Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment

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Introduction

There was optimism at the time of the Royal Commission into Aboriginal Deaths in Custody (RCADIC) that Indigenous imprisonment rates would be reduced. Indeed a core finding of the Commission had been the need to reduce Indigenous custody and imprisonment, and the consequent over-representation of Indigenous people, as a way of addressing the large number of Indigenous deaths in custody. However, over the last two decades Indigenous imprisonment rates have grown significantly rather than declined.

In 2001 I reviewed the first decade after the RCADIC and noted that there was ample evidence to demonstrate that the results of the Royal Commission were not as we might have expected.[1] The first decade post-RCADIC highlighted at least four areas where there was failure to achieve the desired outcomes of the Royal Commission. These included:

- the continued over-representation of Indigenous people in the criminal justice system
- Indigenous deaths in custody remained at high levels
- the recommendations of the Royal Commission were often ignored
- there had been a drift into a more punitive 'law and order' society.[2]

The failure to solve the problematic relationship between the criminal justice system and Indigenous people was most graphically illustrated in the climbing imprisonment rates throughout the 1990s. In summarising these changes, the Australian Institute of Criminology concluded that in the decade from 1991 the number of Indigenous and non-Indigenous prisoners increased at an average annual rate of 8% and 3% respectively, and the level of Indigenous over-representation within the total prisoner population had steadily increased.[3] Imprisonment levels had risen for everyone in Australia during the 1990s, but for Indigenous people the increase was on top of an already high rate, and had occurred at a time when the major policy thrust of the Royal Commission was to *reduce* imprisonment levels.

During the first decade after the RCADIC there were three independent national evaluations of government responses to the Royal Commission recommendations. All three reports were critical of implementation processes by government.

- The *Justice Under Scrutiny* Report prepared by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs[4] addressed the issue of diversion from custody and was critical of government implementation of recommendations in this area. It noted a failure to remedy institutional racism in some police forces.

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[1] Chris Cunneen, 'Assessing the outcomes of the Royal Commission into Aboriginal deaths in custody' (2001) 10(2) *Health Sociology Review* 53, 55.
[2] Ibid 55.
[3] Australian Institute of Criminology, 'Australian crime: facts and figures 2000 ' (Australian Institute of Criminology, 2000).
[4] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 'Justice under scrutiny: Report of the inquiry into the implementation by Governments of the recommendations of the Royal Commission into Aboriginal Deaths in Custody' (Australian Government Publication Service, 1994).

- The *Indigenous Deaths in Custody 1989-1996* Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner[5] examined 96 Indigenous deaths in custody during the period 1989-1996 and found that on average there were between eight and nine Royal Commission recommendations breached with each death in custody. The most frequent breaches occurred in Queensland and Western Australia.[6]
- The *Keeping Aboriginal and Torres Strait Islander People Out of Custody*[7] report focused on those recommendations of the Royal Commission directly designed to reduce custody levels through changes to criminal justice policy. It found a failure on the part of governments to adequately implement specific recommendations and that this failure represented a *massive lost opportunity* to resolve critical issues which lead to the unnecessary incarceration of Indigenous people.[8]

By the end of the first decade post-RCADIC it was apparent there were weaknesses and limitations in the Royal Commission process and it its recommendations. Many of these problems had been highlighted in the reports noted above. Some issues were not dealt with very well, such as the relationship between Indigenous women and the criminal justice system – ironically enough given, as I discuss further below, the way the recent increase in Indigenous women's imprisonment has outstripped the increase for Indigenous men. Some recommendations could have been better drafted: Recommendation 92 (That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort) [9] became destined to be breached systematically. The principle of imprisonment as a sanction of last resort has been legislated in most Australian jurisdictions, but has not been seen as inconsistent with the introduction of mandatory sentences of imprisonment and increased restrictions on judicial discretion.. Finally it became increasingly clear after the first decade that the process of implementation relied too much on government and not enough on Indigenous people and their organisations, and there was largely an absence of independent monitoring of government implementation processes. Too much had been left to the goodwill and good faith of governments to bring about effective change.

