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Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Submission to *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia*

I am pleased to have the opportunity to provide the attached submission to the *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.*

Yours sincerely,

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Overview

This submission focuses on the over-representation of First Nations people in Australian prisons and how justice reinvestment provides both a way to address over-representation, as well as an opportunity for Australia to comply with the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).

The focus of the submission is term of reference ii. options to improve adherence to the principles of *UNDRIP* in Australia.

Over-representation

Over-representation of First Nations people in Australian prisons has been widely recognised since the 1991 *Royal Commission on Aboriginal Deaths in Custody*. More recently it has been the subject of

1. an inquiry by the Australian Law Reform Commission (ALRC) (*Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* (2017)) and
2. extensive criticism by United Nations organisations, including
    a. the United Nations Special Rapporteur on the Rights of Indigenous Peoples (see *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017)) and
    b. the United Nations Committee against Torture (see Committee Against Torture *Concluding observations on the combined fourth and fifth periodic reports of Australia* (CAT/C) UN Doc CAT/C/AUS/CO/4-5 (23 December 2014)).

The current national rate of over-representation is as follows: First Nations peoples comprise 2% of the general but make up 29% of the prison population (Australian Bureau of Statistics, *Prisoners in Australia 2020*). Over-representation continues to worsen. For a more detailed discussion of over-representation (including the State and Territory rates) see pages 16-18 of my 2020 book *Towards Human Rights Compliance in Australian Prisons* (attached).

Over-representation of First Nations people in prisons is contrary to Article 2 of the *UNDRIP*, which requires that First Nations peoples are 'free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin or identity'. Discrimination in the Australian criminal justice system is extensively documented by the abovementioned ALRC report. A brief insight is obtained from the executive summary, which notes: '[o]ver-representation increases with the stages of the criminal justice system. In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment' (page 26).

The mistreatment of First Nations peoples in Australian prisons is contrary to Article 1 of the *UNDRIP*, which refers to 'full enjoyment' of rights contained in other international Treaties. There are numerous Treaty provisions relevant to treatment in prison, but the primary ones are

- the prohibition of 'torture' or 'cruel, inhuman or degrading treatment or punishment' (contained in Article 7 of the *International Covenant on Civil and Political Rights (ICCPR)*; supported by provisions of the *Convention Against Torture* and the *Optional Protocol to the Convention against Torture),* and
- the right of '[a]ll persons deprived of their liberty' to be 'treated with humanity and with respect for the inherent dignity of the human person' (contained in Article 10(1) of the ICCPR).

Justice reinvestment

Justice reinvestment involves redirecting funds spent on imprisonment to the communities in the hope that, with appropriate support, people will be less likely to commit crimes that lead to their imprisonment. Funds are instead spent on services including public housing, substance abuse and mental health treatment programs, education and employment assistance.

Justice reinvestment has the potential to address over-representation of First Nations people because of the place-based focus. It also addresses the 'costs' of imprisonment (both economic and human, such as the aforementioned mistreatment). The economic cost of imprisonment was in 2018 an average of $391.18 per day per person (Australian Institute of Criminology, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Research Report No 5, 2018)).

For further background about justice reinvestment, please see pages 153-195 of my book (attached).

Justice reinvestment has been recommended as a strategy for addressing over-representation of First Nations peoples in prison by the ALRC in their 2017 report. The report recommended specifically an 'independent justice reinvestment body' and 'trials initiated in partnership with Aboriginal and Torres Strait Islander communities' (Recommendations 4-1, 4-2, pages 137–8). It has had the support of Aboriginal and Torres Strait Islander Social Justice Commissioners since 2009 (David Brown, Melanie Schwartz and Laura Boseley, 'The Promise of Justice Reinvestment' (2012) 37(2) *Alternative Law Journal* 96, 99). See, for example, the speech by Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, to the District and County Courts of Australia and New Zealand Conference on Thursday 27 June 2013 titled *Justice Reinvestment: accountability in action* (https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/justice-reinvestment)

It has also received support from the Queensland Productivity Commission in 2019 (recommending that the Queensland government 'prioritise projects aimed at reducing Indigenous offending' in considering justice reinvestment (*Inquiry into Imprisonment and*

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Recidivism. Final Report (2019), Recommendation 30, page 151) and was the subject of a Senate Committee inquiry in 2013 (Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013)).

Justice reinvestment is consistent with (but is insufficient on its own to achieve) the right to self-determination contained in Article 3 of the *UNDRIP* because it can be community-led. A good example is the justice reinvestment trial named 'Maranguka' in the NSW town of Bourke where approximately 31% of the population is First Nations. The trial commenced in 2013 and was overseen by the Bourke Tribal Council. The trial was evaluated by KPMG in 2018; the KPMG evaluation report is available here: https://www.justreinvest.org.au/impact-of-maranguka-justice-reinvestment/

KPMG summarises the approach of the Maranguka project as follows (p8 of the report):

> The primary focus of the Maranguka JR Project has been the design and implementation of long-term system change. This includes the empowerment of community through self-governance linked with practical action and positive role modelling. These activities work in tandem with changing the way the service and justice systems operate – from program design and delivery models, to police force procedures, ways of thinking and court processes.

KPMG found the following cost savings had been achieved (p6 of the report):

> The results for the 2017 calendar year (compared to 2016) show improvement in the following areas:
>
> • Family strength, with a 23 per cent reduction in police recorded incidence of domestic violence and comparable drops in rates of re-offending.
>
> • Youth development, with a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories.
>
> • Adult empowerment, with a 14 per cent reduction in bail breaches and a 42 per cent reduction in days spent in custody.

Justice reinvestment trials in other States and Territories are discussed in the 2018 Australian Institute of Criminology report titled *Justice reinvestment in Australia: A review of the literature*. That report also contains examples from other countries that may be of interest.

TOWARDS HUMAN RIGHTS COMPLIANCE IN AUSTRALIAN PRISONS

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The Australian Prison Population and Daily Life in Australian Prisons

Introduction

Prisons do not exist in a vacuum. Nor does prison law. The legal and other obligations that apply to prisons are greatly influenced by the society in which those prisons operate and the people that are held in them. This chapter provides the statistical and sociological context for the remainder of the book by providing an overview of key aspects of Australian prisons and imprisoned people.

The first part of the chapter provides a picture of the prison population in Australia. This includes the statistical profile of the Australian prison population, and an outline of the characteristics of this population and some of the ways it differs from the general population.[1] The unifying feature of this distinctiveness is vulnerability: the prison population contains an over-representation of vulnerable segments of the general population, including Indigenous Australians and people with mental health problems and cognitive disability.

1 The statistics in this chapter are based on Australian Bureau of Statistics data released in December 2019 drawn from a prison census conducted on 30 June 2019.

The second part of the chapter examines the sociological literature about daily life in Australian prisons. This is important background as to why this particular population requires the human rights protections that form the subject of the remainder of this book.

Men comprise the majority of the Australian prison population and for this reason much of the sociological literature focuses on men's experience of imprisonment. However, because women are one of the fastest growing sub-groups of the Australian prison population and because they have particular vulnerabilities, the first part of this chapter will also outline the statistical profile and vulnerabilities of the female prison population.[2] Selected references will be made to the treatment of women in Australian prisons throughout the remainder of the book. However, it should be noted that women's imprisonment is not the sole focus of this book and imprisoned women's vulnerabilities are sufficiently complex that they alone could be the subject of an entire book.

The Australian Prison Population

The prison population of Australia cannot be completely captured by statistics and simplified categories, but there are three key features. The first is how *many* people are incarcerated, including the trend of these numbers increasing over time (with overcrowding as the corollary). The second is the *disproportionate* imprisonment of members of certain groups of the general population, particularly Indigenous Australians.[3] The third is the characteristics that make people in prison a *vulnerable* group within Australian society.

Vulnerability is the norm rather than the exception in the Australian prison population. This bears out Garland's observations about the function of the prison within what he terms the 'culture of control'.[4] He argues

2 The female prison population rose consistently from 2011–18 before dropping by 4 per cent in 2019. The male prison population has been increasing since 2012, but not at as high a rate as the female prison population: Australian Bureau of Statistics, *Prisoners in Australia 2019* (5 December 2019) ('ABS 2019').

