Brave Leaders and a Broken-down Machine

Public-administration and the failure to reduce First Nations incarceration in Australia

DPhil Thesis

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Abstract

In 1992 the Commonwealth of Australia and all State and Territory Governments committed to reducing the incarceration rate of First Nations Australians. But, over thirty years that policy response has failed. Between 1991 and 2020, the incarceration rate of First Nations Australians more than doubled: from 1,122 per 100,000 adults in 1991 to 2,285 in 2020. This thesis asks whether failings in the Australian system of governance – the machinery of government – were a cause of the failed policy response. It focuses upon two weak mechanisms within the governance of the policy response: the mechanism of policy change at the elite level and the mechanism of policy effect at the local level. Using the methodology of process-tracing, the thesis builds an explanatory causal model for each of these mechanisms, which it uses to gain insights into where the mechanisms broke down by comparing cases where the mechanisms operated to those where they did not.

What emerges is a relational account of failing governance in a complex policy domain: a mechanism of policy change, reliant upon delegations to State and Territory governments, that stalled in the absence of sufficient political will; and a mechanism of policy effect that empowered local leaders and often succeeded in reducing incarceration, only to be frustrated by unstable public administration and unreliable funding. For future policymakers, the thesis shows the practical potential of local self-determination to achieve genuine social change but also warns that the complexity of Australia's public administration must be successfully managed in order to realise this potential in all but exceptional cases.

This thesis is dedicated to Mr. B.W. Wunungmurra and Mr B. Brookdale:

Absent friends.

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Table of Contents

Abstract ..... **i**

This thesis is dedicated to Mr. B.W. Wunungmurra and Mr B. Brookdale: *Absent friends.* ..... **ii**

Acknowledgements ..... **iii**

Table of Contents ..... **iv**

Introduction: No Easy Answers…Only Leadership **1**

I. 1992: The promise of a turning point ***5***

II. Did the machinery of government break down? ***6***

III. Introductory matters ***13***

a) The Policy Response: Self-Determination and Empowering Leaders 13

b) Politics and Policymaking since 1992 16

c) The Puzzle: A Dog That Didn't Bark 19

d) The Theory of Governance Failure 22

IV. Introducing the Case Study: Public Administration and First Nations Incarceration ***23***

a) Criminal Justice Policy 25

b) Indigenous Affairs Policy 33

V. Methodology ***49***

a) Methodological Challenges 49

b) Process-Tracing Broken Mechanisms in Governance 56

Part One (Chapters Two and Three): Existing Explanations and Identifying Failing Mechanisms in the Machinery of Government **60**

Chapter Two: The Causes of Rising First Nations Incarceration **63**

I. Contested Evidence and the Complex Causation of Policy Failure ***64***

II. Causes External to Government ***67***

a) Post-Colonial Conflict Theory 69

b) Offending Theories 78

c) Strain Theories 88

d) Conclusion 94

III. Explanations within Government: Inequality in the Administration of Criminal Justice ***94***

a) Formal Inequality in Criminal Justice 96

b) Assessment 104

c) Substantive Inequality in Criminal Justice 106

IV. Conclusion 115

Chapter Three: Identifying Failing Mechanisms in the Machinery of Government 116

I. Reports on the Implementation of the Recommendations of the Royal Commission 119

a) The Deloitte Report 123

b) The Amnesty Report 125

c) Conclusion: Adoption and Implementation of the Royal Commission's Recommendations 126

II. The Agency of Leaders and the Policy Response to First Nations Incarceration 128

a) Government and Legal Reports 131

b) Justice Reinvestment 134

c) Conclusion 141

III. Structural Constraints and the Policy Response to First Nations Incarceration 141

a) Policy and Administrative Instability and the Policy Response to First Nations Incarceration 142

b) Service Delivery and Funding 152

c) Solutions and Leadership 156

d) Conclusion 157

IV. Conclusion: Identifying Two Weak Mechanisms in the Governance of the Policy Response 158

Part Two (Chapters 4, 5 and 6): Explaining where the Machinery of Government Broke Down. 164

Chapter 4: Explaining Policy Change with regard to Indigenous Australian Incarceration 166

I. 1992 and the Multiple Streams Model of Policy Change. 169

a) Kingdon's Multiple Streams Model of Agenda Setting 170

b) Extending 'streams' beyond agenda Setting: Howlett, McConnell and Perl's Five Streams Confluence Model 172

c) Applying the 'five streams confluence' heuristic of policy change to the policy response to First Nations incarceration in 1992 177

d) Conclusion 196

II. State and Territory Governments as Agents within the Policy Response to First Nations incarceration. 197

a) Initial Collaboration led by the Commonwealth 197

b) New South Wales 199

c) Northern Territory Policy Response....203

d) Conclusion: NSW and NT as agents within the policy response to First Nations incarceration....205

III. Where the mechanism broke down: why did policy not change in 2018?....206

a) Context: Revelations of Abuse at the Don Dale Detention Centre....206

b) Step 1: Commonwealth Government delegates policy formulation to an independent legal authority....208

c) Step 2: Commonwealth resumes responsibility for the policy change process and initiates decision-making regarding a policy response....209

IV. Conclusion....210

Chapter 5: Theorising the Mechanism of Policy Effect....212

I. Focus upon the local level....213

II. Focus upon leadership....215

III. Adapted Tasks Informed by Context....218

IV. Lajamanu....219

a) Historical context of Lajamanu....220

b) First Nations incarceration in Lajamanu in 1991....224

c) The policy response to Indigenous incarceration in Lajamanu and the Kurdiji Law and Justice Committee....225

c) Reduction in First Nations Incarceration....230

d) How did leaders reduce incarceration?....235

e) Conclusion:....261

V. Theorising the Mechanism of Policy Effect....264

a) Step 1 and 2: 1. First Nations leaders and local policy leaders build public confidence in their leadership, consistent with prevailing legal norms; 2. local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law....266

b) Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice....270

c) Step 4: Increased procedural justice increases compliance with criminal justice and First Nations legal norms....273

d) Step 5: Leaders strategically secure long-term funding for a sustained approach....274

Chapter Six: Where did the Mechanism of Policy Effect break down? 276

I. Deductive Process-Tracing: Testing the explanation of policy effect . 280

II. Redfern (NSW)....287

a) Historical Context of the Redfern First Nations Community....288

b) Reduction in First Nations Incarceration in Redfern 294
c) The mechanism of policy effect 298
d) Redfern: Conclusion 307
III. Bourke (NSW) 308
a) Historical context of the Bourke First Nations Community 309
b) Reduction in First Nations Incarceration in Bourke: The Maranguka Justice Project 313
c) Bourke: Conclusion 324
IV. Cases that did not reduce incarceration 326
a) Wadeye 326
b) Dubbo 338
c) Darwin 349
Conclusion 360
Bibliography 364
Appendix A: Table of Interviews 402

Introduction: No Easy Answers…Only Leadership

> There are no easy answers…only leadership: leadership in the rough parts of town and out on the red dirt. Really brave leadership for a really long time.[1]

I was making camp by torchlight in a remote part of the Northern Territory (NT) when I first heard the above statement, which became the lodestar of this DPhil. My girlfriend (now wife) and I had stopped for the night on our way to one of the remote First Nations[2] communities that is a case-study in this thesis – halfway through what would become a 14,000km journey by road undertaken to complete my fieldwork.

We arrived at a campground as night was falling. The kindly owner strolled out of the darkness to warn us that feral pigs had been visiting the site at night, scavenging for late-dry-season food. Reassured that we were too tired to cook much and would be sleeping safely high in the rooftop tent above our Toyota LandCruiser, our host asked where we were travelling to:

> 'Why the f*** are you going there?'

This was not an uncommon response when people learned of our destinations: the town in question is not a tourist destination. In fact, with a raised eyebrow and enquiring smile, our host delivered the vernacular with an amused familiarity that suggested genuine interest. Tired from a long day on dirt

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1 Anonymous wife of a Police Sergeant, Northern Territory.

2 I use 'First Nations' and 'First Nations' people throughout this thesis to 'respectfully encompass the diversity of Aboriginal and Torres Strait Islander cultures and identities': Reconciliation Australia, 'RAP Good Practice Guide', https://www.reconciliation.org.au/wp-content/uploads/2018/05/language-guide.pdf. I also use the word 'Indigenous' where it is embedded into organisational policy as an abbreviation to refer to 'Aboriginal and Torres Strait Islander Australians' (e.g. the Department of Indigenous Affairs), and to refer to 'non-Indigenous' Australians. Some sources I quote use the word 'Aboriginal' in a similar manner; this is particularly prevalent in New South Wales, which has only a small population of Torres Strait Islanders.

roads, and aware that the history of race and incarceration can be a painful subject for many Australians, I responded with a small-target summation of my research:

> 'In 1992 the Australian governments announced they wanted to reduce Indigenous Australian incarceration and spent a big pile of money to do so. But apparently they failed because the incarceration rate has since more than doubled…I'm looking for some answers.'

After a pause, our host stepped into the torchlight and shared that she was the wife of a long-serving police sergeant who had worked as the senior sergeant in remote First Nations communities across the NT. As he was approaching retirement, her husband was currently taking smaller jobs in 'trouble spots' for the police. I responded, somewhat lamely, that my research was focused on the local level and suggested that local police-work was very important to reducing incarceration: 'Besides, being a remote Police Sergeant is surely one of the hardest jobs in Australia'. 'Being a [(First Nations)] community leader is harder', she replied: 'At least my husband gets paid to break up fights in the middle of the night…Community leaders should be the real heroes of your story.' By way of proof, she made an observation I heard repeatedly during my fieldwork, but which rarely emerges from the quantitative data on incarceration:

> 'There are some communities that have turned it around in my time, you should make sure you look at those. There are no easy answers…only leadership: leadership in the rough parts of town and out on the red dirt. Really brave leadership for a really long time.

I scribbled her observation into my notebook and I have since scribbled it on countless whiteboards and atop numerous blank drafts because it suggests the central puzzle of this thesis.

If the following day – when we reached our destination at the end of the 'car-killer' of a dusty highway – I had found a shortage of willing leaders, this

would have been a short and simple enquiry. But in every community in which I conducted fieldwork I was directed to leaders working tirelessly to reduce incarceration. First Nations community leaders striving courageously were always found: I rode around all night with a 'community night-patrol' where elders leveraged their traditional authority, family connections and in one case a reputation for powerful sorcery, to break up fights, talk-down aggressors and convince youths to return home and be well rested for school; I met leaders hosting troubled youths to teach hunting at remote family outstations and other leaders organising regular camping-trips from troubled urban centres, all to divert youths away from criminal justice; and, always, I found leaders striving for opportunities to collaborate in some form with Government agencies. More often than not, I was also directed by First Nations leaders to non-Indigenous leaders doing brave work: teachers, community-based public servants, sports coaches, art centre managers and police among them. If reducing incarceration requires leadership, a shortage of leaders is not the problem.

Two things characterised all community leaders I met. The first was their courage. Not all were effective, but all were courageous – in many cases, 'heroic' is not too strong a word. Most local leaders interviewed were not succeeding on a macro scale. Most of the communities I researched continue to experience high rates of incarceration, offending and victimisation. But successes in individual, personal cases were savoured. In some communities I visited some of the leaders had given up, but in no community had all of the leaders given up. While I

observed it outside of my fieldwork, an interaction with a Yolngu[3] leader I knew through the Government work in Arnhem Land I undertook while writing this thesis is illustrative. While in palliative care for rapidly deteriorating lung cancer, this elder had himself dressed and wheeled in a chair to the community courthouse to make a representation in the sentencing of an offender he believed should be diverted to traditional punishment. Encountering him *en route* to the courthouse I arranged to take his letter to the magistrate for him but warned that the chances of success were low. He repeated a favourite piece of wisdom that captures much of community leaders' work that I have observed: 'it is better to fight and fail, than to fail without fighting…especially when the young people are watching.' While such courage lasts, there is a glimmer of optimism for the success of future policies to reduce First Nations incarceration.

While such courage deserves to be celebrated, this thesis focuses upon the second characteristic I observed in the leaders I met:: they received little support from the machinery of government. In the most basic terms this was evident in their volunteerism: police officers and lawyers apart, few leaders I encountered were paid for their work; some had managed to stretch other roles to allow them to include work to reduce incarceration; most, and the vast majority of First Nations community leaders, were volunteering their time. This is an extraordinary quality in people who willingly leave their beds to break up fights at 3:00 am. Moreover, almost all leaders I encountered lamented the inability to access basic assets that would significantly increase their effectiveness, such as sufficiently reliable and flexible funding for vehicles, fuel

[3] The word name 'Yolngu' refers to a cultural linguistic grouping of First Nations, clans and dialects living in Eastern Arnhem Land: 'yolngu' is the common word these Nations use for Aboriginal person.

and food, without which diversionary programs cannot meaningfully function. Many leaders were paying these expenses from their own pockets. For me this was surprising; for them it was not. For both of us it represented an incongruous dissonance between the national rhetoric around First Nations incarceration: it jarred uncomfortably against well-remembered rhetoric from an iconic moment in Australian politics in 1992.

I. 1992: The promise of a turning point

On 24 June 1992, the Prime Minister of Australia, Paul Keating, rose in Parliament to respond to the tabled reports of a Royal Commission into Aboriginal Deaths in Custody (Royal Commission) that had concluded the previous year:

> 'Today, there is no more central issue to our national identity and self-esteem than the injustices brought home to us all by the Royal Commission into Aboriginal Deaths in Custody. There is nothing more central to our reputation in the world. Or, to the kind of democratic, just society to which we aspire.'[4]

The Royal Commission had been initiated by the Federal Government to investigate a string of deaths of First Nations prisoners in police custody. Its central conclusion was that overrepresentation of First Nations people in prison –- at that time, 29 times the rate of non-Indigenous Australians –- accounted for the large number of First Nations prisoners dying in custody.[5] With the support of all Australian State and Territory Governments, Keating committed the nation to reducing rates of First Nations incarceration.[6] The Keating Government pledged $400million (AUD) ($700 million in 2020) to a policy response intended

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4 The Hon. P.J. Keating, 'Parliamentary Statement Announcing the Commonwealth's Response to the Royal Commission into Aboriginal Deaths in Custody.' (Australian House of Representatives, Canberra, 24 June 1992).

5 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 1* (Canberra: Australian Government Publishing Service, 1991).

6 Keating, 'Parliamentary Statement.'

to reduce First Nations incarceration. Keating concluded with a promise: '*This year should be the turning point*… by the year 2000 justice will have been delivered and the shame removed.'[7]

Keating was lauded for his political courage in Indigenous affairs.[8] But thirty years later, his promise to reduce incarceration rings hollow. There was no turning point. Despite reiterations of the national consensus commitment to the policy response, rates continued to rise steeply. Since 1991 they have more than doubled – from 1,122 per 100,000 First Nations adults in 1991 to 2,285 in 2020.[9] First Nations people now represent more than 28 percent of Australia's prisoners while constituting only three per cent of the national population.[10]

II. Did the machinery of government break down?

In this thesis I address the concern of many First Nations and non-Indigenous local leaders – widely published and frequently repeated to me during my fieldwork – that 'governance arrangements are a threshold cause of policy failure'.[11] I take the case study of First Nations incarceration and ask whether weaknesses in the system of public administration impeded the policy response and contributed to the failure to reduce rising incarceration rates. The Australian Public Service (APS) often uses the phrase 'machinery of government' to refer to 'the way Commonwealth Government responsibilities are managed', both by

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7 Keating, 'Parliamentary Statement.'

8 See for example: Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen and Unwin, 2001), 89.

9 See: Australian Institute of Health and Welfare, 'The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People: An Overview 2011', IHW 42 (Canberra: Australian Institute of Health and Welfare, 2011), 29–30.

10 Australian Bureau of Statistics, 'Prisoners in Australia, 2019' (Canberra: Australian Bureau of Statistics, 12 May 2019).

11 Desert Knowledge Australia, 'RemoteFOCUS: Revitalising Remote Australia - Prospectus' (Alice Springs: Desert Knowledge Cooperative Research Centre, Alice Springs, 2008), 12.

Australian Public Service Agencies and non-Australian Public Service agencies.[12] A passing familiarity with engines generally (and often broken-down engines specifically) remains a necessity of life in remote parts of Australia: in this thesis I use the mechanical analogy of 'machinery of government' both to organise my analysis and to communicate my argument to that part of my audience, most directly involved in working within the case study, that may be unfamiliar with the theoretical language of political science. Put simply, the thesis asks whether the machinery of government broke down in the policy response to First Nations incarceration? And, if so, *where* and *why* did it break?

Answering these questions is a necessary first step if we are to be confident that a future response to First Nations incarceration will be implemented as intended. In this thesis I advance a relational account of failing governance in a complex policy domain. I identify two likely weaknesses in the government machinery: a mechanism of policy change, reliant upon delegations to State and Territory governments, that stalled in the absence of sufficient political will; and a mechanism of policy effect that empowered local leaders and often succeeded in reducing incarceration, only to be frustrated by unstable public administration and unreliable funding. In the Chapters that follow I employ the methodology of process-tracing to explain both, how these mechanisms operated and where they broke down.

This it is not a small or straightforward undertaking. My study is necessarily exploratory. Despite its obvious urgency to the local leaders and street-level bureaucrats working on the ground and its prominence as a long and

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12 Australian Public Service Commission, 'Machinery of Government (MoG) Changes: What Is a MoG Change?' (Canberra: Australian Public Service Commission, 14 May 2019).

costly case study of policy failure, the policy response to First Nations incarceration has escaped the consideration of political science in Australia. The likely reason for this is that the case study is notably complex: First Nations Australia is heterogeneous, spanning more than 250 distinct language and cultural groups. The policy response bridges the constitutionally distinct domains of Indigenous affairs, which is a Commonwealth responsibility, and criminal justice, which is a State or Territory government responsibility; this federal feature necessitates collaboration between Commonwealth, State, Territory and local governments as well as First Nations organisations – creating multiple potential points of failure.

This complexity creates two associated difficulties. First, the methodological challenges confronting analysis of the case are considerable. As will be shown below, available quantitative data sets are underdeveloped, unreliable, and do not generally extend to the local level. Moreover, both cultural and physical remoteness present significant barriers to gathering new data. The fact of remoteness informs my methodological approach. Second, as a case study the policy response to First Nations incarceration lacks the virtues of parsimony that most would-be theorists prize. Sprawling across thirty-years, three levels of government, multiple independent organisations and 250 distinct local socio-political cultures, the case study defies the straightforward application of one of the well-established theoretical frameworks from within public policy studies.

I do not underestimate either of these challenges: both have shaped my methodology. However, I have resisted the temptation to over-simplify the complexity of the case, as I consider that complexity essential to an appreciation

of the case study that might prove useful to future policymaking – which was the original motivating ambition of public policy studies.[13]

During my two years of living in and working in remote Yolngu communities in Arnhem Land – as a Commonwealth public servant and as the manager of a small Aboriginal corporation – I occasionally hosted senior government officials who visited to consult with local leaders or front-line workers about a particular policy or initiative that was not succeeding. On these occasions, I was invariably warned by friends of longer experience and longer-standing residence in remote Australia that I should not get my hopes up. Policymakers had proven unable or unwilling to grasp the complexity of local priorities or the salient local factors affecting the policy or initiative in question; the visitors would insist on the narrow, centrally determined parameters of their consultation would likely depart none the wiser. In my experience visiting government officials occasionally confounded this received local wisdom, but it is nonetheless at the forefront of my mind when approaching this thesis. The same complexity that frustrates scholarship also haunts the policymakers, front-line workers and community leaders grappling with rising First Nations incarceration. But, they do not have the luxury of looking for more parsimonious case studies: they must proceed regardless.

In this spirit of necessity driving innovation, I place my enquiry within the tradition of public policy studies pioneered by Wildavsky, in which the practice

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13 See: Harold Lasswell, 'The Policy Orientation', in *The Policy Sciences*, ed. D. Lerner and Lasswell, H.D. (Stanford, CA.: Stanford University Press, 1951); Harold Lasswell, *The Decision Process* (College Park, MD: University of Maryland Press, 1956).

of policy analysis is understood as involving "art and craft".[14] McConnell, who similarly adheres to Wildavsky's approach in the context of studying policy failures, has observed that 'policy problems imbued with complexity, ambiguity and uncertainty are all around us'. In these circumstances, McConnell argues that: 'ultimately, inventiveness and judgement should be seen as a means for navigating through the facets of public life, rather than decrying them for their lack of scientific clarity.'[15]

The failure to reduce First Nations incarceration is an individually significant case in Australia, but it is also significant as a *type* of case that is increasingly prominent and challenging for policymakers in other democratic societies with similar common-law legal traditions: policy failures in the context of racialised incarceration and racially unequal treatment in criminal justice. I argue that there is a promising theoretical lens to understand such cases in the emerging literature on governance failure.

A subset of the literature on persistent policy failures, governance failure explanations 'focus less on the details of each individual policy and more on the structural determinants of action within the public sector, as well as on the interactions among policies'.[16] This renders the approach distinct from both the general approach in public policy studies and the existing, criminological explanations for the failed policy response to First Nations incarceration, which

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14 Aaron Wildavsky, *Speaking Truth to Power: The Art and Craft of Policy Analysis*, 2nd ed. (New Brunswick, NJ: Transaction, 1987).

15 See: Allan McConnell, 'Policy Success and Failure', in *Oxford Research Encyclopedia of Politics (Online)* (Oxford: Oxford University Press, 2017), 8.

16 B. Guy Peters, 'State Failure, Governance Failure and Policy Failure: Exploring the Linkages', *Public Policy and Administration* 30, no. (3-4) (2015): 261.

are 'connected to the characteristics of the policies themselves':[17] explanations of *policy failure* rather than *governance failure*. Both policy and governance failures can coexist, but the distinction is of practical significance to future policymakers. A policy failure can be remedied by changing policies; a governance failure cannot and requires structural reform. No matter how well you fuel it, you cannot travel far in a broken machine.

I consider the dynamic and layered understanding of governance failure particularly promising given the complexity of the policy response. But the theory has not been applied to the context of criminal justice or to a case as large as the thirty-year policy response to First Nations incarceration. This requires some adaptation and the adoption of a different methodology: process-tracing, which is consciously focused upon mechanisms and motivated by a deterministic understanding of causation (*how*) rather than the differentiation between causal factors (*what*). I explore these matters in greater detail later in this Chapter.

Given these challenges, my ambition in this thesis is modest: to provide useful insights to inform improvement of the machinery of government underpinning future policy responses to First Nations incarceration. However, to achieve this modest goal necessitates some inventiveness and 'art and craft'. The explanation of the case study I build is accompanied by two parallel innovations, one theoretical and one methodological. As such, I advance three contributions:

1. First, with regard to the case study, it builds a mid-level theory, operating generally across the multiple sub-national local case studies, that explains the role of governance systems – 'machinery of government' – in the policy

[17] Peters, 'State Failure, Governance Failure and Policy Failure' 261.

response to First Nations incarceration from 1991 to 2020, and how it broke down.

2. Second, with regard to public policy theory, an application of the emerging theories of governance failure to a large and complex case study that is both individually significant and significant as a *type* of case that is increasingly prominent and challenging for policymakers: policy failures regarding race and criminal justice.
3. Third, within political science methodology, the staged employment of process-tracing methods, both inductively and deductively, to theorise the breakdown of governance mechanisms: a use of process-tracing described theoretically in the methodological literature but rarely employed.

This introductory chapter proceeds in four parts. Below, I introduce: (a) the policy response, (b) the politics and policymaking, (c) the puzzle emerging from the thirty years of its operation and (d) the theoretical literature on governance failure. In the second part of this chapter I conduct an initial appraisal of the public administration arrangements underpinning the policy response: the first from a political science perspective and an important step in shaping my methodological approach. In the third part of the chapter I introduce the methodology of process-tracing and the arguments within the methodological literature supporting my novel approach to employ this method to identify the breakdown in governance mechanisms.

III. Introductory matters

a) The Policy Response: Self-Determination and Empowering Leaders

In April 1991, the Royal Commission published its *Final Report*, containing five volumes and 339 policy recommendations.[18] The report's recommendations covered both the specific issue of First Nations deaths in custody and the broader issue of disproportionate First Nations incarceration. The Royal Commission argued that disproportionate incarceration had to be addressed at two levels: first, at the level of the criminal justice system itself; second, at the level of the 'underlying issues', which bring First Nations into contact with criminal justice.[19] Of these two levels, the second type was most significant:

> '…The more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally.'[20]

The Hon. Robert Tickner, the Commonwealth Minister for Indigenous Affairs who received the report, recalled that the Royal Commission provided 'a detailed and practical blueprint for government policy reform to address this

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18 Johnston QC, *Royal Commission: National Report,* Volume 1; Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991); Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 3* (Canberra: Australian Government Publishing Service, 1991); Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 4* (Canberra: Australian Government Publishing Service, 1991); Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 5* (Canberra: Australian Government Publishing Service, 1991).

19 Johnston QC, *Royal Commission: National Report,* Volume 1, Overview; Amnesty International and Clayton Utz, *Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody* (May 2015).

20 Johnston QC, *Royal Commission: National Report,* Volume 1, Paragraph 1.7.1.

injustice'.[21] The Commonwealth would eventually adopt all of the Commission's recommendations except one, regarding the independence of the Aboriginal and Torres Strait Islander Commission (ATSIC), which was rejected at the request of the ATSIC Board.[22] The Keating government committed to a whole of government response.[23]

Tracing any one of the Royal Commission's recommendations or thematic groups of recommendations over the thirty years of the policy response would provide more than enough empirical material for a doctoral thesis. However, I do not consider it desirable to separate out components of the response in this manner. I consider the task of assessing the relative merit of individual components of the policy response is best left to criminologists: in the following three chapters I consider the growing literature on First Nations incarceration that does just this. Also, of particular significance for this thesis, both the Royal Commission and the Keating Government intended the policy package as a unified, whole-of-government response. What unifies the diverse contents of the policy response is not a policy initiative but a structural one: the commitment to self-determination and empowerment of First Nations leaders within public administration and criminal justice. These are the policies I focus upon in this thesis.

After thirty-two years, the funds allocated in the Keating Government's initial policy response are long spent. To focus heavily on the detailed implementation of individual recommendations from the Royal Commission – as

21 Tickner, *Taking a Stand*, 66.

22 Tickner, *Taking a Stand*, 75.

23 Tickner, *Taking a Stand*, 74.

much of the implementation literature I review in Chapter Three does – is to place an unrealistic expectation upon the degree to which central Governments control decentralised systems of public administration. In the case of the policy response to First Nations incarceration, I find the notion among governance theorists of governments 'steering' a complex system towards a goal to be more plausible and compelling.[24] In a layered system like that in the case study, this conception allows for the prospect that actors lower down in the chain of governance might further innovate in the precise details of the policy to achieve the broader goal. At a fundamental level, I understand the Keating Government's policy response to be an effort to *steer* public administration toward great involvement and empowerment of First Nations within criminal justice.

Dye has defined policy as 'what governments choose to do or not to do'.[25] Following this definition, the subsequent actions of all levels of government over the intervening thirty years can be interpreted in light of the 'steer' toward empowerment and involvement. From thirty years distance, both the Royal Commission and the Keating Government are remembered more for their policies of empowerment than for the details of these policies. But, while the rhetoric of self-determination has faded at the political level, the practical argument for the benefits of involving First Nations leaders in the public administration of the policy response to rising incarceration remains salient. Throughout the period of the case study, community leaders, commentators and

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[24] See, for example: B. Guy Peters, 'Steering, Rowing, Drifting or Sinking? Changing Patterns of Governance', *Urban Research and Practice* 4, no. 1 (2011): 5–12; Gilberto Capano, Michael Howlett, and M. Ramesh, 'Bringing Governments Back in: Governance and Governing in Comparative Policy Analysis', *Journal of Comparative Policy Analysis* 17, no. 4 (2015): 311–21.

[25] See: Thomas R. Dye, *Understanding Public Policy*, 12th ed. (Upper Saddle River, NJ: Pearson Prentice Hall, 2012).

NGOs have continued to argue that the increased involvement and empowerment of local First Nations leaders that improve the effectiveness of policy responses to rising incarceration.[26] To varying degrees the representation of First Nations perspectives – through consultations, co-designs, partnerships or other initiatives – has also remained best practice within the bureaucracy. Writing from within the Department of Prime Minister and Cabinet, Patterson observes that the argument for First Nations representation 'has arguably become of a proxy for unresolved issues of settlement in the ongoing project of Australian nation-building'.[27]

b) Politics and Policymaking since 1992

While the rhetoric of self-determination and the Keating Government did not last, both the strong rhetorical support for the policy response and the formal content of its policies have remained notably stable. The first 'principle of action' of the *National Indigenous Law and Justice Framework 2009-2015*, agreed by the Standing Committee of Attorneys-General, acknowledges that 'the Report of the Royal Commission into Aboriginal Deaths in Custody, particularly its findings on causal and related issues, as a foundation document guiding the work of governments in this area.'[28] In 2016, following revelations of abuse in NT youth detention centres, the strong crisis rhetoric was reiterated: both the Prime

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26 For example: Amnesty International, 'Australia Must Back Indigenous Expertise to End Crisis of Children's Incarceration' (Sydney: Amnesty International, 2 June 2015).

27 Michelle Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', *50 Years of Commonwealth Public Administration in Aboriginal and Torres Strait Islander Affairs: Indigenous Affairs Group (IAG) Discussion Paper*, Department of Prime Minister and Cabinet, Number 1 (2017): 7.

28 Standing Committee of Attorneys General on Indigenous Justice Council of Australian Governments, 'Report: National Indigenous Law and Justice Framework 2009-2015' (Canberra: Council of Australian Governments, 2009), 9 See Principle of Action One, Point 8.

Minister and opposition leader decried a 'national crisis'[29] and the Attorney-General described the phenomenon as a 'national tragedy'. [30] The Turnbull Government instructed the Australian Law Reform Commission (ALRC) to examine factors leading to the overrepresentation of First Nations in prison;[31] and established a Royal Commission to enquire into abuses in Youth Detention centres in the NT, which reported at the end of 2017.[32] At the time of writing, neither of these reports had resulted in a substantive reform of the Commonwealth policy response.

As tens of thousands of Australians joined Black Lives Matter protests across Australia over the weekend of 6 and 7 June 2020, frustration at the ongoing failure to reduce First Nations incarceration peaked. On 9 June, a panel of the Australian Broadcasting Corporation's *Q&A* included actor and writer Nakkiah Lui, a Gamillaroi and Torres Strait Islander woman and actor Meyne Wyatt, a Wongutha-Yamatji man. Leetona Dungay, whose son died while struggling with corrections officers in Long Bay Gaol, was in the studio and asked the first question. In the tense exchanges that followed, there was a notable focus on the lack of 'political will' and 'failed implementation' as an explanation for the

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29 Bill Shorten, 'The Injustice Dealt to Indigenous People Is a Stain on Our Whole Nation', *The Guardian Australia*, 19 November 2015; Anna Henderson, 'Bill Shorten Pledges to End "national Shame" by Reviving Indigenous Imprisonment Reduction Targets', 19 November 2015.

30 Senator the Hon George Brandis QC and The Hon Nigel Scullion, 'Joint Media Release - ALRC Inquiry into Incarceration Rate of Indigenous Australians' (Parliament of Australia, 27 October 2016); Jane Lee and Fergus Hunter, 'George Brandis Announces Inquiry into Indigenous Incarceration "National Tragedy"', *Sydney Morning Herald*, 27 October 2016.

31 Brandis QC and Scullion, 'Joint Media Release - ALRC Inquiry into Incarceration Rate of Indigenous Australians'; Lee and Hunter, 'George Brandis Announces Inquiry into Indigenous Incarceration "National Tragedy"'.

32 The Hon. Malcolm Turnbull MP and Senator the Hon George Brandis QC, 'Joint Media Release - Royal Commission to Be Established into Don Dale Youth Detention Centre in the Northern Territory' (Parliament of Australia, 26 July 2016).

failed policy response. Nakkiah Lui pressed the two politicians on their commitment:

> 'We've told you what to do. A lot of the recommendations from the original...Royal Commission into Aboriginal Deaths in Custody – they weren't implemented. What you can do is you can listen to the families. They can tell you right now what they want. Listen to the families. The answer has been here all along. It's been a lack of political will.'[33]

The politicians on the panel reasserted their commitment to reducing First Nations incarceration rates without suggesting changes in policy. The following day, the Minister for Indigenous Affairs Ken Wyatt announced the Government's commitment to 'justice targets' to reduce First Nations incarceration in a refresh of the 'Closing the Gap' strategy then being negotiated with key, peak Indigenous corporations.[34] Leaked documents from the negotiation suggested a target of parity in incarceration rates between Indigenous and non-Indigenous Australians by 2093 – although this was rejected Minister Wyatt as insufficiently ambitious.[35]

In July 2020, State and Territory governments eventually agreed to a target of 15% reduction in adult incarceration and a 30% reduction in youth (10-17 years old) by 2031.[36] While this modest target was criticised by National Aboriginal Legal Services as showing a 'disappointing lack of ambition', it would

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33 'Hard Truths', Transcript, *Q&A* (Sydney: Australian Broadcasting Corporation, 8 July 2020).

34 The Hon Ken Wyatt AM MP, 'Statement: Indigenous Incarceration Rates' (Canberra: Department of Prime Minister and Cabinet, 9 June 2020).

35 Quoted in: Tom McIlroy, 'Closing the Gap Progress Can't Take 73 Years: Ken Wyatt', *Australian Financial Review*, 3 July 2020.

36 Tom Stayner, 'What the 16 New Closing the Gap Targets Will Actually Mean for Indigenous Australians', *SBS News*, 30 July 2020.

still necessitate the turning point in First Nations incarceration that has eluded the existing policy response for 28 years.[37]

c) The Puzzle: A Dog That Didn't Bark

In the years since the Royal Commission handed down its report, an interdisciplinary literature has developed examining both the causes of rising First Nations incarceration and the relative merits of initiatives within the failed policy response. But, despite its prominence, the case study has been neglected by political scientists. This is lamentable as, from a political science perspective, there is a puzzle in narrative of the policy response I have outlined above that goes beyond the policies themselves – what the Conan-Doyle's fictional detective Sherlock Holmes might describe as a 'dog that didn't bark':[38] why has a failing policy response been largely unchanged for thirty years?

For a political scientist, the persistent failure of a public policy presents a puzzle. Bovens and 't Hart's most recent study of policy failure reminds us that, in our haste to examine the failings of prominent policies, we must recognise that 'governments plan, decide, do, deliver, adjust, reverse and terminate many things, all the time.'[39] Government inaction begs important questions in the case of First Nations incarceration that go beyond the merits of the policy response: over the succeeding thirty years, why did governments not do more? Or less? Why did governments not try something different? Why was the policy response

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37 Lorena Allam, 'Closing the Gap Prison Reduction Targets Show "disappointing Lack of Ambition" Lawyers Say', *The Guardian Australia*, 30 July 2020; Guy Rundle, 'Distant Goals, Rather than Immediate Action, Means New Closing the Gap Is a Squib', *Crikey*, 31 July 2020.

38 See: Arthur Conan Doyle, '"The Adventure of Silver Blaze"', in *The Penguin Complete Sherlock Holmes*, (1892) (London: Penguin Books, 1981).

39 Mark Bovens and Paul 't Hart, 'Revisiting the Study of Policy Failures', *Journal of European Public Policy* 23, no. 5 (2016): 654.

not changed? These questions are all the more puzzling given the evidence of some local successes within the overall failure to reduce national and state incarceration rates. While local successes are not immediately apparent in the national or state level data, they have been noted in a Commonwealth Government commissioned review by the ALRC and advocated in prominent commentary; I have also confirmed them in my own data-gathering, both in my earlier MPhil research and here. Moreover, the Royal Commission underlined the salience of the local level. Why did Commonwealth or State Governments not take action in response to local successes?

The puzzle of government inaction suggests the possibility that failings within the system of public administration – as well as any failings in the detail of the policies themselves – may have undermined the Governmental response. This possibility should not be surprising. Indigenous affairs policymaking has had ten different structures of public administration and twenty-one different ministers over the past fifty years, nine of these structures in the past thirty-years; this, despite the fact that 'key issues confronting the government across the 50 years have remained remarkably similar'.[40] To varying degrees, all of these structures have been criticised for not sufficiently including First Nations leaders, which is problematic for normative reasons of self-determination and is also said to undermine practical efficacy.[41] Perche has argued that 'when we

40 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs' Appendix A and B.

41 See for example: Pat Turner AM, '"Our People Will Lead the Way" to Close the Gap', *SBS News*, 2019; Robynne Quiggin, 'What Does Democracy and Self-Determination Mean for Indigenous Australians?', *Australian Journal of Public Administration* 77 (2018): S53-58; Haylene Grogan, '"Taking a Rightful Place in Our Own Country": Bring First Peoples' Voice into Government Policy', *Australian Journal of Public Administration* 77 (2018): S47–51; Diana Perche, 'Recalibrating the Machinery of Government for Indigenous Affairs:

consider Indigenous affairs generally, it is hard to argue that the current settings are fit for purpose.' She also observed that 'First Nations leaders have expressed dissatisfaction, even despair' and that criticisms are 'persistent, widespread, deeply felt, and they are well informed.'[42] Most direct among the critical First Nations voices that Perche cites was that of Professor Megan Davis who has stated that 'for Indigenous Australians the system is broken.'[43]

It is telling that similar concerns about the machinery of government in Indigenous affairs have been raised within the APS. In 2017 Michelle Patterson from the Department of Prime Minister and Cabinet's Aboriginal and Torres Strait Islander Affairs Group, published a paper reflecting on 'the structure and function' of policymaking in Indigenous Affairs' over the 50 years of Commonwealth involvement. Patterson argued that 'we need a better understanding about the role of the effectiveness of the APS in Australian Indigenous affairs' observing that '… analytical work about the structure, role and effectiveness of the APS is largely absent in decision making' about the shape in public administration.[44] Patterson concluded that: 'the establishment of a critical stream and canon of knowledge focused on public administration in Aboriginal and Torres Strait Islander Affairs is urgently required.'[45]

Towards a New Policy Design for Self-Determination', *Australian Journal of Public Administration* 77, no. S1 (2018): S28–36.

42 Perche, 'Recalibrating the Machinery of Government for Indigenous Affairs', 29.

43 Megan Davis, 'Listening but Not Hearing', *Griffith Review* 51: Fixing the System (2016); Cited in Perche, 'Recalibrating the Machinery of Government for Indigenous Affairs',, 29.

44 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 4.

45 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 17.

d) The Theory of Governance Failure

In public policy studies there is a rich theoretical literature, which might inform the development of a canon of knowledge for which Patterson presses. Van der Steen *et al*. introduce a concept of governance relevant to policymaking where 'the success and failure of policy is dependent on how highly autonomous organisations perform and deliver what policy programs promise'. [46]

> 'Such organisations are not the extension piece of a policy system, nor are they the long arm of the Minister responsible for the service; they are autonomous entities that operate within a broad set of boundaries that provide a mandate for a highly diverse set of practices.'[47]

Van der Steen shows how analysing the effectiveness of policies devolved through such organisations challenges traditional analysis based upon dichotomies between policymaking and implementation or between government and contracted service providers:

> 'The absence of direct control and the mutual dependence of each other is what characterises these systems; success and failure comes from effectively or ineffectively operating within these dilemmatic characteristics'[48]

Accommodating autonomous organisations in this way necessitates a reconsideration of our understanding the success or failure of government policies. Van der Steen and his colleagues argue that it adds 'another layer' to the already rich public policy literature on the subject and conceptualises 'governance failure' far more broadly than narrower notions of 'policy failure' or 'organisation failure': 'governance failure' defined as 'the inability of a policy system for meta-governance of autonomous organisations that deliver the value

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46 Martjin van der Steen et al., 'How to See Failure: Attempts by the Inspectorate of Education to Detect and Disarm Failure in Dutch Education Policy', *Public Policy and Administration* 30, no. 3–4 (2015): 321.

47 van der Steen et al., 'How to See Failure', 321.

48 van der Steen et al., 'How to See Failure', 321.

promised in the policy program'.[49] Relationships are at the heart of Van der Steen's approach:

> 'In the context of layered policy systems, rather than looking at one of the two ends of the dichotomy (organisation or policy, policy or implementation, policy or compliance), it is more productive to look at success or failure at the level of the *relation* between the two'[50]

Since relationships are typically not static, Van der Steen *et al*.'s focus upon them makes for a dynamic and iterative understanding of governance and calls for 'reflection on how we conceptualise success and failure within these systems':

> '… Success or failure is not an outcome but rather a *range of activities*: the ability of the policy core (e.g., a Ministry) to steer autonomous organisations (e.g., schools, hospitals, universities) into the intended direction of policy, without the actual instruments or hierarchical powers to simply instruct them to do so.'[51]

If governance success is an ongoing range of activities, then the actions of governments in any specific instance may be judged according to their ability to achieve their desired ends in the context of the necessary relationships:

> 'Policy success and failure are far less a matter of a sound policy theory and well-assigned authorities and allocated means, but more the art of operating effectively in the complex relations in the system.'[52]

IV. Introducing the Case Study: Public Administration and First Nations Incarceration

I have stated above that this thesis is necessarily exploratory; in its first steps, I argue that it is also necessarily inductive. This is the first consideration in political science of the policy response to First Nations incarceration. It is also the first attempt to theorise the causal effect of governance systems

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49 van der Steen et al., 'How to See Failure', 324.

50 van der Steen et al., 'How to See Failure', 324.

51 van der Steen et al., 'How to See Failure', 324.

52 van der Steen et al., 'How to See Failure', 325.

underpinning the response. As a case study of potential governance failure, it is large, unusually complex, and – considered in its entirety from 1991 to 2021 – lengthy. This naturally raises the question of where to start. I choose to begin by setting out the public administration arrangements underpinning policymaking in the case study, working inductively from this appraisal back towards my methodology and use of theory. In this way, I intend to put the complexity of public administration in the case, which has been largely overlooked by other scholars, at the centre of my enquiry. Primary accounts of those involved in writing Royal Commission reports and the Commonwealth's policy response show that the complexity of these arrangements imposed constitutional, political and practical constraints upon policymakers.[53]

Any comprehensive policy response to First Nations incarceration must bridge two constitutionally distinct domains of governance, each with quite different structures of public administration within the Australian federation. The first, criminal justice policy, is primarily the responsibility of State and Territory Governments; the second, general Indigenous affairs policy, is primarily the responsibility of the Commonwealth. In practice, however, threaded through both criminal justice and Indigenous affairs policymaking in Australia is a third *de facto* domain of governance currently unrecognised in Australia's constitution: First Nations peoples' traditions of law and leadership that pre-date Australian colonisation and federation.

Of the Royal Commission's 339 Recommendations, two-thirds fell within the domain of criminal justice policy, focusing on police, prisons and reform of

53 See, for example: Johnston QC, *Royal Commission: National Report,* Volume 1; Tickner, *Taking a Stand,* Chapter 4.

the criminal justice system; the remaining third addressed First Nations disadvantage and other 'underlying causes' of incarceration which could, accordingly, be considered as part of the Commonwealth's Indigenous affairs policymaking.

a) Criminal Justice Policy

I begin my introduction of the case study from the Commonwealth government perspective because it is there that the policy response to First Nations incarceration originated. The Royal Commission was initiated by Prime Minister Bob Hawke in 1989; the policy response to its recommendations was initiated by Hawke's Labor Party successor, Prime Minister Paul Keating, in 1992, and led from the office of his Minister for Indigenous Affairs, Robert Tickner.[54] However, the starting point for any political scientist examining a policy response so initiated must be the fundamental fact that, under the Australian Constitution, the Commonwealth has no general law-making power over criminal justice policy.[55] A map of the Australian criminal jurisdictions is set out in Figure 1.1 below.

There is only a small Federal jurisdiction of criminal offences in those areas where the Commonwealth does have power to legislate, including crimes with an international dimension such as drug and terrorism offences, and legislated under the Commonwealth's 'external affairs power.'[56] Thus, while the Commonwealth had the power under the *Royal Commissions Act 1902* to initiate the Royal Commission, two-thirds of its recommendations lay beyond its

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54 See: Johnston QC, *Royal Commission: National Report,* Volume 1; Tickner, *Taking a Stand,* Chapter 4.

55 *Commonwealth of Australia Constitution Act* (1900) Chapter I and Chapter V.

56 See: *Commonwealth of Australia Constitution Act* Section 51(xxix).

authority to implement direct.[57] Tickner expressed the problem succinctly: 'A federal minister for Indigenous Affairs has no hope of effectively influencing the decisions of state police and prisons ministers.'[58]

The Commonwealth faced other obstacles to its responding to First Nations incarceration through the reform of criminal justice. The administration and implementation of criminal justice in Australia is governed by powerful legal norms well established in Western common-law jurisprudence generally and in Australian jurisprudence specifically. Two are particularly salient and are addressed in detail below: the doctrine of the 'rule of law' and the related goal of maintaining 'public confidence' in the criminal justice system; and the doctrine of separating judicial from legislative and executive power.

1. Governing Concepts: 'The Rule of Law', 'Judicial Independence' and 'Public Confidence' in Criminal Justice.

A unique normative constraint upon policymaking in criminal justice is that the process of *how* a policy is made and implemented is understood – by scholars and practitioners alike – to be just as significant in considering a policy to be successful as whether the policy achieves its specific aims. The focus on process in criminal justice policy arises from the doctrine of the 'rule of law', a governing concept within the policy domain, and the related sub-concepts of 'independence of the judicial system' and of 'public confidence' in criminal justice. While not specifically articulated in the Royal Commission reports or by the responsible Ministers, from the operation of these concepts we can derive a theory of change for *how* the policy response to First Nations incarceration was intended to work.

57 *Royal Commissions Act* (1902) Section 1A.

58 Tickner, *Taking a Stand*, 80.

The rule of law is a foundational concept in the Western democratic tradition.[59] While frequently referenced, its meaning is debated.[60] In 2010, Lord Bingham identified eight principles that have come to be widely accepted as being necessary components of the 'rule of law':

1. The law must be accessible and so far as possible intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purposes for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. The law must afford adequate protection of fundamental human rights.
6. Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve.
7. Adjudicative procedures provided by the state should be fair.[61]

In criminal justice policy in Australia, these principles directly constrain policy-makers' ability to change behaviour through lawmaking and criminal sanctions. For example, consistent with Bingham's third principle that *the laws of*

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59 Aristotle, *Politics* (Oxford: Clarendon Press, 1905) See, Book 3.

60 For a recent example: Chief Justice Allsop AO, 'Chief Justice of the Federal Court: The Rule of Law Is Not a Law of Rules' (Annual Quayside Oration, Perth, November 2018).

61 See: Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010) Chapter 1.

the land should apply equally to all, Australian courts have consistently held that Aboriginality is not a mitigating factor in sentencing, regardless of the goal of reducing incarceration rates.[62] Australian courts have also reiterated the exclusivity of Anglo-Australian criminal laws to the exclusion of Aboriginal customary laws, arguing that recognition would be adverse to the Crown's sovereignty.[63]

Beyond the direct impact on law-making, two related sub-concepts of the rule of law may be operationalised to demonstrate even more significant second-order constraints on policymakers and other actors in the policy domain: the independence of the judicial system; and the twin notions of public confidence in the judiciary and the moral authority of the law. With regard to judicial independence, the Australian Bar Association describes it as a 'fundamental aspect of law and governance in Australia.'[64] While parliaments are sovereign in Australia and responsible for legislating criminal laws, '… in interpreting and applying the law, judicial officers act independently and without interference from the parliament or the executive.'[65] In reciprocal fashion, there is an ethical obligation upon police and corrections officers, upon court officials, and upon judges and many lawyers, to remain apolitical.[66] The NSW Police Force's social media policy is illustrative: 'employees must take care not to compromise the employee's ability to serve the government of the day in a politically neutral

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62 Most recently: *R Bugmy v The Queen* (2013) 249 CLR 571 (High Court of Australia).

63 *Coe v Commonwealth*, (1993) 68 ALJR 110 (High Court of Australia); *Mabo v Queensland* (No. 2) (1992) 174 CLR 1 (High Court of Australia).

64 Australian Bar Association, '"Introduction: The Judiciary"', 2019, http://austbar.asn.au/policy/the-judiciary.

65 Australian Bar Association, 'Introduction: The Judiciary'.

66 See, for example: Terry Goldsworthy, 'The Australian Federal Police Needs to Do Its Job without Political Interference', *The Conversation*, 26 October 2017.

manner'.[67] Meanwhile, for lawyers, perceived political commitments are significant for and can be a disadvantage in securing judicial appointments later in their careers.[68] In this way, second-order effects of judicial independence infuse the criminal justice policy domain, significantly constraining certain actors in their freedom to identify and criticise a policy that they think unsuccessful or to whose consequences they have objections.

The second sub-concept is captured in the twin notions of 'public confidence in the judiciary' and the 'moral authority of the law'. Both of these notions capture the intended *effect* of criminal justice policy: *how* it is intended to shape human behaviour in the policy domain. Australian jurists frequently reference the importance of maintaining public confidence in the judiciary as a concern that informs the process (the *how*) of criminal justice.[69] Justice Susan Kenny of the Australian Federal Court has spoken precisely to this point:

> 'In a society such as ours, the courts need something other than the force of the State if they are to carry out their task authoritatively. Part of the court's authority rests upon public confidence in the judiciary. The confidence to which I refer is not a matter of being confident that a regime will enforce its commands; that is more a matter of confidence prediction or expectation. Rather the confidence to which I refer is confidence in the courts as the appropriate agency for adjudicating disputes.'[70]

Justice Kenny cites the jurisprudence of H.L.A Hart to describe the effect of this public confidence through building the law's 'moral authority':

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67 Public Affairs Branch New South Wales Police Force, 'Personal Use of Social Media Policy and Guidelines' (New South Wales Police Force, 14 August 2015), 7.

68 See for example: 'What does the Ideal High Court Judge Look Like?'' Gabrielle Appleby, 'Appointing Australia's Highest Judges Deserves Proper Scrutiny', *Australia's Magna Carta Institute/The Conversation*, 11 December 2014.

69 See: Justice Murray Gleeson, 'Confidence in the Judiciary' (Judicial Conference of Australia, Launceston, Tasmania, 27 April 2002); Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium', *Federal Judicial Scholarship* 1 (1999); Also: Murray Gleeson, *The Rule of Law and The Constitution*, The Boyer Lectures (Sydney: ABC Books, 2000); Allsop AO, 'Chief Justice of the Federal Court: The Rule of Law Is Not a Law of Rules'.

70 Kenny, 'Maintaining Public Confidence in the Judiciary'.

> '…According to Hart, the propositions of law are not true just because they were the commands of people who were habitually obeyed, but by virtue of convention that represents the community's acceptance of a scheme of rules empowering such people or groups to create a valid law. The justification for judicial authority is, therefore, the community's acceptance of the authority of the judiciary. To say, as the courts not uncommonly do, that judicial authority rests on public confidence is, perhaps, just another way of saying the same thing. [71]

2. <u>The theory of change underpinning the policy response to First Nations incarceration</u>

From the operation of these governing concepts under the doctrine of the rule of law, it is possible to sketch out an initial understanding of the theory of change underpinning the policy response to First Nations incarceration. It has become popular in Australian public policy to articulate the 'theories of change' underpinning those policies that seek to create behaviour change of which reducing prejudice in criminal justice and reducing offending, both of which underpin the reduction of incarceration, are examples.[72] Articulating such theories adds analytical rigour to a policy response and assists in the assessment of success or failure against key performance indicators.[73] In the early 1990s, when the current policy response was initially conceived, it was uncommon to articulate a theory of change in policymaking. However, reading the Royal Commission's reports in light of the governing concept of the rule of law it is

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71 Kenny, 'Maintaining Public Confidence in the Judiciary' citing at 17; H.L.A Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 96.

72 Lynelle Briggs, Australian Public Service Commissioner, cited in Australian Public Service Commission, 'Changing Behaviour: A Public Policy Perspective' (Canberra: Australian Public Service Commission, 2008); See also: Australian Public Service Commission, 'Tackling Wicked Problems: A Public Policy Perspective' (Canberra: Australian Public Service Commission, 31 May 2012).

73 See: Simon Ruda and Katherine Tindall, 'BX2018: Taking a Behavioural Approach to Stopping Crime', BX2018 (Sydney: Behavioural Insights Team, 30 May 2018); Deborah Gate, 'Developing Theories of Change for Social Programmes: Co-Producing Evidence Supported Quality Improvement', *Nature* 4 (17 June 2018): Article number: 90; Lars Tummers, 'Public Policy and Behaviour Change', *Public Administration* 79, no. 4 (October 2019).

possible to identify some important aspects of their understanding of *how* the policy response would reduce incarceration.

First, consistent with the doctrine of the rule of law, a concern of the Royal Commission was to restore public confidence in criminal justice among First Nations people. The Royal Commission was aware of the scale of this task: Chapter 10 of the national report was devoted to the 'legacy of history' in First Nations incarceration because:

> '…It helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society.'[74]

I summarise the history of First Nations people and criminal justice in Chapter Two. For the present, it is sufficient to note that the Royal Commission understood that confidence in criminal justice among First Nations people had collapsed.'[75] With regard to public confidence in policing, the Commission noted the First Nations' historical experience:

> 'Historically the police have acted as the consistent point of Aboriginal contact with colonial power. This is pertinent to the present situation, for past history relating to police action is very much alive in the minds of Aboriginal people.'[76]

The Commission's appraisal of public confidence in the court system was little better:

> '…Aboriginal experience of the court system was one of discrimination and repression. The courts were seen to be acting on behalf of other interests and to be imposing a foreign culture. That historical experience remains very much the perception of the courts today held by many Aboriginal people.'[77]

The National Commissioner, Elliot Johnson understood this conflict to have a causal effect on Aboriginal incarceration: 'It seems to me that the over-

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74 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991).

75 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.3.8.

76 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 10, Paragraph 10.5.1.

77 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 10, Paragraph 10.6.7.

representation of Aboriginal people in custody (and the deaths of some of them) are part of the ongoing conflict between 'coloniser' and 'colonised.'[78] He set out his reasoning within the terms of rule of law doctrine:

> 'On the one hand, non-Aboriginal people assert that laws are created only after consideration is given to the views of all members of society and are enforced fairly against any member of society who breaches them. On the other hand, it is Aboriginal people's observation that, in practice, their opinions do not count when the laws are formulated, that only Aboriginal people appear to be the target (or at least the main target) of the laws and in the enforcement of the laws police behaviour is frequently rude, harsh, insulting or culturally ignorant.'[79]

In an evocative metaphor, Commissioner Johnson likened this to turning around a battleship:

> 'The process of change is a difficult one, and has a long way to go. Like a battleship under full steam, the traditional relationship between police and Aboriginal people has a tremendous momentum from the past, and it will take great effort to turn it round.'[80]

3. State and Territory Governments

Having thus outlined a grave and likely long-lasting crisis in criminal justice policy, the Commonwealth faced the problem of its constitutionally constrained authority over policymaking in that area. Since the Commonwealth had constitutional power to legislate 'on behalf of Indigenous Australians', it naturally turned primarily to policymaking in that domain – which I introduce in the next section of this appraisal. However, two observations regarding State and Territory Governments are necessary before leaving this introduction of criminal justice policy.

First, even without a legislative power, the Commonwealth was still able to exercise national leadership and influence the criminal justice policy-making

78 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 10, Paragraph 10.1.3.

79 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.2.13.

80 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.4.5.

agenda. Upon noting the constraints upon the Commonwealth's authority to act, Minister Tickner immediately stressed this point: '…hence the importance of listing the implementation of [the Royal Commission] as an agenda item for future ministerial forums of all relevant ministers'[81], whilst acknowledging that: 'Even then, the capacity to influence state and territory decision-making is limited.'[82] In the case of the policy response to First Nations incarceration, the Commonwealth overcame this weakness by delegating the formulation of the policy response to a Royal Commission, a decision with consequences that will considered in Chapter 4.

b) Indigenous Affairs Policy

At the time of Federation in 1901, the new Australian Constitution expressly prohibited the Commonwealth Government from making policies on behalf of First Nations people: Section 51, which outlined the new parliament's powers to legislate for the 'peace, order and good government of the Commonwealth', also provided that it was able to legislate 'for the people of any race, *other than the Aboriginal race in any state*, for whom it is deemed necessary to make special laws.'[83] Instead, State and Territory governments controlled Indigenous affairs policy, as they had prior to Federation. This practice was changed in 1967, when a referendum supported by 90 per cent of Australians and unanimously among parliamentarians altered the Constitution 'so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be

81 Tickner, *Taking a Stand*, 80.

82 Tickner, *Taking a Stand,* 80.

83 Commonwealth of Australia Constitution Act Section 51, Clause xxvi (Amended); Cited in Mark Moran, 'The Courage to Reform: Fixing the Commonwealth's Indigenous Policies', *Griffith Review* 60, no. (Online) (30 April 2018): 2, (Emphasis in Moran's original).

counted in reckoning the Population.'[84] Thus, from 1967, the Commonwealth parliament was empowered to legislate on behalf of First Nations people.

The Commonwealth's late entry into Indigenous affairs policymaking has contributed to complex and unsettled public administration arrangements.[85] Public administration arrangements in Indigenous affairs have undergone nine major re-structures during the thirty-year case study, as I show in Chapter Two's discussion of the history of policymaking.[86] However, for the purpose of commencing my enquiry two conflicting features of Commonwealth policymaking in Indigenous affairs warrant consideration here because of their significant effects upon the policy response to First Nations incarceration: (1) the Commonwealth possesses significant authority over Indigenous affairs policymaking and agenda setting; but (2) the implementation of Commonwealth policies is largely devolved, partly to State and Territory Governments and partly to First Nations organisations.

1. Policymaking and Agenda Setting

Commonwealth Prime Ministers and Ministers of Indigenous Affairs have had ample authority to determine the broad direction of Indigenous affairs policy. Prime Ministers have occasionally employed overriding legislation under Section 109 of the Constitution in order to override State Governments when legislating

84 'Image of Ballot Paper: 1967 Referendum - Ballot Papers', Item Barcode: 1843611 (Commonwealth Electoral Office, National Archives of Australia, 1967); Cited in Moran, 'The Courage to Reform', 2.

85 See: William Sanders, 'Administrative Arrangements in Australian Indigenous Affairs: Will They Ever Settle?', *Australian Journal of Public Administration* 76, no. 4 (2017): 400–402.

86 Moran, 'The Courage to Reform' Citing an observation by Michelle Patterson, a senior bureaucrat within the Department of Prime Minister and Cabinet; Also, Sanders, 'Administrative Arrangements in Australian Indigenous Affairs'

for First Nations.[87] For example, the Whitlam Government overrode racially discriminatory State laws and policies in Queensland in 1975; [88] and the Keating Government overrode more limited State government Indigenous native title policies when it legislated national benchmarks in legislation in 1993.[89]

Moreover, policymaking for First Nations people has also remained prominent in national politics – despite only directly concerning 3% of the population. Tickner noted that every twentieth-century Prime Minister following 1967 took a 'strong personal interest in advancing Indigenous Affairs.'[90] This observation can be extended to present times: Prime Ministerial interest in Indigenous affairs reached its height with Prime Minister Tony Abbott's declaration that he was 'Prime Minister for Indigenous Australians' and absorption of the Ministry into his own Department of Prime Minister and Cabinet in 2013. One of the few political scientists to specialise in Indigenous affairs, William Sanders, has described it as the 'moral *cause célèbre* of Australian nationhood'.[91]

For my purposes it is relevant to note that in formulating and announcing the policy response to First Nations incarceration, all relevant actors –- Aboriginal leaders, activists, Royal Commissioners, as well as the Prime Minister and Commonwealth Minister for Indigenous affairs and staff –- took for granted

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87 *Commonwealth of Australia Constitution Act* Section 109.

88 See: Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs - the Untold Story* (Brisbane: University of Queensland Press, 1997); Cited in Moran, 'The Courage to Reform' Footnote (iv).

89 See: *Native Title Act 1993* (Cth); For Minister for Indigenous Affairs, Robert Tickner's recollection, see: Tickner, *Taking a Stand,* 81.

90 Tickner, *Taking a Stand*, 89.

91 Sanders, 'Administrative Arrangements in Australian Indigenous Affairs', 402.

the Commonwealth's authority to initiate the policy response to First Nations incarceration.[92]

2. Implementation

Despite its leadership in setting the policymaking agenda in Indigenous affairs, the Commonwealth's control over the implementation of its policies is piecemeal. After gaining the power to legislate in the 1967 referendum, the McMahon and Whitlam Governments proceeded cautiously with regard to public administration. In addressing 'State Ministers concerned with Aboriginal Affairs' in 1973, Prime Minister Whitlam declared his 'government's intention to 'assume full responsibility for policy' but not to 'establish an omnibus Department of Aboriginal Affairs'. Instead, his government would:

> '…Seek to devolve upon a wide range of Federal, State and local authorities, as well as upon organisations of Aboriginals themselves, responsibility for carrying out policies decided upon by my Government. These authorities would be responsible for Aboriginals in the same matters and in the same way as they are now functionally responsible for the community generally.'[93]

Alongside State, Territory and local governments, Whitlam's introduction of Indigenous organisations into the implementation of Commonwealth policy reflected his government's commitment to the new policy paradigm of First Nations 'self-determination'. It opened a second avenue of devolved Commonwealth policy, outside of Government and further complicating implementation. Below, I outline each of these in turn:

i. State, Territory and Local Governments

As Moran notes in his account of the development of public administration following the 1967 referendum, devolution of Commonwealth policy

92 See Tickner, *Taking a Stand*, 74–82.

93 The Hon. Gough Whitlam, 'Aborigines and Society: Press Statement', 1(2) (Canberra: Australian Government Digest, 1973), 697.

implementation to State and local governments is commonplace in the Australian Federation.[94] With regard to policies made under the Commonwealth's Indigenous affairs power, specific parcels of funding from the Commonwealth budget – and tied to the performance of objectives determined by the Commonwealth Ministry for Indigenous Affairs – are provided to State, Territory and local governments. The intention of this tied funding is to secure implementation of the Commonwealth's indigenous affairs agenda *within* State and Territory government institutions: programs for First Nations people are implemented alongside mainstream programs in State and Territory Government-run schools, hospitals, police forces; similarly they are implemented alongside local government managed municipal servicing, road maintenance, community spaces, and other municipal facilities. The complexities and inefficiencies of this arrangement in Indigenous affairs are exacerbated by the dispersed and heterogeneous First Nations population living alongside their non-Indigenous compatriots.

The Commissioners of the Royal Commission were well aware of this inefficiency and concerned about its impact upon their recommendations in socio-economic policy. The National Commissioner's Report gives a good example with regard to the maintenance of access roads to remote Aboriginal communities in the NT. Roads outside of towns in the NT are maintained by the Territory Government and funded by the Commonwealth through 'Special Purpose Grants'. (SPGs):[95]

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94 Moran, 'The Courage to Reform, 7.

95 Johnston QC, *Royal Commission: National Report, Volume 1,* Paragraph 20.5.11.

> 'Under current legislative and administrative practices there is no mechanism by which the Commonwealth can ensure that Local Government Councils (LGCs) provide a fair effort in respect of maintaining Aboriginal community access roads within these council's boundaries. The States alone can secure that outcome. The Commonwealth Department of Transport and Communications has a policy that any incorporated body with responsibility for roads provision could be eligible for grants from Commonwealth Local Road Funds. That program has been used for funding maintenance to some Northern Territory outstations.'[96]

The Royal Commission's example highlights the complexity of devolved governance in Indigenous affairs.

ii. *Indigenous Sector*

The First Nations governance and leadership traditions that existed before colonisation have never been formally recognised in the Australian Constitution. Nevertheless, constitutionally recognising an First Nations voice in national affairs is a long-standing objective of many Australians – expressed most recently in the *Uluru Statement from the Heart*, articulated by a national gathering of First Nations leaders in May 2017.[97] Regardless of legal recognition, the more than 250 Indigenous cultural and language groups in Australia prior to colonisation have continued to govern their own affairs and – where possible – their traditional country. Aboriginal leader and legal academic Marcia Langton has coined the term 'ancient jurisdictions' (see Figure 1.2) to describe the domain of these leaders.[98] Moran supports that characterization and takes issue with the view that the concept of jurisdiction should be limited to Commonwealth, State and Territory governments: 'The extent to which Indigenous peoples control these jurisdictions varies substantially. Those that

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96 Johnston QC, *Royal Commission: National Report, Volume 1,* Paragraph 20.5.10.

97 Referendum Council, 'Uluru Statement from the Heart' (Uluru, N.T.: National Constitutional Convention, May 2017).

98 Marcia Langton and Lisa Palmer, 'Indigenous Peoples, Settler States and the Significance of Treaties and Agreements: Overview of the Series' (Negotiating Settlements, Melbourne: Institute of Postcolonial Studies, 2002). See also Moran, 'The Courage to Reform', 10.

have been most successful have been able to define and maintain territorial jurisdictions and, better still, have their accountability and responsibility arrangements – both political and administrative – enshrined in legislation.'[99]

Since the Whitlam Government's announcement of the policy of 'self-determination' in 1972, the Commonwealth has chosen to engage directly with these ancient jurisdictions, although the nature of this engagement has varied according to the changes in policy-making paradigms outlined in Chapter Two. During the policy response to First Nations incarceration, two avenues of engagement have been salient: first, through ATSIC; and second, through regional and local First Nations corporations.

iii. ATSIC

On 5 March 1990, the Hawke Government devolved much of its policy-making power and implementation in Indigenous affairs to ATSIC, an elected, representative body of First Nations people. This devolution continued until the Howard Government abolished ATSIC in 2004 and significantly altered public administration in Indigenous affairs. ATSIC's representative structure was based around 35 ATSIC regions, each of which elected a Regional Council.[100] In addition to being responsible to their own constituencies, ATSIC's elected officials were accountable to the Commonwealth Parliament through the Minister for Indigenous Affairs under the Westminster doctrine of ministerial accountability.

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99 See also Moran, 'The Courage to Reform', 10.

100 Angela Pratt, 'Make or Break? A Background to the ATSIC Changes and the ATSIC Review', Current Issues Brief (Canberra: Australian Parliament House Library, 26 May 2003).

Alongside the representative arm of ATSIC was an amalgamated administrative function.[101] At its height, the Commission's administrative arm comprised 1250 Commonwealth public servants. These public servants took direction from ATSIC's elected officials but reported to the Commonwealth Minister through a CEO of the Commonwealth's appointment.[102] ATSIC's administrative arm managed ATSIC's programs, including the implementation of decisions taken by the elected arm about loan and grant applications and the direction of funding to particular service delivery organisations. In the year before its abolition ATSIC administered $1.3 billion in funding from the Commonwealth, which represented approximately 46% of the $2.8 billion identifiable Commonwealth expenditure on Indigenous affairs in the 2003-04 financial year.[103]

iv. *First Nations Corporations*

Despite the prominence of ATSIC in crafting the policy response to First Nations incarceration, its role in implementing the policy response was secondary to the other expression of self-determination, Indigenous corporations. Indigenous corporations were the original vehicle for self-determination recognised by Australian Governments, starting with the Whitlam Government in 1973. These are organisations incorporated under specific legislation: first, the *Aboriginal Councils and Associations Act 1976* (the '*ACA Act*') and then the *Corporations (Aboriginal and Torres Strait Islander) Act 2005* (the '*CATSI Act*'). Providing

101 John Chesterman and Brian Galligan, *Citizens without Rights* (Sydney: Cambridge University Press, 1997), 213.

102 Pratt, 'Make or Break?'.

103 See: Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs', Current Issues Brief (Canberra: Australian Parliament House Library, 9 August 2004).

funding directly to Indigenous corporations presented Commonwealth policymakers, including ATSIC, with an alternative avenue for implementing the policy response to First Nations incarceration – bypassing State and Territory Governments to influence local-level outcomes directly.

Within the ancient jurisdictions outlined above, First Nations clans and nations had their own mechanisms for collective organisation many of which continued to function alongside, or more frequently in spite of, colonial authorities. As Rademaker and Rowse describe, Indigenous corporations were initially an attempt to recognise these existing Indigenous forms of organisation:

> '…We begin our story in 1970 with Charles Rowley's suggestion that the Aboriginal 'group' would no longer be treated by governments as a 'disappearing liability' (as assimilation policy tended to assume), but as 'an asset, to be endowed, by its own efforts, with enduring legal personality'. …The 'fringe group' was 'the raw material for a corporation in perpetuity.'[104]

An association between many Indigenous corporations and traditional Indigenous authority was cemented by the simultaneous recognition of Aboriginal land rights, which are awarded on the basis of traditional connections to country and are usually held by corporations.[105]

Indigenous corporations became a key-stone of the self-determination or self-management agenda of Commonwealth Governments between 1967 and the commencement of the Royal Commission Barrie Dexter, the Director of the Office of Aboriginal Affairs from 1967 to 1972 and Secretary of the new Federal Department of Aboriginal Affairs (DAA) from 1973-1976, noted that Indigenous

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104 Charles Dunford Rowley, *Outcasts in White Australia* (Australian National University Press, 1971), 425; Cited in: Katherine Curchin and Tim Rowse, '"Taxpayers' Money"? ATSIC and the Indigenous Sector', in *Indigenous Self-Determination in Australia*, ed. Laura Rademaker and Tim Rowse (Canberra: ANU Press, 2020), 144.

105 Justice A.E. Woodward, 'Aboriginal Land Rights Commission: Second Report April 1974' (Canberra: Government Publishing Service, 1974), 65 Paragraph 65; Cited in Curchin and Rowse, 'ATSIC and the Indigenous Sector', 144.

corporations were 'crucial to so much we were trying to do'.[106] Commissioner Johnson, in writing the Royal Commission's National Report, noted that First Nations people 'have accepted the concept of representation through organisations' and predicted that trust in these organisations would continue to grow.[107] At the time of the Royal Commission there were 1,024 corporations registered under the ACA Act and supported by government grants.'[108] Government grant-funded First Nations corporations delivered services in almost all aspects of life in First Nations communities – from art centres and sports associations to health, education and legal services.

To begin my enquiry, three observations may be made about the role of Indigenous corporations on the basis of the Royal Commission's reports and the limited studies that have been made of their operation:

The first is that, from the perspective of policymakers, they are both highly heterogeneous and, in many respects, autonomous. Indigenous corporations are as diverse as the ancient jurisdiction from which they are drawn. While First Nations people are 'linguistically distinct from any other known group outside of Australia' and 'share a fundamentally similar religious cosmology not found elsewhere',[109] Sullivan notes that 'there is as much internal

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106 Barrie Graham Dexter, *Pandora's Box: The Council for Aboriginal Affairs 1967-1976* (Southport, QLD: Keeaira Press, 2015), 336; Cited in Curchin and Rowse, 'ATSIC and the Indigenous Sector'.

107 Johnston QC, *Royal Commission: National Report, Volume 2,* 525–26; Cited in Curchin and Rowse, 'ATSIC and the Indigenous Sector', 147.

108 Office of the Registrar of Aboriginal Corporations (ORAC), 'Annual Report 1989-90' (Office of the Registrar of Aboriginal Corporations (ORAC), 1990); Cited in Curchin and Rowse, 'ATSIC and the Indigenous Sector'.

109 Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment* (Canberra: Aboriginal Studies Press, 2011), 8.

diversity in Aboriginal Australia as external diversity.'[110] More than 250 language and cultural groups comprise Indigenous Australia. They are strikingly diverse, both in terms of their traditional culture and their historical and contemporary experience of colonisation.[111] This heterogeneity has, at times, frustrated Government policy-making, especially at the local level. It has also complicated pan-Aboriginal initiatives to build identity and collective action.[112] The heterogeneity of Indigenous Australia formalised through the relative autonomy of Indigenous corporations. The Royal Commission's reports cite examples of the concern among Indigenous corporations to retain their financial autonomy and avoid absorption into Government.[113] National Commissioner Johnson stressed this autonomy. Drawing on the example of the NT, he argued that 'strong and effective Aboriginal organisations' could be understood as being, 'at least in part', in 'a position of negotiation with the state.'[114]

Second, Indigenous corporations were understood by the Royal Commission to be dominant at the local level and crucial to the success or failure of policies. Noting examples of other successful policies in criminal justice, the National Report argued in Chapter 12: '**...**the key is strong Aboriginal organisations, whether these take the form of local government councils or other

110 Sullivan, *Belonging Together,* 8.

111 R.M.W. Dixon, *The Languages of Australia*, 2nd ed. (Melbourne: Cambridge University Press, 2010), 1; see also Josephine Flood, *The Original Australians: The Story of the Aboriginal People* (St Leonards: Allen and Unwin, 2006).

112 See: Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Crows Nest, NSW: Allen and Unwin, 2009).

113 See for example, the case of corporations in Alice Springs Town Camps seeking to retain financial autonomy from Alice Springs Town Council Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 12, Paragraph 12.2.29.

114 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 12.1.24.

autonomous organisations…'[115] This informed their recommendations. The continuing significance of the local to the success or failure of policies has been confirmed thirty years later by other observers of public administration in Indigenous Affairs. Drawing upon experience working in development programs in remote Indigenous Australia, Moran has argued:

> 'The territorial jurisdictions that matter when looking to achieve social development outcomes are at the local level, regardless of whether the location is remote, rural or urban. Policy and legislative frameworks at a Commonwealth and state/territory level set the field of play, but transformational human and social change are inherently interpersonal and transactional, played out face to face. Running between meetings at Centraplaza in Woden in Canberra, it might be easy for public servants to lose sight of this practical truism. PM&C, or whichever Commonwealth agency has the lead role in the future, is not itself the primary site of Indigenous development.'[116]

Finally, the Royal Commission envisaged a specific, 'vital role' for Indigenous organisations in their theory of change to reduce First Nations incarceration consistent with the rule of law: repairing relations between First Nations communities and the institutions of criminal justice.[117] Their confidence in this devolution of policy was due to their observation of 'some remarkable programs which Aboriginal people and their organisation and police services and their local personnel' had achieved.[118] The Royal Commission was also hopeful that Indigenous corporations would have an additional indirect effect, reducing underlying causes of incarceration through their example:

> 'Where Aboriginal communities or organisations have acquired funds and property and conduct a range of activities, their spokespersons are able to speak with a new confidence and cannot be easily dismissed. Whereas the Aboriginal people who were not in conflict with the law tended in the past to be inconspicuous, accepting of assimilation and unassertive, today they are

115 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 12.2.15.

116 Moran, 'The Courage to Reform', 10.

117 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.5.38.

118 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.2.10.

increasingly able to assert themselves and their Aboriginality through organisations and communities.'[119]

[119] Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.4.3.

