

An introduction to over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system

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Abstract

This introduction presents some of the key themes and factors associated with rates of over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. It provides a summary of literature that evaluates policy proposals to reduce these rates, discussing how dominant societal attitudes can negatively affect the outcomes of policy and legislation. It explores how experiences of modern disadvantage and intergenerational effects can affect incarceration rates, including the extent to which police influence these rates and alternative legal solutions. The tendency towards punitive attitudes in policy responses is examined and focuses on how these attitudes disproportionately affect Aboriginal and Torres Strait Islander people. An explanation of how disadvantage upon release can be mitigated is given, including establishing a national monitoring system to combat recidivism and providing adequate support networks. The uncertainty of diversion programs is discussed and the necessary factors that are needed to create long-term solutions to reduce extreme incarceration rates are revealed.

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Introduction

This document aims to identify some of the key issues and factors that contribute to rates of over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. It presents a summary of literature that evaluates policy proposals to reduce these rates, including a discussion of how current attitudes towards Aboriginal and Torres Strait Islander people can negatively influence how policy responses are framed. This is followed by an evaluation of how a legacy of colonialism and disadvantage can affect Aboriginal and Torres Strait Islander people and their experience with the criminal justice system. Influential factors including parental incarceration, subsequent intergenerational effects and the role of police are examined. Policy responses are identified and evaluated, including alternative legal solutions, such as youth conferencing, and the tendency towards punitive solutions, including mandatory sentencing laws. The necessity of mitigating disadvantage upon release is discussed and possible solutions suggested in the literature will be revealed. This document endeavours to provide a thorough evaluation of how policy has responded to this issue, its negative or positive impact and to uncover the factors that are necessary for effective and long-term solutions.

The magnitude of this over-representation is illustrated by current statistics, whereby Aboriginal and Torres Strait Islander prisoners made up 27% of the total prison population in 2015, despite representing a mere 2% of the entire Australian population ([Australian Bureau of Statistics \[ABS\] 2015](#)). Policy proposals to reduce these statistics are complicated, as the national rates are not equally divisible within each part of Australia, highlighting the need for adaptable and customised policy responses. Aboriginal and Torres Strait Islander prisoners represented 8% of prisoners in Victoria in 2015, which rose significantly to 84% in the Northern Territory ([ABS 2015](#)). These alarming rates are not recent phenomena and were put into the spotlight in 1991, when the [Royal Commission into Aboriginal Deaths in Custody \(RCIADIC\)](#) was published. However, this document will illustrate why significant progress has not been made in regards to incarceration rates, as the literature highlights that many programs aimed at reducing imprisonment and recidivism are deemed as ineffective or superficial, yet continue to prevail.

Attitudes

Aboriginal and Torres Strait Islander people can be negatively affected by dominant societal attitudes and beliefs that shape how stakeholders in policy proposals are viewed and portrayed. References to dominant culture and beliefs are common in the literature, as they provide an initial explanation of how potentially preconceived ideas can influence and permit inherent bias to exist in policy responses. Literature highlights that dominant culture often inevitably categorises Aboriginal and Torres Strait Islander families as delinquent prone, as they do not fit into the description of 'normality', that being a 'middle class, law-abiding' family, and those who do not fit this description become potentially delinquent ([Cunneen 2008](#), p. 52). A damaging consequence of this notion of 'normality' is the presence of internalised racism, whereby ultimately racist and discriminatory attitudes are allowed to exist in

everyday views and beliefs, regardless of whether intentional or not (Paradies & Cunningham 2009, p. 551).

Despite this, some literature argues that current political discourse in Australia advocates for Aboriginal and Torres Strait Islander self-determination and rights, which aim to resist and transform these inherently racist, dominant attitudes ([Rowse 2015](#), p. 8). These attitudes, however, are still evident in legislation that targets youth offending, whereby Aboriginal and Torres Strait Islander youth are presented as disobedient and lawless through punitive policy responses that assume immediate culpability. In 2008, 26% of Aboriginal and Torres Strait Islander youth reported experiencing discrimination based on their origin and those who did not report discrimination were less likely to have experienced unemployment or trouble accessing services ([ABS 2008](#)). Legislation that addresses juvenile justice policy emphasises the necessity of severe penalties to achieve deterrence and provide community protection, however this discourse ultimately depends on individual responsibility and deterrence (Cunneen 1997, p. 294), disregarding any external factors. A constant focus on the individual in policy responses fosters an environment whereby individual histories are substituted for the historical dynamics of societies such that offending is seen as the failing of the individual rather than the consequence of inequality and discrimination ([Cunneen 2008](#), p. 53). Focusing on individual fault and culpability can negatively affect the experience of an Aboriginal or Torres Strait Islander person in the criminal justice system, as it encourages policy responses to ignore the effects of colonialism and any subsequent disadvantage, as well as neglecting to recognise the existence of detrimental societal attitudes.