The evaporation of political goodwill around criminal justice reform in the decade following the RCADIC reflected changed political conditions. The political conditions of neo-liberalism which had grown during the 1980s, but accelerated in the 1990s were no longer conducive in Australia to effective reform of the criminal justice system nor to the recognition of Indigenous rights. The nation has steadily moved into a more punitive period in relation to criminal justice responses, and whatever impetus there was to reform in the early 1990s evaporated during the ensuing decade. Australian states and territories saw the drift into 'law and order' responses manifested in increased police powers, 'zero tolerance' style laws which increased the use of arrest for minor offences, mandatory sentences of imprisonment for minor offences, increasing controls over judicial discretion and demands

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[5] Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Indigenous deaths in custody 1989–1996 ' (Human Rights and Equal Opportunity Commission, 1996).

[6] Ibid xiv

[7] Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Office of Public Affairs, ATSIC, 1997).

[8] Ibid 190

[9] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, pg no [22.1.14] (Recommendation 92).

for longer terms of imprisonment for a range of offences. More generally there was a significant shift away from the recognition of Indigenous rights, including the right to self-determination.[10]

Since these reflections on the RCADIC at the turn of the century, another decade has now passed, and we have the passage of twenty years since the Royal Commission first tabled its findings and 339 recommendations. The purpose of this article is to re-visit Indigenous imprisonment and punishment, and to do so through the prism of the Australian Prisons Project (APP). The APP was established in 2008 as a result of an Australian Research Council grant, with a view to understanding developments in penality since the 1970s through to the present, particularly with a focus on the seemingly inexorable rise in imprisonment rates from the mid 1980s. One component of our work has been the consideration of the over-representation of Indigenous people in prison.[11] In the discussion below I use the example of the Northern Territory to highlight some of the more general trends and issues.

Sentencing, Punishment and Race

The APP has stressed the importance of understanding the multidimensional nature of punishment: punishment is more than a calculative task by sentencers or a technical apparatus administered by experts. The study of punishment extends beyond the effects on a discrete offender to the social meaning and cultural significance of punishment. We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penality defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations. How we understand appropriate or acceptable punishment is contextualised within broader social and cultural norms. The way we punish offenders is understood within particular cultural boundaries which define gender, age, race, ethnicity and class. These boundaries are not static. They are constantly being drawn and redrawn, and punishment itself plays a part in constituting these relations.

Our cultural understandings of 'Aboriginality' have permeated the development of penality in Australia with formal and informal differences in punishment existing from the nineteenth century through to the present. Some historical examples include the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the twentieth century. The segregation of penal institutions along racialised lines has also been common place. Historically these different modes of punishment were justified by (and reproduced) racialised understandings of Aboriginal difference.[12]

Today we understand both sentencing and punishment through concepts of race and culture: witness for example the consideration of the Aboriginality of an offender in sentencing (instantiated in the *Fernando* principles: *R v Fernando*[13] or the growth in Koori, Nunga,

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[10] Michael Dodson and Sarah Pritchard, 'Recent developments in Indigenous policy: The abandonment of self-determination?' (1998) 4(15) *Indigenous Law Bulletin* 4.

[11] For further information on the Australian Prison Project see www.app.unsw.edu.au; See also Eileen Baldry et al, 'Imprisoning rationalities' (2011) 44(1) *Australian & New Zealand Journal of Criminology* 24.

[12] Eileen Baldry and Chris Cunneen, 'Contemporary penality in the shadow of colonial patriarchy' (Unpublished Paper, 2011).

[13] *R v Fernando* (1992) 76 A Crim R 58.

Murri and circle sentencing courts[14] and Indigenous prisons such as Balund-a and Yetta Dhinikal in New South Wales. Contemporary cultural understandings of Indigeneity are not always positive. Discourses speaking to the implied primitiveness of Aboriginality have re-emerged. Witness the Howard Government's *Crimes Amendments (Bail and Sentencing) Act* in 2006. Presented as a response to family violence in Indigenous communities it actually restricts courts taking customary law into consideration in bail applications and when sentencing. In summary, cultural assumptions about Aboriginality within sentencing may be positive (such as in the Koori courts), they may be negative (such as in the Howard government's approach to customary law), or they may reinforce particular boundaries as to who is really Aboriginal (such as in case law which differentiates between traditional and urban Indigenous peoples and applies particular criteria to one group).