Figure 1.1: 'Criminal Jurisdictions' - Map of State and Territory Jurisdictions in Australia



Figure 1.2: 'Ancient Jurisdictions' - Map of Aboriginal Language and Cultural Groups in Australia

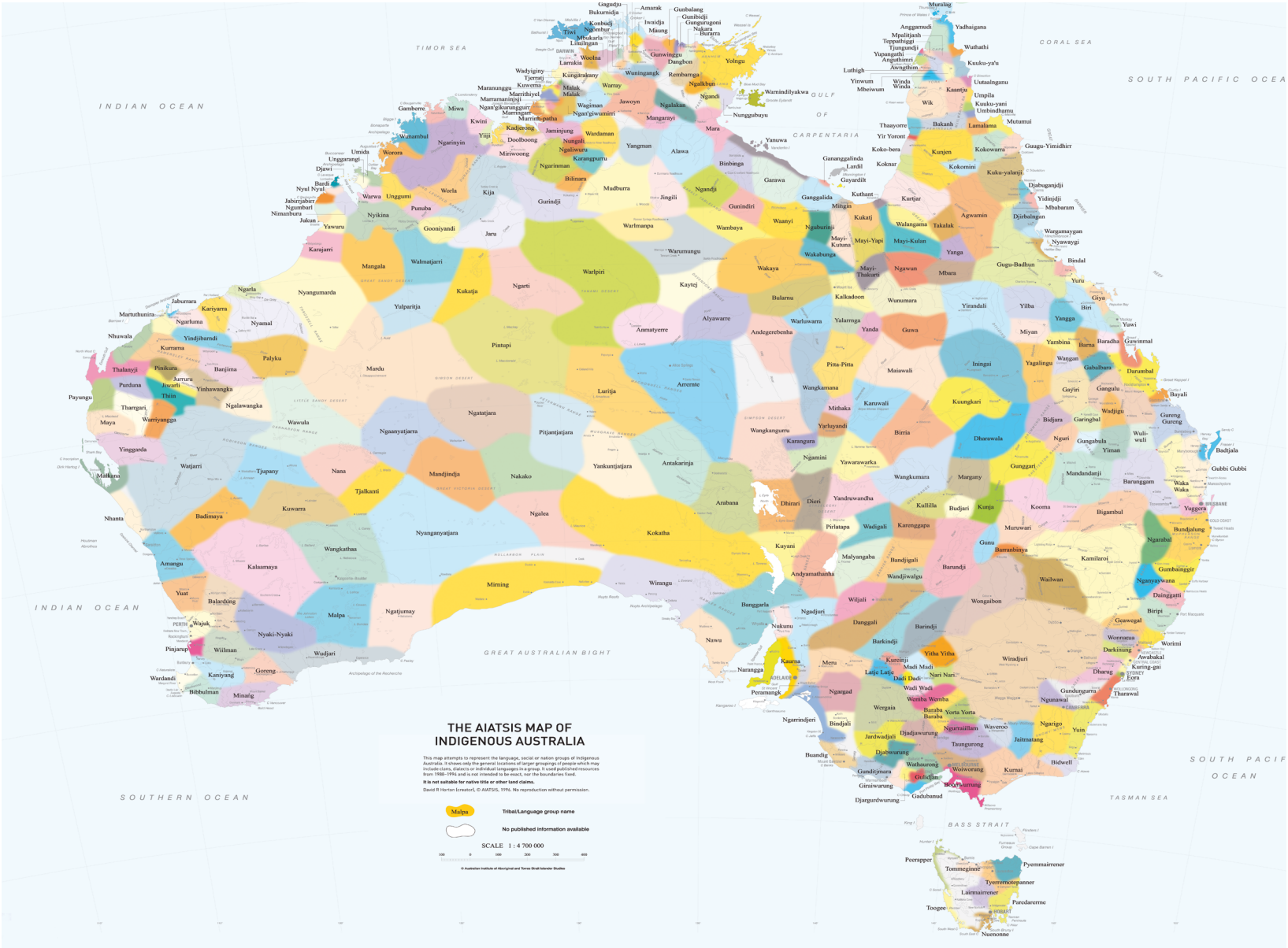
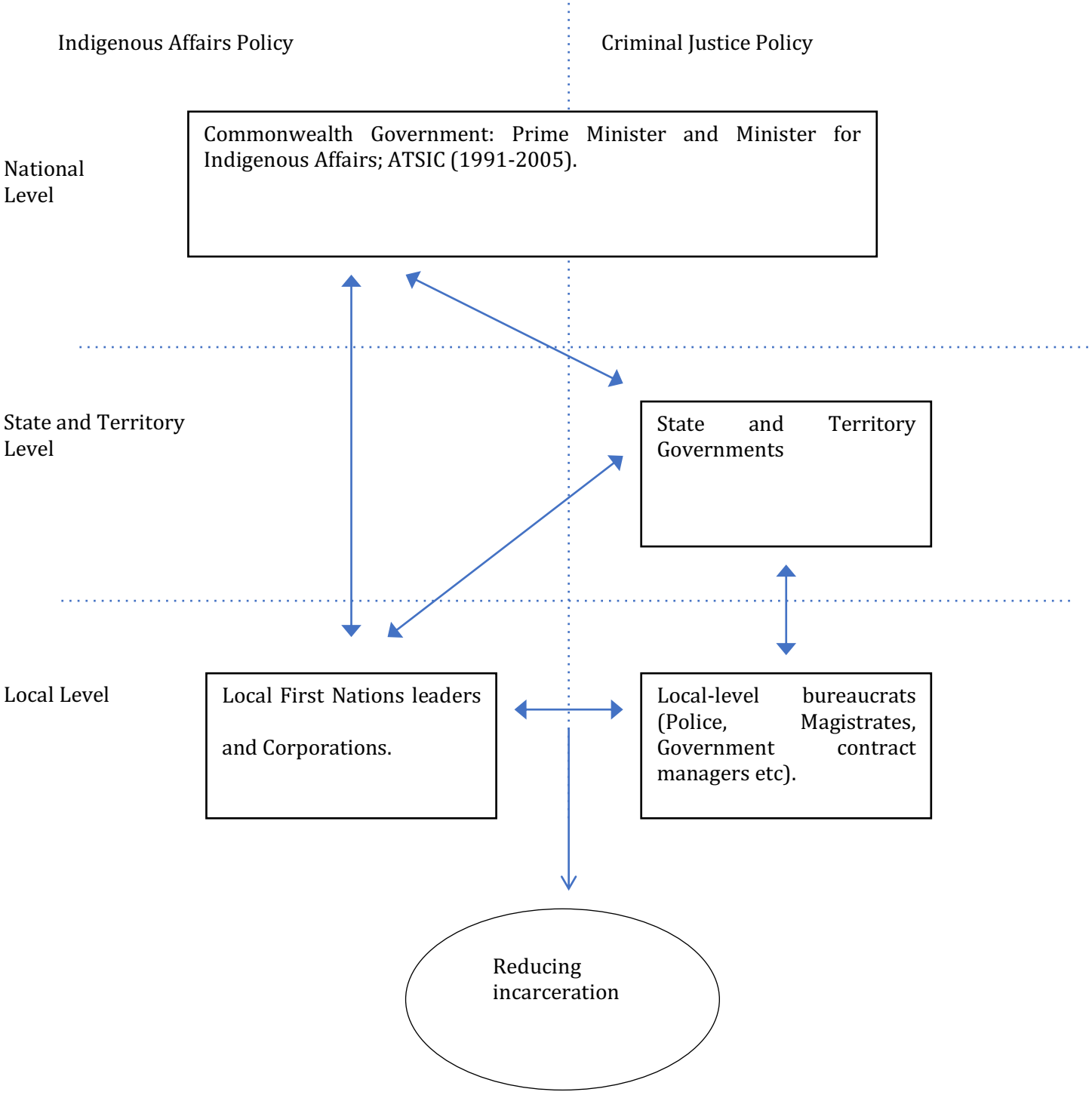


Figure 1.3: Public Administration Arrangements Underpinning the Policy Response to First Nations Incarceration



V. Methodology

a) Methodological Challenges

In the previous section I outlined the public administration arrangements underpinning the policy response to First Nations incarceration after 1991, with a view to explaining their role in its failure. From that initial appraisal, three methodological challenges are apparent for the would-be theorist:

1. First, the scale of the case study is vast – it is stretched across both *space*, with numerous devolutions, sub-jurisdictions and localities, and *time*, across a thirty-year time period;
2. Second, the causal effect of governance systems is complex – consistent with the doctrine of the rule of law, processes of government were understood to have causal effect in the policy response to First Nations incarceration, but potentially an indirect and complex one; and,
3. Third, the case study is heterogeneous – the local level of governance, understood as critical to the success of policy response, is notably heterogeneous in Indigenous Australia.

Methodological challenges such as these bedevil the study of public policy in Australian Indigenous affairs and might contribute to explaining political scientists' relative neglect of the field. Moran, one of the few scholars studying the effectiveness of policies in this area has reflected on similar difficulties:

> 'I have spent the past 12 months looking for a standard of evidence that might sort through this complexity, to find the best performers and team players. I have looked closely at randomised control trials, reverse cross-over (quasi-experimental) design, comparative case study analysis, process tracing, Bayesian analysis and fiscal ethnography…The problem is that there are just too many programs for too few people.

> It is too causally dense, with too many conjunctions and too few who are not "treated" who might form a control.'[1]

Certainly the scale, complexity and heterogeneity of the case study makes it unworkable to study the policy response to First Nations incarceration in the same manner that van der Steen *et al*. study governance failure in the Dutch inspectorate of education: through participatory research methods.[2] However, I consider van der Steen *et al*.'s argument that 'insight into the dilemmas of meta-governance failure helps to further an agenda for research and to improve the practical workings of organisations assigned to that task' to be equally applicable in the context of the policy response to First Nations incarceration.[3] Studying *governance failure* in this larger and more complicated context requires a different methodological approach. In this section I address three methodological difficulties posed by the case study that shape my approach

1. Scale: A focus on principal-agent delegations

The first challenge facing an application of theorising the role of governance factors in the policy response to Indigenous affairs is its scale. Van der Steen *et al*.'s conception of governance failure is similarly broad: 'the inability of a policy system to deliver the value promised in the policy program'.[4] But Van der Steen *et al*. also argue that dynamic and ongoing relationships with autonomous agents are critical to the success or failure of governance in public administration. They understand the success or failure of policies to be 'a dynamic process that evolves over time, rather than a fixed, stable and

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1 See: Mark Moran, 'How Community-Based Innovation Can Help Australia Close the Indigenous Gap', *The Conversation*, 4 March 2016.

2 van der Steen et al., 'How to See Failure', 327–35.

3 van der Steen et al., 'How to See Failure', 323.

4 van der Steen et al., 'How to See Failure', 321.

almost atemporal relation between cause and effect'.[5] Intuitively, both of these concepts resonate with the case of the policy response to First Nations incarceration: policymaking was notably devolved, relying on State and Territory governments as well as autonomous local organisations and leaders; moreover, Royal Commissioners and policymakers understood change to occur in part through a dynamic and continuing process of restoring public confidence consistent with the rule of law. However, the policy response was also understood to take effect over sufficiently long a period as to be compared to turning around 'a battleship under full steam.'[6] How are we to study governance relationships in sufficient detail over a thirty-year period?

Van der Steen *et al*. apply their theory of governance to a case study of interventions by the Dutch Inspectorate of Education to detect and disarm failings at the school level in Dutch education policy. They undertook participative research at the invitation of the Dutch Ministry of Education, in two projects that dealt with underperforming schools, in order to study how the Inspectorate operated between the policy core and the schools.[7] This methodology was appropriate to van der Steen *et al*.'s specific interest in a specific manifestation of governance: the ability of the policy core to intervene to prevent imminent failure in struggling schools.[8] However participative research is less suitable to the more common situation of governance failure where a long-standing but largely unsuccessful set of policies continues for many years in a situation of apparent neglect from the policy core – as is the case with the policy response to First Nations incarceration. In these circumstances the scale of governance arrangements and the time periods are too large to study holistically.

5 van der Steen et al., 'How to See Failure' 325.

6 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, Paragraph 13.4.5.

7 van der Steen et al., 'How to See Failure', 328.

8 van der Steen et al., 'How to See Failure', 327.

In applying van der Steen's concept of governance failure to the policy response to First Nations incarceration I focus my enquiry by utilising a second well-established concept in political science, that of principal-agent relationships. From the outline of the public administration arrangements above, I consider two such relationships critical to the success of the policy response: first, the delegation from the Commonwealth to State and Territory Governments; and second, the delegation from both Commonwealth and State and Territory Governments to local-level leaders. The delegations upon which I focus my enquiry are depicted in Figure 1.4.

Focusing on these relationships renders the scale of the case more manageable. It also allows me to employ methods that are more appropriate to both a long time-frame and a complex causation of change – two characteristics that were highlighted by the Royal Commission's Report as central to their suggested policy response to First Nations incarceration.

2. Accommodating Complex Causation: Process Tracing Mechanisms of Causation

The second challenge facing a theorisation of governance systems in the failed policy response to First Nations incarceration concerns causation. As I have argued earlier in this chapter, a causal role for the processes of governance is assumed in criminal justice policy under the operation of the rule of law – albeit one that is likely to be indirect and complex. Again, the theory of governance failure advanced by van der Steen *et al*. seems on its face to be well suited to the case study. Van der Steen *et al*. argue for an understanding of governance failure as interactive complexity.[9] They identify two limitations of linear theories of causation underpinning probabilistic quantitative methods for the study of governance. The first is that they cannot account for

[9] van der Steen et al., 'How to See Failure', 325.

interactive dynamics such as changes in contextual factors, which are usually not accommodated in linear theories. The second is that they cannot account for the reflexivity or the learning capacity of agents, which precludes the possibility that policymakers identify changes and respond.[10] These arguments resonate with the puzzle unresolved by existing explanations of the failed policy response to First Nations incarceration: over thirty years, why did successive governments not change the policy response if it was not succeeding?

In order to 'look through a lens of causality that takes into account the dynamics of the system', Van der Steen *et al*. argue for an understanding of causation in terms of loops not lines: causation is iterative, rendering governance success or failure the outcome of ongoing successful management of relationships by government over the autonomous organisations upon which it relies.[11] I consider such an understanding of causation necessary if the puzzle of Government inaction is to be accommodated. To achieve this in my study of the two key principal-agent relationships, I adopt the methodology of process-tracing.

Process-tracing uses a 'systems-understanding' to unpack causation as a 'mechanism' connecting cause and effect.[12] It achieves this through a 'detailed, within case empirical analysis of how a causal process plays out in an actual case.'[13] Reykers and Beach have persuasively argued for the relevance of this methodology to principal-agent studies in the context of studying discretionary behaviour by autonomous agents in relations between EU central agencies and national governments. The causal effect of

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10 van der Steen et al., 'How to See Failure', 325.

11 van der Steen et al., 'How to See Failure', 325–27.

12 Yf Reykers and Derek Beach, 'Process Tracing as a Tool to Analyse Discretion', in *The Principal Agent Model and the European Union*, ed. Tom Delreux and Johan Adriaensen, 2017, 260.

13 Reykers and Beach, 'Process Tracing', 261.

delegations from principals to agents are difficult to study using correlational, quantitative methods: correlations manifest themselves only over a range of cases, and there is often not a sufficiently large set in principal-agent studies that can be controlled for other contextual factors.[14] Moreover, as Reykers and Beach argue:

> '…If we really want to uncover empirically *how* a cause produces an outcome, we need to engage in an in-depth *within*-case analysis instead of merely investigating trends *across* cases. To do so requires that we theorise in a more deterministic fashion.'[15]

I outline my process-tracing methodology in detail in the next section of this introduction. But my application of it to the case is shaped by a final methodological challenge posed by the case study.

3. Accommodating the heterogeneous local level:

Having decided to focus my enquiry upon the case's main principal-agent delegations and to explain their causal effect using process-tracing, there is one final aspect of the case study that informs my methodology: accounting for the heterogeneity of Indigenous Australia at the local level. The more than 250 language and cultural groups that pre-existed colonisation are mapped in Figure 1.2. In my initial appraisal of the case study above, I outline how this heterogeneity complicates public policy in Indigenous affairs: it also complicates the study of public policy.

Most commonly, process-tracing is used to explain anomalous case studies in public policy by building a 'minimally sufficient explanation', which is to say a holistic explanation with all factors accounted for.[16] However, the heterogeneity of the local level in Indigenous affairs renders this approach unworkable: any theory of dynamic

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14 Reykers and Beach, 'Process Tracing', 259–60.

15 Reykers and Beach, 'Process Tracing', 260.

16 Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor, MI: University of Michigan Press, 2013), 3; Rudra Sil and Peter J. Katzenstein, *Beyond Paradigms: Analytical Eclecticism in the Study of World Politics* (Basingstoke: Palgrave Macmillan, 2010); Jörg Friedrichs and Friedrich Kratochwill, 'On Acting and Knowing: How Pragmatism Can Advance International Relations Theory and Methodology', *International Organisations* 63, no. 4 (2009): 701–31.

governance must include the Commonwealth level of policymaking, which was the prime motivator for the policy response to First Nations incarceration and retained agenda-setting power throughout the case. However, the policy response was devolved through seven state and territory jurisdictions and took effect at the local level in several hundred ancient First Nations jurisdictions, each of which might be considered as a separate sub-case. Rather than attempting to holistically explain the causation of policy failure in each of these localities, I instead direct my methods towards building a mid-range theoretical explanation of governance failure that might be employed across the range of sub-national cases.

In their endeavour to impose standards upon the uses of process-tracing, Beach and Pedersen have identified three ways of using the method, which differ according to their ambition and the limitations of their conclusions. The most common of these is labelled *explaining-outcome* process tracing, and is concerned to explain prominent anomalous cases. Beyond this case-centric approach, Beach and Pedersen identify two theory-centric approaches: first, an inductive approach to *theory-building*, which constructs 'a generalisable theoretical explanation from empirical evidence, inferring that a more general causal mechanism exists from the facts of a particular case'; and second, *theory-testing* process-tracing, which 'deduces a theory from the existing literature and then tests whether evidence shows that each part of the hypothesised mechanism is present.'[17] I use both of these theory-centric process-tracing methods to build an explanation for the role of governance failure across the policy response to First Nations incarceration.

17 Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*, 3.

b) Process-Tracing Broken Mechanisms in Governance

Beach and Pedersen have suggested a specific method for process-tracing causal mechanisms that have broken down, which they refer to as an 'analytical two-step': first, the theory is built on the basis of 'typical cases' – where the mechanism worked as intended; second, the theory is tested in those cases where the mechanism is suspected of having broken down.[18] While this methodology is not common, I consider it the most appropriate for explaining the present case study. As Beach and Pedersen describe, process-tracing a broken mechanism in this manner can produce two conclusions: first, that there are omitted causal conditions from the model that have to be present in order for the mechanism to operate; and/or second, that there are omitted scope conditions that have to be present for the mechanism to operate as expected.[19]

Each of the two steps in this methodology uses different case-selection, data gathering and data analysis. Below I examine each in turn:

1. Theory-Building

Theory building process-tracing seeks to 'build a midrange theory describing a causal mechanism that is generalisable outside of the individual case to a bounded context' – in this case, to explain governance failure in the bounded context of the policy response to First Nations incarceration.[20] As Beach and Pedersen argue, the key attribute of theory-building process-tracing is its inductive logic:

> 'The core difference between theory-testing and -building process-tracing involves theory before fact versus fact before theory. In theory-building process-tracing, empirical material is used to build a hypothesized theory, inferring first that what is found reflects the observable implications of an underlying causal mechanism. A second

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18 Derek Beach and Rasmus Brun Pedersen, 'Case Selection Techniques in Process-Tracing and the Implications for Taking the Study of Causal Mechanisms Seriously' (APSA Annual Meeting Paper, New Orleans, LA, 2012) See Footnote 18 re Theory Building.

19 Beach and Pedersen, 'Case Selection Techniques in Process-Tracing'.

20 Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*, 16.

> leap is then made by inferring from these observable implications that they reflected an underlying causal mechanism.'[21]

Theory-building process tracing involves three steps: first, evidence is collected; second, the existence of the empirical manifestations of causal mechanisms, sometimes described as 'empirical fingerprints' is inferred; and third, the existence of the components of the causal mechanism is inferred. As Beach and Pedersen argue, however, these steps are iterated:

> 'In reality, theory-building process-tracing is usually an iterative and creative process. Hunches about what to look for that are inspired by existing theoretical and empirical work are investigated systematically, with the results of this search forming the background for further searches.'[22]

2. Data Gathering and Analysis: Sub-National Case Selection

Beach and Pedersen note that theory-building process-tracing 'involves an intensive and wide-ranging search of the empirical record.'[23] I outline my data-gathering and analysis techniques in detail when conducting my theory building in Chapters 3 and 4. For the present, I justify my case selection. First, I conduct my enquiry in one state and one territory jurisdiction: New South Wales (NSW) and the NT. There are no 'typical' state or territory jurisdictions in Australian Indigenous affairs, but these two offer the most representative combination:

- *New South Wales*: NSW is the largest State in terms of overall population and also has the largest First Nations population: 31% of Australia's Indigenous population lives in NSW.[24] New South Wales was the first state colonised and thus has some Aboriginal communities with a much longer colonial history than most. It has a

21 Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*, 16.

22 Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*, 18.

23 Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*,17.

24 Australian Bureau of Statistics, 'Estimates and Projections, Aboriginal and Torres Strait Islander Australians' (Canberra: Australian Bureau of Statistics, 2014).

range of urban, regional and remote Aboriginal communities, although fewer remote communities than Queensland, WA or the NT.

- *The Northern Territory*: The NT has the fourth largest First Nations population, with 10.1% of the whole.[25] But the NT has by far the highest proportion of First Nations people as a proportion of its own population (29.7% of the NT is Indigenous; the next highest proportion is Tasmania with 5%). The NT is an important subnational case to include for three further reasons: first, a greater proportion of the Territory's Indigenous population lives in remote and very remote communities than is the case in other Australian jurisdictions; second, it has a unique policy history having trialled a wide regime of mandatory sentencing for property offences; and third, the NT's colonial history the most recent of Australia's jurisdictions, which has led it to be described as a 'frontier state.'

Figure 1.5: Local Level Process-Traces

New South Wales	Northern Territory
Bourke (remote)	Wadeye (remote) Lajamanu (remote)
Dubbo (regional)	
Redfern (urban)	Darwin (urban)

At the local level, I built my theory using three case studies, in each of which a reduction in First Nations incarceration was achieved: Redfern, an urban community in NSW; Bourke, a remote community in NSW; and, Lajamanu, a remote community in the NT.

25 Australian Bureau of Statistics, 'Estimates and Projections'.

3. Theory-Testing

Theory-testing process-tracing is a deductive method. Having built the theory of how a causal mechanism operates, this method systematically examines the empirical record for manifestations of its operation. It proceeds in three stages: first, the causal mechanism is conceptualised in a manner that makes explicit the context in which it functions; second, the theorised causal mechanism is operationalised, 'translating theoretical expectations into case-specific predictions of what observable manifestations each of the parts of the mechanism should have if the mechanism is present in the case; finally, third, empirical evidence is collected that can be used to make causal inferences that update our confidence in whether the hypothesised mechanism was present in the case. Beach and Pedersen note that this can contain inductive elements:

> 'In practice, theory-testing has inductive elements, especially regarding the operationalization of empirical tests, where we draw on existing empirical work to make case-specific empirical predictions about what evidence we should expect to see if the theory is valid.' [26]

For my enquiry, theory testing is conducted in Chapters Five and Six. Following from my theory-building, I test the causal mechanism in NSW and the NT and in the remaining local cases where incarceration was not reduced: Dubbo (NSW), Wadeye (NT) and Darwin (NT).

[26] Beach and Pedersen, *Process-Tracing Methods: Foundations and Guidelines*, 15.

Part One (Chapters Two and Three): Existing Explanations and Identifying Failing Mechanisms in the Machinery of Government

The most significant decision in my enquiry is the first: identifying which mechanisms in the machinery of government to trace. I am guided by the understanding of governance adopted from Van der Steen and his co-authors, which emphasises dynamic relationships within a layered policy system: policy success or failure is 'the art of operating effectively in the complex relations' within that system'.[1] This theorisation of governance is suited to the case study, given the layered and complex public administration of the policy response to First Nations incarceration. However, as the previous chapter showed, it is impossible to theorise every relationship between Prime Ministers and Commonwealth Ministers who initiated the policy response and the street-level bureaucrats and First Nations leaders I met at the local level. Accordingly, a judgement needs to be made about the most likely sites of governance failure so that they may be focused upon. I address this task in Part One of the thesis: Chapters Two and Three.

Process-tracing uses logical reasoning to unlock the 'black box' of causation, enabling scholars to draw inferences about the process of causation: *how* an outcome was caused, rather than *what* caused it. In the present case, a process-trace serves to theorise the chain of mechanisms through which government machinery functions (or does not) in the policy response to First Nations incarceration. It is a novel approach to the case that enables me to proceed further than a probabilistic analysis of causal factors would be able to on the available data; it also enables to gain insights into the operation of public administration in the case that would be unavailable if my enquiry

[1] Martjin van der Steen et al., 'How to See Failure: Attempts by the Inspectorate of Education to Detect and Disarm Failure in Dutch Education Policy', *Public Policy and Administration* 30, no. 3–4 (2015): 325.

were limited to in-depth local case studies.[2] However, as is true of any social scientific method, process-tracing has weaknesses. In narrowing the scope of my enquiry I must directly confront one such weakness which has attracted some criticism in the methodological literature: the chain of logic that I carry forward in subsequent stages of my methodology begins with the identification of the processes to trace.

Critics of process-tracing have argued that *identifying* a causal process is as great a methodological challenge as *tracing* it. I am cognisant of Hay's warning that 'process identification is logically prior to process tracing and may be rather more difficult in social systems, requiring perhaps a further (and prior) set of methodological reflections.'[3] In their study of the method, Beach and Pedersen observe that in 'in its purest form' a theory-building process trace '…starts with the empirical material and uses a structured analysis of it to detect the observable manifestations of a plausible causal mechanism where X is linked with Y.'[4] In this way, it can be used 'to both to find causal mechanisms between X and Y and in situations where we are in the dark regarding what the causes of Y are.' [5] But Beach and Pedersen advise against such groping around in the dark. They recommend that 'first scholars learn something about the population of a given phenomenon before they engage in selecting cases'. Beach and Pedersen recommend nesting a theory-building method within other comparative studies, even descriptive comparative research in order to 'gain enough knowledge

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2 For an example of this approach: Larissa Behrendt, Amanda Porter, and Alison Vivian, 'Factors Affecting Crime Rates in Six Rural Indigenous Communities', in *Routledge International Handbook of Rural Criminology*, ed. Joseph F Donnermeyer (Abingdon: Routledge, 2016), 33–43.

3 Colin Hay, 'Process Tracing a Laudable Aim or a High Tariff Methodology?', *New Political Economy* 21, no. 5 (2016): 500.

4 Derek Beach and Rasmus Brun Pedersen, 'Case Selection Techniques in Process-Tracing and the Implications for Taking the Study of Causal Mechanisms Seriously' (APSA Annual Meeting Paper, New Orleans, LA, 2012), 7.

5 Beach and Pedersen, 'Case Selection Techniques in Process-Tracing', 7.

about the cases to be able to make informed choices about whether cases are typical or not.'[6]

As the mechanisms this thesis traces are part of an intentional government processes, complex and devolved though they are, I can be confident of the X (government policy) and Y (impact upon First Nations incarceration). But identifying the points at which the many intervening mechanisms broke down and thus selecting cases upon which to focus, is more problematic. Here I must draw upon the existing literature to inform a judgement. While prominent Australian criminologists have lamented that 'it is hard to imagine a more spectacular policy failure', there have been no explanations of the policy response from a political science perspective.[7] As a result, in this first part of the thesis my purpose is less to situate my enquiry alongside existing political explanations than to build a political explanation from scratch.

At one step removed from the question of governance failure, there is a rich multi-disciplinary literature outside of political science on the more general topic of rising First Nations incarceration. As it concerns the subject of the policy response, this literature naturally overlaps with my enquiry and provides important potential insights into likely weaknesses within public administration. In Chapter Two, I conduct a preliminary assessment of the merits of prominent explanations of the causes of rising incarceration, both from outside government and within the administration of criminal justice. From this assessment I identify relevant causal factors to take forward in my theorisation and potential weaknesses in public administration.

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6 Beach and Pedersen, 'Case Selection Techniques in Process-Tracing', 13; See also: Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994), 34–74.

7 Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Canberra: Aboriginal Studies Press, 2014), 26.

Informed by my assessment of the explanations from the existing, multidisciplinary literature on the case study in Chapter Two, in Chapter Three I draw together relevant sources to assemble a public policy literature. My purpose is to identify likely weaknesses in the public administration of the policy response to First Nations incarceration. Examining both the arguments that emphasise the role of agents and those that emphasise structural constraints, I decide to focus my enquiry upon two mechanisms within the chain: first, the mechanism of policy change – how the policy response was initiated and the mechanism through which it would be reformed at the elite level; and second, the mechanism of policy effect – how the policy would impact incarceration rates at the local level.

Chapter Two: The Causes of Rising First Nations Incarceration

While criminologists have lamented that 'it is hard to imagine a more spectacular policy failure',[8] there have been no explanations of the case study from a political science perspective. Adjacent to the study of the policy response is a rich literature concerned with rising First Nations incarceration. Originally a project of criminologists, this literature is now multidisciplinary drawing upon a range of methodologies and epistemologies. Where relevant, this case-specific literature may also be supplemented with two further perspectives: first, from the comparative literature on the politics of racialised 'mass incarceration', which originated in the context of African-American imprisonment but has expanded to include comparable cases; and second, the public policy literature and commentary on Indigenous affairs policy more generally in Australia; and third, the theoretical literature in public policy studies, which contains well-developed concepts of policy failure and systemic government failure.

8 Weatherburn, *Arresting Incarceration,* 26.

I approach this chapter in three stages:

1. I begin by making some observations about evidence and the complex causation of policy failures from the public policy studies literature. This shapes my approach in the remainder of the chapter.
2. I review explanations external to government for rising First Nations incarceration. I draw upon quantitative evidence, published interview data, and my own research, to conduct an initial assessment of these explanations. This is not intended to be the last word on the literature but to make causal inferences about the relevance of these external factors to the failure of the policy response and the likelihood of their interaction with government machinery. I note the factors that will need to be carried forward as contextual factors or scope conditions for my subsequent theorisation.
3. I review the literature for explanations of inequality in criminal justice. Formal or substantive inequality in the administration of criminal justice represents a direct *governmental* cause for rising incarceration: it would thus represent a failure of the policy response. From this literature I draw conclusions about the operation of inequality for my theory.

I. Contested Evidence and the Complex Causation of Policy Failure

While the multi-disciplinary literature on First Nations incarceration has been neglected by political science, it has not been spared from politics. Scholarly explanations have been characterised by contentious cross-disciplinary debates about the quantity and quality of available evidence and whether changes in offending patterns or the prevalence of institutional biases are the primary cause of rising incarceration. These debates are unenlightening: arguments about evidence across divergent methodologies, especially those that draw upon differing epistemological

philosophies of social science, often cannot be resolved.[9] But, the debates have political coherence and can be readily be divided by analysts between theories of First Nations incarceration that prioritise historical and institutional factors (i.e. 'blame the government') and those that prioritise offending-centred factors (i.e. 'blame First Nations people'). This politicisation is not necessarily cynical – the literature is animated by a concern to change the failing policy response and reduce First Nations incarceration – but it complicates my endeavour to untangle the findings relevant to building a theory of the machinery of government.

Public policy scholars have long observed the ubiquity of 'blame games' and evidentiary debates in the study of policy and government failures.[10] While this Chapter is focused upon the literature of the case study, I begin by outlining lessons from public policy studies that shape my approach. McConnell has described how matters of success and failure become a 'methodological minefield': [11]

> 'No sooner is a policy articulated as successful by one political actor (often government) than this same policy is criticized by others as a failure. The fact that all sides use reports, evidence, examples, and moral reasoning can make the issue particularly perplexing. Such contestation carries through into the causes of failure, where discourse is replete with accusations and blame games.'[12]

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9 See: David Marsh and Paul Furlong, 'A Skin Not a Sweater: Ontology and Epistemology in Political Science', in *Theories and Methods in Political Science*, 2nd ed. (Basingstoke: Palgrave Macmillan, 2002), 17–41; see also Rowse's review of Anthony and Weatherburn's theories: Tim Rowse, 'Historical Reasoning About Indigenous Imprisonment: A Community of Fate?', *Australian Review of Public Affairs* 13, no. 1 (2015): 1–21.

10 For early examples see: J. Pressman and Aaron Wildavsky, *Implementation. How Great Expectations in Washington Are Dashed in Oakland* (Berkeley CA: University of California Press, 1973); Aaron Wildavsky, *Speaking Truth to Power: The Art and Craft of Policy Analysis*, 2nd ed. (New Brunswick, NJ: Transaction, 1987).

11 Allan McConnell, 'Policy Success and Failure', in *Oxford Research Encyclopedia of Politics (Online)* (Oxford: Oxford University Press, 2017), 8.

12 Annika Brandstrom and Sanneke Kuipers, 'From "Normal Incidents" to Political Crises: Understanding the Selective Politicization of Policy Failures', *Government and Opposition* 38, no. 3 (2003): 279–305; Christopher Hood, *The Blame Game: Spin, Bureaucracy and Self-Preservation in Government* (Princeton, NJ: Princeton University Press, 2010); R. Kent Weaver, 'The Politics of Blame Avoidance', *Journal of Public Policy* 6, no. 4 (1986): 371–98.

This politicisation of explanations can be problematic for a study of the policy failure because it incentivises over-simplification. McConnell states that the difficulty of analysing causal accounts is 'compounded because in the policy and political arenas, the grey areas, ambiguities, and contradictions often play out very simply.'[13] But, the weight of the public policy studies literature suggests that this simplification is unrealistic:

> 'We know that policy outcomes are typically a bundle of successes and failures, underpinned by varying and often disputed evidence bases ... Amid multiple grey areas and ambiguities, ascertaining whether a policy has succeeded or failed is complex and, some might argue, impossible matter. Yet policy narratives of success and failure are quite the opposite. They are simple.'[14]

Two important lessons may be drawn from McConnell's analysis of the literature on policy failure. First, we should expect the causation of a policy's failure to be complex:

> 'Public policy is not implemented in a laboratory, where we can isolate variables, establish controls, and identify causality with very high degrees of confidence. In the real world, links between policies and outcomes are often complex and contested.'[15]

Accordingly, I see little value in forcing a false parsimony into my causal account: in exchange for analytical elegance I would be trading utility to future policymaking, which is contrary to the ambition of public policy studies.[16] McConnell also draws a second, related, lesson that shapes my expectations of the available evidence:

> 'Evidence to evaluate the impact of a policy may not be available or may be partial at best…The true value of a policy can only be understood if we can envisage what would happen in its absence, but we rarely have the evidence to support such an assessment. For researchers, there is the real difficulty of whether and how to "fill in" the evidence gaps, let alone reconcile ambiguous and competing evidence.' [17]

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13 McConnell, 'Policy Success and Failure', 8.

14 McConnell, 'Policy Success and Failure', 21.

15 McConnell, 'Policy Success and Failure', 15.

16 See, for example: Harold Lasswell, 'The Policy Orientation', in *The Policy Sciences*, ed. D. Lerner and Lasswell, H.D. (Stanford, CA.: Stanford University Press, 1951); Harold Lasswell, *The Decision Process* (College Park, MD: University of Maryland Press, 1956).

17 McConnell, 'Policy Success and Failure', 7.

It is with a view to the 'filling in' of evidentiary gaps and 'reconciling ambiguous and competing evidence' that I approach the literature in this Chapter.

II. Causes External to Government

In this second part of the chapter I consider explanations for the failed policy response that focus upon causes external to government. In reviewing these theories I intentionally cast my net broadly, beyond my own academic discipline. This is for two reasons. First, as I have noted, it is not my ambition to argue that failings in the machinery of government were the sole cause of the failed policy response. Indeed, I anticipate that my theoretical argument in subsequent chapters will be consistent with the scholarly understanding that policy successes and failures have multiple, complex causes interacting over space and time.[18] This understanding finds support in those studies that have collected evidence about First Nations incarceration at the local level. Behrendt and her co-authors' 2016 study of factors affecting crime rates across six rural First Nations communities concluded that 'while combinations of some elements might be illuminating, no one theory was able to fully capture the complexity of crime as a localised phenomenon'; crime rates 'reflect a combination of a complex set of social factors that are contingent on local context.'[19] Dwyer, Scott and Staines's recent study of

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18 See: McConnell, 'Policy Success and Failure', 15; Allan McConnell, 'Policy Success, Policy Failure and Grey Areas in-Between', *Journal of Public Policy* 30, no. 30 (2010): 345–62; Allan McConnell, 'What Is Policy Failure? A Primer to Help Navigate the Maze', *Public Policy and Administration* 30, no. 3–4 (2015): 221–42; Allan McConnell, 'A Public Policy Approach to Understanding the Nature and Causes of Foreign Policy Failure', *Journal of European Public Policy* 23, no. 5 (2016): 667–84.

19 Behrendt, Porter, and Vivian, 'Factors Affecting Crime Rates in Six Rural Indigenous Communities'; Also citing: P.C. Jobes, J.F. Donnermeyer, and Barclay, E., 'A Tale of Two Towns: Social Structure, Integration and Crime in Rural New South Wales'', *Sociologica Ruralis* 45, no. 3 (2005): 224–44; R. McCausland and A. Vivian, 'Why Do Some Aboriginal Communities Have Lower Crime Rates than Others? A Pilot Study'', *Australian and New Zealand Journal of Criminology* 43, no. 2 (2010): 301–30.

frontline police in remote communities in Queensland, 'Strangers in a Strange Land', concurs.[20]

The second reason for reviewing the literature broadly is that the operation of additional causal factors alongside the machinery of government may provide insights into its failings. Recalling Dye's definition of policy as 'whatever governments choose to do or not to do', [21] if other causal factors were operating or interacting alongside the policy response we might learn much about the machinery of government by tracing what governments chose to do or not to do in response. Accordingly, I conduct a broad survey of potential causal factors, identifying those that will inform my process-traces of the two mechanisms of policy change and policy effect in subsequent chapters.

By 'external' explanations I mean those with only indirect reference to contemporary government policies, noting that past government policies always loom large in both criminal justice and Indigenous affairs. I identify three broad categories of these theories external to government: (1) colonial conflict theory; (2) Indigenous offending theory; and (3) strain theory. It is important to reiterate that this brief assessment is not and cannot be the last word on any of these explanatory theories, each of which is prominently represented in the criminological literature on rising First Nations incarceration. I intend to conduct a rigorous assessment of their relevance to my explanation of weaknesses in the machinery of government: if these external factors were indeed overwhelming the policy response over thirty-years of policy making, questions about the lack of a response form policymakers would be relevant to my account.

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20 Anna Dwyer, John Scott, and Zoe Staines, 'Strangers in a Strange Land: Police Perceptions of Working in Discrete Indigenous Communities in Queensland, Australia', *Police Practice and Research* 21 (2020): 1–17.

21 Thomas R. Dye, *Understanding Public Policy*, 12th ed. (Upper Saddle River, NJ: Pearson Prentice Hall, 2012), 12; McConnell, 'What Is Policy Failure? A Primer to Help Navigate the Maze', 230.

Van Evera[22] and later Bennett[23] developed a table containing tests that can be used to make causal inferences about confidence of an outcome in small-n case studies with limited available data. I have extracted it in Figure 2.1. Utilising the available quantitative data and published interview data, alongside my own research collected during fieldwork, I use these tests to draw causal inferences about the relevance of these external factors to my enquiry.

Figure 2.1: Causal Inference in Small-N analyses

		Sufficient for Affirming Causal Inference	
		Yes	No
Necessary for Affirming Causal Inference	Yes	2. Straw in the wind: • Passing: affirms relevance of hypothesis but does not confirm it. • Failing: Hypothesis is not eliminated but is slightly weakened.	3. Smoking-Gun: • Passing: confirms hypothesis • Failing: hypothesis is not eliminated but is somewhat weakened.
	No	4. Hoop Test • Passing: affirms relevance of hypothesis but does not confirm it. • Failing: Eliminates hypothesis.	5. Doubly Decisive • Passing: confirms hypothesis and eliminates others. • Failing: eliminates hypothesis.

a) Post-Colonial Conflict Theory

The history of colonisation remains an essential starting point for consideration of public policy involving First Nations people. With regard to the specific case of First Nations incarceration, most contributors to post-colonial and critical criminology literature are aligned with the argument advanced by Behrendt, Cunneen, and Liebesman who argue that: 'it is impossible to understand the contemporary situation which Indigenous people face in their contact with law without a strong understanding of colonial and more recent history in Australia.'[24] Blagg and other post-colonial

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22 Stephen van Evera, *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997), 31–32.

23 Andrew Bennett, 'Chapter 10: Process Tracing and Causal Inference', in *Rethinking Social Inquiry Diverse Tools, Shared Standards: 2nd Revised Edition*, ed. Henry E. Brady and David Collier (Lanham: Rowan and Littlefield, 2010), 210.

24 Larissa Behrendt, Christopher Cunneen, and Terri Libesman, *Indigenous Legal Relations in Australia* (Melbourne: Oxford University Press, 2009), xi.

scholars have argued persuasively for the merits of privileging First Nations perspectives in the context of ongoing colonial and cross-cultural conflict:

> …Dispossession, loss of land and culture, the desecration of Aboriginal sites, the breakdown of skin and moyete systems (traditional rules for identifying appropriate marriage partners) the unwillingness of white authorities to acknowledge the jurisdiction of Aboriginal law, have *direct* and *immediate* relevance both to criminal behaviour and to processes of criminalisation.[25]

Blagg develops his point by arguing that it is impossible to understand 'the depths of Aboriginal people's sense of alienation from and frustration with, existing systems of justice' without coming to terms with 'the specificity of Aboriginal people's situation as a colonised people, and the historically specific ways criminal justice has been employed as an instrument of colonisation.'[26]

Despite the prominence of these arguments, colonisation's legacies are often marginalised in the causal literature on First Nations incarceration. They are often treated as 'a set of 'distal' rather than 'proximate' causes, to be gestured at but essentially excluded from, our analysis of contemporary issues'.[27] One reason for such gesturing is methodological: legacies of colonisation are difficult to access. Commissioner Patrick Dodson, in reporting to the Royal Commission, characterised them as 'underlying issues':

> The ongoing effect of mission and other forms of institutionalisation on the socio-cultural and economic lives of Aboriginal people; and some of the adverse effects of contemporary Aboriginal social life brought about by Aborigines themselves, as well as those from outside Aboriginal society. Underlying issues are therefore those phenomena that arise in considering the legal, cultural social and economic factors as they occur independent of the other society or through their interrelatedness to it.[28]

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25 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Sydney: Hawkins Press, 2008), 15.

26 Blagg, *Crime, Aboriginality and the Decolonisation of Justice,* 11.

27 Blagg, *Crime, Aboriginality and the Decolonisation of Justice,* 15.

28 Patrick Dodson, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry into Underlying Issues in Western Australia* (Canberra: Australian Government Publishing Service, 1991), 5.

The difficulty of accessing such variables using quantitative methods has led quantitative and post-colonial theorists to a fundamental disagreement: the former argue that there is insufficient evidence to prove a continuing effect of colonisation while the latter argue that 'there has always been a link between positivist research methods and the colonial project.'[29] Much of this dispute is ontological and irresolvable. My methodological focus upon theorising mechanisms gives scope to consider theories offered by both the positivist and post-colonial perspectives. This said, my analysis is not discursive: I look for evidence of 'real', if only partly observable, structures having real effects.

1. Conceptualisation

The legacies of colonisation may be theorised to exist on either side of the 'frontier', which is to say that they may condition both the criminal justice system's treatment of First Nations people and First Nations responses to criminal justice. My experience of living and working in First Nations communities suggests these legacies likely permeate all parts of this thesis, including my own methods and conclusions. But some analytical distinctions remain useful. In this initial section, I am conducting an initial assessment of the likely effects of these legacies in general terms. In subsequent sections I consider more specific manifestations: for example, in the context of strain theories below I consider the breakdown of social norms or anomie, to which colonisation has contributed profoundly; in the next part of this Chapter I consider the legacies within

[29] Weatherburn, *Arresting Incarceration,*52; cf. Harry Blagg, 'Colonial Critique and Critical Criminology: Issues in Aboriginal Violence', in *The Critical Criminology Companion*, ed. Thalia Anthony and Christopher Cunneen (Sydney: Hawkins Press, 2008), 14; Larissa Behrendt, A. Porter, and A. Vivian, *Crime Rates, Colonisation and Indigenous Communities* (2016: Federation Press, 2016); Christopher Cunneen, *Criminological Research and the Search for Meaning: Some Reflections on Praxis* (Sydney: Federation Press, 2011).

Government, including the specific problems of formal and substantive inequality in criminal justice.

In its National Report, the Royal Commission grappled with the impacts of colonisation on First Nations people. The National Report expressly considers the effect that damage to traditional mechanisms of social control has had upon incarceration rates.[30] They quote a submission from anthropologist David Martin about the experience of the mission (later, the town) of Aurukun in Far North Queensland, noting that:

> 'Since European settlement, the traditional Aboriginal social order has been irrevocably altered. The societal mechanisms and cultural institutions which once sustained and reproduced traditional social life, and which defined the boundaries of violent and conflictual behaviour, are no longer in place.'[31]

Weatherburn has the labelled the operation of such impacts a 'social disorganisation' theory of increased offending: this is a useful, if simple, description for my enquiry inasmuch as it highlights the direct relevance for a system of public administration that relies upon local civil society in the implementation of its policies.[32] It is difficult to conduct any broad assessment of the effects of social disorganisation arising from colonisation at the national or even State and Territory level since the effects probably vary between different First Nations and different locations. I carry forward the prospect of these legacies as a contextual factor relevant to my theory building at the local level in Chapter Five.

On the side of the criminal justice system, overwhelming evidence shows that, historically, First Nations people suffered direct and deliberate discrimination in Australia. Indeed, the apparatus of criminal justice was utilised as a mechanism of

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30 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991), Part 11.

31 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 11.10.9.

32 See Weatherburn, *Arresting Incarceration*, 61.

colonial control.[33] Formal discrimination against First Nations people ended before the period of my enquiry, with the passage of the *Racial Discrimination Act 1975* – although it is noteworthy that the *Racial Discrimination Act* was suspended in 2007 to facilitate the NT Intervention.[34] In 1976, Eggleston's study of Aboriginal offenders and criminal justice in ten WA regional towns found clear evidence that discrimination persisted at every level of the criminal justice system.[35] More recent studies have found less evidence of direct discrimination.[36] But, doubtless, incidences of racism discrimination continue to occur in criminal justice. During the period of my enquiry there have been several suspicious Aboriginal deaths in police custody that have resulted in major inquiries.[37] These prominent incidents potentially have an outsized, negative effect upon relations between First Nations people and police – a phenomenon I will return to below. While these instances are too few in number to provide a direct explanation for

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33 For a specific study of discrimination in criminal justice: Elizabeth Moulton Eggleston, *Fear, Favour Or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976); For the history in general, see: Charles Dunford Rowley, *The Destruction of Aboriginal Society* (Australian National University Press, 1970); Charles Dunford Rowley, *Outcasts in White Australia* (Australian National University Press, 1971); Henry Reynolds, *The Breaking of the Great Australian Silence: Aborigines in Australian Historiography 1955-1983* (University of London, Institute of Commonwealth Studies, Australian Studies Centre, 1984).

34 See: Melissa Hinkson and Jon Altman, eds., *Coercive Reconciliation* (Melbourne: Arena Publications, 2007).

35 Eggleston, *Fear, Favour or Affection*, 1–2, 178.

36 Fay Gale, Rebecca Bailey-Harris, and Joy Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* (Sydney: Cambridge University Press, 1990); Garth Luke and Chris Cunneen, 'Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System' (Sydney: Juvenile Justice Advisory Council, 1995); R. Broadhurst, 'Aborigines and Crime in Australia', in *Ethnicity, Crime and Immigration; Comparative and Cross-National Perspectives. Crime and Justice: A Review of Research*, ed. Michael Tonry (Chicago: University of Chicago Press, 1997), 440; Patricia Gallagher and Patrizia Poletti, 'Ethnic Diversity, Aboriginality and Sentencing Young Offenders', *Current Issues in Criminal Justice* 10, no. 1 (1998): 89–90; Christine EW Bond, Samantha Jeffries, and Don Weatherburn, 'How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales', *Australian & New Zealand Journal of Criminology* 44, no. 2 (1 August 2011): 272–90; Christine E.W. Bond and Samantha Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts', *Psychiatry, Psychology and Law* 19, no. 2 (April 2012): 169–83; C. E. W. Bond and S. Jeffries, 'Harsher Sentences?: Indigeneity and Prison Sentence Length in Western Australia's Higher Courts', *Journal of Sociology* 48, no. 3 (1 September 2012): 266–86.

37 For example, the death of Cameron Doomadgee on Palm Island. See: Chloe Hooper, *Tall Man: Death And Life On Palm Island* (Melbourne: Penguin Books, 2008).

the overall increase in incarceration, we must allow for the effect they have on the other side of the 'frontier': by further *alienating* First Nations people from the criminal justice system. [38]

2. The Nature of the Test

Following Van Evera's structured method for assessing the likely operation of these theories on the basis of causal inferences, three preliminary considerations shape my test: my prior theoretical beliefs about post-colonial explanations; the likelihood of finding evidence; and the likelihood-ratio of finding this explanation rather than the alternative hypothesis.

'Theoretical priors' refer to 'prior beliefs about our confidence in the presence of a mechanism'.[39] In this instance my belief in the existence of the colonial legacies is strong, motivated by both the weight of literature in support and the stark evidence of brutal and recent injustices suffered by First Nations people. However, the strength of my belief in the mechanism of institutional racism is counterbalanced by an awareness of the difficulty of empirically observing ideational mechanisms, particularly if we understand them to operate unconsciously. I would only expect to find trace evidence of the operation of post-colonial conflict first, in the racially differentiated outcomes of the policies; and second, in the accounts of First Nations people who encounter the criminal justice system. Distinguishing such effects from the operation of potential alternative hypotheses including those in other theories from the literature is problematic, making it difficult to draw general conclusions.

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38 Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?', *Australian & New Zealand Journal of Criminology* 40, no. 3 (1 December 2007): 272–90.

39 Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor, MI: University of Michigan Press, 2013), 97–98.

3. Assessment

There is evidence that post-colonial conflict theories are relevant to the rise in First Nations incarceration and, by implication, the failure of the policy response to reduce incarceration. This evidence exists on both sides of the frontier. Accounts of those who work in criminal justice show vividly that colonial legacies are consciously confronted and managed in daily working life. Accounts of First Nations people show with similar clarity that colonial legacies inform their contemporary relationship with the criminal justice system.

The first and most obvious evidence of the relevance of colonial legacies to the incarceration of First Nations people is the pattern of evidence offered by the incarceration rates themselves: First Nations people, a group defined by their common experience of colonisation, are disproportionately represented in the Australian prison population. This pattern of evidence is significantly strengthened by international experience: disproportionate incarceration is experienced by Indigenous peoples in other parts of the former British Empire, such as New Zealand and Canada, as well as in other settler societies. While this common pattern of disproportionate incarceration across settler societies is persuasive initial evidence of a link with colonial legacies, the quantitative data suggest little about their operation. Indeed, significant internal variation between First Nations communities has led quantitative analysts such as Weatherburn to conclude that other factors are more strongly correlated.[40] Sustainable on the available quantitative data, this conclusion nonetheless assumes the experience of colonisation across communities was broadly similar despite strong historical

40 Weatherburn, *Arresting Incarceration*, 54.

evidence that the experience of colonisation, particularly under the mission or reservation system, differed arbitrarily between communities.[41]

While colonial history fades to the background of the quantitative data, interviewees repeatedly raised it. No specific question was asked about historical factors. Nonetheless, legacies of historical injustices were frequently raised by Indigenous and non-Indigenous interviewees: by both community leaders and implementers of criminal justice. A First Nations community leader in Bourke observed:

> '…I think what needs to be put on the table as well is this generational trauma. They're still carrying the burden of past Government policy, of dispossession of their own traditional lands. Particularly communities such as Bourke, Brewarrina, Walgett etc is that, we're still a community that was a melting pot for a lot of language groups…In some cases, what has to be recognised is that, yes, people were brought to Bourke by force. And, in some cases people came in a voluntary capacity as well. But that is what I really think we are dealing with. And, it really comes back to the psyche of this country. And, I think this is a lot of the unfinished business.'

Similar sentiments were expressed by interviewees working in criminal justice, including police in NSW. A Commander of the Western Region for the NSW Police, summed up the challenge of historical factors for criminal justice:

> But, as I say, breaking down those years of, and generations of, disadvantage and unemployment, and social welfare, and racist attitudes in the community is very, very difficult and going to be difficult into the future. But I think if we really want to fix the problem once and for all, we need to be starting with the very young children now and working from there.

This account is confirmed by police practice, which invests significant training time and resources into cultural awareness and negotiating historical legacies. Improving cultural competency is clearly a priority for police, in the context of their historically-charged relationship with First Nations communities. One police officer thought the importance of historical experience a stark quotidian reality: 'Anyone who

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41 Behrendt, Porter, and Vivian, 'Factors Affecting Crime Rates in Six Rural Indigenous Communities'; Behrendt, Porter, and Vivian, *Crime Rates, Colonisation and Indigenous Communities*; Josephine Flood, *The Original Australians: The Story of the Aboriginal People* (St Leonards: Allen and Unwin, 2006); Reynolds, *The Breaking of the Great Australian Silence*.

doesn't think history plays a role in policing Aboriginal communities should put on this uniform and try walking down the main street here one day.'

These interview data of my own are supported by other studies of policy working at the local level in First Nations communities. In their 2020 ethnographic study of police working in remote communities, Dwyer, Scott and Staines noted the repeated references to mistrust and difficulty building relationships. They quote one constable saying:

> 'The relationships between police and Indigenous communities is not very effective. When we are dealing with the community, they say that police hate them so much; they say that we're going to kill them and all this sort of stuff. It affects the way that we try and build relationships.'[42]

They also reported the prevalence of warfare metaphors in interviews, 'indicating that they (police) are viewed as hostile outsiders who did not belong there':

> 'Every Australia Day when we go out there in the community they will call it 'Invasion day', specifically referring to us as police. We also find in our regular interactions we get called 'Captain Cook c***', 'bully man', and other sorts of derogative names'.[43]

The direct and metaphorical referencing of warfare confirms earlier studies.[44]

4. Conclusion

While these accounts from those living and working in First Nations communities provide compelling trace evidence of a role for colonial legacies in First Nations incarceration, they reveal little about the precise causal effects of these legacies upon incarceration. The interview data provide some evidence for *how* post-colonial factors complicate the implementation of criminal justice policy at the street level: the accounts of both community leaders and local police, 'carrying the burden of past Government

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42 Dwyer, Scott, and Staines, 'Strangers in a Strange Land: Police Perceptions of Working in Discrete Indigenous Communities in Queensland, Australia', 8–9.

43 Dwyer, Scott, and Staines, 9.

44 See for example: Brian F. Kingshott, Kathleen Bailey, and Suzanne E. Wolfe, 'Police Culture, Ethics and Entitlement Theory', *Criminal Justice Studies* 17, no. 2 (2004): 187–202; cited in Dwyer, Scott, and Staines, 'Strangers in a Strange Land: Police Perceptions of Working in Discrete Indigenous Communities in Queensland, Australia', 9.

policies' likely informs how young offenders relate to criminal justice. As such, the legacies of colonisation are clearly relevant to my enquiry, but probably vary in effect from person to person and location to location.

I draw two conclusions from these colonial-conflict theories to take forward in my enquiry. First, the operation of colonial legacies cannot be discounted at any stage of governance. The diversity of First Nations people at the local level highlights the importance of the local level of governance as a likely site of weakness in public administration. On the basis of literature and interview data reviewed in this section I argue that any adequate explanation of governance in the policy response to First Nations incarceration must account for the experience of colonisation as a contextual factor that varies locally: legacies of colonial conflict will significantly shape the work of local Indigenous leaders and street-level bureaucrats.

Second, the interaction with colonial legacies must be considered in the operation of other causal theories: the disadvantage at the heart of strain theories of incarceration is connected to the experience of colonisation and the ongoing effect of colonisation on formal and substantive inequality in criminal justice cannot be discounted.

b) Offending Theories

A simplistic and prominent explanation for the increase in First Nations incarceration is that it is caused by an increase in crime.[45] For some theorists, a primary focus upon Indigenous offending is the launching point for a nuanced account of the complex factors that influence such offending. Notably, Weatherburn and others have argued for the primacy of 'offending' as a lens to understand First Nations incarceration in

[45] See, for example: Nick Pedley, 'NT and WA to Ignore UN's Call to Review Mandatory Sentencing as Indigenous Incarceration Rate Remains High', *ABC News*, 10 December 2014.

response to the post-colonial theories of incarceration.[46] But, for others, a behavioural pattern of Indigenous offending is offered as a complete explanation.[47] The refrain that Indigenous offending is 'driving' the rise in incarceration rates continues to be repeated by politicians, senior police officers and commentators;[48] indeed, it forms the justification for deterrence-focused policies in WA and the NT.[49]

1. Conceptualisation

Many explanations of First Nations incarceration concerning 'Indigenous offending' offer no theoretical causal mechanism of the type necessary to conduct a process-trace. Two theories offer explanations for a singular focus upon Indigenous offending: first, a cultural theory of Indigenous violence; and second, a lifestyle theory of offending with a particular focus upon substance abuse.

A significant change in offending patterns toward violent offences during the period of my enquiry impact incarceration rates because they attract severe penalties.[50] It is also evident that much of the violence is intra-communal – most victims are First Nations people, particularly women and children.[51] The gendered nature of the violence

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46 Lucy Snowball and Don Weatherburn, 'Indigenous Over-Representation in Prison: The Role of Offender Characteristics', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 99 (2006): 1–19; Don Weatherburn and Jackie Fitzgerald, 'Reducing Aboriginal Over-Representation in Prison: A Rejoinder to Chris Cunneen'', *Current Issues in Criminal Justice* 18, no. 2 (2006): 366–70; cf. Christopher Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues', *Current Issues in Criminal Justice* 17 (2006): 329–46.

47 See: Stephanie Jarrett, *Liberating Aboriginal People from Violence* (Brisbane: Connor Court, 2013); Sarah Hudson, 'Liberating Aboriginal People From Violence', *Centre for Independent Studies: Policy Magazine*, 2013.

48 Luke Eliot, 'Police Chief Says Face Up to Aboriginal Crime', *The West Australian*, 3 October 2011; Tony Thomas, 'The Long History of Aboriginal Violence' (Sydney: Bennelong Society, 7 May 2013); Jarrett, *Liberating Aboriginal People from Violence*.

49 Pedley, 'NT and WA to Ignore UN's Call to Review Mandatory Sentencing as Indigenous Incarceration Rate Remains High'.

50 Weatherburn, *Arresting Incarceration,* 57.

51 F. Al Yaman, M. Van Doeland, and M. Wallis, 'Family Violence Among Aboriginal and Torres Strait Islander Peoples' (Canberra: Australian Institute of Health and Welfare, 2006); Jacqueline Fitzgerald and Don Weatherburn, 'Aboriginal Victimisation and Offending: The Picture from Police

has been noted by several studies and has occasioned responses by female First Nations community leaders.[52]

Criminologists have traditionally theorised community violence as a cultural phenomenon.[53] Wolfgang and Ferracuti noted in their study that: 'quick resort to physical combat as a measure of daring, courage, or defence of status appears to be a cultural expression, especially for lower socioeconomic class males of both races.'[54] Similar arguments have been made with regard to violence in First Nations communities.[55] Langton's ethnographic research argues that swearing and fighting are 'organised forms of social interaction in traditional Aboriginal societies'.[56] Jarrett made a similar argument, citing archaeological evidence of the prevalence of 'defensive injuries' noted in skeletal remains of pre-colonisation, Aboriginal women.[57] Martin also argues that violence and fighting are 'deeply rooted in cultural values', although he also attributes some contemporary violence to 'intervention by wider society.[58] This

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Records', Crime and Justice Statistics Bureau Brief (Sydney: NSW Bureau of Crime Statistics and Research, 2001); R. Harding et al., *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (Sydney: Hawkins Press, 1995); P. Memmott et al., 'Violence in Indigenous Communities' (Canberra: Crime Prevention Branch, Attorney General's Department, 2011).

52 Marcia Langton and Josephine Cashman, 'Don't Forget Victims in Push to Cut Indigenous Numbers in Prison', *Sydney Morning Herald*, 9 May 2016, sec. Comment; Marcia Langton, 'The End of "Big Men" Politics', *Griffith Review* 22 (September 2008): 48–73; Phillip Adams, 'Silence on Indigenous Domestic Violence', *Radio National: Late Night Live* (Sydney: Australian Broadcasting Commission, 20 August 2015).

53 Marvin E. Wolfgang and Franco Ferracuti, *The Subculture of Violence* (London: Tavistock Publications Limited, 1967), 153.

54 Wolfgang and Ferracuti, *The Subculture of Violence,* 153.

55 Marcia Langton, 'Medicine Square', in *Being Black*, ed. K. Keen (Canberra: Aboriginal Studies Press, 1988), 16–22; Colin Tatz, 'Aboriginal Violence: A Return to Pessimism', *Australian Journal of Social Issues* 25, no. 4 (1990): 245–60; D.F. Martin, 'Aboriginal and Non-Aboriginal Homicide: Same but Different', in *Homicide: Patterns, Prevention and Control - Proceedings of a Conference Held 12-14 May*, ed. H. Strang and S. Gerull (Canberra: Australian Institute of Criminology, 1993), 167–76.

56 Langton, 'Medicine Square', 22.

57 Jarrett, *Liberating Aboriginal People from Violence*.

58 Martin, 'Aboriginal and Non-Aboriginal Homicide: Same but Different', 175.

argument is supported by Sutton in his prominent account, *The Politics of Suffering*.[59] Sutton maintains that violent traditional practice has been exacerbated by the experience of colonisation, particularly destruction of culture and substance abuse.[60]

On the basis of these accounts, I suggest a three-stage theorisation of culture as a causal mechanism for First Nations incarceration: first, a culturally determined understanding of violence, operating at times as an ideational mechanism and at others more as an institutional mechanism, has been inherited as a tradition in Aboriginal communities; second, this cultural mechanism *conflicts* with the contemporary, non-Indigenous Australian understanding of violence and criminal law, potentially *causing* an increase in Indigenous offending during the period; and third, this conflict is potentially exacerbated by a number of community-specific factors, such as substance abuse or destruction of culture.

An alternate conceptualisation of Indigenous offending is offered by *lifestyle theories*. These are similar to the cultural theories in its concern with violent offending; indeed, it can be said that these theories operate in addition to the cultural theories with an emphasis on recent changes to culture brought about by the introduction of alcohol and other addictive substances to First Nations communities.[61] Cape York Aboriginal community leader, Noel Pearson, argues that substance abuse is the root cause of Indigenous violence. Alcohol-related crime as well as illicit substance abuse are both more common among Indigenous than non-Indigenous Australians.[62] In Pearson's conceptualisation, substance abuse operates alongside other theoretical factors, such post-colonial and cultural mechanisms, but it comes to dominate:

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59 Peter Sutton, *The Politics of Suffering* (Melbourne: Melbourne University Press, 2009).

60 Sutton, *The Politics of Suffering,* 152.

61 Robert Milliken, 'Unlocking Indigenous Incarceration', *Inside Story*, 31 July 2015,.

62 Weatherburn, *Arresting Incarceration,* 64.

> We must understand that trauma, dispossession *et cetera* make our communities *susceptible* to grog and drug epidemics, they do not automatically cause abuse behaviour… When abusive behaviour is deeply entrenched in our communities it is not the material destitution, the social ills and historical legacy that fuel the abuse epidemics. *It is the epidemics themselves.*[63]

Following Pearson, I conceptualise substance abuse as a causal mechanism in causing incarceration and understand there to be a tipping point where it no longer interacts with other factors but is individually significant. In terms of building a minimally sufficient theory, I consider substance abuse to be best accommodated as a significant 'non-systemic factor'.

2. The Nature of the Test

As above, three preliminary considerations determine my initial assessment of these theories: my own prior beliefs, the likelihood of finding evidence, and the likelihood-ratio of finding the mechanism rather than the alternative hypothesis.

With regard to the cultural offending theory of First Nations incarceration, two theoretical prior beliefs are relevant to my assessment. First, the global mass-incarceration literature gives us reason to question the sufficiency of an explanation that focuses upon offending alone. As Clear and Austin have claimed, the 'iron law of prison populations' states that 'the total number of prisoners behind bars is purely and simply a result of two factors: the number of people put there and how long they stay'.[64] This may be caused by a crime-wave, but is more likely caused through an interaction between offending patterns and changes in criminal justice policy. But the weight of literature considering other national contexts where data is more readily available supports the alternative hypothesis: that 'policy' is the 'driving-force behind mass

63 Noel Pearson, 'On the Human Right to Misery Mass Incarceration and Early Death' (Dr Charles Perkin Memorial Oration, University of Sydney, October 2001), 4; See also: Noel Pearson, *Our Right to Take Responsibility* (Cairns: Noel Pearson and Associates, 2000).

64 Todd R. Clear and James Austin, 'Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations', *Harvard Law and Policy Review* 3 (2009): 307–24.

incarceration'.[65] This gives reason to be sceptical about the singularity of the cultural offending mechanism.

If culturally-driven offending is the primary cause of the increase in incarceration, there is a high likelihood of finding compelling evidence. In the first instance, there should be 'pattern evidence' of an increase in offending to match the increase in incarceration – this can be assessed using the available statistics and provides a strong, initial 'hoop test'. Moreover, there are archaeological studies available as evidence of the prevalence of violence in traditional Aboriginal societies.[66]

The evidential difficulty for cultural offending theory arises from the causal *verbs* (how the causation is happening) and, in particular, the causal direction. Evidence of culturally-condoned violence in pre-colonial or early colonial Aboriginal society is not necessarily evidence of a violent culture today. It bears noting that the penal settlement in early colonial Australia condoned high levels of violence between non-Indigenous Australians among whom convicts were governed by a brutal regime of corporal punishment. Yet that culture and regime are not used as an explanation for contemporary violent crime among the non-Indigenous Australian population. Moreover, some cultural offending theorists, such as Martin and Sutton, cite the destruction of traditional culture rather than (or, as well as) its persistence as a catalyst

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65 See, for example: Heather Schoenfeld, 'Putting Politics in Penal Policy Reform', *Criminology and Public Policy* 10, no. 3 (2011): 715–24; Mona Lynch, 'Mass Incarceration, Legal Change and Locale: Understanding and Remediating American Penal Overindulgence', *Criminology and Public Policy* 10, no. 3 (2011): 673–98; Alfred Blumstein and Allen J. Beck, 'Population Growth in US Prisons, 1980-1996', in *Crime and Justice: Prisons*, ed. Michael Tonry and Joan Petersilia (Chicago: University of Chicago Press, 1999); Alfred Blumstein and Allen J. Beck, 'Reentry as a Transeint State between Liberty and Recommitment', in *Prisoner Reentry and Crime in America*, ed. Jeremy Travis and Christy A. Visher (New York: Cambridge University Press, 2005).

66 Sutton, *The Politics of Suffering*; Citing: Geoffrey Blainey, *Triumph of the Nomads: A History of Aboriginal Australia* (Melbourne: Sun Books, 1983), 105–11; W. Lloyd Warner, *A Black Civilisation: A Social Study of an Australian Tribe*, (rev. edn 1958) (New York: Harper & Brothers, 1937). Blainey, Triumph of the Nomabs,105-11 Warner A Black Civilisation 173

for violent offending.[67] Account evidence of the impact of cultural factors satisfies, at best, a 'straw-in-the-wind' test of the mechanism. To establish the sufficiency of this simple explanation the alternative hypothesis would have to be disproven: that offending is driven by complex other factors including interaction with criminal justice policy.

Indigenous offending theories only engage with the first of my causal mechanisms. Nonetheless, if borne out by the evidence they offer a potentially sufficient explanation.

3. Assessment

The available quantitative data at the National level may be used to perform a 'hoop test' on the basis of offending patterns.

Figure 2.2 – National Incarceration Rates

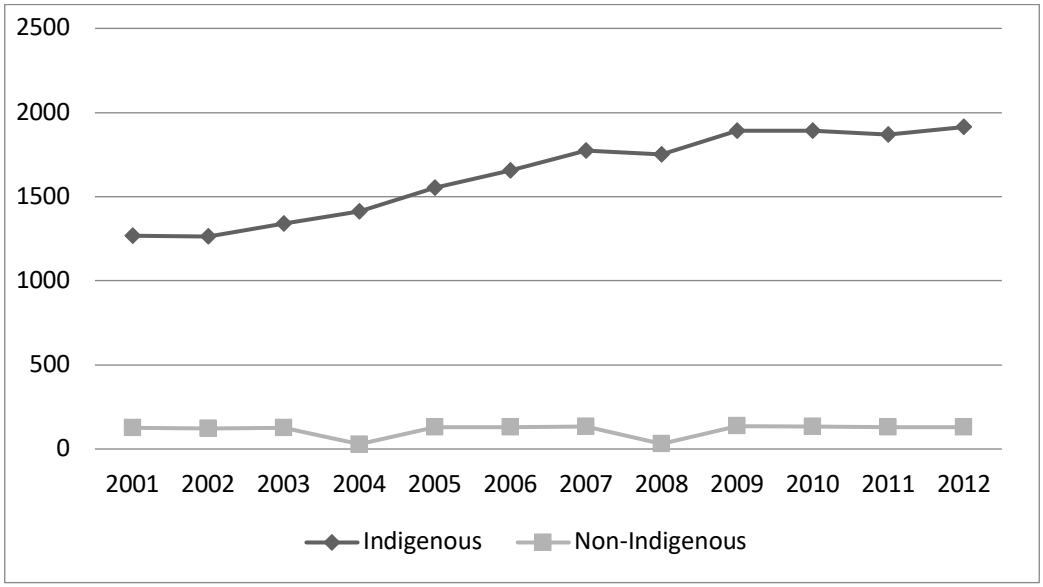


Figure 2.2 (y = per 100,000 of age-adjusted adult population) – Source: *Prisoners in Australia* 2001 and 2011.

67 Martin, 'Aboriginal and Non-Aboriginal Homicide: Same but Different', 175; Sutton, *The Politics of Suffering*, 155–56.

Figure 2.3 – National First Nations Involvement in Crime

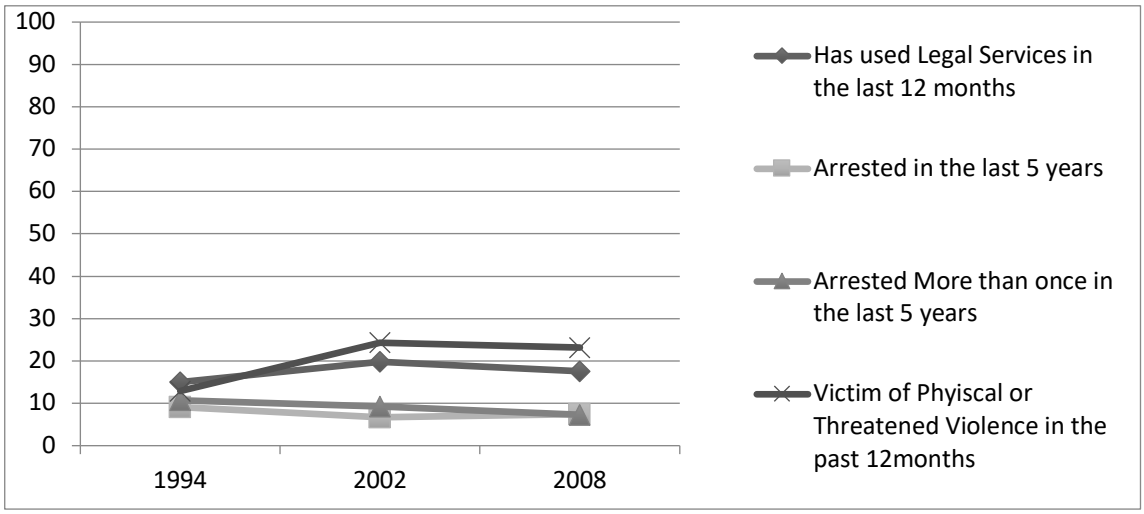


Figure 2.3: (y = % of Indigenous persons 15 years and older): Source - *National Aboriginal and Torres Strait Islander Social Survey* 1994, 2002, 2008.

Figure 2.3 shows the corresponding trend in the four measures of 'involvement in crime' from the *National Aboriginal and Torres Strait Islander Social Survey*, conducted in 1994, 2002 and 2008. These are very broad trends, measured in self-reported survey data. Nonetheless, for the purposes of a hoop test, they are sufficient to demonstrate the overall pattern of evidence: the persistent increase in First Nations incarceration has not been accompanied by a corresponding 'crime wave' among First Nations people. In order to explain the increase in incarceration, a corresponding increase in offending would be strongly evident in the data, which is not the case.

Having ruled out a corresponding increase in overall Indigenous offending, it is necessary to account for the possibility that the increase is caused by a change in the pattern of offending – toward more serious offences, that carry a greater likelihood of a prison sentence. Again, because of the clear trend in incarceration, the existence of corresponding changes in offending patterns can assessed using a hoop test against broad patterns within the available quantitative data.

Figure 2.4 Changes in National, First Nations Prison Population by Primary Offence

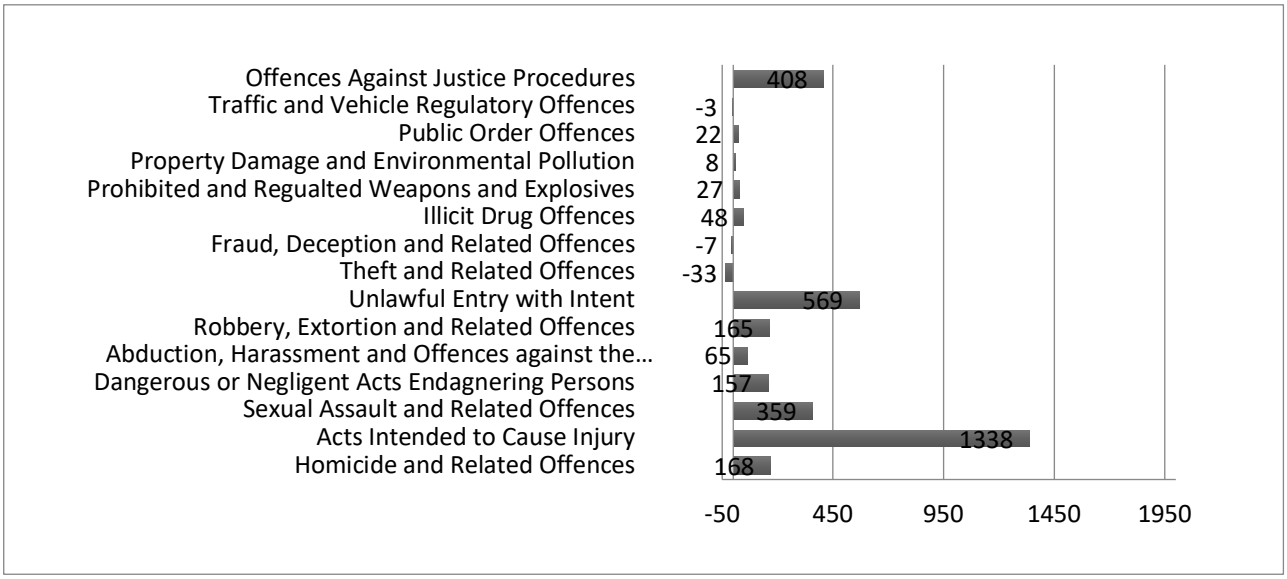


Figure 2.4 (y = change in primary offence between 2001 and 2011 by no. of prisoners): Source – *Prisoners in Australia* 2001 and 2011.

Figure 2.4 shows a clear trend towards violent offending and property offences over a past decade (2001-2011) at the national level. It also shows a lesser trend toward 'Offences Against Justice' nationally. As a hoop test, I consider these trends sufficient to disregard the *cultural theory* of Indigenous offending – insofar as it is conceived in the existing literature. If a cultural predisposition toward violence has been inherited from pre-colonial Indigenous societies, it does not make sense that it would sharply increase over a past decade. This does not preclude the operation of cultural factors entirely, but it does rule out operation as it is theorised in the literature. However, the *lifestyle theory* of Indigenous offending passes the hoop test and my confidence in it is strengthened by the evidence – provided that there is an external explanation for recent increases in violent and property crime.

The interview data provide a fitting external explanation to strengthen inference we draw from the quantitative data: an influence of a growing crisis in substance abuse.

Increasing disruption of community life due to alcoholism, including a generational crisis of foetal alcohol syndrome, as well as abuse of hard drugs was raised by many interviewees – and most strongly by community leaders. A First Nations community leader in Bourke observes:

> 'The other contributing factor is the need for these quite serious illicit drugs that young people have access to. My understanding is that you can get what you like in Bourke, which is a local government area with only 4000 people with 3000 people in the town. I think it is appalling when it's to the point where, yes, this was an epidemic, but I think it has moved on to a pandemic…The use of intravenous drugs and needles.'

When asked whether this had changed notably since 1991, they continued:

> 'Absolutely, absolutely. That's all evidence based as well. A scenario would be that some discreet areas of the community where young people are dumping their needles…some of them are now just leaving it on the street, in the driveway, in their front gate. Years ago people would be discreet. You wouldn't even realise it was happening in the community. Now it is in your face, and that is quite alarming. And, that is only going to increase as well because they are now trying a whole range of cocktails of different drugs. And then you get a mixture of binge drinking. Then they get to a state where they are vulnerable to anything, and it becomes a devil's playground, then nine times out of ten they get into trouble.'

The negative impact of substance abuse is also supported by self-reported survey data: over two-thirds (68%) of Aboriginal and Torres Strait Islander people aged 15 years and over who had experienced physical violence in 2015 reported that alcohol or other substances contributed to the most recent incident (70% of males compared with 67% of females); this was significantly higher in remote areas (76%) than in non-remote areas (65%).[68]

I consider the operation of these offending theories to be essential to an account of the government policy response. Evidence of changing trends in offending raises questions as to why no further policy response was forthcoming.