Legacy of colonialism and disadvantage

The lingering effects of colonialism and their influence on the modern disadvantage that Aboriginal and Torres Strait Islander people experience are commonly mentioned in the literature as factors contributing to extreme rates of incarceration. This discussion acknowledges that modern inequities, in sectors such as health and education, have provided increased means and reasons for offending and have further influenced incarceration rates. Contemporary consequences of colonialism and its inherent racist nature include low standards of housing, health and mortality, coupled with high levels of unemployment that result in low income rates (Paradies & Cunningham 2009, p. 548). Explicit acknowledgment and understanding of these effects and how they negatively impact upon Aboriginal and Torres Strait Islander people are crucial in determining how to effectively reduce current rates of incarceration. However, the development of policy to reduce offending can often fail to understand the complexity of remote communities, thus neglecting the existence of a deeply entrenched colonial history (Cunneen 1997, p. 293). This can result in the creation of superficial and hollow solutions that do not have lasting success.

Literature argues that this systemic disadvantage created by colonialism places Aboriginal and Torres Strait Islander people in a 'community of fate', whereby the preservation of their contemporary but historically determined structural position in society is preserved ([Rowse 2015](#), p. 4). Although colonialism is often referred to as a

legacy with lingering effects, some literature argues that its widespread segregation of Aboriginal and Torres Strait Islander people simply continued after the repeal of the Native Welfare Act, whereby segregation was henceforth facilitated through penal rather than administrative form and consequently, high rates of incarceration emerged (Hogg 2001, p. 356, 367).

Modern discussions of criminality allude to the existence of negative or spiteful attitudes and assume malicious motivation, often ignoring the effects of colonialism on disadvantage and offending. These assumptions are detrimental and as such, a complete and thorough understanding of historical disadvantage is necessary when discussing criminal motivations. There is evidence that Aboriginal and Torres Strait Islander youth may offend due to a lack of resources and infrastructure within communities, to form alliances and develop trust among peers, or simply as a form of entertainment (Ogilvie & Van Zyl 2001, p. 3). Furthermore, detention can often be mistakenly referred to as a rite of passage for some Aboriginal and Torres Strait Islander people, however it may be acting instead as another means to construct an identity (Ogilvie & Van Zyl 2001, p. 3) that has been questioned or damaged by a legacy of colonialism. Some literature argues that discussing violence within Aboriginal and Torres Strait Islander communities solely in terms of criminality is confining it to a compact definition (Sutton 2001, p. 154-155). This can create an additional layer of disadvantage, as it neglects to understand how history has contributed to the prevalence of violence within these communities.

Proper recognition of the unique nature of Aboriginal and Torres Strait Islander cultures and societies is deemed essential in reconciliation discourse, however this uniqueness can be overlooked as a factor contributing to modern disadvantage, whereby policy responses are instead based on Western values and expectations and thus may be difficult to realise in distinct communities (Sutton 2001, p. 148-149). This recognition of cultural differences is extremely important, regardless of how many individuals retain such traditional values and practices. Definitions of crime and incarceration according to Western understandings are rarely questioned, resulting in Aboriginal and Torres Strait Islander criminality being understood from a neo-colonial perspective with only particular acts being considered criminal and others not ([Klein, Jones & Cubillo 2016](#), p. 4). This illustrates how criminal justice policy may neglect to acknowledge or accommodate for cultural differences and become inherently biased towards Western values.

Intergenerational effects

Parental incarceration can have long-term, intergenerational effects on Aboriginal and Torres Strait Islander youth. Separation from parents at an early age by means of incarceration can create familial disruption which in turn increases the risk of mental health issues (Quilty 2005, p. 256). This health risk, combined with a lack of suitable health and social services, increases the risk of incarceration (Krieg 2006, p. 534).

Fear of prison is often cited as a deterrent for offending, however familiarity with prison from a young age due to familial incarceration may reduce any potential

deterrent effects (Ogilvie & Van Zyl 2001, p. 5). The literature argues that maintaining a strong family connection whilst in custody is essential for lowering levels of recidivism ([Standing Committee on Aboriginal and Torres Strait Islander Affairs \[SCATSIA\] 2011](#), p. 53), however, possible mental health issues stemming from incarceration and subsequent familial disruption may hinder the development of these connections.

