initiatives to keep young people, in their communities, in school and with their families.

WORKSHEETS AND ACTIVITIES

The Exploring Issues section comprises a range of ready-to-use worksheets featuring activities which relate to facts and views raised in this book.

The exercises presented in these worksheets are suitable for use by students at middle secondary school level and beyond. Some of the activities may be explored either individually or as a group.

As the information in this book is compiled from a number of different sources, readers are prompted to consider the origin of the text and to critically evaluate the questions presented.

Is the information cited from a primary or secondary source? Are you being presented with facts or opinions?

Is there any evidence of a particular bias or agenda? What are your own views after having explored the issues?

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Brainstorm, individually or as a group, to find out what you know about Indigenous people and the criminal justice system. Complete your answers on a separate sheet of paper if more space is required.

1. What is the current rate of incarceration for Aboriginal and Torres Strait Islander men and women, compared to non-Indigenous men and women? Provide the year and source of your statistics.

2. What is justice reinvestment? What is its role in the reduction of Indigenous imprisonment rates?

3. What was the Royal Commission into Aboriginal Deaths in Custody (1987-1991)? Briefly explain its key recommendations.

4. Choose ONE of the following 13 key areas of focus in the Australian Law Reform Commission’s Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017) and explain the recommendations made in relation to that topic in the final report: justice reinvestment; bail; sentencing and Aboriginality; community-based sentences; mandatory sentencing; prison programs and parole; access to justice; Aboriginal and Torres Strait Islander women; fines and driver licences; alcohol; police accountability; child protection and adult incarceration; criminal justice targets and Aboriginal Justice Agreements.
The reasons for the disproportionately high incarceration rates of Indigenous peoples can be separated into two main categories: socioeconomic factors, and structural bias and discrimination within the criminal justice system.

Consider the above statement, and in the spaces below list and briefly describe each of the major risk factors which contribute to the high incarceration rates of Aboriginal and Torres Strait Islanders. Provide an example of how each factor might interrelate with others to contribute to higher Indigenous contact with the criminal justice system.

**SOCIOECONOMIC FACTORS**

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

**STRUCTURAL BIAS AND DISCRIMINATION WITHIN THE CRIMINAL JUSTICE SYSTEM**

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
Complete the following multiple choice questionnaire by circling or matching your preferred responses. The answers are at the end of this page.

1. What percentage of the total Australian prisoner population do Aboriginal and Torres Strait Islanders account for (as at 30 June 2018)?
   a. 3%
   b. 8%
   c. 15%
   d. 18%
   e. 28%

2. In 2017, the Australian Law Reform Commission’s Pathways to Justice inquiry made how many recommendations to turn around the rising rate of imprisonment among Aboriginal and Torres Strait Islander men and women?
   a. 35
   b. 135
   c. 235
   d. 335
   e. 385

3. The Royal Commission into Aboriginal Deaths in Custody report (1991) made how many recommendations to improve justice outcomes for Aboriginal and Torres Strait Islander people?
   a. 39
   b. 139
   c. 239
   d. 339
   e. 389

4. Respond to the following statements by circling either ‘True’ or ‘False’:
   a. Indigenous prisoners account for over a quarter of Australia’s prisoner population. True / False
   b. The total Aboriginal and Torres Strait Islander population in Australia aged 18 years and over is approximately 12%. True / False
   c. Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006 and 2016. True / False
   d. Aboriginal and Torres Strait Islander men are 15 times more likely to be in custody than non-Indigenous men. True / False
   e. Aboriginal and Torres Strait Islander women are 21 times more likely to be in custody than non-Indigenous women. True / False
   f. Indigenous children make up 7% of the general youth population but 54% of those in youth detention in Australia. True / False
   g. Annual savings to the economy of nearly $1.9 billion could be achieved by 2040 if the gap between Indigenous and non-Indigenous rates of incarceration were closed. True / False
   h. Indigenous people are currently more likely than non-Indigenous people to die in custody. True / False

MULTIPLE CHOICE ANSWERS

MULTIPLE CHOICE ANSWERS

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At 30 June 2018, Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (28%) of the total Australian prisoner population. The total Indigenous population in Australia aged 18 years and over in 2018 was approximately 2% (ABS, Aboriginal and Torres Strait Islander prisoner characteristics). (p.1)