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68 Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey' (Canberra: Australian Bureau of Statistics, 2015) Table 8.1.

4. Conclusion

The assessment of offending theories above demonstrates that considerable changes have occurred in patterns of offending over the thirty years of the policy response. There is sufficient evidence to conclude that these changes in offending were a contributing cause of rising First Nations incarceration. But there is not sufficient evidence to control for or exclude the operation of other factors or to dismiss other explanations, such as the post-colonial conflict theories assessed above, or the strain theories assessed below.

For my purposes, it is interesting that these changes in the subject of the policy response to First Nations incarceration have not occasioned further change in the policy response. This suggests a different weakness in public administration to the local implementation failures highlighted above: it suggests that the policy response was unusually resistant to change in response to changing circumstances. As the policy response was initiated at the national level, the assessment of offending theories strengths our causal inference of a weakness there, or of a weakness in the feedback loop between the local level and the national level. This is an inference I carry forward in my analysis.

c) Strain Theories

Strain theory is a long-standing criminological explanation for incarceration that links crime to socio-economic disadvantage. Merton's (1968) original theorisation explains offending through a gap between 'socialised aspirations' and the 'legitimate means available to attain them'.[69] The strain caused by this gap is understood to induce a state of apathy in some members of disadvantaged communities; this may result in them

[69] Robert King Merton, *Social Theory and Social Structure* (Glencoe: The Free Press, 1968).

'retreating' (into substance abuse or self-harm) or 'rebelling' (by committing offences).[70] Versions of the strain theory argument have been used to explain First Nations incarceration.[71] For First Nations people there is an inevitable link between strain explanations and those considered earlier under the categorisation of post-colonial conflict: colonisation is widely understood to be the cause of First Nations disadvantage. For the Royal Commission, this compounded the strain:

> The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australia in every way, whether socially, economically or culturally.[72]

The Royal Commission's argument was adopted by Hunter (1993), who argues that the 'anomie' caused by profound disadvantage to First Nations violence toward self and others.[73] Originating in the work of Durkheim, 'anomie' is a sociological concept that refers to a 'condition in which society provides little moral guidance to individuals'; it results from a breakdown between an individual and their community and thus a disconnection from the norms that govern that community.[74] In the case of First Nations people, I consider this the most persuasive conceptualisation of strain theory.

1. Conceptualisation

The anomie concept has been found to resonate with the experience of First Nations people, conceptualising it as a causal mechanism requires some specification. This is especially true if the concept of 'anomie' is to be expanded beyond Merton's initial focus

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70 Weatherburn, *Arresting Incarceration,* 62; Merton, *Social Theory and Social Structure*.

71 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 1* (Canberra: Australian Government Publishing Service, 1991); John Walker and David McDonald, 'The Overrepresentation of Indigenous People in Custody in Australia', Trends and Issues in Crime and Criminological Justice (Canberra: Australian Institute of Criminology, 1995); Ernest Hunter, *Aboriginal Health and History: Power and Prejudice in Remote Australia* (Cambridge, UK.: Cambridge University Press, 1993).

72 Johnston QC, *Royal Commission: National Report,* Volume 1, para. 1.7.1.

73 Hunter, *Aboriginal Health and History*, 195; Cited in: Weatherburn, *Arresting Incarceration,* 62.

74 Emile Durkheim, *Suicide: A Study in Sociology*, ed. George Simpson, trans. John A. Spaulding (New York: The Free Press, 2010); Stjepan Gabriel Mestrovic, *Emile Durkheim and the Reformation of Sociology* (Lanham: Rowan and Littlefield, 1993).

upon atavistic property crime and acquisition of status. Such expansion is necessary if the concept is to accommodate the First Nations experience. Blagg has criticised the application of strain theories on the basis that First Nations people have historically been excluded from Australian society, and therefore never lost status.[75] I do not consider Blagg's criticism prohibitive as long as the link to colonisation is acknowledged: both the Royal Commission and Hunter connect their notion of anomie to the disempowerment of colonialism.[76] There is no good reason to think that the operation of colonial legacies suggested by *post-colonial conflict theory* and the operation of a sense of anomie under *strain theory* need to be mutually exclusive. Given a strong correlation between First Nations peoples in settler societies and socio-economic disadvantage, it seems more probable that they are interactive and mutually reinforcing.

One potential option for theoretical expansion is offered by Agnew, who understands anomie as a 'negative affect state' (i.e. rage, frustration or depression). These are caused by negative relationships, where the offender has been prevented from pursuing a strongly desired goal or is unable to escape from an unpleasant situation.[77] Weatherburn suggests that Agnew's theorisation has potential in explaining First Nations incarceration.[78] For my purposes, it is the strain theory that comes closest to providing a causal mechanism. This can be understood in two parts: incarceration rates will rise in First Nations communities if (a) there is sufficient

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75 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, 32.

76 Hunter, *Aboriginal Health and History*, 195; Johnston QC, *Royal Commission: National Report*, Volume 1, para. 1.7.1.

77 Robert Agnew, 'Foundation for a General Strain Theory of Crime and Delinquency', *Criminology* 30, no. 1 (1992): 51; Cited in: Weatherburn, *Arresting Incarceration,* 63.

78 Weatherburn, *Arresting Incarceration,* 62.

disadvantage/dysfunction to cause negative relationships; and (b) these result in negative effect states (some of which will result in illegal behaviour).

2. Nature of the Test

My prior theoretical understanding with regard to the application of strain theory is strong and favourable. The disadvantage suffered in First Nations communities is well documented and apparent in the data presented earlier in this Chapter. Moreover, strain theory has been persuasively applied by criminologists in other comparable contexts.[79] Moreover, as the disadvantage of First Nations people is acute, we can be relatively confident of finding evidence for both stages of Agnew's theorisation of the mechanism. The difficulty with strain theory arises when we turn to alternative hypotheses. Weatherburn has suggested that Agnew's theory explains too much. It is, he writes, '… hard to see what the theory could not explain'.[80] To strengthen my assessment of the theory, I look for trace evidence of the specific experience of alienation as set out by Agnew above and beyond a general experience of disadvantage. This 'straw in the wind' test will not suffice to exclude the operation of other theoretical concepts, but will establish whether 'anomie' needs to be accounted for in my subsequent theory-building.

3. Assessment

One theme that emerged strongly from the interviews was a variously-described sense of 'hopelessness'. The term was used by an NSW Aboriginal Legal Service lawyer who outlined its operation:

> 'What I'm really building to is I think there has been an increase in the factors that push Aboriginal people to despair or hopelessness. And, what I think is that Aboriginal people today see far less opportunity for good in their future lives than they did 10 or 20 years ago. 10 or 20 years ago I think there was some real encouragement or steps that things

79 Merton, *Social Theory and Social Structure*.

80 Weatherburn, *Arresting Incarceration,* 67.

> would change in their lifetime or that of their children…That person in an Aboriginal community who is not part of the emerging Aboriginal middle class, but is just trying to make ends meet and bring up their family, they have gotten to a point of hopelessness.'

They understood the effect upon incarceration rates to be direct:

> 'It's apparent when you dig down into these statistics that within the Aboriginal prisoner population it's a greater proportion of them just churning through, that are making up the numbers (in comparison to the non-Aboriginal population). And these people that get out of gaol, muck around for 6-9months and then go back to gaol, they absolutely epitomise the hopelessness I'm talking about.'

This is strong and specific evidence not of mere disadvantage but of a sense of anomie operating in First Nations communities. Moreover, it is clearly connected to and mutually reinforcing with a sense of post-colonial grievance, rather than mutually exclusive with it. A First Nations community leader in Bourke made a similar observation:

> 'Where's the incentive? Where's the adventure? And then you wonder why people are doing drugs, why they don't care anymore, why they'd rather push their own grandmother over – because there is nothing for them. They're being limited to, what I call, levy bank syndrome.[81] Because they are all kept inside, because they are not allowed to go out – the moment they go out the police are chasing them up and down anyway. '

The specific evidence of anomie was coloured by and often linked with another theme to emerge strongly from the interviews: the high rate of youth suicide in Indigenous communities. The tragically high rate of youth suicide in Indigenous Australia has been well documented,[82] but it has largely been neglected in the existing literature on incarceration rates despite its being powerful and tragic evidence of the anomie aspect of the problem.

The pattern in the quantitative data suggests that the Indigenous youth suicide has worsened simultaneously with the increase in incarceration: instances of Indigenous youth suicide were 'almost non-existent' twenty years ago but are now

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81 Referring to the flood levy banks that border the town of Bourke.

82 See, for example: Karen Middleton, 'Australia's Indigenous Youth Suicide Crisis', *The Saturday Paper*, 2 April 2016.

claimed to be the highest in the world.[83] Indigenous suicide increased from 5% of total Australian suicide in 1991, to 50% in 2010: the most dramatic increase occurred among young people 10-24 years old among whom the rate rose from 10% in 1991 to 80% in 2010.[84] There is also evidence that the suicide crisis is geographically concentrated in certain communities – particularly in the 'Top End' or far North of Australia. In the Kimberley region of WA, there was an attempted Indigenous suicide every week in 2010, resulting in a rate of suicide 100 times the national average.[85] The simultaneous timing of the youth suicide crisis in First Nations communities and the rise in incarceration rates, as well as its comparable severity, make it compelling evidence of a pervasive anomie among First Nations youth.

4. Conclusion

The straw-in-the-wind test I have conducted against interview data shows strong and specific evidence of the operation of anomie among Indigenous offenders – and is strengthened further by the suggested link to the high rate of Indigenous youth suicide. However, the straw-in-the-wind test does not exclude the operation of other explanatory theories; indeed, it is consistent with the evidence that post-colonial conflict theories are operating alongside anomie caused by disadvantage and are mutually reinforcing of it. What can be causally inferred is that the well-evidenced anomie amongst First Nations youth must be accounted for as a contextual factor in the implementation of the policy response at the local level in any sufficient explanation of First Nations incarceration and the failure of the policy response.

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83 Mick Gooda and Pat Dudgeon, 'The Elders' Report into Preventing Indigenous Self-Harm and Youth Suicide' (Darwin: People Culture Environment (in Partnership with Our Generation Media), April 2014), 8.

84 Gooda and Dudgeon, Elder's Report, 8.

85 Gooda and Dudgeon, Elder's Report, 8.

d) Conclusion

From the above assessment of the causes of First Nations incarceration three conclusions are relevant to building a theory of the operation of governance in the policy response:

1. Legacies of colonial conflict continue to operate in the everyday administration of criminal justice, and the cultural conflict manifests strongly at the local level: this strongly suggests the importance of the local level as a site for theorisation.
2. Changes in patterns of offending during the period suggest a different weakness in public administration. The absence of a corresponding change in the policy responses suggests a problematic resistance to change: as the policy response was initiated at the level of national policy-making, this level or the relationship between this level and the local level is of particular interest.
3. Finally, the ongoing prevalence of anomie as a reported cause of rising incarceration from local perspectives suggests an important contextual factor for the operation of public administration is the ongoing disadvantage and disorganisation of civil society in some localities – this is a specific and ongoing legacy of colonisation.

III. Explanations within Government: Inequality in the Administration of Criminal Justice

I now turn my attention to the prospect that the actions of government were responsible for increasing First Nations incarceration and defeating the policy response. The most immediate potential cause of racially disproportionate incarceration is racially unequal treatment in criminal justice. I examine the literature on inequality in criminal justice in detail for two reasons: first, unequal treatment would directly result from the machinery of government, which is the subject of my enquiry; and second,

unequal treatment was the initial concern of the interdisciplinary literature on First Nations incarceration and remains the most prominent potential causal factor, both in the literature and the commentary.[86]

Part of the prominence of unequal treatment as an explanation for rising incarceration is due to controversy. As outlined above, policymaking in criminal justice is administered under the governing concept of the rule of law and 'equal treatment before the law' is a fundamental tenet of that concept.[87] Consequently, any finding of unequal treatment in criminal justice is of fundamental significance to the justice system, necessarily controversial and likely politicised.[88] Political salience has resulted in semantic but politically significant debates about whether terms such as 'racist' or 'biased' should or should not be applied to Australian criminal justice.[89] While such labels are meaningful and politically significant, they are less relevant to my inquiry than whether the outcome of criminal justice in its treatment of First Nations Australians is equal or not. Below I consider the potential causal impact of two conceptions of unequal treatment: (1) formal inequality and (2) substantive inequality. These conceptions are defined by the ALRC in their 2017 report on First Nations incarceration and are consistent with the usage in common law jurisprudence concerning the rule of law.

> 'Formal equality suggests that all people should be treated the same regardless of their differences. Substantive equality is "premised on the basis that rights, entitlements,

86 For example, see Eggleston's pioneering study: Eggleston, *Fear, Favour Or Affection*.

87 See: Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010).

88 On fundamental significance in Australia: Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Sydney: Australian Law Reform Commission, December 2017), 23.

89 See Weatherburn's critique of Blagg stretching the term 'racism' 'beyond it's elastic limit' Weatherburn, *Arresting Incarceration,* 53; Cf: Blagg, *Crime, Aboriginality and the Decolonisation of Justice*.

> opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality."'[90]

As will be seen, the distinction between formal and substantive inequality is analytically important because, whilst each has significance for the study of the machinery of government in responding to First Nations incarceration, they are significant in different ways.

a) Formal Inequality in Criminal Justice

The prospect of formal inequality, through reports of bias and discrimination were a motivating factor in the Hawke Government's decision to call the Royal Commission. As Minister Tickner recalled:

> The fact that Aboriginal people have been overrepresented and disadvantaged at all stages of the criminal justice system was established beyond doubt in the 1960s and 1970s as a result of research by such people as the late Elizabeth Eggleston and Professor Colin Tatz.'[91]

At that time, the causal effect of unjust government policies and unfair treatment by legal institutions on the disproportionate incarceration of First Nations people was widely accepted by policymakers. Reflecting on the individual cases of deaths in custody reported by the Royal Commission, Tickner continued:

> In large measure the suffering was a direct result of the actions and policies of Australian governments of all political persuasions. These policies were, and remain, the cause of the vast overrepresentation of Aboriginal people in prison and the consequent continuing high number of Aboriginal deaths in custody[92]

Surveying Australian legal history and drawing upon its own landmark research, the Royal Commission observed:

> '… Aboriginal experience of the court system was one of discrimination and repression. The courts were seen to be acting on behalf of other interests and to be imposing a

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90 Australian Law Reform Commission, *Pathways to Justice*, 23.

91 Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen and Unwin, 2001), 67 referring to: Eggleston, *Fear, Favour Or Affection*; Colin Tatz, *Race Politics in Australia: Aborigines, Politics and Law* (Armidale: University of New England Publishing Unit, 1979).

92 Tickner, *Taking a Stand: Land Rights to Reconciliation*, 66.

> foreign culture. That historical experience remains very much the perception of the courts today held by many Aboriginal people.'[93]

The Royal Commission devoted Chapter 13 of its National Report to instances of 'Institutional Discrimination and Racism' citing numerous examples reported between 1980 and 1989, especially of discriminatory and racist treatment by police resulting in over-reliance on arrest and failure to employ alternatives.[94] The National Report also criticised the large percentage of arrests and detentions for minor offences, especially drunkenness and offensive language.[95] Two-thirds of the Commissioners' eventual recommendations related to police, prisons, coronial inquests and other institutions of criminal justice: half of these, 106 recommendations, related to over-representation in the criminal justice system.

The literature on formal inequality begins with Eggleston's 1976 study, which assessed whether the over-representation of First Nations people in prison was due to 'discrimination in the administration of justice' or 'greater criminality in the Aboriginal population'.[96] Eggleston conducted a two-stage research method focused within WA: she began with interviews of criminal justice officials and then tested these subjective impressions through a quantitative analysis of court cases dealt with in ten WA country towns.[97] Eggleston argued that laws and institutions, as well as individual officials, could be discriminatory and that this discriminatory treatment may be unconscious:

> 'Discrimination in the administration of justice may operate in different ways. First, officials of the legal system may not be impartial and may express prejudiced attitudes in discriminatory acts against Aborigines. Such discrimination is not justified by existing legal rules. On the other hand, there may be discrimination built into the system itself.

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93 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 10.6.7.

94 Johnston QC, *Royal Commission: National Report, Volume 2,* Chapter 13, especially Paragraphs 13.4, 14.14.8-14.14.9, 21.1.7, 30.2.2-30.2.14.

95 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraphs 14.14.8-14.14.9, 21.1.7, 30.2.2-30.2.14.

96 Eggleston, *Fear, Favour or Affection*, 1; See Weatherburn, *Arresting Incarceration,* 44–46.

97 Eggleston, *Fear, Favour or Affection*, 3.

> Some legislation only applies to Aborigines and law officers who enforce that legislation are then acting in accordance with the law even though they thereby discriminate against Aborigines.'[98]

Eggleston found evidence that suggested formal inequality in the application of criminal justice at every level. She found evidence of WA police charging Aboriginal people with offences where a non-Aboriginal person would be warned, cautioned, or their behaviour even ignored. Aboriginal defendants were more likely to be unrepresented, more likely to have their case adjudicated by a justice of the peace than a trained judge, more likely to be convicted; and more likely to receive a prison sentence.[99] In the months before the Royal Commission's establishment, Eggleston's pioneering research was joined by others: Ronalds, Chapman and Kitchener found disproportionately high conviction rates for public order convictions in NSW;[100] Milne found that NSW police were disproportionately quick to arrest Aboriginal people for 'offensive behaviour' and 'public drunkenness'.[101] Cunneen and Robb attributed high rates of arrest in north-western NSW to 'over-policing', as well as Aboriginal offending.[102] While not conclusive, the pattern of these correlative studies strongly suggested unequal treatment of First Nations offenders in criminal justice.

Eggleston's theory was that the effect of small formal inequalities in the administration of criminal justice accumulate on a defendant: 'the cumulative effect of

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98 Eggleston, *Fear, Favour or Affection*, 1–2.

99 Eggleston, *Fear, Favour or Affection*, 177–78; Well summarised in: Weatherburn, *Arresting Incarceration,* 44–45.

100 See Chris Ronalds, Murray Chapman, and Kevin Kitchener, 'Policing Aborigines', in *Issues in Criminal Justice Administration*, ed. Mark Findlay, Sandra J. Egger, and Jeff Sutton (Sydney: George Allen and Unwin, 1983), 168–83; also, by the same authors: New South Wales Anti-Discrimination Board, *Study of Street Offences by Aborigines: A Report of the Anti-Discrimination Board in Accordance with Section 119 of the Anti-Discrimination Act 1977* (Sydney: New South Wales Anti-Discrimination Board, 1982).

101 T. Milne, 'Aborigines and the Criminal Justice System', in *Issues in Criminal Justice Administration*, ed. Mark Findlay, Sandra J. Egger, and Jeff Sutton (Sydney: George Allen and Unwin, 1983), 184–99.

102 Christopher Cunneen and Tom Robb, *Criminal Justice in North-West New South Wales* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1987).

past injustices is that the Aboriginal defendant now before the court has a long criminal record which the court can look at to justify a heavy sentence…'[103] This argument was further developed by Gale *et al*. in their study of juvenile incarceration among First Nations people in SA. Gale *et al*. observed that in SA Aboriginal juveniles are more likely to be arrested, charged and sent to court rather than diverted to a non-court adjudicating authority.[104] This selective treatment then compounds inequality at subsequent stages: at bail, prosecution, sentencing and parole; at each point rendering the Aboriginal offender more likely to be or remain incarcerated.[105]

In several instalments over the past decade, Weatherburn has developed the most thorough critique of the formal inequality argument.[106] With justification he points to a significant flaw in the argument that formal inequality is the *primary* reason for disproportionate incarceration: there is insufficient data available to control for other variables.[107] Prior to the Royal Commission, there were no national data archives on relative rates of Indigenous and non-Indigenous offending in Australia: as Weatherburn notes 'there were virtually no data that could be used to test competing hypotheses about the causes of over-representation.' [108] Prompted by the recommendations of the Royal Commission, data gathering by the Australian Bureau of Statistics (ABS) and other agencies has improved since. Nevertheless, there remains significant scope for interpretation. For example, with regard to the argument that the disproportionate

103 Eggleston, *Fear, Favour or Affection*, 178.

104 Gale, Bailey-Harris, and Wundersitz, *Aboriginal Youth and the Criminal Justice System*.

105 Gale, Bailey-Harris, and Wundersitz *Aboriginal Youth and the Criminal Justice System*.

106 Weatherburn, *Arresting Incarceration*; Fitzgerald and Weatherburn, 'Aboriginal Victimisation and Offending: The Picture from Police Records'; Weatherburn and Fitzgerald, 'Reducing Aboriginal Over-Representation in Prison: A Rejoinder to Chris Cunneen''; Cf: Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues'.

107 Weatherburn, *Arresting Incarceration,* 48.

108 Weatherburn, *Arresting Incarceration,* 23.

likelihood of police choosing to charge Indigenous offenders rather than to issue cautions is increasing incarceration, Weatherburn argues that this practice might result from a reluctance to cooperate with police, the commission of more serious offences, or having a longer criminal record:

> 'These are considerations which, regardless of ethnic background would render anyone more likely to be charged rather than cautioned, more likely to be refused bail than granted it, and more likely to be given a sentence of detention if convicted.'[109]

On the basis of the quantitative data available through prison surveys, Weatherburn argues that disproportionate offending by Indigenous Australians, rather than unequal treatment is the *primary* explanation for disproportionate incarceration.[110]

A note on the available data:

A small digression from my review of formal inequality explanations of disproportionate incarceration is necessary here to consider the available data whose weaknesses have been identified most prominently in the context of debate over formal inequality – and therefore potential racist discrimination – before the law. But the same limited datasets underpin all of the causal literature seeking to explain rising incarceration. In this context, Weatherburn's critique of the formal inequality literature provides an illustrative example, through which to make a general point.

Evidence from the annual surveys of prisoners undertaken by the ABS support Weatherburn's argument that increases in more serious types of offence, especially violent offences, are an important causal factor in increasingly disproportionate incarceration.[111] Self-reporting in the *National Aboriginal and Torres Strait Islander Survey* suggests that First Nations rates of victimisation in violent crime have risen

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109 Weatherburn, *Arresting Incarceration,* 48.

110 See: Weatherburn, *Arresting Incarceration,* Chapter 9.

111 Weatherburn, *Arresting Incarceration,* 55–56.

alongside increases in this type of offending.[112] However, the limitations of these data mean that they should not be used to exclude other explanatory factors, as Weatherburn attempts to do. The ALRC highlighted these limitations in its 2017 report, which commissioned a team from Curtin University to assemble and analyse the available data and make recommendations for its improvement. The ALRC noted three limitations, to which I add a fourth:

1. First it is not possible to fully account for prisoner 'flow', 'national prison statistics are produced annually by the ABS, but these are incomplete – they do not count or report on the total 'flow' of prisoners who come into and leave prison over a defined period';[113]
2. Second, it is not possible to fully account for upstream factors in either offending or victimisation including 'many factors, not just penal policy/practice are known to have a bearing on incarceration levels'. Thus, the ALRC recommended:
    a. 'National criminal court statistics be improved such that breakdowns of finalisations, sentencing decisions and penalties (quantum) by Aboriginal and Torres Strait Islander status are available for all jurisdictions';[114]
    b. The *National Aboriginal and Torres Strait Islander Survey* should be 'expanded to include more detail on self-reported offending and on the reason for arrest/imprisonment', as '…at the moment it is possible to explore the correlates of victimisation but very difficult to explore

112 Both self-reported rates in survey data and identification as the victim in in criminal proceedings.

113 Australian Law Reform Commission, *Pathways to Justice*, Paragraph 3.77.

114 Australian Law Reform Commission, *Pathways to Justice*, Paragraph 3.82.

the correlates of arrest/offending because there is no way of distinguishing between arrests for different kinds of crime'.[115]

3. Third, it is not possible to account fully for recidivism. Whilst the ALRC finds that 'current proxy measures such as prior record of imprisonment are inadequate' despite implying high recidivism rates, the Commission recommended that 'a nationally consistent approach to the estimation and analysis of recidivism rates, by way of detailed rigorous estimation of probabilities of returns to prison by offenders, with special attention paid to correlates of recidivism in prison populations.'[116]
4. To the ALRC's concerns I add a fourth, namely that it is not usually possible to break down the quantitative data to the local level. Local differences are readily apparent to one working and travelling between First Nations communities. In 1990, Gale *et al*. noted in 1990 the problem this poses for general analyses of national offending trends: 'such a thesis is difficult to substantiate, especially since it cannot explain why Aboriginal youths living under similar conditions in neighbouring rural communities experience different rates of apprehension, arrest, Court referral and detention.[117] Local differences suggest the probability that other causal factors also contribute to rising First Nations incarceration.

Returning to Weatherburn's critique of the formal inequality literature, I caution against dismissing the causal impact of formal inequality too hastily. Formal inequality cannot fully explain rising incarceration: the Royal Commission's national report in 1991 acknowledged that 'the most fundamental causes for the over-representation of

115 Australian Law Reform Commission, *Pathways to Justice*, Paragraph 3.82.

116 Australian Law Reform Commission, *Pathways to Justice,* Paragraph 3.84.

117 Gale, Bailey-Harris, and Wundersitz, *Aboriginal Youth and the Criminal Justice System*, 38.

Aboriginal people in custody are not to be found in the criminal justice system…the most significant contributing factor is the disadvantaged and unequal position Aboriginal people find themselves in the society – socially, economically and culturally.'[118] Further, Weatherburn cites studies undertaken since the Royal Commission's report that suggest instances of formal inequality have decreased.[119] He argues that this should be not surprising, as in the decades since the Royal Commission 'concern about Indigenous over-representation in prison is, if anything, more intense among magistrates and judges than amongst the wider community'.[120] I accept this, but argue that formal inequality must nonetheless be accounted for in explaining the policy response for two reasons.

The primary reason is the evidence that, while less common than in 1991, unequal treatment persists. While formal inequality alone does not directly explain the disproportionate rise in incarceration, the second order effects of prominent injustices are understood by judicial leaders to be disproportionately severe. It is for this reason that common law jurisprudence has repeatedly stipulated that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'[121] It is both intuitive and logical to expect, as the Royal Commission did, that perceptions of justice would be even more significant in the post-colonial context of Indigenous Australia where 'to construct bridges of trust and respect requires initiatives on both sides.' [122]

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118 Johnston QC, *Royal Commission: National Report*, Volume 1, 15; Weatherburn, *Arresting Incarceration*.

119 Bond, Jeffries, and Weatherburn, 'How Much Time?'; Bond and Jeffries, 'Harsher Sentences?'; Bond and Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts'.

120 Weatherburn, *Arresting Incarceration,* 52.

121 *R v Sussex Justices; Ex Parte McCarthy* [1924] KB 256 (King's Bench).

122 Johnston QC, *Royal Commission: National Report,* Volume 1, Paragraph 1.8.8.

b) Assessment

The outsized effects of injustice can be assessed in a manner similar to the external causes of First Nations incarceration considered above. This can only be done in the context of a specific event: allowing the reaction to and interpretation of a perceived injustice to be measured. An illustrative example is provided by a widely reported instance of formal inequality that occurred in the sentencing of Matthew Alexander for the death of Jack Sultan-Page in 2015:

> The Case of Matthew Alexander and Jack Sultan-Page
>
> On the 22nd of July 2015, Magistrate John Neill of the Darwin Magistrates Court handed down a sentence upon a non-Indigenous man, Matthew Alexander, for causing the death of an Indigenous boy, Jack Sultan-Page. Eight year old Sultan-Page had been riding his bicycle in suburban Palmerston (NT) in November 2014, when he was struck and killed by Alexander's car in a 'hit and run' incident. Alexander did not stop his vehicle or render assistance. He pleaded guilty to drug possession and driving in a dangerous manner. Magistrate Neill sentenced Alexander to a fine of $2,090 AUD, 18 months suspended sentence and six months home detention. This light sentence was widely perceived in the Darwin Indigenous community as unjust and racially motivated.

The sentencing of Matthew Alexander for the death of Jack Sultan-Page was very controversial across First Nations communities in a manner that is inexplicable without the racial-dimension.[123] The temporal dimension of my travels following the incident was critical: as I travelled a 14,000km loop through the communities within this study between July and September 2015, I was able to trace the interpretation of this event across the ten communities in the months following its reporting.

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123 See: Nadia Daley, 'Matthew Alexander Sentenced Over Hit-and-Run Death of Jack Sultan-Page Fined over Separate Charges', *ABC News*, 22 July 2015; Allan Clarke, 'Authorities Will Not Review Sentence Of Driver Who Left Indigenous Boy For Dead', *BuzzFeed News Australia*, 13 August 2015.

1. Preliminaries

My knowledge of this event and its significance prior to the test were low: although aware of it, it was not a high-profile crime and the matter was being heard in the Darwin Magistrates Court. I anticipated it might cause some discussion within the NT but not elsewhere. However, the confirmatory power of this specific assessment was high. This was a unique, specific and discrete event. For evidence of effects of the concern over this injustice to emerge unprompted in unstructured discussions would be a doubly decisive confirmation of the potential second-order effects of formal inequality.

2. Assessment

In each of the ten communities in which I conducted interviews, from my first interviews in Dubbo until my final confirmatory interviews in Bourke two months later, the case of Matthew Alexander and Jack Sultan-Page was referenced: either as evidence of preferential treatment of white Australian offenders before the courts or of a disregard for the safety of Aboriginal children. The spontaneous references greatly exceeded my expectations. For a sentencing in a lower level Court in the NT to cause apparent discomfort and distrust across First Nations communities in different criminal jurisdictions highlights the reach of the vicarious injustice experience.

3. Conclusion

Formal inequality forms a major part of the history of criminal justice in Australia. There is evidence that it is still occurring, albeit far less commonly than at the commencement of the policy response to First Nations incarceration. However, even rare instances of unequal treatment have outsized effects. The evidence of reactions to the case of Matthew Alexander and Jack Sultan Page leads me to conclude that the

impacts of formal inequality cannot be dismissed in a theory of the governance of the policy response.

c) Substantive Inequality in Criminal Justice

Alongside the literature on formal inequality as a cause of rising incarceration, is a literature on substantive inequality. This approach to inequality acknowledges that many contextual factors influence the enjoyment of equal rights before the law: thus, 'a one size fits all approach will not achieve equality.'[124] Substantive inequality was a major concern of the Royal Commission, lying behind the National Report's observation that 'the most fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system'.[125] Substantive equality was an explicit goal of the ALRC recommendations in its 2017 report. The ALRC claimed that it 'did not propose a "parallel system" of justice for Aboriginal and Torres Strait Islander people'.[126] Rather, it argued that:

> 'Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander Offers. It includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.'[127]

This recommendation connects with an argument about institutional racism internationally prominent in the criminology literature on race and incarceration. Blagg cites Bowling's formulation, developed in the context of disproportionate policing against black and minority ethnic communities in the UK:

> If the outcome of the established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred. Although racism is rooted in

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124 Australian Law Reform Commission, *Pathways to Justice*, 23.

125 Johnston QC, *Royal Commission: National Report,* Volume 1, 15; Weatherburn, *Arresting Incarceration*.

126 Australian Law Reform Commission, *Pathways to Justice*, 23.

127 Australian Law Reform Commission, *Pathways to Justice*, 23.

> widely shared attitudes, values and beliefs, discrimination can occur irrespective of the intent of individuals who carry out the activities of the institution.[128]

In this way, achieving the goal of reducing First Nations incarceration may require more than the elimination of formal inequality – facially neutral laws and practices may be unequal in practice, contributing to racially disproportionate incarceration. The precise causal impacts of substantive inequality upon incarceration are difficult to measure using the quantitative methods that predominate both in government policy reviews and among government criminologists such as Weatherburn. Nevertheless, evidence exists. Since 1991, concern for substantive inequality has dominated submissions to all government enquiries from First Nations organisations and leaders – starting with the Royal Commission and concluding with the ALRC report.[129] Moreover, in the interdisciplinary project of explaining First Nations incarceration two prominent bodies of literature offer compelling concern for substantive inequality from within their own methodologies and epistemologies: first, a jurisprudential argument, which has been developed in arguments in Australian courts, and second, a critical criminology literature, arising from de-colonising epistemology of post-colonial studies and indigenous studies.

1. Jurisprudence

Following the publication of the Royal Commission's report, advocates sought to secure the adoption of its principle of 'incarceration as a sanction of last resort' through sentencing decision in Australian Courts. (Strategic litigation had been a successful method for First Nations people to secure native title rights through judicial leadership

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128 Benjamin Bowling and Coretta Phillips, *Racism, Crime and Justice* (London: Longman, 2002); Cited in Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, 9.

129 See: Johnston QC, *Royal Commission: National Report*, Volume 1; Johnston QC, *Royal Commission: National Report, Volume 2*; Australian Law Reform Commission, *Pathways to Justice*.

in the *Mabo* decision, which prompted subsequent legislation.[130]) This strategy had some success at state level. The NSW Supreme Court adopted the principle of 'incarceration as a sanction of last resort' in the case of *Parker v DPP*;[131] subsequently codified in legislation through s5(1) of the *Crimes Sentencing Procedure Act 1999* (NSW).[132] Since judicial leadership carries significant weight in the criminal justice policy domain and this strategy having been employed by many actors, this body of literature has particular significance to the study of the policy failure.

At the centre of the judicial approach to substantive inequality in incarceration adopted by NSW courts were the principles outlined in 1992 in *R v Stanley Edward Fernando*.[133] In his seminal judgement, Justice Wood outlined eight principles.[134] The *Fernando* principles implemented many of the concepts at the heart of the Royal Commission: a recognition of the importance of Aboriginal identity; a recognition of the vexed connection between violent Indigenous offending and alcohol abuse; and an understanding of the complex relationship between socio-economic disadvantage and offending. This precedent was soon adopted by the full NSW Supreme Court on appeal.[135] Since Justice Wood's decision in 1992, the application of the principles in *Fernando* has been narrowed by courts: for example, distinctions have been drawn

130 *Mabo v Queensland* (No. 2) (1992) 174 Commonwealth Law Reports 1 (High Court of Australia); 'Paul Keating Ignored Advice to Do Nothing over Mabo', *The Australian*, 30 December 2016; The Hon Justice Michael Kirby AC CMG, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty', *Melbourne University Law Review* 30 (2006): 576–93.

131 *Parker v DPP* (1992) 28 NSWLR 282.

132 New South Wales Law Reform Commission, 'Sentencing Aboriginal Offenders', (96; Sydney: New South Wales Law Reform Commission, 2000), [2.47], [3.88].

133 *R v Stanley Edward Fernando* (1992) 72 A Crim R 58 (NSW) 58.

134 Ibid., at 62-3.

135 This occurred in the unreported case of *R v Hickey* (Unreported, New South Wales Court of Criminal Appeal, 27 September 1994); *R v Lana Ryan* [2002] NSWCCA 171; *R v Ah See* [1999] NSWCCA 175; R v David Cook [1999] NSWCCA 234.

between people from urban and remote communities.[136] Courts have also required the level of disadvantage to be 'exceptional', precluding those with high school education.[137]

Following *Fernando*, the project of strategic litigation was to extend these principles to other State jurisdictions and also to secure approval at the national level by the High Court. This work was informed by Canadian Supreme Court decisions in *R v Gladue* and *R v Ipeelee*, which are influential throughout the common law world with regard to incarceration of indigenous people. Both the principles in *Fernando* and the Canadian authorities of *Gladue* and *Ipeelee* came before the High Court of Australia in case of *Bugmy*.[138] The arguing of this case arose from a long-standing desire by many advocates and Indigenous legal services to present the High Court with an appropriate 'test case' to decide questions of substantive inequality in the sentencing of First Nations defendants.[139]

Of particular interest to the legal appeal in *Bugmy* was the question of whether the consideration for substantive inequality should be given less weight in sentencing over time, or in the context of continued reoffending. The High Court held that the effects of a background of deprivation do not diminish and should be given full weight as factors for consideration. However, the Court maintained a race-neutral approach by holding that the deprived background of an Indigenous offender may mitigate sentencing, just as the deprived background of a non-Indigenous Australian offender would in the same circumstances since to decide otherwise would impair individualised justice in sentencing.[140]

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136 *R v Newman, R v Simpson* (2004) 145 A Crim R 361 (NSW).

137 *Anderson v R* [2008] NSWCCA 211at 214-5; *R v Knight* [2004] NSWSC 498.

138 *Bugmy v The Queen* (2013) 249 CLR 571 (High Court of Australia).

139 Interview with NSW Aboriginal Legal Service Manager, 2015.

140 *Bugmy* at 36 (French CJ, Hayne, Crennan, Kieffel, Bell, Gageler and Keane JJ).

The majority also held that: 'to accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity.'[141] Thus, in the 'absence of specific legislative direction of the kind discussed in the Canadian decisions' Australian courts are unwilling to move further toward recognising substantive inequality. For this reason, the ALRC recommended a legislative provision:

> 'Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander Offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait islander Peoples.'[142]

The ALRC thereby recommended that the principle of 'imprisonment as a last resort' – Recommendation 92 of the Royal Commission, universally adopted by Australian Governments – be reinforced by sentencing legislation.

2. Post-colonial Criminology

Post-colonial thinking places the experience of colonisation and 'the colonial matrix of power' at the centre of the inquiry.[143] The post-colonial criminological project has drawn on the epistemologies of post-colonial thinkers to:

> '…Identify the pluriversality of power and laws, the active colonial project with its forms of oppression in everyday Indigenous lives and the location of Indigenous place as a site of colonial contest and Indigenous resistance and resurgence.'[144]

This requires a fundamental change in perspective from the jurisprudence cited above. Post-colonial criminology is sceptical of the western tradition of the rule of law and the institutions of Australian criminal justice at the centre of the policy response to First Nations incarceration. Blagg and Anthony, two prominent criminologists and long-

141 *Bugmy* at 53.

142 Australian Law Reform Commission, *Pathways to Justice*, 204, Recommendation 6-1.

143 Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (London: Springer, 2019), 1.

144 Blagg and Anthony, *Decolonising Criminology,* 1–2.

time analysts of First Nations incarceration, have explored reasons for this scepticism: 'euro-modernity's darker machinations manifest in its tendency to cynically shelve its normative commitment to the rule of law and human rights when confronted by "problem" populations overseas or, increasingly, at home.'[145] Rather than a more traditional Western progressive agenda that 'has elevated Western human rights as the *sine qua non* of human progress in the world', this literature 'locates the return of stolen land and reparations for crime against the Indigenous collective at the forefront of its demands, whereas human rights activism would consider these to be secondary to individual rights and liberties.'[146]

Post-colonial criminology is difficult to reconcile methodologically with other contributions to the literature on the causes of incarceration. Blagg and Anthony note that the post-colonial literature is critical of quantitative and qualitative analyses in the Western tradition arguing that they are both:

> '…unreliable guides, profoundly compromised by their origins within colonial discourse.'[147] Both qualitative and quantitative methods 'construct reality from the same position of ontological privilege, reflecting the implicit authority of Western gaze.'[148]

The post-colonial literature describes itself as 'post-disciplinary': 'what we are seeking is to develop research that recognises alternative epistemologies, ontologies and methodologies, and places Western knowledge systems in the socio-historical context of imperialism.'[149] It is unified by its commitment to Indigenous world-views, 'as a distinct form of human experience'. [150]

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145 Blagg and Anthony, *Decolonising Criminology,* 2.

146 Blagg and Anthony, *Decolonising Criminology,* 9.

147 Blagg and Anthony, *Decolonising Criminology,*37.

148 Blagg and Anthony, *Decolonising Criminology,*37.

149 Blagg and Anthony, *Decolonising Criminology,*14.

150 Tim Rowse, 'Global Indigenism: Genealogy of a Non-Racial Category', in *Rethinking the Racial Moment: Essays on the Colonial Encounter*, ed. A. Holland and B. Brookes, 2011, 229.

It is not useful for me to assess the post-colonial criminological literature as I have done with earlier theories of rising incarceration because it has a fundamentally different ontology and epistemology of comparative evidence. [151] Nor do I consider it useful to engage in the interpretivist analysis favoured by some post-colonial analysts: as the purpose of public policy studies is to provide useful analysis to future policymaking, to stray beyond the philosophical and methodological foundations of the Australian democratic policymaking enterprise is unlikely to be productive. Nevertheless, I do not dismiss the work of post-colonial scholars.

The philosophical and cultural divide between Indigenous and non-First Nations worldviews is profound and readily experienced when travelling between communities. A useful example of the seriousness with which some First Nations leaders take these differences is provided by Warlpiri, the community of Lajamanu in the Tanami Desert, which participated in my fieldwork and is explored in more detail in Chapter Five. After agreeing to my visit, the Kurdiji Elders provided the 38-page document *Ngurra-kurlu: A way of working with Warlpiri People*, written by Wanta Jampijinpa Pawu-Kurlpurlurnu and others.[152] Those working in Lajamanu, including academics alongside government workers and other service providers, are encouraged to learn from this document, which is freely available online: it provides an introduction to key Warlpiri socio-political concepts which can be used by practitioners and/or Warlpiri to 'increase the success' of such community projects. Through the *Ngurra-kurlu* document, Warlpiri leaders powerfully demonstrated their firm conviction that the cultural and philosophical differences between Indigenous and non-Indigenous Australia had a significant causal impact upon the success or failure of policy initiatives in their

151 Rowse, 229.

152 Wanta Jampijinpa Pawu-Kurlpurlurnu, Miles Holmes, and Alan Box, 'Ngurra-Kurlu: A Way of Working with Warlpiri People', Desert Knowledge CRC (Alice Springs: Central Land Council, 2008).

community. Indeed, the leaders invested considerable time and effort in preparing and distributing the *Ngurra-kurlu* document, in an attempt to try and bridge those cultural differences and secure more successful policy outcomes for their community.

The strength of the post-colonial criminological literature is that it is informed by First Nations perspectives that are important to the success or failure of the policies at the centre of my enquiry. Blagg and Anthony argue that 'in terms of criminological methodologies,' 'it is vital to adopt a mix of techniques, rather than privileging one approach and run together insights from a diversity of disciplines.'[153] Accordingly, I adopt three concepts from the post-colonial criminological literature that are both significant to my theory-building and had real world effects that I can observe: first, the existence of the Aboriginal domain; second, the importance of place; and third the ongoing nature of colonisation.

The Aboriginal domain has been defined by John Sturmer as 'places where the dominant social life or culture is Aboriginal, where the system of knowledge is Aboriginal, where the major language is Aboriginal; in short where the resident Aboriginal people constitutes the public.'[154] The domain is 'not static and unchanging': 'its shape, density and texture is in constant flux and in a dynamic relationship with the mainstream society. Furthermore, domain can be found in urban, rural and remote places.'[155] The presence of Aboriginal domains is observable at the local level. It is the manifestation of the differences in political culture highlighted in the Lajamanu example above. Brigg has argued that the differences between the domains is ontological: settler Australian society, within the Western democratic tradition, is *biopolitical*, being

153 Blagg and Anthony, *Decolonising Criminology*, 37.

154 John von Sturmer, *Towards an Aboriginal Research Strategy*, 1984, 219; cited in Tim Rowse, *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination* (Darwin: North Australia Research Unit, Australian National University, 1992), 19.

155 Blagg and Anthony, *Decolonising Criminology*, 40.

focused on human life and human rights; by contrast, many First Nations ontologies are *terrapolitical*, where power is determined by relationship to land.[156] While unresolvable, such differences are relevant to my enquiry as they have to be bridged for policy to succeed at the local level.

The second concept I adopt from the postcolonial literature is an extension of the first: the salience of place. At the centre of post-colonial criminology is 'recognising and centring Indigenous place as the bedrock of Indigenous politics'[157] This has important implications for my judgement about where to focus my enquiry. To account for the impact of First Nations ontologies and domains provides another reason to focus my enquiry at the local level.

The third concept I draw from the post-colonial literature is also relevant to my methodology: a different measurement of time and temporal factors. As Blagg and Anthony observe, post-colonial literature does not consider colonisation a 'finite event', 'rather it is an ongoing phenomenon.'[158] For this reason, postcolonial criminology 'disputes the view that colonisation is a thing of the past', rather 'it is an ongoing process and lived experience'[159] 'Wolfe has argued that colonisation is a dynamic structure and process, rather than an isolated event.[160]

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156 Morgan Brigg, 'Biopolitics Meets Terrapolitics: Political Ontologies and Governance in Settler Colonial Australia', *Australian Journal of Political Science* 42, no. 3 (2007): 403–17.

157 Blagg and Anthony, *Decolonising Criminology*, 40.

158 Blagg and Anthony, *Decolonising Criminology,* 15; See also: Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005), 181.

159 Blagg and Anthony, *Decolonising Criminology*, 31.

160 Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999); Cited in Blagg and Anthony, *Decolonising Criminology*, 16; See also: Biko Agozino, 'The Withering Away of the Law: An Indigenous Perspective on the Decolonisation of the Criminal Justice System and Criminology', *Decolonising Criminal Justice: Indigenous Perspectives on Social Harm* 3, no. 1 (2018).

IV. Conclusion

Building on my conclusions from the formal inequality literature, the substantive inequality literature enhances my confidence in both the importance of the local level and the relevance potential interaction with the external causes of rising First Nations incarceration assessed in the first part of this Chapter. Both the legal jurisprudence and the post-colonial criminology literature reinforce my intuition that the machinery of government played an important role in the policy response to First Nations incarceration. Assembling the diverse threads of a public policy literature in order to consider that role more closely is the task to which I now turn in Chapter Three.

Chapter Three: Identifying Failing Mechanisms in the Machinery of Government

In the previous chapter I reviewed and assessed existing explanations of rising First Nations incarceration. While primarily concerned with the policy response, this literature overlaps with its subject matter and can provide important insights. Rather than excluding a causal role for the machinery of government, these explanations have increased my suspicion that it broke down in the policy response. The logical implications of my assessment of existing explanations of rising incarceration also provide insights into two likely weaknesses in public administration: first, at the local level, where the existing explanations coalesce and the burden of the policy response to First Nations incarceration fell disproportionately; second, at the elite level, where the policy has proven resistant to change, despite contextual changes affect the subject matter of the response.

While these insights are promising, I do not consider them sufficient to commence process-tracing. To avoid blundering around when building a theory with process-tracing, we must be confident of a relationship between *x* (government machinery) and *y* (the effect on incarceration rates):

> 'If we are studying the mechanisms in-between *x* and *y* we already either know that there is a causal relationship between *x* and *y*, or have good theoretical and/or empirical grounds for assuming that there is one.'[1]

Process-tracing then allows us to explore the *how*: the arrow between *x* and *y*.[2] As introduced in Chapter One, in the case of the policy response to First Nations incarceration the question of *how* government machinery impeded the

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1 Derek Beach and Rasmus Brun Pedersen, 'Case Selection Techniques in Process-Tracing and the Implications for Taking the Study of Causal Mechanisms Seriously' (APSA Annual Meeting Paper, New Orleans, LA, 2012), 2.

2 Beach and Pedersen, 'Case Selection Techniques in Process-Tracing', 2.

policy response is most pressing for future policymaking. To make this question manageable, I need to narrow my *x* from the entire machinery of government, to a specific mechanism or mechanisms that we have theoretical or empirical grounds for assuming broke down. Drawing upon the public policy theories of governance failure, I anticipate that these will be relationships in the multi-layered policy system that have broken down and impeded the policy response.

Until now I have cast my net broadly, intentionally opening the thesis to all perspectives so as to not miss relevant factors. In this chapter, I narrow my focus. My task is to move from the general insights of the existing explanations to the identification of specific mechanisms to theorise in the chapters that follow. Returning to the mechanical analogy favoured by practitioners of process-tracing that runs through this thesis, in this Chapter I am fault finding. Just as a mechanic will run an engine and look and listening for rattling loose parts or other signs of malfunction before she begins disassembling individual mechanisms to fix faults, in this Chapter I am looking and listening for faults in the machinery of government underpinning the policy response. While there is no political science literature directly concerned with the case study of the policy response to First Nations incarceration, there are diverse sources of literature that echo with the rattling I am looking for. In this Chapter, I assemble these sources to create a public policy literature that brings greater specificity to the relationship between the systems of government machinery and the outcome of the policy response.

To start with, there are formal reviews of the implementation of the recommendations of the Royal Commission. These reviews provide a thorough assessment of the adoption of the Royal Commission's recommendations and a

more limited qualitative analysis of the implementation. But these are primary sources from within the governance of the policy response and the civil society supporting it; they provide no account either of *why* some recommendations were incompletely implemented or of *why* they did not achieve their aims; nor do they explicitly consider government machinery – indeed, many of the contributions supporting these reviews come from within that machinery.

To further supplement this literature, in the second and third sections of this Chapter I reference the common analytical dichotomy in political science between agency and structure to construct two further literatures on the machinery of the policy response: one focused upon the importance of the agency of leaders to policy success; the other focused upon the role of structural constraints:

- In the second section, a literature about the importance of leadership and agency to the policy response to First Nations incarceration, including the long-standing literature connected to the question of First Nations self-determination and the literature specific to the increasingly prominent policy approach of justice reinvestment; and,
- In the third section, a literature about structural constraints facing policy actors within the policy response to First Nations incarceration, including the instability of public administration in both Indigenous affairs and criminal justice and a literature on First Nations corporations.

Before commencing, it is necessary to note a certain imposed artificiality in the extent to which I am holding these literature I assemble together: it is not the intention of these sources to explain the operation of government machinery; many of them are not directly concerned with First Nations incarceration; and

they are not consciously in debate or conversation with each other, except through my analysis. But, in my judgement each of the literatures I assemble echoes with the rattling of loose parts in the same government machinery that underpins the policy response to First Nations incarceration. In the absence of a political literature explaining the case study, the sources collected provide the most feasible opportunity to narrow my focus. I argue they may be utilised to further inform my judgements as to the likely sites of weakness in the public administration of the policy response and to inform theories of the mechanisms operating at those sites of weakness.

I. Reports on the Implementation of the Recommendations of the Royal Commission

Accusations of incomplete implementation of the Royal Commission's recommendation are prominent in the commentary on First Nations incarceration.[3] But prominent commentary has not engendered a corresponding academic interest and the implementation of the policy response has not been systematically studied in the scholarly literature on First Nations incarceration. Engagement with questions of implementation has been left to a series of reports, variously commissioned by Governments and NGOs. These reports assess the formal adoption of the recommendations of the Royal Commission, frequently assigning percentage scores for the number of recommendations adopted. For example, reporting on the Deloitte Report reviewed below concluded: 'Of the 339 recommendations, 64% were fully implemented, 14%

[3] See for example: Lorena Allam and Calla Wahlquist, 'Indigenous Deaths in Custody: Key Recommendations Still Not Fully Implemented', *The Guardian Australia*, 25 October 2018; Laura La Rose, 'The Point Recap - Royal Commission into Aboriginal Deaths in Custody Review; Juunkan Gorge Detonation', *The Point, NITV SBS*, 12 June 2020.

were mostly implemented, 16% were partly implemented and 6% were not implemented at all.'[4] This is a different approach to implementation than that commonly adopted in public policy studies, which has a long-standing concern with implementation failure: for the sake of analytical clarity, I consider the approach currently adopted in reviews of the policy response to First Nations incarceration to be more appropriately described as studying 'adoption' rather than of 'implementation'; it is a study of whether governments did *something* (i.e. adopted policies) in response to the policy recommendations of the Royal Commission, not of whether those policies were fully implemented.

Public policy scholars have a broader understanding of implementation. In their pioneering study of implementation failure from the 1970s, Pressman and Wildavsky defined implementation as 'to carry out, accomplish, fulfil, produce, complete'.[5] This more fulsome definition generally encompasses the work of bureaucrats and service providers in a chain of implementation stretching from policy-maker to the 'results on the ground', against which the success or failure of implementation must be understood.[6] As the title of Pressman and Wildavsky's study of implementation in the context of American policymaking describes: it is the study of 'how great expectations in in Washington are dashed in Oakland'.[7] In the five decades since Pressman and Wildavsky's study the consistent failure to achieve this kind of implementation

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4 See: Allam and Wahlquist, 'Indigenous Deaths in Custody'.

5 J. Pressman and Aaron Wildavsky, *Implementation. How Great Expectations in Washington Are Dashed in Oakland* (Berkeley CA: University of California Press, 1973).

6 Evert Lindquist and John Wanna, 'Is Implementation Only About Policy Execution?: Advice for Public Sector Leaders from the Literature', in *New Accountabilities, New Challenges*, ed. John Wanna, Evert Lindquist, and Penelope Marshall (Canberra: Australian National University Press, 2015), 210.

7 Pressman and Wildavsky, *Implementation.* Also: Lindquist and Wanna, 'Is Implementation Only About Policy Execution', 210.

has remained a longstanding focus of public policy studies.[8] The associated literature has grown in size and sophistication, spawning several significant sub-literatures, including the governance failure literature in which I situate this thesis.[9]

Inevitably, the 339 recommendations of the Royal Commission have provided a ready benchmark for those seeking to measure government performance. This benchmark had immediate political significance: at the time of the policy response, Tickner noted the significant effort his office made to lobby other Commonwealth ministers, departments and agencies to secure the adoption of *all* these recommendations, aside from the one not supported by ATSIC.[10] Since 1991, this benchmarking has continued. In the first decade of the policy response, reports into the adoption of these recommendations were commissioned by ATSIC and the Aboriginal and Torres Strait Islander Justice

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8 See: Harold Lasswell, 'The Policy Orientation', in *The Policy Sciences*, ed. D. Lerner and Lasswell, H.D. (Stanford, CA.: Stanford University Press, 1951); Harold Lasswell, *The Decision Process* (College Park, MD: University of Maryland Press, 1956); Harold Lasswell, *A Pre-View of Policy Sciences* (New York, NY: American Elsevier, 1971).

9 See Lindquist and Wanna, 'Is Implementation Only About Policy Execution?'; and Harald Saetren, 'Facts and Myths about Research on Public Policy Implementation: Out-of-Fashion, Allegedly Dead, but Still Very Much Alive and Relevant', *Policy Studies Journal* 33, no. 4 (2005): 559–82; Citing Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes Law* (Washington DC: Brookings Institute, 1977); Carl E. Van Horn, *Policy Implementation in the Federal System* (Lexington: Heath, 1979); Robert Nakamura and Frank Smallwood, *The Politics of Policy Implementation* (New York, NY: St. Martin's Press, 1980); Walter Williams, *The Implementation Perspective: A Guide for Managing Social Service Delivery Programs* (Berkeley CA: University of California Press, 1980); Walter Williams et al., *Studying Implementation: Methodological and Administrative Issues* (Chatham NJ: Chatham House, 1982); Daniel A. Mazmanian and Paul A. Sabatier, *Implementation and Public Policy* (Glenview: Scott Foresman and Company, 1983); Malcolm L. Goggin et al., *Implementation Theory and Practice: Toward a Third Generation* (Glenview: Scott Foresman and Company, 1990); Michael Hill and Peter Hupe, *Implementing Public Policy: An Introduction to the Study of Operational Governance*, 3rd Edition (London: Sage, 2014).

10 Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen and Unwin, 2001), 74–75.

Commissioner.[11] Subsequent reports have followed this focus upon the recommendations and agreed with Cunneen and McDonald's conclusion in 1997 that 'the recommendations of the Royal Commission into Aboriginal Deaths in Custody in general terms still provide a blue print for reforming key aspects of criminal justice administration'.[12]

In my view, this focus on specific recommendations risks losing sight of the broader structural argument that unifies them: self-determination and the empowerment of local leaders. Indeed, as the rhetoric of self-determination has lost its political salience, there has been some evidence of a convenient focus on the detail of individual recommendations to avoid the broader argument. Consideration of the fulsome implementation of efforts to achieve self-determination, which was central to Cunneen and McDonald's review in 1997, has increasingly been confined to the small set of recommendations that reference it specifically (Recommendations 188-213). In the full report of the Royal Commission, empowerment is referenced with regard to almost every other recommendation, so much so that the Commissioners feared they were being over-repetitive.[13] Moreover, the Commissioners forecast that empowerment would be difficult to implement within Australian public administration. Commissioner Elliot acknowledged that 'it would be obviously

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11 Christopher Cunneen and David McDonald, 'Keeping Aboriginal and Torres Strait Islander People Out of Custody' (Sydney: Aboriginal and Torres Strait Islander Commission, 1996); Christopher Cunneen and David McDonald, 'Indigenous Imprisonment in Australia: An Unresolved Human Rights Issue', *Australian Journal of Human Rights* 3, no. 2 (1997): 90; Aboriginal and Torres Strait Islander Justice Commissioner, 'Indigenous Deaths in Custody 1989 to 1996: Second Report' (Canberra: Human Rights and Equal Opportunities Commission, 1996).

12 Cunneen and McDonald, 'Indigenous Imprisonment in Australia: An Unresolved Human Rights Issue', 7.

13 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 1* (Canberra: Australian Government Publishing Service, 1991), Paragraph 1.10.10.

foolish not to acknowledge that some of these recommendations raise large questions of administrative difficulty.'[14]

Two prominent reviews have recently been commissioned into the implementation of the Royal Commission's recommendations. The most recent was commissioned by the Minister for Indigenous affairs in December 2017 and conducted by Deloitte Access Economics (the 'Deloitte Report'). This was originally intended to be an internal review for the Commonwealth bureaucracy, but its existence was disclosed by the *Guardian Australia* and its release was compelled by a motion of the Australian Senate.[15] An earlier study was that commissioned by Amnesty International and supported by the Australian law firm Clayton Utz, which ran between 2010 and 2015 and subsequently informed the *Change the Record Campaign*, a campaign advocating policy changes to reduce First Nations incarceration. Together, these reports represent the most thorough investigation of the implementation of the policy response to First Nations incarceration.

a) The Deloitte Report

In December 2017, Commonwealth Minister for Indigenous Affairs Nigel Scullion engaged Deloitte Access Economics to 'review the implementation status' of the 339 recommendations of the Royal Commission.[16] Deloitte undertook a desktop review, which they then supplemented by consulting Commonwealth Government agencies and State and Territory Governments to 'capture additional actions that have been undertaken that we did not uncover during the

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14 Johnston QC, *Royal Commission: National Report,* Volume 1, Paragraph 1.10.12.

15 See: Allam and Wahlquist, 'Indigenous Deaths in Custody'.

16 Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Department of Prime Minister and Cabinet, August 2018), ix.

desktop review.'[17] The Deloitte review considered the problem of implementation of the Royal Commission's recommendations under ten headings: (1) coronial matters; (2) the justice system; (3) Aboriginal and Torres Strait Islander disadvantage; (4) non-custodial approaches; (5) prison safety; (6) self-determination; (7) cycle of offending; (8) health and education; (9) equal opportunity; (10) reconciliation, land needs and international obligations.[18] It concluded that 78 per cent of the recommendations had been fully or mostly implemented; 16 per cent had been partially implemented; and 6 per cent were not implemented.[19]

The Deloitte Report's conclusions were immediately seized upon by commentators as evidence of implementation.[20] But the limited scope of Deloitte's methodology has been criticised by a large number of academics: most notably, more than thirty individuals and several institutions co-signed a critical appraisal of the report from the Centre for Aboriginal Economic Policy (CAEPR) at the Australian National University.[21] The Deloitte Report is limited by its terms of reference to 'assessing the actions taken to respond to each recommendation,' while 'commentary on whether the intended outcomes from each recommendation have been achieved' was excluded from its remit.[22] Its remit did not extend to 'assessing the actions taken', but instead was evaluating

17 Deloitte Access Economics, *Review,* ix.

18 Deloitte Access Economics, *Review,* viii–ix.

19 Deloitte Access Economics, *Review,* vii: 'Executive Summary'.

20 See for example: Aaron Patrick, 'In Australia, Black Lives Do Matter', *Australian Financial Review*, 10 June 2020.

21 Kirrily Jordan et al., 'Joint Response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', *CAEPR Topical Issue* (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2018),.

22 Deloitte Access Economics, *Review*, 3.

'whether actions had been taken'.[23] As a result, the review is a limited accounting of the formal adoption of the Royal Commission's recommendations rather than of their implementation. Writing on behalf of the co-signed academics and institutions, Jordan and others argue that, as a result, Deloitte 'substantially overstate the progress made towards implementing the [Royal Commission] recommendations'.[24] To its credit, the Deloitte Report does provide a thorough catalogue of formal Government actions in response to the recommendations of the Royal Commission, which it has confirmed through consultation. The Deloitte Report also extends its consideration beyond the immediate response to the recommendations in the 1990s to include subsequent government policymaking, with the noted caveat that 'an exhaustive history of all the relevant government actions since 1991 was also outside of scope.'[25]

b) The Amnesty Report

Between 2010 and 2015, Amnesty International was supported by Clayton Utz and a team of volunteers in conducting its own review of the implementation of the Royal Commission's recommendations (the 'Amnesty Report'). Like the Deloitte Report, the Amnesty Report is primarily a desktop survey. Not being commissioned by government, the Amnesty Report lacked comparable access to government agencies. However, it has the considerable merit of offering more thorough accounting of government actions down to what it characterises as the 'third tier' of policymaking, which includes strategic plans to reduce First

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23 Deloitte Access Economics, *Review,* 3.

24 Jordan et al., 'Joint Response to the Deloitte Review', 1.

25 Deloitte Access Economics, *Review*, 3.

Nations incarceration developed by individual government agencies.[26] The Report has the further advantage of drawing upon perspectives from First Nations leaders and communities in its assessment. For example, in assessing the implementation of criminal justice reforms to improve relations between police and the Indigenous community, it notes 'the apparent difference between the government assessments and views and experience of the Indigenous community.'[27] Unlike the Deloitte Report, the Amnesty Report also assesses the implementation qualitatively: continuing the above example regarding police-community relations it recommends that '…strengthening of the implementation of Recommendations 60 and 61 provides an important opportunity for the police'.[28] As such, it is much more critical of the implementation of the policy response than the Deloitte Report. But, while it draws on a wider range of perspectives than the later Deloitte Report, the Amnesty Report does not systematically assess the completeness of implementation or the effectiveness at the local level. It also offers no explanation for how or why the policies that were formally adopted from the Royal Commission's recommendation were not implemented into effect at the local level.

c) Conclusion: Adoption and Implementation of the Royal Commission's Recommendations

In terms of the machinery of government, the first conclusion that must be drawn from the formal reviews of the implementation of the policy response concerns delegations. It is apparent that State and Territory Governments

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26 Amnesty International and Clayton Utz, *Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody* (May 2015), 2.

27 Amnesty International and Clayton Utz, *Review,* 183.

28 Amnesty International and Clayton Utz, *Review,* 183.

exercised considerable jurisdiction in how many recommendations they adopted, and how fully these recommendations were implemented. Despite the best efforts of Minister Tickner, Prime Ministers Hawke and Keating, and their respective staffs, the Commonwealth was unable to secure State adoption of all of the Royal Commission's recommendations.[29] Moreover, in many instances commitments the Commonwealth was able to secure from State and Territory governments were not enduring.[30] This conclusion is significant in the context of the mechanism that changes policy in the response to First Nations incarceration. It suggests the politics of delegation between principal (the Commonwealth) and agents (States and Territories) are a major weakness in that mechanism. There is a well-developed theoretical literature on this type of principal/agent relationship in political science, which I consider in the fourth section of this chapter alongside other relevant theories.

Beyond the question of which recommendations were adopted, the Deloitte and Amnesty reports provide a useful catalogue of government action at the Commonwealth and State level undertaken formally to adopt the recommendations of the Royal Commission. Notwithstanding the value of community perspectives in the Amnesty Report, it shares with the Deloitte exercise the limitation that desktop methodologies share in preventing thorough assessment of the policies' effectiveness. Both reviews are primarily concerned with causation in the other direction: measuring completeness against the content of the recommendations of the Royal Commission, rather than the more

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29 Tickner, *Taking a Stand,* 45; Deloitte Access Economics, *Review,* Chapter 1, Overview; Amnesty International and Clayton Utz, *Review,* Overview.

30 Tickner, *Taking a Stand*, 45–49.

methodologically difficult question of policies' actual effects upon First Nations incarceration.

While they are not explained as such, many of the examples given in the Amnesty Report also suggest the possibility of breakdowns in public administration at the local level. Evidence is cited that suggests implementation is not occurring locally, although it is beyond the scope of the review's methodology to consider that possibility or its reasons in detail.[31] To interrogate more precisely the possibility of a further breakdown at the local level requires the agency and structure literatures I draw together below. There is also a further salient feature of the case, which emerges from these reviews: the frequent administrative and policy changes that have occurred in the policy domains around the policy response. The impact of such changes I consider in the third section.

II. The Agency of Leaders and the Policy Response to First Nations Incarceration

The question of leadership and agency of leaders has been central to Indigenous affairs policymaking from before the time of the Commonwealth's constitutional empowerment at the 1967 referendum. While the interaction between agents and structures is of general academic interest to scholars of politics, legacies of colonisation, and the assertion of a right to self-determination by First Nations leaders, make the interaction in the case of the politics of Indigenous affairs sharp, and systemic. Patterson's description of the question of 'whether and if so how to achieve the representation of Aboriginal and Torres Strait Islander

31 See in this regard the review of police practices: Amnesty International and Clayton Utz, *Review,* 183.

people' as a 'constant and underlying problem' for the administration of Aboriginal and Torres Strait Islander Affairs bears recalling at this point.[32] The problem of representation has fundamental roots: First Nations people have a right to self-determination that successive Australian Governments have struggled to realise in public administration.[33] In this context, First Nations representation raises 'practical, ethical and political questions' for policymakers. From her position within the Department of Prime Minister and Cabinet, Patterson observes that despite 'ten different structures and 21 different Ministers' in the 50 years since the 1967 referendum, these questions remain 'unresolved.'[34]

While the ethical dimension of the right to self-determination is beyond the scope of this thesis, it is necessary to note that it has immediate political manifestations. Since colonisation, self-determination has been central to First Nations resistance and activism: Maddison has documented Aboriginal activists using the language of self-determination as early as the 1920s.[35] Patterson observes that 'when pursuing structural solutions to the problem of representation, governments have been pushed to defend these ideas against the criticism that Aboriginal and Torres Strait Islander structures are divisive.'[36]

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32 Michelle Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', *50 Years of Commonwealth Public Administration in Aboriginal and Torres Strait Islander Affairs: Indigenous Affairs Group (IAG) Discussion Paper*, Department of Prime Minister and Cabinet, Number 1 (2017): 3.

33 United Nations General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples' (2007) Articles 3,4 and 5.

34 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 3.

35 Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Crows Nest, NSW: Allen and Unwin, 2009) Chapter Two: Autonomy and Dependency.

36 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 10.

There is a conservative strain of politics in Australia that is hostile to the perception of so-called 'special treatment' for First Nations people – both in the context of democratic institutions and of criminal justice and the rule of law.[37] The creation of ATSIC was a high water mark for administrative accommodation of self-determination and a flashpoint for conservative discontent. John Howard's comments during the *ATSIC Bill* debates in 1989 are illustrative: 'I take the opportunity of saying again that if the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its [ATSIC].'[38] Howard's period as Prime Minister from 1996 to 2007 saw the abolition of ATSIC in 2004 and the throttling of Government efforts to accommodate self-determination in public administration.[39] I consider the structural ramifications of this paradigm shift in the following section.

Separate from its ethical and political weight, it is the practical significance of empowering of First Nations leaders within Commonwealth and State Government policymaking that was the policy centrepiece of the response and is my primary concern in this thesis. I turn now to consider the emphasis placed upon empowering leaders in both the original report of the Royal Commission and the subsequent reports that informed the policy response, most notably the ALRC Report in 2017. I also consider the implicit argument for the

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37 Paul Karp, 'Tony Abbott Incorrectly Claims "no Evidence" Indigenous Australians Face Justice System Discrimination', *The Guardian Australia*, 14 June 2020; Anne Pedersen et al., 'Attitudes toward Indigenous Australians: The Issue of "Special Treatment"', *Australian Psychologist* 41, no. 2 (2006): 85–94.

38 The Hon. John Howard, ''Ministerial Statement: Administration of Aboriginal Affairs', House of Representatives, Debates (Canberra: Parliament of Australia, 11 April 1989), 1328.

39 Jordan et al., 'Joint Response to the Deloitte Review', 2.

importance of agency and leadership in the prominent emerging arguments for justice reinvestment as further policy response to First Nations incarceration.

a) Government and Legal Reports

The first source for the literature emphasising the importance of agency in the policy response to First Nations incarceration remains official governmental and legal reports. This begins with the 1991 reports of the Royal Commission. These were published at the highpoint of self-determination as a policymaking paradigm in Indigenous Affairs. The language and logic of self-determination infuses Commissioner Johnston's National Report.[40] This emphasis on the importance of involving First Nations people carried through into the Royal Commission's recommendations. Recommendation 188 specifies:

> 'That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.'[41]

The National Report gives examples to support this emphasis on leadership in implementation – both from Indigenous and non-Indigenous leaders. In the context of police relations with Indigenous communities the Royal Commission gives the example of local success in the town of Elliot in the NT:

> '… the Aboriginal Council, as volunteers, acted as wardens to patrol the camps at night and to discourage and attend to unruly behaviour. The councillors acted as go-between for community and police. When, finally, funding was granted through …[ATSIC] to employ the councillors in this role, this was seen to be a breakthrough. Funding, however, was then withdrawn and the sergeant in charge supported the protest of the community to ATSIC about this unfortunate

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40 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991), Paragraph 13.4.37.

41 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 4* (Canberra: Australian Government Publishing Service, 1991), Recommendation 188.

> decision. A less sensible sergeant may have seized the opportunity to call for more police to be stationed at Elliot.'[42]

While the Royal Commission's reports are not explicit, these examples give clear insights into the causal impact that the Commissioners understood leaders to play in reducing First Nations incarceration if sufficiently empowered within the public administration of criminal justice policy. Leadership was critical to collaboration between First Nations people and non-Indigenous people at the local level; and leadership was a critical mechanism for adapting policy instruments to achieve outcomes in local circumstances.

The policy paradigm of self-determination fell from favour following the election of the Howard Government in 1996 and was replaced in 2007 by the 'Closing the Gap' agenda, which was explicitly focused upon achieving equality between First Nations people and was less interested in claims of self-determination. However, emphasis on local leadership as a critical factor in reducing First Nations incarceration has remained strong in subsequent governmental, parliamentary and legal reports. In 2011, the Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islanders released a report into the over-representation of Indigenous youth in criminal justice.[43] Lamenting that the 'Closing the Gap Strategy' did not include a National Partnership Agreement dedicated to its section on 'Safe Communities', the report made 40 policy recommendations. It also identified five underpinning principles that it believed 'must be applied' to 'effect change with respect to Indigenous disadvantage and disproportionate incarceration rates, all which

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42 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 14.4.40.

43 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. *Doing Time-Time for Doing: Indigenous Youth in the Criminal Justice System*. (Canberra: Parliament of Australia, June 2011).

either directly referenced local leadership or required the involvement of local leaders to be brought into effect.[44]

A prominent structural role for local leaders was made explicit in the ALRC's 2017 *Pathways to Justice* Report. The ALRC reported that 'a recurring observation made during consultation and in submissions to this Inquiry was that solutions should be developed and led by Aboriginal and Torres Strait islander people'.[45] The ALRC proceeded to recommend a local approach:

> 'The ALRC was told that some of the most effective solutions to local problems (such as diversion programs and post release assistance) have been developed locally by, or in conjunction with, local Aboriginal and Torres Strait Islander people. The corollary is that what works in one community (such as alcohol restrictions) may not be the best solution in another.'[46]

The ALRC acknowledged the empowering local leadership was a significant structural challenge for public administration in Australia:

> 'Taking a local approach to local problems can create difficulties for Australian governments, which necessarily plan for centrally developed and imposed national, state or territory-wide programs. Without acceptance and participation by the local communities, those programs can fail or, at least, not fully meet their objectives.'[47]

The ALRC offered a solution to this structural challenge through its recommendation that Commonwealth, State and Territory governments pursue a 'justice reinvestment' approach to reducing First Nations incarceration.[48] Two structural reforms would underpin this approach. First, Commonwealth, State and Territory governments should establish an independent justice reinvestment body, 'to promote the reinvestment of resources form the criminal

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44 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time-Time for Doing*.

45 Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Sydney: Australian Law Reform Commission, December 2017), 24.

46 Australian Law Reform Commission, *Pathways to Justice*, 24–25.

47 Australian Law Reform Commission, *Pathways to Justice*, 25.

48 Australian Law Reform Commission, *Pathways to Justice*, Recommendation 4.

justice system to community-led, place-based initiatives that address the drivers of crime and incarceration' (Recommendation 4-1). Second, governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities (Recommendation 4-2). The concept of justice reinvestment has its own growing literature, which I consider in the following section.

Both the national report of the 1991 Royal Commission and the 2017 ALRC Report incorporate a critical causal function for leadership in their understanding of a successful response to First Nations incarceration.

b) Justice Reinvestment

A further source of literature arguing for the importance of agency centres on the concept of "justice reinvestment". While the ALRC's justice reinvestment recommendations have not won formal support from the Commonwealth Government, the growing literature on the concept warrants specific consideration for two reasons. First, the strategy of justice reinvestment has become a prominent rallying point for advocates of policy change in response to First Nations incarceration. It is the first strategy to secure broad support to move beyond the policy recommendations of the Royal Commission; it has been a primary focus of scholarship and activism on the policy response for the past decade. Second, because of the logical implications of justice reinvestment's argument for localised funding and decision-making, contributors to the justice reinvestment literature engage with the focus of my enquiry: namely, structural weaknesses in the machinery of government. In this section I will briefly outline the origins of the justice reinvestment literature in Australia and describe its

causal logic, before proceeding to outline its structural critique of the public administration of the policy response to First Nations incarceration.

The idea of justice reinvestment originated in the United States in the early 2000s, as a policy response to soaring incarceration rates – especially among African Americans, whose severe and racialised experience of criminal justice has been categorised as 'mass incarceration'.[49] Willis and Kapira argue that such rates have resulted in 'massive and growing prison populations and correspondingly huge recurrent and capital costs'.[50] The observed concentration of prisoners whose offending originated in the same postcodes, opened the possibility that strategic investment in crime prevention in these 'million dollar blocks' could substantially reduce spending on incarceration.[51] After several successful pilot programs at the State level, justice reinvestment has received growing support in American jurisdictions including federal legislative support.[52] Justice reinvestment strategies have also been adopted in other common law jurisdictions including the UK.[53]

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49 Matthew Willis and Madeleine Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', AIC Reports: Research Report (Australian Institute of Criminology, 2018), 2.

50 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 2.

51 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 3; See also James Austin and Garry Coventry, 'A Critical Analysis of Justice Reinvestment in the United States and Australia', *Victims & Offenders: An International Journal of Evidence-Based Research, Policy and Practice* 9, no. 1 (2014): 126–48.

52 'Criminal Justice Reinvestment Act', U.S.C. § (2009); Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report: 2009' (Canberra: Human Rights and Equal Opportunities Commission, 2010) Case Study 2.1 'Texas' and Case Study 2.2 'Kansas'.

53 Commission on English Prisons Today, 'Do Better Do Less' (London: The Howard League for Penal Reform, 2009); Cited in Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 24. House of Commons Justice Committee, 'Cutting Crime: The Case for Justice Reinvestment', First report of session 2009-10 (London: House of Commons, 2010), 5.

1. Defining Justice Reinvestment in Australia: Empowering Local First Nations Leaders

In reviewing the international literature for the Australian Institute of Criminology, Willis and Kapira observe that 'there is no single definition of justice reinvestment'.[54] It may be described as a data-driven approach to reducing incarceration while simultaneously reducing expenditure upon criminal justice policy by redirecting funds from incarceration and reinvesting them into the communities where offenders originate with the aim of reducing future offending.[55] But, as Schwartz has observed in advocating for justice reinvestment to be adopted in response to rising First Nations incarceration: 'due to its local focus, justice reinvestment is an inherently flexible strategy.'[56]

Pressure to adopt justice reinvestment policies within the policy response to First Nations incarceration has increased throughout the second half of the thirty-year case study in this thesis beginning with the arguments of the then Aboriginal and Torres Strait Islander Justice Commissioner Tom Calma in his final *Social Justice Report* in 2009. [57] It was then continued by Calma's successor Mick Gooda.[58] For both Commissioners, increasing the agency of First Nations

54 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', vi.

55 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', vi.

56 Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment', *Australian Indigenous Law Review* 14, no. 1 (2010): 3.

57 Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report: 2009'; See also: Wendy-Rea Young and Tammy Solonec, 'Epidemic Incarceration and Justice Reinvestment: It's Time for Change', *Indigenous Law Bulletin* 7, no. 26 (2011): 15–21; Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 28.