3 The first two themes are taken from Garland, who writes, 'imprisonment ceases to be a fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population': David Garland, 'Introduction: The Meaning of Mass Imprisonment' in David Garland (ed), *Mass Imprisonment: Social Causes and Consequences* (SAGE, 2001) 2.

4 This is a framework for understanding developments in crime control in the United States of America (USA) and United Kingdom between 1975 and 2000 that can be generally characterised as involving increasing punitiveness.

that prisons are used as a means of 'segregating the problem populations created by today's economic and social arrangements'.[5] Garland's approach echoes Australian authors, such as Cunneen et al, who argue that prison 'has been reconstituted as a "therapeutic institution" providing a solution not only to serious criminal behaviour but also to behaviour seen as too difficult to manage in the community'.[6]

Imprisonment Statistics and Rates

As at 30 June 2019, there were 43,028 people in Australian prisons (a combination of those who have been sentenced, and those on remand), resulting in an overall imprisonment rate of 219 per 100,000 (409 per 100,000 males and 35 per 100,000 females).[7] Because criminal law, sentencing and prisons are a state/territory responsibility, there are variations in both the imprisonment rate and the growth of imprisonment rates across jurisdictions. The imprisonment rates for each state and territory are provided in Table 1.1 in ascending order (by the overall imprisonment rate), with the male and female imprisonment rates provided in separate columns. These rates are from the annual prison census conducted on 30 June 2019.

Table 1.1: Imprisonment Rates in Australian Jurisdictions as at 30 June 2019

Jurisdiction	Total imprisonment rate per 100,000 of population[8]	Male imprisonment rate per 100,000 of population[9]	Female imprisonment rate per 100,000 of population[10]
Australian Capital Territory	143.2	274.9	19.5
Victoria	157.1	297.8	22.0
Tasmania	164.7	308.4	25.6
South Australia	207.3	394.6	37.9
New South Wales	213.6	404.0	29.7

5 Garland, above n 3, 199.

6 Chris Cunneen et al, *Penal Culture and Hyperincarceration. The Revival of the Prison* (Ashgate, 2013) 285–6. A similar argument is made in relation to prisons in the USA by Loïc Waquant, 'Deadly Symbiosis: When Ghetto and Prison Meet and Mesh' in David Garland (ed), *Mass Imprisonment: Social Causes and Consequences* (SAGE, 2001) and, more broadly, David Scott, 'Unequalled in Pain' in David Scott (ed), *Why Prison?* (Cambridge University Press, 2013) 315 and the authors cited therein.

7 ABS 2019, above n 2.

8 Ibid, Table 17.

9 Ibid.

10 Ibid.

Jurisdiction	Total imprisonment rate per 100,000 of population[8]	Male imprisonment rate per 100,000 of population[9]	Female imprisonment rate per 100,000 of population[10]
Queensland	224.8	415.0	42.8
Western Australia	344.7	623.0	70.2
Northern Territory	942.0	1,708.3	128.5
Australia	218.6	409.0	34.9

The Northern Territory's rate of imprisonment is particularly startling.[11] As Scott observed, '[i]n March 2012 the Northern Territory had a prisoner rate of 821 per 100,000, which, if it was a nation in its own right, would be the number one penal incarcerator in the world'.[12] This rate has risen since 2012 and is much higher for males. As Table 1.1 shows, the rate of male imprisonment in the Northern Territory is 1,708.3 per 100,000. To put this into perspective, the *World Prison Brief* lists the highest imprisonment rate in the world as the United States of America's (USA's) rate of 655 per 100,000.[13]

The rate of imprisonment in Australia grew by 10 per cent between 2002 (when it was 152 per 100,000) and 2012 (when it reached 167 per 100,000) before rising higher still to the 2019 rate shown above of 218.6.[14] This has occurred despite overall crime rates declining.[15]

Although the rate of growth varies between states and territories, growth is a common feature across all jurisdictions and is a trend that applies regardless of which political party is in power (explanations for this growth and how it might be addressed are considered in Chapter 4). In the period between 2012 and 2013, the Australian Bureau of Statistics reported an upward trend in all jurisdictions except Western Australia and Tasmania.[16]

11 The Northern Territory's imprisonment rate has been higher than the national average for many years. For example, in 2008, the Northern Territory's male imprisonment rate was 1,111.9 per 100,000 while the national average was 320.3 per 100,000: ibid, Table 15.

12 Scott, above n 6, 5.

13 International Centre for Prison Studies, *World Prison Brief* <http://www.prisonstudies.org/world-prison-brief>. Similar to Australia, the USA's rate varies when broken down on a state-by-state basis.

14 Australian Institute of Criminology, *Australian Crime: Facts and Figures: 2013* (2014) Chapter 6 ('AIC 2013').

15 Ibid, Foreword. There are some exceptions to the general trend of declining crime rates. For a detailed discussion see Rick Sarre, 'The Importance of Political Will in the Imprisonment Debate' (2009) 21(1) *Current Issues in Criminal Justice* 154, 157–8 and the statistics in ibid.

16 Australian Bureau of Statistics, *Prisoners in Australia 2013* (2014).

Taking a longer-term perspective, Weatherburn compared the increases in imprisonment rates across jurisdictions between 2002–16 and found an increase of 81 per cent in South Australia, 78 per cent in the Northern Territory and 74 per cent in Western Australia.[17] The Victorian Sentencing Advisory Council documents that the Victorian imprisonment rate increased by 40 per cent between 2002 and 2012.[18]

The consequence of this rapid growth in the prison population is overcrowding, which is an increasing problem in Australian prisons.[19] The Victorian Auditor-General has highlighted that the 'nationally-accepted limit for the safe and efficient operation of the prison system' is a 95 per cent utilisation rate.[20] Yet the Report on Government Services highlights that secure facilities nationally were operating at 121.2 per cent of capacity in 2016–17 (the most recent year for which a reliable national rate is available),[21] with West Australian secure prisons operating at 132.8 per cent capacity in 2018–19.[22] The Victorian Ombudsman referred to overcrowding in Victorian prisons as a 'crisis' in 2014, writing that '[a]s a result of overcrowding, people detained in custody in Victoria face a greater risk of harm than any time in the past decade'.[23]

Overcrowding is a theme that recurs throughout this book because it is a major factor precluding human rights compliance in Australian prisons. It will be seen that overcrowding is itself often a breach of human rights (such as when it leads to two or three people being held in a cell designed for one), but it also indirectly causes or worsens distinct breaches of human rights (such as when the stresses of crowded prisons leads to greater violence).

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17 Don Weatherburn, 'Australian Imprisonment 2002-2016: Crime, Policing and Penal Policy' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 537, 538.

18 Sentencing Advisory Council, *Victoria's Prison Population 2002–2012* (2013).

19 Termed 'hyperincarceration' by Cunneen et al, above n 6.

20 It was noted in the report that this rate 'allows prison management the flexibility to adequately manage the rehabilitation, human rights and welfare of prisoners. Operating above 95 per cent utilisation compromises the ability of prison management to safely and humanely manage prisoners': Victorian Auditor-General, *Prison Capacity Planning* (2012) 9.

21 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018, Volume C: Justice* (Commonwealth of Australia, 2018) 8.14, Table 8A.13. The figure is 115.6 per cent for 2017–18, but Victoria, New South Wales and South Australia did not provide data and, given that Victoria and New South Wales operate two of the larger prison systems in Australia, this skews the data: Steering Committee for the Review of Government Service Provision, *Report on Government Services 2019, Part C: Justice* (Commonwealth of Australia, 2019) 8.17.

22 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2020, Volume C: Justice* (Commonwealth of Australia, 2020) Table 8A.13.

23 Victorian Ombudsman, *Investigation into Deaths and Harms in Custody* (2014) 10.

Over-Representation of Certain Population Groups

This section will cover four of the population groups that are over-represented in the Australian prison population: (1) Indigenous Australians, (2) people with mental illness or cognitive disability, (3) people from disadvantaged locations and (4) older people.