Despite the occurrence of positive initiatives like the Koori and other Indigenous courts, we have also seen Indigenous Australians' imprisonment rates rising rapidly. In the 20 years to 2008 Indigenous imprisonment rates have more than doubled from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at a slower rate from 100 to 169 per 100 000 of population during the same period.[15] By 2010 the Indigenous imprisonment had settled at 2303 per 100 000.[16]

There has also been a very marked increase in women's imprisonment, and this has particularly impacted on Indigenous women. The proportion of women in the total prison population has doubled over the last two decades[17] and the proportion of Indigenous women in the female prison population increased from 21% of all women prisoners in 1996 to 30% in 2006 and steadied at around that percentage (29.3 per cent in 2010).[18] The rate of Indigenous women's imprisonment in 2010 was 374 per 100 000 of adult Indigenous females compared with 18 per 100 000 for non-Indigenous females.[19] Thus the Indigenous women's rate of imprisonment was 21 times higher than the non-Indigenous women's rate. The Indigenous women's rate of imprisonment is now more than 50 per cent higher than of the non-Indigenous *male* rate.[20]

Despite the RCADIC findings and its recommendations, despite apparent government commitments in the early 1990s to implement the recommendations, despite some positive initiatives such as Indigenous sentencing courts[21] and some comprehensive Indigenous Justice Agreements,[22] Indigenous imprisonment rates are far higher now than they were in 1991.

Governing through Crime and Punishment

[14] Elena Marchetti and Kathleen Daly, 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 415.

[15] Carlos Carcach and Anna Grant, 'Imprisonment in Australia: Trends in Prison Populations & Imprisonment Rates 1982–1998' (Australian Institute of Criminology, 1999), 3 ; Carlos Carcach, Anna Grant and Rowena Conroy, 'Australian corrections: The imprisonment of Indigenous people' (Australian Institute of Criminology, 1999), 2.

[16] Australian Bureau of Statistics (2010), *Prisoners in Australia*, Canberra: ABS, Catalogue No. 4517.0, 55

[17] Baldry and Cunneen, above n 12.

[18] Australian Bureau of Statistics (2006), *Prisoners in Australia*, Canberra: ABS, Catalogue No. 4517.0, 15; ABS, above n 16.

[19] ABS, above n 16, 56.

[20] Ibid.

[21] Marchetti and Daly, above n 14.

[22] Fiona Allison and Chris Cunneen, 'The role of indigenous justice agreements in improving legal and social outcomes for Indigenous people' (2010) 32(4) *Sydney Law Review* 645.

In understanding the use of imprisonment one of the most important points to grasp is that a rising imprisonment rate is not directly or simply related to an increase in crime. The use of prison is a function of government: it reflects government policy and legislation, as well as judicial decision-making. Governments make choices that either directly impact on the use of imprisonment (for example, legislation covering such matters as standard non-parole periods, mandatory sentencing, maximum penalties for particular offences, etc) or less indirectly (for example, availability of non-custodial sentencing options, presumptions in favour of bail, availability of parole, etc)

In summarising the international literature, Wilkinson and Pickett note that only 12 per cent of the growth in the state prison population in the USA during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment. [23] Similarly a comparison between the UK and the Netherlands showed that two thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates. [24] Imprisonment rates in Australia also do not appear to be a function of increased levels of crime, since increases in imprisonment rates have continued, while crime rates have levelled or fallen, in many categories of crime from 2000. [25]

More specifically the increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time. [26] The NSW Bureau of Crime Statistics and Research studied the 48 per cent increase in Indigenous imprisonment rates in NSW between 2001 and 2008 (which, incidentally, was a greater increase than occurred with the non-Indigenous imprisonment rate). It found that 25 per cent of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime. In other words, the 48 per cent increase was not caused by increased crime levels.