58 Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Parliament of Australia, June 2013), 44 Paragraph 5.7; Mr Gooda cited in United Church in Western Australia, Submission 65, p.8.

leaders in criminal justice policy was not an incidental benefit of justice reinvestment but their motivating concern in pursuing the strategy.[59]

In pursuing this additional empowerment of local leaders, Commissioner Calma referenced the existing leader-centric empowerment initiatives at the centre of the Royal Commission and the subsequent policy response through Aboriginal and Torres Strait Islander justice groups:

> 'It was suggested that communities where local Aboriginal and Torres Strait Islander justice groups operate could act as a starting point for trialling JR because pathways for making use of existing partnerships and local knowledge are already in place and will ensure that local needs are met.'[60]

In a later submission to a Senate Constitutional and Legal Affairs Reference Committee report on the relevance of Justice Reinvestment in Australia, Commissioner Calma's successor, Commissioner Gooda, was more explicit about the link between justice reinvestment and the agency of local Indigenous community leaders:

> 'I believe that Justice Reinvestment also provides opportunities for communities to take back some control. If it is to work properly it means looking at options for diversion from prison but more importantly, it means looking at the measures and strategies that will prevent offending behaviour in the first place. The community has to be involved and committed to not only taking some ownership of the problem but also some ownership of the solutions…'[61]

2. <u>Adoption of Justice Reinvestment in Australia</u>

While no Australian jurisdiction has comprehensively adopted justice reinvestment as a strategy to reduce First Nations incarceration, all have made some initial movements in its favour. To date, this has not required a paradigm shift in criminal justice policy: as Schwartz has observed, justice reinvestment is

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59 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 28.

60 Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report: 2009', 51.

61 Senate Legal and Constitutional Affairs References Committee, 'Value of a Justice Reinvestment Approach to Criminal Justice in Australia', 44 Paragraph 5.7; Mr Gooda cited in United Church in Western Australia, Submission 65, p.8.

largely consistent with the goals of the *National Indigenous Law and Justice Framework 2009-2015*, agreed by the standing committee of Commonwealth State and Territory Attorney's-General:

> 'The degree of overlap between the aims articulated in the Framework and those articulated by the proponents of JR is striking. There is abundant scope for the Framework, which will be in place until 2015, to adopt JR as a vehicle for achieving the policy goals it sets out. [62]

Emphasising Schwartz's point, justice reinvestment has been a subject of several reports at the Commonwealth level in Australia, each attracting a large body of primary submissions from service providers, police, lawyers, jurists, and First Nations community leaders.[63] In addition to these Commonwealth reports, all States and Territories have taken some steps towards justice reinvestment with some adopting piloting programs.[64]

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62 Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment', 7–8.

63 These are: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time-Time for Doing*; Senate Legal and Constitutional Affairs References Committee, 'Value of a Justice Reinvestment Approach to Criminal Justice in Australia'; House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (Canberra: Parliament of Australia, 2015) Recommendation 14; Senate Standing Committees on Finance and Public Administration, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (Parliament of Australia, 2016) Recommendations 7-8; Senate Community Affairs Reference Committee, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Canberra: Parliament of Australia, 2016) Recommendation 24; Australian Law Reform Commission, *Pathways to Justice*.

64 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 32. For example, NSW: Just Reinvest NSW, 'Policy Paper: Key Proposals #1: Smarter Sentencing and Parole Law Reform' (Sydney: Just Reinvest NSW, 2017); QLD: Alexandra Bratanova and Jackie Robinson, 'Cost Effectiveness Analysis of a "justice Reinvestment" Approach to Queensland's Youth Justice Services', Discussion Paper (Brisbane: University of Queensland, 2014); ACT: Australian Capital Territory (ACT) Treasury, 'Budget Paper 3: Budget Outlook' (Canberra: Australian Capital Territory Government, 2014), 79, 104; Calla Wahlquist, 'Justice Reinvestment to Be Trialled in ACT to Reduce Indigenous Incarceration Rate', *The Guardian*, 2017; Elizabeth Daly, 'Alternatives to Secure Youth Detention in Tasmania' (Hobart: Commissioner for Children Tasmania, 2013); Paul Papalia, 'Justice Reinvestment: An Option for Western Australia?' 37 (2010): 18; See further Australian Law Reform Commission, *Pathways to Justice*, 136-137.

3. The implicit argument for the agency of local leaders in policy success

On the basis of the above reports and government initiatives, there is evidence to support Schwartz's suggestion that justice reinvestment is a 'strategy that has found its time' in the context of First Nations incarceration.[65] Schwartz identifies three novelties in the justice reinvestment approach: a data-driven method; and economic argument; and a place-based method.[66] Data-driven approaches to First Nations incarceration must grapple with the same limited data sets and methodological challenges outlined in Chapter One. The economic argument for justice reinvestment in Australia is widely accepted as strategic.[67] Critics have rightly pointed out that the smaller scale of prisons in Australia will make the often-cited savings more difficult to achieve: for example, Hudson has argued that the number of Aboriginal prisoners in each State and Territory, while disproportionate, is too small to achieve tangible savings and benefits from reducing incarceration alone.[68]

The place-based, local emphasis of justice reinvestment is a strong, if implicit, argument for the agency of local leaders as a causal factor improving the chances of policy success. Early developers of the justice reinvestment concept stated that one of its key elements is that it seeks to develop measures and policies to improve the 'prospects not just of individual cases but of particular places.'[69]

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65 Schwartz, 'Building Communities, Not Prisons', 3.

66 Schwartz, 'Building Communities, Not Prisons', 4–5.

67 Aboriginal and Torres Strait Islander Justice Commissioner, 'Social Justice Report: 2009', 10.

68 Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities', CIS Policy Monograph (Sydney: Centre for Independent Studies, 2013).

69 Rob Allen, 'From Restorative Prisons to Justice Reinvestment', in *Justice Reinvestment - A New Approach to Crime and Justice*, ed. Rob Allen and Vivian Stern (London: International Centre for Prison Studies, 2007), 5.

Willis and Kapira note that a premise of justice reinvestment is that 'the causes of crime are complex and are also location specific'.[70] This local focus has significant consequences for the agency of local leaders: 'the emphasis on community dictates that local rather than central government should decide how money should be spent to produce safer local communities.'[71]

Accordingly, I interpret the emerging justice reinvestment movement in Australia as an extension of the empowerment policies recommended by the Royal Commission. My interpretation is supported by other reviews of the literature: Willis and Kapira conclude in their review that Indigenous leaders' pressure for justice reinvestment flows from their understanding it as 'an opportunity to achieve the kinds of systemic changes and localised interventions they have long sought.' [72]

In this way, justice reinvestment has become 'something more akin to a rallying cry for investment in the kind of locally-focused, evidence-based interventions that have long been contended as necessary to address the impacts of disadvantage.'[73] As such, the weight of submissions to the reports cited above read as an emphatic endorsement of the merits of attempting to empower local leaders. Considered in their context, they also contain an equally weighty and emphatic implicit criticism of the structural failure to achieve that local empowerment within the current machinery of government.

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70 Schwartz, 'Building Communities, Not Prisons', 3.

71 Schwartz, 'Building Communities, Not Prisons', 5.

72 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 41.

73 Willis and Kapira, 'Justice Reinvestment in Australia: A Review of the Literature', 42; Citing Ross Homel, 'Justice Reinvestment as a Global Phenomenon', *Victims & Offenders* 9, no. 1 (2014): 6–12.

c) Conclusion

Components of the two mechanisms identified in the previous chapter are now beginning to emerge. While the formal reviews of the implementation of the recommendations of the Royal Commission highlighted the delegation from Commonwealth to State Governments in the mechanism of policy change, the agency literature I have assembled highlights the importance of local leadership in the mechanism of policy effect. The argument for empowerment of these leaders that lay behind much of the original policy response continues to run through subsequent reports, including the more recent push for justice reinvestment. The weight of the available literature on agency I have assembled in this chapter suggests that local leaders – Indigenous community leaders and local-level police, magistrates and other bureaucrats – are central to the mechanism by which the policy response had effects upon First Nations incarceration.

III. Structural Constraints and the Policy Response to First Nations Incarceration

A logical extension of arguments that emphasise the importance of agency in political science is attention to structural constraints upon it. The point holds for public administration in Indigenous affairs in Australia. The literature on emphasising structural factors in the success or failure of policy making is more dispersed and less coherent than that which emphasises the agency of leadership since it lacks the unifying theme of self-determination prominent in Australian Indigenous affairs. But, as with the agency of leaders above, it is feasible to gather together a literature on structural constraints relevant to the policy response to First Nations incarceration. While fewer, the arguments linking

structural constraints in the governance of Indigenous affairs to policy failure are weighty. One prominent example considered further later in this chapter is given in the reporting of Desert Knowledge Australia, an Alice Springs-based multidisciplinary collaboration between academia, industry and government. In a 2008 report it declared that public administration in remote Australia constituted a 'failed state'; in a 2012 report it concluded that 'governance arrangements are a threshold cause of policy failure'.[74] The force of such criticism suggests that a structural perspective on the failed policy response to First Nations incarceration also warrants consideration.

In this section I assemble a literature on structural constraints to policymaking in three parts. First, I consider the instability of both policy paradigms and policy administration – both of which have changed greatly during the thirty years of the policy response. Secondly, I consider the service delivery and funding, especially through Indigenous corporations. Thirdly, linking back to the literature on agency and leadership, I consider the solutions proposed and the role they envisage for political leadership in structural reform.

a) Policy and Administrative Instability and the Policy Response to First Nations Incarceration

While the policy response itself has remained relatively stable over the past thirty years, there have been sweeping changes to policies adjacent to it, both in Indigenous affairs and in criminal justice policy. These changes have significantly altered the administrative arrangements delivering the policy response; they

74 Desert Knowledge Australia, 'RemoteFOCUS: Revitalising Remote Australia - Prospectus' (Alice Springs: Desert Knowledge Cooperative Research Centre, Alice Springs, 2008); Bruce W Walker, Douglas J Porter, and Ian Marsh, 'Fixing the Hole in Australia's Heartland: How Government Needs to Work in Remote Australia' (Alice Springs: remoteFOCUS: Desert Knowledge Australia, September 2012), 12.

have also, at times, been at odds with the goal of reducing First Nations incarceration. In this section, I examine the paradigm shifts and major restructurings in the administration of Indigenous affairs policy since the Royal Commission, before considering their collective effects on the policy response to First Nations incarceration.

1. Paradigm Shifts

A peculiarity of policymaking with regard to First Nations people in the Australian federation is that it has been punctuated by sharp morally-charged paradigm shifts. Sanders has observed a pattern to these punctuations, occurring at roughly thirty-year intervals, since 1910.[75] One occurred during the period of the case study, between 2000 and 2007. The shift began the emergence of 'much more negative rhetoric, both about the consequences of past Indigenous affairs policy and the need for greater "responsibility" among Indigenous people'.[76] The shift's beginning is commonly dated to 2000, when prominent Aboriginal leader Noel Pearson published his lecture *Our Right to Take Responsibility*, which argued that thirty years of self-determination had 'corrupted Aboriginal values of responsibility and sharing'. [77] Pearson's critique drew support from the anthropologist Peter Sutton in a lecture that he gave in 2001 entitled 'The

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75 William Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', in *Howard's Fourth Government: Australian Commonwealth Administration 2004-2007*, ed. Chris Aulich and Roger Wettenhall (Sydney: University of New South Wales Press, 2008), 187–205; William Sanders, 'Changing Agendas in Australian Indigenous Policy: Federalism, Competing Principles and Generational Dynamics', *Australian Journal of Public Administration* 72, no. 2 (2013): 156–70; Gillian Cowlishaw, Emma Kowal, and Tess Lea, 'Introduction: Double Blinds', in *Moving Anthropology: Critical Indigenous Studies*, ed. Tess Lea, Emma Kowal, and Gillian Cowlishaw (Darwin NT: Charles Darwin University Press, 2006), 1–15.

76 Sanders, 'Changing Agendas in Australian Indigenous Policy', 163.

77 Noel Pearson, *Our Right to Take Responsibility* (Cairns: Noel Pearson and Associates, 2000), 5; See also Noel Pearson, 'White Guilt, Victimhood and the Quest for the Radical Centre', *Griffith Review* 16 (2007).

politics of suffering: Indigenous policy in Australia since the 1970s', which was highly critical of the impact of Indigenous specific programs under the logic of self-determination in remote Indigenous communities.[78]

Such criticisms began to resonate politically. In March 2004, the leader of the Opposition and the Australian Labor Party, Mark Latham, announced his intention, if elected, to abolish ATSIC.[79] This prompted the conservative Howard Government to announce it would follow suit. On 15 April 2004, Prime Minister Howard announced his government's intention to abolish ATSIC: the institutional restructure was formally completed at midnight on the 24 March 2005.[80] I consider this change's structural significance in the following section, but note here that removal of the most prominent institutional manifestation of self-determination was a major step towards paradigm change: away from self-determination and toward centralisation and government intervention. Howard's government was re-elected in late 2004 with a majority in the Senate as well as the House of Representatives, affording it significant legislative freedom of action. In mid-2006, following several prominent allegations of systemic child abuse in remote First Nations communities, the NT Government announced a Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. In 2007, the Board published its report entitled *Little Children are Sacred*. On 21 June 2007, Prime Minister Howard announced a 'national

78 Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s', *Anthropological Forum* 11, no. 2 (2001): 125–73; Peter Sutton, *The Politics of Suffering* (Melbourne: Melbourne University Press, 2009).

79 See: Alexandra Kirk, 'Labor Would Abolish ATSIC (Transcript)', *PM: ABC Radio*, 30 March 2004.

80 See: Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs', *Current Issues Brief* (Canberra: Australian Parliament House Library, 9 August 2004).

emergency in relation to the abuse of children in Indigenous communities in the Northern Territory'. The response to the declared emergency, known as the NT 'Intervention', the Commonwealth deployed the Australian Army to remote First Nations communities in the NT: this was ostensibly to assist in restoring order, although it was widely perceived as a political gesture; the soldiers were unarmed and there was no violence.[81] Shortly afterward, the Commonwealth began mainstreaming many Indigenous specific programs.

In observing the pattern of these punctuations, Sanders notes their intense moral tone.[82] That tone is apparent in the rhetoric of dysfunction and emergency that accompanied the shift from self-determination to mainstreaming. Sanders has described the punctuations in Indigenous affairs as 'a moralised rejection of the governing paradigm and the "moral denigration" of those who once advocated it.'[83] Of relevance to the present case, between 2000 and 2007 this resulted in the discrediting of many of those involved in Indigenous affairs policymaking, and a high turnover of staff in general and of local staff in particular. The implications of these paradigm shifts, in particular the Intervention, on incarceration and First Nations at the local level will be explored in detail in Chapters Five and Six.

2. Changes in Public Administration

As noted in Chapter One, in the fifty years of Commonwealth policymaking in Indigenous affairs there have been 21 different ministers and ten major organisational re-structures of public administration, nine of which have

81 See the contributions in: Melissa Hinkson and Jon Altman, eds., *Coercive Reconciliation* (Melbourne: Arena Publications, 2007).

82 Sanders, 'Changing Agendas in Australian Indigenous Policy', 167.

83 Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', 11.

occurred during the thirty-year period of the case study.[84] Such administrative instability is unusual in Australia, especially in comparison with other settler societies dealing with indigenous populations. In Canada, for example, changes in policy priorities are dealt with in other ways, such as cross-cutting ministerial committees. In the USA, the federal Bureau of Indian Affairs has not experienced similar restructuring since 1849.[85]

The Royal Commission occurred at the height of the policy doctrine of self-determination in Australia and its recommendations are imbued with the logic of its policies.[86] As a governing paradigm, self-determination encouraged a decentralised public administration that relied heavily upon local Indigenous organisations.[87] Under this paradigm, a wide range of local and regional Indigenous organisations took on responsibility for service provision in areas as diverse as health, housing, legal services, employment community and municipal services.[88] These Indigenous organisations were generally funded through Indigenous-specific programs of block grants, managed by the Commonwealth Department of Aboriginal Affairs.[89]

From 1990, during the period of the Royal Commission's enquiry but before the publication of its reports, management of these Indigenous-specific

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84 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 4 See also Attachments A and B detailing the different structures.

85 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 15.

86 See: Johnston QC, *Royal Commission: National Report,* Volume 1, Part 1.7.

87 Barrie Graham Dexter, *Pandora's Box: The Council for Aboriginal Affairs 1967-1976* (Southport, QLD: Keeaira Press, 2015), 336.

88 Burke A. Hendrix et al., 'Building Capacity in Indigenous Governance: Comparing the Australian and American Experiences', *Australian Journal of Public Administration* 79, no. 1 (March 2020): 33.

89 Hendrix et al., 'Building Capacity in Indigenous Governance', 33.

grant programs was passed from the Commonwealth Department to ATSIC.[90] By the time of the publication of the Royal Commission's reports and the crafting of the policy response to First Nations incarceration, ATSIC was understood to be a key custodian of the policy response. Indeed, a clause of the Royal Commission's first recommendation was that 'subject to the agreement of its Commissioners so to do, ATSIC be given special responsibility and funding to enable it to monitor the progress of the implementation of the adopted recommendations and to report thereon to the Aboriginal and Torres Strait Islander community.'[91]

On the abolition of ATSIC, the Commonwealth moved away from a strong involvement of First Nations people in policy development, planning and delivery. Instead, the Commonwealth expressed its intention to 'mainstream' First Nations programs, which would be delivered through general programs in line agencies.[92] In 2005, then Minister for Indigenous Affairs Amanda Vanstone described these structural changes as 'a quiet revolution in Indigenous Affairs'[93] Gray and Sanders have questioned the degree to which the label 'mainstreaming' understates public administration's continuing focus on Indigenous groups specifically given their special needs in social problems, location language.[94] Nonetheless, Hendrix and others have noted that mainstreaming was a significant structural reform: 'Responding to Indigenous needs and aspirations

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90 Hendrix et al., 'Building Capacity in Indigenous Governance', 33.

91 Johnston QC, *Royal Commission: National Report,* Volume 1, Recommendation 1, Paragraph (b).

92 Hendrix et al., 'Building Capacity in Indigenous Governance', 33–34.

93 Senator Amanda Vanstone, 'Address to the National Press Club by Minister for Immigration and Multicultural and Indigenous Affairs, Minister Assisting the Prime Minister on Indigenous Affairs' (National Press Club, Canberra, 23 February 2005).

94 William Gray and William Sanders, 'Views from the Top of the "Quiet Revolution": Secretarial Perspectives on the New Arrangements in Indigenous Affairs', Centre for Aboriginal Economic Policy Research Working Paper (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2006).

changed from being 'decentralised' to Indigenous forms of self-governance, to being 'deconcentrated' (*sic*.) across multiple government agencies'[95]

The final major restructure during the thirty-year period of the policy response in 2013 when the incoming Abbott Government returned to a former approach of centralising all Indigenous-specific programs in one government agency. Having designated himself the 'Prime Minister for Indigenous Australians', Abbott placed the programs in question in the Department of Prime Minister and Cabinet.[96] In their study of the funding of Indigenous corporations, Hendrix and others have noted that:

> 'Once in PM&C, there was a stronger attempt at policy centralization through the Indigenous Advancement Strategy (IAS), which reduced a large number of Indigenous-specific programs to five priority areas – employment, schooling, safety, culture, and remote areas.'[97]

The centralisation of policymaking in the Department of Prime Minister and Cabinet represented the low-point of First Nations self-determination in the public administration. It also represented the culmination of the long-standing conservative critique of self-determination as to 'special treatment' of 'special interests'. While the labelling of this centralised effort was altered under the Morrison Government with the creation of the National Agency for Indigenous Australians in 2019, it remains the approach at the time of writing. As such, the

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95 Mark Moran, Douglas Porter, and Jodie Curth-Bibb, 'The Impact of Funding Modalities on the Performance of Indigenous Organisations', *Australian Journal of Public Administration* 75, no. 3 (2016): 359–72; Mark Moran, Douglas Porter, and Jodie Curth-Bibb, 'Funding Indigenous Organisations: Improving Governance Performance through Innovations in Public Finance Management in Remote Australia' (Canberra: Closing the Gap Clearing House, 2014), 61; Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment* (Canberra: Aboriginal Studies Press, 2011); William Sanders, 'Experimental Governance in Australian Indigenous Affairs: From Coombs to Pearson via Rowse and the Competing Principles', CAEPR Discussion Paper (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2014); Mark Turner and David Hulme, *Governance, Administration and Development* (London, UK: Macmillan Press, 1997)160-161.

96 Hendrix et al., 'Building Capacity in Indigenous Governance', 43.

97 Hendrix et al., 'Building Capacity in Indigenous Governance', 34.

structure of public administration of Indigenous affairs in Australia has moved from its most decentralised and self-determined to its most centralised over the thirty-year period of the policy response to First Nations incarceration.

3. Effect of Instability on the Policy Response

It is difficult to measure the effect of this instability in public administration on policy success or failure because the counter-factual ("what would have happened had public administration remained stable?") cannot be quantified because it cannot be known. As has been established in the previous chapter, multiple factors affect the policy response to First Nations incarceration alongside the instability in public administration. Likely, these would have still impacted the policy response, especially at the local level where many of the causes of rising First Nations incarceration overlap, although it is unknown what the difference in these impacts would have been. At the least, we can conclude that any change that further complicated the already daunting task facing local leaders and street-level bureaucrats would impose a transaction cost upon finite local resources.

The weight of informed opinion within the Indigenous affairs policy community holds that instability significantly weakens policymaking. From her perspective within the Department of Prime Minister and Cabinet's Indigenous Affairs Group, Patterson notes that 'each change in administrative arrangements requires the redirection of effort towards internal realignment and bureaucratic work'; major changes, such as those that accompanied the paradigm shift from self-determination and decentralisation to mainstreaming and intervention, 'created intensive internal focus on further change of bureaucratic arrangements

to support "new" policy'.[98] The result of internally focussing finite government resources is that 'during such change, focus on the external client has suffered.'[99] The potential magnitude of Patterson reflections is notable when considered in the context of the nine major administrative restructures that occurred during the period of the policy response. We can only conclude that the occurrence of a restructure roughly every three years resulted in considerable internal focus.

Beyond the immediate consequence for public resources, the burden of opinion claims that administrative change can have additional damaging consequence in the cross-cultural context of Indigenous affairs. In her interviews of First Nations leaders, Maddison cites deep frustration that change undermines relationship building and undoes incremental progress, a sensation described by at least one interviewee in the following graphic terms:

> 'It's like being caught in a big washing machine…You've got change all the time: every time we just get used to something you move to another cycle and the cycle keeps changing and we keep moving and we haven't got used to the last cycle before we are moving on to the next cycle.'[100]

Calma argued that the consequence of such cycle changes is that 'government has never maintained a policy long enough to be able to let any of this stuff bed down' and that every administrative change 'you're undermining confidence and you're undermining people's ability to cope'.[101] This experience described by First Nations leaders is echoed by Patterson's analysis from within Government:

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98 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 15.

99 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 15.

100 Muriel Bamblett, cited in: Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture*, 3.

101 Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, cited in: Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture,* 22.

> 'Relationships of trust and good faith can take many years to build across cultures and are often centred on the commitment of a particular community and particular public servants. Such relationships are considered essential to 'working with' Aboriginal and Torres Strait Islander Australians.'[102]

For public servants like Patterson, the consequences of administrative change for these relationships can be severe:

> 'When these relationships suffer during machinery of government overhauls, not only do problematic gaps open in service delivery, but also widespread scepticism often emerges. Yet, the creative solutions that are needed for any policy in this arena can only be forged through strong trusting relationships that enable give and take on both sides. Where machinery changes introduce uncertainty, effectiveness suffers in the short term and potentially into the longer term as well. Overcoming scepticism becomes a critical first task of the 'new administration…and so it goes on'.[103]

Patterson's concern appears to manifest in local studies of the impact of policy change. Moran and Elvin have observed that in remote desert communities of central Australia local leaders are 'less concerned with the relative merits of alternative government policies, but rather are frustrated with seemingly endless and largely fruitless round of changes seeking improvements'.[104]

Impairment of relationships is worsened by the 'intense moral tone' that Sanders has reported accompanying the paradigm shift during the period of the case study.[105] The moralised nature of these paradigm shifts has significant second-order effects in terms of the longevity of the involvement of actors in the policy domain. Several prominent analysts of policymaking in Australian Indigenous affairs have lamented the loss of corporate knowledge that

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102 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs', 16.

103 Patterson, 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs' 16.

104 Mark Moran and Ruth Elvin, 'Coping with Complexity: Adaptive Governance in Desert Australia', *GeoJournal* 74, no. 5 (2009): 415–28; Cited in Mark Moran, 'The Courage to Reform: Fixing the Commonwealth's Indigenous Policies', *Griffith Review* 60, no. (Online) (30 April 2018): 17.

105 Sanders, 'Changing Agendas in Australian Indigenous Policy', 167.

accompanied the paradigm shift in 2000-2007. In his critique of public administration, Moran observes that the frequency and severity of change exacerbate the policy challenges in Indigenous affairs, which require corporate knowledge and expertise acquired incrementally:

'The reality of Indigenous affairs is that achievements are hard won over many years, and they remain tenuous for years longer. Given the intractability of alleviating Indigenous disadvantage, there is little argument to justify sweeping away past gains for the perceived hopes of a new policy idea. Policy-makers cannot simply afford to dismiss past practice as failed or irrational because it does not align with their latest solution. What higher knowledge do they bring?'[106]

b) Service Delivery and Funding

Despite all the changes around it, the logic and the content of the policy response– as it appears in formal government policy documents – remained relatively stable over the past thirty years. The first 'principle of action' of the *National Indigenous Law and Justice Framework 2009-2015* acknowledges the Royal Commission, 'particularly its findings on causal and related issues, as a foundation document guiding the work of governments in this area.'[107] But, while this rhetorical continuity gives the appearance of stability in the public administration of the policy response this seems intuitively unlikely given the severity and frequency of the structural changes described above. In this section, I consider the evidence in the literature that the changes in the governing

106 Moran, 'The Courage to Reform: Fixing the Commonwealth's Indigenous Policies', 17.

107 Standing Committee of Attorneys General on Indigenous Justice Council of Australian Governments, 'Report: National Indigenous Law and Justice Framework 2009-2015' (Canberra: Council of Australian Governments, 2009), 9 See Principle of Action One, Point 8.

paradigms of Indigenous affairs policy and its public administration imposed transaction costs upon delivery of the policy programs underpinning the policy response to First Nations incarceration.

In the previous section I assembled a literature emphasising the importance of the agency of leaders at the local level in both policy success generally in First Nations communities, and reductions in incarceration specifically. Alongside this literature is a related literature arguing that the structural changes in public administration during the thirty-year time period of the case study have impeded local leadership. This literature is less coherent than that focused upon Indigenous agency, as it lacks the unifying theme of self-determination, but once assembled it is compelling.

The most frequently cited structural impediment for local First Nations leadership concerns the administration and funding of local corporations, which remain the primary vehicle for local First Nations representation. My initial appraisal of the public administration arrangements in the case study in Chapter One identified the unusual and significant role played by autonomous First Nations corporations within Indigenous affairs policymaking. Under the paradigm of self-determination, these organisations were funded to undertake the majority of Government service provision in First Nations Australia. Despite the 'normalising' logic of mainstreaming, First Nations corporations have remained crucial to the delivery of policy on the ground. But, between 2005 and the present, the administrative structure of their funding has changed significantly: moving from the model of block grant funding under self-determination, to a model of contested, service-provision contracts. Desert Knowledge Australia's reporting notes that this has changed 'more or less in

tandem with what has been occurring worldwide as economic globalisation expanded.'[108] New public management-style reforms in Australia entered government service provision following the *Hilmer Review of Competition Policy* in 1993, with a 'steady shift away from direct provision of services by government towards arms-length, performance-based contractual arrangements, with for-profit or NGO providers undertaking front-end responsibilities, and progressively more elaborate accountability arrangements being applied to discipline and monitor their performance and results achieved.'[109] Under the new public management approach, 'centralising' and 'normalising' service provision in Indigenous affairs resulted in contracting some of the same First Nations corporations that had been created under self-determination, but with less favourable results.

Regardless of any success new public management may have enjoyed in other nations or in mainstream Australia, most scholarly opinion finds that it has adapted poorly to the circumstances of remote First Nations Australia. That opinion finds, further, that it has heavily strained local corporations that are both physically and culturally remote from the mainstream economy. Walker and others argue that:

> 'In this context, there are severe limits to what can be achieved through demanding more efficient service delivery or statutorily imposed responsibility and 'mutual obligation'. A policy hoping to deliver dramatic shifts in social and economic outcomes through this route amounts to just "pushing on a string"'.[110]

The imposition of new public management approaches has 'compounded the problems they hoped that they would resolve': from the local perspective,

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108 See Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 35.

109 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 35.

110 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 35.

shorter-term contracts have served to create 'a terrain marked by policy uncertainty, institutional fragmentation and partially implemented experiments'.[111]

Anecdotally, the impact of changes in service delivery contracts has been further exacerbated by smaller discretionary and project-based grants that have continued to flow from the Commonwealth in a number of areas – including to support the efforts of leaders to reduce incarceration rates studied in this thesis. Examples of the administrative burden this has placed upon local corporations that wish to innovate in response to local needs, beyond the limits of federal service provision, are compelling. Moran cites the example of Julalikari Council Aboriginal Corporation, which fulfils a broad cross-sectoral service delivery function and represents local Indigenous leadership in Tenant Creek:

> 'In its 2011-12 financial report, it acquitted against eighty-one grants for a total income of $11.5 million. It cobbled together the cost of its core governance functions by charging a small administration fee from some of these grants when permitted under the terms of the grant.'[112]

In this context, 'acquittal of a grant' means the formal process of reporting financial expenditure back to government, often a lengthy and detailed process sometimes requiring assistance from a professional accountant; in effect, the change described by Moran is an enormous increase in administrative burden from the block grants administered under self-determination.

There are few theoretical or systematic studies of the impact of public administration on Indigenous corporations. Hendrix and others have however conducted an interesting comparative study against funding arrangements for

111 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 35.

112 Moran, 'The Courage to Reform: Fixing the Commonwealth's Indigenous Policies', 11.

first nations in the United States.[113] While the Australian system of public administration has moved towards centralised management of competitive contracts, the American structure has retained block funding, administered on a 'government to government' basis between the Federal Government and local tribal leadership structures. Hendrix and others consider the 'key contrast' between the two approaches to be the impact on local capacity building:[114]

> 'The Australian model generates uncertainty and limits the ability of Indigenous organizations to service the needs of communities. Rather than growing the capacity and linkages with local communities, the model reinforces the shortage of Indigenous capacities and detracts from the possibilities'.[115]

The argument advanced by Hendrix and others is based on a broad-brush comparison of public administration, conducted in general terms and without the support of comparative data or detailed case studies. The authors concede the limitations of their empirical support; their argument is intended as a starting point for more detailed comparisons.[116] But their conclusions are intuitively compelling and the anecdotal support for the severe administrative burden on local First Nations corporations is very strong.[117]

c) Solutions and Leadership

Before concluding, there is a final observation that may be drawn from the literature on structural constraints. There is near consensus that structural weaknesses in the public administration of Indigenous affairs will only be solved through political leadership. Walker and his colleagues writing for Desert

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113 Hendrix et al., 'Building Capacity in Indigenous Governance'.

114 Hendrix et al., 'Building Capacity in Indigenous Governance', 35.

115 Hendrix et al., 'Building Capacity in Indigenous Governance', 35.

116 Hendrix et al., 'Building Capacity in Indigenous Governance', 33.

117 See the case studies in: Mark Moran, *Serious Whitefella Stuff: When Solutions Became the Problem in Indigenous Affairs* (Melbourne: Melbourne University Press, 2016); Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment*.

Knowledge Australia are specific in the site of this leadership, arguing that it needs to occur 'at the top level of government'.[118] The political leadership they call for is '…aimed at systemic change to the way governments make decisions, operate and are accountable, will take us beyond a 'we-must-try-harder' mantra without regard to the efficacy of the system itself.' [119]

> '…This cannot be driven from within the bureaucracy, which is constituted within the status quo and bound by its rules. Political leadership needs to come to the conclusion that there is a system problem not a policy problem.'[120]

This said, Walker and his colleagues share the widely held view of the literature that this leadership must include 'civic' leaders: '…if the three levels of government and the community (Aboriginal and non-Aboriginal) are working at cross purposes success is impossible because goals are different.' [121]

This observation about leadership and reform refers back to the agency argument considered in the previous section. It also reinforces my conviction that the elite-level policy change mechanism is dynamically related to the policy effect at the local level.

d) Conclusion

The literature on structural constraints in the policy response to First Nations incarceration has further detailed both of the mechanisms I have identified as likely sites for breakdown in the government machinery. For the mechanism of effect, at the local level of governance, the literature on structural constraints gives detail to *how* the agency of leaders functions at the local level: First Nations corporations are a key, structural enabler of this agency's function. Further, it is

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118 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 12.

119 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland' 68.

120 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 68.

121 Walker, Porter, and Marsh, 'Fixing the Hole in Australia's Heartland', 68.

apparent that the funding of these corporations is precarious and has become increasingly so over the period of the case study. Moreover, these corporations have been buffeted by the transaction costs of frequent policy and administrative change – one specific outcome has been that the administrative burden on these small corporations has increased significantly.

On the other side of the principal/agent delegation, structural factors have also influenced the government agent: there has been a noted shift toward stricter accountability and closer management of shorter contracts occasioned by the national shift toward new public management strategies; there has also been a high turnover of key staff and career uncertainty due to frequent administrative restructures. Finally, the agency of leaders is also understood to be significant at the elite level of government. There is near consensus that only national leadership of all levels of government can solve the structural constraints that frustrate commentators. This is consistent with my initial appraisal of the public administration of the policy response to First Nations incarceration, which concluded that Commonwealth leadership was an important component in the initiation of policy change.

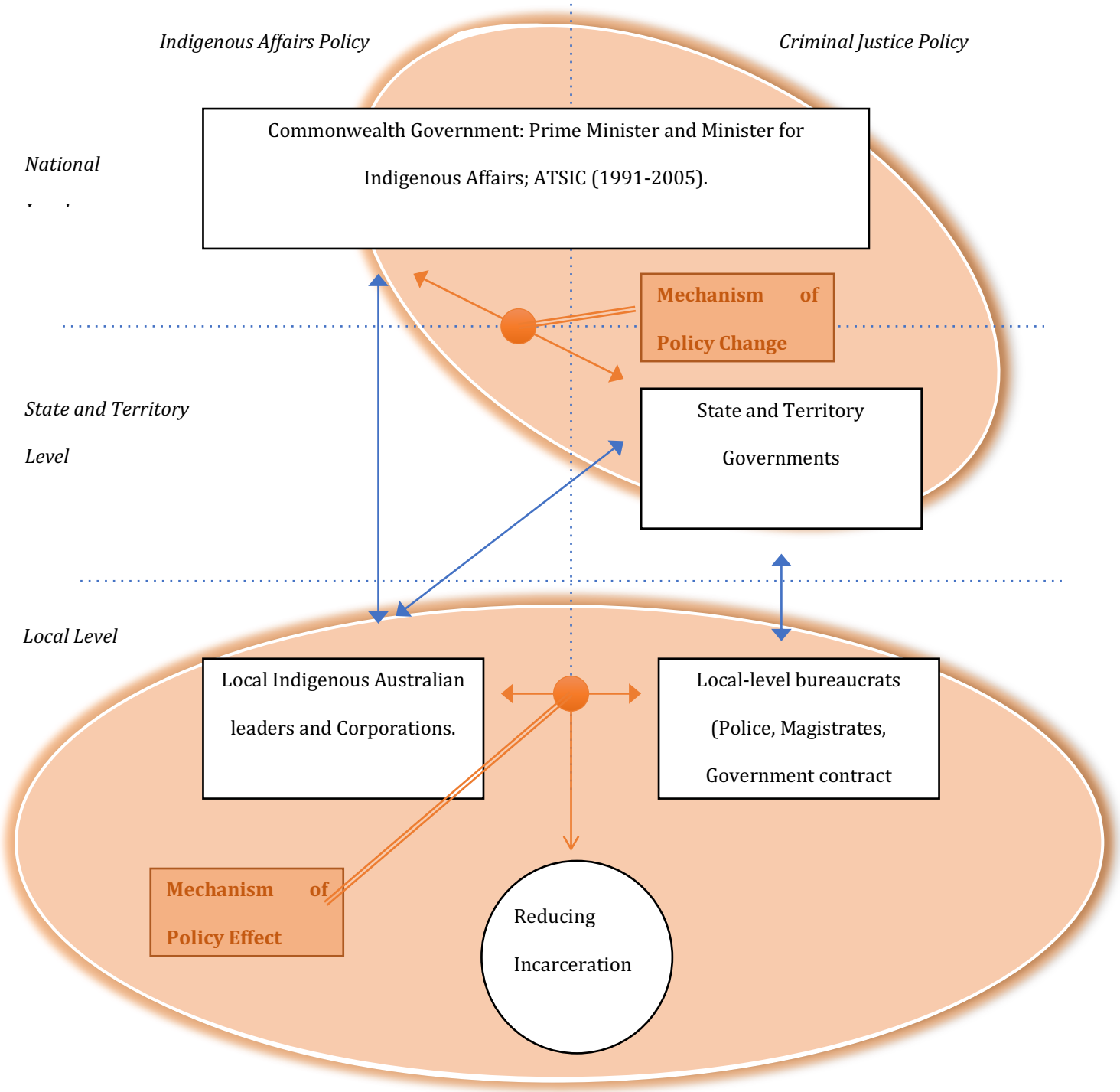
IV. Conclusion: Identifying Two Weak Mechanisms in the Governance of the Policy Response

This chapter has pieced together relevant references to failings in the public administration underpinning the policy response to First Nations incarceration from a wide range of disparate sources – some of them not concerned with that specific topic. While the literature so assembled is diverse, two key themes emerge consistently in explanations of policy success or failure. The first is the extent to which delegations, from government to government or from

government to corporations, are reliable; the second is the relative agency of leaders in overcoming shifting structural constraints to secure outcomes. These themes suggest structural weaknesses within the public administration of the policy response. They also confirm the advice I received by the side the highway in 2015, with which I opened this thesis: leaders should not be ignored in an explanation of Australia's policy response to First Nations incarceration.

As well as suggesting structural weaknesses in the public administration of the policy response, the existing literature also provides insights into where these weakness occur. The weight of concern focuses upon two specific points in the chain from policy-making to policy effect: first, the elite level, where policy changes; and second, the local level, where policy takes effect. Over the thirty years of the policy responses, these are the two parts of the government machinery that have rattled most loudly. From this I derive the two 'mechanisms' I focus upon going forward: the mechanism of policy change and the mechanism of policy effect. In Figure 3.1 I depict the location of these mechanisms – the arrows between *x and* y – in the context of the chain of governance underpinning the policy response to First Nations incarceration.

Figure 3.1: The *Mechanism of Policy Change* and the *Mechanism of Policy Effect* in the Policy Response



Combining the two mechanisms identified in this chapter with my initial analysis of the policy domain in Chapter 1, the centrality of delegations, from principals to agents, becomes apparent. In order to change policy with regard to First Nations incarceration, constitutional limitation within the policy domain were seen to impose two delegations upon the Commonwealth in 1992: first, the delegation of policy formulation to a Royal Commission, comprised of legal experts; and second, the delegation of implementation of reforms in criminal justice to State and Territory Governments, who hold constitutional responsibility for those matters in Australia. The task of giving effect to the policy response in a layered policy domain effectively imposed a third delegation: from both Commonwealth and State or Territory governments to local First Nations leaders and their street-level counterparts within the criminal justice system.

There is a longstanding interest within political science on the politics of delegation between principals and agents and why such delegations often result in unfavourable or unexpected outcomes to the principal. [122] A significant portion of the principal/agent scholarship has been devoted to identifying likely determinants of high agency costs and to determining the degree of potential autonomy as a function of the size of informational asymmetries and strength of the control functions.[123] Many of the established determinants of high agency costs are present in the case study, including:

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122 Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 258; Alec Stone Sweet and Mark Thatcher, 'Theory and Practice of Delegation to Non-Majoritarian Institutions', *West European Politics* 25, no. 1 (2002): 3.

123 Mark A. Pollack, 'Delegation, Agency and Agenda Setting in the Treaty of Amsterdam', *European Integration Online Papers* 3, no. 6 (1999); Fabio Franchino, 'Control of the Commission's Executive Functions: Uncertainty, Conflict and Decision Rules', *European Union Politics* 1, no. 1 (2000): 63–92; Fabio Franchino, 'The Commission's Executive

- The delegation of strong discretionary powers at all levels of the response,[124] which is prevalent throughout the policy response, including to street-level bureaucrats and junior police officers in remote locations;
- The small pool of available agents,[125] a notable factor at the local level with regard to Indigenous corporations, where frequently only one such corporation is considered representative of the local community;
- Very weak sanction mechanisms,[126] especially notable on the part of the Commonwealth as principal with regard to State and Territory Governments as agents;
- High informational asymmetries,[127] these are exacerbated by the significant cultural differences both within First Nations and between Indigenous and non-Indigenous Australians – creating a high informational asymmetry in favour of the local level.

Discretion, Information and Comitology', *Journal of Theoretical Politics* 12, no. 2 (2000): 155–81; Jonas Tallberg, 'Delegation to Supranational Institutions: Why, How and with What Consequences?', *West European Politics* 25, no. 1 (2002): 23–46; Hylke Dijkstra, 'Information in EU Security and Defence', in *The Politics of Information: The Case of the European Union*, ed. Tannelie Blom and Sophie Vanhoonacker (Basingstoke: Palgrave, 2014), 229–41; Manfred Elsig, 'The EU's Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?', *Journal of Common Market Studies* 45, no. 4 (2007): 927–48; Mark Furness, 'Who Controls the European External Action Service? Agent Autonomy in EU External Policy', *European Foreign Affairs Review* 18, no. 1 (2013): 103–26.

124 See: Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003).

125 See, for example: Darren G. Hawkins and Wade Jacoby, 'How Agents Matter', in *Delegation and Agency in International Organisations*, ed. Darren G. Hawkins et al. (Cambridge, UK.: Cambridge University Press, 2006), 199–228.

126 See, for example: Pollack, 'Delegation, Agency and Agenda Setting in the Treaty of Amsterdam'; Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*; Tom Delreux and Bart Kerremans, 'How Agents Weaken Their Principals' Incentives to Control: The Case of EU Negotiators and EU Member States in Multilateral Negotiations', *Journal of European Integration* 32, no. 4 (2010): 357–74.

127 See: Hylke Dijkstra, 'Explaining Variation in the Role of the EU Council Secretariat in First and Second Pillar Policy-Making', *Journal of European Public Policy* 17, no. 4 (2010): 527–54; David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (New York: Cambridge University Press, 1999).

As such, there are strong initial reasons to suspect the relevance of principal agent theories to potential breakdowns in the policy-change and policy-effect mechanisms within the response to First Nations incarceration. The principal-agent literature in political science is less well-developed with regard to the causal processes that generate transaction costs. Reykers and Beach have argued that this is methodological: 'because of the lack of explicit causal mechanisms in theoretical models, most principal-agent theorisation is in the form of probabilistic claims about causes whose presence increases the likelihood of an effect occurring'.[128] Reykers and Beach suggest a process-tracing approach is preferable in this regard.

In the following chapters, Part Two of this thesis (Chapters 4, 5 and 6) employs process-tracing to develop explanations for *how* the mechanism of policy change and the mechanism of policy effect operated, or indeed broke-down, in the machinery of the policy response to First Nations incarceration. In building a causal explanation for each mechanism, I aim to account for the effect of principal-agent relationships within the operation of the mechanisms. Also, consistent with my dynamic understanding of governance success or failure, I aim to gain insights into the management of such relationships, both by the policy core and by local leaders. In this way, I intend to account for both the agency of leaders and the causal impact of governance upon the policy response

[128] Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 259.

Part Two (Chapters 4, 5 and 6): Explaining where the Machinery of Government Broke Down.

In the previous chapter, I drew upon the existing literature to identify two weak mechanisms in the machinery of government underpinning the policy response to First Nations incarceration: the mechanism through which policy changed and the mechanism through which policy took effect. Each of these mechanism is associated with a paradox immediately apparent from the empirical evidence of the policy response: despite its lack of success, the policy response has been notably resistant to change; and, despite the overall failure to reduce incarceration rates, the policy response's empowerment of First Nations leaders in criminal justice have achieved notable successes at the local level in some communities. Each of the mechanisms is also centred upon delegations between layers of the policy domain: in the case of policy change, delegations from the Commonwealth to the Royal Commission to formulate policy and the States and Territories to implement policy; in the case of policy effect, delegations from the Commonwealth and States and Territories to empowered, local First Nations leaders.

In second part of the thesis, my intention is to trace the causal operation of these mechanisms in the policy response in order to gain insights into where they broke down. To achieve this, I employ the methodology of process-tracing in paired comparisons: using case studies of where the mechanism operated as expected in order to build a explanation that can be applied to cases where the mechanism did not operate, in order to identify the breaking points.

I employ different case selection strategies for each mechanism. As the policy response has been largely static for three decades, potential case studies for the mechanism of policy change are limited. In Chapter 4, I create case studies temporally: I compare the initiation of the policy response to First Nations incarceration following the Royal Commission in 1992 to the inaction taken in broadly similar circumstances, following the publication of the ALRC's *Pathways to Justice* report in 2018. Naturally, building my explanation for policy change upon two cases limits my confidence in the generality of its conclusions. But I argue it nonetheless provides useful insights for future research.

For the mechanism of policy effect, the large number of heterogeneous First Nations communities presents a diverse range of experiences beneath the national trend. Focusing upon the policies intended to empower First Nations leaders within criminal justice, in Chapters 5 and 6, I use the experience of three communities that successfully reduced incarceration to build an explanation of how the mechanism of policy effect operated at the street level; I then apply this explanatory model to three communities that did not achieve a reduction in incarceration to gain insights into where the mechanism broke down.

Chapter 4: Explaining Policy Change with regard to Indigenous Australian Incarceration

In this chapter I build an explanation of the mechanism through which Australian government policy toward First Nations incarceration changes. This addresses one of the two paradoxes in the failed policy response to First Nations incarceration from 1991 to 2021: its apparent stasis or, to repeat the exasperated question frequently expressed to me during my fieldwork at the street-level – 'why hasn't the Government done anything more about this since the Royal Commission?' As identified in the previous Chapter, two significant principal-agent delegations required to change policy with regard to First Nations incarceration are apparent from constitutional structure of the policy domain: first, the delegation of policy formulation to an independent legal authority (the Royal Commission), while not constitutionally required, is common practice for the Commonwealth when considering law reform; and second, delegation to the States and Territories for implementation.

Within my understanding of governance as the management of relationships in a layered policy system, I consider it preferable to consider the significance of these principal-agent delegations in the context of the causal mechanism of which they are a component; this allows me to use the causal logic of process-tracing to understand the role these delegations played in the mechanisms success or failure. To this end, I seek to build a generalisable explanation for *how* the policy change mechanism operates. Such an explanation can only be built from empirical case studies where that mechanism operated fully and as intended, which is to say: where policy changed. Unfortunately, the

stasis of the policy response to First Nations incarceration is problematic in this regard. Between 1991 and 2021 only one major policy change has occurred, that which launched the policy response following the report of the Royal Commission.

The limitations imposed by building a general theory of how a causal mechanism operates across a population from one suitable case study are significant. Inevitably it reduces the confidence that I have in causal inferences that can be drawn from applying this theory to identify where the mechanism broke down in cases where policy did not change. While process-tracing methods are not strictly comparative, the strength of their causal inferences is improved through further application: for example, in Chapters Five and Six I am able to test and refine the theoretical mechanism of policy effect, developed inductively in Lajamanu, through deductive application to two further cases where it operated successfully (Redfern and Bourke) before employing it to provide insights into cases where the mechanism did not reduce incarceration.

However, despite these limitations I consider it worthwhile proceeding to build a theory of policy change in this Chapter for two reasons. First, ignoring the mechanism of policy change would be inconsistent with my broader theoretical framework of relational governance; in this context, an explanation for the failure of a largely static, thirty-year-old policy response that did not account for the absence of major amendment or reform would be patently incomplete. The second reason that I consider it worthwhile to proceed is that there are well established theoretical models of policy change in political science that I am able apply to aide my analysis. Given the apparent synergy between the case study and Kingdon's popular streams model policy change, I utilise this model to

identify steps in a causal mechanism of policy change and situate the principal-agent delegations upon which I focus my analysis.

Having identified the steps within the mechanism of policy change, I then apply them to a second case where the mechanism apparently broke down. In December 2017, the Turnbull Government received the ALRC report. This report had been commissioned following the revelation of abuse and torture of juvenile First Nations detainees at the Don Dale Youth Detention Centre in the NT.[1] But, since the receiving the report, the Commonwealth has not acted, and policy has not been substantially changed. The broad similarity of contextual circumstances between 1989-91 and 2017-18 provide a compelling opportunity to compare the instance where policy changed to that where it did not.

In this Chapter I proceed in three stages. First, I employ the multiple streams model of policy change to structure an empirical account of the change that brought about the policy response to First Nations incarceration. This begins with the initial activism in favour of a Royal Commission beginning in 1984, to the expiration of the initial Commonwealth funding package in 1998. To follow the policy package through to the expiry of the funding, I focus on two State and Territory level jurisdictions: New South Wales and the NT. In the second part of the Chapter, I redefine these stages as a testable causal mechanism with a focus upon the two principal-agent delegations: first, the delegation of policy formulation to an independent legal authority; and second the delegation of policy implementation to the States and Territories. Finally, in

1 Caro Meldrum-Hanna and Elsie Worthington, 'Evidence of "torture" of Children Held in Don Dale Detention Centre Uncovered by Four Corners', *ABC News*, 25 July 2016.

the fourth part of the Chapter I apply this theoretical mechanism to the case of the response to the ALRC Report in 2018 in order to identify where the process of policy change broke down.

I. 1992 and the Multiple Streams Model of Policy Change.

Reducing the empirical account of how the policy response to First Nations incarceration in 1992 was initiated to a generalisable causal mechanism requires a significant narrowing of scope. In the systems-understanding of causation that underpins my process-tracing methodology, causal mechanisms are broken-down into clearly defined constituent steps, each of which can be described in terms of *entities,* such as actors, organisations, structures, that undertake *activities*, the actions that transmit causal forces through the mechanism. [2] In order to guide my identification of the constituent steps behind policy change in First Nations incarceration, I draw upon the multiple streams model of policy change .

Since public policy studies emerged as a sub-discipline of political science following the Second World War, scholars have used heuristics to analyse processes of policy change. The practice finds expression in longstanding analytical devices, which have been employed to aid understanding by scholars and practitioners alike.[3] The empirical narrative of the policy response to First Nations incarceration described above has a striking resonance with one of these

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2 Yf Reykers and Derek Beach, 'Process Tracing as a Tool to Analyse Discretion', in *The Principal Agent Model and the European Union*, ed. Tom Delreux and Johan Adriaensen, 2017, 263; citing: Peter Machamer, Lindley Darden, and Carl F. Craver, 'Thinking about Mechanisms', *Philosophy of Science* 67, no. 1 (2000): 1–25; Peter Machamer, 'Activities and Causation: The Metaphysics and Epistemology of Mechanisms', *International Studies in the Philosophy of Science* 18, no. 1 (2004): 27–39.

3 Michael Howlett, Allan McConnell, and Anthony Perl, 'Streams and Stages: Reconciling Kingdon and Policy Process Theory', *European Journal of Political Research* 54 (2014): 420; For an example applicable the APS, see: Catherine Althaus, Peter Bridgeman, and Glyn Davis, *The Australian Policy Handbook*, 4th ed. (Crows Nest, NSW: Allen and Unwin, 2007).

longstanding heuristics: the *multiple streams model* of policy change, originally published by Kingdon in 1984.[4] Howlett, McConnell and Perl describe the strength of the *multiple streams model* as being its compelling account of the common political phenomenon of 'an idea whose time has come'.[5] In this second part of the Chapter, I employ the multiple streams heuristic to identify key stages within the process of policy change, which I can subsequently refine into a causal mechanism.

a) Kingdon's Multiple Streams Model of Agenda Setting

In his 1984 theory, Kingdon conceives of policymaking as being comprised of three streams, which periodically converge:

1. A *problem stream*, which comprises those problems in a society requiring policymakers' attention. The actors in this stream comprise those who draw attention to these problems, including journalists, statisticians and concerned citizens. This stream is the origin of *focusing events*, potentially bringing the three streams together.
2. A *policy stream*, which is comprised of the many potential policy solutions that originate with communities of policymakers, experts and lobby groups. Actors within this stream include *policy entrepreneurs*, who strive to connect policy solutions both to relevant problem and to the political agenda, potentially bringing the three streams together.
3. A *political stream*, comprising factors such as changes in government, legislation change and public opinion. The actors in this stream are politicians and their staff: they own the agenda of policymaking. But the

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4 John Kingdon, *Agendas, Alternatives and Public Policies* (Boston, MA: Little, Brown, 1984).

5 Howlett, McConnell, and Perl, 'Streams and Stages', 3.

interest of political actors is forever roving. It is the task of policy entrepreneurs to capture this attention.

In Kingdon's theory, the three streams flow independently of each other until circumstances lead to a convergence in the form of a 'focusing event' or crisis. Kingdon understands the resulting confluence of streams to present a 'policy window', which represents a limited opportunity for policy entrepreneurs, political actors and policymakers to change policy.[6]

Kingdon's *multiple streams model* has been widely applied by public policy scholars, to a diverse range of cases.[7] While originally developed in the US and focused upon that layered federal system, Kingdon's model has been successfully used in comparative analysis.[8] It has been found to be advantageous in the Australian context, successfully explaining policy changes at the Federal State and Territory level.[9] Successful applications include policy domains adjacent to the policy response to First Nations incarceration, such as to explain

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6 Howlett, McConnell, and Perl, 'Streams and Stages', 3.

7 See the summary in: Pragati Rawat and John Charles Morris, 'Kingdon's "Streams" Model at Thirty: Still Relevant in the 21st Century?', *Politics and Policy* 44, no. 4 (2016): 613; for example, see on drug administration: Elaine B. Sharp, 'Paradoxes of National Anti-Drug Policymaking', in *The Politics of Problem Definition: Shaping the Policy Agenda*, ed. David A. Rochefort and Roger W. Cobb (Lawrence, Kansas: University Press of Kansas, 1994), 98–116; on foreign policy, B. Dan Woods and Jeffrey S. Peake, 'The Dynamics of Foreign Policy Agenda-Setting', *American Political Science Review* 92, no. 1 (1988): 173–84.

8 For a review, see: Daniel Béland and Michael Howlett, 'The Role and Impact of the Multiple-Streams Approach in Comparative Policy Analysis', *Journal of Comparative Policy Analysis: Research and Practice* 18, no. 3 (2016): 221–27.

9 Kate Crowley, 'Irresistible Force? Achieving Carbon Pricing in Australia', *Australian Journal of Politics and History* 59, no. 3 (2013): 368–81; Peter D'Abbs, 'Alignment of the Policy Planets: Behind the Implementation of the Northern Territory (Australia) Living with Alcohol Programme', *Drug and Alcohol Review* 23, no. 1 (2004): 55–66; Jennifer DeVoe, 'A Policy Transformed by Politics: The Case of the 1973 Australian Community Health Program', *Journal of Health Politics Policy and Law* 28, no. 1 (2003): 77–108; Roslyn Poulos, Alex Donaldson, and Caroline Finch, 'Towards Evidence-Informed Sports Safety Policy for New South Wales, Australia: Assessing the Readiness of the Sector', *Injury Prevention* 16, no. 2 (2010): 127–31.

changes to alcohol policy in the NT.[10] Situating my causal mechanism within this well-established theory of policy change increases my confidence in building the mechanism from a single available case. By utilising widely employed concepts from the streams heuristic, I am able to identify the core components of the theoretical causal mechanism with greater confidence: the constituent steps, the *entities* and causal *activities* they undertake in order to transmit causal force through the mechanism.[11] Moreover, situating the causal mechanism within a widely employed theoretical framework should serve to facilitate future application and critical comparative study of the mechanism, which may improve its empirical support.

b) Extending 'streams' beyond agenda Setting: Howlett, McConnell and Perl's Five Streams Confluence Model

Kingdon did not originally intend his theory to be applied beyond the initial agenda setting of policymaking.[12] But, since its publication in 1984 there have been numerous attempts to extend Kingdon's compelling concept of converging *policy*, *politics* and *problem* streams to include more of the policymaking process.[13] Some have applied Kingdon's three streams to other stages of

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10 D'Abbs, 'Alignment of the Policy Planets'.

11 Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 263; citing: Machamer, Darden, and Craver, 'Thinking about Mechanisms'; Machamer, 'Activities and Causation: The Metaphysics and Epistemology of Mechanisms'.

12 See: Nikolaos Zahariadis, 'The Multiple Streams Framework: Structure, Limitations, Prospects', in *Theories of the Policy Process*, ed. Paul A. Sabatier, 2nd ed. (Boulder, CO: Westview Press, 2007), 65–92; Nikolaos Zahariadis and Christopher Allen, 'Ideas, Networks and Policy Streams: Privatisation in Britain and Germany', *Policy Studies Review* 14, no. (1-2) (1995): 71–98.

13 Howlett, McConnell, and Perl, 'Streams and Stages', 421.

policymaking;[14] others have sought to extend the multiple streams concept through innovations and additions.[15] In a 2014 extension of Kingdon's multiple streams theory, Howlett, McConnell and Perl extend the framework beyond the process of agenda setting to accommodate a more complete understanding of the larger process of policy change, including the formulation policy options and eventual decision-making. They label their extension the 'Five Streams Confluence Model' and their figurative representation of the model is extracted in Figure 4.1. In this Chapter, I use this Five Streams Confluence model as the foundation for building a mid-range theoretical explanation of how policy changes with regard to First Nations incarceration: the policy change mechanism.

In order to extend its operation beyond agenda setting, Howlett, McConnell and Perl make three additions to Kingdon's Multiple Streams concept. First, they introduce two further streams that join the now five stream confluence after the agenda has been set: a *process stream* 'designed to examine options, support authoritative decisions and so on, which sets up the future timetable for deliberations and establishes the general course through which the stream will flow'; and a *programme stream* 'designed to calibrate new programme instruments and integrate them with established ones.' For their second addition, Howlett, McConnell and Perl import the concept of discrete 'stages' in policymaking, a longstanding analytical tool in public policy analysis

14 For example, on 'implementation', Mark Exworthy and Martin Powell, 'Big Windows and Little Windows: Implementation in the "Congested State"', *Public Administration* 82, no. 2 (2004): 263–81.

15 Prominent examples include: Michael Barzelay, 'Introduction: The Process Dynamics of Public Management Policymaking', *International Public Management Journal* 6, no. 3 (2006): 251–82; Geert R. Teisman, 'Models for Research into Decision-Making Processes: On Phases, Streams and Decision-Making Rounds', *Public Administration* 78, no. 4 (2000): 937–56; Zahariadis, 'The Multiple Streams Framework'.

with a diverse literature dating back to Lasswell's post-war pioneering of the field as a specialisation within political science.[16] To incorporate stages into Kingdon's streams model, Howlett, McConnell and Perl conceive of further 'confluence points' and 'sub-confluence points', where the streams re-converge. Each of these confluence points marks a discrete stage, 'capable of bringing something different (such as new actors, new agenda-setting streams, new tactics)'.[17] Conceived of as such, these stages warrant individual analysis. In their model represented in Figure 4.1, Howlett McConnell and Perl suggest two further stages: 'policy formation' and 'decision-making'.[18] Although, they acknowledge that in certain cases further stages with further confluence and sub-confluence points would be possible.

The third addition Howlett, McConnell and Perl make to Kingdon's streams theory does not extend the scope of the framework but rather its ability to accommodate complexity. They do this through the concept of a *dominant stream*. Following the confluence of their five streams – a 'whirlpool', 'at times turbulent and hidden from public view' – one of the five streams can become dominant. Howlett, McConnell and Perl conceive of the four other streams being nested within this dominant stream: in Figure 4.1, the political stream is represented as being dominant in the policy formation and decision-making stages, with the other four streams being nested within it. Within this model, dominance lasts for the duration of the 'stage', until the next confluence of streams (triggering a further 'whirlpool').

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16 Harold Lasswell, *The Decision Process: Seven Categories of Functional Analysis* (College Park, MD: University of Maryland Press, 1956).

17 Howlett, McConnell, and Perl, 'Streams and Stages', 427.

18 Howlett, McConnell, and Perl, 'Streams and Stages', 427.

'Crucially, therefore, and unlike any of the other potential streams models, a degree of complexity is recognised because the five streams can be nested within each other to help explain different types of policy making and the way in which one particular stream can be in effect an agenda setter, setting the parameters for other streams within it.'[19]

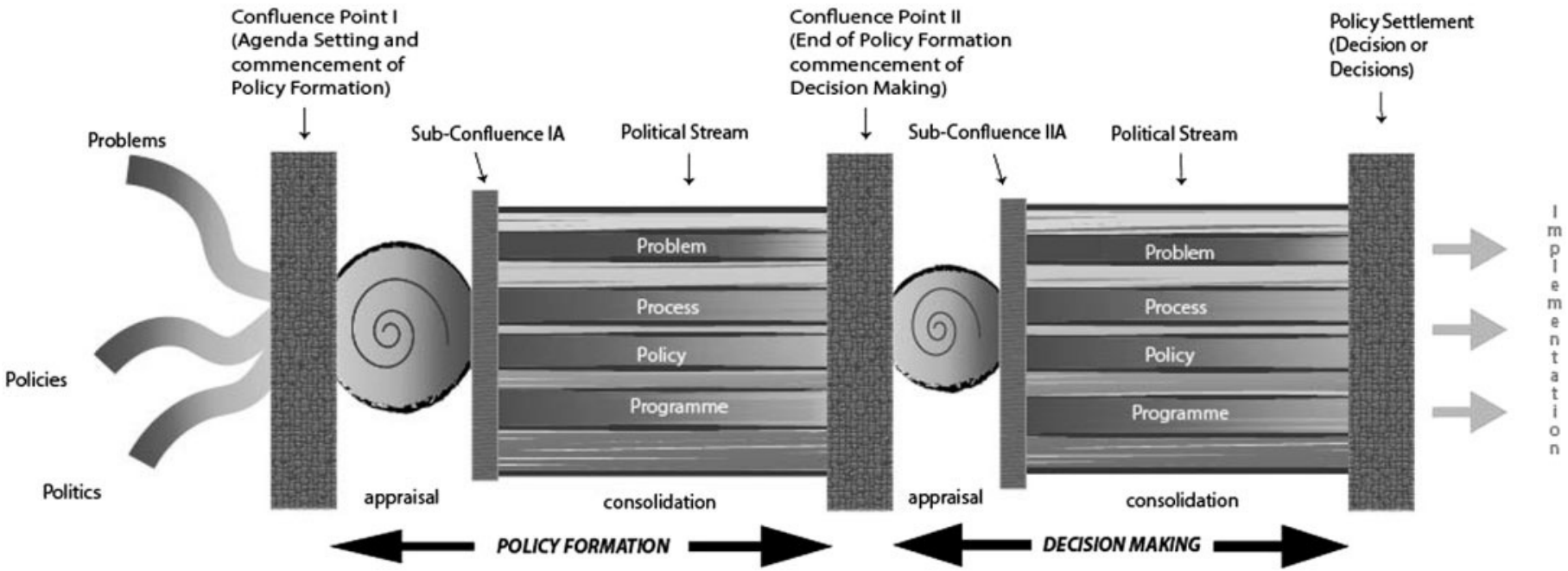
The conception of a dominant stream allows Howlett, McConnell and Perl to analyse, 'which stream guides the current at a particular point' capturing 'a key insight explaining the analytical power and persistence of the stages-cycle idea'.[20] The authors prefer a dominant political stream in their conception, 'because it helps capture how political will can at times trump and shape all other forces', but they recognise that in the 'art' and 'interpretative aspects of policy analysis' different analysts may consider different streams to dominate in other circumstances.[21]

19 Howlett, McConnell, and Perl, 'Streams and Stages', 427.

20 Howlett, McConnell, and Perl, 'Streams and Stages', 427.

21 Howlett, McConnell, and Perl, 'Streams and Stages', 432 Footnote 2.

Figure 4.1: ***Five Streams Confluence Model by Howlett, McConnell and Perl***[1]



[1] See Figure 4 in Howlett, McConnell, and Perl, 'Streams and Stages', 427.

c) Applying the 'five streams confluence' heuristic of policy change to the policy response to First Nations incarceration in 1992

Howlett, McConnell and Perl's five stream confluence model provides a useful heuristic for understanding the process of policy change that initiated the response to First Nations incarceration. In this section I use it do identify the key entities and activities in each of the stages of the policy change. These form the components of my theoretical mechanism of policy change, represented below in Figures 4.2 and 4.4.

1. Precondition: Agenda Setting

The initiation of the policy response to First Nations incarceration presents as a compelling case study of Kingdon's streams concept of agenda setting. In 1987, a 'policy window' was opened for the Hawke Government through a combination of the advocacy of First Nations leaders and the approach of the bicentenary of Australian settlement in 1988.

In 1984, a group of five police officers were acquitted of the manslaughter of John Peter Pat, who had died in police custody after fighting with several off-duty police officers in the town of Roebourne in the Pilbara region of Western Australia.[1] This acquittal caused consternation in First Nations Australia, such that it was acknowledged by the Royal Commission as a 'symbol of injustice and oppression' for First Nations people.[2] Following the acquittal of the police officers, a *Committee to Defend Black Rights* was established and began a

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1 See: Peter N. Grabosky, 'Chapter 5: An Aboriginal Death in Custody: The Case of John Pat', in *Wayward Governance: Illegality and Its Control in the Public Sector* (Canberra: Australian Institute of Criminology, 1989), 79–92.

2 See Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of John Peter Pat* (Canberra: Australian Government Publishing Service, 1991) Introduction.

campaign calling for a Royal Commission.[3] Helen Corbett, one of the leaders of the *Committee* recalls that the wider community didn't connect these individual cases to a broader phenomenon.[4] In response, in 1986 the *Committee* started a national listening tour to gather evidence of other deaths in custody.[5] Following the tour, the *Committee* received a grant from the Hawke Government's Commonwealth Ministry for Indigenous Affairs to prepare a case for an inquiry.[6] Corbett also sought to gather support overseas,[7] and observed that support overseas generated significant public attention in Australia.[8]Other sources agree with Corbett about the significant impact of the international support.[9]

Further sources emphasise other factors in 1987 that coalesced strengthen the case for a Royal Commission. In 1987 a new organisation, the *Deaths in Custody Watch Committee* also began campaigning for a Royal Commission into the deaths.[10] Major newspapers around the country began publishing a running tally of the number of deaths, with some listing each deceased person by name, while editorials joined the chorus of voices calling for

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3 Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (Crows Nest, NSW: Allen and Unwin, 2001), 67.

4 Ryan Emery, 'Anniversary of Deaths in Custody Royal Commission', *SBS News*, 22 September 2013.

5 See: Helen Corbett and Tony Vinson, 'Black Deaths in Custody: Instigating the Royal Commission', in *Actions Speak: Strategies and Lessons from Australian Social and Community Action*, ed. Eileen Baldry and Tony Vinson (Melbourne: Longman Cheshire, 1991), 95–104; Emery, 'Anniversary of Deaths in Custody Royal Commission'.

6 Tickner, *Taking a Stand*, 67.

7 See Corbett's interview with Emery: Emery, 'Anniversary of Deaths in Custody Royal Commission'.

8 Emery, 'Anniversary of Deaths in Custody Royal Commission'; Corbett and Vinson, 'Black Deaths in Custody: Instigating the Royal Commission'.

9 See: Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Canberra: Aboriginal Studies Press, 2014), 19; T. Hewett, 'Aborigines Find Allies Abroad', *Sydney Morning Herald*, 1 September 1987.

10 G. Williams, 'Black Deaths in Custody an Outrage', *Sydney Morning Herald*, 26 June 1987; Cited in Weatherburn, *Arresting Incarceration*, 19.

a Royal Commission.[11] The case for a Royal Commission gained a special political resonance from the approach of Australia's bicentennial anniversary of settlement, which the Government was planning to celebrate. As Harding observed, national reconciliation between First Nations and settler Australians was impossible in a climate of suspicion about the fairness of criminal justice.[12]

Hal Wootten QC, who later became a commissioner of the Royal Commission, recounted how these factors coalesced with surprising force in 1987 – shaking even a well-informed bystander like himself out of complacency:

> 'What should have been worrying signs, among them the growing campaign stemming from John Pat's death in custody at Roebourne in 1983, went largely unnoticed. In 1987 a confident nation looked forward to celebrating its bicentenary the following year with head held high. The Complacency (*sic*.) was interrupted by Moral Panic (*sic*.} as deaths in custody unexpectedly became news'[13]

Not yet the Minister for Indigenous Affairs but with a vantage point within the Hawke Government, Tickner broadly shared Wootten's view:

> 'The case for a Royal Commission became increasingly unanswerable with each high-profile death in custody such as that of Lloyd Boney in Brewarrina New South Wales, on the 6 August 1987. There had been a wave of publicity and public concern about the number of these deaths and the inadequate public explanations about the circumstances, where the possibility of foul play could not be discounted.'[14]

Within Kingdon's streams concept, this constituted a 'policy window' that policy entrepreneurs from within the First Nations community, the legal profession and the Hawke Government were able to exploit in order to initiate a policy response. I do not consider this initial salience and agenda setting to be a

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11 Williams, 'Black Deaths in Custody an Outrage'; Cited in Weatherburn, *Arresting Incarceration*, 19.

12 R. Harding et al., *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (Sydney: Hawkins Press, 1995) cited in Weatherburn, *Arresting Incarceration*, 21.

13 Hal Wootten AC, QC, 'Foreword: 20 Years from the Royal Commission', *Australian Indigenous Law Review* 15, no. 1 (2011): 1.

14 Tickner, *Taking a Stand*, 68.

component of the causal mechanism as I consider it unrealistic to theoretically generalise about the many methods in which political salience might be achieved. Within the language of process-tracing, I characterise the presence on the national agenda as a causal contextual condition of my mechanism: it is not a generalisable component and may vary from case to case; but the outcome, political salience, is a condition for the mechanism to function effectively. On the basis of this empirical account, I predict that the presence of this contextual condition will be evident in a particular case through a content analysis of Australian media at time of the case study.

***Contextual Condition*: National political salience of First Nations Incarceration.** *Predicted to be evidence from the content of national media.*

2. Confluence Point One: Decision for a Royal Commission

The outcome of policy, political and problem streams converging in 1987 was the Hawke Government's decision to form a Royal Commission, with the bipartisan support of State and Territory Governments. I consider the delegation from the Commonwealth Government to an independent legal authority, in this case a Royal Commission, to be the first step in my causal mechanism of policy change. It is represented as Step 1 in Figure 4.1. Within the context of Howlett, McConnell and Perl's five streams extension of Kingdon's heuristic, this is a significant decision point: by delegating to a Royal Commission, the Hawke Government determined that the policy formation stage of the model would be dominated by the process-stream.

I argue that there is evidence for the dominance of 'process' concerns in the empirical account of the expansion of the Royal Commission. The initial scope of the Royal Commission was focused on the deaths that had occurred in custody, not broader concerns.[15] Initially, a sole Commissioner, Justice James Henry Muirhead, was appointed to investigate 44 deaths.[16] After two years, Commissioner Muirhead concluded that the deaths were a product of broader, systemic problems, having their origins 'in the very despair of individuals, in frustration, in anger, in legal practices and procedures' in which many First Nations people had no confidence.[17]

In response to Commissioner Muirhead's interim report, the Hawke government increased the Royal Commission's size and its scope. Five new commissioners were appointed, four of which were senior lawyers. The non-legally trained Commissioner, Commissioner Patrick Dodson, was a First Nations leader from the Kimberley in WA.[18] National Commissioner Elliot Johnston QC headed this group, replacing Commissioner Muirhead.

Commissioner Hal Wootten QC recalled that following Muirhead's interim report, the problem facing the Hawke Government was that what 'cried out for investigation was not the likelihood of foul play', but why so many First Nations

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15 Elena Marchetti, 'Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody', *Macquarie Law Journal* 5 (2005): 104.

16 There were in fact 124 First Nations deaths in custody during the relevant time period, although 25 of these were found to fall outside of the Commission's Letters Patent: Christopher Cunneen, 'The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes' (Canberra: Monitoring and Reporting Section, Aboriginal and Torres Strait Islander Commission, 1997); Marchetti, 'Critical Reflections', 105.

17 See: James Muirhead QC, *Royal Commission into Aboriginal Deaths in Custody: Interim Report* (Canberra: Australian Government Publishing Service, 28 December 1988); Julie Power, 'Death in Custody Report Advises Urgent Law Reform', *Australian Financial Review*, 29 December 1988.

18 Marchetti, 'Critical Reflections', 105.

people were 'falling foul of the justice system and spending time in custody'. [19] However, this was not the purpose for which the Commission had been established, and the Government was 'naturally cautious in expanding what was already proving to be a mammoth task'. However, Wootten recalls, it was eventually accepted that this central underlying issue could not be ignored.[20]

On 6 May 1988, the Royal Commission's *Letters Patent* were extended to include consideration by the National Commissioner of underlying social, cultural and legal issues that may have contributed to the deaths. This was interpreted broadly by National Commissioner Johnson to include '…not only how people died, but why they died.'[21] As the Hawke Government was already committed to thoroughly investigating the individual deaths, this resulted in a considerable expansion of the Royal Commission's workload as well as its scope. Wootten described the impact:

> 'The question implicit in the terms of reference was: has misconduct of custodial officers caused the deaths of Indigenous prisoners, and if so why has this not been detected? The question should have been: why are Aboriginals taken into custody at such stunningly higher rates than non-Aboriginals? By the time this was realised, it was politically impossible to call the death inquiries off. A hundred or so Aboriginal families and communities were convinced or highly suspicious that a loved one had been victim of foul play or neglect.'[22]

The now dual purposes of the Royal Commission caused methodological challenges for the Commissioners. The 'quasi-judicial fact-finding' method of the Royal Commission was found to be insufficient to support the significant policy

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19 Wootten AC, QC, 'Foreword', 2.

20 Wootten AC, QC, 'Foreword', 2.

21 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report, Volume 1* (Canberra: Australian Government Publishing Service, 1991), 103.

22 Hal Wootten AC QC, 'Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody', *Indigenous Law Bulletin* 7, no. 27 (December 2011): 3.

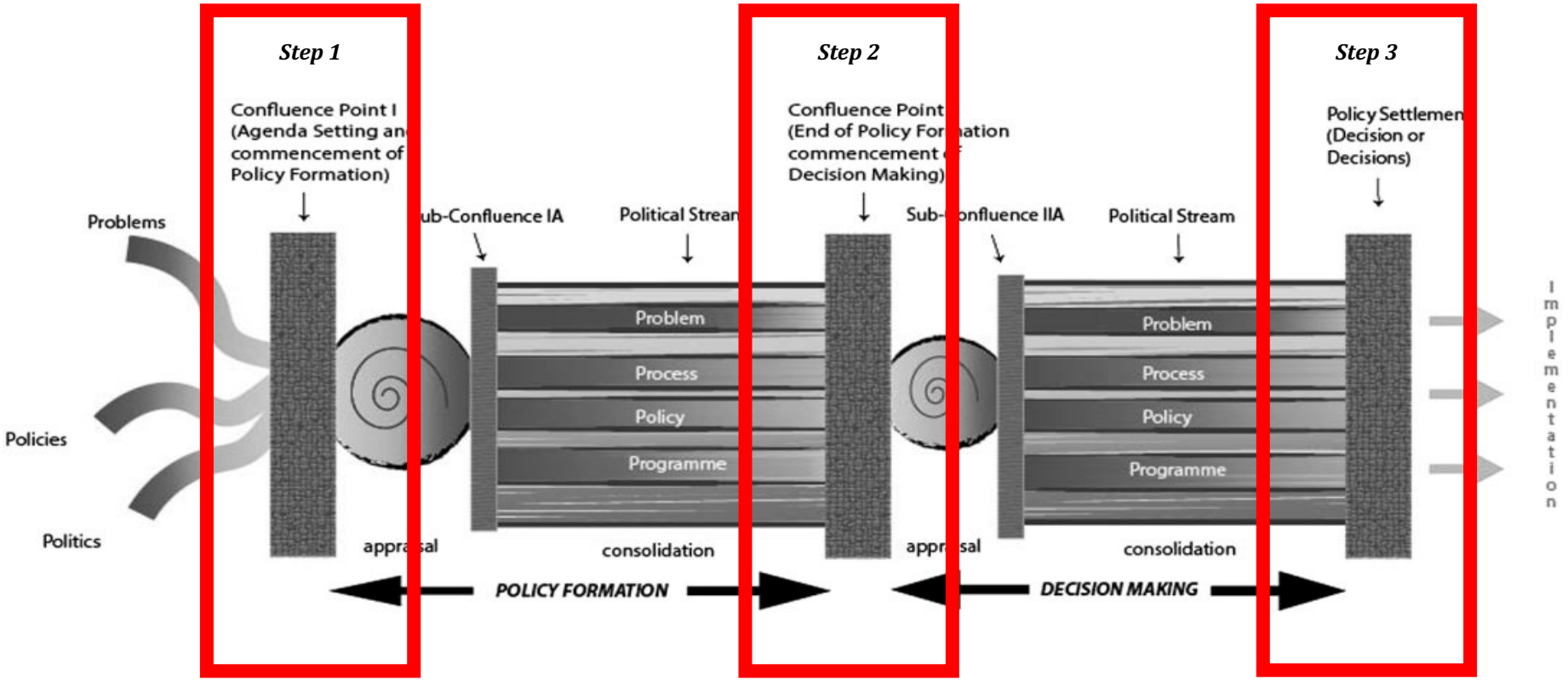
recommendations emerging from the *National Report*. [23] As a result, the incidental work of the individual Commissioners was bolstered through the establishment and staffing of specific research units.[24] It is largely through the work of these units that the policy recommendations that form the focus of this thesis were formulated.