Three out of four Aboriginal and Torres Strait Islander prisoners had been imprisoned under sentence previously, compared to one in two non-Indigenous prisoners [At 30 June 2018] (ibid). (p.2)

The Australian Law Reform Commission’s Pathways to Justice inquiry was commissioned by the Federal Government to investigate whether courts, police and prisons were contributing to the over-incarceration of First Nations people. In 2018, the inquiry made 35 recommendations, including ending the practice of jailing people for unpaid fines; courts should consider First Nations people’s systemic and background factors; and governments should set criminal justice targets to reduce incarceration and violence (ABC News, Australian justice system overhaul needed to address Indigenous incarceration, inquiry finds). (p.4)

The reasons for the disproportionately high incarceration rates of Indigenous peoples can be separated into two main categories: socioeconomic factors, and structural bias and discrimination within the criminal justice system (The Spinney Press, Causes of high imprisonment rates). (p.5)

The rate of Indigenous incarceration has increased by 45% since 2008. It is a national shame that Aboriginal and Torres Strait Islander Australians make up 2% of the total Australian population, but 28% of the adult prison population (Sophie Russell & Chris Cuneen/ The Conversation, As Indigenous incarceration rates keep rising, justice reinvestment offers a solution). (p.13)

Research has found a large portion of prisoners come from and return to a small number of inadequately resourced neighbourhoods and communities. It is well known that prisons are filled with people who are disproportionately disadvantaged and who have unmet social, health and disability-related needs (ibid). (p.14)

Research has shown that prison does not reduce crime. It actually perpetuates cycles of poverty, disadvantage and reoffending (ibid). (p.14)

Indigenous Australians are the most incarcerated people on the planet Earth. Indigenous Australians were imprisoned at higher rates than Indigenous people in the US in 2010, in Canada in 2010-11 and in New Zealand in 2015, and than African-Americans in 2015 (Thalia Anthony/The Conversation, Are Indigenous Australians the most incarcerated people on Earth?). (pp. 18-19)

To change the record, all levels of government need to work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to design and invest in holistic early intervention, prevention and diversion strategies. These are smarter, evidence-based and more cost-effective solutions that increase safety, address the root causes of violence against women and children, cut reoffending and imprisonment rates, and build stronger communities (Change the Record, Indigenous imprisonment and violence: blueprint for change). (p.21)

The Royal Commission into Aboriginal Deaths in Custody was established in 1987 in response to growing concern over the deaths of Indigenous people in custody. The RCIADIC (1991) found Indigenous people were no more likely than non-Indigenous people to die in custody but were considerably more likely to be arrested and imprisoned (AIC, Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody). (p.27)

There were 247 Indigenous deaths in prison custody over the 1991-92 to 2015-16 period, accounting for 19% of all prison deaths. Between 1991-92 and 2015-16, the number and proportion of Indigenous prison deaths fluctuated (11%-30% each year), while the number and proportion of Indigenous people in the prison population increased (from 14% to 27%). Since 2003-04, the proportion of Indigenous deaths in prison custody has been smaller than the relative proportion of prisoners (ibid). (pp. 27-28)

More than half of the Indigenous people who died in custody since 2008 had not been convicted of a crime. In contrast, the majority of non-Indigenous people who died in custody (51%) were serving a prison sentence. Most of the Indigenous people who had not yet been charged were suspected of non-indictable offences which typically carry sentences of less than five years, ranging from public intoxication to evading police (The Spinney Press, Progress on deaths in custody questioned). (p.35)

Between June 2014 to June 2018, more than half of young people aged 10 and over were Aboriginal or Torres Strait Islander; Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night. Over the 4-year period, this fluctuated between 21 and 28 times the non-Indigenous rate (AIHW, Detention rates of Aboriginal and Torres Strait Islander young people). (p.38)

It is 30 years since Australia ratified the 1989 Convention on the Rights of the Child. Yet we still do not have a national strategy or measures to ensure the implementation of appropriate protection of children’s rights in Australia (Kate Fitz-Gibbon and Faith Gordon/The Conversation, One year on from Royal Commission findings on Northern Territory child detention: what has changed?). (p.44)

There are many reasons why Aboriginal and Torres Strait Islander children are so over-imprisoned. The disadvantage experienced by many Aboriginal and Torres Strait Islander children means that, by no fault of their own, they are more likely to end up in prison. Further, research has pointed to bias by police against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly children (Change the Record, Free to be kids – national plan of action). (p.45)
Aboriginal
A person who identifies as being of Aboriginal origin. May also include people who identify as being of both Aboriginal and Torres Strait Islander origin.