The general national picture is captured well by Cunneen et al when noting, 'the rapid increases in imprisonment rates across Australian jurisdictions (and arguably elsewhere) from the mid-1980s onward, while clearly variable and far from uniform across the Australian states and territories, can be seen as predominantly composed of Indigenous men, women and juveniles'.[24] This book does not deal with juveniles, but will deal with the other main sub-groups, as well as some additional aforementioned sub-groups. This is because juvenile detention is a specialised area and under international human rights law, the starting position (that juvenile detention should only be used 'as a measure of last resort and for the shortest appropriate period of time'[25]) is different to the starting position that applies in relation to adult imprisonment (this will be detailed in Chapter 2).

Indigenous Australians

The over-representation of Indigenous Australians in prison is striking. Indigenous people (men and women) make up 28 per cent (11,866) of the national adult prison population despite only comprising 2 per cent of the general adult population.[26] This means that the overall national imprisonment rate of 219 per 100,000 cited above, when broken down by Indigenous status, is 162 for non-Indigenous Australians and 2,349 for Indigenous Australians.[27] It also means that if the imprisonment rates in Table 1.1 were separated by Indigenous and non-Indigenous by jurisdiction, the imprisonment rate for non-Indigenous people would be lower and the difference even more striking. A useful way of characterising the figures is that Indigenous Australians are approximately 13 times more likely to be imprisoned than non-Indigenous Australians.[28]

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24 Cunneen et al, above n 6, 182. Cunneen defined women and the first three categories as 'Suitable Enemies: Penal Subjects': at Chapter 5.

25 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b). Australia ratified this Convention on 17 December 1990.

26 ABS 2019, above n 2, Table 2.

27 ABS 2019, above n 2, Table 17.

28 Human Rights Watch, *'I Needed Help, Instead I Was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia* (2018) 20.

The Indigenous imprisonment rate varies around the country. For instance, the imprisonment rate for Indigenous people in Western Australia is 70 per cent higher than the national imprisonment rate.[29] The imprisonment rate for Indigenous people in each of the states and territories is shown (in ascending order) in Table 1.2 alongside the Indigenous proportion of the prison population in each jurisdiction.

Table 1.2: Indigenous Imprisonment Rates in Australian Jurisdictions as at 30 June 2019

Jurisdiction	Indigenous imprisonment rate per 100,000 of population[30]	Indigenous proportion of prison population (%)[31]
Tasmania	777.3	20.2
New South Wales	1,879.9	23.1
Australian Capital Territory	1,944.2	21.9
Queensland	2,098.7	32.8
Victoria	2,267.7	10.4
South Australia	2,551.1	23.8
Northern Territory	2,837.4	83.4
Western Australia	4,105.7	38.6
Australia	2,349.2	27.6

The over-imprisonment of Indigenous people is even more acute when particular communities are examined. For example, in the town of Papunya, Northern Territory, 72 out of the total population of 308 adults (23 per cent) were imprisoned during 2007–08.[32] Such a high imprisonment rate has implications for the entire community.

The Indigenous imprisonment rate is growing rapidly. Between 2004 and 2018, the Indigenous prison population rose by 88 per cent, whereas the remainder of the prison population rose by 28 per cent.[33]

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29 The Honourable Wayne Martin (Chief Justice of Western Australia), 'Indigenous Incarceration Rates. Strategies for Much Needed Reform' (Speech, 2015) 4. The figures quoted in this speech were from the Australian Bureau of Statistics in 2014 when the rate was 3,663 per 100,000 in Western Australia and 2,174 per 100,000 nationally. For a discussion of possible causes see Hilde Tubex et al, 'Western Australian Penal Culture and Indigenous Over-Representation: Evaluating 25 Years of Law, Policy and Practice' (2018) 43(1) *The University of Western Australia Law Review* 264.

30 ABS 2019, above n 2, Table 17.

31 Ibid, Table 14.

32 Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Overimprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2, 4–5.

33 Human Rights Watch, above n 28, 21.

Indigenous women represent the fastest growing sub-group in the Australian prison population overall. Human Rights Watch report that they are '21 times more likely to be incarcerated than their non-indigenous peers'.[34] This rate also varies across jurisdictions. For example, in Western Australia, Indigenous women comprise more than 50 per cent of the female prison population.[35]

Indigenous incarceration was the subject of a recent in-depth inquiry by the Australian Law Reform Commission, which produced a detailed report in December 2017. The report found that over-representation of Indigenous people in prisons is the culmination of over-representation at every stage of the criminal justice system (being arrested, charged, prosecuted and sentenced).[36] The report also found that Indigenous people were disproportionately more likely than non-Indigenous people to receive a custodial sentence, rather than a community-based sentence.[37] The report contained a number of recommendations to address this situation and the main recommendations concerning justice reinvestment will be considered in detail in Chapter 4.[38]

People with Mental Illness or Cognitive Disability

There are high rates of mental illness and cognitive disability across the prison population. The precise proportion of imprisoned people with mental illness varies according to the definition of mental illness used. The Australian Institute of Health and Welfare reports that 35 per cent of male prison entrants and 37 per cent of male prison dischargees fall into the category of 'reported being told by a health professional that they had a mental health condition (including alcohol and other drug use disorders)'. The figures are 65 per cent and 38 per cent respectively for females.[39]

34 Ibid 23.

35 Martin, above n 29, 4. The figures quoted in this speech were from the Australian Bureau of Statistics in 2014.

36 The executive summary reports, 'Over-representation increases with the stages of the criminal justice system. In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment': Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 26.

37 The executive summary reports, 'Up to 45% of Aboriginal and Torres Strait Islander offenders sentenced in 2015–2016 received a sentence of imprisonment of less than six months. Few received a community-based sentence': ibid.

38 These were recommendations 4-1 and 4-2 contained in Chapter 4 of the report: ibid 137–8.

39 Australian Institute of Health and Welfare, *The Health of Australian Prisoners 2018* (2019) 28. This is based on individuals' responses when 'asked whether they had ever been told that they have a mental health disorder by a doctor, psychiatrist, psychologist or nurse': ibid 137–8.

4

The First Prerequisite: Reduce Reliance on Imprisonment

Introduction

When the United Nations (UN) Human Rights Committee (HR Committee) provided its Concluding Observations in its periodic report on Australia in December 2017, the first concern it listed about imprisonment was overcrowding.[1] The first of the HR Committee's six recommendations was that Australia '[e]liminate overcrowding in places of detention, including by increasing resort to non-custodial alternative measures to detention'.[2] Therefore, it is appropriate that the first prerequisite in this book is to reduce reliance on imprisonment, which is the best way to reduce overcrowding.

An alternative method for addressing overcrowding would, of course, be to continue to expand the number of prisons so that there is plenty of space for more people to be imprisoned. However, even if governments were willing to allocate the necessary expenditure to such an endeavour, which they have not been to date, this is hardly desirable. It would not accord with the strong emphasis international human rights law places on the prohibition of torture or cruel, inhuman or degrading treatment

1 Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 8.
2 Ibid [42](a).

or punishment.[3] Australia's 2017 ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), which sets in place mechanisms for preventing the occurrence of practices falling within this definition in prisons, gives further weight to this argument.[4] Given the nature of prisons as 'total institutions' and the 'pains of imprisonment' outlined in Chapter 1, the best way to prevent people potentially being subjected to such practices is to keep them out of prison. This is recognised by the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) (the UN expert committee established by the OPCAT) in its guiding principles, which note that 'detention conditions … in some circumstances can also be a means of torture'.[5] This has led some scholars to argue that prisons should be abolished entirely.[6]

The human rights violations that are more likely to occur in overcrowded prisons are detailed in this chapter (under 'Prison Overcrowding and Human Rights Violations') and clearly demonstrate that reducing reliance on imprisonment is essential as a prerequisite for human rights compliance in Australian prisons. This chapter then turns to three strategies for achieving this goal. The first is prison abolition, and is dealt with relatively briefly here given the overwhelming political challenges it presents. A discussion of two other, more politically feasible strategies—justice reinvestment and a reductionist prison policy—follows.

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3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('ICCPR'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 15 ('CRPD').