I consider the expansion of the scope of the Royal Commission to be clear evidence of the dominance of the process-stream within Howlett, McConnell and Perl's heuristic. By delegating policy formulation to an independent legal authority the Hawke Government relinquished significant control, to the extent that the Royal Commission was able to substantially alter its focus. The subsequent commitment of the Hawke and Keating Governments to the recommendations of the Royal Commission suggests that they were satisfied that this produced a more thorough policy formulation process. However, as will be seen below, it had a significant consequence for the next stage in the mechanism.

23 Marchetti, 'Critical Reflections', 109.

24 Marchetti, 'Critical Reflections', 109.

Figure 4.2: ***Steps of the mechanism through which the Commonwealth Government changes policy with regard to First Nations incarceration***[1]



[1] Modified from Figure 4 in Howlett, McConnell, and Perl, 'Streams and Stages', 427.

I incorporate the delegation to an independent legal authority into my general theory of policy change with regard to First Nations incarceration. This is due to the constitutional complexity of this policy domain, which exists across Commonwealth, State and Territory and judicial constitutional powers in Australia.

Step 1 – *Delegation from Commonwealth to Independent Legal Authority for Policy Formulation*

Commonwealth Government (potentially with support from States and Territories)	Independent Legal Authority Commissioned for Policy Formulation (i.e. Royal Commission, Australian

3. Confluence Point Two: End of Policy Formation

The significance of the dominant process stream during policy formulation becomes apparent at the second confluence point in an application of the five streams confluence model to the initiation of policy response to First Nations incarceration.

Once the Royal Commission published its final report in 1991, the Commonwealth Government resumed authority for the policy response to First Nations incarceration. A trace of the empirical evidence makes clear that at this point political leaders were required to invest considerable political effort in order to generate a policy response. Tracing the policy response is assisted by several memoirs have since been published covering this period of the Keating

Government,[1] as well as the Keating Government's Cabinet papers from the years 1992-3 that were released in 2017.[2] I have also gained insights through an interview conducted with Minister Tickner in 2021.

Tickner recalls that the National Report's recommendations were broad, 'affecting numerous portfolios and concerned governments at all levels.'[3] Despite Prime Minister Keating's strong commitment to the recommendations of the National Report, securing support across all portfolios was problematic. Minister Tickner recalled the process in detail his published memoir:

> 'An interdepartmental group of officials prepared the first draft of the Commonwealth response. It was a deeply disappointing document. Of the 339 recommendations, almost half had not been agreed to by government departments and agencies. This was of very great concern as I believed the Commonwealth should set the pace. My office therefore committed ourselves to drive the process. I determined that I would chair a series of working groups of officials around key areas of the recommendations – law and justice, health and substance abuse, employment, education and youth policy. The task meant taking each of the recommendations and getting agreement from the relevant government department and minister who would need to take responsibility for implementing it. This was a daunting job of writing, lobbying and negotiation in which a key group of ATSIC officers, together with my own staff, played a magnificent role. Often my senior adviser, Kathleen Taperell, was still lobbying and organising in other ministerial offices in the early hours of the morning.'[4]

In this manner, Minister Tickner and his key group of staff and ATSIC officers eventually secured Commonwealth agreement to all of the National Report's recommendations except for the recommendation relating to ATSIC, which was rejected by the ATSIC board.[5]

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1 See for example: Don Watson, *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM* (Sydney: Random House, 2002); Kerry O'Brien, *Keating* (St Leonards, NSW: Allen and Unwin, 2016); Troy Bramston, *Paul Keating: The Big Picture Leader* (Melbourne: Scribe Publications, 2017); Tickner, *Taking a Stand*.

2 For a summary, see: Diana Perche, 'Cabinet Papers 1992-93: Keating Government Fights for Indigenous Rights on Multiple Fronts', *The Conversation*, 1 January 2017.

3 Tickner, *Taking a Stand*, 74.

4 Tickner, *Taking a Stand,* 74–75.

5 Tickner, *Taking a Stand,* 75.

Having secured agreement to the recommendations, Tickner's office turned their attention to securing funding for the policy response. Once again, this was a political struggle. They assembled a group of ATSIC Commissioners and staff, together with the ministerial office and 'set about developing a package of funding to tackle the underlying issues of health, substance abuse, housing, employment, education and other areas which [the Royal Commission] found to be the root cause of the disproportionate rate of Aboriginal imprisonment.'[6] Tickner recalled that 'again, the proposed package not only had to be negotiated with the ATSIC Board but had to be agreed with all relevant government departments, agencies and ministerial offices'.[7]

Commonwealth funding was secured at a cabinet meeting, which Tickner arranged to be addressed by three ATSIC Commissioners: Lowitja O'Donoghue, Alf Bamblett and Steve Gordon.[8] Tickner recalled the subsequent cabinet discussion:

> 'After the three ATSIC commissioners left, Cabinet discussion began. I recall Gerry Hand[9] as my only real vocal supporter. Between us, speaking from opposite ends of the table, we talked Cabinet to a standstill. The meeting finally adjourned when we reached agreement on new measures that gave $400million over five years. It was clearly understood, however, that the Commonwealth funding was not to be a substitute for a commitment to equitable contributions from programs administered by mainstream government departments and agencies.'[10]

However, the struggle to fund the policy response continued. Later, the immediate funding package was limited to those recommendations directly related to criminal justice (AUD$150 million), in response to the demands of the

6 Tickner, *Taking a Stand,* 75.

7 Tickner, *Taking a Stand,* 75.

8 Tickner, *Taking a Stand,* 75.

9 A former Minister for Aboriginal Affairs (1987-1990).

10 Tickner, *Taking a Stand,* 75.

Departments of Treasury and Finance. The remainder of the policy response was to be funded from offsets found elsewhere.[11] Tickner recalls that this response was not intended to be comprehensive, but to lead a whole-of-government Commonwealth effort and a corresponding effort from State and Territory Governments. [12] This required further lobbying. Prime Minister Hawke had won support from all State and Territory Governments for holding the Royal Commission; now his Government endeavoured to secure support for as many of the 339 recommendations as possible.[13] Tickner recalled that Prime Ministerial pressure was required for this: State and Territory Governments 'followed the Commonwealth's lead after the Commonwealth pressured them by, for example, sending letters to premiers and chief ministers personally signed by Prime Minister Hawke'.[14] During this work, Prime Minister Hawke was replaced by Prime Minister Keating, who continued this process.[15] In our subsequent interview Tickner was quick to stress the importance Prime Ministerial support: 'This sort of thing takes a Prime Minister, and one who wants to leave a legacy.'[16]

The perspective of Howlett, McConnell and Perl's multiple streams framework casts provides an interesting insight into this political effort. While in the policy formulation state, the *process stream* had been dominant, in the decision-making stage there is clear evidence that the *political stream* was dominant. There are two enduring structural reasons why the political stream is

11 See: Perche, 'Cabinet Papers 1992-93'.

12 Tickner, *Taking a Stand,* 75.

13 Tickner, *Taking a Stand,* 75.

14 Tickner, *Taking a Stand,* 75.

15 Tickner, *Taking a Stand,* 42.

16 The Hon. Robert Tickner, Fieldwork Interview, Sydney, September 2021.

dominant in decision-making with regard to First Nations incarceration by the Commonwealth: first, the constitutional requirement to secure collaboration from State and Territory Governments; and second, the low electoral salience of First Nations voters in federal electorates in Australia due to demographic size and distribution. The effect of these structural factors is further shaped by a temporal one: due to the delegation of policy formulation to an independent legal authority, the decision-making regarding a policy response is distant from the original policy window and the political salience of the original crisis.

I argue that the need to change the dominant stream, from *process* to *political* partly explains the difficulty in changing the policy response to First Nations incarceration. In the case of 1992, the Keating Government secured commitment to the Royal Commission's recommendations almost four years after the policy window was opened by the bicentennial celebrations. The available evidence suggests that the level of political commitment required by the Keating Government was high: Minister Tickner described it as requiring 'a mongrel determination'. Minister Tickner also observed that responding to First Nations incarceration, alongside the even larger struggle to achieve Native Title rights, had 'exhausted the government'.[17]

The evidence of leadership by political actors that emerges from the empirical account of the policy change in 1991-92 is notable in two ways that I use to define my test for the evidence we would expect to find in future cases. The first, is a question of political interest. Commentators have agreed that the Keating Government had little to gain politically in responding to the Royal

[17] The Hon. Robert Tickner, Fieldwork Interview, Sydney, September 2021.

Commission– indeed, it risked considerable political cost.[18] That the logic of this political calculation was acknowledged by the Keating Government at the time of the policy response in 1992 was confirmed to me in an interview with Minister Tickner: Tickner observed that the policy response was consistent with Labor's values, but that there was opposition due to the high political cost.[19] The second notable factor of political leadership that emerges from the empirical account above is a question of degree: considerable lobbying by political leaders and their staff was required. Tickner's reflection, when interviewed in 2021, was that it would not have been possible to achieve the policy response to First Nations incarceration without the personal commitment and involvement of Prime Ministers Hawke and Keating. While the reflections of former politicians, such as Tickner, have an inevitable bias, his observations as to the necessity of Prime Ministerial leadership are telling as they cut against his bias and diminish his personal role. Moreover, they are corroborated by other sources.[20]

In order to provide a useful yardstick against which to measure the available evidence of this notion of leadership in my explanation of policy change I employ the concept of a 'sense of purpose' in leadership developed by Neustadt in his 1960 study of presidential power. Neustadt finds evidence for this 'sense of purpose' in 'irreversible commitments to defined courses of action' which are manifested in 'personal involvement in terms of what the man himself (*sic*) is seen to say and do, so plain and so direct that politics – and history – will not let

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18 For example: Gabrielle Chan, 'Paul Keating's Response to Talkback Caller over Mabo a Reminder of Leadership Past', *The Guardian Australia*, 1 January 2017; 'Paul Keating Ignored Advice to Do Nothing over Mabo', *The Australian*, 30 December 2016; Perche, 'Cabinet Papers 1992-93'; Bramston, *Paul Keating: The Big Picture Leader*; O'Brien, *Keating*; Watson, *Recollections of a Bleeding Heart*

19 The Hon. Robert Tickner, Fieldwork Interview, Sydney, September 2021.

20 Perche, 'Cabinet Papers 1992-93'; 'Paul Keating Ignored Advice to Do Nothing over Mabo'.

him turn back.'[21] I argue that sufficient leadership to satisfy this step of my theory is evidenced by Neustadt's concept.

Step 2 – *Commonwealth resumes responsibility for process and initiates decision-making*



4. Confluence Point Three: Settlement

The final confluence point in Howlett, McConnell and Perl's five streams heuristic is the policy settlement. This is the conclusion of their process and the final step of my causal mechanism. In the first Chapter of this thesis I introduced the constitutional complexities of the policymaking with regard to First Nations incarceration: specifically, the ability of the Commonwealth to fund local First Nations corporations but reliance upon State and Territory Governments to reform criminal justice. These tensions are apparent in the empirical account of the 1992 policy response.

In his memoir, Tickner presents the Commonwealth response as embodying a two-stage strategy. First, on 27 March 1992 the 'national response of all governments' to the Royal Commission's recommendations was tabled in Federal Parliament, as was the detail of the first stage of the Commonwealth's policy package. Focused specifically on criminal justice, the intention in this first stage was to cement 'an agreed national agenda for improving Aboriginal-police relations based on the unanimous support of all governments for RCIADIC's

[21] Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Basic Books, 1990), 168; cited in Nigel Bowles, *Nixon's Business: Authority and Power in Presidential Politics* (College Station, Texas: Texas A&M University Press, 2005) Chapter 1, Footnote 39.

practical proposals for reform.'[22] To this end, it funded enhanced employment strategies in police services, and cross-cultural training within custodial and court systems. The Commonwealth also announced its intention to work with the States and Territories and the legal profession to implement similar programs for judicial staff and police. It also supported and funded a national conference bringing together police and senior First Nations community leaders.[23] It also funded a range of programs through ATSIC, including further support to Aboriginal Legal Services.[24]

Prime Minister Keating's announcement of the second stage of the Commonwealth's policy response on 25 June 1992 included the policy response to address the 'underlying issues' identified by the Royal Commission as driving the disproportionate rate of First Nations incarceration. The policy package was broad, spanning many government portfolios. Writing in 2001,[25] Tickner highlighted ten initiatives (as shown in Figure 4.3) whose purpose was to spark a broader, whole-of-government response to First Nations disadvantage:

22 Tickner, *Taking a Stand*, 76.

23 Tickner, *Taking a Stand*, 76.

24 Tickner, *Taking a Stand*, 77.

25 Tickner, *Taking a Stand*, 77.

Figure 4.3: Tickner's Summary of Stage Two Policies

1. Funding for a land acquisition and development program that would provide the capital resources and training for better use and sustainable development of Aboriginal and Torres Strait Islander land;
2. The establishment of an Aboriginal rural resources program to encourage enterprise, particularly in managing pastoral properties;
3. A Community Economic Initiative Scheme, funded over five years, to foster local enterprise;
4. The expansion of the Australian National Parks and Wildlife contract employment program for managing natural and cultural resources;
5. Funding for ATSIC to develop long-term Aboriginal industry strategies in the pastoral, arts and tourism industries;
6. Significant expansion of CDEP;
7. A Young People's Development Program to encourage planned community action to meet the specific needs of indigenous young people;
8. An Aboriginal Youth Sport and Recreation Development Program to provide Aboriginal sports development officers to work in communities;
9. An increase of 200 Aboriginal education workers from 1993; and
10. 600 more preschool places for Aboriginal children from 1994.

The funding package for the two stages of the Commonwealth policy response expired in 1998. The results disappointed Tickner who concluded that cooperation between States and Territories remained negligible:

> '… rhetoric not action remains the reality for most indigenous people in their dealings with government departments and agencies. [The Royal Commission] clearly set an achievable agenda and all that is needed is the political will to put into effect. But state and territory governments have allocated next to nothing by way of additional resources in the immediate aftermath … and there is no evidence of a genuine commitment by those governments to an equitable allocation of resources from programs of their mainstream departments and agencies.'[26]

I incorporate the need for delegations to both State and Territory Governments forward into my explanation of policy-change where they constitute my final step: a delegation from Commonwealth Government to both

[26] Tickner, *Taking a Stand*, 79.

First Nations corporations and State and Territory Governments in order to achieve policymaking at the local level. I predict that such a delegation should be readily evident in public documents: either grants to organisations or funding agreements with States and Territories. This final stage in my mechanism is represented below.

Step 3 – *Implementation delegated by Commonwealth Government to State and Territory Governments and Local Leaders*

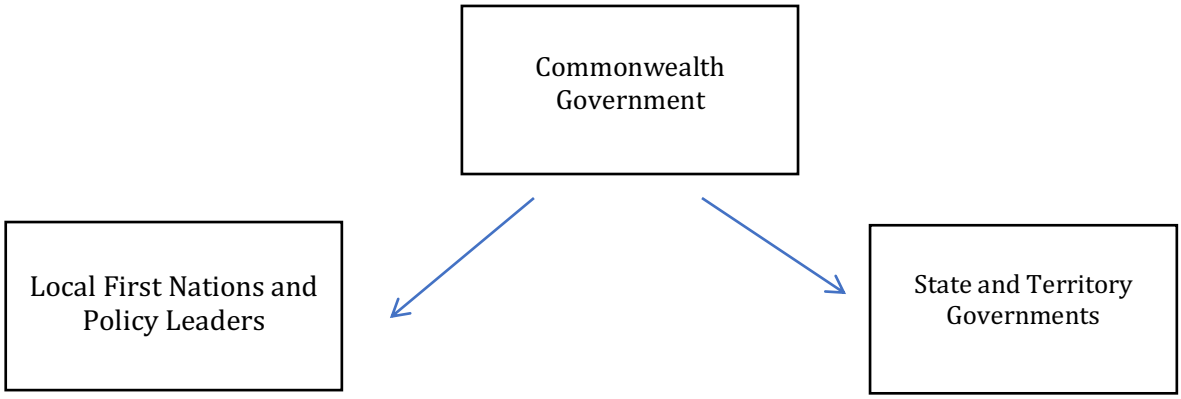


Figure 4.4: Causal Mechanism of Policy Change with regard to First Nations Incarceration

Mechanism of Policy Change with regard to First Nations Incarceration			
Constituent Steps	*Step 1: Commonwealth Government delegates policy formulation to an independent legal authority*	*Step 2: Commonwealth resumes responsibility for policy change process and initiates decision-making regarding a policy response.*	*Step 3: Commonwealth delegates implementation of policy response to State and Territory Governments and local leaders*
Contextual Conditions (if absent, will undermine the mechanism)	• First Nations leaders, activists, and media generate national political salience.	• Independent legal authority publishes policy recommendations.	• Constitutional requirement
Predicted evidence of mechanisms operation	• Necessary level of public confidence should be readily evident from conversations with community members.	• Political leaders make irreversible commitments to defined courses of action in favour of policy response.	• Public commitments, through grants for funding agreements.

d) Conclusion

Through applying the multiple streams heuristic to the empirical account of the policy change that initiated the response to First Nations incarceration in 1992, I have refined my explanation of policy change into a three-step process detailed in Figure 4.4. Steps 1 and 3 of this process are principal-agent delegations and I consider the likely weak points for governance of a policy response. While this three step explanation is necessarily simplified, I argue that it may be generally applied to gain insights into other cases of policy change in First Nations incarceration. I do this to identifying where the mechanism of policy change broke down in 2018 below.

The delegation in Step 1 from the Commonwealth to an independent legal authority did not create direct transaction costs in 1992 through agency discretion: the Royal Commission conducted a process-dominated policy formulation to the apparent satisfaction of the Hawke Governments; the delegation to the Royal Commission also lent considerable legitimacy to policy formulation occurring at the limits of the Commonwealth's power, both relative to the States and the judicial branch of government. But delegation did create the conditions for a considerable political cost in the next Step of the mechanism, when the Commonwealth had to resume control of policymaking long after the initial policy window created by the crisis over First Nations deaths and proximity to the bicentenary had passed.

The transaction costs of the delegations in Step 3 of the mechanism to State and Territory Governments and local leaders remain an open question. The consequences of delegation to empowered local leaders forms will be considered in detail Chapters Five and Six of this thesis. Below, I consider how State and Territory Governments have followed through on the policy response to First Nations incarceration over time before considering the case of 2018.

II. State and Territory Governments as Agents within the Policy Response to First Nations incarceration.

In between the initiation of the Commonwealth policy response to the Royal Commission report in 1992 and the policy window that gave rise to the ALRC report that was expected to change the policy response but did not in 2017/18 lies twenty five years of State and Territory government policymaking. Before proceeding to consider the case of 2018, it is necessary to account for the actions of these subnational governments within the context of the principal-agent delegation described above. Given the breadth of the Commonwealth policy response following the report of the Royal Commission in 1992, it is beyond the scope of this thesis to detail a narrative of the subsequent policy response in each State and Territory. For my purposes here I limit my consideration to NSW and the NT, and focus upon the policy initiatives designed to empower First Nations community leaders that are my primary concern in subsequent chapters.

a) Initial Collaboration led by the Commonwealth

From 1992 the Commonwealth steered the policy response to First Nations incarceration through collective meetings of State and Territory Premiers and Chief Ministers and their respective Attorneys-General. At the first of these following the announcement of the policy response, in August 1992, there was 'strong initial government support' for the implementation of the Royal Commission and its recommendations: at this gathering, dubbed a Ministerial Council on Aboriginal and Torres Strait Islander Affairs, the States also agreed (subject to Commonwealth funding) to report annually on the implementation of the recommendations.[507] Consistent with

[507] Amnesty International and Clayton Utz, *Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody* (May 2015), Paragraph 2.2.1.

the Recommendations One and Two of the Royal Commission, all governments also began work to establish Aboriginal Justice Advisory Committees to involve First Nations leaders directly in the policy response.

Implementation of these commitments was subject to a further agreement by Australian Governments in 1992. In May of that year, the Keating Government established the Council of Australian Governments ('COAG'), as the country's primary intergovernmental forum. Its members were the Federal Government, the governments of the six States and two mainland Territories, and representatives of the Australian Local Government Association. COAG met periodically throughout the period examined in this thesis. On 29 May 2020, Prime Minister Morrison announced the replacement of COAG by the 'National Cabinet' structure established in response to the COVID-19 pandemic.[508]

Following the Labor Government's defeat in 1996, the Howard Liberal-National Coalition Government continued this method of influencing the policy response to First Nations incarceration. In July 1997 a Ministerial Summit on Indigenous Deaths in Custody was held, involving Commonwealth, State and Territory Ministers, ATSIC representatives, the Aboriginal Torres Strait Islander Social Justice Commission and the National Aboriginal Justice Advisory Committee.[509] The meeting reiterated commitment to implementing the Royal Commission's recommendations in full. With the exception of the NT, all governments also agreed to develop jurisdiction-level agreements in consultation with their Aboriginal Justice Advisory Committees. Later known as Indigenous Justice Agreements ('IJA's) these agreements had as their object empowerment of First Nations citizens by means of a highly-publicized agreement to

508 See: Georgia Hitch, 'Scott Morrison Says National Cabinet Here to Stay, Will Replace COAG Meetings in Wake of Coronavirus', *ABC News*, 29 May 2020.

509 Amnesty International and Clayton Utz, *Review*, 3 Paragraph 2.2.1.

improve the quality of justice to First Nations people. [510] While many of these IJAs have since lapsed, in August 2021 the NT announced an Aboriginal Justice Agreement committed to reducing incarceration rates.[511]

b) New South Wales

New South Wales joined with other Australian governments in announcing its support both for the Royal Commission in 1989 and for its National Report in 1992. Consistent with the Commission's first and second recommendations, NSW also committed at the Ministerial Summit in 1997 to develop Indigenous Justice Agreements and Aboriginal Justice Advisory Committees.

From 1998, the NSW Office of Aboriginal Affairs produced yearly reports.[512] In November 1997, the NSW Government published a *Statement of Commitment to Aboriginal People*, setting out the NSW Government's determination to lead towards justice and equality for First Nations people and to move forward in partnership with the First Nations people of NSW.[513] As part of the 'Government's commitment to a more responsive justice system' the strategy specified several objectives, including:

- 'Encouraging Aboriginal involvement in the formulation of policies and programs within law and justice;
- Collaboration with Aboriginal communities in the implementation of non-custodial and post-release programs; and

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510 Amnesty International and Clayton Utz, *Review*, 3 Paragraph 2.2.1.

511 Department of the Attorney-General and Justice, Northern Territory Aboriginal Justice Agreement 2021-2027' (Darwin NT: Northern Territory Government, 2021) 13-15.

512 See: New South Wales Office of Aboriginal Affairs, 'Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody' (Sydney: New South Wales Government, 1993).

513 New South Wales Government, 'Statement of Commitment to Aboriginal People' (Sydney: New South Wales Government, November 1997); For a description see: New South Wales Law Reform Commission, 'Sentencing: Aboriginal Offenders' (Sydney: New South Wales Law Reform Commission, October 2000), 18

- Making preventative measures central to law and justice policy.'[514]

The process of negotiating the NSW Aboriginal Justice Agreement continued throughout this time, concluding in 2004 with the signing of two separate commitments: the NSW Aboriginal Justice Plan (2003); and the NSW Two Ways Together 2003-2012 Aboriginal Affairs Plan (2004).[515]

The NSW Aboriginal Justice Advisory Committee (NSW AJAC) began meeting in November 1998. Its membership comprised the six ATSIC regions of New South Wales, with a community representative from each joining a chairperson and executive officer. According to the Amnesty Report, the NSW AJAC provided the framework for engagement with criminal justice agencies until 2009, when it was replaced with a broader consultation process.[516]

As will be seen in Chapter 6, at the local level in NSW, implementation of policies to involve and empower First Nations Leaders was mixed. The Amnesty Report criticised the NSW response to recommendations 214, 215 and 220 that had set out the case for a framework for engaging local leaders. In 1994, NSW reported on implementing these recommendations through its Aboriginal Community Liaison Officer (ACLO) scheme, and appointment of an Aboriginal Client Consultant and four Regional Aboriginal Coordinators.[517] However, in 1998 the NSW AJAC retreated from the earlier report of implementation and recognised that there was still work to do with

514 New South Wales Law Reform Commission, 'Sentencing: Aboriginal Offenders', 19.

515 See: Amnesty International and Clayton Utz, *Review*, 7 Paragraph 2.3.3; also: Bob Carr, *Run for Your Life* (Melbourne: Melbourne University Press, 2018).

516 Amnesty International and Clayton Utz, *Review*, 11 Paragraph 3.3.

517 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', Parliamentary Paper (Canberra: Parliament of Australia, 1994).

'negotiating with Aboriginal communities about policing practices' being 'an area requiring greatest Government attention.' [518]

With respect to Recommendation 220 and community justice programs, the Amnesty review found no evidence that the NSW Government had examined the Julalikari and CJP schemes, but that by 2007 'Aboriginal Community Justice Groups' had been established. The extent of such establishment varied by location. The 1996 NSW implementation report referred to mobile patrols of community leaders in Bourke and Walgett but 'noted that these were operating under resource constraints'.[519]

Contradictory Reforms in Criminal Law

The evidence above suggests incomplete but nonetheless considerable commitment from the NSW Government to the policy response to First Nations incarceration. However, this evidence needs to be qualified with the addition of 'tough on crime' reforms that NSW has made within criminal justice during the period, which have simultaneously serviced to increase incarceration and likely undone much of the positive affect achieved by the actions above. From 1995 onwards, NSW has experienced a string of 'tough on crime' elections. In the 1995 State election, Premier Bob Carr adopted Tony Blair's promise to be 'tough on crime; tough on the causes of crime' with great effect.[520] Tough on crime elections followed in 1999, 2003, 2007, 2015.[521] T Reforms prior to the 2003 and 2007 elections were especially notable in

518 Amnesty International and Clayton Utz, *Review*, 483.

519 See Amnesty International and Clayton Utz, *Review*, 490 Footnote 39.

520 Editorial, 'Getting Tough on Crime? Let's Get Real', *The Sydney Morning Herald*, 7 September 2002; Editorial, 'State Election Special: More Cops, Tougher Sentences, Less Paperwork', *Sydney Morning Herald*, 25 February 2007.

521 Editorial, 'State Election Special: More Cops, Tougher Sentences, Less Paperwork'; Editorial, 'Scaring up the Votes', *Sydney Morning Herald*, 27 January 2003; Nicole Hasham, 'Extra Police Powers, Tougher Proceeds of Crime Rules under Premier's Law-and-Order Lockdown.', *The Sydney Morning Herald*, 3 March 2015.

their impact upon First Nations incarceration. For example, in February 2003, significant changes to NSW criminal sentencing law were made by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW).[522] This package of reforms made a number of changes that were relevant to Indigenous incarceration. In particular:

- It encoded a statutory statement of 'the purposes of sentencing' (section 3A);
- It stipulated an elaborate list of factors relevant to sentencing (section 21A); and
- It provided for a new system of 'minimum' standard non-parole sentencing for designated serious offences, including 'acts intended to cause injury' offences and 'break and enter' offences particularly relevant to Indigenous offenders (ss54A-54D).

The *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) continued the policy of standard non-parole periods but also introduced 'tougher' mandatory minimum sentences for drug offences and the offences of possession of a weapon and the infliction of grievous bodily harm.[523] Particularly significant for sentence lengths was also the new suite of statutory 'aggravating factors', which included tough penalties for the commission of offences in groups and in the presence of children.

It should be acknowledged that neither the 2003 nor 2007 legislative packages, nor the 'crime auction' elections which preceded them, were directly targeted at First Nations Australians. Indeed, the political rhetoric was focused elsewhere: in 2003 upon offences using concealed weapons, which is atypical for First Nations offending in NSW;[524] and in 2007 on offences which victimise children – with Premier Iemma

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522 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW)

523 *Crimes Sentencing (Procedure) Amendment Act* 2007 (NSW).

524 Ean Higgins, 'Labor Bids High in the Law and Order Auction', *The Australian*, 26 February 2007.

claiming, 'if you hurt children, I am your enemy'.[525] However, the incidental effect of these legislative policy changes upon First Nations Australians was likely significant and certainly contrary to the efforts to reduce incarceration outlined above.

c) Northern Territory Policy Response

At the Ministerial Council in 1992, representatives of the NT Government backed implementation of the recommendations of the Royal Commission. The NT published implementation reports in 1993, 1994, 1996 and 1997. Thereafter, the Commonwealth funding package from 1992 ended, and the NT made no further reports.[526] At the Ministerial Summit in 1997, the NT government declined to develop an IJA. However, in 2017 the Labor Government of Chief Minister Gunner in the NT began consultations towards the development of a *Northern Territory Aboriginal Justice Agreement.* This Agreement was finalised in August 2021.[527]

The NT Government did set up an Aboriginal Justice Advisory Committee (NT AJAC), although its institutional life has been discontinuous: its publications indicate that its establishment in 1997 was followed by dormancy until 2001.[528] After 2004, which coincides with the abolition of ATSIC and restructuring of Commonwealth funding, it appears to have been moribund. There is evidence that the NT AJAC was

525 Lisa Carty, 'Tough New Laws to Target Child Killers', *Sydney Morning Herald*, 20 September 2007.

526 Fiona Allison and Christopher Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People', *Sydney Law Review* 32 (2010): 645; Cited in: Amnesty International and Clayton Utz, *Review*, 9 Paragraph 2.8.

527 See: Department of the Attorney-General and Justice, Northern Territory Aboriginal Justice Agreement 2021-2027'.

528 See Christopher Howse, 'State and Territory Implementation of the Recommendations of the Royal Commission: Northern Territory', *Indigenous Law Bulletin* 5, no. 6 (2001); Cited in Amnesty International and Clayton Utz, *Review*, 13 Paragraph 3.9.

consulted on a draft NT IJA formulated in 2003: Alison and Cunneen speculate the NT AJAC was subsequently disbanded. If a draft IJA was finalised, it went unpublished. [529]

As was true of NSW, implementation of the Royal Commission recommendations whose object it was to involve First Nations leaders in local criminal justice, varies from place to place. Locally initiated predecessors of the NT's Community Justice Project pre-dated the Royal Commission and were noted favourably in National Report: notably, in Elliot and Tennant Creek.[530] A review of policing in remote First Nations communities in the NT conducted by the Allen Consulting Group in 2010 found that 'a number of agreements are in place or proposed between police and Indigenous organisations in remote communities', an indication of some progress having been made toward implementing these recommendations in remote areas. [531] Pressure for these initiatives in the NT has extended well beyond expiry of the individual funding package in 1998. The Amnesty Report also noted that 'significant Commonwealth government funding arrangements have been put in place for community policing initiatives in the NT for 10 years from July 2012, with the aim of supporting up to 350 paid positions in 81 NT Indigenous communities.'[532]

As in NSW, the NT's commitments to collaborating with the Commonwealth to reduce First Nations incarceration have been overshadowed by other reforms made in criminal law. Motivated by similar law and order electoral concerns to NSW, in 1997 the NT introduced mandatory sentencing for property offences, which operated on a three

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529 See: Allison and Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People'; Amnesty International and Clayton Utz, *Review*, 13 Paragraph 3.9.

530 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991), Recommendations 216, 217, 218.

531 See: The Allen Consulting Group, 'Independent Review of Policing in Remote Indigenous Communities in the Northern Territory: Policing Further into Remote Communities' (Darwin NT: Northern Territory Government, April 2010).

532 Amnesty International and Clayton Utz, *Review*, 489.

strikes basis, with adult offenders facing mandatory minimum terms of imprisonment, 14 days, 90 days and 12 months respectively.[533] In 2001 these laws were repealed following the suicide of a First Nations youth who had been mistakenly mandatorily detained for his second minor property offence: theft worth $50 from a council building.[534] Mandatory sentences were reintroduced in the NT in 2015, prompting widespread criticism from within the legal community as a significant driver of First Nations incarceration.[535]

d) Conclusion: NSW and NT as agents within the policy response to First Nations incarceration

This section highlights a paradox in the response of NSW and the NT to First Nations incarceration. There is evidence of both agreement to collaborate on the policy response and independent actions taken to reduce incarceration. As will be seen at the local level in subsequent actions, some of these actions have had lasting positive effects. However, in both cases the effect of policies designed to reduce incarceration has likely been undone, in whole or in part, by other reforms to criminal justice. I attribute these apparently contradictory actions to the relatively low electoral salience of First Nations Australians compared to the vote-changing issue of criminal justice in State and Territory elections. This poses a significant and ongoing structural problem for the Commonwealth in addressing First Nations incarceration. It suggests that the transaction costs of the principal-agent delegation in this case are determined primarily by State level political factors that are difficult for the Commonwealth to influence.

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533 See Declan Roche, 'Mandatory Sentencing' (Canberra: Australian Institute of Criminology, December 1999); Australian Law Reform Commission, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples', Discussion Paper (Sydney: Australian Law Reform Commission, 19 July 2017) Para 4.18.

534 Australian Law Reform Commission, 'Incarceration Rates Discussion Paper', Para 4.18.

535 See, for example Ginny Stein, 'Mandatory Sentencing Blamed for Northern Territory's Status as Australia's Top Jailer', *ABC News*, 28 May 2014.

III. Where the mechanism broke down: why did policy not change in 2018?

In the final section of this chapter, I return to one of the two paradoxes with which I opened this thesis: why, despite its apparent lack of success, has the policy response to First Nations incarceration not been amended, renewed or reformed? As foreshadowed throughout this Chapter this is a difficult question to answer. It is always more difficult for an analyst to study something that did not happen than something that did; access to political leaders and the processes of decision-making in national politics is difficult; moreover, there is only one instance of policy change upon which to inductively build my theoretical mechanism. But the reasons for seeking insights into where the mechanism of policy change broke down over the past three decades are compelling. Previous chapters have observed both the weight of commentary that laments the 'lack of political will' at the national level with regard to First Nations incarceration and the weight of literature that argues for national political leadership to drive structural reform.

In this section I employ the explanation of policy change developed in this Chapter to study an interesting case where policy did not change, despite apparently similar circumstances to those which gave rise to the original policy response: the failure to respond to the ALRC's *Pathways to Justice Report* in 2018.

a) Context: Revelations of Abuse at the Don Dale Detention Centre

Don Dale Youth Detention Centre is a juvenile detention facility located in Berrimah, East of Darwin in the NT. On 24 July 2016 the Australian Broadcasting Corporation's *Four Corners* television program called 'Australia's Shame' revealed instances of torture at the detention centre, including footage of tear-gassing of six boys, five of whom were

locked in their cells in solitary confinement.[536] Three weeks prior to this incident five boys had escaped from Don Dale. Upon recapture they were placed in isolation for between 15 and 17 days, kept locked in their cells for 24hrs with no running water, little natural light and no access to school and education material.[537] The program also showed footage of children being chained to chairs and restrained with 'spit hoods'.[538]

The footage released through 'Australia's Shame' caused an immediate public reaction. The following day, Prime Minister Malcolm Turnbull announced a *Royal Commission into the Protection and Detention of Children in the Northern Territory*. Three months later, Attorney-General George Brandis announced an inquiry into First Nations incarceration by the ALRC. In announcing the ALRC inquiry, Attorney-General Brandis described the rates of First Nations incarceration as 'a national tragedy'. He condemned previous policy as failed, flawed or incomplete efforts which had shown 'little in the way of tangible progress' and concluded that 'it is clear that after a quarter of a century of countless policy initiatives, a great deal of public discussion and immense public good will…many of the disturbing trends upon which the royal commission shown a light persist.'[539]

The ALRC delivered the report to the Attorney-General in December 2017. Several months later, on 28 March 2018, Attorney-General Christian Porter (who had replaced George Brandis in February 2018), tabled the ALRC report in Parliament. The 35 recommendations contained in the ALRC Report constitute a landmark document within the literature on First Nations incarceration in Australia; I have considered the

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536 Meldrum-Hanna and Worthington, 'Evidence of "torture" of Children Held in Don Dale Detention Centre Uncovered by Four Corners'.

537 Meldrum-Hanna and Worthington 'Evidence of 'torture''.

538 Summer May Finlay, 'What Drives Action? CCTV Footage, Spit Hoods and "Australia's Shame"', *NITV, SBS*, 21 November 2017, 1.

539 See: Jane Lee and Fergus Hunter, 'George Brandis Announces Inquiry into Indigenous Incarceration "National Tragedy"', *Sydney Morning Herald*, 27 October 2016.

ALRC's proposal for justice reinvestment in detail in Chapter Three. Unlike the release of the Royal Commission report, the tabling of the ALRC report was not accompanied by a statement in Parliament or any commitment to working towards implementing the Report's recommendations.

Contextual Condition: National Salience of First Nations Incarceration

One of the attractive features of the failure to change the policy response in 2018 is the degree to which the First Nations incarceration achieved a national salience comparable to that which it had achieved in 1989. Naturally, after three decades of policy response, the circumstances of this salience were different: not least because there was considerably more information available about First Nations incarceration in 2018. But a brief survey of the national media following the revelations of abuse at Don Dale reveals a consensus of concern among major media outlets in Australia as well as bipartisan political support for the inquiry from national Australian political parties.[540] I consider that the causal condition for the operation of the mechanism of policy change to have been satisfied in 2016-18.

b) Step 1: Commonwealth Government delegates policy formulation to an independent legal authority

In commissioning a report by the ALRC, the Turnbull Government fulfilled Step 1 of my suggested causal mechanism. While the commissioning of the *Pathways to Justice* report received bipartisan support from Australian political parties, it is noteworthy that both the Australian Labor Party and the Australian Greens initially queried the need for a further report: Shadow Attorney-General Mark Dreyfus initially stated 'we don't need another inquiry' before a joint statement between Dreyfus, the Opposition Leader Bill

[540] Meldrum-Hanna and Worthington, 'Evidence of "torture"'; Lee and Hunter, 'George Brandis Announces Inquiry into Indigenous Incarceration "National Tragedy"'.

Shorten and Shadow Indigenous Affairs Minister Pat Dodson was released later that day.[541] I consider this to be more of an argument for the enduring relevance of the 1991 Final Report of the Royal Commission, rather than an argument against the need for an independent policy formulation. The President of the Australian Bar Association, Patrick O'Sullivan welcomed the ALRC's involvement in a statement as 'a significant opportunity to make informed and practical changes that address this problem and deliver better justice outcomes for Indigenous Australians and the country as a whole.' [542]

c) Step 2: Commonwealth resumes responsibility for the policy change process and initiates decision-making regarding a policy response.

It is at the second step of my suggested mechanism of policy change that the process apparently broke down in 2018. At the time of writing, neither the Turnbull Liberal-National Government nor the subsequent Morrison Liberal-National Government have responded to the ALRC Report. When questioned about this in March 2021 Senate Estimates by Senator Patrick Dodson, former Royal Commissioner in 1991 and now Labor Party Senator, the Secretary of the National Indigenous Affairs Agency, confirmed that the Government is not formally required to respond to the report.[543]

As foreshadowed in the first Chapter of this thesis however, the rise of the Black Lives Matter movement in 2020, operating as an additional contextual condition and creating a new policy window, has had some impact. In 2021 'Justice Targets' were added to the 'Closing the Gap' Implementation Plan upon which the Commonwealth

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541 See: Dan Conifer et al., 'Indigenous Incarceration a "National Tragedy": George Brandis Announces Inquiry', *ABC News*, 27 October 2016.

542 See Conifer et al, 'Indigenous Incarceration a "National Tragedy"'.

543 Senator Patrick Dodson, Commonwealth of Australia, *Finance and Public Administration Legislation Committee*, Senate, 26 March 2021, p.34-7.

Government reports annually. In the Implementation Plan the Commonwealth committed to 'working closely with Aboriginal and Torres Strait Islander Representatives, the Coalition of Peaks and the States and Territories to establish a Justice Policy Partnership' during 2021.[544] The Implementation Plan briefly references the recommendations of the ALRC Report.[545] It states that the Commonwealth sees this partnership as an opportunity to achieve the target of reducing the First Nations incarceration rate by 15% by 2031, 'notwithstanding its limited levers to achieve direct change'.[546]

At time of writing, there is not evidence of political commitment by the Morrison Government that would reach the 'irreversible commitment' regarded by my explanation as necessary to secure policy change. Nevertheless, Minister Wyatt, Australia's first First Nations Minister for Indigenous Affairs has seized the opportunity of the policy window created by the Black Lives Matter protest to reignite the process that stalled in 2018.

IV. Conclusion

In this chapter I have built an explanation of the mechanism of policy change in the policy response to First Nations incarceration. Utilising the multiple streams model of policy change, I refined the empirical account of how policy changed in 1992 into a three step mechanism focused upon delegations between principals and agents: from the Commonwealth to the Royal Commission to formulate policy; and from the Commonwealth to the States and Territories to implement policy. Both of these delegations appear to have significant transaction costs. In the case of policy

544 Commonwealth of Australia, *Closing the Gap Implementation Plan 2021* (Canberra: Commonwealth of Australia, 2021), 48–50.

545 Commonwealth of Australia, *Closing the Gap Implementation Plan* 2021, 48.

546 Commonwealth of Australia, *Closing the Gap Implementation Plan* 2021, 50.

formulation, the experience of both 1992 and 2018 suggests that the cost of delegating policy formulation to an independent legal authority is not caused through self-interested discretion on behalf of the agent; as might be expected from the principal-agent literature. Rather, the cost is downstream: it is far more difficult for political leaders to resume control of policymaking some time after the initial salience of the First Nation incarceration as an issue has passed. In 1992, the Keating Government overcome this problem with the investment of considerable political capital. Following 2018, the mechanism of policy change appeared to have stalled at Step 2, although recent developments following a second moment of national salience achieved through the Black Lives Matter protest show signs that the mechanism may once again be functioning.

The transaction costs of delegating to State and Territory governments the implementation of policy in criminal justice follow a more traditional pattern, within the principal-agent literature. In 1992 the Commonwealth demonstrated the ability to secure considerable, if not complete, commitment from States and Territories to the goal of reducing First Nations incarceration. But ongoing rhetorical commitment to the goal has not prevented apparently contrary reforms in criminal justice motivated by the electoral success of 'tough on crime' campaigns. This presents an ongoing structural challenge for Commonwealth policymakers wishing to reduce First Nations incarceration.

Chapter 5: Theorising the Mechanism of Policy Effect

In this chapter I build an explanatory model of the mechanism through which the policy response to First Nations incarceration took effect at the local level. My intention is to generate a mid-range explanation that it might be useful in identifying where governance mechanisms broke down in the policy response to First Nations incarceration between 1991 and 2021: a crucial question for policymakers in designing future policies to reduce First Nations incarceration in Australia. In both this chapter and the next, I take a particular interest in initiatives to empower First Nations leaders at the local level. This is for two reasons: first, I consider such empowerment to have been the philosophical core of the 1992 policy response, with its focus upon self-determination;[1] second, local empowerment has particular relevance for justice reinvestment strategies, which are a promising avenue for future policymaking (see Chapter 3).

As in Chapter 4, my strategy for identifying potential breakdowns in the mechanism of policy change is to engage in two stages of process tracing: building an explanation of the mechanism from cases where it functioned as intended and then using this to identify breaking points in those cases where it did not. At the local level I have a much richer range of cases to select from than I did in the previous Chapter. In studying the effect of the policy response, I have gathered evidence in six First Nations communities across NSW and the NT: Redfern (NSW), Dubbo (NSW), Bourke (NSW), Darwin (NT), Lajamanu (NT) and Wadeye (NT). In order to process-trace the effect of the policy response in each of these communities I conducted fieldwork on the ground, using a snowball method to interview any community member or street-level

[1] Elliot Johnston QC, *National Report: Volume 1*, Royal Commission into Aboriginal Deaths in Custody, 1991 (Recommendations 1, 2, 188, 199, 195, 199).

bureaucrat suggested as having an interest in reducing First Nations incarceration rates. This interview data has been supplemented by all available quantitative evidence and documentary data to build a process-trace of the causal effect of the policy response to reducing incarceration. While I deliberately cast my net broadly to include all potential causes of rising incarceration, I consciously focused upon the role of leaders from both the First Nations community and the street-level bureaucrats charged with implementing the policy. I justify this focus below. As outlined in Chapter One, while these two sub-national jurisdictions and six communities do not fully represent the heterogeneity of First Nations Australia they were selected in order to inform the theory of policy effect with case studies from urban, regional and remote Australia.

In this Chapter I focus upon the experience of Lajamanu, where a direct initiative of the policy response to First Nations incarceration has continued from the original response in the 1990s to the present: the Kurdiji Community Justice Group. In the first part of this Chapter I conduct an inductive process-trace of the effect of the policy response to First Nations incarceration between 1991 and 2021 in each of these communities. In the second part of the Chapter, this informs my building of a generalisable explanation of *how* the policy response took affect across First Nations communities: the mechanism of policy effect.

Before I commence the process-trace in Lajamanu it is necessary to justify two decisions that shape my approach: focusing upon the local level and focusing on the activities of leaders.

I. Focus upon the local level

In order to achieve this two-stage method I focus my analysis of policy responses effect at the local level, where a small number of First Nations communities were able to achieve significant turning points and reduce high incarceration rates. My decision to

focus upon the local level is supported by both the criminology and the public policy literature with regard to First Nations Australians. Among Australian criminologists, the commonly held intuition that some neighbourhoods, streets or towns are more dangerous than others has been supported by research since at least 1975, when Vinson prominently argued that strategies to reduce crime should be addressed at the neighbourhood level.[2] Similarly, the heterogeneity of Australia's First Nations has led scholars of Indigenous affairs policy to focus upon discrete communities or regions. Most recently, Moran has argued based on both personal experience and several case studies that 'practice trumps policy' on the ground in remote First Nations Australia.[3] This view was also expressed by those living and working in remote First Nations communities who I interviewed in my own research: conceding that he was unsure of the specific content of the policy response to rising incarceration, the school principal in Wadeye reflected 'what is in the policy in Canberra matters a lot less than who is doing the implementing here in Wadeye'.

A focus upon the local level is also consistent with the logic of the Royal Commission. The Royal Commission's recommendations placed a strong emphasis on the empowerment of leadership in order to reducing First Nations incarceration. Recommendations emphasising both First Nations community leaders and policy implementers at the local level include:

- Reform of the criminal justice system (Recommendations 48-62) – including Recommendation 62, which specifically encourages collaboration with First

2 Tony Vinson and Ross Homel, 'Crime and Disadvantage. The Coincidence of Medical and Social Problems in an Australian City', *British Journal of Criminology* 15, no. 1 (1975): 29.

3 Mark Moran, *Serious Whitefella Stuff: When Solutions Became the Problem in Indigenous Affairs* (Melbourne: Melbourne University Press, 2016) Chapter 8.

Nations organisations to devise strategies to reduce juvenile involvement in crime;[4]

- Implementing non-custodial approaches (Recommendations 79-121) – including involvement of First Nations leaders in culturally based diversionary programs;
- Breaking the cycle of offending (Recommendations 214-245) – including Recommendation 214,215 and 220 which encourage involvement of First Nations leaders and organisations in community policing;[5] and,
- Most significantly, promoting self-determination (Recommendations 188-213) – including, Recommendations 188 and 192 regarding the involvement of local communities in criminal justice policy.[6]

II. Focus upon leadership

The recommendations of the Royal Commission extracted above do not only focus on prevalence of localities in policy effect: they specifically identify a role for leaders – both First Nations community leaders and policy implementers, be they police, lawyers, magistrates or other street-level bureaucrats in criminal justice.[7] Indeed, the National Report makes clear the Royal Commission entrusts leaders at the local level with a primary role in 'turning around the battleship' of bad relations between First Nations Australians and criminal justice.[8] As outlined in Chapter One, this is consistent with the governing paradigm of the 'rule of law' in criminal justice and with building the 'public

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4 Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Department of Prime Minister and Cabinet, August 2018) 125–28.

5 Deloitte Access Economics, *Review,* 431–44.

6 Deloitte Access Economics, *Review,* 374–81.

7 Re the need for 'successful and enlightened' leadership within the police see, Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2* (Canberra: Australian Government Publishing Service, 1991) Paragraph 13.2.5; Re First Nations leadership see: paragraphs 20.4.44 and 20.4.

8 See for example Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 13.4.17.

confidence' upon which the rule of law is understood to depend.[9] I anticipate the concept of 'public confidence' to be central to my theory-building in the final part of this Chapter.

There is a rich public policy literature on leadership and local-leadership in particular, which provides a promising avenue to build upon *how* local leaders might build 'public confidence' in criminal justice. Without prejudicing the primarily inductive nature building a theory through process-tracing, I consider it prudent to draw upon the public policy literature on local leadership to provide an initial framework for my analysis. Given the political and cultural complexity of Australia's First Nations people and the exigencies of conducting fieldwork across seven geographically distant communities, such a framework provides a necessary starting point for my evidence gathering and an initial structure for my analysis of the empirical material.

Copus and Leach have observed that the study of local political leadership has 'shifted over time from a deep case-based analysis of particular leaders to a general concern with tasks and functions and an understanding of systemic constraints and enablers that have an impact on the effectiveness of political leaders.'[10] Copus and Leach advocate using the 'tasks and functions' that political leaders undertake as a framework for understanding local leadership. They identify three generic tasks that local leadership commonly requires:

1. Relating to citizens and incorporating their input to political decision-making;

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9 See: Murray Gleeson, *The Rule of Law and The Constitution*, The Boyer Lectures (Sydney: ABC Books, 2000); Justice Murray Gleeson, 'Courts and the Rule of Law' (The Rule of Law Series: Melbourne University, Melbourne, 7 November 2001); Justice Murray Gleeson, 'Confidence in the Judiciary' (Judicial Conference of Australia, Launceston, Tasmania, 27 April 2002).

10 Colin Copus and Steven Leach, 'Local Political Leaders', in *The Oxford Handbook of Political Leadership*, ed. R.A.W. Rhodes and Paul 't Hart (Oxford: Oxford University Press, 2014), 551.

2. Overcoming political resistance;

3. Ensuring that their values make a long-term and strategic difference.[11]

However, Copus and Leach also echo the finding of significant body of public policy literature, that the exercise of leadership is in a dynamic relationship with the context in which it is exercised: 'local leadership is multi-contextual, as a series of relationships and developments in structural frameworks and settings influence the way political leadership operates.'[12] At the local level, context factors include 'the features, traditions, histories and political cultures rooted in a specific locality'.[13] While context influences the dynamic of political leadership, Copus and Leach argue that it is not determinative: they cite studies of Norwegian,[14] British[15] and American[16] case studies of local leadership to support this conclusion. Context is understood to have a similar effect upon the operation of street-level bureaucrats.[17] I begin my analysis of each local case study with a detailed consideration of the local context.

Before applying the public policy literature on local leaders to the local case studies a qualification must be made concerning the characterisation of First Nations

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11 Copus and Leach, 'Local Political Leaders'; citing Clarence N. Stone, 'Political Leadership in Urban Politics', in *Theories of Urban Politics*, ed. David Judge, Gerry Stoker, and Harold Wolman (London UK; Thousand Oaks CA: Sage Publications, 1995), 96–116; Stephen Greasley and Gerry Stoker, 'Urban Political Leadership', in *Theories of Urban Politics*, ed. Jonathan S. Davies and David L. Imbroscio (London: Sage, 2009), 125–36.

12 Copus and Leach, 'Local Political Leaders', 551; citing, Oliviere Borraz and Peter John, 'The Transformation of Urban Political Leadership in Western Europe', *International Journal of Urban and Regional Research* 28, no. 1 (2004): 107–20.

13 Copus and Leach, 'Local Political Leaders', 553.

14 Michael Goldsmith and Helge Larsen, 'Changing Government Relations in Europe: From Localism to Intergovernmentalism', *International Journal of Urban and Regional Research* 28, no. 1 (2004): 121–33.

15 Peter John and Alistair Cole, 'Political Leadership in the New Urban Governance: Britain and France Compared', *Local Government Studies* 25, no. 4 (1999): 98–115.

16 James Svara, *Official Leadership in the City: Patterns of Conflict and Cooperation* (Oxford: Oxford University Press, 1990); David R. Morgan and Sheilah S. Watson, 'Mayors of American Cities: An Analysis of Powers and Responsibilities', *American Review of Public Administration* 26, no. 1 (1996): 113–25.

17 Copus and Leach, 'Local Political Leaders', 553.

leaders and street-level bureaucrats within criminal justice as 'local political leaders' within the public policy frameworks above. I have little doubt that many of the leaders, police and legal professionals participating in my research would object to this characterisation. Police and legal professionals understand themselves to be apolitical in the sense of being divorced from partisan politics within Australian democracy. I do not dispute this. But while it is not political in the sense of partisan politics in Australia, I still consider the task of building public confidence to be *political* in a sense that is broadly consistent with the public policy literature cited above. With regard to First Nations leaders, I have outlined in Chapter Two the growing post-colonial studies literature that argues persuasively that the political ontologies behind First Nations leadership and political culture are fundamentally different to the Western tradition, which sits behind settler Australian governance, including the concept of the rule of law. I acknowledge this inconsistency but consider it necessary and reflective of the empirical facts of the case. All First Nations leaders interviewed in this thesis were seeking to engage with the rule of law paradigm, either to work within it or to reform it through addition of their own legal concepts. As will be seen below, the legal pluralism underpinning such arguments is fundamental to my theory building.

III. Adapted Tasks Informed by Context

For the purposes of building a theory of how the policy response to First Nations incarceration took effect, I adapt the three generic leadership tasks identified by Copus and Leach to the specific context of building confidence in criminal justice. I also inform them with the other factors identified as likely causes of rising First Nations incarceration in my assessment of the existing literature in Chapter Two. As well as the potential for unequal administration of criminal justice itself, these include: legacies of post-colonial conflict such as social disorganisation and entrenched distrust of criminal

justice, substance abuse and anomie or hopelessness caused by disadvantage. The initial framework I use for understanding the tasks of local leadership in giving effect to the policy response to First Nations incarceration is thus:

1. Improving the relations between First Nations communities and the criminal justice system, in the context of substantively unequal criminal justice and legacies of entrenched distrust;
2. Overcoming resistance in order to change established patterns of behaviour, both from within criminal justice and within First Nations communities, in the context of substance abuse and anomie.
3. Ensuring a long-term and strategic approach, in the context of disadvantaged communities and social-disorganisation caused by colonisation.

Identifying these three generic tasks is as far as the existing literature on First Nations incarceration and the theoretical literatures from public policy studies and criminology can take us. The question of what leaders *did* at the local level to achieve these tasks and, most significantly, how they were supported or not in those actions by governance arrangements and the machinery of government occupies the remainder of this chapter.

IV. Lajamanu

Lajamanu is a remote Aboriginal community of almost 1000 people, located on Aboriginal land on the northern edge of the Tanami Desert. The population of Lajamanu is 80% Aboriginal Australian, predominately comprised of Warlpiri people who strongly maintain their language and culture.[18] Lajamanu is 557km by road from the regional service hub of Katherine and 1318km from Alice Springs. It is serviced with: an airport, school with classes up to the first year of secondary school (age 13), a

[18] 78.7% of census responders spoke Warlpiri at home; only 8% of respondents spoke English at home: '2016 Census QuickStats: Community Profile Lajamanu' (Canberra: Australian Bureau of Statistics, 23 October 2017).

store and a clinic. In the 1990s and early 2000s, the Warlpiri communities of the Tanami grappled with an epidemic of petrol sniffing, which caused high rates of crime and incarceration.[19]

After commencing my fieldwork in the NT in 2015, I was encouraged to visit Lajamanu to consider the successful reduction in incarceration achieved through strong leadership by a group of Warlpiri elders referring to themselves as the 'Kurdiji', which is the Warlpiri word for shield. The central policy initiative recommended by the Royal Commission and carried through into the subsequent policy response was to empower First Nations leaders within criminal justice in order to reduce incarceration – through initiatives such as community justice groups. The Kurdiji Community Justice Group in Lajamanu is unique within this thesis as an example of the policy response taking full effect, as it was intended to: the Kurdiji Community Justice Group, having been created under the Northern Territory's Aboriginal Justice Strategy, traces its functions, unbroken, from the initial funding offered in original Keating Government policy response. I take the Kurdiji experience as my starting point for building a theory of the mechanism of policy effect. In this section I examine the historical context of Lajamanu in detail before gathering evidence of actions taken by the Kurdiji and their collaborators in the criminal justice system and government more broadly against the three leadership functions required by the policy response.

a) Historical context of Lajamanu

Two key themes emerge from the historical experience of Lajamanu as important context for contemporary work in criminal justice: (1) forced relocation and

[19] For an account see: Andrew Stojanovski, *Dog Ear Cafe: How the Mt Theo Program Beat the Curse of Petrol Sniffing* (Melbourne: Hybrid Publishers, 2010).

dispossession; and (2) the continuation of Warlpiri political culture and traditional authority mechanisms.

1. Forced Relocation and Dispossession

In 1948 the Federal Government – at that time administering the NT – decided to establish an Aboriginal Reserve at 'Catfish Waterhole', a permanent water source 600km north of the Warlpiri settlement of Yuendumu. The decision was motivated by concerns about drought and overcrowding in Yuendumu, but was unpopular with the Warlpiri as Catfish is in the country of the Gurindji people, neighbours of the Warlpiri.[20]

The Native Affairs Branch dispatched two young Warlpiri men from Yuendumu as guides to Catfish, but 150km from the waterhole they found themselves in unknown country and turned back. Subsequently, Native Affairs staff in Yuendumu trucked 25 Warlpiri men towards Catfish. But the men found reliable water at while camping at 'Hooker Creek' and decided to remain. This became the site of the Hooker Creek Welfare Settlement. In 1951 another 150 Warlpiri were relocated to Hooker Creek, but they were unwilling to live on Gurindji country, separated from their traditional country, sacred sites and relatives. Famously, all 150 walked the 500km back to Yuendumu, only to be trucked back to Hooker Creek by the Native Affairs Branch.[21] Two more resettlements and 'walk backs' occurred in the late 1950s and early 1960s. Ultimately, a further 400 people were compulsorily relocated from Yuendumu to Hooker Creek. [22]

Eventually, Warlpiri people stayed in Hooker Creek and began to see it as home, although they retained strong connections to their traditional country in the Southern Tanami. But, the relocation of a Warlpiri community onto Gurindji country presented a

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20 Department of Families, Housing, Community Services and Indigenous Affairs et al., 'Local Implementation Plan: Lajamanu' (Lajamanu: Commonwealth of Australia, 2010).

21 'Lajamanu Community Profile', 17th National Remote Indigenous Media Festival (Lajamanu: First Nations Media: Australia, 27 October 2015).

22 'Lajamanu Community Profile'.

fundamental problem for community leadership, which is traditionally determined by relationship to land for both Gurindji and Warlpiri people. As a result, the relationship between the Warlpiri and Gurindji over the issue of land, land ownership and development was tenuous. [23]

In the 1970s, Hooker Creek stopped being a welfare settlement and was renamed 'Lajamanu'. The Lajamanu Council became the first Aboriginal Community Government Council in the NT. At the same time a unique series of ceremonies occurred where the Gurindji traditional owners of the Lajamanu area handed over the country and its Dreaming – the 'Spectacled Hare Wallaby (*Lagorchestes conspicillatus*) or 'Wampana' – into the custodianship of the Warlpiri at Lajamanu.[24] Following these ceremonies, there has been a 'general understanding that Lajamanu is a Warlpiri community and its direction and development is to be determined by Warlpiri people.'[25] As part of this understanding, the Gurindji appointed three Warlpiri people to the Lajamanu Community Government Council to act with the authority of 'traditional owners', on behalf of the Gurindji in relation to matters affecting Lajamanu and its immediate surrounds.[26]

2. <u>Continuation of Warlpiri Political Culture and Authority</u>

Leadership for Warlpiri people is traditionally determined by the five key elements of Warlpiri culture: '*Land* (also called Country), *Laws*, *Language*, *Ceremony*, and *Skin* (also called Kinship).'[27] The current generation of Warlpiri leaders has labelled the collective

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23 'Lajamanu Community Law and Justice Plan' (Darwin NT: The Office of Aboriginal Development, Northern Territory Government, 1998), 4.

24 'Lajamanu Community Profile'.

25 'Lajamanu Community Law and Justice Plan', 4.

26 'Lajamanu Community Law and Justice Plan', 4.

27 Wanta Jampijinpa Pawu-Kurlpurlurnu, Miles Holmes, and Alan Box, 'Ngurra-Kurlu: A Way of Working with Warlpiri People', Desert Knowledge CRC (Alice Springs: Central Land Council, 2008), 1.

of these five elements and the relationship between them, *Ngurra-kurlu.*[28] An individual's relationship to each of the elements of *ngurra-kurlu* will determine their claim to exercise leadership on a particular issue, in a particular place or time – as a result, leadership is traditionally best performed by a group of senior elders balancing leadership across the five elements of *ngurra-kurlu.*

This process is rooted in a complex socio-political culture. During my fieldwork in 2015, Warlpiri leader Wanta Jampijinpa Pawu-Kurlpurlurnu (who publishes his work under the name of Steven Jampijinpa Patrick) generously spent a day explaining some of this socio-political culture to me:[29] he has published a policy paper[30] and a widely disseminated YouTube clip[31] to explain *ngurra-kurlu* to non-Warlpiri people. Traditional Warlpiri leadership and decision-making structures were adapted to township life from the beginning of mission settlement in the Tanami desert. There is documentary evidence to support the oral history that consultation with Governments, cattle-station owners and the Baptist missionaries on the Hooker Creek Welfare Settlement – as well as decision-making within the Warlpiri community of Hooker Creek – was conducted by 'representative groups' of skin group leaders determined under this system.[32] These structures were continued when the Lajamanu Tribal

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28 The term 'ngurra-kurlu' has been popularised by Wanta Jampijina and Jerry Jangala as a reference to the five elements (and the relationship between them) because a collective label is analytically useful in explaining Warlpiri culture to Kardiya (non-Indigenous people). Pawu-Kurlpurlurnu, Holmes, and Box, 2.

29 Conversation with Wanta Jampijinpa Paw-Kurpurlurnu, August 2015.

30 See: Pawu-Kurlpurlurnu, Holmes, and Box, 'Ngurra-Kurlu: A Way of Working with Warlpiri People'.

31 See: Pintupi-Anmatjerre-Warlpirri Media and Communications (PAW), *Ngurra-kurlu* (Alice Springs, 2007), https://www.youtube.com/watch?v=iFZq7AduGrc&t=9s.

32 For example: the representative group of women elders who met with Coombs and Stanner in 1974: H.C. Coombs and W.E.H. Stanner, 'Program for Yuendumu and Hooker Creek' (Canberra: Australian Government Publishing Service, 1974), 16–19.

Council was assembled in the 1970s; this was the senior, representative leadership group at the time of the Royal Commission in 1991[33]

The Lajamanu Community Government Council was established in 1981 under the Northern Territory's *Community Government Act*. It provided a range of services and functions to the community of Lajamanu, roughly equivalent to those of a local government. The establishment of the Lajamanu Community Government Council and its administration of grant-funded programs was consistent with the policy-making paradigm of self-determination for Aboriginal communities, which prevailed in Australia from the 1970s until 2007.

b) First Nations incarceration in Lajamanu in 1991

Despite its history of strong local leadership, there was little reason to suspect that Lajamanu would succeed in reducing Indigenous incarceration rates. Certainly – at the time of the Royal Commission in 1991 – it did not seem better placed than other Aboriginal communities in the NT. From the 1970s to the 1990s, Lajamanu had a reputation as a 'violent community'.[34] This reputation was shared with other Warlpiri communities of Yuendumu and Ali-Curung. Concern over community violence was evident in the earliest consultations between Warlpiri leaders and Government representatives: in 1974, Coombs and Stanner's report on *Hooker Creek and Yuendumu* describes a meeting with a 'representative group of women' who expressed concern about alcohol-related violence.[35] Responses to crime in the communities of Yuendumu and Lajamanu were also central in the early stages of the outstation movement – with

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33 'Lajamanu Community Law and Justice Plan', 5.

34 Barbara Glowczewski references this repeated warning in her fieldwork from the late 1970s. See: 'Part One: Lajamanu' Glowczewski, *Les Reveurs Du Desert: 'Desert Dreamers'*.

35 Tim Rowse, *Obliged to Be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge: Cambridge University Press, 2000), 139.

removal of offenders to outstations for the teaching of traditional Warlpiri discipline a common response in the 1970s and 1980s.[36]

In the 1990s Warlpiri communities throughout the Tanami also grappled with an epidemic of volatile substance abuse ('petrol sniffing') among young people, driving up violent offending and antisocial behaviour.[37] As part of the response to sniffing, the Wulaign Outstation Resource Centre had periodically operated a Community Service Order program, taking abusers from Lajamanu to outstations for rehabilitation and diversion from criminal justice.[38] The high rates of offending in Lajamanu prior to the initiation of the Lajamanu Community law and Justice Plan in 1998 are apparent in the data gathered from court lists presented in the Figures above, showing more than 800 offences in Lajamanu in 1995, in a community of less than 500 people.[39]

c) The policy response to Indigenous incarceration in Lajamanu and the Kurdiji Law and Justice Committee.

In 1996 the NT Government established the Aboriginal Law and Justice Strategy ('ALJS') to give effect to recommendations of the *Royal Commission into Aboriginal Deaths in Custody*. Local 'Law and Justice Groups' were recognised as a priority in this strategy, which aimed to provide 'a community justice framework to maximise community participation in the administration of justice'.[40] The work of voluntary Aboriginal

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36 See for example, the establishment of Nyirrpi outstation: Nicholas Peterson, 'What Was Dr Coombs Thinking? Nyirrpi, Policy and the Future', in *Experiments in Self-Determination: Histories of the Outstation Movement in Australia*, ed. Nicholas Peterson and Fred Myers, E Press Edition (Canberra: ANU E-Press, 2016).

37 See: WYDAC, 'Warlpiri Youth Development Aboriginal Corporation (WYDAC) Overview' (Yuendumu: WYDAC, 2013); See also: Stojanovski, *Dog Ear Cafe: How the Mt Theo Program Beat the Curse of Petrol Sniffing*.

38 'Lajamanu Community Law and Justice Plan', 5.

39 Kurdiji Law and Justice Group, 'Court List Data: Lajamanu' (North Australian Aboriginal Justice Agency (NAAJA) and Central Land Council (CLC), 2014).

40 Rex Wild and Pat Anderson, 'Ampe Akelyernemane Meke Mekarle - Little Children Are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from

leadership groups alongside the criminal justice system had been praised by the Royal Commission including that of Julalikari Council in Tennant Creek in the NT and Community Justice Panels at Echuca in Victoria.[41] In Lajamanu, the ALJS policies manifested in the arrival to two public servants working with the OAD who had been instructed to support the development of Law and Justice Groups in the Tanami.

On the announcement of the NT ALJS, Warlpiri leaders in Lajamanu, Yuendumu, Ali-Curung and Willowra identified an opportunity to achieve their long-held aim of greater involvement in and control over criminal justice in their communities: specifically, to bring the 'two laws' (Warlpiri customary laws and the criminal law) together.[42] In the mid-1990s, the *Lajamanu Law and Order Committee* ('Law and Order Committee') had been formed at a community meeting led by representatives of the Tribal Council, the Community Government Council and the Women's Resource Centre. The first two of these groups were longstanding leadership groups in Lajamanu; the third originated from the Women's Safe House Management Committee – a group of women who were 'regular workers or visitors to the Lajamanu Women's Centre'.[43] The positive experience of the women leaders in visiting the Ali-Curung to study the administration and operation of the Ali-Curung Women's Safe House was significant in promoting regional collaboration around criminal justice in the Tanami.[44] The Law and

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Sexual Abuse' (Darwin NT: Northern Territory Government, 2007), 180–83; Thalia Anthony, 'Two Laws: Indigenous Justice Mechanisms in Context', *Journal of Australian Indigenous Issues* 18, no. 1 (2015): 106; Brian R. Martin, 'Customary Law - Northern Territory' (JCA Colloquium, Darwin, 5 October 2007), 19.

41 Deloitte Access Economics, 'Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', 441.

42 Robert Chapman et al., 'Yakarra-Pardija-Pina: Insights from a Development Approach to Rebuilding Governance in Aboriginal Communities' (Alice Springs: Central Land Council, May 2014).

43 'Lajamanu Community Law and Justice Plan', 5.

44 'Lajamanu Community Law and Justice Plan', 5.

Order Committee was primarily comprised of senior Warlpiri leaders from each of these three groups.

In September 1997 the Lajamanu Tribal Council and the Lajamanu Community Government Council – assisted by two NT public servants from the Office for Aboriginal Development – wrote a joint letter to the NT Chief Minister, the Minister for Police and the Minister for Aboriginal Development. As the Kurdiji Committee's documents recall, this letter:

> '…Identified the need for customary law and the mainstream justice system to work together and asked for government assistance to establish a forum that could interface with the mainstream justice system and could work to bring the 'two laws' together in a practical and meaningful way.'[45]

The Chief Minister instructed the Office of Aboriginal Development (OAD) to coordinate a whole of government response to these requests.[46] The Lajamanu Law and Order Committee took the opportunity to establish itself as 'a focal point for local law and order concerns'.[47] It also began to develop the strategies that would eventually underpin the Lajamanu Law and Justice Plan through a series of 'community meetings, workshops and meetings with community groups, organisations and residents. In doing this work, the Warlpiri leaders of the Law and Order Committee were supported by the public servants from OAD as 'facilitators', operating under a principle they described as 'participatory planning'.[48]

In 1999, representatives from the following organisations signed the 'Lajamanu Law and Justice Plan'. The Lajamanu Law and Justice Plan was a comprehensive agreement with multiple commitments from all parties. At its centre, however, was the

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45 Kurdiji Law and Justice Group, 'Kurdiji Group - Background Pamphlet' (Lajamanu: Kurdiji Law and Justice Group, 2013), 1.

46 'Lajamanu Community Law and Justice Plan', 1.

47 'Lajamanu Community Law and Justice Plan', 1–2.

48 'Lajamanu Community Law and Justice Plan', 2.

definition of a primary role for 'community organisations' in law and justice. As the agreement states:

'The Organisations believe they are best able to participate in the law and justice process in these areas:

1. At the earliest possible time (when an offence has been committed or when trouble is occurring);
2. When matters go to court;
3. Family violence;
4. Alcohol related issues;
5. Diversionary programs;
6. Pre-court conferencing; and,
7. Other law and justice strategies.' [49]

In particular, the Tribal Council and the Law and Order Committee committed to exercising leadership in Lajamanu over each of these seven areas, in collaboration with the relevant government service providers.[50]

Alongside the work on individual community Law and Justice Plans, regional collaboration was occurring to reduce incarceration, involving the same Warlpiri leaders and AOD facilitators. Following the establishment of Law and Justice Committees in Ali-Curung (1997), Lajamanu (1998) and Yuendumu (2000) a regional 'Combined Communities Law and Justice Committee' was established in 2001 with representation from the Lajamanu, Ali-Curung, Yuendumu and Willowra. This was named the 'Kurduju' committee from the Warlpiri word meaning 'shield' and also the name of a major initiation ceremony for Warlpiri men (there is a regional variation in

49 'Lajamanu Community Law and Justice Plan', 7.

50 'Lajamanu Community Law and Justice Plan', 15–16.

spelling, rendering the same word 'Kurdiji' in Lajamanu); it became the first Indigenous Regional Crime Prevention Committee recognised in the NT and committed to meet four times a year.

The Kurduju Committee was used extensively by government and non-government agencies in a policy development role as well as for consultation and information gathering.[51] Committee members participated in and presented at national and territory conferences on safety, justice and family violence issues and appeared before the NT Government's standing Committees on both Alcohol and Substance abuse and Constitutional Development. It also had membership on the committee appointed by the NT Government to inquire into Aboriginal Customary Law and representation on the NT Parole Board.[52]

In 2001, Responsibility for the AJLS was transferred to the NT Department of Community Development, Sport and Cultural Affairs in 2001, and to the Department of Justice in 2003. Both the Lajamanu Law and Justice Committee and the overarching Kurduju regional committee were defunded in late 2003, although Community Corrections continued the pre-court conferencing aspect of the strategy until 2005.

After de-funding, the Lajamanu Kurdiji Law and Justice Committee continued its informal work on an unpaid, voluntary basis. Following a long period of lobbying for support and funding, the group re-formed for its formal role in 2010 with the assistance of the North Australian Aboriginal Justice Agency (NAAJA) – the legal aid provider for First Nations Australians in the Northern part of the NT. Since that time, the Kurdiji group has met before each court sitting in Lajamanu to discuss community safety issues

51 Kurdiji Law and Justice Group, 'Background Pamphlet' 1.

52 Kurdiji Law and Justice Group, 'Background Pamphlet' 2.

and provide crime prevention advice and reports to the court.[53] Since 2011, the Kurdiji have also been supported by the CLC's community governance project and have resumed their proactive advocacy around problems 'caused by outside conflict, representing community views to the Liquor commission and lobbying to have a direct line to NT police reinstated'.[54] During this, the Kurdiji have maintained their informal support to criminal justice in Lajamanu; this has been funded in large part through community-controlled royalty funding from a mining operation on Warlpiri land, including funding the major refurbishment of a disused building to secure a private meeting space.[55]

c) Reduction in First Nations Incarceration

Having detailed the context of First Nations incarceration in Lajamanu, I now consider its success in reducing First Nations incarceration from the 1995 to the present. Consistent with process-tracing methodology, I draw upon all available evidence: quantitative data form court lists was supplied to me by NAAJA; I supplement this with the documentary record of the Kurdiji group, reporting as the group gained confidence, and interviews and participatory research conducted in Lajamanu in 2015.