Role of police and alternative legal solutions

The way in which police affect incarceration rates is discussed in the literature, including the level of influence awarded to police over the coordination and outcome of alternative legal solutions. The literature emphasises the lack of evidence demonstrating that increased incarceration of Aboriginal and Torres Strait Islander people results from deliberate racial discrimination by agents such as police, however, it does acknowledge that historical evidence proves that enhanced regulation of police practices could aid in decreasing overall incarceration rates ([Rowse 2015](#), pp. 10, 13). Some argue that inherent negative attitudes of Aboriginal and Torres Strait Islander people towards police may lead to the potential understatement of incidents of police violence, whereby an expectation of violence exists (Cunneen 2009, p. 211). These inherent negative attitudes that define violence as expected or normal are damaging and would require substantial and incremental change to be altered.

Appropriate exercise of police discretion is commonly discussed in the literature, as policy proposals designed to reduce incarceration rates often grant police influential power over alternative sentencing methods. Some argue that police have significant discretion over the outcome of these methods, whereby policies such as mandatory sentencing grant police increased power (Cunneen 1997, p. 295; [Cunneen 2008](#), p. 45; [Hunyor 2015](#), p. 8) that has the potential to be abused. The role of police in youth conferencing is criticised as being too dominant and central to the process, as a study using data from trial conferencing in Alice Springs found that this method may be redundant if it fails to include repeat offenders, a group which includes many Aboriginal and Torres Strait Islander youth (Cunneen 1997, p. 295). In the most extreme cases, the ill-advised use of police discretion or failure to exercise adequate caution can lead to death (Cunneen 2009, p. 213), as illustrated in the RCIADIC.

The literature evaluates the success of alternative legal solutions that seek to assist Aboriginal and Torres Strait Islander people in the criminal justice system and further comments on the unavoidable consequences that arise from these solutions. Whilst self-determination has not been a fundamental factor in criminal justice policy development, the literature argues that the consideration of alternative legal solutions such as youth conferencing, circle sentencing and Aboriginal courts are an exception to this apparent lack of attention, forming a great part of the restorative justice framework ([Cunneen 2008](#), p. 53). The success of these alternative legal solutions is difficult to measure, as statistical data is not necessarily predictive of the possible intangible advantages of these solutions, such as a better relationship

between remote communities and courts ([Australian Institute of Health and Welfare \[AIHW\] 2013](#), p. 14).

However, alternative solutions to traditional courts cannot be stand-alone events and require long-term support to produce lasting positive results. Effective and ongoing health and social services are crucial to the success of these alternative solutions, as they need the support of community-based programs to be functional in the long term (Krieg 2006, p. 535). Furthermore, to measure the success of alternative methods, it is necessary to supplement the available quantitative data with qualitative evidence, as reducing overall incarceration rates in general, including the factors that contribute to these rates, is distinct from reducing over-representation in prisons, whereby representation of other groups could simply rise without any change in Aboriginal and Torres Strait Islander incarceration rates ([Klein, Jones & Cubillo 2016](#), p. 8).

Specialised legal services designed to provide Aboriginal and Torres Strait Islander people with representative, preventative, divertive and rehabilitative facilities have constantly been underfunded, thus only managing to provide basic legal services and ignoring alternative legal solutions, community legal education and government advocacy ([Klein, Jones & Cubillo 2016](#), p. 2). These services are essential to combat cross cultural issues, remoteness and language barriers that many Aboriginal and Torres Strait Islander people experience ([Amnesty International 2015](#), p. 21). This underfunding gives rise to further disadvantage, whereby alternative solutions are eradicated or strictly limited for those who may not have access to them otherwise.

Punitive attitudes in policy responses

A tendency towards punitive solutions in policy and legislation is confirmed by an overwhelming consensus in the literature (Cunneen 1997, p. 296; [Cunneen 2008](#), p. 48; Hogg 2001, p. 357, 370; [Hunyor 2015](#), p. 8). These punitive attitudes can negatively contribute to rates of incarceration, whereby areas known for extreme rates of Aboriginal and Torres Strait Islander incarceration, such as the Northern Territory and in Western Australia, are consequently also areas where these attitudes are extremely prevalent in legislation (Hogg 2001, p. 370). Furthermore, punitive attitudes can encourage the creation of laws that may disproportionately affect Aboriginal and Torres Strait Islander people. Some argue that mandatory sentencing laws are an example of this legislation, as their enforcement in communities ruled by punitively focused governments fundamentally targets existing disadvantaged groups in society, regardless of any evidence to suggest that these laws are effective in reducing crime or creating a safe community ([Hunyor 2015](#), p. 6, 8). These punitive laws can lead to the entrenchment of disadvantaged groups in the criminal justice system.