More generally however, the overall environment within which sentencing and punishment occurs has been one of constantly changing criminal law. Roth found that between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories, [27] while Steel[28] has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident. More broadly, and particularly impacting on Indigenous people, a number of factors appear to have contributed to the increased use of imprisonment including:

- changes in sentencing law and practice
- restrictions on judicial discretion

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[23] Richard Wilkinson and Kate Pickett, *The spirit level* (Bloomsbury Press, 2009), 147.
[24] Ibid.
[25] Legislative Council Select Committee on the Increase in Prisoner Population, 'Inquiry on the Increase in Prisoner Population: Final Report' (New South Wales Parliament, 2001), xv.
[26] Jacqueline Fitzgerald, 'Why are Indigenous Imprisonment Rates Rising?', Issue Paper No 41 (August, 2009) Sydney: New South Wales Bureau of Crime Statistics and Research.
[27] Lenny Roth, 'Law and order legislation in the Australian States and Territories: 2003-2006' (Briefing Paper No 12/06, Parliamentary Library, Parliament of New South Wales, 2006), 1.
[28] Alex Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' in Marie Segrave (ed), *Australia and New Zealand Critical Criminology Conference 2009: Conference Proceedings* (Monash University and the Australia and New Zealand Critical Criminology Network, 2009), 228-243.

- changes to bail eligibility
- changes in administrative procedures and practices
- changes in parole and post-release surveillance
- the limited availability of non-custodial sentencing options
- the limited availability of rehabilitative programs, and
- a judicial and political perception of the need for 'tougher' penalties.[29]

While these administrative, legal and technical changes contribute to increased penal severity, they are themselves reflective of less tolerant and more punitive approaches to crime and punishment.

In reflecting on the US growth in imprisonment, Simon argues that criminalisation and imprisonment has become increasingly used as a tool of social policy which has resulted in a process of 'governing through crime'.[30] Increased punishment has been targeted at those defined as high risk, dangerous and marginalised. Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms.[31]

Simon's notion of governing through crime is useful for understanding the rise of penal severity and its link to particular political configurations in many western democracies. One aspect of the governing through crime thesis particularly applicable to the Australian context is that weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. This focus has lead to populist political responses to perceived 'popular' opinion about crime: hence a view that the most politically expedient response to crime is the promotion and implementation of the 'toughest' response to crime. While conservative political parties may have traditionally appeared to be 'tougher' on crime and punishment, it is clear that in jurisdictions like NSW and the Northern Territory the most sustained and largest increases in imprisonment rates have occurred under Labour governments. For example the recent decade of the Labour government in the Northern Territory under Claire Martin and later leaders saw imprisonment rates (and particularly Indigenous imprisonment rates) increase at a much faster rate than in the previous decade under the National Liberal Party.[32]

Not all modern democracies have followed the path of countries like Australia, New Zealand, the US or the UK which have relied on exclusionary and punitive approaches to penal policy. According to Lacey,[33] some European jurisdictions have opted instead for criminal justice

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[29] Chris Cunneen, 'Fear: Crime and Punishment' (2010) 29(2) *Dialogue* 44, 45.

[30] Jonathan Simon, *Governing through crime: How the war on crime transformed American democracy and created a culture of fear* (Oxford University Press, 2007) 3-4.

[31] Ibid, 6.

[32] See Australian Prison Project website for correlation between political parties in power and prison trends: http://www.app.unsw.edu.au/nt-indigenous-imprisonment-rate-compared-australian-imprisonment-rate, and http://www.app.unsw.edu.au/section-5-political-timeline-5. Accessed 24/10/11

[33] Nicola Lacey, *The prisoners' dilemma: Political economy and punishment in contemporary democracies (The Hamlyn Lectures)* (Cambridge University press, 2008).

systems that are relatively moderate and inclusionary. Lacey argues that more social democratic and corporatist forms of government have sustained more moderate criminal justice policies. The governing through crime thesis also needs to be able to account for the profound racialisation of punishment, both in Australia and other liberal democracies like the US. Perhaps in nations like Australia the concept of 'colonising and racialising through crime' is as apt as the more general notion of 'governing through crime'.