4 *Optional Protocol to the Convention against Torture*, adopted 18 December 1992, UN Doc A/RES/57/199 (entered into force 22 June 2006) ('OPCAT'). The OPCAT also applies to other places of detention: see art 4(2).

5 Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/OP/12/6 (30 December 2010) 5(d).

6 See, eg, Angela Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003); Thomas Mathieson, 'The Politics of Abolition' (1986) 10 *Contemporary Crises* 81.

Justice reinvestment was recommended by the Australian Law Reform Commission (ALRC) as a useful strategy for dealing with over-imprisonment of Indigenous Australians in 2017.[7] A reductionist prison policy is a response that is contained within the criminal justice system itself and does not require the wholesale social change that both prison abolition and justice reinvestment would necessitate. It is the most feasible of the three strategies. Therefore, the way that a reductionist prison policy could be implemented in Australia is the final topic of this chapter (under 'Application of a Reductionist Policy in Australia').

Prison Overcrowding and Human Rights Violations

The Australian prison population is growing, and this growth is consistent across all jurisdictions (as outlined in Chapter 1). In 2018 alone, male imprisonment rose by 4 per cent and female imprisonment rose by 10 per cent.[8] Most Australian jurisdictions are expanding their prison capacity. New South Wales (NSW) has recently opened two 'rapid build' prisons that house imprisoned people in dormitories, adding 1,044 beds in the 2017–18 financial year.[9] Victoria opened a new 1,000-bed prison in 2017.[10] Western Australia (WA) has built two new prisons.[11] The Australian Capital Territory (ACT) has added 120 beds to the Alexander Maconochie Centre (the sole adult prison in the ACT, which accommodates both men and women).[12] Despite these expansion efforts, prison infrastructure has at times failed to keep pace with the growth in prison population. The Queensland Productivity Commission estimated that it would cost $3.6 billion dollars by 2025 to increase the capacity of the Queensland prison system to meet the current shortfall.[13]

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7 Australian Law Reform Commission (ALRC), *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 137–8, Recommendations 4-1, 4-2.

8 Australian Bureau of Statistics, *Prisoners in Australia 2018* (6 December 2018). For a longer-term perspective see Don Weatherburn, 'Australian Imprisonment 2002-2016: Crime, Policing and Penal Policy' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 537.

9 NSW Government, *Department of Justice Annual Report 2017-18* (2018) 52–3.

10 Minister for Corrections, 'Ravenhall Correctional Centre Officially Opened' (Media Release, 12 October 2017).

11 Office of the Inspector of Custodial Services (OICS), *Western Australia's Prison Capacity* (2016) i.

12 Lorana Bartels, 'The ACT Prison: Human Rights Rhetoric Versus Crowded and Bored Reality' (2015) 9 *Court of Conscience* 13, 16.

13 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism. Final Report* (2019) x.

Despite prison capacity expansion, prisons are exceeding the number of people they are designed to house. They are overcrowded. The Productivity Commission reported in 2018 that secure facilities were operating at 121.2 per cent of capacity in 2016–17 (the most recent year for which a reliable national rate is available),[14] with West Australian secure prisons operating at 132.8 per cent capacity in 2018–19.[15]

Overcrowding has led some jurisdictions to use shipping containers to cope with their expanding prison populations. This has occurred in South Australia, WA and Victoria.[16]

A good overview of the multitude of problems associated with overcrowding is provided by the NSW Inspector of Custodial Services inspection standards:

> Overcrowding can have significant detrimental effects on the standard of living, regime and safety within a correctional centre. An overcrowded correctional centre may entail cramped and unhygienic accommodation, a constant lack of privacy, reduced out of cell activities, demand outstripping the capacity of staff and facilities, overburdened health care services, increased tension and potentially increased levels of violence.[17]

The major implication of overcrowding is people having to share cells that are not designed to accommodate the number of people placed in them. For instance, in WA, there have been situations where two people have had to share cells designed for one person, and of cells designed for three people accommodating four to six people.[18] Moreover, triple bunking has

14 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018, Volume C: Justice* (Commonwealth of Australia, 2018) 8.14, Table 8A.13. The figure is 115.6 per cent for 2017–2018 but Victoria, New South Wales (NSW) and South Australia did not provide data and, given Victoria and NSW operate two of the larger prison systems in Australia, this skews the data: Steering Committee for the Review of Government Service Provision, *Report on Government Services 2019, Part C: Justice* (Commonwealth of Australia, 2019) 8.17.

15 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2020, Volume C: Justice* (Commonwealth of Australia, 2020) Table 8A.13.

16 Elizabeth Grant, '"Pack 'em, Rack 'em and Stack 'em": The Appropriateness of the Use and Reuse of Shipping Containers for Prison Accommodation' (2013) 13(2) *Australasian Journal of Construction Economics and Building* 35, 37–8 (in relation to SA), 36 (in relation to WA); Jane Lee, 'Prisoners Moved into Shipping Containers', *The Age* (Victoria), 6 January 2014; Margaret Paul, 'More Shipping Containers Cells Purchased to Accommodate Growing Prisoner Population', *ABC News* (Australia), 9 April 2014.

17 NSW Inspector of Custodial Services, *Inspection Standards for Adult Custodial Services in New South Wales* (2014) 27, Standard 21.1.

18 OICS, *Report of an Announced Inspection of Greenough Regional Prison* (2013) 26.

occurred in Victorian prisons.[19] In NSW, where imprisoned people are housed in dormitories in two new prisons, all of the same concerns apply and are amplified.

Sharing cells is contrary to Rule 12 of the UN *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules) ('the Mandela Rules'), which stipulates:

> [w]here sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.[20]

The Mandela Rules do not specify how much space each person is to be provided with in prison and nor do the 2018 *Guiding Principles for Corrections in Australia* ('Guiding Principles'). The superseded 2012 *Standard Guidelines for Corrections in Australia* ('Guidelines') referred to the cell size being consistent with the 'Standard Guidelines for Prison Facilities in Australia and New Zealand (1990)'.[21] The Office of the Inspector of Custodial Services (OICS) in WA summarises these requirements as follows:

> The Standard Guidelines for Prison Facilities in Australia and New Zealand 1990 (Australasian Standard Guidelines 1990) provide that a single person cell without ablution facilities (toilet, shower, and basin) should be a minimum of 7.5 m^2 ('dry cells'). An additional 1.25 m^2 is required for cells that include ablution facilities ('wet cells'). If a cell is to be shared, a further 4.0 m^2 is required for each additional person.[22]

19 Victorian Auditor-General, *Prison Capacity Planning* (2012) 15.

20 United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc A/RES/70/175 (17 December 2015) ('the Mandela Rules').

21 The Corrective Services Ministers' Conference (Cth), *Standard Guidelines for Corrections in Australia* (3rd ed, 2004) 2, Guideline 2.3 ('Guidelines').

22 OICS, above n 11, 10.

Following an assessment of prison cells in WA, the OICS concluded that 'only one third of prisoners can be held in conditions that comply with Australasian Standard Guidelines for Corrections for cell size … the practice of routinely double bunking single cells is in breach of the "Mandela Rules"'.[23]

Cell sharing raises a number of concerns. First, people have far less than the recommended seven square metres of space each. This is particularly problematic when imprisoned people spend as much time in their cells as they do in Australian prisons. The national average of time spent *out* of cells is nine hours per day and, in some jurisdictions, it is less (eg, 7.2 hours per day in NSW and 7.7 hours in Tasmania and SA).[24]

Second, overcrowding in cells leads to the violation of the right to be treated with humanity and respect, and the prohibition of torture, cruel, inhuman and degrading treatment or punishment. This is clear from individual communications to the HR Committee. Part of the responsibility of the HR Committee is to consider whether the circumstances complained of in individual communications constitute violations of arts 7 and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) by state parties.[25] As there have been no communications to the HR Committee concerning overcrowding in Australian prisons, some examples from other countries are illustrative.