1. <u>Quantitative assessment of the reduction in incarceration from court lists supplied by NAAJA.</u>

Uniquely within this thesis, I was able to source quantitative data for offending at the local level in Lajamanu. This data was provided to me by NAAJA who provide legal services across the northern half of the NT. Through a collaboration with an officer of the NT Magistrate's Court, NAAJA were able to construct a measure of local data on

53 Kurdiji Law and Justice Group, 'Background Pamphlet' 2.

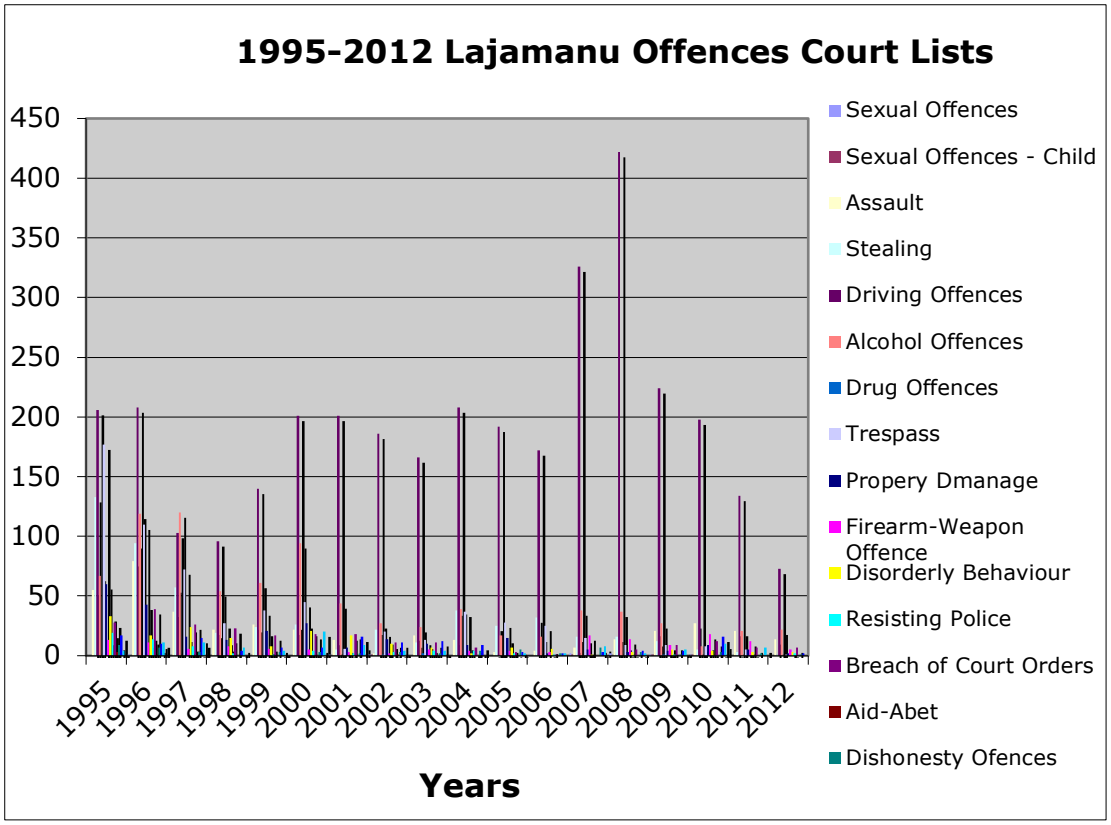
54 Kurdiji Law and Justice Group, 'Background Pamphlet' 2.

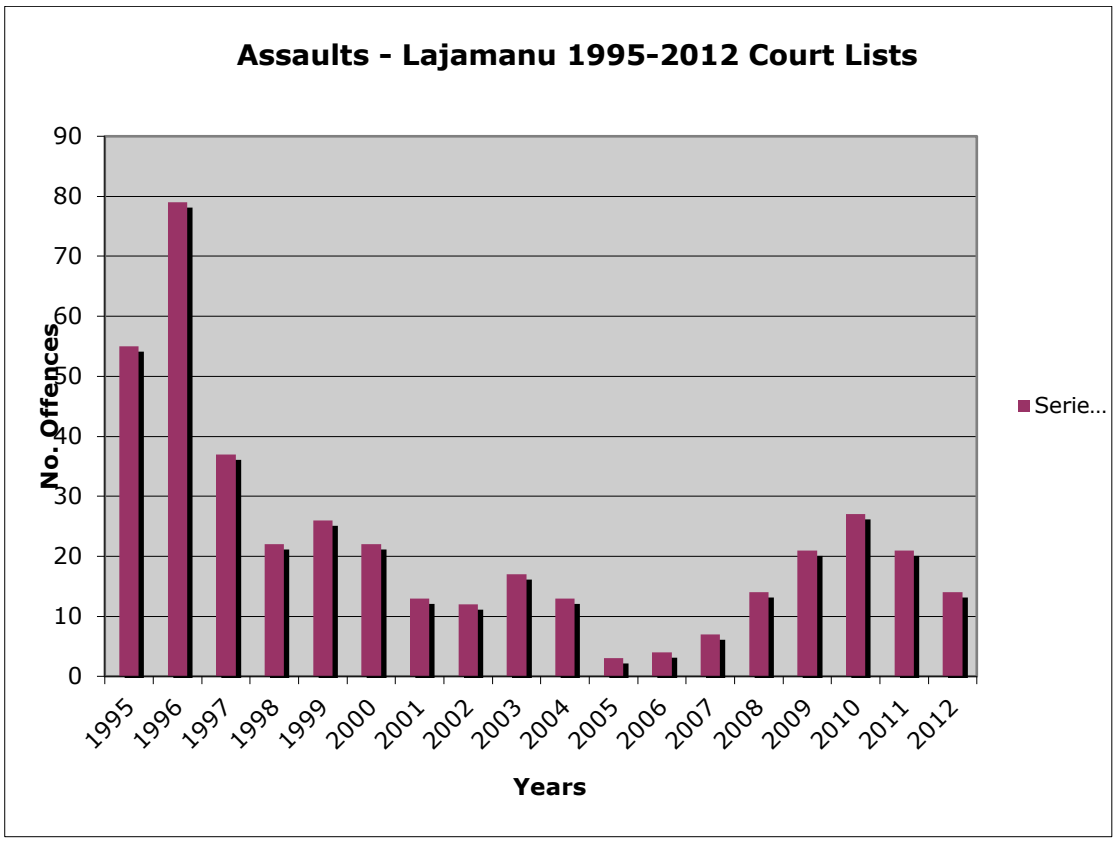
55 Kurdiji Law and Justice Group, 'Background Pamphlet' 2.

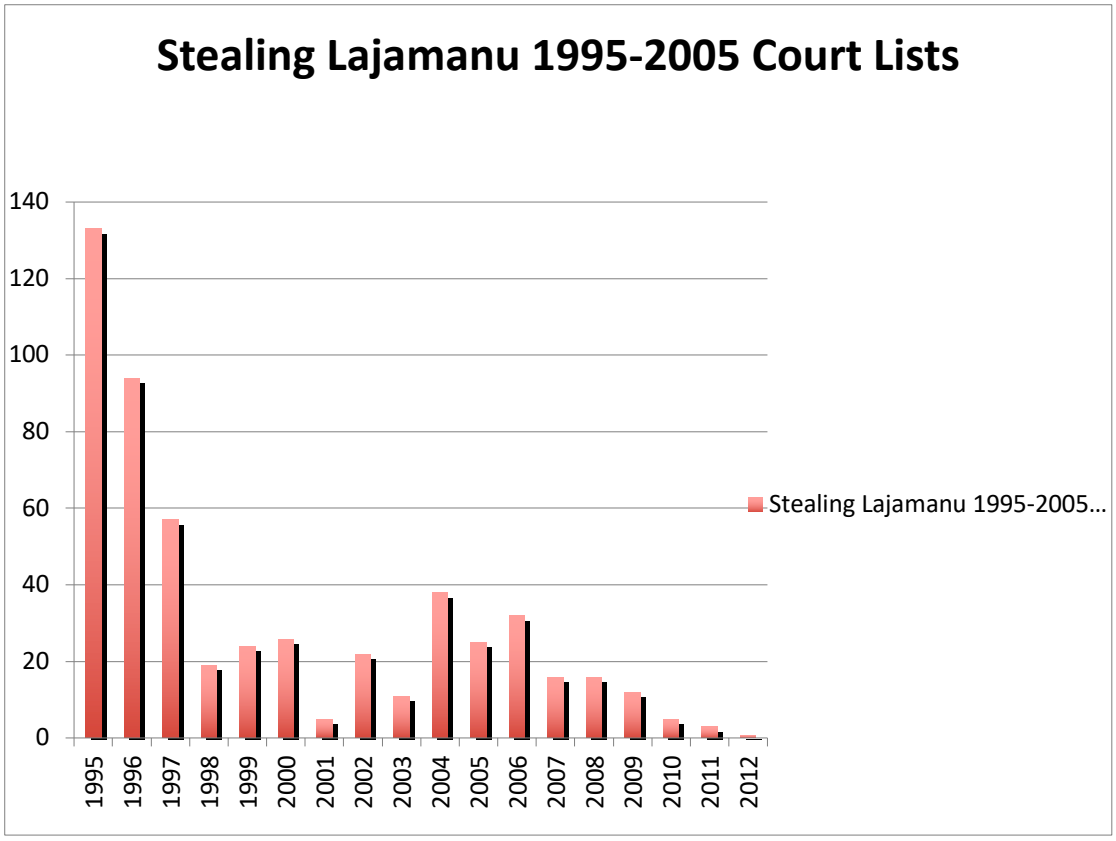
crime trends in Lajamanu using the court lists. This works in Lajamanu due to the remote and discrete nature of the town and the unique nature of the NT's travelling bush courts, which visit individual First Nations communities periodically, holding hearings for offences committed in that community: as such, the Lajamanu court list gives a measure of offences committed by First Nations people in Lajamanu in a way that no regional or urban court list would be able to. This said, it is important to note that this is, at best, a general measure: it does not reflect whether the charges brought were successful in court; nor does it account for any offences committed in Lajamanu but heard in a metropolitan centre (very unlikely under the NT's bush court model but possible). Lajamanu court lists are also unable to show trends in offending by Lajamanu residents when they visit the regional centre of Katherine or other parts of the NT. Nonetheless, the data gathered from the court lists shows a clear downward trend in charged offences in Lajamanu. NAAJA's estimate from this measure was that there had been 'a 50% reduction in total offending, from about 343 to about 157 offences per annum, and that there was a similar reduction in violent offending from 1996 to 2014 levels, with dishonesty offending dropping by 90%.'[56]

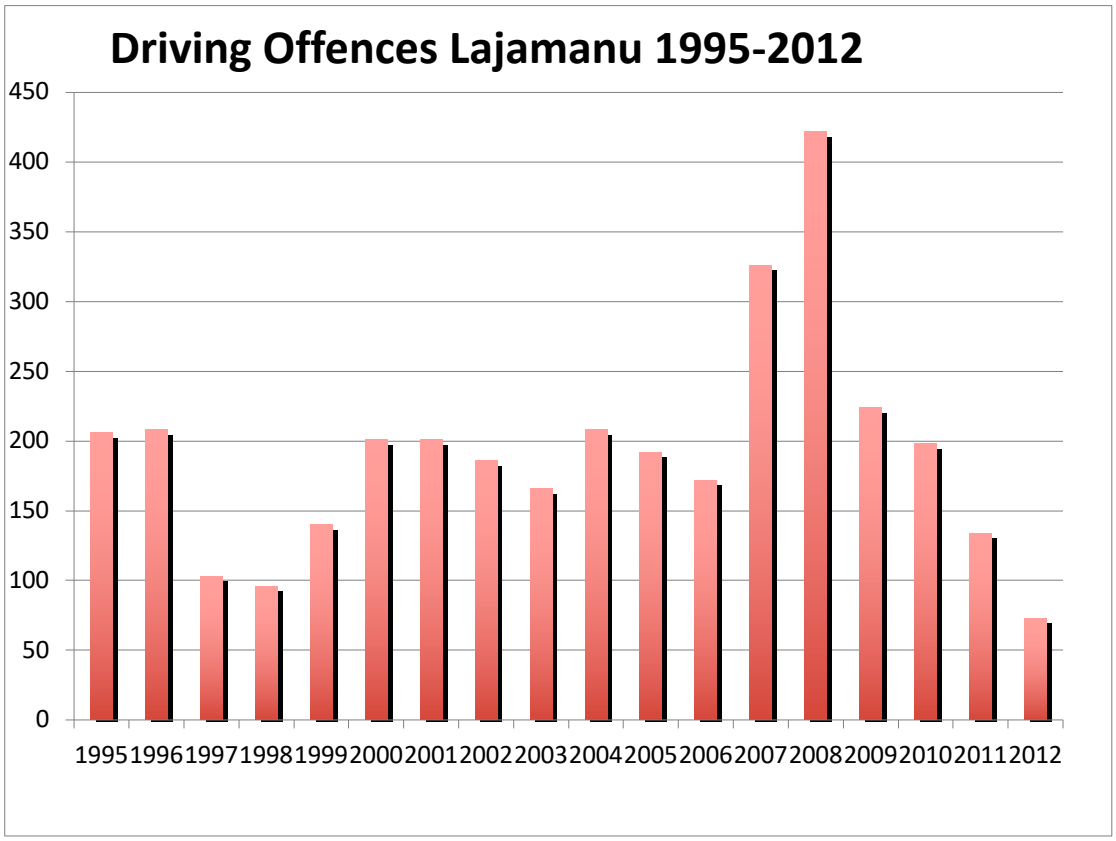
This data set provided by NAAJA is presented below. The broad trends that it depicts are corroborated by qualitative data in the following section.

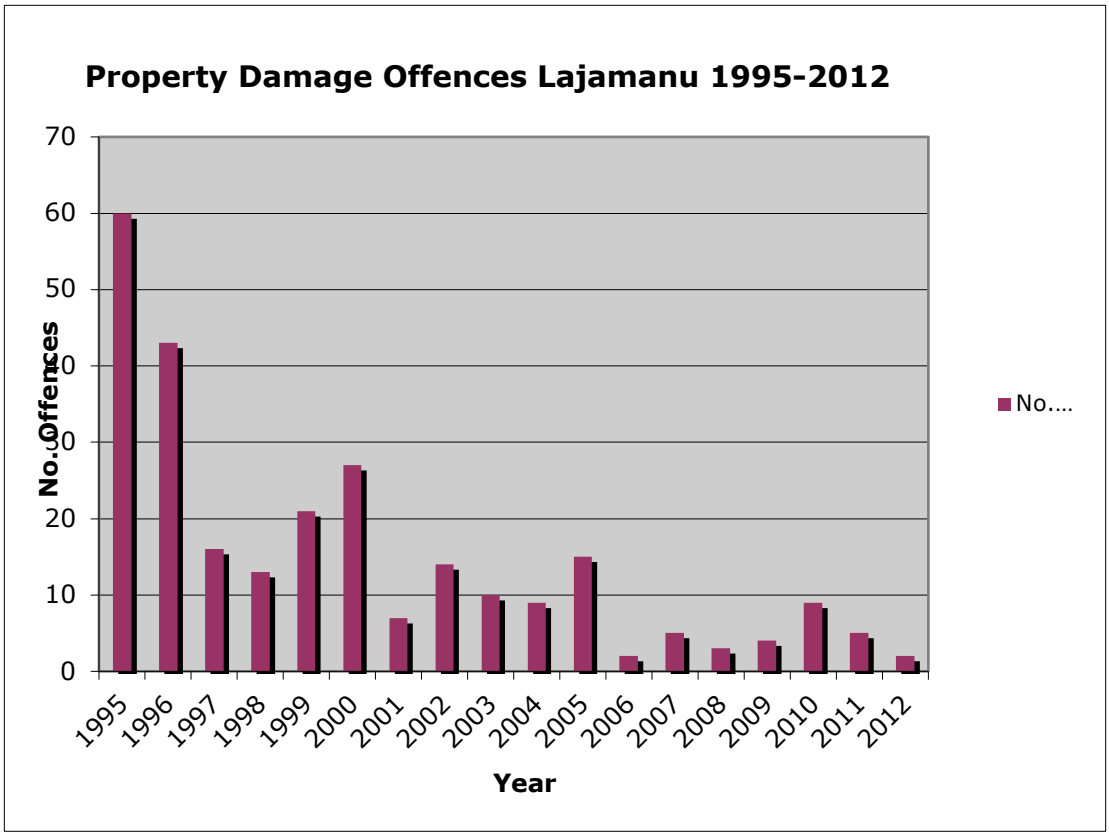
[56] NAAJA Community Education Coordinator, Fieldwork Interview, 2015.


1995-2012 Lajamanu Offences Court Lists
450
400
350
300
250
200
150
100
50
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
Years
Sexual Offences
Sexual Offences - Child
Assault
Stealing
Driving Offences
Alcohol Offences
Drug Offences
Trespass
Propery Dmanage
Firearm-Weapon Offence
Disorderly Behaviour
Resisting Police
Breach of Court Orders
Aid-Abet
Dishonesty Ofences


Assaults - Lajamanu 1995-2012 Court Lists
No. Offences
90
80
70
60
50
40
30
20
10
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
Years
Serie...


Stealing Lajamanu 1995-2005 Court Lists
140
120
100
80
60
40
20
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
Stealing Lajamanu 1995-2005...


Driving Offences Lajamanu 1995-2012
450
400
350
300
250
200
150
100
50
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012



2. Qualitative assessment of the reduction in incarceration in Lajamanu

Across multiple measures, the quantitative evidence presented above shows a clear reduction in certain types of charged offences, especially disorderly behaviour offences, property damage offences, theft offences and assaults. It is also clear that these have driven down the overall rate of offences in court lists in Lajamanu. This said, other types of charged offences, especially firearms offences and traffic offences, have not decreased. As numerous people noted to my time in Lajamanu, the decrease is especially noteworthy given the increase in criminal legislation by the NT Government and the significant increase in policing in Lajamanu and other remote First Nations communities following the NT Intervention in 2007. Increased police likely explain the increases in traffic and firearms offences: compliance with regulations for maintaining vehicle and firearms registration is difficult in remote areas with no registry office; for First Nations people who rely upon these essential tools to hunt and gather efficiently,

the temptation to break licensing laws would be high and prior to the increased police presence in 2007 it is likely that many people did so successfully.

The reduction in charged offences apparent in the quantitative data was corroborated by multiple sources during my fieldwork, most notably by Commonwealth public servants working on the ground. Perhaps the strongest indication of the trend though came from an unplanned piece of participatory research: as I was camping in my Toyota 4WD while conducting fieldwork, in every other NT town I had been repeatedly warned to carefully consider the security of my campsites and my belongings; in Lajamanu, when I went to lock the car, my hosts laughed and observed that 'no-one in Lajamanu bothers'.

d) How did leaders reduce incarceration?

So far in this part I have outlined both the historical context of criminal justice in Lajamanu and the reduction in First Nations incarceration that has been achieved since the Royal Commission. Noting that Lajamanu's success in reducing incarceration is widely attributed to the leadership of the Kurdiji group of elders, I now turn to the key question for this thesis: *how* did leaders achieve the reduction in incarceration in Lajamanu?

This is a critical question both for understanding the policy response to First Nations incarceration following the Royal Commission and for my theory-building in this thesis. As I have outlined in Chapters One to Three, the Royal Commission intended the empowerment of First Nations leaders within criminal justice to be the critical mechanism to reduce incarceration. Consistent with the logic and theory of the rule of law, this was intended to re-set the relationship between First Nations people and the criminal law and build the public confidence necessary for the rule of law to operate. The Kurdiji Group in Lajamanu is a unique case study within this thesis as it traces its

directly to the initial policy response to the Royal Commission: community justice groups were commended in the Final Report of the Royal Commission and First Nations leaders, including the Kurdiji, were encouraged to establish justice groups, in partnership with NT Government bureaucrats, under the Aboriginal Justice Strategy.[57] As such, it is a case study of the mechanism for policy effect in the response to First Nations incarceration operating fully and as it was intended by the Royal Commission, the Keating Commonwealth Government and the Martin Government in the NT.

Process tracing a causal mechanism requires that it be broken down into constituent parts, described in terms of *entities* that engage in *activities.*[58] Below I process-trace the actions of First Nations leaders and street-level policy leaders under the generic tasks identified above as being expected of local leaders in the policy response: (1) improving relations between the First Nations community and criminal justice in the context of substantively unequal criminal justice and legacies of entrenched distrust; (2) overcoming resistance in order to change established patterns of behaviour, both within criminal justice and the First Nations community, in the context of substance abuse and anomie; and (3) ensuring a long-term and strategic approach, in the context of disadvantage and social disorganisation caused by colonisation. Each of these tasks is understood to occur in a dynamic and ongoing relationship both with the historical context described above, and the system of public administration.

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57 See: Gwen Brown et al., 'Jinta Marni Jaku: Community Protocol' (Ali Curung: Ali Curung Safety and Justice Committee, September 2003); Peter Ryan, 'Submission to the Review on Indigenous Law and Justice: Project Officer - Kurduju Committee', Submission (Darwin NT: Parliament of Australia, Public Accounts and Audit Committee, 15 June 2004).

58 Yf Reykers and Derek Beach, 'Process Tracing as a Tool to Analyse Discretion', in *The Principal Agent Model and the European Union*, ed. Tom Delreux and Johan Adriaensen, 2017, 263; citing: Peter Machamer, Lindley Darden, and Carl F. Craver, 'Thinking about Mechanisms', *Philosophy of Science* 67, no. 1 (2000): 1–25; Peter Machamer, 'Activities and Causation: The Metaphysics and Epistemology of Mechanisms', *International Studies in the Philosophy of Science* 18, no. 1 (2004): 27–39.

By tracing a causal logic between leaders and an effect upon incarceration through these tasks I intend to establish two conclusions: first, the necessary components of the mechanism (identified actors undertaking identified activities), which must be present for it to function in any First Nations community; and second, significant contextual factors, either unique to Lajamanu or present across First Nations communities, that impede or improve the mechanism's function. Together, these conclusions form the foundations of a theory that I can subsequently use to provide insight into where the policy mechanism broke down in locations that did not reduce incarceration.

1. Improving relations between the First Nations community and criminal justice in the context of substantively unequal criminal justice and legacies of entrenched distrust.

The Final Report of the Royal Commission explicitly tasked leaders at the local level with improving the relationship between criminal justice and First Nations communities.[59] It is worth reiterating that, in the context of policing, improving relations of 'injustice and prejudice' was understood to 'take time and require great effort', 'a process of change' likened to turning around 'a battle-ship trader' at full steam with 'a tremendous amount of momentum from the past'.[60] The historical context outlined above shows that Lajamanu fully shares the tremendous momentum of injustice and prejudice that concerned the Royal Commission. Fundamental to the Warlpiri response to this context has been as assertion of legal pluralism. A Kurdiji elder who spoke to me on behalf of the group in 2015, reiterated several times that the starting point for understanding the Kurdiji was: 'we want the two laws to work side by

59 Johnston QC, *Royal Commission: National Report, Volume 2*.

60 Johnston QC, *Royal Commission: National Report, Volume 2,* Paragraph 13.4.5.

side – *kardiya* (non-Indigenous) law and *yapa* (First Nations) law.' When Warlpiri leaders from Ali Curung, Lajamanu and Yuendumu came together in the late 1990s to form the regional Kurduju community, differences between Warlpiri law and Australian law were a primary concern for leaders and a primary challenge in reducing incarceration. A detailed articulation of the problem by one the Warlpiri leaders was included by the Ali Curung Justice Group in their 2004 publication of 'Community Protocols':

> 'One of the big problems we are having is understanding how your law works and how it finds out how people are guilty of breaking the law. In our culture we have an inquisitorial process for establishing guilt. This means there is a consensus approach by the community in laying blame and for punishment. This might involve all the victim's family and extended family as well as the offender's family. It might mean bringing in people from other communities like Elders from the right skin groups (classificatory skin groups). It might involve Traditional Land owners if the families and Elders cannot agree. If things are really serious the decision might have to go to the ceremony grounds. Often the persons who caused the trouble are not involved in these decisions. In our culture these things are worked out (negotiated and arbitrated). In things like customary marriage and ceremony and funerals the right people make the decisions, not by the individuals. Same with punishment. Some people are guilty in our law but they are not guilty in your law.'[61]

The evidence of the operation of two systems of law in Warlpiri country continues to place both First Nations leaders and policy implementers in a difficult position. As discussed in Chapter One, First Nations criminal legal concepts are not formally recognised in Australia.[62] But, Warlpiri law and culture of governance is the source of the Kurdiji leaders' authority in Lajamanu. Also, due to the fact that Australian property law (unlike criminal law) *does* recognise First Nations legal concepts through both Native Title property rights and statutory land rights in the NT, Warlpiri law and culture is also a source of the Kurdiji's financial support, through royalty payments to

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61 Brown et al., 'Jinta Marni Jaku: Community Protocol'; cited in Ryan, 'Submission', 3.

62 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Law' (Canberra: Australian Law Reform Commission Customary Law Enquiry, 1986) see: 'Aboriginal Customary Law - Criminal Law, Evidence and Procedure, Discussion Paper 20, 1984.

some traditional owners from mining or pastoral enterprises on their traditional country.

Both Kurdiji leaders and street-level policy leaders in Lajamanu have generally navigated the legal pluralism in Lajamanu through two endeavours: first, building public confidence in their own authority and legitimacy by anchoring their leadership in the norms of their respective legal culture; and second, seeking opportunities to position their authority and leadership in a mutually reinforcing collaboration with the institutions of Australian criminal justice. Below, I consider the actions of First Nations leaders and street-level policy leaders separately – as separate cogs within the mechanism – before considering the effect of their collaboration. As each entity or cog within the mechanism has to be empirically established in future applications of a general theory, I also consider the available evidence for each action taken by leaders in Lajamanu.

2. Building Public Confidence in the Kurdiji: Anchoring Leadership in the tradition of Warlpiri Legal and Political Culture

Spending time in Lajamanu with the Kurdiji leaders reveals the extent to which their work on reducing incarceration draws deeply upon a rich tradition of First Nations leadership – both pre-colonial and in response to colonisation. As an example, during my time in Lajamanu numerous Warlpiri people acknowledged the importance of the leadership by Gurindji traditional owners in ceremonially handing over custodianship for the Lajamanu area to Warlpiri people, following their forced relocation from Yuendumu to the Hooker Creek welfare settlement in the 1950s. To this end, in 2013 the Kurdiji leaders travelled to Kalkarindji and met with the Gurindji traditional owners

and secured their endorsement.[63] More broadly, Warlpiri leaders described to me how they had watched their predecessors and applied learning from the experience of both the Lajamanu Tribal Council and the Lajamanu Community Governance Council in the interagency collaboration achieved by the Kurdiji Law and Justice Group and Law in its first iteration under the Lajamanu Law and Justice Plan between 1998 and 2003. A Kurdiji elder described his own experience of learning from the example of earlier leaders: 'When Government agents came to town they went to see our elders, who were strong community members. When we saw those elders there, we were learning from that. We would ask the elders questions: who were those important *kardiya* and why were they here?'

For Warlpiri leaders public confidence in their work – its legitimacy and authority – is derived from its link to Warlpiri traditions of law and governance. While it is not immediately apparent to a Western audience, there is clear signalling to this end in the name Kurdiji itself. The direct translation of the Warlpiri word 'kurdiji' as 'shield' has been widely reported in the commentary on the group's success.[64] But in a broad-ranging interview about Warlpiri culture in Lajamanu in 2015, Wanta Jampijinpa explained to me the importance of Kurdiji as a concept within Warlpiri culture. Kurdiji is the subject of an important Warlpiri initiation ceremony. While much of the ceremony is secret and shared only with the initiated, Warlpiri leaders have shared its conceptual pillars – language, ceremony, skin name and law – and their view that these pillars

63 Chris Roche and James Ensor, 'Independent Evaluation of the Central Land Council's Community Development and Governance Programs' (Alice Springs: Central Land Council, 2014), 88.

64 See, for example: Stephanie Zillman, 'Indigenous Warlpiri Elders Helping Locals in Court System with Reference Letters', *ABC News*, 21 October 2016; Department of Prime Minister and Cabinet, 'Closing the Gap: Prime Minister's Report 2018' (Canberra: Department of Prime Minister and Cabinet, 2018).

provide young people with a resilient identity that can protect them from hardship.[65] Wanta Jampijinpa explained that the name of the Kurdiji leaders invokes the values of the ceremony.

Given the necessarily public nature of its association, there is plentiful evidence of the link that Wanta Jampijinpa described between the Kurdiji leadership group and the Kurdiji concepts' ceremonial importance – most notably, in the sharing of the Kurdiji ceremony through the Milpirri festival as a response to youth suicide, which I describe in the following section in the context of anomie. However the firmest evidence of the importance placed upon anchoring the Kurdiji group in traditional Warlpiri governance comes from the composition of the group. A Kurdiji elder made clear in his interview with me that the group's work in criminal justice had to be collective: 'it can't be one Kurdiji member, we all need to be there, the men and the women from each skin group.' This can be quickly confirmed through an examination of the leaders present at Kurdiji meetings or listed in the group's leadership: the eight male and female Warlpiri skin names and the traditional ownership of land and ceremonies are all carefully represented. Finally, the projection of Warlpiri cultural authority in the work of the Kurdiji is explicitly evident in their oft repeated advice to deter young offenders: 'there is no *jukurrpa*, no dreaming, in prison. Yapa people belong outside. Prison is not a place for them.'[66] Problematic to define in English, *jukurrpa* or 'dreaming' refers to the spiritual identification of a Warlpiri person to their country:[67] imprisonment is thus positioned by the Kurdiji as being in opposition to Warlpiri identity.

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65 Dijana Damjanovic, 'Indigenous Warlpiri Elders Want to Blend Traditions into App to Help Tackle Suicide Risk', *ABC News*, 4 April 2017

66 Kurdiji elder, Fieldwork Interview, Lajamanu, 2015

67 Cliff Goddard and Anna Wierzbicka, 'What Does Jukurrpa ("Dreamtime", 'the Dreaming') Mean? A Semantic and Conceptual Journey of Discovery', *Australian Aboriginal Studies* 11 (2015): 43–65.

3. Building Public Confidence in Criminal Justice: Street-Level Policy Leaders

In parallel with the Kurdiji leaders building public confidence in their work from within the traditional of Warlpiri law and governance, those working within criminal justice – bureaucrats, lawyers, police and magistrates – also had to gain and consolidate public confidence as a precondition for successful collaboration. It is easy to take this cog in the mechanism for granted in the context of Lajamanu for two reasons: first, the work of Warlpiri leaders is naturally more prominent and evident among Warlpiri people in Lajamanu; and second, there is a tendency to assume the authority of institutions that are invested with the power and hardware of the state. But, two tasks before the leaders within criminal justice in Lajamanu are noteworthy, as they were necessary both to secure public confidence and facilitate the collaboration that followed: securing interagency collaboration and administering criminal justice with substantive equality. Without achieving these two outcomes within the public administration of criminal justice it is difficult to see how the Kurdiji project could have proceeded.

Interagency collaboration is a frequent necessity for successful work in remote First Nations communities due to the complexity of public administration that I outlined in Chapter One, between Federal, State and local governments alongside contracted Indigenous corporations. Both the Lajamanu Kurdiji Law and Justice Group from 1998 and the regional Kurduju Law and Justice Committee spanning Lajamanu, Ali-Curung and Yuendumu secured high levels of interagency collaboration: by 2000 eight Commonwealth and NT agencies with a responsibility for criminal justice had formally agreed to the local and regional 'safety and justice plans'.[68] This interagency collaboration was achieved through the work of Peter Ryan and Jackie Antoun, NT public servants tasked to facilitate the development of community justice groups in the

[68] See Ryan, 'Submission', 1.

Warlpiri communities under the NT's Aboriginal Law and Justice Strategy in 1996.[69] In this way, Ryan and Antoun sought to make groups like the Kurdiji 'the interface between the community and the myriad of government agencies involved in the provision of law and justice services.[70] Consistent with the self-determination paradigm running through the reports of the Royal Commission in and the NT ALJS, Ryan and Antoun intended to enmesh the Warlpiri leaders within the administration of public administration in a position of influence.[71] While the agreements to collaborate expired with the community safety plans in 2005, when the justice groups were de-funded, the network of relationships continued. The Kurdiji have continued to engage with these agencies: for example, in collaborative advocacy to the Liquor Licencing Commission to restrict liquor sales at the Top Springs roadhouse on the road to Katherine.[72] As will be made clear below, several agencies have also provided funding or other support to the Kurdiji for periods, including NT Corrections, the NT Government and the Commonwealth Government.

Even more important that establishing interagency collaboration though has been administering criminal justice in Lajamanu with substantive equality for First Nations people. Warlpiri people I interviewed acknowledged that they had been fortunate to have 'good police' and 'good sergeants' in Lajamanu. In large part, the evidence for the fair administration of criminal justice is the absence of incidents involving perceived unequal or harsh treatment. There have been such perceptions formed in other communities considered in this thesis, such as the perceived light

69 Ryan, 'Submission'.

70 Ryan, 'Submission'.

71 Ryan, 'Submission'.

72 Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel' (Darwin NT: Northern Territory Licensing Commission, 17 July 2014); Jano Gibson, 'Indigenous Elders Want Tougher Controls on Takeaway Alcohol Sales at the Top Springs Hotel', *ABC News*, 6 February 2014.

sentence received by Matthew Alexander over the hit-and-run killing of Jack Sultan outlined in Chapter Two. There have also been incidents in other Warlpiri communities that have sparked outrage, most significantly the shooting of Kumanjayi Walker by police in the closely related community of Yuendumu.[73] It is sufficient to say that had any such incidents occurred in Lajamanu it would have destroyed public confidence and seriously compromised the ability of criminal justice to collaborate with the Kurdiji.

4. Collaboration

Having consolidated public confidence in their own authority, the core of the strategy initiated by the Warlpiri to reduce incarceration in Lajamanu was to publicly collaborate: to 'bring the two laws together'. The most longstanding and public example of collaboration between the Kurdiji leaders and criminal justice is their direct involvement in the bush court. From the beginning of the justice group in 1998, Kurdiji leaders supported the bush court by meeting with magistrates, providing references for some community members appearing before the court charged with an offence, and attending hearings.[74] As outlined above, Kurdiji leaders continue to perform this role supported by NAAJA. In 2015, the NAAJA Community Legal Education manager explained to me the impact of this collaboration, from the perspective of clients he has worked with:

> '…One of the good things these groups have done is invite key senior elders into the process of criminal justice: in Lajamanu its generally anywhere between 10-20 elders attending meetings on each occasion…. So that the effort of general deterrence and denunciation is carried out by the community because they are involved. If you didn't have that, nobody would actually turn their mind to these issues, certainly you don't have the reflective kudos of the community leaders to propel the Court's messages of disapproval.'

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73 Natassia Chrysanthos et al., 'Northern Territory Policeman Charged with Murder over Shooting of Indigenous Man', *Sydney Morning Herald*, 14 November 2019

74 Ryan, 'Submission', 2–3.

Having subsequently moved from a solicitor's role to being directly involved with supporting the Kurdiji Group from NAAJA, his view is that the benefits of enhanced public confidence arising from the collaboration are both mutual and mutually reinforcing: he refers to this as 'reflective kudos'.

Beyond the correlating drop in offending and incarceration rates, evidence for the efficacy of this collaboration in Lajamanu as a governance strategy has been confirmed by independent evaluations of the program commissioned by the Central Land Council (CLC). [75] It has also been publicly attested by successive generations of judicial officers: more than a decade after the collaborative approach to the bush court commenced Judge Elisabeth Armitage was quoted in the Department of Prime Minister and Cabinet's National Closing the Gap Report emphasising that the Kurdiji 'play an important role in helping the judges, the prosecution and defence lawyers understand the circumstances of the people before the court' and also 'supporting offender remediation, often in conjunction with the police.'[76] This was strongly confirmed by my participatory research in attending a Kurdiji dispute resolution meeting, which was qualitatively more impactful than any of the many sittings of bush courts I have attended across remote Australia over the past 5 years.

However, a more difficult question of evidence arises when considering theorizing the collaboration for application beyond Lajamanu. Evidence of collaboration and efficacy alone is not sufficient, for the simple reason that First Nations leaders, police, lawyers and bureaucrats were attempting to collaborate in every other community I visited in my fieldwork. Improvement in the relationship between the First Nations community and criminal justice – evidenced through collaboration – is thus a

75 Roche and Ensor, 'Independent Evaluation of the Central Land Council's Community Development and Governance Programs'.

76 Department of Prime Minister and Cabinet, 'Closing the Gap: Prime Minister's Report 2018', 126.

question of degree. However, there is a notable quality to the collaboration achieved by the community in Lajamanu that can be established through evidence: a high level of trust between across the plural legal systems. I find Neustadt's conception of leading with a 'sense of purpose', which I used to assess evidence leadership at the elite level in Chapter Four, to resonate again: the sense of purpose is evident 'in irreversible commitments to define courses of action' that are 'so plain and so direct' that they cannot be taken back.'[77] There are irreversible commitments in the collaboration in Lajamanu: in sitting in the courtroom or lunching with the Magistrate, First Nations leaders make an irreversible commitment to the criminal justice system in that their authority would be greatly damaged if the court were to subsequently be seen to commit an injustice. Similarly, given that Australian criminal law does not formally recognise the Warlpiri legal framework from which the Kurdiji derive their authority, local police leaders and judicial officers make an irreversible commitment in supporting the Kurdiji dispute resolution I describe below in the sense that they would highly-likely suffer professional consequences if those processes got out of control and resulted in the breaking of the criminal law. These irreversible commitments are compelling evidence of confidence and trust in a resilient relationship between First Nations leaders and those within criminal justice.

5. Overcoming resistance in order to change established patterns of behaviour, both from within criminal justice and within First Nations communities, in the context of substance abuse and anomie.

Having improved the relationship between the First Nations community and criminal justice to the point of collaboration, first nations leaders and leaders within criminal

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77 Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Basic Books, 1990), 168.

justice in Lajamanu confronted the causes of incarceration. My assessment of the existing literature in Chapter Two suggests two causes are immediately relevant: substance abuse and anomie, or hopelessness. The keystone of the Kurdiji response to these factors, as well as other instances of antisocial behaviour, is a unique style of community dispute resolution meetings. Below I consider this in detail, before considering substance abuse and anomie specifically.

i. *Kurdiji Dispute Resolution Meetings*

The Kurdiji approach to causes of offending in Lajamanu is proactive. As well as representing all the male and female Warlpiri skin-names, the group contains a representative spread of senior Warlpiri staff within service providers in Lajamanu. A Kurdiji elder described to me how 'Kurdiji members are involved in all organisations, we wear many hats: the store, the hospital, youth sport and rec…if there is a problem with one of these we can all work together.' From their beginning the Kurdiji have been notably focused on reducing violence and antisocial behaviour, which had been a notable problem in Lajamanu in the 1990s. The group overlap with the Night Patrol a government grant funded program from 2007 for senior Warlpiri people to patrol the community at night encouraging young people to go home to bed on school nights, reporting any criminal or unsafe activity (particularly substance abuse such as paint sniffing). As such, from the perspective of a young Warlpiri person in Lajamanu, Kurdiji members are effectively omnipresent, in the day or during the night.

The primary forum for resolving issues that the Kurdiji come across using this proactive approach to public safety is a 'community meeting': a public meeting led by the Kurdiji and informed by the criminal law, but rooted in Warlpiri traditional governance. The efficacy of these meetings was first demonstrated in the context of dispute resolution to prevent an escalation in public violence between families. The

NAAJA Community Legal Education manager described this type of dispute resolution meeting to me in 2015: 'They convene meetings, often after a day of fighting, and they lay down the law and say "this is not on; here's why it's not on; please reconcile". They'll get the families to reconcile and have around 200-300 people watching that happen…''

Kurdiji Community Meetings are a useful forum for issues beyond resolving public fights, which are now relatively uncommon in Lajamanu. In my time in Lajamanu in 2015 I was fortunate to be invited to observe a Community Meeting about more minor antisocial behaviour: a group of youths who had been throwing rocks onto a tin roof at night and causing a disturbance. The meeting was held in the cool of the early evening on a well-lit basketball court. Twenty Kurdiji elders were sitting in a group at one end of the court with several hundred people sitting or standing around the edge of the court, while still more people were watching from cars or groups of chairs slightly further away and outside of the glare of the lights. The meeting began with a general discussion of public safety and antisocial behaviour – much of which was in Warlpiri, but parts of which were translated for me by my host. The specific incident was then discussed where three youths had been throwing rocks onto the tin roofs of buildings late at night, causing a disturbance while people were sleeping. The three young accused were then brought before the meeting by appropriate elders; each was then publicly chastised by other elders. Over the course of my fieldwork and my later work in remote First Nations communities I have attended numerous sittings of the 'bush court', assembled for visiting magistrates. These are characterised by a mixture of confusion, resignation and fear. None of these emotions were evident at the Kurdiji meeting. The faces of Warlpiri spectators around me were intent and, at times, righteous. The three youths brought before the meeting looked uncomfortable to be receiving its attention – far more so than I have ever seen before a bush court – but they were also ashamed and

contrite. As the meeting closed, I was struck by the impression that the experience had been a strong affirmation of the authority of the Kurdiji leaders.

ii. *Substance Abuse*

Kurdiji leaders I spoke to emphasised that alcohol abuse and petrol sniffing had historically been problems in Lajamanu and alcohol remains a particular concern. Uniquely among the communities I consider in this thesis, alcohol has always been prohibited in Lajamanu. Prior to 1964, First Nations people were not legally entitled to consume alcohol in the NT, although many Warlpiri people who now live in Lajamanu worked as stockman on cattle stations alongside non-Indigenous Australian stockmen with a notable drinking culture. Following 1964, the Commonwealth Government continued to restrict alcohol in many communities, including Lajamanu, but allowed First Nations people to buy and drink in some towns and designated canteens: for example, in Wadeye – the other remote, NT First nations community I consider in this thesis – the Murrinh Patha Social Club, a 'wet' canteen served alcohol from the late 1970s. Following the NT achieving self-administration alcohol was regulated under the *Northern Territory Liquor Act* 1979, which maintained prohibitions on alcohol in some locations: at the time of the Royal Commission, alcohol in Lajamanu was restricted under this legislation.[78] Restrictions on the sale of alcohol increased in the NT following the NT Intervention in 2007. Alcohol continues to be prohibited in Lajamanu. This is supported by the Kurdiji and the majority of the community, although a hearing by the NT Licensing Commission in 2014 noted some dissenting voices.[79]

Restrictions on alcohol in Lajamanu have not stopped alcohol abuse and associated harms, including violent offending. Alcohol is purchased by residents from a

78 See: Maggie Brady, *Teaching Proper Drinking? Clubs and Pubs in Indigenous Australia* (Canberra: ANU E-Press, 2017), 83 Table 1.

79 Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel', 6.

wet canteen in Kalkarindji, approximately 100km away by road; Top Springs Roadhouse, approximately 270km away by road; and the town of Katherine 560km. While alcohol cannot be drunk in Lajamanu, there is an established drinkers camp at 10 mile, a location immediately outside of the geographic restriction on drinking around the town: residents consume their alcohol at 10 mile, before returning to town. In 2014, the NT Licensing Commission conducted a hearing into the sales of alcohol at Top Springs Roadhouse, in part due to lobbying by the Kurdiji. The Licensing Commission's 'Reasons for Decision' report contains significant evidence of alcohol abuse, some provided by Kurdiji members. Andrew Johnson, a Kurdiji Member and Night Patrol worker gave evidence of his experience:

> 'It's concerning me seriously. I've seen some young ones passed away because of grog too much in the community. 20 cartons (note: a carton contains 24x375ml cans), 15 cartons, too much and the whole community just getting – you know – just getting wild. How can we stop these problems that we have in our own place? It's the grog that comes in, pouring in like water and everyone just getting mad and also people killing themselves, bashing their wife, committing suicide, burning themselves alive which is not good, especially for blackfella in those community.'[80]

Johnson continued that such incidents are particularly acute on weekends when 'its royalty time': in March, August and September, when royalties from agricultural or mining enterprises have been paid to some Warlpiri Tradition owners.[81] Sergeant Garrin Metcalf, Officer in Charge of the Lajamanu Police Station in 2014 confirmed Johnson's account, describing incidents of 300 people at the 10 mile with '5 or 6 fights going on-all involving intoxicated people'.[82]

When violent or antisocial behaviour results from drinking, the Kurdiji have had some success in minimising harm and preventing cyclical violence through their 'community meeting' dispute resolution described above. The Kurdiji have also

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80 Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel', 12.

81 Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel', 12.

82 Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel', 10.

conducted a longstanding campaign of advocacy regarding alcohol: from their 1998 appeared before the NT Government's Standing Committee on Substance Abuse to the more recent lobbying of the Licensing Commission around restrictions of sales at the Top Springs Roadhouse.[83] But neither the Kurdiji leaders or street-level policy leaders in Lajamanu have been successful in keeping alcohol related offending and harm from Lajamanu and it remains their most significant concern.[84]

iii. Anomie

Alongside other First Nations communities in Australia, leaders in Lajamanu have grappled with the anomie or hopelessness caused by inherited trauma, historical injustices and ongoing disadvantage. Lajamanu has also been touched by the associated disproportionate rate of suicide among First Nations young people, which is twice that experienced by their non-Indigenous peers and, among young men between 25 and 29, is the highest rate in the world.[85] Following the death by suicide of a young Warlpiri person in Lajamanu in 2005, Warlpiri leaders met to directly consider the anomie experienced by young First Nations people. In response, they decided to share previously secret content from the Kurdiji ceremony more broadly. Wanta Jampijinpa Patrick and his father Jerry Jangala Patrick were instrumental in this decision. In 2014, Wanta Jampijinpa described the importance of ceremony to young Warlpiri people's identity in the context of *ngurra-kurlu*, which contains the four pillars of the Kurdiji ceremony 'skin, law, land, language and ceremony'.[86]

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83 See: Ryan, 'Submission to the Review on Indigenous Law and Justice: Project Officer - Kurduju Committee', 2; Northern Territory Licensing Commission, 'Reasons for Decision Top Springs Hotel'; Gibson, 'Indigenous Elders Want Tougher Controls on Takeaway Alcohol Sales at the Top Springs Hotel'.

84 Kurdiji elder, Fieldwork Interview, Lajamanu 2015.

85 Australian Institute of Health and Welfare, 'Suicide and Self-Harm Monitoring: Deaths by Suicide Amongst Indigenous Australians' (Canberra: Australian Institute of Health and Welfare, 2021).

86 Pawu-Kurlpurlurnu, Holmes, and Box, 'Ngurra-Kurlu: A Way of Working with Warlpiri People'.

Later, following a decision to publish the knowledge for all First Nations Australians Wanta Jampijinpa elaborated to reporters : 'It's meant to teach people to look at life and really protect life – shelf them off from all the elements of negative things of the world.'[87] This expanded sharing of the Kurdiji concepts began in 2005 with the Milpirri festival, an annual dance festival in which young Warlpiri people in Lajamanu share dances from ceremonies as well as contemporary dance, with visitors from across Australia: dances from the Kurdiji ceremony itself were shared in 2007 and 2016. While its effect is difficult to quantify, there is strong evidence that the festival resonates with Warlpiri people in Lajamanu. An evaluation commissioned by the Central Land Council, which partly funds the festival on behalf of traditional owners, noted that in 2012 more than one third of Lajamanu residents directly participated.[88] It has also been reported that Lajamanu has not experienced a suicide since this initiative started.[89]

In 2017 the Kurdiji sought a broader audience. Through a partnership with the Black Dog Institute, a leading Australia mental health NGO, the Kurdiji leaders developed an App, 'Kurdiji 1.0', which digitally presented the concepts of the Kurdiji ceremony in a format that was accessible to any First Nations person in Australia.[90] Wanta Jampijinpa explained their logic to the *Huffington Post*:

> 'Suicides kept happening here and it takes the guts out of the communities. Suicide is a new thing to us and it caught my community off-guard, so we heard about all these suicides and we went back to the traditional way of how you maintain the story to prevent suicide. Lost stories mean lost history for the people and for their families. They simply drip away from community, even if they live within the community. Bringing

87 Australian Associated Press, 'Indigenous Elders Develop App in Bed to Reduce Youth Suicide Rate', *The Guardian Australia*, 6 April 2017.

88 Roche and Ensor, 'Independent Evaluation of the Central Land Council's Community Development and Governance Programs', 77.

89 Luke Cooper, 'Indigenous Elders Are Creating a Mobile App to Tackle High Suicide Rates', *Huffington Post Australia*, 4 April 2017.

90 Cooper, 'Indigenous Elders'.

> them that story makes them whole and useful to the community. To keep a healthy body is to keep your story alive.'[91]

The logic of the Kurdiji leaders in sharing the concepts of the Kurdiji ceremony is that they are undoing some of the damage of colonization, which has dislocated young First Nations people from their culture, country and identity. Wanta Jampijinpa continued:

> 'When you look at Indigenous culture, it's not about people, it's about country and how you look after country and it looks after you and your body. You need to teach oneself of keeping that story alive. You are the story but you're also holding up other people. It's so that they can understand themselves a bit more about the world around them. It's to be strong in whatever challenges life throughs at you. It's not to be afraid of all these challenges.'

The Kurdiji 1.0 Twitter account stated a similar view of the importance of cultural solutions to anomie among First Nations people: 'Culture in the lifeblood of the people.'[92]

This project has received support from a number of prominent Australians, including musician Nick Cave and the prominent actor Uncle Jack Charles, a Bunurong and Wiradjuri man, who agreed to be the app's patron.[93] The development of the Kurdiji 1.0 app was crowd-funded through a campaign using the 'GoFundMe' platform. Access to Kurdiji 1.0 is available for free and its content is planned to expand in three stages: first, focusing upon Warlpiri youth in the Tanami; second, broadening to all First Nations youth; and thirdly to include at-risk non-Indigenous populations with high rates of suicides, such as farmers.[94] While it is too early to judge the impact of Kurdiji 1.0 beyond Lajamanu, it has significant credibility through the endorsement of mental health experts at the Black Dog Institute. Dr Fiona Shand was quoted saying: 'there is a sense that strengthening people's connection to their traditions and their culture and

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91 Note, Wanta Jampijinpa is quoted using his English name, Steven Patrick: Cooper.

92 Cooper, 'Indigenous Elders'.

93 Cooper, 'Indigenous Elders'; Samantha Maine, 'Nick Cave Lends Support to Suicide Prevention App', *NME*, 29 April 2017.

94 Cooper, 'Indigenous Elders'.

their Indigenous identity and heritage is a protective thing to do.' Certainly Kurdiji 1.0 is an interesting example of local leaders looking to project their authority more broadly, to other Warlpiri people, other First Nations people and beyond.

6. Ensuring a long-term and strategic approach, in the context of disadvantaged communities and social disorganisation caused by colonisation.

As has been outlined above, the Kurdiji group was originally funded by the policy response to the Royal Commission. In the NT, this funding flowed through the ALJS to form 'Community Justice Groups'. On the ground in Lajamanu it manifested in funding for local meetings to develop a local law and justice plan, travel to regional meetings to develop a regional law and justice plan and facilitation by two NT Government bureaucrats, Peter Ryan and Jackie Antoun.[95] However, the funding payments from the Commonwealth under the Keating Government's policy response expired in 1998 and between 2003 and 2005 all of the NT's Community Justice Groups lost funding, including the Kurduju Regional Committee in the Tanami, and the Justice Groups at Ali-Curung, Yuendumu and Lajamanu. The resilience of the Kurdiji Group in Lajamanu and its continuing work reflects the success of local leaders, both Warlpiri and street-level policy leaders, to overcome Lajamanu's disadvantage and marginalisation and repeatedly secure alternate sources of funding.

The disruption caused by the cessation of the community justice group funding should not be understated: Warlpiri Leaders and street-level bureaucrats both emphasised this to me that the loss was unexpected and followed a period of growth and success. The Lajamanu Law and Justice Plan – the outcome of the process initiated in response to the Royal Commission by Ryan and Antoun on behalf of the Department

95 See: Ryan, 'Submission to the Review on Indigenous Law and Justice: Project Officer - Kurduju Committee'.

of Community Development, Sport and Cultural Affairs – commenced operation in November 2000. On 28 February 2002, the Minister Assisting the Chief Minister on Indigenous Affairs, Jack Ah Khit, spoke in Parliament of the program's success as part of the Territory's Aboriginal Justice Plan: he announced that a $40,000 grant had been provided by the NT Government to help refurbish a building to establish a women's safe house; Lajamanu was chosen as a site by the Ministerial Council for Aboriginal and Torres Strait Islander Affairs working group for a pilot of the national indigenous family violence strategy.[96] But, by 2003, the funding that had supported Ryan and Antoun's work with the Kurdiji was removed and in 2005, under a newly elected Country Liberal Party Government, funding for Aboriginal Justice Groups (of which the Kurdiji were one) ceased entirely.

The disruption caused by the loss of funding was soon compounded by sweeping changes in public administration, which undid much of the Kurdiji's network of support. In 2007, following the NT Emergency Response or 'Intervention' the local public administration framework, in which the Lajamanu Law and Justice Plan was nested, was radically altered. In the short term, the Australian Defence Force arrived in Lajamanu followed by a significantly increased police presence: Anthony has shown that this resulted in a significant increase in prosecutions for non-violent offences, particularly traffic offences, across the NT and specifically in Lajamanu.[97] This is apparent in the data sets developed by NAAJA and the Magistrates Court that are extracted above with significant increases in traffic offences in 2007/08. Writing in 2009, Anthony characterised the shift in NT governance of criminal justice to be consistent with

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96 Northern Territory Parliamentary Debates, Legislative Assembly, Questions for 9th Assembly, 28 February 2002, p.127.

97 Thalia Anthony, 'Governing Crime in the Intervention', *Law in Context* 27, no. 2 (2009): 102–5.

Simon's theory of 'governing through crime'.[98] As well as increased policing, the paradigm change ushered in by the Intervention also made practical changes to public administration. The Commonwealth Government was now represented at the local level in Lajamanu, in the persons of a Government Business Manager and Indigenous Engagement Officer, public servants with oversight over Commonwealth funding in the community. Meanwhile, the local government – a vehicle of Warlpiri self-determination since the closure of the Hooker Creek Welfare Settlement – was folded into a 'Super Shire' Council The Central Desert Regional Council; this resulted in the 12 person local council being reduced to two representatives on the Regional Council in Alice Springs.[99] A 2014 evaluation of the Central Land Council's programs in Lajamanu, conducted independently by La Trobe University, noted ongoing and widespread frustration with these governance changes in Lajamanu: 'It was the a near universal view of residents and service providers interviewed in Lajamanu that the combination of the NTER, and the nature of the Shire governance model, significantly reduced the ability of Lajamanu residents to meaningfully influence government decision that affect them, or to exercise decision making authority.'[100]

i. *First Nations Leaders*

Following the loss of funding and the dismantling of the public administration arrangements that had underpinned the law and justice plans, the Regional Kurduju Community Justice Group and the Ali-Curung and Yuendumu groups ceased operation. But the Lajamanu Kurdiji group continued. For several years, this was due to the

98 Anthony, 'Governing Crime in the Intervention', 102–5.

99 Allyson Horn, 'Super Shires Condemned as Worse than Intervention', *ABC News*, 31 January 2012, https://www.abc.net.au/news/2012-01-31/20120131-mick-gooda-on-super-shires/3802586.

100 Roche and Ensor, 'Independent Evaluation of the Central Land Council's Community Development and Governance Programs', 93.

determination of the Warlpiri leaders involved to continue. A Kurdiji elder described this time to me in 2015:

> 'After a couple of years there was no funding for it (the Community Justice Group). We had almost forgotten about it and the job it did… As a Kurdiji group we all put our hands up and said we want to keep this going. Other communities shouldn't wait for Government. They should go ahead with it. It's supporting each other. Hopefully Governments will support that somewhere down the track'.

In the first instance, the Kurdiji were able to source money from within the Warlpiri community. As a Kurdiji elder continued: 'There was no funding for it, but we decided to fund it with our own money – GMAAAC, Granites Mine, money'. The Granites Gold Mine is a mining enterprise on Warlpiri Country, which pays royalties to some traditional owners who live in Lajamanu; GMAAAC refers to the Granites Mine Affected Area Cooperation Project, which is a project for distributing royalty money from the mine conducted by the Central Land Council. In the first instance, the Kurdiji leaders convinced these traditional owners to provide some funding. But they needed to secure further support, both financial and collaborative, to continue their work bringing 'the two laws together'. For this, they sought to identify possible collaborators among local policy leaders or street-level policy leaders.

ii. *Local Policy Leaders and Street-Level Policy Leaders*

The key contribution that policy leaders, or street-level policy leaders, have made in Lajamanu is to enable the Kurdiji leaders through linking them to support, both financial and collaborative. The first institutional support that the Kurdiji received was from NT Correctional Services. A former case manager for Lajamanu at the time, described how she began collaborating with the Kurdiji in 2004:

> 'I was working with community corrections at the time and had a manager who was open to exploring alternative justice options that were inclusive of community members and elders and were respectful towards the community that those sentences were coming out of; that they had an input and say into what was the best options; what was the sentencing alternative for their clients…'

Supporting the Kurdiji from within community corrections necessitated a narrowing of focus from the broad multi-agency collaboration originally designed by the Warlpiri leaders with Ryan and Antoun. The former case manager describes:

> 'It was a little bit different then because it was facilitated by community corrections, the elders would come together in a group and be joined with us with the court list. We would not discuss every client but those that the Kurdiji felt could benefit from alternatives other than incarceration…It was an opportunity for them to make a recommendation, and some of their recommendations were really important for the Magistrates, particularly around youth: sharing the knowledge they have of what's in their culture and what might impact on a young person's life from their perspective rather than the court's or the magistrate's.'

The quantitative trend cited above suggests that the Kurdiji's work continued to succeed in reducing incarceration in this narrower format. The former case manager considers that 'it was really good, it was really innovative at the time, although I guess I am reflecting that, compared to what they are doing now, the voices have got even stronger since.' But, the former case manager stresses that the support she was able to provide to the Kurdiji achieved from NT Corrections was ad hoc. She describes how it ended in 2007: 'it was never really funded; it was just that I had an empathetic manager who could see the benefit from it. And, that was my caseload, the Lajamanu caseload, so I had discretion to continue the work. But, then that that manager left and a new one came in…'

As support form NT Corrections ceased, the Kurdiji were able to secure further support from Mary Spiers Williams, a criminologist and lawyer who was then studying community courts in the NT, including at the Warlpiri communities of Lajamanu and Yuendumu. Spiers Williams assisted the group with advocacy in 2007 and 2008. This was a difficult time for the Kurdiji as it coincided with the NT Intervention and disruption to the public administration system they had worked hard to familiarise themselves with: the quantitative trend cited above shows a corresponding slide back into higher offending during this period.

However, the Kurdiji remained in touch with the former case manager. When she changed jobs to work at NAAJA, she identified an opportunity to secure further support for the Warlpiri leaders whose commitment had inspired her: '…That was what pushed me, that was why it was a priority when I came to Darwin to NAAJA, it was one of the first things I mentioned … was that this is what corrections were doing in this space: there's a really strong group of elders down there who are really keen and enthusiastic about being involved in that space.' She did a trip out to Lajamanu from NAAJA's Katherine office and met with the Kurdiji. Shortly afterward, NAAJA agreed to formally support the Kurdiji with facilitation, advocacy and some fundraising assistance – the framework for the current iteration of collaboration with the criminal justice system described above.

Another avenue through which the Kurdiji were able to secure support was from the CLC, a statutory authority established under the *Aboriginal Land Rights (Northern Territory) Act 1976*. The CLC was established in 1977 and represents First Nations Australians in the southern half of the NT with regard to both land rights and native title rights, however it also has a longstanding interest in community and economic development as well as advocacy. In 2011 the CLC secured funding from the Commonwealth Government, intended to improve governance at Remote Service Delivery Sites, including Lajamanu.[101] From the outset, the CLC's Lajamanu Governance Project worked with the existing Kurdiji group.[102] Through this collaboration the CLC and the Kurdiji were able to recommence much of the advocacy work that had been intended for the group under the original Aboriginal Justice Strategy in 1998: including,

101 Department of Prime Minister and Cabinet, 'Closing the Gap: Prime Minister's Report 2018', 126.

102 Roche and Ensor, 'Independent Evaluation', 85.

for example, the advocacy around liquor sales at the Top Springs Roadhouse outlined above.[103]

On the ground in Lajamanu, there is evidence that the funding and support received by the Kurdiji from both NAAJA and the CLC has been strategically managed by the Warlpiri leaders to achieve an outsized effect. A good example of this is the Kurdiji building. One outcome of the Lajamanu Governance Project was that the CLC and Kurdiji were able to use GMAAAC royalties to fund the construction of a Kurdiji building in 2013. Many Warlpiri attested to me the significance of this space in the context of both genuine and equal collaboration with the *kardiya* criminal law and also their authority to resolve disputes in Lajamanu. This was a view that resonated strongly with me personally having spent the past months accompanying other First Nations leaders in other communities, doing similar work and trying to escape the heat and dust under the shade of trees, on people's verandas or in vehicles: by contrast, the official building, with a sign out the front, was a compelling projection of authority. This view was also reported by the independent evaluation from La Trobe University, which the CLC commissioned to study its work: 'A view expressed to the Review Team is that the Kurdiji building is more important to the group at a symbolic level (about legitimacy, voice and control) than at a practical level (as a venue to meet). It was reported that the Kurdiji building has coalesced a sense of identity and reinforces the legitimacy of the group'.[104]

The above example demonstrates the strategic significance of securing long term funding. Street-level policy leaders, from NT Corrections, NAAJA and the Central Land Council all played a role in supporting the Kurdiji in this regard. This is an important

103 Roche and Ensor, 'Independent Evaluation', 88.

104 Roche and Ensor, 'Independent Evaluation', 92.

empirical observation to take forward into my theory building. Certainly, the case study of Lajamanu is overwhelmingly evidence of resilient Warlpiri leadership and initiative. There is strong evidence of disruption, caused by instability in public administration, which these First Nations leaders have had to overcome. One important way that the Kurdiji, in drawing theoretical conclusions for a generally applicable model, it is important to note that this leadership has been enabled at key moments by entrepreneurial leaders within the broader framework of governance and criminal justice. This is in part attributable to the strategic vision of the Kurdiji in inspiring collaborators. It is also important to note an observation by the La Trobe evaluation of the CLC collaboration, that the approach taken by these policy leaders to collaboration was significant and contextually specific to Lajamanu. Key elements included: 'self-awareness and an ability for ongoing critical reflection; an ability to follow peoples articulated views through active listening and to work at their pace, avoiding the temptation to prioritise personal views or take over responsibility for actions which could be more easily done by the co-ordinator.'[105] This less-is-more approach to enabling self-determination undertaken by policy leaders alongside the Kurdiji in Lajamanu is evidence of the need for policy leaders to manage a dynamic relationship with their context in a similar manner to the First Nations leaders. A significant conclusion to take forward into my theory building is that the success of the collaboration likely rests on the successful management of the dynamic relationship with the specific local context.

e) Conclusion:

This Chapter's inductive process-trace of *how* the Kurdiji Community Justice Group worked at the street-level to reduce incarceration in Lajamanu has produced a more

105 Roche and Ensor, 'Independent Evaluation', 93.

nuanced account that that offered by national level studies of the policy response to First Nations incarceration from 1991. Both the apparent success in Lajamanu and the well-evidenced and widely-attributed contribution of the Kurdiji are important empirical observations that defy the national trends and associated commentary and literature. Certainly, both observations caution against dismissing the policy response and its focus upon empowerment and self-determination as an unqualified failure. I argue that the observations also caution against an over reliance upon national and state or territory level quantitative data and associated probabilistic methods, especially in the context of the local heterogeneity and limitations upon data-gathering that characterize First Nations Australia.[106]

The causes of First Nations incarceration identified within the existing literature in Chapter Two of this thesis were all present in Lajamanu: Warlpiri presence on Gurindji traditional country Lajamanu is the product of colonial dispossession and forced migration; the Lajamanu community continues to grapple with alcohol and substance abuse; and Lajamanu's youth have been touched by the anomie born of disadvantage and marginalisation. These causes of incarceration were present in Lajamanu in 1991 and have not lessened in the intervening period. Lajamanu's success in reducing incarceration has not been due to the absence of its causes but due to actions taken by leaders to mitigate and overcome them. A probabilistic approach to causation that focused upon the relative importance of the causes of incarceration would risk underemphasising this agency by leaders. But, in a process trace that gathers evidence for a causal logic, between the community justice group and an effect upon incarceration, the work of leaders is foregrounded: Warlpiri and Gurindji leaders have

106 Cf: Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Canberra: Aboriginal Studies Press, 2014).

innovated and collaborated to overcome the damage of dispossession and resettlement to their political and legal cultural traditions; Kurdiji leaders continue to resolve disputes caused by alcohol and advocate regulation change; and Kurdiji leaders have responded innovatively to use concepts from within their own ceremonies to build resilience in the face of anomie.

The empirical account from Lajamanu confirms the relevance of the dynamic and iterative understanding of governance that I apply in this thesis: van der Steen and colleagues' conception of governance that succeeds or fails in the relations between policymaking and autonomous organisation within a layered system. [107] I argue that both the success and resilience of the Kurdiji in Lajamanu can only be fully explained through their dynamic and iterative relationship with several autonomous organisations within criminal justice, including: the NT Police, NT Corrections Service, NAAJA and the CLC, as well as the NT and Commonwealth Governments. However, the evidence from Lajamanu suggests that in the context of First Nations Australia the successful governance relied far more upon the ability of local leaders to manage these relationships that it did upon the policy core in either the NT of Commonwealth Governments. Following the initial policy response, it was local Warlpiri leaders or street-level policy leaders who took the initiative to continue collaborating and to secure funding. This is a change of emphasis from the original work of Van der Steen and colleagues, which focused upon interventions by the policy core in the context of failing Dutch education programs. [108] But, I argue that it is not theoretically inconsistent

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107 Martjin van der Steen et al., 'How to See Failure: Attempts by the Inspectorate of Education to Detect and Disarm Failure in Dutch Education Policy', *Public Policy and Administration* 30, no. 3–4 (2015): 324.

108 van der Steen et al., 'How to See Failure', 327–35.

with their concept: the initiative is coming from leaders on the other side of the relationship.

Finally process-tracing the mechanism of policy effect in Lajamanu has confirmed the relevance of the three generic leadership tasks that I developed form the public policy literature on local leadership and the case specific literature of causes of First Nations incarceration. Each of these tasks is necessary if empowered leaders are to have the effect upon First Nations incarceration that the Royal Commission envisaged, and the policy response intended. In the following section of this Chapter I refine the empirical observations collected against these generic tasks further to form a mid-range theory of the mechanism of policy effect that I can apply generally to local cases within the policy response to First Nations incarceration in Chapter Six.

V. Theorising the Mechanism of Policy Effect

In this final part of the Chapter, I refine the empirical account of how the policy response to First Nations incarceration took effect in Lajamanu into a theoretical model that can be applied to provide insights in other First Nations communities. As in Chapter Four, I do this by employing the heuristic device of a causal mechanism, broken down into 'interlocking steps that transmit causal powers of forces' between the policies that empower First Nations leaders (the *cause*) and the effect upon incarceration rates (the *effect*).[109] Each of the steps in the mechanism is described in terms of *entities* – including actors, organizations or structures – that engage in activities. [110] These steps comprise the theoretical mechanism of policy effect that I argue is generally applicable to explain

[109] Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 263.

[110] Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 263; citing: Machamer, Darden, and Craver, 'Thinking about Mechanisms'; Machamer, 'Activities and Causation: The Metaphysics and Epistemology of Mechanisms'.

the *how* the policy response operated, or broke down and did not operate, across Australian First Nations communities.

Alongside the entities and activities that comprise the causal mechanism, I identify two further groups of causal factors that are not generally applicable but contextually sensitive, varying from case to case. The first of these groups of causal factors comprises what process-tracing scholars label *contextual conditions*, which refers referring to factors that operate upon the causal mechanism. From the empirical account of Lajamanu I identify three: access to funding, stability in public-administration; and the presence of local Indigenous corporations. Where these contextual conditions are present, they enhance the operation of the causal mechanism; where they are not, its operation will be frustrated. The second group of case-specific rather than generalisable causal factors that I understand to operate outside my theory of the mechanism of policy effect includes the other causes of First Nations incarceration identified in the existing literature, including colonial legacies, substance abuse and anomie caused by disadvantage. These causes of First Nations incarceration operate externally to the mechanism of policy effect, but they are relevant as they operate in the same First Nations communities and their causal effect may overwhelm or disguise that of the policy response.

As I have argued in Chapter One, this explicit unpacking of the causal process is central to the contribution that process-tracing studies can make alongside those employing other methodologies. In laying out the causal logic that we use to link the steps identified in the empirical material process-tracing scholars invite healthy contestation of 'what actually happened', rather than treating causation as 'an analytical

black box.' [111] My theoretical model of how the empowerment of First Nations leaders takes effect upon First Nations incarceration is represented in Figure 6.1 Below, I will briefly outline: first, how each of the steps in the mechanism is informed by the empirical experience of Lajamanu outlined above; and second, how the logic linking each step is justified by the relevant theoretical literature in public policy studies and criminology.

a) Step 1 and 2: 1. First Nations leaders and local policy leaders build public confidence in their leadership, consistent with prevailing legal norms; 2. local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law.

Step 1 and 2 of the mechanism relate to the actions taken by both First Nations leaders and local policy leaders prior to collaborating to reduce incarceration. It is clear from the empirical account from Lajamanu above, that prior to collaborating these leaders were concerned to confirm their own authority. In order to articulate this empirical experience in terms that form a generalisable theory, I have drawn several concepts from relevant literature: first, the criminological concept of legal pluralism, which is why Step 1 and 2 are separated; and second, the concept of 'building public confidence', which draws upon theories of the rule of law.

1. Legal pluralism

The concept underpinning Steps 1 and 2 of my model of how the policy response took effect in First Nations communities is legal pluralism. Legal pluralism is used by legal scholars to describe the situation where two legal systems co-exist and operate

111 Reykers and Beach, 'Process Tracing as a Tool to Analyse Discretion', 256.

alongside each other in a particular place. [112] The empirical fact of two separate legal systems operating in Lajamanu is readily apparent from the causal account above and is inherent in the oft-repeated strategy of the Kurdiji to 'bring the two laws together'. Pimnetal has observed that legal pluralism is a common outcome of colonization, making it 'a reality for millennia, undoubtedly dating back to the first examples of invasion and occupation'; an example is apparent in the Bible's New Testament, 'which confirms that Roman authority was asserted as superior to Jewish law in Israel'.[113] Legal pluralism has been commonly observed across former British colonies, where Indigenous legal systems were generally permitted to function if they did not contradict British legal norms.[114] Forsyth, a leading scholar of legal pluralism in Pacific nations, describes 'the existence of normative legal systems operative independently or semi-independently from the State' as being 'an empirical reality in almost every decolonised country in the world.' [115]

The question of whether to characterise the normative legal systems operating in Australia's first nations communities as 'law' remains a vexed one, both within the legal pluralism literature and Australian jurisprudence.[116] I have noted above that, despite the acknowledgement of legal pluralism in Law Reform Commission reports and

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112 David Pimentel, 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?', *Harvard International Review* 32, no. 2 (2010): 32.

113 Pimentel, 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?', 32.

114 See 'Repugnancy Clauses' Pimentel, 32.

115 Miranda Forsyth, *A Bird That Flies with Two Wings: Kastom and State Justice in Vanuatu* (Canberra: ANU E-Press, 2009), 29; citing, Franz von Benda-Beckmann, 'Some Comparative Generalizations about the Differential Use of State and Folk Institutions of Dispute Settlement', in *People's Law and State Law*, ed. Anthony Allott and Gordon R. Woodman (Berlin, New York: De Gruyter Mouton, 1985), 187–206; Sally Falk Moore, 'Treating Law and Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts', *Law and Society Review* 26, no. 1 (1992): 11–46; see also: Miranda Forsyth, 'Legal Pluralism: The Regulation of Traditional Medicine in the Cook Islands', in *Regulatory Theory: Foundations and Applications* (Canberra: ANU E-Press, 2017), 233–46.

116 Forsyth, *A Bird That Flies with Two Wings*, 38.

Australian property law, pre-colonial First Nations legal concepts have not been formally recognised within Australian criminal law.[117] I do not intend to resolve that question here. I argue that creating a binary distinction between laws and non-laws risks ignoring the evident practical effects that parallel systems of legal norms continue to have regardless of formal characterisation. Forsyth advances a spectrum of potential arrangements in response to legal pluralism from complete denial by the State system of the alternate to total incorporation.[118] She characterises Australia's legal relationship with First Nations as being within the middle of this spectrum, with 'no formal recognition but active encouragement of a non-state justice system by the state.'[119] Forsyth cites the example of Community Justice Groups in the NT and Queensland, such as the Kurdiji, as evidence for her characterization.[120]

The dynamic tension in this arrangement that Forsyth has identified as characterising Australian legal pluralism provides the frame for my theory of the mechanism of policy effect. She suggests that it raises three questions that will vary between contexts:

1. What kind of informal relationships should be fostered and with whom – that is, who are the people/institutions with the best potential to act as bridges between systems?
2. What level of formality should there be in the regulation of those relationships or linkages – that is, a written policy or left to the discretion of people in the position of 'gate-keepers', for example, the police?

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117 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Law'; Martin, 'Customary Law - Northern Territory'; William Jonas, 'The Recognition of Aboriginal Customary Law' (Sydney: Human Rights and Equal Opportunity Commission and International Lawyers Association (Australian Division) Workshop, 20 November 2003).

118 Forsyth, *A Bird That Flies with Two Wings*, 205–8.

119 Forsyth, *A Bird That Flies with Two Wings,* 208.

120 Forsyth, *A Bird That Flies with Two Wings,* 208.

3. Would people working for the non-state justice system be financed by the State and, if so, how?

Forsyth suggests that the potential problems arising from these three questions can be managed through 'an active dialogue between the systems', which resonates with my dynamic understanding of governance.[121]

2. Public Confidence

The second concept I utilise in *Step 1* and *Step 2* of my theory of policy effect is public confidence in the judiciary. This concept is drawn directly from the jurisprudence that outlines the doctrine of the rule of law in Australia. While the concept of public confidence is rarely defined by Australian jurists, it is prominently referenced in their reasoning as the mechanism through which the rule of law takes effect. Then Chief Justice of the High Court of Australia Murray Gleeson described in 2002 that: 'judges, individually and collectively, attach great importance to maintaining the confidence of the public. (In the term "judges" I include all judicial officers). Public confidence is invoked as a guiding principle in relation to the conduct of judges, on and off the bench, and in relation to the institutional conduct of courts.'[122] This prominence is a compelling factor for me in including this concept in my theory.

Policy leaders within criminal justice in Australia operate within a framework based upon the doctrine of the rule of law form which I have drawn the concept of public confidence. First Nations leaders draw upon different cultural traditions, and will necessarily build confidence in a manner that is consistent with those traditions. Evidence for the public confidence that Chief Justice Gleeson is describing should be readily attainable at the street-level in a community. Certainly, it should be revealed

121 Forsyth, 'Legal Pluralism', 209.

122 Gleeson, 'Confidence in the Judiciary'.

through a snow-ball interviewing technique with community members: if local respondents don't have knowledge of which local leaders would be best to talk to about issues concerning criminal justice, the necessarily level of public confidence is not present.

b) Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice.

Step three of my theoretical model of how polices take effect upon First Nations incarceration introduces two further concepts: first, the activity of collaboration and second the structure of procedural justice.

1. Collaboration

In every First Nations community I visited over the course of researching this thesis, community leaders and policy leaders were collaborating to some degree. This raises an important question: what was the difference in Lajamanu? In part, the difference may be explained by leaders having built higher levels of public confidence in Steps 1 and 2. But, I argue that there is also a qualitative dimension to the collaboration in Lajamanu that should be incorporated into the theory: a high level of trust between across the plural legal systems. I find Neustadt's conception of leading with a 'sense of purpose', which I used to assess evidence leadership at the elite level in Chapter 4, to resonate again: the sense of purpose is evident 'in irreversible commitments to define courses of action' that are 'so plain and so direct' that they cannot be taken back.'[123] There are irreversible commitments evident in the collaboration in Lajamanu. In sitting in the courtroom or lunching with the Magistrate, First Nations leaders make an irreversible commitment to the criminal justice system in that their authority would be greatly

123 Neustadt, *Presidential Power and the Modern Presidents*, 168.

damaged if the court were to subsequently be seen to commit an injustice. Similarly, given that Australian criminal law does not formally recognise the Warlpiri legal framework from which the Kurdiji derive their authority, local police leaders and judicial officers make an irreversible commitment in supporting the Kurdiji dispute resolution I describe below in the sense that they would highly-likely suffer professional consequences if those processes got out of control and resulted in the breaking of the criminal law. These irreversible commitments are compelling evidence of confidence and trust in a resilient relationship between First Nations leaders and those within criminal justice.

2. Procedural Justice

Collaboration between First Nations and policy leaders alone does not explain increased compliance with criminal laws. However, the empirical account of how the collaboration led by the Kurdiji in Lajamanu has reduced incarceration resonates with a theoretical literature in criminology concerning procedural justice.[124] There has long been debate among criminologists over why people obey the law. In particular, there is a longstanding dispute between instrumentalist theorists who argue people obey the law to avoid harsh penalties and normative theorists who obey the law because they feel a moral obligation to do so.[125] There is some evidence in Lajamanu to suggest that collaboration between Kurdiji leaders and police has increased the instrumental power of criminal justice in terms of social sanctions imposed upon offenders by the community. However the greater of weight of evidence suggests that collaboration has qualitatively improved the normative effect of the criminal law.