Colonising Punishment

While the development of crime control as a key form of governance may go some way to explaining the punitiveness which has underpinned developments in penal policy, it is also clear that punishment is highly racialised. The two jurisdictions in Australia, which have the highest imprisonment rates (the Northern Territory and Western Australia), are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are well beyond any meaningful comparison to other rates in Australia: whilst the non-Indigenous imprisonment rate in Western Australia in 2010 was 170 per 100 000, the rate of Indigenous imprisonment was 4309.6.[34]

I want to consider how the increased focus on risk and danger has been targeted at Indigenous people. In other words, how is it that governing through crime comes to identify specific populations such as Indigenous people as high risk and dangerous. Bail and the use of remand is fundamentally about risk and it provides a useful way of considering how changes in understandings of risk have negatively impacted on Indigenous people. The use of remand has grown significantly in all Australian jurisdictions since the 1970s with an increase in the use of remand as a percentage of imprisoned people rising from 11% in 1978 to 23% in 2008 nationally.[35] This dramatic increase has had a significant impact on overall prison numbers, and has specifically impacted on Indigenous people. As noted previously, 25 per cent of the increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by more Indigenous people being remanded in custody and for longer periods of time.[36]

As we have noted elsewhere[37] remand is a useful prism through which to view penal culture for a number of reasons. First, it is a fundamental principle of criminal law that a person cannot be legally punished unless they have been found guilty of a crime. This means that in order to keep a person in custody on remand, a court must rely on reasons other than those associated with punishment. Historically, the primary justification for remand was a fear that the accused would flee the jurisdiction. The extent to which modern bail legislation provides additional reasons to refuse bail illuminates changes and developments in ideas around risk. Secondly, remand and bail was historically a discretion exercised by courts and the extent to which that discretion has been constrained or re-directed by government provides an insight into the ways in which a changing penal culture has seen increased attempts to directly influence the operation of the courts.

From the late 1970s the law on bail was codified, with most jurisdictions introducing a presumption in favour of bail. Legislative amendment since then has overwhelmingly seen a

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[34] ABS, above n 16.

[35] David Biles (1990) *Remand Imprisonment in Australia*, Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No 27, 3; Australian Bureau of Statistics (2008), *Prisoners in Australia,* Canberra: ABS, Catalogue No. 4517.0, 17.

[36] Fitzgerald, above n 27, 5.

[37] Baldry et al, above n 11.

retreat from that position, with jurisdictions increasingly limiting the discretion of courts to grant bail. Much of the initial focus on restricting bail concentrated on particular offences such as armed robbery, burglary, drug offences and domestic violence. However during the 1990s and more recently restrictions on bail eligibility have particularly focused on types of offenders: specifically repeat offenders. As we noted previously, 'these restrictions on bail provide for simple, strong political statements about "locking up" "offenders" but have the potential to incarcerate large groups of accused without proper analysis of whether such deprivation of liberty achieves any justifiable social ends'.[38] Given the higher recidivism rates of Indigenous people (see below), any focus on repeat offenders is likely to negatively impact on Indigenous offenders.

Theorists such as Ulrich Beck[39] have argued that the politics of insecurity in late modern societies like Australia, Canada, the United States and New Zealand has led to a preoccupation with and aversion to risk, uncertainty and dangerousness. One reaction to the 'ontological insecurity' generated by risk aversion is a decline in tolerance and a greater insistence on the policing of moral boundaries.[40] As I have argued elsewhere,[41] criminalisation plays a significant role in creating moral boundaries and constructing Indigenous peoples as a threat to the social order because of their presumed criminality. The criminal justice system constitutes social groups as threats and reproduces a society built on racialised boundaries. Indeed it has been argued that the process of criminalisation itself now constitutes a significant racialising discourse – that is we understand race through discourses about crime and punishment, and we understand crime and punishment through images of race.[42] The Northern Territory Intervention provides a particularly graphic example of the construction of Indigenous men in particular as sexual and physical abusers of women and children. Such abuse was also linked to traditional Aboriginal culture. An increased criminal justice response was seen as appropriate to dealing with the perceived problem and Indigenous imprisonment rates in the Northern Territory have continued to increase dramatically.

There are at least two ways the rise of 'risk' paradigms negatively impact on the assertion of Indigenous authority specifically within the criminal justice area. Firstly, the developments of risk in criminal justice policy has seen a shift in focus towards the utilisation of various risk assessment processes: the development of 'techniques for identifying, classifying and managing groups assorted by dangerousness'.[43] Criminal justice classification, program interventions, supervision and indeed detention itself is increasingly defined through the management of risk. The assessment of risk involves the identification of aggregate populations based on statistically generated characteristics. One result of this is that an understanding of crime and victimisation in Indigenous communities is removed from specific historical and political contexts. Within the risk paradigm any rights of Indigenous peoples (such as self-determination or self-government) are seen as secondary to the membership of a risk-defined group. In other words the group's primary definition is centred

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[38] Ibid, 31.