The risk of entrenchment is exacerbated when authorities fail to use cautions, as Aboriginal and Torres Strait Islander youth may become heavily involved in the juvenile justice system instead of being offered a restorative justice solution ([Cunneen 2008](#), p. 46). This notion is further likened to the punitive action of refusing

young people bail and demonstrated by the outcomes of targeted legislation, such as the *Bail Amendment (Repeat Offenders) Act 2002*, which directly correlated to an enormous jump in incarceration rates for Aboriginal and Torres Strait Islander youth ([Cunneen 2008](#), p. 48). Whilst the legislation does not explicitly target specific groups in society, it does so implicitly by failing to acknowledge how such laws may disproportionately affect already disadvantaged groups. In seeking reduced contact with the criminal justice system, some policy approaches have sought to reduce court contact, however, this gives authoritative figures more power to detain and may instead result in increased detention. This is highlighted by the outcome of the paperless arrest regime in the Northern Territory, whereby police are given greater power to detain, even for infringements that would normally only be penalised with a fine ([Hunyor 2015](#), pp. 3-6).

Disadvantage upon release

Whilst a substantial amount of the literature focuses on experience and contact with the criminal justice system, some literature considers how the disadvantage that Aboriginal and Torres Strait Islander people experience within the system continues once released from custody ([Kinner et al. 2011](#), pp. 67-68). Literature argues that the higher mortality rate of Aboriginal and Torres Strait Islander ex-prisoners compared to those in custody, especially for drug-related causes, shows the extreme vulnerability of this group upon release and during the community reintegration process ([Kinner et al. 2011](#), p. 67). Some are critical, however, of the fact that there is a lack of data to inform reliable research on the lingering effects of incarceration upon release, thus exposing a gap in the literature. There is strong agreement that a national monitoring system of ex-prisoners is needed to both ensure the ongoing care of Aboriginal and Torres Strait Islander people upon release and aid the effective management and implementation of any rehabilitative programs ([Kinner et al. 2011](#), pp. 67-68; Krieg 2006, p. 535). This system is essential for a reduction in recidivism, as simple measures to combat immediate prison time or divert offenders intermittently from incarceration do not produce long-term results. Evidence-based solutions must be devised and implemented, however they require data that is nationally consistent, standardised and disaggregated ([Amnesty International 2015](#), p. 23), highlighting the need for a national monitoring system.

The literature reaches an agreement that policy solutions must be enacted and supported in local communities, as opposed to solely within the criminal justice system, in order to address the underlying issues that lead to incarceration ([Crofts & Mitchell 2011](#), p. 278; Krieg 2006, p. 535). Along with this understanding, programs must endeavour to both educate and propose alternative solutions for Aboriginal and Torres Strait Islander people, such as vocational options, in order to create a multi-faceted approach (Putt, Payne & Milner 2005, p. 5).

Although common discourse places blame on individuals for recidivist behaviour, it becomes prevalent when there is inadequate support for ex-prisoners ([SCATSIA 2011](#), p. 255). Limitations to employment for Aboriginal and Torres Strait Islander people are common upon release, however little research has been conducted about the

effectiveness of proposed and existing solutions ([Graffam & Shinkfield 2012](#), pp. 1-2). A new focus for policy solutions that is not commonly noted within the literature suggests investigating how desistance, rather than recidivism, could mitigate extreme levels of incarceration (Ogilvie & Van Zyl 2001, p. 5). This focus would enable further understanding of the factors that affect those who do not have contact with the criminal justice system.

Diversion

The literature confirms that there is no singular or simple solution to reducing rates of Aboriginal and Torres Strait Islander incarceration. Some literature states that the benefits of diversion programs, including community residential drug and alcohol rehabilitation services, outweigh those of incarceration, as they produce financial savings and lead to improvements in health and mortality ([National Indigenous Drug and Alcohol Committee 2012](#), p. 63). These diversion programs are often referred to as alternative solutions, however they can be interventionist rather than preventative, as they do not substantially reduce factors that contribute to Aboriginal and Torres Strait Islander contact with the criminal justice system and may only divert attention for a small period of time ([AIHW 2013](#), p. 13). Furthermore, 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 (Cunneen 1997, p. 293).

Conclusion

A discussion of contemporary Aboriginal and Torres Strait Islander incarceration rates and subsequent policy responses must acknowledge and understand the history of disadvantage that surrounds the issue. Literature reveals that there is no quick fix to reduce these rates, as solutions must be multi-faceted and include community consideration and consultation, which are factors that depend on long-term programs and firm commitment and support from institutions. Solutions must also combat intergenerational effects and current negative attitudes towards Aboriginal and Torres Strait Islander people and families. Limiting the tendency towards punitive responses may lead to decreased contact with the criminal justice system for Aboriginal and Torres Strait Islander people. Furthermore, adequate support upon release must be available and a national monitoring system is necessary to guide future policy responses and aid in reducing recidivism.

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