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124 Kristina Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance', in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (Canberra: ANU Press, 2017), 43–58.

125 See: Tom Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990).

The concept of procedural justice operationalises the causal impact of that 'the quality of treatment' and the 'quality of decision-making' that a person receives from a legal authority has upon their likelihood to comply with the law.[126] Murphy argues that this 'involves more than a regulator just being nice to people' and is typically defined by: *respect*, with research showing that citizens are particularly sensitive to perceived disrespectful treatment from authorities;[127] *neutrality*, with decisions being based on consistently applied legal rules; *trustworthiness*, which is communicated when authorities 'communicate their trustworthiness and fairness when they listen to people's accounts and explain or justify their actions in ways that show an awareness of and sensitivity to people's needs and concerns'; and *voice,* where people have an opportunity to 'voice concerns and issues to authority'.[128] Murphy also argues that an established perception of procedural justice can be undermined 'ignoring an individual's grievances or concerns in unlikely to foster a sense that the authority has used procedural justice.'[129]

The relevance of the concept of procedural justice to a post-colonial context that like of First Nations Australia is reinforced by a related literature that argues that a citizens social identity is also relevant.[130] These 'group engagement' or 'group value' models of procedural justice have sought to incorporate notions of identity into the

126 Murphy, 'Procedural Justice ', 48.

127 Murphy, 'Procedural Justice' 46; see also: Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders', *Law and Human Behaviour* 28 (2004): 187–209.

128 Murphy, 'Procedural Justice, 46–47.

129 Murphy, 'Procedural Justice', 47.

130 Michael Wenzel, 'The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers Identity', *Journal of Applied Psychology* 87 (2002): 629–45; Steven Blader and Tom Tyler, 'Testing and Expanding the Group Engagement Model', *Journal of Applied Psychology* 94 (2009): 445–64.

concept. [131] This collective perception of procedural justice resonates strongly with the Kurdiji's understanding of 'bringing the two laws together' and the causal impact of their collaboration upon an improved perception of the processes of criminal justice among Warlpiri people.

c) Step 4: Increased procedural justice increases compliance with criminal justice and First Nations legal norms.

Step 4 relies upon the same concept of procedural justice as Step 3. There is a weight of scholarship in criminology establishing the causal effect of procedural justice in increased compliance with the law, using self-reporting surveys, interviews and observational methodologies.[132] While most of these studies focus on policing, they have also found evidence for the impact of procedural justice in the context of prisons, tax avoidance and nursing home regulation.[133] Both interviews and participation in a Kurdiji dispute resolution meeting provided evidence for the causal effect of procedural justice in Lajamanu. I anticipate that evidence of Step 4's operation would be readily available in other cases, both in terms of interview and observational data and a corresponding impact upon incarceration rates.

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131 Blader and Tyler, 'Testing and Expanding the Group Engagement Model'; E. Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

132 Lyn Hinds and Kristina Murphy, 'Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy', *Australian and New Zealand Journal of Criminology* 40 (2007): 27–42; Kristina Murphy, Lyn Hinds, and Robyn Fleming, 'Encouraging Public Cooperation and Support for Police', *Policing and Society* 18 (2008): 138–57; Jason Sunshine and Tom Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing', *Law and Society Review* 37 (2003): 513–47; Tyler, *Why People Obey the Law*; John David McCluskey, *Police Requests for Compliance: Coercive and Procedurally Just Tactics* (New York: LFB Scholarly, 2003).

133 John Braithwaite and Toni Makkai, 'Trust and Compliance', *Policing and Society* 4 (1994): 1–12; Michael D. Reisig and Gorazd Mesko, 'Procedural Justice, Legitimacy and Prisoner Misconduct', *Psychology, Crime and Law* 15 (2009): 41–59; Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders'; Kristina Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy and Tax Non-Compliance', *Journal of Law and Society* 32 (2005): 562–89; Michael Wenzel, 'A Letter from the Tax Office: Compliance Effects of Informational and Interpersonal Justice', *Social Justice Research* 19 (2006): 345–64.

As represented in Figure 6.1, two other causes of First Nations incarceration are relevant to consider with regard to Step 4, as they are potentially operating alongside the policy response and may overwhelm or offset any decreases in incarceration achieved by causing simultaneous increases: substance abuse and anomie caused by disadvantage. Both of these causes were evident in Lajamanu and had been the subject of a specific response by the Kurdiji and local policy leaders. In Lajamanu, increases in incarceration caused by these two factors were smaller than the reductions caused through the collaboration. This cannot be assumed in future applications of the theory so a case-specific effect of these two other causes must be accounted for in the application.

d) Step 5: Leaders strategically secure long-term funding for a sustained approach.

The final step in my theory of how the policy response to First Nations incarceration took effect does not require further theorisation: the terms it employs are applied consistently with their usual meaning. But the experience in Lajamanu suggests that it is a crucial and distinct final stage in the mechanism and is a potential discrete point of failure. In Lajamanu, this final step is where policy leaders made their greatest contribution, restoring funding after periods when it had been lost. Two contextual conditions are notably relevant to this step: the presence of local First Nations corporations and access to funding. These two conditions are linked – an Indigenous corporations is frequently required to receive grant funding – but they represent separate potential points of failure for the mechanism. As such, I carry these two conditions forward within my theory. I anticipate that both the presence of local First Nations corporations and sources of funding will usually be publicly evident in First Nations communities.

v. Conclusion

In this Chapter I have used an inductive method to build a theory of how the policy response to First Nations incarceration took effect in communities from the experience of Lajamanu in the NT. In the following Chapter, I apply this theory deductively: first, to two further communities that successfully reduced First Nations incarceration, Redfern and Bourke in New South Wales; second, to three further cases that did not succeed in reducing incarceration, Dubbo, Wadeye and Darwin, in order to identify where the mechanism broke down.

Chapter Six: Where did the Mechanism of Policy Effect break down?

In this Chapter I take the theoretical mechanism of *how* the policy response to First Nations incarceration took effect on the ground in communities and apply it. As with my application of the theoretical mechanism of policy change in Chapter Five, my purpose in tracing the mechanism in further case studies is to gain insights into where it may have broken down. To achieve this, I again seek to compare cases where the mechanism functioned (i.e. cases where the policy response achieved reductions in incarceration) against those in which it broke down (i.e. cases where the policy response did not reduce incarceration). However, my case-selection strategy in this Chapter is different from that employed in Chapter Four. In developing my theoretical mechanism of policy change with regard to the policy response at the elite-level, I drew upon a well-established literature in public policy theory but was limited to a small number of temporally defined case studies. In developing a theoretical mechanism of policy effect with regard to the policy response at the local level, the challenge is reversed: the heterogeneity of First Nations Australia presents a large number of local case studies, but the theoretical literature on how criminal justice policy takes effect is limited.

Figure 6.1 Mechanism of Policy Effect: Empowerment of First Nations leaders within criminal justice					
Constituent Steps	Step 1: First Nations leaders build public confidence in their leadership, consistent with prevailing legal norms.	Step 2: Local policy leaders build public confidence in their leadership, consistent with doctrine of the rule of law.	Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice	Step 4: Increased procedural justice increases compliance with criminal justice and First Nations legal norms.	Step 5: Leaders strategically securing long-term funding for a sustained approach.
***Contextual Conditions* (if absent, will undermine the mechanism)**	• Local Indigenous corporations • Access to funding	• Stability in public administration	• Stability in public administration	• Stability in public administration	• Local Indigenous corporations • Access to funding
Case-specific causes of incarceration (operating alongside the mechanism)	• Social disorganisation caused by colonisation.	• Substantive inequality in criminal justice • Distrust caused by historical injustice	• Distrust caused by historical injustice	• Substance abuse • Anomie caused by disadvantage	• Social disorganisation caused by colonisation.
Predicted evidence of mechanisms operation	• Necessary level of public confidence should be readily evident from conversations with community members.	• Necessary level of public confidence should be readily evident from conversations with community members.	• The necessary level of collaboration requires 'irreversible commitments', evidenced in actions.	• Reductions in First nations offending, court appearances and incarceration.	• Evidence in sources of funding, length of continuous operation and in prospects of future funding.
Relevant Test	*Hoop Test*: presence affirms but does not confirm operation; absence eliminates it.	*Hoop Test*: presence affirms but does not confirm operation; absence eliminates it.	*Smoking Gun:* presence confirms hypothesis; absence weakens it; absence of any collaboration would operate as a *Hoop Test.*	*Straw-in-the-wind:* reduction in incarceration affirms hypothesis but does not confirm; increase could be due to other case-specific causes.	*Hoop Test*: presence affirms but does not confirm operation; absence eliminates it.

As introduced in Chapter One, it is not the ambition of this thesis nor is it feasible within my small-*n* process-tracing method, to study the mechanism of empowered leadership across a representative sample of First Nations communities. Nevertheless, I consider that further applications of the theory are required to strengthen it into mid-range causal model that can be usefully applied to provide insights into how the policy response took effect across First Nations Australia: the heterogeneous policy domain of any future response to First Nations incarceration. This is for two reasons. Lajamanu is one of several hundred diverse First Nations Communities and it is both notably remote and, being mostly Warlpiri speaking, notably culturally homogenous. Adopting the three-part categorisation of First Nations Australia commonly used in Australian Government service provision, it necessary to also consider *regional* and *urban* communities as well as *remote* ones before a theory can be considered broadly applicable.[1] This necessity is strengthened by the fact that, unlike for my modelling of policy change in Chapter Four, I was not able to draw upon established public policy theories of how criminal justice policy takes effect: the theoretical mechanism from Chapter Six has been built inductively drawing together criminology and jurisprudence as well as political science to explain each step. In this Chapter, I test that explanation through deductive application to further local cases.

In this Chapter, I apply the explanation built upon the experience of Lajamanu to five further local case studies: Redfern, an urban community in

[1] These three categories are defined in Parts I and II of Schedule 2 of the *Income Tax Assessment Act 1936* (Cth).

Sydney NSW; Bourke, a large remote community in far Western NSW; Wadeye, the largest remote community in the NT; Darwin, an urban community in the NT; and Dubbo, a regional community in NSW. I do not consider the collective experience of these six communities fully representative of First Nations Australia. Nor do I argue that the experience of these six communities can fully explain why incarceration rose in a seventh. Inevitably, my methodological reliance upon data gathering through interviews and street-level participatory research is constrained by logistical realities. In this context, I argue that the experience of these six communities is sufficient to inform my more modest project: building a theoretical mechanism of how the policy response operated in the context of rising incarceration, that may be generally applied to provide insights where that mechanism may have broken down. I offer such an explanation as a starting point that may hopefully be refined through further application beyond this thesis in the future.

This Chapter proceeds in two parts. First, I process-trace the mechanism of policy effect in two cases that successfully reduced rates of First Nations incarceration: Redfern and Bourke. In these cases, I am expecting each step of the theoretical mechanism to be evident. Second, I process-trace the mechanism of policy effect in three cases that did not reduce rates of First Nations incarceration: Wadeye, Darwin and Dubbo. In these cases I am seeking to identify where the mechanism broke down. From the comparison between these cases, I draw insights into both the specific question of whether empowering local First Nations within criminal justice was an effective principal-agent

delegation and the broader question of what role the machinery of government had upon the success of the policy response.

I. Deductive Process-Tracing: Testing the explanation of policy effect

Before proceeding to the local case studies, it is necessary to briefly outline my use of deductive process-tracing in this Chapter, which differs from the inductive method employed in the previous Chapter and, due to the greater availability of cases at the local level, the deductive method I employed in Chapter Four. A deductive process-trace works from the theoretical explanation back towards the empirical material to 'test' for the presence of each step in the logical chain I am relying on to explain policy effect. It does so by assessing the available evidence in a case against our expectation of the evidence we should find if the mechanism was operating. [2] As in my prior assessments of the other causal theories of rising incarceration and the mechanism of policy change, I employ four tests drawn from the work of both Van Evera[3] and Bennett[4] (see Figure 2.1 in Chapter Two) to draw causal inferences from the available evidence. It is worth reiterating that I do not consider the causal inferences generated by these tests to provide an exhaustive causal story of the rise in First Nations incarceration or the performance of the policy response in the local cases in this

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2 Yf Reykers and Derek Beach, 'Process Tracing as a Tool to Analyse Discretion', in *The Principal Agent Model and the European Union*, ed. Tom Delreux and Johan Adriaensen, 2017, 268.

3 Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997) at 31-2.

4 Andrew Bennett, 'Chapter 10: Process Tracing and Causal Inference', in *Rethinking Social Inquiry Diverse Tools, Shared Standards: 2nd Revised Edition*, ed. Henry E. Brady and David Collier (Lanham: Rowan and Littlefield, 2010), 210.

Chapter. The tests provide a useful method to structure judgements about the causal role of governance factors within the limitations of the available evidence.

Figure 6.1 above contains both a description of the evidence that I have predicted should be present if a step of the mechanism is operating and my suggested tests for drawing causal inferences from the presence or absence of this evidence.

In this Chapter I test for each step of the mechanism, against both my prior confidence in the mechanisms operation and any alternative explanations for the evidence found. As the mechanism is not theorised to be the only causal factor influencing First Nations incarceration I also account for the operation of other causes, listed for each step of the mechanism in Figure 6.1. Finally, I account for the operation of contextual conditions: unlike the generally applicable components of my explanation, these vary from case to case and are notably relevant to my consideration of the cases where the mechanism is expected to have broken down. Below I will outline the and justify the relevant test for each step of the mechanism of policy effect, before proceeding to the individual case studies.

Step One: First Nations leaders build public confidence in their leadership, consistent with prevailing legal norms.

If the first step of my suggested mechanism of policy effect is operating, I expect that the necessary level of public confidence in First Nations leaders will be readily evident at the street-level in a First Nations community. The presence

of leaders within a community may seem self-evident, but cannot be taken for granted following the destructive impact and the social disorganisation caused by colonisation. The relatively simple and high standard of expected evidence is necessitated by the role that public confidence is understood to play in the doctrine of the rule of law: a source of 'habitual conformity' with legal norms.[5] With regard to First Nations leaders, it is important to qualify that the prevailing legal norms likely differ in origin, if not content, from those of criminal justice; in Lajamanu, for example, the Kurdiji base their authority in Warlpiri law and culture. In each case, I have tested for this public authority through my snow-ball interviewing method at the local level. If I have not been readily directed to relevant First Nations leaders as being *the* representatives of the community to talk to with regard to criminal justice and First nations incarceration, I do not consider them to have established sufficient public confidence. I consider this a *hoop test*: if sufficient public confidence is not present then the first step of the causal mechanism is not operating in the case; if public confidence is present, it doesn't confirm the operation of the mechanism to the exclusion of other hypothesise, but it considerably affirms our confidence in its presence.

5 Justice Murray Gleeson, 'Confidence in the Judiciary' (Judicial Conference of Australia, Launceston, Tasmania, 27 April 2002).

Step Two: Local policy leaders build public confidence in their leadership consistent with doctrine of the rule of law.

For the second step of the causal mechanism I apply the same test to policy leaders within criminal justice. For these leaders the norms governing public confidence are prescribed within the rule of law, particularly formal equality in the administration of criminal justice. My experience has been that if there is a public perception that criminal justice is not being applied fairly in the community – for example, if particular police are considered racist – it will be readily apparent. Once again, I consider this a *hoop test*. If there is not public confidence that criminal justice is being administered with formal equality the mechanism of policy effect cannot operate to reduce substantive inequality. In such circumstances collaboration between First Nations leaders and policy leaders is not feasible.

Step Three: First Nations and local policy leaders collaborate to build public confidence in their leadership, consistent with doctrine of the rule of law.

This is the critical component of the mechanism of policy effect as it was understood by the Royal Commission and observed in Lajamanu: empowering First Nations leaders within criminal justice works to reduce incarceration through combining public confidence in First Nations leaders with that in criminal justice. The evidence I require to establish this step is specific. In Lajamanu I found that the notion of 'irreversible commitments' to be a

compelling measure. This is drawn from the work of Neustadt in studying leadership at the elite level; I also employ it at the elite level, within my mechanism of policy change in Chapter Four. I consider the concept of 'irreversible commitments to defined courses of action', the personal involvement of the leader, in terms 'so plain and so direct that politics – and history – will not let him(*sic*) turn back' to be equally applicable to leaders at the local level. [6] A simpler formulation of having 'sufficient skin in the game' serves to highlight this point, given the consequences of irreversible commitments going wrong at the local level are likely to be immediate for the leader in question, both in terms of their authority and potentially also their safety and that of their family. In Lajamanu I found evidence irreversible commitments in the collaborative actions of First Nations leaders, police and judicial officers, including participation in public court hearings, community meetings organised by First Nations leaders. It was the stakes of this collaboration, as well as its public nature, that made the commitment irreversible. I anticipate similar evidence should the mechanism operate in other cases.

I consider evidence of irreversible commitments between First Nations and policy leaders to collaborate and reduce incarceration to be a *smoking-gun* test of the operation of this step in the mechanism: if this evidence is found, the presence of the mechanism is confirmed; if it is not found, confidence in the mechanism is weakened. As irreversible commitment is a high standard, I consider that a secondary test may be conducted in the event this standard is not

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6 Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Basic Books, 1990), 168; cited in Nigel Bowles, *Nixon's Business: Authority and Power in Presidential Politics* (College Station, Texas: Texas A&M University Press, 2005) Chapter 1, Footnote 39.

met. Evidence of any attempt at collaboration may operate as a *hoop test*: if this is not in evidence, it may be said that the mechanism is not operating.

Step Four: Increased procedural justice increases compliance with criminal justice and First Nations legal norms.

As outlined in the previous chapter, this fourth step is drawn from the criminological theory of procedural justice. Procedural justice has been defined by Murphy and others as including: respect, referring to whether the authority respect people in their dealings and also their rights under law; neutrality, which involves making decisions consistently upon legal rules and principles, not personal opinions and biases; and trustworthiness, which is an indicator of whether the authority will be motivated to treat people in a fair manner.[7] Satisfying these criteria is understood to increase voluntary compliance with the law. The concept of procedural justice resonates strongly with Chief Justice Gleeson's understanding of how public confidence functions: 'what it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.'[8]

In assessing the operation of procedural justice, it is important to note the likely operation of two case-specific causes that are well established in the

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7 Kristina Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance', in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (Canberra: ANU Press, 2017), 47.

8 Gleeson, 'Confidence in the Judiciary'.

literature as increasing First Nations incarceration: substance abuse and the anomie caused by entrenched disadvantage. While the operation of these causes likely differs between local cases – and is thus not incorporated into my general explanation – there is evidence to suggest that they operate in many First Nations communities. Operating alongside the policy response, we must account for the possibility that these causes have drowned out or otherwise altered the effect of procedural justice. A reduction in incarceration thus operates as a *straw-in-the-wind* test of whether procedural justice is present in the case. Evidence of reduced incarceration affirms the hypothesis but does not confirm it and increasing incarceration could be due to these other case-specific causes. The relative weakness of this test is conceded. An unfortunate characteristic of the procedural justice literature has been the difficulty of empirically establishing its claims; nevertheless, as the previous makes chapter makes clear, the theory closely matches the empirical experience and stated logic of First Nations leaders in Lajamanu upon which this explanation is built.[9]

Step Five: Leaders strategically securing long-term funding for a sustained approach.

[9] Lyn Hinds and Kristina Murphy, 'Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy', *Australian and New Zealand Journal of Criminology* 40 (2007): 27–42; Kristina Murphy, Lyn Hinds, and Robyn Fleming, 'Encouraging Public Cooperation and Support for Police', *Policing and Society* 18 (2008): 138–57; Tom Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990); John David McCluskey, *Police Requests for Compliance: Coercive and Procedurally Just Tactics* (New York: LFB Scholarly, 2003).

The final step in my explanation of policy effect goes to the longevity of action at the local level. After losing funding between 2003 and 2005, the Kurdiji leaders in Lajamanu spent most of their effort in securing future funding. Following the expiry of the initial policy response to First Nations incarceration, it is clear from the Lajamanu experience that the onus is upon First Nations leaders to secure funding, even if it takes the form of Government grants. I consider this to operate as a *hoop test*. If programs are not funded, they eventually cease operation: if there is no evidence of strategic funding the mechanism will not operate for long. Two related contextual conditions are relevant here: first, the availability of funding, especially through government grants; and second, the presence of local Indigenous corporations. As outlined in Chapter One, in the complex public administration of the First Nations policy domain in Australia the Commonwealth is able to directly fund local Indigenous corporations and has traditionally relied upon this to implement programs. In the case of Lajamanu both the CLC and traditional owner corporations play this role: the CLC, in receiving the Commonwealth grant to support the Kurdiji from 2011; traditional owners, in the distribution of royalty moneys to the Kurdiji. The absence of functioning Indigenous corporations with capacity to be involved in initiatives to reduce incarceration is thus an important contextual condition for this mechanism.

II. Redfern (NSW)

The Redfern Aboriginal community in Sydney is one of Australia's most prominent urban First Nations Communities. Located in the suburb of Redfern, the community is popularly associated with 'The Block', an area bordered by

Eveleigh, Caroline and Vine Streets where the Aboriginal Housing Company was granted property by the Whitlam Government in 1973.[10] At the time of the Royal Commission, Redfern was notorious in both First Nations and settler Australian communities as a site of ongoing hostility between First Nations Australians and police. However, from 2009 collaboration between First Nations leaders and local police has achieved significant reductions in offending and incarceration. A centrepiece of this collaboration is the *Clean Slate Without Prejudice* project, a program run by the Tribal Warrior First Nations corporation and Redfern Local Area Police Command to divert at risk youth from the criminal justice system through fitness, boxing and mentorship.

Urban Redfern, in central Sydney in NSW, is a very different First Nations community to remote Lajamanu in the Tanami desert of the NT. The success of the Redfern First Nations and policy leaders in reducing incarceration presents an opportunity to test and refine the explanation of policy effect I have built from the experience of Lajamanu. Below I outline the historical context of the Redfern First Nations community before assessing the available evidence for each step of my explanation of the policy effect mechanism.

a) Historical Context of the Redfern First Nations Community

The suburb of Redfern is located on the land of the Gadigal people, a clan of the Eora nation.[11] The early colonial history of Sydney had a devastating effect upon

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10 See: Chris Cunneen, 'Aboriginal-Police Relations in Redfern: With Special Reference to the "Police Raid" of 8 February 1990', Report Commissioned by the National Inquiry into Racist Violence (Sydney: Human Rights and Equal Opportunities Commission, May 1990), 1.

11 Val Attenbrow, *Sydney's Aboriginal Past: Investigating the Archaeological and Historical Records* (Sydney: University of New South Wales Press/New South Publishing, 2010), 13.

Eora people. Of the 50 to 60 Gadigal traditional owners of Redfern who were recorded as being in residence in 1788, only three are thought to have survived the smallpox epidemic and remained alive to be recorded in 1791.[12] Three themes from Bourke's history resonate with contemporary leadership in criminal justice: resistance to violent dispossession; segregation and activism; and recent conflict with police.

1. Resistance to Violent Dispossession

By 1789 a guerrilla war was being fought on the outskirts of Sydney, which escalated in 1791 and was being 'waged in earnest between 1797 and 1805. On the First Nations side the fighting was being led by the Eora leader Pemulwuy, and his son Tedbury; among the colonists, the violence began with individual actions by convicts and settlers but soon gained official authorisation.[13] At the peak of his struggle, Pemulwuy's forces were joined by some British escapees, such as William Knight and Thomas Thrush.[14] On 2 June 1802, Pemulwuy was killed after Governing King put a considerable reward upon his head.[15] His body was subsequently decapitated, and his head was sent to Sir Joseph Banks in England, where it was kept in the Natural History Museum: a source of ongoing grievance for First Nations Australians.

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12 James Kohen, *The Darug and Their Neighbours: The Traditional Aboriginal Owners of the Sydney Region* (Blacktown, NSW: Darug Link and Blacktown and District Historical Society, 1993), 15.

13 Attenbrow, *Sydney's Aboriginal Past*, 15.

14 See: 'New South Wales Government General Standing Orders 1802' (State Library of New South Wales, 22 November 1801), 68.

15 See: 'New South Wales Government General Standing Orders', 68.

The legacy of Pemulwuy's resistance remains strong in NSW and particularly in Redfern. He is remembered among First Nations Australia as a heroic figure and there has been a high profile campaign to locate and return his severed head from the United Kingdom. Telling evidence of Pemulwuy's significance lies in his continued memorialisation in Redfern: in 1993, a new park in the centre of Redfern (85-121 Eveleigh Street) was named Pemulwuy Park and became a significant community meeting place;[16] when the Aboriginal Housing Corporation announced a major redevelopment of 'the Block' in Redfern in 2014 it named the named its work 'the Pemulwuy Project'.[17]

2. Segregation and Activism

As the city of Sydney expanded, First Nations traditional owners were increasingly forced away from the Redfern area. At first this process was informal but in the 1880s it became Government policy to remove First Nations people from urban locations; this was formalised in 1883 with the establishment of the Aborigines Protection Board (APB), which established Aboriginal Reserves (or missions), formally segregating First Nations people from other Australians.[18] In the first half of the twentieth century, many First Nations people in NSW sought to escape the mission system through work opportunities: 'they

16 City of Sydney, 'History of Pemulwuy Park' (Sydney: City of Sydney, 27 March 2013), https://www.cityofsydney.nsw.gov.au/histories-local-parks-playgrounds/history-pemulwuy-park.

17 Aboriginal Housing Company Limited, 'What Is the Pemulwuy Project?', 2014, https://www.ahc.org.au/pemulwuy/.

18 Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Sydney: Human Rights and Equal Opportunities Commission, 1997),

migrated between Salt Pan Creek, La Perouse and then Redfern in search of work and a better quality of life.'[19]

From the 1920s First Nations Australians were increasingly drawn back to the suburb of Redfern by work opportunities at Eveleigh Railway Workshop and the factories of the industrial precinct along Botany Road. Permission to leave mission stations for these jobs offered 'a better life, free from the control of the Aborigines Protection Board.'[20] As First Nations people began to move to Redfern from around NSW, it became a flourishing urban Aboriginal community.[21] Symbolic of the community was the Redfern All-Blacks Rugby League football team, which became a political power-base for prominent Redfern community leader Ken Brindle. Between 1967 and 1971, Brindle used the All-Blacks and the strategic location of Redfern in central Sydney to campaign against the *Aborigines Protection Act 1935* as NSW state secretary of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI).[22]

3. Escalating Conflict with Police

From the late 1960s onwards, First Nations people in Redfern had claimed that they were regularly arrested, harassed by police and subjected to an unlawful,

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19 National Indigenous Australians Agency, 'Empowered Communities: Empowered Peoples - Design Report' (Canberra: National Indigenous Australians Agency, Commonwealth Government, 2015), 138.

20 National Indigenous Australians Agency, 'Empowered Communities', 138.

21 National Indigenous Australians Agency, 'Empowered Communities' 138.

22 Lyn Brignell, 'Brindle, Kenneth (Ken) (1931-1987)', in *Australian Dictionary of Biography* (Canberra: Australian National University, 2007); National Indigenous Australians Agency, 'Empowered Communities', 138.

police-imposed curfew.[23] Writing in 1974, Hal Wootten QC, co-founder and first President of the Aboriginal Legal Service in Redfern from 1970 (and later, Justice of the NSW Supreme Court and Commissioner of the Royal Commission) recalled his initial disbelief at illegal police curfew:

> 'I found, as most people do, it [the curfew] a little hard to believe when I first heard it, but when I observed it operating with my own eyes I was left with little doubt. The simple proposition was that any Aboriginal who was on the streets of Redfern at a quarter past ten was simply put into the paddy wagon and taken to the station and charged with drunkenness, and that was something that was just literally applied to every Aboriginal walking along the street, irrespective of any signs of drunkenness in his [sic] behaviour. This and the associated problems gave rise to very strong feelings amongst Aboriginals here.'[24]

Between the early 1970s and the Royal Commission in 1991 conflict between the First Nations community in Redfern and the police was ongoing, with intermittent flash-points that garnered national press attention. [25]

The Royal Commission coincided with the commencement a substance abuse epidemic in Redfern: the drug heroin 'took hold in the Block' and Redfern 'became synonymous with drugs, crime and violence.' [26] The 1990s was a 'glut' in the heroin market in Australia.[27] Retrospective studies concluded that increased supply of heroin in Australia was likely caused by a small number of high-level drug trafficking groups in South East Asia deciding to target Australia and

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23 Gregory Lyons, 'Aboriginal Legal Services: Essays in Memory of Elizabeth Eggleston', in *Aborigines and the Law*, ed. Peter Hanks and Bryan Keon-Cohen (Sydney: Allen and Unwin, 1984), 138; cited in Cunneen, 'Aboriginal-Police Relations in Redfern', 1.

24 Hal Wootten AC, QC, 'Aboriginal Legal Services', in *Aborigines Human Rights and the Law*, ed. Garth Nettheim (Sydney: Australian and New Zealand Book Company, 1974).

25 See Summary in Cunneen, 'Aboriginal-Police Relations in Redfern', 8–9.

26 National Indigenous Australians Agency, 'Empowered Communities', 137.

27 See: Paul Dietze, 'Interpreting Changes in Heroin Supply in Melbourne: Droughts, Gluts or Cycles?', *Drug and Alcohol Review* 21 (2002): 295–303; Louisa Degenhardt et al., 'The "Lessons" of the Australian "Heroin Shortage"', *Substance Abuse Treatment, Prevention and Policy* 1, no. 11 (2006): 1–7.

successfully delivering some large shipments. [28] Redfern became one of three 'large open-air drug markets' in Sydney, the others being at Kings Cross and Cabramatta.[29] Naturally, the available evidence regarding the origin and nature of these markets is sparse. In 2002, Linter argued on the available evidence that the drug market in Redfern likely originated through links between the First Nations community and Vietnamese gang members established in prison.[30] With increasing availability of the drug came expansion of markets, a surge in drug-fuelled crime – especially thefts to fund addiction, and deaths from overdose.[31] This led to increased policing in Redfern and increasing conflict throughout the 1990s.

Relations between First Nations people in Redfern and police reached their nadir in 2004, before exploding into their most violent conflict. On 15 February 2004 a 17 year-old First Nations youth named Thomas 'TJ' Hickey died when he crashed a bicycle into a protruding gutter, was flung in the air and impaled on a fence. The circumstances immediately prior to this are disputed: police officers claimed that he was riding downhill; many First Nations people believe that a nearby police patrol car had been giving chase. On the evening of 15 February, hundreds of First Nations residents of Redfern clashed with police in what became a nine-hour battle: bottles, bricks and Molotov cocktails were

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28 See: Degenhardt et al., 'The "Lessons" of the Australian "Heroin Shortage"'.

29 Louisa Degenhardt et al., 'The Effect of a Reduction in Heroin Supply in Australia Upon Drug Distribution and Acquisitive Crime', *British Journal of Criminology* 45 (2005): 4.

30 Bertil Lintner, *Blood Brothers: Crime, Business and Politics in Asia* (Sydney: Allen and Unwin, 2002).

31 See Louisa Degenhardt, 'Opioid Overdose Deaths in Australia: 2000 Edition' (Sydney: National Drug and Alcohol Research Centre, UNSW, 2001).

thrown at police, who responded with riot battens and, eventually, fire hoses.[32] 50 police were injured in the clash and Redfern Train Station was set on fire.[33]

b) Reduction in First Nations Incarceration in Redfern

I have not been able to gather quantitative evidence for the reduction in First Nations incarceration in Redfern using the method that was employed in Lajamanu. This is for several reasons. First, an analysis of court lists is not feasible as the urban First Nations community in Redfern is not geographically distinct in the way that Lajamanu is: it is located at the heart of Sydney, Australia's largest city. In NSW, local data sets are available as the NSW Bureau of Crime Statistics and Research collaborates with police to produce statistics by local government area (LGA). But, analysis of the suburb of Redfern is complicated by its location within the City of Sydney LGA, along with Sydney's central business district and some affluent suburbs that abut it. Moreover the First Nations community in Redfern is concentrated on the Western edge of the suburb, on the border of the Inner West LGA. Finally, research by the NSW Government has warned that First Nations people often do not identify as such when faced with a police call out or charge; this causes an undercount of First Nations people in justice-based datasets.[34] This is not a problem in Lajamanu as Warlpiri people, speaking Warlpiri and living in a predominantly Warlpiri community, generally identify themselves as Aboriginal.

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32 Editorial, 'Redfern Riot Leaves City on Edge', *Sydney Morning Herald*, 16 February 2004; Sydney Morning Herald, 'Three Inquiries into Redfern Riot', *Sydney Morning Herald*, 2004; David Fickling, 'If You Oppress People Long Enough, Things Will Erupt. Riots Will Happen.', *The Guardian*, 2004.

33 ABC News, 'Fifty Police Injured in Redfern Riot', *ABC News*, 16 February 2004.

34 NSW Aboriginal Affairs, Department of Education, 'Aboriginal Identification in NSW: The Way Forward' (Sydney: NSW Government, 2015), 21.

Despite the limited quantitative data, there is sufficient evidence to conclude that there has been both a turning point in incarceration and in the relationship between the criminal justice system and the First Nations community in Redfern. Redfern Police, who I interviewed in 2013, had evidence from an internal police database, broken down to the street level. It showed a sharp decline in property offences, youth offending and public violence: between 2008 and 2009 the percentage of robbery offences committed by Aboriginal and Torres Strait Islander youth dropped by 80 per cent; in 2010 and 2011, the percentage of robberies committed by Aboriginal offenders was 41 per cent and 44 per cent compared to 65 per cent in 2008.[35] This was corroborated by interview-data gathered from community members and police about the change in public safety, decline in robberies and youth crime and improved relations. A police officer I interviewed phrased it this way:

> 'I've only just come back to this command in the last 12 months, but it used to be horrific here. And juvenile offenders were our main offenders, and when I come back and I had a look at who was being arrested, juvenile offenders are not our main problem anymore. When I came back it was maybe 10% - and the crimes they are committing aren't as series. So it is a huge change that I have noticed happening in this community.'

Perhaps, the most telling evidence of the improvement in relations between the First Nations community and police and its impact upon incarceration is contained in a case study from 2013 that several Redfern residents and police drew to my attention.

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35 These statistics were subsequently quoted in Australian Human Rights Commission, 'Value of a Justice Reinvestment Approach - Supplementary Evidence' (Sydney: Australian Human Rights Commission, 4 June 2013), 5.

Case study: Defusing tensions following Kings Cross shooting

On 21 April 2012, a stolen car containing four young First Nations people between 13 and 24 drove onto the footpath in Kings Cross in order to escape pursuing officers. After the vehicle struck a 29 year-old woman, who became pinned underneath, police opened fire in an attempt to stop the vehicle: the 14-year-old driver and his 18-year-old front seat passenger were shot and taken to St Vincent's Hospital for treatment.[36] Given the history of tension between First Nations Australians and police in Redfern outlined above, there were concerns that rioting would occur and riot police were deployed. Superintendent Luke Freudenstein and other Redfern Police were asked to go to the hospital and talk with community members to defuse the situation. Freudenstein was accompanied to the hospital by Redfern First Nations leader Mick Mundine. He recognised several of the concerned family members from volunteering with the Redfern All Blacks rugby league team and engaged with them: Jacob Saunders, one of the young family members present, later told a *The Australian* newspaper that Freudenstein said 'Look mate, I want you to do this, no violence. Tell the boys to back off'; he promised that an investigation would be held and that he would personally inform the families of the result.[37] Freudenstein provided me with an account of what followed:

> They (NSW Government and police) thought there would be rioting in Redfern…We spent the day walking the streets here: and what we did is, we told them exactly what happened. We said: "yes, police did shoot those boys". But, we also said – and I can't prejudge the critical incident investigation – "the boys went up on the foot path and ran a lady over. How many more people might they

[36] Eamonn Duff, 'Teens Shot by Police after Car Takes to Footpath', *The Sydney Morning Herald*, 21 April 2012.

[37] Dan Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment', *The Australian*, 29 January 2016.

> have run over? And, from what I saw, they couldn't smash the window with their battens, they had no way to reach in and spray them (with capsicum spray) or anything. So they just had to do it. But that critical incident investigation is still ongoing. It won't go before the coroner because, thank god, the boys didn't die.
>
> Do you know, one of the boys in that car – 14 years of age – he actually passed away, but was revived? The bullet actually took away part of his heart. He had to be cut right down the middle, all of his organs taken out to remove shrapnel, then all of his organs put back in again. Within a month, he's at Redfern with us boxing, and coming up to the Police Station to visit us. Very important that happened, because can you imagine what he might have thought of Police…[38]

Freudenstein account was corroborated to me by other police and by Redfern residents. What Freudenstein didn't elaborate upon in the interview but I learned later was the level of personal commitment underpinning his work, and that of First Nations leaders such as Mick Mundine and Shane Phillips. A month later, when Saunders was in court over the shooting charge, Freudenstein and Phillips gave character evidence on his behalf. Saunders received a suspended sentence on the condition he participate in the *Clean Slate without Prejudice Program.* Every morning after training, Saunders had to report to Freudenstein in his office. The policemen then went with Saunders to a job interview at Linfox.[39]

I consider the resolution of tensions following this Kings Cross shooting compelling evidence of the effectiveness of collaboration between police and First Nations leaders in Redfern. Against the historical context outlined above, it shows a clearly demonstrates ability to defuse tensions that had not previously been evident in criminal justice in Redfern. Most importantly for this thesis, it also suggest that empowering local First Nations leaders has been an important component of the successful reduction in incarceration.

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38 Superintendent Luke Freudenstein, Interview, Redfern Police Station, 2013.

39 Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment'.

c) The mechanism of policy effect

As described above, the evidence of the *Clean Slate Without Prejudice* program reducing incarceration in Redfern presents a compelling opportunity to test my explanation of how the policy of empowering leaders within criminal justice takes effect. Unlike the Kurdiji Community Justice Group in Lajamanu, the *Clean Slate Without Prejudice* program does not trace its origins directly to the policy response to recommendations of the Royal Commission. However there are strong indirect links: Shane Phillips, the CEO of the Tribal Warrior Association and one of the most prominent First Nations leaders behind *Clean Slate Without Prejudice* worked as a field officer for the Royal Commission; the NSW police in Redfern Local Area Command all worked in a police force significantly reformed following the Royal Commission. Moreover, there is a clear philosophical consistency between the collaboration in Redfern and the method of reducing First Nations incarceration through empowering local leaders.

1. <u>Step 1: First Nations leaders build public confidence in their leadership, consistent with prevailing norms.</u>

It is clear from the historical experience outlined above that First Nations leadership in Redfern takes place against a notably different context to that of Lajamanu. From violence, disease and dispossession in the eighteenth century, to forced relocation, confinement and neglect and in the nineteenth century, and segregation and disadvantage in the twentieth century, Redfern's history has shaped a heterogeneous community comprised of families from numerous First Nations languages, experiences and backgrounds. Redfern is also a community at the centre of Sydney and its fortunes are inextricably linked to those of

Australia's largest city. At the time that the Royal Commission handed down its Report in 1991, the epidemic of opioid addiction was taking hold; a drug crisis centred upon Redfern, but fuelled by demand for heroin from across Sydney. These were undeniably challenging circumstances for local leadership. In the context of criminal justice, any attempt by leaders to reduce incarceration was further complicated by a broken relationship with NSW police, which at that time Shane Phillips characterised as that of 'enemies'.[40] Police had a similarly low opinion. Following the rioting in Redfern in 2004, Sergeant Paul Huxtable from Redfern police told reporters that 'criminals instead of elders now held control of the Aboriginal community living in Redfern.'[41] However, whatever the truth of Sergeant Huxtable's statement in 2004, it was evident by the time I began conducting interviews in Redfern in 2013 that First Nations community leaders had both regained control and repaired their relationship with police.

I found First Nations leaders in Redfern to enjoy considerable public confidence in their work with criminal justice, firmly establishing the operation of this first step in the causal mechanism. In 2013, all interviewees directed me promptly to the Tribal Warrior Association and the *Clean Slate Without Prejudice* program and to individual leaders such as Mick Mundine and Shane Phillips, as appropriate points of contact; in the following years, as Redfern's success was reported upon and became better known, public confidence in Redfern leaders began to spread to other parts of Sydney. The Tribal Warrior Association

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40 Shane Phillips, quoted in Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment'.

41 Sydney Morning Herald, 'Redfern Riot Blamed on Heroin Trade', *Sydney Morning Herald*, 17 May 2004.

originated in 1998, when a group of leaders came together to revitalise First Nations culture in Redfern by linking it to economic opportunity and social stability. Gifted a boat by a long-time resident of Redfern, the former pearling lugger *Tribal Warrior* from which the association takes its name, leaders established a maritime training program, linking local men to both employment and the saltwater culture of the Gadigal Eora traditional owners of South Sydney. Notably, the founders of Tribal Warrior understood themselves to be asserting this cultural alternative in opposition to 'the rites of passage associated with gangs and prison.'[42] In a 2009 sociological study of urban First Nations identities, Thompson described the Tribal Warrior Association as 'a definitive reaffirmation of Aboriginality on The Black in Redfern's Aboriginal heartland'.[43]

2. Step 2: Local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law.

When the policy response to First Nations incarceration commenced in 1992, the relationship between criminal justice and the First Nations community was historically bad and deteriorating further. It reached its nadir following the death of TJ Hickey and the riots in 2004, which is when Phillips characterised the Redfern community and police as 'enemies'. Superintendent Freudenstein took over as commander of the Redfern Local Area command in 2008 the riots were a recent memory. In my interviews with Freudenstein and a group of other Redfern police, all spoke openly of 'building trust'. One constable said: 'I think it

42 Tribal Warrior, 'Who We Are', accessed 30 September 2021, https://www.tribalwarrior.org/our-services.

43 Stephanie Lindsay Thompson, 'The Tribal Warrior Association: Reconstructing Identity', in *Exploring Urban Identities and Histories* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2013), 29.

has come down from the Boss, gaining the trust of the elders. Then the elders changing how they saw the police and building up relationships; and then, police working alongside and everyone working alongside together – that is what has made the difference.'[44] Another Constable warned that, in their experience with Redfern youth, gaining trust was work that all those administering criminal justice had to do: 'I think they are tough characters. I think it takes a fair bit to build that trust and respect and I think that each individual has to do that themselves.'[45]

Superintendent Freudenstein's personal steps to build trust are well documented. A strong believer and practitioner of community policing, upon being appointed to command in Redfern, he made a clear effort to become involved in the community: he volunteered running water for the Redfern All-Blacks rugby team; he regularly attended the Babana Men's Group. A year after starting in Redfern, Freudenstein recounts that he walked into a Babana meeting with a list of 15 names of boys he knew to be involved in robberies. He told the group 'I can arrest my way out or we can do something together'.[46] This began the collaboration that became the *Clean Slate Without Prejudice* program.

For the purposes of establishing the operation of the second step of the mechanism, I consider that the sufficient level of public confidence in criminal justice and Redfern police was evident from April 2012. This is due to the successful non-violent resolution of tensions following the shooting of the youths

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44 Redfern Police, Fieldwork Interview, Redfern 2013.

45 Redfern Police, Fieldwork Interview, Redfern 2013.

46 Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment'.

in the stolen car in Kings Cross on the 22 April, outlined above. The success of police in achieving a non-violent outcome demonstrates a public confidence in the Redfern Local Area Command that had been absent in earlier instances where tensions had escalated into violence.

3. Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice.

Close, regular and public collaboration is at the centre of the *Clean Slate Without Prejudice* program and has been from its beginning. Indeed, the collaboration is so close that it is tactile. Three mornings a week, police, First Nations leaders and at-risk youth gather at dawn for boxing training. 'Irreversible commitment' to collaborate at the personal level is the building block of this approach to improving relations. Shane Phillips recounted to a profile in the *Australian*, that when Superintendent Freudenstein first suggested the program to the Babana Men's Group, the elders insisted he bring with him 'some of the rougher cops, those who had the worst relationships with the Aboriginal boys out on the streets.' Before the first morning session Phillips recalls 'we're in the bus waiting and we saw one of the police officers walk in and in knew his reputation. One of the boys said, 'I hate him' and we said 'We've got to go in. We're going to go in and train'. By the time the session finished, both sides had dropped their guard.'[47]

47 Shane Phillips quoted in Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment'.

Even at the personal level, the commitment required to leaders to collaborate in this way is irreversible, within Neustadt's understanding: the boxing program was public; any breakdown in behaviour by police or First Nations leaders would have significant costs for the other. It is notable that these inter-personal commitments to collaborate proved resilient in times of crisis when the stakes were considerably raised. Community leader Mick Mundine and Superintendent Freudenstein placed considerable trust in each other following the Kings Cross shooting: while Freudenstein personally committed to keep families informed of a fair process, Mundine fronted the media with the family of one the injured boys to say: 'We all know what happened in the past but this happened in the Cross and I think we'll just leave it at that. Everybody feels pretty sad. We've just got to go through the right protocol now.'[48] While ultimately successful, both Freudenstein and Mundine risked considerable personal consequences in terms of their personal authority if their collaboration had not restored calm.

4. Step 4: Increased procedural justice increases compliance with criminal justice and First Nations Legal Norms

The evidence for the reduction in incarceration has been outlined above. However a more nuanced understanding of the causal story behind this correlation is gained by considering the role that case-specific causal factors have played alongside the *Clean Slate Without Prejudice* program in Redfern. Substance abuse, in the form of opioid addiction, was a significant factor driving

48 Mick Mundine, quoted in Ilya Gridneff, 'I Thought They Must Be Bad Guys, Then I Saw It Was Kids', *The Sydney Morning Herald*, 22 April 2012.

rising incarceration in Redfern. A well-documented decline in supply of heroin in Australia occurred from 2001, caused by a combination of high profile law enforcement seizures and the dynamics of the international opioid black-market.[49] This reduction in one of the major causes of offending in Redfern likely created an opportunity for local First Nations and policy leaders to reduce incarceration. The second case-specific cause to consider is the role of a strong anomie among Redfern youth caused by disadvantage and marginalisation and compounded by cycles of incarceration. Interviews revealed the extent to which this anomie was at the primary concern of both First Nations and police leaders. Superintendent Freudenstein relayed to me a view he shared with Shane Phillips:

> 'As one of our Aboriginal leaders, Shane Phillips says: 'You used to be a bit of a hero if you'd been "inside" – in a gaol – and you'd come out and you'd say, yeah, I'm a legend.' Now, he says that they are 'numb nuts'. They are disrespected. It's no great achievement: you're a loser. Now the big ego is about how fit you can get. Or, what you have done for bush regeneration and cultural stuff…There's not this pressure to commit offences because you are ostracised now if you do, whereas before you were part of the team.'[50]

While the available evidence shows that leaders in Redfern remain concerned about anomie and the effects of cyclical incarceration and recidivism, it also shows that they took action in response. In this context, it is relevant to note that the *Clean Slate Without Prejudice* program extends beyond boxing to also include mentoring and support for participants to find employment. There is the opportunity for participants to join other Tribal Warrior programs, including the maritime training. In August 2015, Tribal Warrior took the further step of initiating the *Never Going Back* program, which opens the boxing and fitness

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49 Degenhardt et al., 'The "Lessons" of the Australian "Heroin Shortage"'.

50 Redfern Police, Fieldwork Interview, Redfern 2013.

sessions to Redfern prisoners in Sydney correctional facilities who are reaching the end of their sentences, starting their rehabilitation in community prior to their release. Through these programs the work of Tribal Warrior has a direct impact beyond repairing relationships through offering a diversionary alternative to prison for Magistrates. The NSW Criminal Court has commended the work of Tribal Warrior in providing these diversionary alternatives.[51]

5. Step 5: Leaders strategically securing long-term funding for a sustained approach.

The final step of the mechanism of policy effect, strategically securing long-term funding, remains an ongoing challenge in Redfern. This threatens the sustainability of the *Clean Slate Without Prejudice* approach, which almost ceased in 2013 due to lack of funding.[52] As it stands, the mentoring aspect of the program would be significantly boosted with more funding.

Unlike in Lajamanu, the *Clean Slate Without Prejudice* program was not funded through the initial policy response to First Nations incarceration from 1992, that funding agreement had ended by the time the program started. Following an initial voluntary pilot, the *Clean Slate Without Prejudice* program was funded through a $300,000 grant from the Commonwealth Government. By the time I began conducting interviews in Redfern in 2012-2013, the program had expanded through a patchwork of public funding: from the NSW State Department of Community Service (DOCS), Commonwealth grants, and

51 *MW v R* [2010] NSWCCA 324 at [67].

52 See, for example: Rick Feneley, 'Swing and a Miss: Funding Gaps Hit Scheme Slashing Crime Rates', *The Sydney Morning Herald*, 2013; Lindy Kerin, 'Funds Needed to Continue Redfern Success Story', *AM: ABC Radio*, 12 March 2013.

piecemeal grants for mentoring through Centrelink (the Australian Government unemployment benefit provider) and the Commonwealth Department of Education, Employment and Workplace Relations.[53] Fortunately, as the *Clean Slate Without Prejudice* program gained prominence, larger blocks of funding have become available. While many police members and First Nations community leaders continue to volunteer, at the time of writing the work of the Tribal Warrior mentors is currently funded by a $3.2 million investment from the Commonwealth Government.[54]

From the perspective of governance and public administration, it is important to note the critical structural role played by the Tribal Warrior Association, as an established local First Nations corporation, in securing funding to initiate the *Clean Slate Without Prejudice* program: many of the grants listed above are only available to applications from First Nations corporations; moreover, the administrative burden of reporting upon and regularly reapplying for such a diverse range of partial grant funding is considerable and would likely not be possible without an established corporation that could fund its administrative functions through other means. For this reason, I understand the presence of First Nations corporations to be an important contextual condition for the operation of empowered local leaders as a mechanism to reduce incarceration.

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53 Megan Davis, 'Mentoring Indigenous Young People: The Tribal Warrior Program', *Judicial Officer's Bulletin* 23, no. 1 (2011).

54 The Hon Ken Wyatt AM MP, 'Press Release: Tribal Warrior Building Stronger Communities' (Canberra: Department of Prime Minister and Cabinet, 9 December 2019).

d) Redfern: Conclusion

Applying the explanatory model of a mechanism of policy effect to the case of Redfern has led me to several conclusions about how this mechanism operated within the machinery of government. First, while the policy response in Redfern did not directly originate with the 1992 policy response, it validates the effectiveness of the central policy idea of the Royal Commission: empowering First Nations leaders to collaborate within in criminal justice. As in Lajamanu, the Commonwealth has been well served by delegating some policy implementation to local First Nations leaders and local policy leaders. While exercising considerable discretion, these leaders have shown considerable commitment to the goal of reducing incarceration; a commitment out of proportion to the relatively low level of Government funding received. This is a novel outcome in the context of the principal-agent literature, which predicts high costs of delegation for a principal in such circumstances.

In terms of public administration and *governance*, I draw a second conclusion. *Step 5* of the mechanism, securing sustainable funding, emerges as a critical moment in the dynamic relationship between autonomous local organization and the policy core. That the Commonwealth eventually invested funding on a large scale is consistent with the dynamic concept of *governance* advanced by van der Steen and colleagues: 'the art of operating effectively in the complex relations in the system. [55] This said, given the long wait for this investment, the eventual success of governance says more about the resolve and

[55] Martjin van der Steen et al., 'How to See Failure: Attempts by the Inspectorate of Education to Detect and Disarm Failure in Dutch Education Policy', *Public Policy and Administration* 30, no. 3–4 (2015): 325.

innovative resilience of the local leadership in Redfern than it does to commend the responsiveness of the Commonwealth. In this regard, the contextual condition of a local First Nations corporation, such as the Tribal Warrior Association, is evidently critical: without such a corporation, it is difficult to see how the *Clean Slate Without Prejudice* project could have been funded. This is an important conclusion given that First Nations corporations are often overlooked as a component of the machinery of government. If we imagine the machinery of government as a car engine, the experience of Redfern suggests that local First Nations corporations operate as the differential: they are separate from the engine – it can run happily and noisily without them – but they are necessary for it to transmit any power to the wheels.

III. Bourke (NSW)

Bourke is an agricultural centre located on the Darling River. In the 2016 census, Bourke had a population of 2,634 people, of whom 829 (31.5%) identified as being Aboriginal or Torres Strait Islanders.[56] This First Nations community, along with those of the other 'river towns' along the Darling has a long and prominent history in NSW, extending beyond the boundaries of their own traditional country. In 2013, a First Nations leader in Bourke recounted to me the long and influential activism from the river towns of Bourke, Wilcannia and Brewarrina around First Nations deaths in custody: three decades later, the outrage and protest emanating from the river towns following the death in police custody of Lloyd James Boney in Brewarrina in 1987 is widely regarded as a

56 Australian Bureau of Statistics, '2016 Census QuickStats' (Canberra: Australian Bureau of Statistics, 23 October 2017).

catalyst for the Hawke Governments decision to initiate the Royal Commission.[57] But for ten years following the Royal Commission, the First Nations community in Bourke continued to struggle with rising incarceration.

On the basis of a comparison of violent offending and incarceration statistics, the front-page of the Sydney Morning Herald on 2 February 2013 proclaimed: 'Bourke tops list: more dangerous than any country in the world'.[58] On the basis of comparing violent crime per capita with United Nations data, the Herald continued by arguing that Bourke was 'more dangerous per capita than any country in the world'.[59] Citing statistics from the NSW Bureau of Crime Statistics and Research, the Herald noted that Bourke had the highest rates of offending in NSW in six of eight categories of crime, including the highest rates of assault, break-ins and car thefts.[60] However, between 2013 and 2021, First Nations leaders, in collaboration with street-level bureaucrats and non-government stakeholders, achieved a remarkable turnaround in incarceration through the Maranguka Justice Project: Australia's most advanced and successful pilot of 'justice reinvestment' strategies to reduce incarceration.

a) Historical context of the Bourke First Nations Community

Three themes emerge from Bourke's history that are relevant to contemporary work in criminal justice: massacres and conflict, forced relocation and segregation and economic disadvantage.

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57 See for example, the timeline published for the twenty-fifth anniversary of RCIADIC: SBS News, 'The Royal Commission into Aboriginal Deaths in Custody: Timeline of Events and Aftermath', *SBS News*, 14 April 2016.

58 Rachel Olding and Nick Ralston, 'Bourke Tops List: More Dangerous than Any Country in the World', *Sydney Morning Herald*, 2 February 2013.

59 Olding and Ralston, 'Bourke Tops List'.

60 Olding and Ralston, 'Bourke Tops List'.

1. Massacres and Conflict

Disease, constraints upon movement within traditional country and the effect of livestock upon hunting and gathering all contributed to the devastation of the First Nations of the Darling River region. However, both the oral history of the First Nations and the documentary record left by settlers suggests that violent conflict also played a defining role.[61] The most severe accounts concern incidents on Quantambone Station, 18-20km North of Brewarrina, in 1859. Several accounts suggest that a reprisal attack was made by cattlemen and station workers upon Ngiyampaa people possibly following the spearing of cattle or an attack on a white stockman. The main attack was made on a group of around 400 Ngiyampaa people; only two small children, a girl and a boy were reported to have survived. The oral history of this incident, later named the 'Hospital Creek Massacre', was preserved among both settler and First Nations communities: newspaper reports in the early twentieth century contain accounts from eyewitnesses who survived the massacre as children; in the 1970s, skeletal material with bullet holes could still be found after rain had disturbed the soil.[62] The Hospital Creek Massacre remains prominent in the consciousness of the Darling River Region: the site of the massacre has been memorialised by the local council and is marked by signs; in a 2017 op-ed in the *Australian* newspaper, reflecting upon the meaning of 'Australia Day' – the annual anniversary of British settlement in Australia observed on the 26th of January and labelled 'Invasion

61 See: OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study' (Bourke: Bourke Shire Council, 2019), 46.

62 Max Kamien, *The Dark People of Bourke: A Study of Planned Social Change* (Canberra: Australian Institute of Aboriginal Studies, 1978), 15; cited in: OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 41.

Day' by many First Nations Australians – the Hospital Creek Massacre was specifically referenced by Prime Minister Scott Morrison.[63]

2. Forced Relocation and Segregation

As with the experience of the Redfern First Nations community, the establishment of the Aborigines Board in 1883 had a significant impact in Bourke. While the First Nations Population had been declining, Bourke was becoming a major town Australia's booming wool industry. [64] The boom and bust of the wool market had a large effect upon First Nations people as many lived and worked on stations, enterprises relied heavily upon and exploited available Aboriginal Labour.[65] But the fragility of this relationship was exposed by the depression of the 1890s. With their labour no longer required, First Nations people who had previously lived on stations were forced to move to reservations or missions. On the basis of census records and the records of the Aborigines Protection Board, the Bourke Shire Council's Aboriginal Heritage study estimates that by the early twentieth century there were less than 50 Aboriginal people in Bourke, with the majority having been moved to Brewarrina Mission Station.[66] The Brewarrina Mission was established in 1883, had a population of 324 in

63 See: Rt Hon. Scott Morrison, 'Why I Cherish Jan 26 in All Its Complexity', *The Australian*, 4 September 2017.

64 See: Bourke and District Historical Society, *History of Bourke and District*, vol. 1–13, 13 vols (Bourke: Bourke and District Historical Society, 1996); OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 19.

65 See: Bourke and District Historical Society, *History of Bourke and District*; OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 19.

66 OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 43.

1939, but only 114 in 1960 and 35 in 1965/6, with the population declining as restrictions on movement were eased.

3. Economic Disadvantage

First Nations people from a radius of about 500km began moving to Bourke following the opening of the meatworks in 1938 and the promise of employment:[67] On arriving in Bourke, people camped near the railway line, near the river upstream from town or near the rubbish tip.[68] The encampment on the Darling River was gazetted an Aboriginal reserve on 30 August 1946.[69] By 1981, at the commencement of the period considered by the Royal Commission there were 737 Aboriginal people in Bourke and 818 in Bourke Shire. But, the long-term decline of wool prices and increasing mechanisation of agriculture reduced the prosperity of much of the community in Bourke. The First Nations community was characterised by increasing disadvantage. Documented by the Maranguka Justice Project and KPMG in their preliminary assessment of the justice reinvestment strategy in Bourke: going back two decades, location-based studies have consistently identified Bourke as one of the most disadvantaged local areas in NSW and Australia: this is particularly true of measures of long-term unemployment and family and community violence.[70] During the 1980s,

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67 See Kamien, *The Dark People of Bourke: A Study of Planned Social Change*, 16; Bourke and District Historical Society, *History of Bourke and District*, 1–13:53; OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 53.

68 Kamien, *The Dark People of Bourke: A Study of Planned Social Change*, 17.

69 OzArk Environmental and Heritage Management Pty Ltd, 'Bourke Shire Aboriginal Heritage Study', 53.

70 See: Tony Vinson, *Unequal in Life - the Distribution of Social Disadvantage in Victoria and New South Wales* (Richmond, Victoria: The Ignatius Centre for Social Policy and Research, 1999), 80; Tony Vinson, *Community Adversity and Resilience: The Distribution of Social Disadvantage in Victoria and New South Wales and the Mediating Role of Social Cohesion*

substance abuse became increasingly common in Bourke, especially among First Nations people. Throughout the 1990s and 2000s Bourke LGA was consistently identified as having the highest rates of alcohol related assaults in NSW and double the average rate of alcohol related hospitalisations.[71]

b) Reduction in First Nations Incarceration in Bourke: The Maranguka Justice Project

Beginning in 2007, First Nations leaders in Bourke began a project to change the trajectory of their community. The project began through the Bourke Aboriginal Community Working Party collaborating with the NSW Ombudsman to strengthen the delivery of community services in Bourke. [72] Between 2007 and 2013, leaders engaged Commonwealth and State Governments, philanthropic bodies and Just Reinvest NSW – an emerging organisation devoted to promoting justice reinvestment in NSW – to craft a transformative whole-of-community agenda for change in Bourke. This became the Maranguka Justice Reinvestment Project.[73]

Of the local successes in reducing First Nations incarceration that I consider in this thesis, the success in Bourke is the most recent. As in Redfern,

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(Richmond, Victoria: Jesuit Social Services, 2004); Tony Vinson, Margot Rawsthorne, and Brian Cooper, *Dropping off the Edge: The Distribution of Disadvantage in Australia* (Richmond, Victoria: Jesuit Social Services, 2007), 74; Tony Vinson et al., *Dropping off the Edge 2015: Persistent Communal Disadvantage in Australia* (Richmond, Victoria: Jesuit Social Services, 2015); Cited in: KPMG, 'Unlocking the Future: Maranguka Justice Reinvestment in Bourke - Preliminary Assessment' (Sydney: JustReinvest NSW/KPMG, September 2016), iv.

71 Teresa Senserrick et al., 'Evaluation of the Bourke Alcohol Action Plan: Final Report' (The George Institute for Global Health, University of Sydney, June 2012), 14.

72 NSW Ombudsman, 'Inquiry into Service Provision to the Bourke and Brewarrina Communities' (Sydney: NSW Ombudsman, December 2010), 44–53; KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 33.

73 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 33.

the response in Bourke did not originate with the initial policy response following the Royal Commission, but there are strong indirect links to the policy leadership of that time: for example, Bourke First Nations community leader Alistair Ferguson, the Executive Director and Founder of the Maranguka, was involved in high level consultations and advice within the NSW Aboriginal Justice Strategy, the centrepiece of NSW's response to the Royal Commission. While the closeness of the reduction in First Nations incarceration limits the available data, it is clear that a turning point has been achieved. A collaboration between NSW Police and KPMG has produced data for a three year block between 2015 and 2017 which shows very promising initial reductions in offending. The report found:

- 18% reduction in major offences
- 34% reduction in non-domestic violence related assaults
- 39% reduction in domestic violence assaults
- 39% reduction in drug offences
- 35% reduction in driving offences.[74]

Just as significantly, in the context of the policy recommendation of the Royal Commission, there is evidence that the relationship between the criminal justice system and First Nations people in Bourke has been fundamentally changed direction for the better.[75] Below I examine the this evidence in the

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74 Lorena Allam, 'Unique Community Policing Sees Crime Rates Plunge in Bourke', *The Guardian Australia*, 9 October 2018; KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment' (Bourke, NSW: KPMG/Maranguka Justice Reinvestment Project, 2018).

75 KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment'; KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment'.

context of the three generic leadership tasks identified I have applied across the case studies of successful reductions in First Nations incarceration.

1. Step 1: First Nations leaders build public confidence in their leadership, consistent with prevailing legal norms; and, Step 5: Leaders strategically secure long-term funding for a sustained approach.

The context in which local leadership occurs in Bourke is different again from that of Lajamanu and Redfern. Interestingly for this study of public administration and governance failure, First Nations leaders in Bourke took structural concerns about service delivery and funding as their starting point. In this way, they brought *Step 1* and *Step 5* of my suggested explanation for the mechanism of policy effect together: gaining public confidence for their work in criminal justice, at least in part, by strategically securing resources. As will be seen below, this did not undermine the productive continuity of my suggested mechanism. Indeed, the two steps proved mutually reinforcing, creating an outcome of structural empowerment for First Nations leaders within criminal justice servicing with some similarities to that achieved under the NT Aboriginal Justice Strategy in Lajamanu in the late 1990s.

A First Nations local leader in Bourke made it clear that the priority for First Nations leaders was changing the structure of service provision and securing the investment of funding:

> 'The justice system itself has lost a lot of traction since the wind-up of the *Aboriginal Justice Advisory Council for NSW* ("AJAC"). As a result we have found that, (off the top of my head) about the $600,000 that was committed to the AJAC on an annual basis, and since the AJAC is no longer functioning, the funding has been diverted to complement other programs within the Attorney-General's

> Department – such as Circle Sentencing Coordinators, Justice Group Coordinators, the new Aboriginal Community Client specialist service officers. So my understanding is that there has been some reinvestment. But I think what needs to happen is a big overhaul: a big reinvestment. So that's the language that I've been using and it shares the sentiments of a lot of other people that share an understanding of what is happening.'

First Nations leaders in Bourke were determined to follow a holistic approach to reducing incarceration, which required both the investment as well as a reorganisation of service provision. In 2007, the leaders formed a Bourke Aboriginal Community Working Party to collaborate with the NSW Ombudsman to explore how service provision could be strengthened.[76]

From 2011, the Working Party was 'developing a transformative 'whole of community agenda for change in Bourke.' [77] In 2012, JustReinvest NSW, a new NGO closely aligned with the NSW Aboriginal Legal Service, was approached by First Nations local leaders to suggest collaboration and developing a justice reinvestment program for Bourke. In 2013, a proposal document was forwarded by the Working Party to the NSW Department of Premier and Cabinet, the NSW Aboriginal Affairs Department and the Aboriginal and Torres Strait Islander Justice Commissioner, which secured some initial funding and also collaboration, with the NSW Government declaring the strategy compatible with its policy direction 'a new beginning/a new way'.[78] Meanwhile, through the partnership with Just Reinvest NSW, the Working Party's proposal was distributed to philanthropic and corporate sectors as well as Government securing funding

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76 NSW Ombudsman, 'Inquiry into Service Provision to the Bourke and Brewarrina Communities', 44–53; KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 33.

77 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 35; KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment'.

78 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 35.

from the Dusseldorp Forum and the Vincent Fairfax Family Foundation to progress the project for a period of two years from 2014. In 2015, the NSW Legislative Standing Committee on Social Issues recommended that Maranguka be funded for an additional five years. By, 2018 more than 20 non-government organisations were active partners in the Maranguka Justice Reinvestment Project.[79] Through these partnerships and funding relationships, the Maranguka Justice Reinvestment project has the most resilient future funding model within this thesis.

By restructuring service provision and securing both funding and allies, First Nations leaders in Bourke noticeably empowered their community and in that process built public confidence in their work to reduce incarceration. An independent assessment of Maranguka Project by KPMG observed that 'the Bourke Aboriginal community can be seen to be re-building its Indigenous nationhood through a process of identifying, organising and acting to improve outcomes for its Indigenous peoples. [80] This process of 'doing' self-determination included reinvigorating governance structures, such as the Bourke Tribal Council, which can represent Bourke's diverse First Nations population and direct its collective efforts.[81] To achieve this, Bourke First Nations leaders have successfully employed popular and innovative strategies within public policy and criminal justice, such as justice reinvestment and collective impact

79 KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment', 10; KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 35.

80 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 40.

81 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 40.

frameworks, where they align with their own pursuit of greater self-determination.

In their description of participation in the Maranguka Working Groups, which involve First Nations residents of Bourke in creating solutions to drivers of incarceration, a First Nations local leader describes the impact that the restructuring of servicing and injection of investment has had upon public confidence in Bourke:

> 'There is an undeniable elevated sense of positivity in Bourke. People in Bourke feel empowered. There is a real sense of pride and agency. Maranguka has brought community members, including young people, to the table and put them in the driver's seat.'[82]

When I conducted fieldwork in Bourke for the second time in 2015, a high level of public confidence in the work of Maranguka was apparent at the street level and in interviews with community members and service providers. The involvement of community members in the Working Groups was described as having been instrumental in building not only confidence but also awareness of both the structures of criminal justice and the work that leaders were doing.[83]

2. Step 2: Local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law.

Policy leaders within criminal justice also benefitted in terms of public confidence from the restructuring of service provision. Police, in particular, have had to overcome entrenched, historic distrust within the First Nations community in order to secure the success in reducing incarceration. In 2012,

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82 See also Aboriginal Legal Service NSW/LTD, 'Maranguka Working Groups' (Aboriginal Legal Service NSW/ACT, 2021).

83 Bourke Community Leader, Fieldwork Interview, Bourke 2015.

when I interviewed the Commander of NSW Police in the Western Region (which includes Bourke), he was very aware of this challenge: he listed 'racist attitudes within the community' alongside 'generations of disadvantage, unemployment and social welfare' as challenging, historic drivers of crime. He pointed to initiatives taken in terms of First Nations recruitment within NSW Police and cultural change as initiatives he hoped would further improve policing in this regard.

By the time of my second visit to Bourke in 2015, improvements were evident in public confidence towards criminal justice generally and police specifically. In an interview in 2015, a respected First Nations criminal lawyer working for the Aboriginal Legal Service in Bourke, observed some improvements. While noting that 'there was still a lot of work to do' as 'you have this historical experience between the two groups', he described the change to me:

> 'There has been some good coming through. I see quite a lot of Aboriginal police coming through and that's a good thing. Other officers that I work with over here, they do have that cultural awareness. Quite a few of them, I think the vast majority, have that awareness of where Aboriginal people come from. The culture is shifting, you know, which is good.'

I consider this interview notably strong evidence of an improvement in public confidence in NSW Police. As an Aboriginal Legal Service lawyer he is both well placed to observe attitudes toward police and frequently positioned by his work as a criminal defence lawyer in opposition to the NSW police force. He thus has little reason to praise NSW police undeservedly. In these circumstances, his observation of improvements in policing is compelling. I argue that it is sufficient evidence to establish that a degree of public confidence in policing in Bourke,

albeit within a criminal justice system that most Bourke First Nations residents would argue substantively affects them disproportionately.

Since 2015, increased collaboration between NSW police and the First Nations community in Bourke has continued and been increasingly publicised by the NSW Government. For example, an initiative undertaken by Maranguka to conduct drivers licence training for unlicensed community members was supported by eight off-duty police officers, who volunteered to help instruct learner drivers. Inspector Andrew Hurst of Bourke Police noted that while he couldn't pinpoint a specific cause 'there had been a noticeable improvement over the past 12 months as collaboration between the community and police had increased. "We're working a lot more closely around youth engagement and family violence. The closer we work together the better. The collaboration is geared to problem-solve rather than us using arrest as the only tool in the kit.'[84]

3. Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice.

Public collaboration between First Nations and policy leaders in the Maranguka process is formal and structured, occurring first through the Bourke Aboriginal Community Working Group and then the Maranguka Working Groups. Several policy leaders, operating in a manner similar to the policy leadership observed in Lajamanu, were involved in early stages of the endeavour to restructure service provision and secure reinvestment. The initial KPMG assessment of Maranguka in 2016 identified a range policy leaders as having been 'key players', including: Sergeant Michael Williams, an Aboriginal Officer from NSW Police, who was

84 Allam, 'Unique Community Policing Sees Crime Rates Plunge in Bourke'.

seconded to Maranguka for 12 months; Andrew Rose, a public servant seconded from the Department of Aboriginal Affairs; the Hon. Brad Hazzard MP, the NSW Minister for Family and Community Services and Minister for Housing who worked as a 'parliamentary champion' of the project; and the NSW Ombudsman's office, which continued to provide independent oversight.[85] This formal collaboration from policy leaders has certainly been tangible, in terms of staffing support and funding for Maranguka. I argue that it may be characterised as an 'irreversible commitment' in Neustadt's sense of that term in that all involved had certainly invested considerable political, career or personal authority in the success of the program. Moreover, because the collaboration to restructure services and secure funding in Bourke occurred prior demonstrable reductions in incarceration, the collaboration occurred before any success was evident.

However, it is noteworthy that the formally structured collaborations between policy and First Nations leaders within the Maranguka justice reinvestment approach, have been accompanied by on-the-ground collaborations that are notably similar to the experience of Redfern or Lajamanu. A quote from the current NSW Police Commander highlights the change in approach:

> 'Instead of waiting for a crisis officers visited known perpetrators of domestic violence to talk to them about triggers, which might prompt the men to stick to mid-strength beer or spend the night away from their partner on nights they drank. 'What's uncle doing here?' the men asked in the early days 'Uncle is here because we're worried about you…'[86]

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85 KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', 34.

86 Harriet Alexander, 'How NSW Town Labelled "most Dangerous in the World" Changed Its Destiny', *The Sydney Morning Herald*, 29 May 2019.

As in Redfern and Lajamanu, these interpersonal collaborations in volatile situations have high stakes for both the First Nations leaders and the policy leaders involved; they provide further confirmatory evidence of an irreversible commitment to collaborate.

4. Step 4: Increased procedural justice increases compliance with criminal justice and First Nations legal norms.

The correlation between this reduction and the work of Maranguka can be qualified through consideration of the operation of other causes of incarceration that emerged from my data gathering. Numerous interviewees in Bourke, stressed a complex combination of causes of crime and the need for a holistic approach. Reflecting upon his clients, the respected First Nations criminal defence lawyer I interviewed described the effect as 'multifaceted and holistic':

> 'From my perspective in Bourke there's a lot of historical and cultural factors that come into play. Dispossession, drug and alcohol issues, mental health issues, poverty, other things like trauma…The effect lies through their interaction and is greater than the sum of the parts. You could use the analogy of an onion, when you peel the layer of the onion you can see all these contributing factors, which build up over time.'

This multi-dimensional analysis was confirmed in an interview with a respected local General Practitioner, who highlighted an interaction between high incidence of mental health problems, substance abuse and addiction and other associated traumas as likely drivers of crime. The doctor also highlighted overcrowded housing and poor access to services as second-order causes of these drivers.

Consistent with the conclusions of the existing literature reviewed in Chapter Two, addressing both substance abuse and anomie have been a priority for local leaders. In the 1990s and 2000s, the Bourke LGA was consistently

identified as having the highest rates of alcohol related assault in NSW and double the average rate of alcohol related hospitalisations.[87] The Bourke community's response to alcohol abuse follows a similar structural path to that of Maranguka: in 2008, several Bourke community organisations and leaders joined together to form the Bourke Alcohol Working Group (BAWG) due to increasing concern; BAWG developed a five-year *Bourke Alcohol Action Plan* in consultation with the NSW Office of Liquor Gaming and Racing, a key strategy of which was the introduction of alcohol restrictions, including on takeaway sales, size of containers, and the maximum strength of beverages.[88] An evaluation by Sydney University in 2012, found that restrictions had reduced both alcohol related crime and antisocial behaviour.[89] In addition to alcohol, the Bourke community has continued to grapple with a crisis of drug addiction, escalating recently due to the availability of crystal methamphetamine or 'ice'. A First Nations local leader reported his concern with drug addiction to me in 2012:

> 'My understanding is that you can get what you like in Bourke, which is a local government area with only 4000 people with 3000 people in the town. I think it is appalling when it's to the point where, yes, this was an epidemic, but I think it has moved on to a pandemic…The use of intravenous drugs and needles.'

Both alcohol abuse and drug addiction remain prominent concerns of the Maranguka working groups: while it is too early to assess the impact of their efforts, these groups have provided a useful forum for interagency collaboration with community members to address the associated problems.

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87 Senserrick et al., 'Evaluation of the Bourke Alcohol Action Plan: Final Report'.

88 Senserrick et al., 'Evaluation of the Bourke Alcohol Action Plan: Final Report' 28.

89 Senserrick et al., 'Evaluation of the Bourke Alcohol Action Plan: Final Report'.

Alongside and related to substance abuse is the concern for anomie. Again there is evidence of concern that in such circumstances the cycle of incarceration has provided young First Nations people with new rites of passage. The First Nations criminal defence lawyer I interviewed described his observation among his clients:

> 'Of course there's the danger that when you put people into custody at a young age they're introduce to the criminal justice system and there's a risk and danger of them becoming institutionalised. That's a real concern I see with some of our clients, you see them go in, for some kids – not all, I don't mean to generalise – but for some kids in communities it's kind of like a rite of passage: "I've been to juvie", "Look at my I'm a big tough fella, look at what I've done"'.

A First Nations local leader lamented the plight of young people when compared to the sense of adventure he felt in his own youth, when, 'being a 10 year old, I'd be out cotton chipping doing a man's day of work for a man's pay':

> 'Today you just turn up to a network service agency and say that you've been walking around looking for work that's not here. It's just ludicrous. Where's the incentive? Where's the adventure? And then you wonder why people are doing drugs, why they don't care anymore, why they'd rather push their own grandmother over…because there's nothing for them. They're being limited to, what I call 'levy bank syndrome' (referring to the levy banks, surrounding the town of Bourke).

Youth programs have been a priority for Maranguka as a site for reinvestment.

c) Bourke: Conclusion

The case of response to First Nations incarceration in Bourke shows a local leadership directly confronting the structural weaknesses in governance evident in both Lajamanu and Redfern and, to some degree, successfully restructuring public administration to secure better services. As with Redfern, this is consistent with van der Steen and colleagues' dynamic concept of government, with the initiative for dynamism coming from the local level. The movement of

Step 5, securing sustainable funding, forward within the mechanism is notable. While Step 5 was originally conceived to follow demonstrable success at the local level, as was the case in Lajamanu and Redfern, I do not consider that bringing it forward has undermined the productive continuity of the mechanism. Indeed, where this is possible, the experience of Bourke suggests that there are benefits: certainly, empowering the community through restructuring services and securing funding helped leaders in Bourke build public confidence in their work in criminal justice. This is strong evidence in support of the logic of justice reinvestment.