[39] Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, 1992) *passim.*

[40] Fenna Van Marle and Shadd Maruna, 'Ontological Insecurity and 'Terror Management'' (2010) 12(1) *Punishment and Society* 7.

[41] Chris Cunneen, 'Indigeneity, sovereignty and the law: Challenging the processes of criminalization' (2011) 110(2) *South Atlantic Quarterly (Special Issue)* 309, 317-319.

[42] Malcolm Keith, 'From punishment to discipline' in Michael Cross and Malcolm Keith (eds), *Racism, The City and The State* (Routledge, 1993), 193.

[43] M Feeley and J Simon, 'Actuarial justice: The emerging new criminal law' in D Nelken (ed), *The futures of criminology* (Sage, 1994)

on the risk characteristics they are said to possess, and risk is measured through factors such as the incidence of child abuse, domestic homicide, drug and alcohol problems, school absenteeism, juvenile offending and so on.

Secondly, the post 9/11 concerns with security and the war on terror have led to what some commentators have referred to as a 'paranoid' nationalism which emphasises order and conformity over difference.[44] Within this context Indigenous claims to self-determination, the recognition of Indigenous law and greater control over criminal justice, including punishment, can be easily portrayed as a threat to the national fabric. As Megan Davis notes in discussing sovereignty claims, 'it is difficult to comprehend how the patriotic, warlike, race-divided Australia of today can even begin to think in earnest about what principles underpin a liberal democracy or to seriously consider reform of our public institutions'.[45]Indigenous claims to sovereignty and self-government are presented as at best irrelevant to solving the problems of social disorder which are increasingly defined as a threat of criminality from risk-prone populations, or at worst the claims are seen as a threat to national unity and security.

Returning to the Northern Territory for the moment, we can see the changing discourses on punishment which occurred during the period from the 1970s through to the end of the first decade of the twenty first century. In a review of the Northern Territory prison system in 1973, Hawkins and Misner described the functions of existing prisons as being to 'warehouse bodies, prevent escapes and to keep the prison as neat and clean as possible'.[46] The Hawkins and Misner report was the first of a number aimed at improving correctional services.[47] From the 1970s through to the early 1990s there was a period of reform which was clearly focused on lowering prison numbers and in particular reducing Indigenous imprisonment. There was also an approach to decriminalise certain offences and to increase the range of non-custodial sentencing options. The Hawkins and Misner report recommended wide-ranging changes to punishment and imprisonment in the Northern Territory, and set the agenda for correctional services reform in the Territory for the next decade.[48] Their recommendation to decriminalise public drunkenness was quickly enacted by the Territory government. Other key recommendations included a reduction in prison numbers through a wider range of alternatives to imprisonment and the development of mental health services including reform of the Mental Defectives Ordinance. Changes introduced during the later part of the 1970s and 1980s included the decriminalisation of public drunkenness, the introduction of the fine default diversionary program, the introduction of home detention and the establishment of Aboriginal Community Corrections officers.

Yet by the early to mid 1990s the focus of reform in the Northern Territory had shifted from reducing Indigenous imprisonment and over-representation to a retributive rhetoric aimed at making conditions more harsh for offenders. This shift to a more punitive penalty occurred at almost the same time that governments were responding to the recommendations of the RCADIC which was advocating for reform which centred around reducing prison numbers.

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[44] Ghassan Hage, *Against paranoid nationalism: Searching for hope in a shrinking society* (Pluto Press, 2003) *passim*.

[45] Megan Davis, 'The 'S' word and Indigenous Australia: A new variation of an old theme' (2006) 31 *Australian Journal of Legal Philosophy* 127, 134.

[46] Gordon J Hawkins and Robert L Misner, 'Report on restructuring the criminal justice system in the Northern Territory: Submission to the Minister for the Northern Territory' (1973), 34.

[47] See also R C Ward, 'Report from the Select Committee Appointed to Inquire into Prisons and Prison Legislation' (The Legislative Council for the Northern Territory, 1974).