In a prison in the Philippines, a complainant was accommodated in a dormitory with over 200 others where violence was 'acquiesced in by the prison authorities'. This, in the view of the HR Committee, amounted to violations of both articles.[26] Similarly, a complaint concerning conditions in a prison in the Dominican Republic saw the HR Committee find that both articles had been violated due to the following circumstances:[27]

23 Ibid v, 10–15.

24 These figures are for secure prisons. Steering Committee for the Review of Government Service Provision, above n 15, Table 8A.13.

25 The prohibition of 'torture, cruel, inhuman or degrading treatment or punishment' (art 7) and the requirement that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' (art 10(1)).

26 Human Rights Committee, *Views: Communication No 868/99*, UN Doc CCPR/C/79/D/868/1999 (30 October 2003) ('*Wilson v The Philippines*') [2.4]–[2.5], [7.3].

27 Human Rights Committee, *Views: Communication No 188/84*, UN Doc CCPR/C/31/D/188/1984 (5 November 1987) ('*Portorreal v Dominican Republic*') [11].

> Later the same day, the author was allegedly separated from the other political opposition leaders and transferred to another cell (known as the 'Viet Nam cell'), measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held. Conditions were allegedly inhuman in this overcrowded cell, the heat was unbearable, the cell extremely dirty and owing to lack of space some detainees had to sit on excrement.[28]

In the Australian context, concerns about these rights have been referred to in reports by monitoring bodies such as the OICS: '[t]oilets in shared cells are unscreened and there is no dignified way to use them in front of another person. This presents particular problems at night when prisoners are locked in cells for 12.5 hours or more'.[29] These matters are discussed further in Chapter 7.

Third, there is an increased risk of intimidation, bullying and violence. This was reflected in the now superseded 2012 Guidelines, which stipulated the following requirements in relation to sharing of cells to protect against such risks: 'Where prisoners are accommodated in multiple occupancy cells or rooms, the prisoners are to be carefully assessed and selected as being suitable to associate with one another in those conditions. Particular care should be taken to avoid prisoners being subjected to intimidation or bullying'.[30]

It was difficult to establish whether this policy is being followed in practice because there was no reporting requirement stipulated in the Guidelines. While the 2018 Guiding Principles contain 40 principles relating to 'safety and security', none of these specifically refer to the potential risk of intimidation, bullying and violence caused by cell sharing in the way that the 2012 Guidelines did.[31] There is a very broad principle pursuant to which this risk might be taken into account by prison managers: 'Prisoners are assessed and allocated to accommodation compatible with their assessed risks and needs to ensure their safety and security and the good order of the facility'.[32]

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28 Ibid [2.2].
29 OICS, above n 11, 15.
30 Guidelines, above n 21, 24.
31 Corrective Services Administrators' Conference (Cth), *Guiding Principles for Corrections in Australia* (2018) 15–19.
32 Ibid 18, Principle 3.3.2.

In light of the high levels of violence in prisons generally (irrespective of cell sharing) (as outlined in Chapter 1), combined with Steels and Goulding's finding that shared cells are one of the places in prisons where the risk of sexual assault is highest, it seems more likely than not that 'intimidation or bullying', or worse, is occurring.[33]

While the NSW dormitory prisons have not been in operation for long, there were concerns expressed about safety during a recent parliamentary committee inquiry:

> Inmates were strongly opposed to the dormitory style accommodation, in which older and quieter inmates must co-reside with younger, more troublesome inmates. For some, there is a fear of being attacked or assaulted in their sleep, especially as there is a no transfer policy between pods, such that 'there is no escaping the threats and abuse'.[34]

Overcrowding raises some other concerns, in addition to those raised by cell sharing. There is evidence from Victorian prisons that as the prison population has increased the rate of assaults and self-harm has also increased.[35] The Victorian Auditor-General has documented this as follows:

> The increase in prisoner numbers and overcrowding within prisons and management cells has coincided with an increase in prisoner incidents over the past six years. The rate of serious incidents per prisoner, such as assaults, attempted suicides and self-mutilation, has almost doubled over this time.[36]

Overcrowding puts pressure on services for imprisoned people, including medical care, means of communicating with family members (such as telephones), education and programs to facilitate their rehabilitation (such as drug and alcohol programs). The difficulty of providing health

33 Protection units contain a high concentration of people convicted of sex offences because they need protection from those in mainstream units and they may victimise others in the protection unit: Brian Steels and Dot Goulding, *Predator or Prey? An Exploration of the Impact and Incidence of Sexual Assault in West Australian Prisons* (November 2009) 50–1.

34 New South Wales, Parliament Legislative Council Portfolio Committee No. 4 – Legal Affairs, *Parklea Correctional Centre and Other Operational Issues* (2018) 80. The Committee also heard evidence about problems with dormitory-style prison accommodation overseas and in juvenile detention centres in Australia: ibid 85–6.

35 By 40 per cent in the last 10 years: Sentencing Advisory Council, *Victoria's Prison Population 2002-2012* (2013).

36 Victorian Auditor-General, above n 19, xii.

care in overcrowded prisons has been recognised by the Australian Institute of Health and Welfare. The Institute has noted that, in response to overcrowding, imprisoned people are frequently being transferred between facilities, action that makes 'continuing health care more difficult'.[37] Overcrowding has had an impact on the operation of Victoria's residential drug program[38] and there has been pressure put on telephone services in NSW prisons, with the NSW Inspector of Custodial Services giving the illustration of a prison with one telephone shared between 48 imprisoned people.[39]

The dangers to prison health care services that can result from overcrowding should not be underestimated and are starkly illustrated by a decision of the United States Supreme Court in 2011. Severe overcrowding in Californian prisons had resulted in people with mental illness not receiving adequate treatment. The situation was so dire that there were 68 preventable deaths in a year. People were waiting for 12 months to receive mental health treatment and some mentally ill people were held in cages while awaiting treatment.[40] The Supreme Court held that this violated the *United States Constitution* Eighth Amendment (prohibition of cruel and unusual punishment).[41]

Overcrowding can increase the risk of riots, which pose obvious risks to the safety of all people imprisoned (as well as staff) at the time of the riot. Overcrowding was described as a 'contributing factor' in an independent investigation of the causes of a riot in a Victorian prison that occurred in 2015.[42] The OICS noted this as a risk of overcrowding in a 2016 report and referred to riots in WA prisons in 2013, 1998 and 1988.[43]

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37 Australian Institute of Health and Welfare, *The Health of Australian Prisoners 2018* (2019) 7.

38 Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (2015) 59.

39 NSW Inspector of Custodial Services, *Full House: The Growth of the Inmate Population in NSW* (2015) 12. See also OICS, above n 11, 19. Lack of access to telephones is also a problem in the Alexander Maconochie Centre in the ACT and in Western Australian prisons: ACT Inspector of Correctional Services, *Review into the Treatment and Care of Remandees at the Alexander Maconochie Centre* (2018) 54–5; OICS, *Contact with Family and Friends While in Custody* (2018).

40 Alicia Bower, 'Unconstitutionally Crowded: Brown v Plata and How the Supreme Court Pushed Back to Keep Prison Reform Litigation Alive' (2012) 45 *Loyola of Los Angeles Law Review* 555, 556–7.

41 *Brown v Plata*, unreported, Supreme Court of the United States, 23 May 2011. See also Ian Freckelton, 'Cruel and Unusual Punishment of Prisoners with Mental Illnesses: From Oates to Plata' (2011) 18(3) *Psychiatry, Psychology and Law* 329, 329.

42 Independent Investigation into the Metropolitan Remand Centre Riot, *Final Report* (December 2015) 7. The introduction of a smoking ban in Victorian prisons was another contributing factor, as noted in Chapter 1.

43 OICS, above n 11, 20.

It is clear that overcrowded prisons lead to human rights violations of imprisoned people. They also exacerbate the 'pains of imprisonment', as outlined in Chapter 1.

Strategies to Reduce Reliance on Imprisonment

The most radical strategy for resolving the problems outlined above is to abolish prisons. Given this response is unlikely to be pursued, alternative responses need to be explored. Justice reinvestment and a reductionist prison policy instead focus on minimising the use of imprisonment to the greatest extent possible. These three strategies are discussed below.