Bail
A pre-sentencing option where a person is released into the community for a prescribed period before they appear in court for trial or for sentencing.

Community justice approaches
Therapeutic and restorative processes, e.g. Koori and Murri courts, drugs courts and healing circles, are ways in which the criminal justice system can help to rebuild relationships and deliver positive outcomes for the entire community. Investment in early intervention and prevention activities can be more cost-effective and prevent offending occurring in the first place.

Crime
An action or omission that constitutes an offence that may be prosecuted by the state and is punishable by law. What is classified as a crime is supposed to reflect the values of society and to reinforce those values.

Criminal justice system
Consists of state/territory and federal government institutions, agencies, departments and personnel responsible for dealing with the justice aspects of crime, victims of crime, persons accused or convicted of committing a crime, and related issues and processes.

Customary law
Customary laws, traditions, customs, observances, practices and beliefs of an Aboriginal community. These customary laws may vary from one community to another.

Deaths in custody
The Royal Commission into Aboriginal Deaths in Custody was established in 1987 in response to concerns over the deaths of Indigenous people in custody. The RCIADIC (1991) found Indigenous people were no more likely than non-Indigenous people to die in custody but were considerably more likely to be arrested and imprisoned. Since 2003-04, the proportion of Indigenous deaths in prison custody has been smaller than the relative proportion of prisoners.

Diversion
Method of dealing with offenders (usually juvenile offenders) without taking court proceedings.

Imprisonment rates
Indigenous prisoners are over-represented in Australia, currently representing just over a quarter (28%) of the total Australian prisoner population. The total Aboriginal and Torres Strait Islander population in Australia aged 18 years and over is approximately 2%.

Indigenous disadvantage
In Australia, Aboriginal and Torres Strait Islander people do not enjoy the level of wellbeing enjoyed by the wider community. They consistently experience lower levels of health, education, employment and economic independence than those enjoyed by most Australians. The key issues involving Aboriginal and Torres Strait Islander disadvantage are in the areas of education; health and wellbeing; employment; housing and accommodation; law and justice; and regional and remote communities.

Indigenous people
People who identify themselves as being of Aboriginal and/or Torres Strait Islander origin. ‘Indigenous peoples’ is used when referring collectively to the first peoples of the land in international communities. ‘Indigenous Australian’ is used when speaking about both Aboriginal and Torres Strait Islands peoples within Australia.

Justice reinvestment
Strategy for reducing the number of people in prison by investing funds drawn from the corrections budget into early intervention, prevention and diversionary solutions in communities where many prisoners come from and return to. Justice reinvestment involves working with a community to design local solutions to overcome the drivers of crime and incarceration.

Mandatory sentencing
Minimum sentence applied when someone is found guilty of a crime. This limits a judge’s discretion in sentencing, in particular the influence of mitigating and aggravating circumstances.

Non-custodial penalties
Include community service orders, good behaviour bonds, dismissal of charges, conditional discharge of the offender, deferral of sentencing, suspended sentences and fines.

Offences
An offence is an act considered prima facie (before investigation) to be in breach of the criminal law.

Prisoner
A person held in custody.

Recidivism
The act of repeated or habitual participation in crime.

Remand
When a person is waiting for the outcome of a court hearing and is placed in custody.

Sentenced
The legal status of a person who has received a custodial or community-based order from a court for a conviction for an offence.

Youth detention
Punitive ‘tough on crime’ approaches to youth offending and misbehaviour fail to recognise that young people are still developing and that more appropriate opportunities for support and positive reinforcement exist than putting children behind bars. Exposure to youth detention also substantially increases the likelihood of involvement in crime as an adult. Young people at risk must be supported to maximise their chances of achieving their full potential.
Websites with further information on the topic

Australian Bureau of Statistics  www.abs.gov.au
Australian Human Rights Commission  www.humanrights.gov.au
Australian Institute of Criminology  www.aic.gov.au
Australian Institute of Health and Welfare  www.aihw.gov.au
Australian Law Reform Commission  www.alrc.gov.au
Change the Record  https://changetherecord.org.au
Human Rights Law Centre  www.hrlc.org.au
Indigenous Justice Clearinghouse  www.indigenousjustice.gov.au
The Conversation  https://theconversation.com/au

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