[48] Hawkins and Misner, above n 46.

Over the next decade and a half changes in the Northern Territory were to include punitive amendments to juvenile justice legislation, the introduction of mandatory sentencing, the introduction of punitive work orders, changes to parole, changes to public order legislation, government endorsement of zero tolerance policing approaches, and calls by politicians for the judiciary to impose harsher sentences. The increase in the prison population has been particularly marked over the last decade: rising from 469 per 100 000 in 2000 to 663 per 100 000 in 2010,[49] while the specific Indigenous imprisonment rate in the Northern Territory rose by 74 per cent from 1206 per 100 000 in 2000 to 2103 per 100 000 in 2010.[50]

Waste Management

Harsh criminal justice policies and ever increasing prison numbers may be popular among politicians and some voters. Punitive measures can be introduced by government in response to apparent populist demands with relative ease. Governments can be seen to be doing 'something' without much consideration of the longer term impacts. Indeed, increased criminalisation does not require complex bureaucracies or systems of government, although it does require increased budgetary allocations.[51] A result has been what some have called the 'waste management' prison which 'promises no transformation of the prisoner… [i]nstead, it promises to promote security in the community simply by creating a space physically separated from the community'.[52] It functions to hold people who are defined as presenting an unacceptable risk for society.

It is difficult to conceive of anything more removed from the vision of the RCADIC than the idea that prisons have become human warehouses for marginalised peoples. Yet the metaphor of the waste management prison is useful in capturing some of the changes which have occurred as a result of penal expansionism. The size of the prison system has grown to deal with expanding prison numbers, and a significant focus on risk and custody has developed, alongside the physical expansion of the penal estate. How we *think* about the physical size of prisons has also changed over the last two decades. A medium sized prison in the 1990s was about 300 inmates, and large prison was around 500. Across Australia today new prisons are being built or old prisons expanded to hold around 1000-plus prisoners. Staffing ratios have fallen, there are more prisoners per prison officer and there is far greater reliance on various technical forms of surveillance and security in the new prisons. Economies of scale are being used to try and push down the average cost per prisoner.

Further, we know the significant limitations of prison as a rehabilitative institution and crime control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will bring about reductions in re-offending.[53] Yet we see the opposite occurring when it comes to Indigenous people. The Indigenous re-imprisonment rate (58 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for

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[49] ABS, above n 16, 33.
[50] Ibid, 55.
[51] Cunneen, above n 31, 44.
[52] Simon, above n **Error! Bookmark not defined.**, 143.
[53] David Brown, 'The limited benefit of prison in controlling crime' (2010) 22(1) *Current Issues in Criminal Justice* 137, 142-143.

Indigenous students (which is below 50 per cent).[54] As a society we do better at keeping Indigenous people in gaol than in school or university.

Meanwhile, Indigenous participation in university and TAFE decreased across all age groups between 2001 and 2006. For example, Indigenous participation at university for 25 to 34 year olds fell by 18 per cent between 2001 and 2006. [55] On the basis of the *2006 Census* data Indigenous men are 2.4 times more likely to be in gaol than in a tertiary institution at any one time. This estimate is also consistent with the results from the 2002 National Aboriginal and Torres Strait Islander Social Survey which showed that Indigenous people are far more likely to report contact with the criminal justice system, including incarceration, than a tertiary qualification. In the 2002 Survey, some 3 per cent of Indigenous people reported having a Bachelor degree or above, while 7 per cent reported being incarcerated in the previous five years.[56] Given the trends of *decreasing* Indigenous tertiary participation levels and *increasing* Indigenous imprisonment rates it may be that these odds have increased further since 2006.

Conclusion: The Politics of Neo-Liberalism

The central finding of the Royal Commission was Aboriginal people die in custody at a rate relative to their custodial population. However, 'the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often'.[57] The Royal Commission found that there were two ways of tackling the problem of the disproportionate number of Aboriginal people in custody. The first was to reform the criminal justice system; the second approach was to address the problem of the more fundamental social and economic factors which bring Indigenous people into contact with the criminal justice system - the underlying issues relating to over-representation. The Commission argued that the principle of Indigenous self-determination must underlie both areas of reform. In particular the resolution of Aboriginal disadvantage could only be achieved through empowerment and self-determination.