Prison Abolition

The prison abolition literature suggests that prisons would not be needed if society was transformed in such a way that alternative mechanisms were used to deal with vulnerabilities such as mental illness. In a similar vein to other abolition movements (eg, the abolition of slavery), prison abolitionists have developed a vision of society without prisons and with much lower crime rates. Scott describes this as an 'abolitionist real utopia'.[44] This vision involves large-scale social changes, including:

- greater investment in schools as they provide 'the most powerful alternative to jails'[45]
- decriminalisation of drug use, with community-based drug treatment made freely available on a voluntary basis[46]
- providing adequate mental health services in the community, so that people with mental illness are not imprisoned[47]
- where sanctions are required, basing them on 'reparation and reconciliation rather than retribution and vengeance'.[48]

44 David Scott, 'Unequalled in Pain' in David Scott (ed), *Why Prison?* (Cambridge University Press, 2013) 323.
45 Angela Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003) 108.
46 Ibid 108–9.
47 Ibid 108.
48 Ibid 107, 114–15.

The changes required are large scale and broader than changes to the criminal justice system. The changes would build the sense of community, specifically the interdependency a person has with their society, including such things as their 'relationships of loyalty, trust and concern'.[49] When these relationships break down, a person is more likely to commit crime. Therefore, social changes that rebuild these relationships should reduce the incidence of crime. However, it must be recognised that these changes would require a significant investment of resources, only some of which could reliably be obtained from the savings made by not operating existing prisons.

While in many ways an attractive approach to the problems caused by imprisonment, prison abolition is not a very realistic solution. Abolition scholarship has been criticised for posing a solution that may only be workable 'in an environment that bears practically no resemblance with modern social and political order'[50] and for only being potentially workable in small countries like Norway.[51] There is also a very real risk that abolition would not be accompanied by the necessary social changes. A parallel example is the abolition of mental health institutions in the 1960s and 1970s which were supposed to be replaced by community care for mentally ill people. This has never been properly resourced and people do not get the support they need.[52] This is a contributing factor to the large number of mentally ill people in Australian prisons.[53]

However, it would be foolish to dismiss these arguments in their entirety. First, however unrealistic prison abolition may be for the general community, the types of social change identified by the prison abolition movement are essential if the harm caused by imprisonment to vulnerable segments of the population is to be addressed. Second, the prison abolition movement has both middle- and long-term aims. The long-term aim—a society without prisons—is arguably unrealistic. The middle-term aim—to minimise the expansion of prisons and 'shrink the scope

49 Rob White and Fiona Haines, *Crime and Criminology* (Oxford University Press, 4th ed, 2008) 168.
50 Sebastian Scheerer, 'Towards Abolitionism' (1986) 10 *Contemporary Crises* 5, 15.
51 Ibid 18. Norway is where prominent abolitionist Mathieson is from.
52 See, eg, Sebastian Rosenberg et al, 'National Mental Health Reform: Less Talk, More Action' (2009) 190(4) *Medical Journal of Australia* 193.
53 See, eg, Paul White and Harvey Whiteford, 'Prisons: Mental Health Institutions of the 21st Century?' (2006) 185(6) *Medical Journal of Australia* 302.

of criminal law to the absolutely necessary core'—is more realistic.[54] It is an argument that has been made in relation to women's imprisonment in Australia (discussed below).

Mathieson puts forward eight arguments against building more prisons—arguments for achieving the middle-term aim:[55]

1. Prisons do not lead to individuals being less likely to commit crime upon their release. In other words, they are ineffectual at achieving the often-declared aim of individual crime prevention[56]
2. There is evidence that prisons do not have a general deterrent effect[57]
3. Overcrowding can be addressed by changing sentencing laws, releasing people earlier from prison and lowering the limit for parole eligibility[58]
4. Once a prison is built, it will be used for a long period of time. That is, a prison has an 'irreversible character'[59]
5. The prison system has an 'expansionist character'. This means individual prisons will always be full and there will always be a need to build more unless a conscious decision is made to reduce the prison population[60]
6. Prisons are inhumane and involve numerous 'pains' (see Chapter 1)[61]
7. Building more prisons 'solidified the prison solution in our society'. This is a cultural problem because it suggests that it is a 'good' solution, despite the fact that building prisons 'emphasizes violence and degradation as a method of solving inter-human conflicts'[62]
8. There are huge costs associated with building and operating prisons, and the money could be better spent. Mathieson describes this last as a supporting argument to his main points, rather than a standalone argument.[63]

54 Scheerer, above n 50, 19.

55 Many of these arguments are supported by the more recent abolitionist movement launched in the United States of America (USA) in the 1990s: see, eg, Julia Oparah, 'Why No Prisons?' in David Scott (ed), *Why Prison?* (Cambridge University Press, 2013) 298–300; Scott, above n 44, 320.

56 Thomas Mathieson, 'The Politics of Abolition' (1986) 10 *Contemporary Crises* 81, 89.

57 Ibid.

58 Ibid 90. These are 'front door' and 'back door' strategies and are discussed further in 'Reductionist Prison Policy' below.

59 Ibid 90–1.

60 Ibid 91.

61 Ibid.

62 Ibid 92.

63 Ibid.

Mathieson writes that these arguments constitute 'a forceful basis for advocating a policy of a permanent international ban on prison building'.[64]

In addition to supporting the abolitionist middle-term option, they are each worth considering in their own right. They are also consistent with the reductionist prison policy that is advocated later in this chapter. Indeed, they have had some impact on discussion about women's imprisonment.

Prison Abolition in Australia

There is potentially more political saleability to the argument that imprisonment should be abolished—or at the very least minimised—for women than there is for imprisonment overall. This is because women are predominantly sentenced for less serious criminal offences and shorter terms of imprisonment. They also frequently have a history of victimisation. There is also the need to take into account the impact that imprisonment has on the dependent children of these women (as referred to in Chapter 1). The combination of these factors has led the Law Council of Australia to suggest that most women could 'safely serve their sentences within the community'.[65]

A summary of the profile of different offences committed by men and women in Victoria provided by the Victorian Sentencing Advisory Council in 2010 is pertinent here and illustrative of national trends:

> Men predominate in offences such as assault (11.8% of men versus 7.5% of women), sex offences (18.5% versus 3.5%) and unlawful entry with intent (burglary) (11.0% versus 6.0%), while women most commonly appear in prison with property offences (including theft) (21% of women versus 6.1% of men) and deception offences (10.0% versus 3.1%).[66]

When women do commit violent offences, it has been observed that '[m]ost violent offences by women are one-off events and few women are repeat violent offenders'.[67] The OICS in WA has found that women—particularly Indigenous women—are over-represented among people in prison for fine default.[68]

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64 Ibid 88.

65 Cited by Anna Kerr and Rita Shackel, 'Equality with a Vengeance: The Over-Incarceration of Women' (2018) 147 *Precedent* 20, 24.

66 Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (2010) 60.

67 Mary Stathopoulos, 'Addressing Women's Victimisation in Custodial Settings' (ACSSA Issues No 13, Australian Institute of Family Studies, Australian Centre for the Study of Sexual Assault, 2012) 7.

68 OICS, *Fine Defaulters in the Western Australian Prison System* (2016) v.

Women tend to be imprisoned for short sentences and the Victorian Sentencing Advisory Council has noted 'an increase in the number of women sentenced to short terms of imprisonment (less than one month)'.[69] This is particularly the case for Indigenous women, and Stathopoulos has observed that 'Indigenous women serve shorter sentences, meaning they are imprisoned for very minor offences—such as driving infringements and non-payment of fines—and that they are more likely than non-Indigenous women to be on remand'.[70]

There have been calls to stop building more women's prisons, commencing with a NSW Task Force in 1985. Stubbs and Baldry summarise that:

> [a]t the time, the number of women in prison in NSW had more than doubled in just two years … The Task Force adopted a critical approach and a strong reductionist stance … [and] concluded that building a new prison for women would 'in all probability be counter-productive'.[71]

This was followed by another NSW report in the late 1990s recommending 'a moratorium on expanding the number of places for women in prison aligned with a focus on prison reduction', but despite this, 'within 20 minutes of the Committee's report being tabled, the government announced that the new women's prison would go ahead'.[72]

While these reports are not recent, and they have not stemmed the tide of continuous growth in the female prison population in Australia (with Stubbs and Baldry describing them as 'long forgotten'[73]), it is worth noting that there are sound justifications for considering alternatives to imprisonment for the majority of women and that these justifications have been seen as sensible in recent history. Reasonable alternatives are outlined by McCausland and Baldry as including:

69 Sentencing Advisory Council, above n 66, 56.

70 Stathopoulos, above n 67, 3. This is supported by the recent ALRC inquiry: ALRC, above n 7, 356, 371.

71 Julie Stubbs and Eileen Baldry, 'In Pursuit of Fundamental Change Within the Australian Penal Landscape. Taking Inspiration from the Corston Report' in Linda Moore et al (eds), *Women's Imprisonment and the Case for Abolition: Critical Reflections on Corston Ten Years On* (Routledge, 2017) 134.

72 Ibid 136. This is another illustration of the government failing to implement the recommendations of monitoring bodies, as detailed in Chapter 3.

73 Ibid 143.

- early intervention and diversionary programmes, e.g. police cautioning schemes; bail housing that diverts women from escalating contact with the criminal justice system; [and]
- sentencing alternatives, e.g. home detention, community-based orders with adequate support to meet parole conditions and avoid incarceration.[74]

Justice Reinvestment

Justice reinvestment involves redirecting resources from prison infrastructure towards those communities from which a large proportion of the prison population is drawn. The rationale is that if people from these communities are provided with sufficient services and support, they will be less likely to commit crimes that result in imprisonment. As is the case with prison abolition, justice reinvestment requires social change. However, the changes required to implement justice reinvestment are less radical than those required to achieve prison abolition. It nevertheless still recognises both the vulnerability of most imprisoned people and the need to reduce society's reliance on prisons.

Justice reinvestment is a relatively recent approach that seeks to respond to a number of important research findings.[75] It has been shown that the majority of the prison population is drawn from certain localities.[76] These localities can be identified using a process termed 'justice mapping' and have high rates of social disadvantage. In addition, recidivism studies show that imprisoning high numbers of people increases crime, rather than reducing it.[77] Also, as previously detailed, imprisonment is expensive, and the higher the rate of imprisonment, the higher the cost to society.[78] This, arguably, involves misuse of public money when it does not result in crime reduction.

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74 Ruth McCausland and Eileen Baldry, 'Understanding Women Offenders in Prison' in Jane Ireland et al (eds), *The Routledge International Handbook of Forensic Psychology in Secure Settings* (Routledge, 2017) 37.

75 The term 'justice reinvestment' was first used by Tucker and Cadora in 2003: David Brown et al, *Justice Reinvestment. Winding Back Imprisonment* (Palgrave Studies in Prisons and Penology, 2016) 18.

76 Some examples of Australian localities were provided in Chapter 1.

77 Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011) 17; Lorana Bartels, 'Criminal Justice Reform Challenges for the Future: It's Time to Curb Australia's Prison Addiction' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 124.

78 It costs on average $391.18 per day to keep someone in prison: Australian Institute of Criminology (AIC), *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Research Report No 5, 2018) x. The costs of building new prisons in Australia is referred to in 'Concluding Remarks on Justice Reinvestment' below.

The justice reinvestment response to these findings is to propose two courses of action: (1) that resources should be reallocated away from prisons and (2) that resources should be invested in the localities where the majority of imprisoned people come from. The first proposal entails not building new prisons and reducing the population of existing prisons. The second requires justice mapping, both to identify the target communities and to assess what services are already available in these localities.[79] Investment would be in infrastructure and programs that would benefit the community, such as public housing, substance abuse and mental health treatment programs, education and employment assistance.[80] Justice reinvestment has been argued to be 'Preventative financing, through which policymakers shift funds away from dealing with problems "downstream" (policing, prisons) and towards tackling them "upstream" (family breakdown, poverty, mental illness, drug and alcohol dependency)'.[81]

Justice reinvestment has been implemented in over half the states in the United States of America (USA)[82] and has also been used in the United Kingdom (UK) to a lesser extent.[83] In the USA, the annual prison budget exceeds US$53 billion.[84] Economic pressures have led to 32 states trialling justice reinvestment, with 18 of those having embedded it in legislation.[85] There was also federal legislation passed in 2009.[86] The Australian Senate Legal and Constitutional Affairs References Committee (Senate Committee) summarised the success of justice reinvestment in Texas, USA, as follows:

> Texas recorded savings of $443.9 million in 2008-09 including savings from the cancellation of plans to build new prison units. Savings were reinvested in treatment and diversion programs including $241 million to expand the capacity of substance abuse, mental health, and intermediate sanctions facilities and programs.[87]

79 David Brown, Melanie Schwartz and Laura Boseley, 'The Promise of Justice Reinvestment' (2012) 37(2) *Alternative Law Journal* 96, 97.
80 Ibid 96.
81 Lanning et al cited by ibid 97.
82 Australian Institute of Crimonology, *Justice Reinvestment in Australia: A Review of the Literature* (Research Report No 9, 2018) vii.
83 See ibid 24–5.
84 These are 2013 figures, based on US$47 billion used by states and US$6.7 billion at the federal level: Brown et al, above n 75, 29.
85 Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 48–61, 49.
86 *Criminal Justice Reinvestment Act 2009*: AIC, above n 82, 11.
87 Senate Legal and Constitutional Affairs References Committee, above n 85, 51.

The Australian Institute of Criminology adds to this that 'as opposed to the projected increase in the prison population of 5,141 people, actual growth in the prison population was only 529 people between January 2007 and December 2008'.[88]

There is growing interest in this approach in Australia—particularly for addressing Indigenous over-imprisonment—and it is already being trialled in some communities.

Support for Justice Reinvestment in Australia

Recent support for justice reinvestment has been expressed at the national level by the ALRC in the context of a report into Indigenous incarceration in 2017, as well as by the Queensland Productivity Commission (QPC) in 2019. The ALRC's report recommended an 'independent justice reinvestment body' and 'trials initiated in partnership with Aboriginal and Torres Strait Islander communities'.[89] The QPC also recommended that the government 'prioritise projects aimed at reducing Indigenous offending' in considering justice reinvestment.[90]

This builds on the continuous support for justice reinvestment for addressing Indigenous over-imprisonment that has been expressed by Aboriginal and Torres Strait Islander Social Justice Commissioners since 2009.[91] The reasons for this include the high levels of disadvantage in Indigenous communities from which many imprisoned people come.[92] They also include the 'democratic nature of decision making in the JR [justice reinvestment] methodology', which involves a high level of participation from the communities in the development of solutions.[93]

88 AIC, above n 82, 21.

89 ALRC, above n 7, 137–8, Recommendations 4-1, 4-2.

90 Queensland Productivity Commission, above n 13, 151, Recommendation 30.

91 Brown, Schwartz and Boseley, above n 79, 99. See also recommendation 40 of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report on incarceration of Indigenous youth and young adults (*Doing Time – Time for Doing. Indigenous Youth in the Criminal Justice System* (2011)) and recommendation 9 of the Senate Legal and Constitutional Affairs References Committee, above n 85. This support is also summarised by the ALRC, above n 7, 138–9.

92 For example, Indigenous Australians fare much worse than non-Indigenous Australians in the areas of educational attainment, employment and health indicators, and there are more Indigenous people living in overcrowded housing and with children in out-of-home care: Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Overimprisonment' (2010) 14(1) *Australian Indigenous Law Review* 2, 9. This was also documented by the ALRC, above n 7, 61–81.

93 Brown, Schwartz and Boseley, above n 79, 100; ALRC, above n 7, 141.

Additionally, there is the economic irrationality of the amount of money being spent on Indigenous incarceration. The ALRC estimated that this cost was $3.9 billion in 2016.[94] This irrationality is more acute when it is broken down to the level of particular communities. Schwartz gives the illustration of the town of Papunya, Northern Territory, where 72 out of 308 adults (23 per cent) were in prison during 2007–2008, at a cost of $3,468,960 per year.[95] One does not need to be an economist to imagine what this funding could achieve if it was instead spent on social services for the total Papunya population of 379 adults and children.