We have done far too little in any of these three areas: reforming the criminal justice system, addressing the underlying issues, or recognising self-determination. I noted at the beginning of this article that political conditions from the early 1990s were no longer conducive to the type of reforms envisaged by the RCADIC. These changed political conditions were reflective of the growing ascendancy of neo-liberalism. In conclusion it is worthwhile exploring why neo-liberalism has proved so hostile to the reform of criminal justice systems and recognition of Indigenous rights. Firstly, and as noted previously, among western style democracies it is those who have most strongly adopted neo-liberalism which have the highest imprisonment rates (particularly the US, Australia, New Zealand, the UK and South Africa), while social democracies with co-ordinated market economies have the lowest (Sweden, Norway, Finland and Denmark).[58] The development of neo-liberal state has coincided with a decline in welfarism. The re-alignment of values and approaches primarily

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[54] Australian Bureau of Statistics (2010), *Repeat Imprisonment.* Australian Social Trends. March Quarter 2010. Canberra: ABS: Catalogue No. 4102.0, 2; Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous disadvatage: Key indicators 2009' (Productivity Commission, 2009), [4.50]; Universities Australia, 'Equity and Participation Action Plan' (April 2008), 2.

[55] SCRGSP, above n 54, [4.71].

[56] Australian Bureau of Statistics (2004), *National Aboriginal and Torres Strait Islander Social Survey*, Canberra: ABS, Catalogue No. 4714.0, 14.

[57] Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 5* (Australian Government Publication Service, 1991), 6.

[58] Lacey, above n 33.

within Anglophone justice systems emphasised deeds over needs. The focus shifted from a welfare-aligned rehabilitative approach to a justice-oriented approach with an emphasis on deterrence and retribution. Individual responsibility and accountability increasingly became the focus of the way justice systems approached offenders. The privatisation of institutions and services, widening social and economic inequality, and new or renewed insecurities around fear of crime, terrorism, 'illegal' immigrants and racial, religious and ethnic minorities have all impacted on the way criminal justice systems operate. All of which have fuelled demands for authoritarian law and order strategies, a focus on pre-crime and risk as much as actual crime,[59] and a push for 'what works' responses to crime and disorder.[60] Within this context Indigenous claims to self-determination increasingly appeared to have no relevance to criminal justice administration and reform.[61]

In his discussion of international criminal justice, Findlay[62] has succinctly summarised the values and principles of neo-liberalism to include individualisation of rights and responsibilities; the valorisation of individual autonomy; a belief in free and rational choice which underpins criminal liability and penality; a denial of welfare as central state policy; the valorisation of a free market model and profit motivation as a core social value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations. The values of neo-liberalism promote individualism and individual responsibility and downplay the need for social and structural responses to crime such as reducing unemployment rates, improving educational outcomes, increasing wages, ensuring proper welfare support, improving housing and urban conditions.[63] Promoting individual responsibility largely became identified with retributivism, incapacitation and just deserts – all of which translated into more frequent use of prison and with longer gaol terms. The requirement for social and structural changes – which formed the basis of the RCADIC's approach to addressing underlying issues – was seen as less relevant to justice systems focused on ensuring individual accountability. And in a social and political milieu which defined individual accountability in terms of imprisonment, the focus of the RCADIC on diminishing the use of imprisonment appeared increasingly insignificant. Certainly from the mid 1990s it was difficult to find a politician in either of the major parties who would publicly advocate for reducing prison numbers. Governments continued to say they were implementing the RCADIC but they conveniently forgot the core values and outcomes the Commission had advocated for: reduce custody levels, address social and economic disadvantage and respect Indigenous self-determination.

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[59] Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) *Theoretical Criminology* 261, 262.
[60] John Muncie, 'The globalization of crime control – the case of youth and juvenile justice: Neo-liberalism, policy convergence and international conventions' (2005) 9(1) *Theoretical Criminology* 35, 41.
[61] Cunneen, above n 41, 318-319.
[62] Mark Findlay, *Governing through globalised crime* (Willan Publishing, 2008), 15.
[63] David Brown, 'Searching for a social democratic narrative in criminal justice' (2009) 20(3) *Current Issues in Criminal Justice* 453, 456.

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