This is purely the economic costs. There is also the separate issue of the long-term social costs to individuals and communities of incarceration that are more difficult to measure.[96]

Justice Reinvestment Trials

The ACT had a four-year justice reinvestment strategy that applied from 2014–18 and included a goal of 'reducing recidivism by 25% by 2025'.[97] It also involved two trials, both tailored to Indigenous people. One provided bail support and the other was for families with 'complex needs'.[98] The ACT Government announced in February 2019 that they were expanding their commitment to justice reinvestment as part of a new 'Building Communities Not Prisons' strategy, and that as part of this strategy, additional funding has been provided to one of the trials.[99]

One of the earliest justice reinvestment trials to commence in Australia was in the NSW town of Bourke. The town had the following demographic characteristics at the time of the trial: '[t]here are 2,465 people living in the Bourke Shire of which 762 people are Aboriginal and Torres Strait Islander (approximately 30.9%). The median age of Bourke's Indigenous population is 25 years, approximately 33.7% of which are children aged

94 ALRC, above n 7, 127.

95 Schwartz, above n 92, 4–5.

96 See, eg, the quotation from the submission from Jesuit Social Services to the ALRC, above n 7, 128.

97 ACT Justice and Community Safety Directorate, *Reducing Recidivism* <https://www.justice.act.gov.au/justice-programs-and-initiatives/reducing-recidivism>.

98 ALRC, above n 7, 135. ACT Government, 'Family-Focused Justice Reinvestment Trial to Help Reduce Over-Representation of Aboriginal and Torres Strait Islanders in Justice System' (Media Release, 26 April 2017).

99 Jordan Hayne and Niki Burnside, 'Canberra's Only Jail is Running Out of Cells, But the Government Wants to "Build Communities Not Prisons"', *ABC News* (Australia), 15 February 2019.

0 to 14 years'.[100] The ALRC noted that '[i]t was estimated that the direct costs of Aboriginal juvenile and young adult involvement with the justice system was approximately $4 million per year'.[101]

The development phases of the trial commenced in 2012 by the community in partnership with an organisation called 'Just Reinvest NSW' and the Australian Human Rights Commission,[102] and it was later funded by an Australian Research Council project.[103] Implementation commenced from 2016 and it is known as the 'Maranguka Justice Reinvestment Project'.[104] It is too soon for there to be any formal evaluations of the project, but Just Reinvest NSW released some positive statistics in October 2018:

> Newly released statistics demonstrate the following changes in Bourke between 2015 and 2017:
>
> - 18% reduction in the number of major offences reported
> - 34% reduction in the number of non-domestic violence related assaults reported
> - 39% reduction in the number of domestic violence related assaults reported
> - 39% reduction in the number of people proceeded against for drug offences
> - 35% reduction in the number of people proceeded against for driving offences.[105]

The ALRC's report notes that there were also trials being conducted in the Northern Territory, Queensland and South Australia.[106]

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100 Just Reinvest NSW, *Justice Reinvestment in Bourke* <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>.

101 ALRC, above n 7, 136. A report was also produced about the changes that occurred in Bourke in 2017 as a result of the project: KPMG, *Maranguka Justice Reinvestment Project Impact Assessment* (2018).

102 Brown et al, above n 75, 134–5.

103 ALRC, above n 7, 135.

104 Ibid 136–7. See also AIC, above n 82, 32–5.

105 Just Reinvest NSW, *New Evidence From Bourke* <http://www.justreinvest.org.au/new-evidence-from-bourke/>.

106 ALRC, above n 7, 136. There is more detail about some of these contained in AIC, above n 82, 35–40. The Queensland Productivity Commission reports that a trial may be conducted in Cherbourg, Queensland, but the details of the proposed trial were not available: above n 13, 140.

Challenges Posed by Justice Reinvestment

There are some reasons to be cautious about the justice reinvestment approach and several challenges to its implementation were recognised by the Senate Committee and other reports, including:

- lack of clarity about what the strategy means and encompasses[107]
- need for multi-partisan support, because funding within communities would need to be maintained for longer than election cycles for it to be effective[108]
- jurisdictional split of responsibility between federal and state and territory governments for the wide-ranging types of community services that would be required (a whole of government approach would be necessary)[109]
- probability that the level of economic savings would be less in Australia compared to countries with larger populations[110]
- lack of availability of data, which would impact on the mapping and evaluation stages.[111]

Another reason to be cautious of this approach is that it may result in a 'disinvestment' in prison-based services and programs justified under the guise of justice reinvestment. This is a particular danger in 'a cost cutting environment'.[112] Justice reinvestment is intended to divert resources away from building new prisons and expanding prison capacity, without abolishing prisons entirely. However, because the core concern of the strategy is using resources in a manner that benefits the community and reduces the commission of crime, disinvestment in services for the smaller number of people who are incarcerated may be inconsistent with the aims of justice reinvestment.

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107 Senate Legal and Constitutional Affairs References Committee, above n 85, 83–4. See also Brown, Schwartz and Boseley, above n 79, 101.

108 Ibid 85–6. See also Brown, Schwartz and Boseley, above n 79, 101–2.

109 Ibid 86–8. Guthrie et al note that local government would also need to be involved: Jill Guthrie, Michael Levy and Cressida Forde, 'Investment in Prisons: An Investment in Social Exclusion?' (2013) 1(2) *Griffith Journal of Human Dignity* 254, 261.

110 Ibid 89–91.

111 Ibid 94–9. See also Brown et al, above n 75, 156–7; ALRC, above n 7, 144–5.

112 David Brown, 'Prison Rates, Social Democracy, Neoliberalism and Justice Reinvestment' in Kerry Carrington et al, *Crime, Justice and Social Democracy: International Perspectives* (Palgrave Macmillan, 2012) 80. Supported by Chris Cunneen et al, *Penal Culture and Hyperincarceration. The Revival of the Prison* (Ashgate, 2013) 173.

Concluding Remarks on Justice Reinvestment

There is no doubt that a hard-headed economic analysis favours justice reinvestment over current expenditure on the expansion of the prison system. As previously detailed, the expenditure on the prison infrastructure expansion is enormous. For example, the Ravenhall prison in Victoria (opened in 2017) reportedly cost $670 million to build,[113] and Victoria has allocated another $689.5 million to build another prison (construction commencing in 2019).[114] Further, once prisons are built imprisoning people is very expensive, costing a total of $3.8 billion each year nationally.[115]

As the imprisonment rate continues to grow (as detailed in Chapter 1), without any evidence that it is reducing the crime rate, such expenditure is increasingly recognised to be an unwise use of public funds.[116] In addition to curbing the growth of the prison population, justice reinvestment has the added advantage of reducing many societal problems that lead to vulnerable people being over-represented in the prison population.

Notwithstanding the significant advantages of justice reinvestment and the positive indications from the early trials in Australia, there are some challenges posed to implementing it in a federation where imprisonment is the responsibility of the states and territories. The ALRC's recommended national body is designed to address this.[117]

There is also no denying that this approach requires a major shift of resources and significant social change, with the ALRC noting that 'justice reinvestment involves a holistic approach to the drivers of incarceration, which extend beyond justice-related factors to community and social determinants of crime and incarceration'.[118] An alternative approach that requires changes confined to the criminal justice sphere may be preferable and is considered next.

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113 Tom Cowie, 'Inside Victoria's Newest Prison, at Ravenhall, and the Room Where You Don't Want to End Up', *The Age* (Victoria), 5 July 2017.

114 'Vic Prison Secures Almost $690m in Budget', *SBS News* (Australia), 24 April 2018.

115 Bartels, above n 77, 123.

116 The overall crime rate is reducing for unrelated reasons: see, eg, David Brown, 'The Limited Benefit of Prison in Controlling Crime' (2010) 22(1) *Current Issues in Criminal Justice* 137. For NSW-specific data see Lily Trimboli, *NSW Trends in the Age-Specific Rates of Offending, 1995 – 2018* (Issues Paper No 143, NSW Bureau of Crime Statistics and Research, 2019).

117 ALRC, above n 7, 139.

118 Ibid.