I draw two further conclusions from the experience of Bourke that refine my explanation. The first conclusion is in support of an understanding of governance that includes autonomous actors and organisations: a defining feature of the Maranguka project in Bourke has been its ability to draw a coalition of new actors, both corporate and charitable, into the response to First Nations incarceration; indeed, this is a key plank of their success. The second conclusion is that, despite the reordering of the mechanism, First Nations corporations remain central to successful governance in Bourke. The Maranguka Project in Bourke is consciously built around a 'backbone organisation', which represents a considerable portion of the reinvestment: KPMG's initial assessment of Maranguka estimated the total program cost to be $4 million per annum, of which the 'backbone organisation' and full-time project officer costs $554,800.[90]

[90] KPMG, 'Maranguka Justice Reinvestment in Bourke - Preliminary Assessment', viii.

IV. Cases that did not reduce incarceration

In the final part of this chapter I apply the explanation I have built from the reduction of First Nations incarceration in Lajamanu, Redfern and Bourke to three local cases that have not reduced incarceration: remote Wadeye and urban Darwin in the NT, and Dubbo in regional NSW. In applying my explanation to these three communities there are two possibilities to account for: first, that the mechanism of empowering local leaders to reduce incarceration, which I observed in Lajamanu, Redfern and Bourke, was operating but had its effect offset by the strength of other case-specific causes of incarceration; or second, that the mechanism did not operate as intended, due to the failure of a step or the absence of a contextual condition.

a) Wadeye

Wadeye, also known by its former name of Port Keats, is a large, remote First Nations community in the West Daly region, on the North Western coast of the NT. With a population that rises seasonally to up to 3,000, it is one of the largest First Nations Communities in the NT.[91] It is a former Catholic Mission town, with a culturally and linguistically diverse First Nations population drawn from the 22 different clans of the Thamarrurr region. Wadeye has longstanding and recently politicised reputation in Australia as a community that struggles with law and order. In his anthropological study of leadership in the Thamarrurr, Ivory notes that its reputation dates back to the colonial period when it was described as the

[91] Thamarrurr Development Corporation, 'Wadeye', 2021, https://thamarrurr.org.au/.

'wild lands'[92] or 'bad lands [93] and was though to represent 'the last frontier'.[94] Wadeye's reputation gained national prominence in May 2006 when Commonwealth Indigenous Affairs Minister Mal Brough flew in to personally intervene during ongoing violence between violent gangs, which had closed down the community.[95] Brough's threat to 'turn off' Commonwealth welfare payments to the community made headlines and Wadeye remained prominent in the rhetoric that surrounded the NT intervention the following year.[96]

1. Historical Context of Wadeye

Two aspects of Wadeye's history are notably relevant to the work of contemporary local leaders: legacies of frontier conflict and the rise of gangs.

i. Frontier Conflict

Seafarers, traders and fishermen from Sulawesi and other parts of South East Asia would have visited the Thamarrur region, along with their other documented trips to the Northern coastline of Australia from the 18th century onwards. [97] However, it is likely only in the 1870s that the colonial frontier began to directly impact the lives of people in the region, through the spread of epidemics, population decline and the intrusion of pastoralists and mining

92 Ion Idriess, *Nemarluk: King of the Wilds* (Sydney: Angus and Robertson, 1941), 4; cited in Bill Ivory, 'Kunmanggur, Legend and Leadership: A Study Indigenous Leadership and Succession Focussing on the Northwest Region of the Northern Territory of Australia' (Darwin NT, Charles Darwin University, 2009), 62.

93 Sidney Downer, *Patrol Indefinite: The Northern Territory Police Force* (Adelaide: Rigby, 1963), 138; cited in Ivory, 'Kunmanggur, Legend and Leadership', 62.

94 Alan Powell, *Far Country: A Short History of the Northern Territory* (Melbourne: Melbourne University Press, 1992), 5; cited in Ivory, 'Kunmanggur, Legend and Leadership', 62.

95 Lindsay Murdoch, 'Brough Flies into NT Violence', *The Age*, 4 May 2006.

96 For example: Editorial, 'In the Eye of the Storm', *The Sydney Morning Herald*, 30 June 2007.

97 See Campbell MacKnight, 'Macassans and Aborigines', *Oceania* XLII, no. 4 (1972): 283–319; Campbell MacKnight, *The Voyage to Marege: Macassan Trepangers in Northern Australia* (Melbourne: Melbourne University Press, 1976).

exploration.[98] In January 1870, the first detachment of police arrived in the NT from SA, which administered the territory until Australian Federation in 1901. Participants in Ivory's ethnography of leadership in Wadeye reflected that while 'the relationship between the police and Aboriginal people was tense', 'it was a situation that was not uncommon for the Port Keats people and other groups' as 'they were used to engaging with outside militaristic-type forces'.[99] Older participants in Ivory's study recalled the conflicts with police but also that at times their elders 'saw the police as noble and worthy adversaries'[100]

Wadeye and the Thamarrurr region was incorporated into the Daly River Reserve, declared an Aboriginal Reserve by SA in 1885.[101] As such the people of the Thamarrurr avoided the total dispossession experienced by First Nations and continued to live on their ancestral homelands. From within the reserve they had contact with neighbouring pastoral enterprises, such as Bradshaw, Legune and Auvergne Stations – including, at times, violent conflict. However, it is the memory of conflict between warriors from the Thamarrurr region and police that has formed an important part of local folklore and, through the writings of Idreiss and others, national popular history in Australia.[102]

In his anthropological study of leadership in the Thamarrurr, Ivory notes that: 'society has myths, legends and heroes' which form 'part of the folklore that underpins behaviour, mores and sanctions and in some ways define

98 Ivory, 'Kunmanggur, Legend and Leadership', 144.

99 Ivory, 'Kunmanggur, Legend and Leadership', 163.

100 Ivory, 'Kunmanggur, Legend and Leadership', 163.

101 Ivory, 'Kunmanggur, Legend and Leadership', 66.

102 See, for example: Idriess, *Nemarluk: King of the Wilds*.

leadership.'[103] Ivory observes that some of the figures from the period of conflict between the Thamarrurr clans and the police have assumed the mythic status. Most famous among these is Nemarluk, from the *Rak Kirnmu* clan, and his 'Red Band' of warriors. According to the bushman and popular Australian writer Idreiss, a contemporary and sometime acquaintance of Nemarluk while crocodile hunting in the Daly region, Nemarluk and his companions were determined to resist the advance of colonization onto their country. Idreiss recounts Nemarluk's speech: 'The white men are all around our country. Even though far away, nearer and nearer they come. They come to take our lands, our hunting grounds. When they enter our country let us kill them.'[104] On 10 August 1931, Nemarluk and the Red Band gained notoriety by killing the crew of a Japanese pearling boat following a dispute over disagreeable trading. In the police search that followed, Nemarluk engaged in a lengthy tracking duel with his pursuers, led by four trackers including the famous Bull Bull, from the *Malak Malak* language group of the Daly River region, who purportedly hated Nemarluk due to a private quarrel.[105] In 1933, after being captured and imprisoned in Fannie Bay Gaol in Darwin, Nemarluk escaped by joining the sanitary gang who were tasked with emptying effluent into the sea and swimming across Darwin Harbour. In 1934, he was recaptured, again by Bull Bull, near Legune Station on the edge of the Thamurrurr region. While there are conflicting accounts, Nemarluk likely passed away without returning to Port Keats. But his relevance

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103 Ivory, 'Kunmanggur, Legend and Leadership', 144.

104 Idriess, *Nemarluk: King of the Wilds*, 13.

105 Ivory, 'Kunmanggur, Legend and Leadership', 176; Downer, *Patrol Indefinite: The Northern Territory Police Force*, 48.

in Wadeye is enduring. Ivory describes how Nemarluk 'arguably transformed from local notoriety to legend', noting a heated incident in 2006 when he heard a close descendant of the warrior to a rival clan: 'You mob are f*** all! If it wasn't for Nemarluk you would not even be here.'[106] Certainly, the legacy of Nemarluk is relevant to other historical characteristic of Wadeye confronting contemporary local leaders: the rise of gang violence.

ii. *The rise of gangs in Wadeye*

The second piece of historical context that is relevant to the work of local leaders in Wadeye is the prevalence of gangs. A prominent feature of life in Wadeye since the 1980s has been the organisation of young men and increasingly young women into gangs. There are several differing accounts of how gangs emerged in Wadeye. A First Nations local leader I interviewed in Wadeye in 2015 described the origin as a screening of the 1979 film *Warriors* directed by Walter Hill in the early 1980s, which contained depictions of American gang culture. He describes people imitating the fashion of the American film to the irritation of the elders: 'The Council said, "No – you can't wear ripped jackets and jeans with swear words on them"; they took those clothes and burned them.' Other accounts cited by Ivory include the popularity of Kung-Fu films in the 1980s and playing the music show "Countdown" at the school.[107] Regardless of the specific origin, from the 1990s onwards gangs were an alternate source of authority to traditional leadership in Wadeye. Ivory's ethnography of gang members highlights generational tensions. On the basis of interviews with gang leaders and members

106 Ivory, 'Kunmanggur, Legend and Leadership', 175.

107 Ivory, 'Kunmanggur, Legend and Leadership', 295.

he concludes: 'they emphasise that their leadership emerged due to their frustrations with the leadership demonstrated by the elder men of the community'.[108]

A 2013 study from the Australian Institute of Criminology ('AIC') noted 14 gangs operating in Wadeye, generally defined through cultural, clan and family affiliations but with contemporary Americanised gang characteristics a strong symbolic link to heavy metal music and clearly defined turn boundaries.[109] Prominent gangs include: the Judas Priests, identifying with the British heavy metal band of the same name: the Slayer mob, identifying with the eponymous American band: and, the Evil Warriors, identifying with a German band but also, being comprised primarily of Murrinh-patha speaking members of the *Kardu Diminin* clan according to Ivory's ethnography, identifying with their ancestors Nemarluk and the Red Band.[110] The AIC report also noted that while the gangs engage in some minor drug distribution for profit they primarily exist as offensive or defensive structures for their members and the protection of their turf: most of the offences they commit are violent.[111]

First Nations leaders I interviewed in Wadeye all stressed the internal nature of these turf wars, to highlight that I was in no personal danger. One First Nations local leader described that 'there are different clans and they form into gangs; it might be tribal, a fight for land – all of this is happening now; often it is

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108 Ivory, 'Kunmanggur, Legend and Leadership', 296.

109 Teresa Cunningham et al., 'Youth Gangs in a Remote Indigenous Community: Importance of Cultural Authority and Family Support', Trends and Issues in Crime and Criminological Justice (Canberra: Australian Institute of Criminology, 2013), 1.

110 Ivory, 'Kunmanggur, Legend and Leadership', 298.

111 Cunningham et al., 'Youth Gangs in a Remote Indigenous Community', 2.

about revenge, sort of like getting even.' Another Fist Nations local leader described to me how gang membership and leadership positions are often passed down within families linking quarrels to longstanding clan feuds. I also met gang members in Wadeye who confirmed these statements and those contained in Ivory's ethnography.

2. First Nations Incarceration in Wadeye: no reduction, continuing violence

Sadly, there has not been a reduction in First Nations incarceration in Wadeye. After a period of relative calm in the mid-2010s, the evidence suggests that public violence has been escalating in recent years. In November 2018, five police officers were injured in a violent clash following a police response to a domestic violence incident. [112] In June 2019, thirty people were arrested following a fight between families at an Australian rules football match.[113] In November 2020, houses and cars were burned and four people had to be airlifted to Darwin hospital following armed riots.[114] Local level data is not available for Wadeye, but interviewees in criminal justice with access to police databases confirmed that, consistent with the headlines and the evidence at the street level, the incarceration rate has remained high and continued to increase. However, as will be seen below, within this generally negative trend there were periods of improvement: small victories that were hard won and warrant consideration.

112 Chris McLennan, 'Police Officers Assaulted - Wadeye', *Katherine Times*, 2 November 2018.

113 Matt Garrick and Sowaibah Hanifie, 'AFL Match Stoush Leads to Arrest of 30 People in Isolated NT Community', *ABC Radio Darwin*, 19 June 2019.

114 Chris McLennan, 'Police Make Six Arrests after Wadeye Riots', *Katherine Times*, 5 November 2020.

i. *Step 1: First Nations leaders build public confidence in their leadership, consistent with prevailing legal norms.*

The evidence at the local level in Wadeye shows that local First Nations leaders have been able to consistently maintain public confidence in their efforts to reduce offending or incarceration. Some of the strongest available evidence for a breakdown in the rule of law and loss of public confidence is recurring, uncontrolled public violence. As such, I do not consider the first step of the mechanism of policy effect observed in Lajamanu, Redfern and Bourke, to have been consistently operating in Wadeye. However, this conclusion must be immediately qualified by other observations. While they did not secure an overall success in reducing incarceration I observed many smaller successes through the work of leaders in Wadeye. During my brief time in Wadeye, these leaders demonstrated considerable public confidence: in certain places, such us on traditional homelands outside of town; among certain groups of community members, very many of whom successfully avoid crime or incarceration; and in certain endeavours, particularly economic and cultural or ceremonial work. Indeed, of all of the First Nations communities I visited, I observed leaders in Wadeye *doing* the most.

The most commonly suggested solution to the problems of violent crime and incarceration in Wadeye, which many family and clan leaders utilise within the sphere of their influence, is to take people out of the town and onto ancestral homelands. This removes the immediate problem of conflict between the 22 clans residing in Wadeye, but is also a powerful assertion of pre-colonial structures from which leaders draw their authority. During my time in Wadeye I

was invited to accompany such a trip, to the small homeland of Ditchi, located 30km from Wadeye on the coast of the Bonaparte Gulf. My experience at Ditchi was reminiscent in many ways of the model successfully employed by Kurdiji leaders at Lajamanu. The elders at Ditchi lamented that it was not possible to achieve such outcomes in town, but was also not possible to remain in the homeland during the wet season due to the poor quality of roads and housing.

Another example of successful leadership is Palngun Wurnangat Aboriginal Corporation (PWAC), an independently owned Indigenous women's corporation. PWAC is a successful social enterprise, allowing women to supplement their welfare benefits through the sale of traditional and contemporary art and craft: they are particularly well known for their vibrant screen printing and entrepreneurial venture involving the harvest of Kakadu plums, an Australian native fruit.[115] Spending an afternoon with the women at the corporation, I heard numerous accounts of its important role in supporting women and families through domestic violence, which is highly prevalent in Wadeye. The impact of such initiatives upon incarceration is difficult to quantify. But given the evidence for intergenerational impacts of incarceration and violent crime, it is reasonable to assume that the PWAC considerably mitigates future crime and incarceration by supporting women and families.

Finally, there is evidence of notably successful leadership in Wadeye in the context of economic development. The Thamarrurr Development Corporation, which acts as a regional corporation for Port Keats, is recognised in

115 See, for example: Wendy Caccetta, 'Wadeye Women Stun with Plums', *National Indigenous Times*, 27 November 2018.

the Top End as a successful model of regional First Nations economic development. An entrepreneurial First Nations leaders and long time board member of Thamarrurr told me that he viewed economic self-determination as the starting point. He pointed to the success of the Men's Shed, a registered RJCP/CDP (work-for-welfare) program for men and the Thamarrurr Indigenous Rangers as life changing opportunities for some young people in Wadeye. Like the Kurdiji leaders in Lajamanu, he lamented the sweeping changes to public administration that accompanied the Intervention and the creation of NT 'super-shires' in 2007; these, he felt, had set the work on the Thamarrurr project back decades.

ii. *Step 2: Local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law.*

Similarly, the evidence at the local level suggests that policy leaders have also struggled to maintain public confidence in their work in criminal justice in Wadeye. Certainly, their interventions have been ultimately unsuccessful at defusing the public violence and, at times, have exacerbated it.[116] Again, this has not been through lack of trying. During my visit to Wadeye policy leaders were working on two initiatives that illustrate the point: the first was a music festival, seeking to harness the popular music that is prominent in youth culture in Wadeye; and the second was the reintroduction of Australian Rules Football, which formed a notable collaboration that I consider below. The music festival was ultimately successful, although at the time of my arrival it was in peril of not occurring: the stage, which had been set up some hours prior to the show,

116 For example: McLennan, 'Police Officers Assaulted - Wadeye'.

became involved in an unrelated scuffle and an axe was put through the drum kit. Nevertheless, I observed the music festival occur successfully, peacefully and to the enjoyment of many young people, including gang members.

iii. *Step 3: First Nations and policy leaders collaborate to build public confidence in local procedural justice.*

The second project that was animating policy leaders in Wadeye during my visit in 2015, the re-commencement of an Australian Rules football competition, subsequently enjoyed notable success as a collaboration with First Nations leaders. Wadeye's troubled Australian Rules football competition had ended in 2013, after too many players had been imprisoned.[117] But, community members and NT Police Sergeant, Scott Rose, who had worked in Wadeye on and off since the 1990s, were determined to revive it. Although games had been a cause of violence in the past, Rose's view was that football would ultimately reduce violence. Holding the games took considerable commitment from police and community leaders, who umpired the games and mediated disputes between rival supporters and families. Rose himself participated, playing as a forward for the Yirrminhirnu Crows.[118] There is some evidence that the season of the Wadeye football competition correlated with reductions in incarceration, both in 2015 and 2017.[119]

iv. *Wadeye: Conclusion*

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117 James Dunlevie, 'Local Police Officer Kicking Goals in Effort to Keep the Peace at Wadeye', *ABC News*, 17 December 2015.

118 Dunlevie, 'Local Police Officer Kicking Goals'.

119 Georgia Hitch and Kristy O'Brien, 'Clan Violence, Incarceration Rates Drop in Remote Aboriginal Town Due to Love for AFL', *ABC News*, 21 June 2018; Zach Hope, 'Drop in Violence and Theft Figures in Wadeye, NT, Linked to Rise of Local Football League', *The Herald Sun*, 29 November 2015.

The case of Wadeye highlights the profound challenges confronting leaders at the local level in responding to First Nations incarceration. From the opening chapter of this thesis, I have qualified that my explanation of how the policy response to incarceration did not exclude the impact of other causal factors. The experience of leaders in Wadeye shows the impact of those factors, with the result that leadership is contested. Several leaders in Wadeye wryly observed to me their frustration with outsiders asking for more leadership. In response they made an obvious point which, in order to avoid compromising these leaders, I will express here through a similar quote that Ivory's ethnography has already put on the public record:

> 'Well I'll tell you mob something. We are sh** scared of the gangs! I worry for my family and myself. They know if we dob them in. They've got spies everywhere. It's easy for you mob (outsiders) to say that the leaders need to be strong and do something about it. But I don't want to die young.'[120]

In this context of contested leadership, governance failures around instability of public administration and uncertainty of funding, which were observed but ultimately overcome in Lajamanu, Redfern and Bourke, are cast in a different light: they appear incompatible with any prospect of success in Wadeye.

While any positive impact a policy response around empowered local leadership in Wadeye has likely been overcome by other factors, I did find evidence of positive effects. In this way, a secondary conclusion is open upon the evidence. While it has not been successful, there is no evidence to suggest that in delegating initiatives for reducing incarceration to local leaders Commonwealth or State Governments have suffered from a traditionally conceived

120 Ivory, 'Kunmanggur, Legend and Leadership', 300.

principal/agent cost. Local leadership has been energetic and resolute in its ongoing attempts to reduce crime and incarceration in Wadeye. While there is not sufficient evidence to quantify the effect, anecdotal and individual successes evident in interviews suggests that crime and incarceration would be considerably worse but for the efforts of local leaders.

b) Dubbo

Dubbo is a regional centre in the central west of NSW. At the 2016 census, it had a population of 38,394 people of whom 14.6% were First Nations people.[121] It is located on the traditional land of the Tubbagah people of the Wiradjuri First Nation. It is located 370km from the town of Bourke introduced earlier in this Chapter, for which it provides much servicing. The Dubbo First Nations community is prominent in NSW. Historically, the community was connected with activism against racism and segregation within NSW country towns. Prominently this occurred through the Freedom Ride undertaken by Charles Perkins, Australia's first Aboriginal university student and friends from Sydney university, which visited Dubbo among other country towns to protest segregation; in 2015, a recreation of the Freedom Ride visited the Orana juvenile detention centre in Dubbo to highlight the ongoing racial disparity in incarceration.[122] However, the 21st century Dubbo is also famous for clashes

121 Australian Bureau of Statistics, '2016 Census QuickStats: Dubbo' (Canberra: Australian Bureau of Statistics, 23 October 2017),

122 Monica Tan and Freddy McConnell, 'Freedom Ride: Plenty of Lessons to Be Learned at Dubbo Juvenile Justice Centre', *The Guardian Australia*, 19 February 2015.

between the First Nations community and police; most notably riots in 2006, which resulted in the closing and relocation of the Gordon Housing Estate.[123]

1. History of Dubbo

i. Violent Conflict

Conflict between the Wiradjuri nation and European settlers in the 19th century is well documented. European settlers had identified a route across the Blue Mountains in 1813. In 1821 Governor Thomas Brisbane decided to encourage expansion to the North West of Sydney by altering land settlement laws award numerous land grants to the West of the Blue Mountains. This brought pastoralists into conflict with the Wiradjuri people, traditional owners of that country. In 1822, Wiradjuri people began an organised resistance under the leadership of a well-known warrior named Windradyne. In 1824, in response to these attacks, Governor Brisbane declared martial law over Wiradjuri country and rushed a detachment of the 40th Regiment to Bathhurst. Several clashes followed including the 'Battle of Bathurst', after which soldiers and settlers massacred a group of Wiradjuri who were burying their dead. By late 1824, large numbers of Wiradjuri were surrendering. On 11 December 1824 martial law was repealed and on 28 December 1824, Windradyne appeared with a large group of Wiradjuri in Parramatta to attend a public feast held by the Governor. Reportedly, he was no arrested out of fear of inciting a riot, given the large

123 See: ABC News, 'Police Restore Order after Dubbo Riot', *ABC News*, 2 January 2006; Louise Hall, 'From Ghetto to Grove, a Housing Success Story', *The Sydney Morning Herald*, 29 April 2010.

number of Wiradjrui present. He was wearing a straw hat with the word 'Peace' visible on a label. This was the end of the conflict.[124]

iii. Forced Relocation and Segregation

By 1825, the Nanima Mission had been established 50km to the south east of Dubbo.[125] Recent historical work in the Central West has highlighted the extent to which Aboriginal workers were instrumental in the establishment of large pastoral stations in the first half of the 19th century: the extent to which they provided knowledge as well as labour is evident in the positioning of historic homesteads in the vicinity of traditional camping and ceremony sites.[126] Following the establishment of the Board for the Protection of Aborigines ('the Board') in 1883, Wiradjuri people who were not employed on stations or in other roles began to be forcibly relocated to missions, including Nanima.[127] As in Redfern and Bourke, this process significantly disrupted First Nations societies in the Central West of NSW. In 1914, the Board instructed stations managers that all 'mixed descent youths' over 14 had to leave stations to find work: the boys in agricultural employment, the girls in service or to the Cootamundra Training Home for Girls.[128] In 1915, the Board for the Protection of Aborigines was given 'total power' to separate Aboriginal children from their families without having to attend court or establish that they had been neglected; the manager of an

124 David Andrew Roberts, Windradyne (1800-1829) *Australian Dictionary of Biography* (Canberra: Australian National University, 2005).

125 The earliest date represented in the cemetery is 1825.

126 P. Memmott et al., 'Violence in Indigenous Communities' (Canberra: Crime Prevention Branch, Attorney General's Department, 2011).

127 See: Human Rights and Equal Opportunity Commission, 'Bringing Them Home' Chapter 3.

128 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 80.

Aboriginal station or a police officer could also order a removal.[129] This caused great trauma to First Nations families, which continues to resonate as an intergenerational experience in the present: trauma was the first cause of alcohol and substance abuse and of ongoing anomie that was raised in interviews with me by First Nations leaders in Dubbo. Forcible relocation, removal of children and segregation also caused considerable social dislocation and disorganisation. From 1917, a perceived shortage of available farmland caused the closure of some Aboriginal Reserves and further relocations; some families fled reserves or moved to Victoria in order to avoid the removal of their children;[130] many families moved around NSW in order to escape reserves by securing work, including to Sydney and Redfern, as described above. As a result of this history, Dubbo – like many regional centres in NSW – has a diverse First Nations community, drawing upon numerous traditional languages, cultures and traditions.

2. First Nations Incarceration in Dubbo

Like most First Nations communities in Australia, Dubbo has not achieved a reduction in incarceration. Noting the NSW government's concern that data requiring First Nations people to self-identify in criminal justice is distorted, the general trend observable from the available local quantitative data, as well as interview and anecdotal evidence from within criminal justice, is of a continuing rise since 1992, consistent with the State trend.[131] Local data from the NSW

129 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 80.

130 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 79–80.

131 NSW Aboriginal Affairs, Department of Education, 'Aboriginal Identification in NSW: The Way Forward', 21.

Bureau of Crime and Statistics, which draws upon police data bases, shows some continuing trends: 11.8% increase in domestic violence and 21.4% increase in harassment and threatening behaviour and a 21.4% increase in breach of apprehended violence order offences over the past 5 years; increases in possession and/or use offences for drugs, 18.9% for cannabis, 10.8% for amphetamines, 22.9% for other drugs. However, the data also shows decreases over the past 5 years in property offences. As in Wadeye, this suggests that either the policy response to First Nations incarceration did not take effect in Dubbo, or that any effect was masked by the greater effect of other factors driving incarceration. Again, I will examine this by tracing the policies designed to empower local leaders.

ii. *Step 1: First Nations Leaders build public confidence in their leadership, consistent with prevailing legal norms*

Leaders from Dubbo were involved in one of the most prominent initiatives of the policy response to First Nations Incarceration in NSW: circle sentencing. Circle sentencing is a model of community based sentencing developed in Canada in 1992; it involves judicial officers sitting with elders, community members and families of the offender and victim to decide upon an appropriate sentence.[132] Marchetti and Daly trace the rise of restorative justice initiatives in NSW to the recommendations of the Royal Commission;[133] circle sentencing is the largest restorative justice initiative available to First Nations offenders in

132 Ivan Potas et al., 'Circle Sentencing in New South Wales: A Review and Evaluation' (Sydney: Judicial Commission of New South Wales, October 2003), 3.

133 Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia', *Trends and Issues in Crime and Criminal Justice* 277, May (2004): 1–6; Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical Jurisprudential Model', *Sydney Law Review* 29, no. 3 (2007): 415.

NSW. It was adopted through a joint initiative of the NSW AJAC, the centrepiece of First Nations empowerment within criminal justice in NSW, and the Judicial Commission of NSW.[134] This process began in 1999. A pilot began in the town of Nowra in 2002.[135] The first circle sentencing case convened outside Nowra was heard on 26 August 2003 in Dubbo.[136] Circle sentencing is now available in 12 NSW local courts. Initial evaluations of circle sentencing were mixed but more recent studies have shown positive reductions in both incarceration recidivism: participating offenders were 9.3% less likely to receive a prison sentence; 3.9% less likely to reoffend within 12 months; take 55 days longer to reoffend if they do.[137]

While it is important to credit the success of circle sentencing and similar initiatives which have had a transformative impact upon the lives of some individuals, the shared view of interviewees in Dubbo was that these successes were buried under other drivers of incarceration. Foremost among these is a crisis in substance abuse caused by the drug crystal methamphetamine or 'ice'. There are multiple sources of evidence confirming the rise of crystal methamphetamine in Dubbo First Nations community since the mid-2000s. The manager of the Lyndon Community Centre, one of the primary rehabilitation facilities for central western NSW has observed: 'we're seeing a lot more Aboriginal people come to our treatment services; probably about 20% of our

134 Potas et al., 'Circle Sentencing in New South Wales', 3.

135 Potas et al., 'Circle Sentencing in New South Wales', 3.

136 Steve Yeong and Elizabeth Moore, 'Circle Sentencing, Incarceration and Recidivism' (Sydney: NSW Bureau of Crime Statistics and Research, April 2020), 3.

137 Yeong and Moore, 'Circle Sentencing' 3.

treatment services were Aboriginal eight years ago and now it's 50%; between January and July of 2015, the Lyndon Community Withdrawal Unit treated 980 people for substance abuse, 60% of those came from Western NSW.[138] On top of these accounts, there is compelling evidence in the discarded needles that can be observed at the street level.

The social and criminal impact of 'ice' is tangibly different to other substances that the Dubbo community had experienced because of its frequent psychotic manifestations. A quote from Frank 'Riverbank Frank' Doolan, a prominent First Nations community member highlights the experience of leaders:

> 'It's very scary. It's heightening of the levels of trauma and the drama that Aboriginal people live with. It's a pretty bad thing. People react on ice in a way that no other drug has done to them in the past. There is no handbook for it and a lot of it is guesswork.' [139]

A matriarch of the Dubbo First Nations local leader I interviewed told me a story to illustrate this point. Some months prior to our interview in 2015, a friend and mentor of hers, a respected First Nations elder of famously forceful personality, had been told that a grandson of hers was having a psychotic episode due to a bad-trip on ice; he had been seen roaming the streets with a knife and talking to himself. The grandmother immediately set off to intervene but she found her grandson in a state of psychological disassociation: unable to recognise her, unwilling to put down the knife and pursuing a community dog he had mistaken for a person. My interviewee observed that 'no amount of leadership was going

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138 Allan Clarke, 'A Community Being Ripped Apart by Ice: Despair, Hope and the Fight for Survival as Methamphetamine Ravages Indigenous NSW', *BuzzFeed News Australia*, 5 November 2015.

139 Frank Doolan, quoted in Clarke, 'A Community Being Ripped Apart by Ice'.

to fix that situation.' In this way, the crystal-methamphetamine crisis in Dubbo shows the limits of the policy response: there are some problems that empowered local leaders are unable to resolve. In these circumstances, First Nations leaders have been unable to build sufficient public confidence.

However, First Nations leaders identified that they could address the problem of crystal-methamphetamine by increasing servicing. There is no drug rehabilitation service in Dubbo; the closest rehabilitation facility is the Lyndon Community Withdrawal Unit, which is 200km away in Canowindra. One example of an initiative that First Nations community leaders took in response was to organise and form a corporation. Nguumambiny Indigenous Corporation was established in 2013 and became a leading advocate of securing a rehabilitation facility in Dubbo.[140] The corporation expanded into offering employment services and mentoring for rehabilitating offenders and addicts, as well as specific courses for both men and women struggling with drug addition, anger management and domestic violence. At its peak, Nguumambiny had 7,500 clients and was praised for its work in a press release from the Office of the Register of Indigenous Corporations ('ORIC').[141] But, the programs Nguumambiny was providing were funded through short-term, piecemeal government grants that had to be regularly reapplied for. After a series of unsuccessful applications, at the end of 2016 Nguumambiny lost a tender from NSW Department of Justice to

140 Jennifer Hoar, 'Nguumambiny Indigenous Corporation CEO Manager Lynn Field Says Dubbo's Ice Issues Are Far from Over', *Daily Liberal*, 6 July 2015; Jennifer Hoar, 'Dubbo Community Gets behind Push for Drug and Alcohol Rehabilitation Centre', *Daily Liberal*, 27 May 2015.

141 Office of the Registrar of Indigenous Corporations (ORIC), 'Practical Help Puts Lives Back on Track' (Canberra: Office of the Registrar of Indigenous Corporations, November 2015).

provide services to male domestic violence victims and was no longer financially viable. Lynn Field, the long-term manager who had been working voluntarily for several years, stepped down and the corporation ceased operations.[142]

Earlier sections of this thesis have highlighted the importance of First Nations corporations in examples of local success. The experience of Nguumambiny presents the more common story. While corporations are an important first step in funding local initiatives; the piecemeal and uncertain nature of public funding makes their future tenuous and many do not survive.

iv. Step 2: Local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law.

Despite some success in areas such as circle sentencing, I did not find that policy leaders had achieved a high level of public confidence among First Nations people in Dubbo. When I conducted fieldwork in Dubbo in 2012 and 2015 the relationship between criminal justice – and especially NSW police – and the First Nations community remained overshadowed by an incident in 2006, referred to as the 'Gordon Estate Riot', which resulted in the closure and relocation of a public housing estate. Police action following the Gordon Estate riot was continuing to undermine public confidence in police in 2015, which provides an important case study of how actions perceived to be inconsistent with the rule of law can have a longstanding impact upon public confidence.

In January 2006, a riot involving approximately one hundred First Nations people erupted in the Gordon Housing Estate in Dubbo: two police officers were injured in the response, a police car was set on fire and public

142 Jennifer Hoar, 'Lynn Field Steps Down', *Narromine News*, 8 November 2016.

housing buildings were damaged.[143] Police leadership blamed the social structure of the estate. Detective Inspector Michael Willing was quoted as saying: '…the same thing has taken place as took place 12 months ago, you've got problematic families who cannot get on living in the same estate. It's an ongoing problem and all agencies and resources need to work together to try and deal with it.' [144] In response to the riot, the NSW Government and the NSW Police took the extraordinary step of closing the estate: '1,300 predominantly Aboriginal residents were shipped out, their homes knocked down or sold off to private buyers, and the suburb was renamed Rosewood Grove.'[145] The closure of the Gordon estate did have an immediate impact upon crime and incarceration rates in Dubbo, as reported form NSW Police databases, although this was in part due to the movement of residents to other areas. Nevertheless, in 2010 the move was declared a success and awarded the Australian Crime and Violence Prevention award. [146]

It is difficult to fully assess the impact of response by policy leaders to the Gordon Estate riot. It may have been necessary due to immediate law and order concerns in 2006 and, as has been outlined above, it was perceived to have short-term benefits. But, on the basis of my data gathering I cannot avoid the conclusion that alongside any benefits, the closure of the Gordon Estate further

143 See: ABC News, 'Police Restore Order after Dubbo Riot'; Hall, 'From Ghetto to Grove, a Housing Success Story'.

144 Harriet Alexander, 'Harsh Means and Harsher Ends: The Results of a Radical Social Housing Policy', *The Sydney Morning Herald*, 28 May 2019.

145 Alexander, 'Harsh Means and Harsher Ends'.

146 Hall, 'From Ghetto to Grove, a Housing Success Story'.

entrenched distrust of police and Government and did long-term damage to public confidence in criminal justice for First Nations residents in Dubbo.

v. *Step 3: First nations and policy leaders collaborate to build public confidence in local procedural justice*

Unsurprisingly, given the evidence found for Steps 1 and 2 above, I did not find evidence of irreversible commitments from First Nations Leaders or policy leaders to collaborate in Dubbo. However, there is a positive caveat to that conclusion. From 2017 there has been commitment from both First Nations leaders and leaders within criminal justice and local government to collaborate on implementing justice reinvestment in Dubbo. Interest in justice reinvestment has arisen, in part, from the positive experience of Bourke with which the Dubbo First Nations community is strongly connected and which shares a police chain of command. While there is not yet evidence available to assess the impact of justice reinvestment in Dubbo, the positive experience of Bourke gives reason for optimism.

3. Conclusion Dubbo

The conclusions I draw from the experience of Dubbo reinforce those from the experience of Wadeye. First, and perhaps surprisingly in the circumstances, the core policy of empowering First Nations leaders was validated: despite the difficult circumstances in Dubbo, Commonwealth and State Governments have suffered little transaction cost in their principal-agent relationship with First Nations leaders in Dubbo; indeed, they have gotten a lot of voluntary work at a bargain rate. Paired comparison between Dubbo and Lajamanu, Bourke or Redfern offers two insights where the mechanism broke down. First, once again,

the structural importance of First Nations corporations is evident. The experience of Nguumambiny Corporation is compelling evidence of this point. While the demise of a small corporation is not unusual, the gradual over-burdening of Nguumambiny through administrative burden and short-term grant funding suggests a lack of strategic awareness by the policy core within the layered system of government. The second breaking point I observed was in the lack of collaboration between First Nations leaders and policy leaders, although this may have changed with the move towards justice reinvestment. I do not consider this a condemnation of the leaders themselves – in interviews I found evidence of goodwill between both communities. I consider it a qualifier of the success of collaboration in Lajamanu, Bourke and Redfern: irreversible commitment to collaborate in the context of criminal justice is both rare and difficult.

c) Darwin

Darwin is the capital city of the NT. In considering the mechanism through which the policy response took effect upon First Nations incarceration, the community in Darwin provides a different experience again from the four communities considered so far. Darwin's transient homeless population, referred to as 'long-grassers', and its status as the major servicing hub for the Northern Australia highlights the degree to which these local case studies are interconnected. Survey data suggests that this population is disproportionately vulnerable: it has a very high self-reported incidence of trauma, trauma-related illness and self-medication; it also has disproportionately poor health, as many people have

originally come to Darwin due to health concerns.[147] This creates a notably difficult context for local leadership providing insights into both the limitations of local leaders when confronted by regional issues and the weaknesses within the public administration system supporting them.

1. Historical Context of Darwin

After four previous, unsuccessful attempts to establish a European settlement on the coast of the NT, the site of Darwin was settled in 1869. Originally named Palmerston, it was on the traditional country of the Larrakia First Nation. The expansion of European settlement in the NT in the second half of the nineteenth century expanded more swiftly than earlier settlements in other parts of Australia due to nineteenth century technology and funding from large pastoral and mining interests. By the late 1880s, most land was occupied for some kind of development and most was owned by large corporate interests.[148] Dispossessed First Nations people who were not able to reach an accommodation with cattle stations or mines were compelled to 'set up camps on the outskirts of non-Indigenous townships.' [149] This is the historical context for Darwin's 'long-grass' population. The response to this itinerant population both by policy leaders or officials and the Larrakia traditional owners provides important historical context for contemporary local leadership.

147 Catherine Holmes and Eva McRae-Williams, 'NDLERF: An Investigation into the Influx of Indigenous "visitors" to Darwin's Long Grass from Remote NT Communities - Phase 2', Monograph Series (Hobart: National Drug Law Enforcement Research Fund, 2008), 8–12.

148 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 83.

149 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 83.

i. Segregation in Darwin

In his history of the Larrakia, Scambray has argued that Darwin was a segregated city 'from its earliest establishment'. [150] In 1910, the *Northern Territory Aboriginals Act 1906* was passed, establishing the Northern Territory Aboriginals Department. This provided the legal framework for the Chief Protector, who was appointed the 'legal guardian of every Aboriginal and every half-caste child up to the age of 18 years'. These laws were reaffirmed by the Commonwealth when it took control over the NT from SA in 1910; they provided the basis for a system of segregation which characterised Darwin until the second half of the twentieth century. In contrast to rural areas, where First Nations people were moved to stations, in urban areas of the NT, First Nations people were largely compelled to reside in compounds, where they were required to undertake farming to make their compound self-sufficient. The most famous of these, the Kahlin Compound, was set up outside Darwin in 1913.[151]

Life in the Compounds was heavily regulated. From 1918, the Chief Protector had 'total control' as guardian over all First Nations women unless they were married and living with a husband 'who is substantially of European origin'; to marry a non-Indigenous man they had to obtain permission from the Chief Protector.[152] From 1913, the then Northern Territory Protector of Aborigines, anthropologist Walter Baldwin Spencer, commenced an aggressive policy of removing mixed-race children from 'the native camp'; in the case of the

150 Benedict Scambary, '"No Vacancies at the Starlight Motel": Larrakia Identity and the Native Title Claim Process', in *The Social Effects of Native Title: Recognition, Translation, Coexistence.*, ed. B.R. Smith, CAEPR Research Monograph (Canberra: ANU E-Press, 2007).

151 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 84.

152 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 84.

Kahlin Compound in Darwin, they were removed to a 'Half-Caste Home' nearby.[153] In 1938, the Bagot Aboriginal Reserve was created and the Kahlin Compound closed. Removal of 'mixed-race' children continued on the Bagot Reserve, to the Retta Dixon Home, which was co-located.

vi. *Larrakia Traditional Owners*

Larrakia assertions of their ownership of Darwin have been present at all points in Darwin's history.[154] But leadership by Larrakia traditional owners has been significantly complicated by both the history of segregation in Darwin and the large transient population of other First Nations people from all of the NT. Scambray's history of the Larrakia describes how they responded to segregation by building identity and leadership in institutions that were open to them:

> '…Many Larrakia have maintained and developed their identity as Larrakia through a complex of family and social relations, centred on continued residence in the Darwin area and in reserves, the Parap Camp and the Police Paddock. Institutions such as the Sunshine Club, and the Buffaloes sporting club, which have typically been the domain of 'Darwin Aboriginal Families' and loosely the Larrakia, have also been an important focus of Larrakia identity.'[155]

As First Nations Australians achieved greater rights and freedoms following WW2, the Larrakia were able to asset their identity and traditional ownership of Darwin more strongly. For example, in 1971, following the *Gove Land Rights Case*,[156] Larrakia leader Bobby Secretary led both Larrakia traditional owners and other First Nations residents of Darwin in protest under the slogan '*Gwalwa Dariniki'* ('our land'). The recognition of land rights has been

153 Human Rights and Equal Opportunity Commission, 'Bringing Them Home', 84.

154 James Dunlevie and Xavier La Canna, 'Kenbi Land Claim: Hand-Back to Aboriginal Owners 37 Years in the Making', *ABC News*, 21 June 2016.

155 See: Scambary, '"No Vacancies at the Starlight Motel": Larrakia Identity and the Native Title Claim Process'.

156 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

a source of power and economic security for many other traditional owners in the NT: as an example, royalties from land rights were instrumental in the Kurdiji funding their program in Lajamanu. But the Larrakia's claim was frustrated by the presence of Darwin on their country. Some success was eventually achieved in 2016, with the granting of the Kenbi Land claim.[157]

2. First Nations Incarceration in Darwin

It is not possible to separate trends in First Nations incarceration in Darwin from those of the NT at large. This is for two reasons. First, Darwin's large transient population is drawn from across the NT; the need to travel to Darwin for services creates many short-term visitors, as well as medium and long-term residents. Second, the presence of the NT's main prisons near Darwin, until 2014 at Berrimah and after that at Holtze, has anecdotally resulted in offenders from other parts of the Territory choosing to be released in Darwin, only to reoffend.[158] The increase in First Nations incarceration in the NT has been documented by the Australian Bureau of Statistics in its annual *Prisoners in Australia* survey: the rate has more than doubled, from 1,244 per 100,000 adults 2,851 per 100,000 in 2019.[159] I found no evidence at the local level in Darwin to suggest that it has risen less than this trend. But, as in Wadeye and Dubbo, I did find evidence of local leaders working resolutely to try and reduce First Nations incarceration in the future.

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157 Dunlevie and La Canna, 'Kenbi Land Claim: Hand-Back to Aboriginal Owners 37 Years in the Making'.

158 Larrakia Night Patrol, Fieldwork Interview, Darwin 205.

159 Australian Bureau of Statistics, 'Prisoners in Australia, 2019' (Canberra: Australian Bureau of Statistics, 12 May 2019).

i. Step One: First Nations Leaders build public confidence in their leadership, consistent with prevailing legal norms

First Nations leaders in Darwin have not been able to establish the level of public confidence observed in Lajamanu, Redfern and Bourke. In this sense, I do not consider the mechanism of policy effect to be operating to reduce First Nations incarceration in Darwin. But, a paired comparison with any of the three successful cases highlights a contextual factor in Darwin that differentiates it: the large 'long-grassing' population creates a far less coherent or stable First Nations community, which is an often insurmountable challenge for leaders attempting exercise authority in the context of criminal justice. This is evident in the experience of two initiatives undertaken by First Nations leaders that I was directed to in Darwin.

One authority that was repeatedly reference in my time in Darwin was that of the Larrakia traditional owners: the right of traditional owners to exercise a degree of authority over visitors to their country is generally respected by First Nations people in the NT. These people directed me to the Larrakia Nation Aboriginal Corporation. One of the most important programs run by the Larrakia Nation is the community night patrol; this is the same Commonwealth program run by the Kurdiji in Lajamanu, but on a larger scale. Every night, the Larrakia Night Patrol patrols Darwin engaging with the long-grass community to promote public safety and transport those who are unsafe to a better location. The coordinator of the patrol's view was clear:

> 'My thought personally is that it all revolves the homelessness. What we see every night is the homelessness. Basically, no one's got a home and the security of a place to stay in. The indigenous clients we pick up every night are the same

> people. They've got nowhere to go. Darwin is the capital city, if you like, of all the First Nations communities – it's a one stop shop for all communities in the Northern Territory. But once the clients get in, due to the shortage of housing, they become long-grassers. Once they become long-grassers that is when issues start occurring: get into trouble with the police every night; different clan groups and family groups don't get along.'

In the process described by the coordinator of the patrol and observed by myself during my time in Darwin with the Larrakia Nation, the contextual factor of homelessness operates as a catalyst that exacerbates other causes of incarceration and hinder leaders in their response. The coordinator observed that this presents an almost impossible task for leaders in the traditional owner community. They feel culturally obliged to host other First Nations people, but the scale of the homeless population is too large: 'Indigenous people are caring people; it's hard for them to tell a person they can't stay with them but suddenly you've got overcrowding - suddenly a house with 4 people on the lease has 34 people in it and you've lost your lease.'

While there is evidence that services provided by the Larrakia Nation are making a positive contribution to the well-being of the long-grass population and are likely reducing further incarceration, I found leaders frustrated that the drivers of the problem were beyond their control. A rise in the Darwin homeless population was documented at the time of the Northern Territory Intervention in 2007; [160] during my visit in 2015 a similar increase had been documented by the Larrakia Night Patrol, this time driven by visitors from WA, displaced by decisions in that State to withdraw public servicing from 'unviable' First Nations communities. As one leader lamented to me, there is a sense that 'we'd have to solve every problem in the Top End to fix this'.

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160 Holmes and McRae-Williams, 'NDLERF - Phase 2', v.

A second initiative I was directed to in Darwin was initiated by a First Nations leader who was not a traditional owner and provides additional insights into the case. David Cole, a Luritja and Wambaya First Nations man traditionally from central Australia, has worked for twenty years with his wife to improve outcomes for youth in Darwin. The Balanu Foundation, which the couple founded, provides culturally based programs for at-risk youth in Darwin. Rooted in Cole and his wife's personal experience, Balanu focuses upon preventing suicides, addressing substance abuse and diverting youth from prison. The Balanu program has collected data over the years of its operation that suggest a positive impact in reducing suicide: 80-85% of the kids that Cole has worked with report that they had attempted or thought about suicide prior to entering his program, consistent with the national statistics for young First Nations people; 15-20 have attempted suicide during his program but as at 2015 there had been no suicides. This suggests some success in addressing anomie through 'cultural healing'. However, in July 2015, Balanu had to cease all programs due to losing the funding it had been receiving. For a period it continued on a voluntary basis, but only conducting advocacy: it was able to continue to the financial commitment of Cole and his wife. Balanu has subsequently regained some further government and philanthropic funding and recommenced programs, but its future remains uncertain.

ii. *Step Two: Local policy leaders build public confidence in their leadership, consistent with the doctrine of the rule of law*

Because Darwin is the capital city of the NT, it has been difficult for local policy leaders to differentiate themselves from the elite policy leaders of the Territory.

This has been problematic for local leaders, as there is a political incentive for Territory politicians to be 'tough' on long-grassers, who are not electorally significant and, among other barriers, are likely not registered to vote in Darwin.

A brief content analysis of NT media by Holmes and McRae-Williams shows that negative rhetoric towards the homeless First Nations population in Darwin has been remarkably consistent from senior policymakers in the Territory. As outlined above, segregation in Darwin was driven by a desire to control this population. In the 1930s, Dr Cook, the then Chief Protector of Aborigines, wrote that with stricter supervision 'these camps will disappear and aboriginals now in the vicinity of Darwin will be more concentrated under supervision'. [161] In 1996, the Darwin Lord Mayor was quoted as saying '…harass, harass, harass…I reckon that if you keep shifting them around, constantly harass them so they can't settle, they will get sick and tired of it and maybe some of them will go back to their own communities'. [162] There have been some exceptions. In the early 2000s, the Martin Labor Government launched the 'community harmony project', a concerted effort to engage with First Nations groups, including Larrakia Nation, in order to address the compounding harms of long-grassing. But this did not prove politically sustainable and prior to the 2005 election, it changed policy to campaign on an aggressive platform targeting anti-social behaviour in Darwin.[163]

161 Holmes and McRae-Williams, 'NDLERF - Phase 2', 7.

162 Holmes and McRae-Williams, 'NDLERF - Phase 2', 7.

163 Tony Eastley, 'Clare Martin Defends Anti-Social Behaviour Laws', *ABC: AM*, 17 June 2005.

While I observed significant effort and collaboration at the individual level by police and some policy leaders – for example in the collaboration between police and the Larrakia Night Patrol – I did not find evidence of public confidence in criminal justice in Darwin's transient First Nations population. In the case of Darwin, I conclude that this is the point at which the mechanism broke down.

3. Conclusion: Darwin

The case of Darwin highlights a theme I have observed throughout my enquiry at the local level: crime and incarceration are connected to a multiplicity of other factors within a community and a society. In the other cases in this thesis, leaders were able to overcome many of these connections by forging a powerful local identity. In the context of Darwin's transient homeless population that has not been possible. However, leaders have made important contributions nonetheless, both within the Larrakia community, the long-term First Nations community in Darwin that is not Larrakia and in mitigating some of the harms caused by homelessness. Certainly First Nations leaders in Darwin have not used their discretion, within the context of the principal-agent relationships underpinning contracted Government servicing, to avoid difficult problems. The Larrakia Night Patrol is famously hardworking and in the circumstances afforded a notable level of respect. The experience of the Balanu Foundation once again emphasises the core structural role played by First Nations corporations as a contextual condition for successful local initiatives. I found no stronger evidence of this than the willingness of David Cole and his wife to pay the administrative

costs of Balanu personally, in order to have the corporation in place for future funding opportunities.

Conclusion

This thesis has presented a relational account of failing governance in a complex policy domain. At its conclusion, it is apparent that both the mechanism of policy change and the mechanism of policy effect broke down in the policy response to First Nations incarceration, although for different reasons. The mechanism of policy change stalled in the absence of sufficient political will. The principal-agent delegations required to initiate policy change in First Nations incarceration have high transaction costs. Delegating policy formulation to an independent legal authority increases the political cost of resuming policymaking at a later point, when First Nations incarceration has likely lost political salience. Moreover, managing the delegation of implementation to State and Territory governments requires ongoing, exhausting political effort from the Commonwealth. In 1992, the Hawke and Keating Governments were sufficiently committed to overcome these transaction costs; subsequent Commonwealth Governments have not been able or willing to follow that example; subsequent State and Territory Governments have not been willing to protect the policy response from the political expedience of 'tough on crime' electioneering.

By contrast, in delegating the mechanism of policy effect to empowered local leaders, the Commonwealth has secured a bargain unanticipated by the principal-agent literature. While local First Nations and policy leaders enjoy considerable discretionary autonomy, in all the cases within this thesis these *agents* have shown far greater commitment to reducing First Nations incarceration than the Commonwealth *principal* has been able to fund. In some cases empowered local leaders have collaborated successfully to achieve notable

reductions in incarceration. But, more commonly, the contextual conditions necessary for the mechanism of policy effect to operate have not been met. In the local case studies in Chapter 6, stability in public administration and access to funding operated as necessary conditions for the policy to take effect: where these were not present, local initiatives were frustrated. A critical structural factor enabling success within the case studies in this thesis was the presence and resilience of local First Nations corporations. As described in Chapter 6, if the machinery of government is a car engine, First Nations corporations are the differential: while separate from the engine, they transmit all the power to the wheels. Where First Nations corporations have failed at the local level, so has the policy response.

I commenced this thesis as an exploratory study of a methodologically challenging but important national case. In reaching my conclusions, I am mindful of its limitations. In explaining both policy change and policy effect with regard to First Nations incarceration, my enquiry has been limited by available data and available case studies. Further application would significantly strengthen my explanatory model, particularly in the case of policy change for which there were limited available cases to compare. Nonetheless, in the imperfect world of public policy, I consider this thesis to present a potentially useful heuristic to practitioners trying to reduce First Nations incarceration. I hope that it can provide some insights to inform the many judgements practitioners are compelled by necessity to make upon limited information.

As introduced in Chapter 2, the thesis sits between two bodies of literature: a case specific, interdisciplinary literature on First Nations

incarceration; and a public policy theory literature on governance failure. In concluding, it offers a small contribution to each of these literatures and a larger promise of opportunities for further study. Within the interdisciplinary literature on First Nations incarceration, I argue that the thesis has shown the merit of a political science perspective and methodology: the agency of leaders and structures of public-administration have not featured prominently in existing explanations of the continuing rise of First Nations incarceration, despite significant anecdotal evidence at the local level. Political science offers a useful perspective to study these factors further. Foregrounding the agency of local leaders also provides an alternate argument for future strategies to reduce incarceration that empower the local level, such as justice reinvestment.

Within the growing literature on racially disproportionate incarceration, First Nations Australia represents an important case study. While the contextually sensitive nature of process-tracing does not lend itself easily to broad comparative analyses, the insights from this thesis may prove useful in other jurisdictions where policymakers are designing policy responses to racially disproportionate incarceration. Finally, within the public policy literature this thesis has sought to contribute to the growing interest in governance failure, as distinct from policy failure. I feel that it contributes a messy and difficult case study to the governance failure literature – two characteristics that are not unusual when governments fail to achieve their aims.

For policymakers, this thesis shows the practical potential of local self-determination to achieve genuine social change but also warns that the complexity of Australia's public administration must be successfully managed in

order to realise this potential in all but exceptional cases. As they currently stand, the complicated public policy arrangements underpinning the policy response to First Nations incarceration are stacked against success. But, through the lens of relational governance the case studies within this thesis show that governance failures have – at times – been overcome through the agency of leaders. While this is a qualified argument for agency, it is also a hopeful one. My experience of studying the policy response to First Nations incarceration has taught me that at the street level leadership is one of the few things that is not in short supply.

It is not usual for scholars of politics to study leaders at the elite level and the local level simultaneously. My closing reflection is that this is a shame. I found optimism, energy and resolution in the policy response to First Nations incarceration among leaders at the local level. If Australia is going to drive a broken government machinery toward reduced First Nations incarceration in the future, elite level policymakers might be advised to start by emulating their local counterparts.

Bibliography

'2016 Census QuickStats: Community Profile Lajamanu'. Canberra: Australian Bureau of Statistics, 23 October 2017. http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC70152.

ABC News. 'Fifty Police Injured in Redfern Riot'. *ABC News*. 16 February 2004. https://www.abc.net.au/news/2004-02-16/fifty-police-injured-in-redfern-riot/136268.

———. 'Police Restore Order after Dubbo Riot'. *ABC News*. 2 January 2006. https://www.abc.net.au/news/2006-01-02/police-restore-order-after-dubbo-riot/771470.

Aboriginal and Torres Strait Islander Commission. 'Annual Report 1995-1996'. Canberra: ATSIC, 1996.

Aboriginal and Torres Strait Islander Justice Commissioner. 'Indigenous Deaths in Custody 1989 to 1996: Second Report'. Canberra: Human Rights and Equal Opportunities Commission, 1996.

———. 'Social Justice Report: 2009'. Canberra: Human Rights and Equal Opportunities Commission, 2010.

Aboriginal Housing Company Limited. 'What Is the Pemulwuy Project?', 2014. https://www.ahc.org.au/pemulwuy/.

Aboriginal Legal Service NSW/LTD. 'Maranguka Working Groups'. Aboriginal Legal Service NSW/ACT, 2021. https://www.alsnswact.org.au/maranguka_working_groups.

Adams, Phillip. 'Silence on Indigenous Domestic Violence'. *Radio National: Late Night Live*. Sydney: Australian Broadcasting Commission, 20 August 2015.

Agnew, Robert. 'Foundation for a General Strain Theory of Crime and Delinquency'. *Criminology* 30, no. 1 (1992): 47–87.

Agozino, Biko. 'The Withering Away of the Law: An Indigenous Perspective on the Decolonisation of the Criminal Justice System and Criminology'. *Decolonising Criminal Justice: Indigenous Perspectives on Social Harm* 3, no. 1 (2018).

Al Yaman, F., M. Van Doeland, and M. Wallis. 'Family Violence Among Aboriginal and Torres Strait Islander Peoples'. Canberra: Australian Institute of Health and Welfare, 2006.

Alexander, Harriet. 'Harsh Means and Harsher Ends: The Results of a Radical Social Housing Policy'. *The Sydney Morning Herald*. 28 May 2019.

https://www.smh.com.au/national/nsw/uprooted-the-results-of-a-radical-social-housing-policy-in-dubbo-20190522-p51q7l.html.

———. 'How NSW Town Labelled "most Dangerous in the World" Changed Its Destiny'. *The Sydney Morning Herald*. 29 May 2019. https://www.smh.com.au/national/nsw/how-nsw-town-labelled-most-dangerous-in-world-changed-its-destiny-20190527-p51ri6.html.

Alfred, Taiaiake. *Wasase: Indigenous Pathways of Action and Freedom*. Toronto: University of Toronto Press, 2005.

Allam, Lorena. 'Closing the Gap Prison Reduction Targets Show "disappointing Lack of Ambition" Lawyers Say'. *The Guardian Australia*. 30 July 2020. https://www.theguardian.com/australia-news/2020/jul/30/closing-the-gap-prison-reduction-targets-show-disappointing-lack-of-ambition-lawyers-say.

———. 'Unique Community Policing Sees Crime Rates Plunge in Bourke'. *The Guardian Australia*. 9 October 2018. https://www.theguardian.com/australia-news/2018/oct/09/unique-community-policing-sees-rates-plunge-in-bourke.

Allam, Lorena, and Calla Wahlquist. 'Indigenous Deaths in Custody: Key Recommendations Still Not Fully Implemented'. *The Guardian Australia*. 25 October 2018. https://www.theguardian.com/australia-news/2018/oct/24/indigenous-incarceration-rate-doubles-since-royal-commission-report-finds.

Allen, Rob. 'From Restorative Prisons to Justice Reinvestment'. In *Justice Reinvestment - A New Approach to Crime and Justice*, edited by Rob Allen and Vivian Stern. London: International Centre for Prison Studies, 2007.

Allison, Fiona, and Christopher Cunneen. 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People'. *Sydney Law Review* 32 (2010): 645–69.

Allsop AO, Chief Justice. 'Chief Justice of the Federal Court: The Rule of Law Is Not a Law of Rules'. Presented at the Annual Quayside Oration, Perth, November 2018. https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181101-2.

Althaus, Catherine, Peter Bridgeman, and Glyn Davis. *The Australian Policy Handbook*. 4th ed. Crows Nest, NSW: Allen and Unwin, 2007.

Amnesty International. 'Australia Must Back Indigenous Expertise to End Crisis of Children's Incarceration'. Sydney: Amnesty International, 2 June 2015. https://www.amnesty.org/en/latest/news/2015/06/australia-must-back-indigenous-expertise-to-end-crisis-of-childrens-incarceration/.

Amnesty International and Clayton Utz, *Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody* (May 2015).

Anthony, Thalia. 'Governing Crime in the Intervention'. *Law in Context* 27, no. 2 (2009): 90–113.

———. 'Two Laws: Indigenous Justice Mechanisms in Context'. *Journal of Australian Indigenous Issues* 18, no. 1 (2015): 99–115.

Appleby, Gabrielle. 'Appointing Australia's Highest Judges Deserves Proper Scrutiny'. *Australia's Magna Cart Institute/The Conversation*, 11 December 2014. https://www.ruleoflaw.org.au/australia-high-court-appointment/.

Aristotle. *Politics*. Oxford: Clarendon Press, 1905.

Attenbrow, Val. *Sydney's Aboriginal Past: Investigating the Archaeological and Historical Records*. Sydney: University of New South Wales Press/New South Publishing, 2010.

Austin, James, and Garry Coventry. 'A Critical Analysis of Justice Reinvestment in the United States and Australia'. *Victims & Offenders: An International Journal of Evidence-Based Research, Policy and Practice* 9, no. 1 (2014): 126–48.

Australian Associated Press. 'Indigenous Elders Develop App in Bed to Reduce Youth Suicide Rate'. *The Guardian Australia*. 6 April 2017. https://www.theguardian.com/australia-news/2017/apr/06/indigenous-elders-develop-app-in-bid-to-reduce-youth-suicide-rate.

Australian Bar Association. '"Introduction: The Judiciary"', 2019. http://austbar.asn.au/policy/the-judiciary.

Australian Bureau of Statistics. '2016 Census QuickStats'. Canberra: Australian Bureau of Statistics, 23 October 2017. https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA11150?opendocument.

———. '2016 Census QuickStats: Dubbo'. Canberra: Australian Bureau of Statistics, 23 October 2017. https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC11296.

———. 'Estimates and Projections, Aboriginal and Torres Strait Islander Australians'. Canberra: Australian Bureau of Statistics, 2014.

———. 'National Aboriginal and Torres Strait Islander Social Survey'. Canberra: Australian Bureau of Statistics, 2015.

———. 'Prisoners in Australia, 2019'. Canberra: Australian Bureau of Statistics, 12 May 2019.

Australian Capital Territory (ACT) Treasury. 'Budget Paper 3: Budget Outlook'. Canberra: Australian Capital Territory Government, 2014.

Australian Early Development Census. 'Data Explorer: Bourke NSW'. Canberra: Australian Early Development Census, 2012.

Australian Human Rights Commission. 'Value of a Justice Reinvestment Approach - Supplementary Evidence'. Sydney: Australian Human Rights Commission, 4 June 2013.

Australian Institute of Health and Welfare. 'Suicide and Self-Harm Monitoring: Deaths by Suicide Amongst Indigenous Australians'. Canberra: Australian Institute of Health and Welfare, 2021.

———. 'The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People: An Overview 2011'. IHW 42. Canberra: Australian Institute of Health and Welfare, 2011.

Australian Law Reform Commission. '*Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*'. Sydney: Australian Law Reform Commission, December 2017.

———. 'Recognition of Aboriginal Customary Law'. Canberra: Australian Law Reform Commission Customary Law Enquiry, 1986.

Australian Public Service Commission. 'Changing Behaviour: A Public Policy Perspective'. Canberra: Australian Public Service Commission, 2008.

———. 'Machinery of Government (MoG) Changes: What Is a MoG Change?' Canberra: Australian Public Service Commission, 14 May 2019.

———. 'Tackling Wicked Problems: A Public Policy Perspective'. Canberra: Australian Public Service Commission, 31 May 2012.

Bardach, Eugene. *The Implementation Game: What Happens After a Bill Becomes Law*. Washington DC: Brookings Institute, 1977.

Barzelay, Michael. 'Introduction: The Process Dynamics of Public Management Policymaking'. *International Public Management Journal* 6, no. 3 (2006): 251–82.

Baumgartner, F., and B. Jones. 'Agenda Dynamics and Policy Subsystems'. *Journal of Politics* 53 (1991): 1044–74.

Beach, Derek, and Rasmus Brun Pedersen. 'Case Selection Techniques in Process-Tracing and the Implications for Taking the Study of Causal Mechanisms Seriously'. New Orleans, LA, 2012.

———. *Process-Tracing Methods: Foundations and Guidelines*. Ann Arbor, MI: University of Michigan Press, 2013.

Behrendt, Larissa, Christopher Cunneen, and Terri Libesman. *Indigenous Legal Relations in Australia*. Melbourne: Oxford University Press, 2009.

Behrendt, Larissa, A. Porter, and A. Vivian. *Crime Rates, Colonisation and Indigenous Communities*. 2016: Federation Press, 2016.

Behrendt, Larissa, Amanda Porter, and Alison Vivian. 'Factors Affecting Crime Rates in Six Rural Indigenous Communities'. In *Routledge International Handbook of Rural Criminology*, edited by Joseph F Donnermeyer, 33–43. Abingdon: Routledge, 2016.

Béland, Daniel, and Michael Howlett. 'The Role and Impact of the Multiple-Streams Approach in Comparative Policy Analysis'. *Journal of Comparative Policy Analysis: Research and Practice* 18, no. 3 (2016): 221–27.

Benda-Beckmann, Franz von. 'Some Comparative Generalizations about the Differential Use of State and Folk Institutions of Dispute Settlement'. In *People's Law and State Law*, edited by Anthony Allott and Gordon R. Woodman, 187–206. Berlin, New York: De Gruyter Mouton, 1985.

Bennett, Andrew. 'Chapter 10: Process Tracing and Causal Inference'. In *Rethinking Social Inquiry Diverse Tools, Shared Standards : 2nd Revised Edition*, edited by Henry E. Brady and David Collier, 207–19. Lanham: Rowan and Littlefield, 2010.

Bingham, Tom. *The Rule of Law*. London: Penguin Books, 2010.

Blader, Steven, and Tom Tyler. 'Testing and Expanding the Group Engagement Model'. *Journal of Applied Psychology* 94 (2009): 445–64.

Blagg, Harry. 'Colonial Critique and Critical Criminology: Issues in Aboriginal Violence'. In *The Critical Criminology Companion*, edited by Thalia Anthony and Christopher Cunneen. Sydney: Hawkins Press, 2008.

———. *Crime, Aboriginality and the Decolonisation of Justice*. Sydney: Hawkins Press, 2008.

Blagg, Harry, and Thalia Anthony. *Decolonising Criminology: Imagining Justice in a Postcolonial World*. London: Springer, 2019.

Blainey, Geoffrey. *Triumph of the Nomads: A History of Aboriginal Australia*. Melbourne: Sun Books, 1983.

Blumstein, Alfred, and Allen J. Beck. 'Population Growth in US Prisons, 1980-1996'. In *Crime and Justice: Prisons*, edited by Michael Tonry and Joan Petersilia. Chicago: University of Chicago Press, 1999.

———. 'Reentry as a Transient State between Liberty and Recommitment'. In *Prisoner Reentry and Crime in America*, edited by Jeremy Travis and Christy A. Visher. New York: Cambridge University Press, 2005.

Bond, C. E. W., and S. Jeffries. 'Harsher Sentences?: Indigeneity and Prison Sentence Length in Western Australia's Higher Courts'. *Journal of Sociology* 48, no. 3 (1 September 2012): 266–86.

Bond, Christine E.W., and Samantha Jeffries. 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts'. *Psychiatry, Psychology and Law* 19, no. 2 (April 2012): 169–83.

Bond, Christine EW, Samantha Jeffries, and Don Weatherburn. 'How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales'. *Australian & New Zealand Journal of Criminology* 44, no. 2 (1 August 2011): 272–90.

Borraz, Oliviere, and Peter John. 'The Transformation of Urban Political Leadership in Western Europe'. *International Journal of Urban and Regional Research* 28, no. 1 (2004): 107–20.

Bourke and District Historical Society. *History of Bourke and District*. Vol. 1–13. 13 vols. Bourke: Bourke and District Historical Society, 1996.

Bovens, Mark, and Paul 't Hart. 'Revisiting the Study of Policy Failures'. *Journal of European Public Policy* 23, no. 5 (2016): 653–66.

Bowles, Nigel. *Nixon's Business: Authority and Power in Presidential Politics*. College Station, Texas: Texas A&M University Press, 2005.

Bowling, Benjamin, and Coretta Phillips. *Racism, Crime and Justice*. London: Longman, 2002.

Box, Dan. 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment'. *The Australian*. 29 January 2016. https://www.theaustralian.com.au/news/clean-slate-without-prejudice-tribal-warrior-redfern-and-a-bold-boxing-experiment/news-story/d2b78c1e2a5e463bc3ea745defd4b567.

Brady, Maggie. *Teaching Proper Drinking? Clubs and Pubs in Indigenous Australia*. Canberra: ANU E-Press, 2017.

Braithwaite, John, and Toni Makkai. 'Trust and Compliance'. *Policing and Society* 4 (1994): 1–12.

Bramston, Troy. *Paul Keating: The Big Picture Leader*. Melbourne: Scribe Publications, 2017.

Brandis QC, Senator The Hon George, and The Hon Nigel Scullion. 'Joint Media Release - ALRC Inquiry into Incarceration Rate of Indigenous Australians'. Parliament of Australia, 27 October 2016.

Brandstrom, Annika, and Sanneke Kuipers. 'From "Normal Incidents" to Political Crises: Understanding the Selective Politicization of Policy Failures'. *Government and Opposition* 38, no. 3 (2003): 279–305.

Bratanova, Alexandra, and Jackie Robinson. 'Cost Effectiveness Analysis of a "justice Reinvestment" Approach to Queensland's Youth Justice Services'. Discussion Paper. Brisbane: University of Queensland, 2014.

Brigg, Morgan. 'Biopolitics Meets Terrapolitics: Political Ontologies and Governance in Settler Colonial Australia'. *Australian Journal of Political Science* 42, no. 3 (2007): 403–17.

Brignell, Lyn. 'Brindle, Kenneth (Ken) (1931-1987)'. In *Australian Dictionary of Biography*. Canberra: Australian National University, 2007.

Broadhurst, R. 'Aborigines and Crime in Australia'. In *Ethnicity, Crime and Immigration; Comparative and Cross-National Perspectives. Crime and Justice: A Review of Research*, edited by Michael Tonry, 407–68. Chicago: University of Chicago Press, 1997.

Brown, Gwen, Lionel Turner, Jeffrey Small, Charlie Poulson, Marjorie Limbarie, and Peter Ryan. 'Jinta Marni Jaku: Community Protocol'. Ali Curung: Ali Curung Safety and Justice Committee, September 2003.

Caccetta, Wendy. 'Wadeye Women Stun with Plums'. *National Indigenous Times*. 27 November 2018. https://nit.com.au/wadeye-women-stun-with-plums/.

Capano, Gilberto, Michael Howlett, and M. Ramesh. 'Bringing Governments Back in: Governance and Governing in Comparative Policy Analysis'. *Journal of Comparative Policy Analysis* 17, no. 4 (2015): 311–21.

Carr, Bob. *Run for Your Life*. Melbourne: Melbourne University Press, 2018.

Chan, Gabrielle. 'Paul Keating's Response to Talkback Caller over Mabo a Reminder of Leadership Past'. *The Guardian Australia*. 1 January 2017. https://www.theguardian.com/australia-news/2017/jan/01/keating-mabo-pre-trump-world-revealed-in-cabinet-papers.

Chapman, Robert, Miles Holmes, Linda Kelly, Diane Smith, Jayne Weepers, and Alyson Wright. 'Yakarra-Pardija-Pina: Insights from a Development Approach to Rebuilding Governance in Aboriginal Communities'. Alice Springs: Central Land Council, May 2014.

Chesterman, John, and Brian Galligan. *Citizens without Rights*. Sydney: Cambridge University Press, 1997.

Chrysanthos, Natassia, Zach Hope, Ben Grubb, and Megan Levy. 'Northern Territory Policeman Charged with Murder over Shooting of Indigenous Man'. *Sydney Morning Herald*. 14 November 2019. https://www.smh.com.au/national/northern-territory-policeman-charged-with-murder-over-shooting-of-indigenous-man-20191113-p53aei.html.

City of Sydney. 'History of Pemulwuy Park'. Sydney: City of Sydney, 27 March 2013. https://www.cityofsydney.nsw.gov.au/histories-local-parks-playgrounds/history-pemulwuy-park.

Clarke, Allan. 'A Community Being Ripped Apart by Ice: Despair, Hope and the Fight for Survival as Methamphetamine Ravages Indigenous NSW'. *BuzzFeed News Australia*. 5 November 2015. https://www.buzzfeed.com/allanclarke/dubbo-struggling-to-break-free-from-ice.

———. 'Authorities Will Not Review Sentence Of Driver Who Left Indigenous Boy For Dead'. *BuzzFeed News Australia*. 13 August 2015. https://www.buzzfeed.com/allanclarke/no-sentence-appeal-for-hit-and-run-driver-who-killed-boy?utm_term=.if5nnZVDva#.er5ZZJdK69.

Clear, Todd R., and James Austin. 'Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations'. *Harvard Law and Policy Review* 3 (2009): 307–24.

Commission for Children and Young People and Child Guardian. 'Annual Report: Deaths of Children and Young People Queensland 2012-13'. Brisbane: Commission for Children and Young People and Child Guardian, 2013.

Commission on English Prisons Today. 'Do Better Do Less'. London: The Howard League for Penal Reform, 2009.

Commonwealth of Australia, 'Closing the Gap Implementation Plan 2021' (Canberra: Commonwealth of Australia, 2021),

Conifer, Dan, Anna Henderson, Henry Belot, and Stephanie Anderson. 'Indigenous Incarceration a "National Tragedy": George Brandis Announces Inquiry'. *ABC News*. 27 October 2016. http://www.abc.net.au/news/2016-10-27/indigenous-incarceration-inquiry-announced/7970186.

Coombs, H.C., and W.E.H. Stanner. 'Program for Yuendumu and Hooker Creek'. Canberra: Australian Government Publishing Service, 1974.

Cooper, Luke. 'Indigenous Elders Are Creating a Mobile App to Tackle High Suicide Rates'. *Huffington Post Australia*. 4 April 2017. https://www.huffingtonpost.com.au/2017/04/03/indigenous-elders-are-creating-a-mobile-app-to-tackle-high-suici_a_22023366/.

Copus, Colin, and Steven Leach. 'Local Political Leaders'. In *The Oxford Handbook of Political Leadership*, edited by R.A.W. Rhodes and Paul 't Hart, 549–63. Oxford: Oxford University Press, 2014.

Corbett, Helen, and Tony Vinson. 'Black Deaths in Custody: Instigating the Royal Commission'. In *Actions Speak: Strategies and Lessons from Australian Social and Community Action*, edited by Eileen Baldry and Tony Vinson, 95–104. Melbourne: Longman Cheshire, 1991.

Cowlishaw, Gillian, Emma Kowal, and Tess Lea. 'Introduction: Double Blinds'. In *Moving Anthropology: Critical Indigenous Studies*, edited by Tess Lea,

Emma Kowal, and Gillian Cowlishaw, 1–15. Darwin NT: Charles Darwin University Press, 2006.

Criminal Justice Reinvestment Act, U.S.C. § (2009).

Crowley, Kate. 'Irresistible Force? Achieving Carbon Pricing in Australia'. *Australian Journal of Politics and History* 59, no. 3 (2013): 368–81.

Cunneen, Chris. 'Aboriginal-Police Relations in Redfern: With Special Reference to the "Police Raid" of 8 February 1990'. Report Commissioned by the National Inquiry into Racist Violence. Sydney: Human Rights and Equal Opportunities Commission, May 1990.

Cunneen, Christopher. *Criminological Research and the Search for Meaning: Some Reflections on Praxis*. Sydney: Federation Press, 2011.

———. 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues'. *Current Issues in Criminal Justice* 17 (2006): 329–46.

———. 'The Royal Commission into Aboriginal Deaths in Custody: An Overview of Its Establishment, Findings and Outcomes'. Canberra: Monitoring and Reporting Section, Aboriginal and Torres Strait Islander Commission, 1997.

Cunneen, Christopher, and David McDonald. 'Indigenous Imprisonment in Australia: An Unresolved Human Rights Issue'. *Australian Journal of Human Rights* 3, no. 2 (1997): 90.

———. 'Keeping Aboriginal and Torres Strait Islander People Out of Custody'. Sydney: Aboriginal and Torres Strait Islander Commission, 1996.

Cunneen, Christopher, and Tom Robb. *Criminal Justice in North-West New South Wales*. Sydney: New South Wales Bureau of Crime Statistics and Research, 1987.

Cunningham, Teresa, Bill Ivory, Richard Chenhall, Rachael McMahon, and Kate Senior. 'Youth Gangs in a Remote Indigenous Community: Importance of Cultural Authority and Family Support'. Trends and Issues in Crime and Criminological Justice. Canberra: Australian Institute of Criminology, 2013.

Curchin, Katherine, and Tim Rowse. '"Taxpayers' Money"? ATSIC and the Indigenous Sector'. In *Indigenous Self-Determination in Australia*, edited by Laura Rademaker and Tim Rowse, 143–64. Canberra: ANU Press, 2020.

D'Abbs, Peter. 'Alignment of the Policy Planets: Behind the Implementation of the Northern Territory (Australia) Living with Alcohol Programme'. *Drug and Alcohol Review* 23, no. 1 (2004): 55–66.

Dahl, Robert A. *Who Governs?* New Haven, CT: Yale University Press, 1961.

Daley, Nadia. 'Matthew Alexander Sentenced Over Hit-and-Run Death of Jack Sultan-Page Fined over Separate Charges'. *ABC News*. 22 July 2015. http://www.abc.net.au/news/2015-07-22/matthew-alexander-fined-over-drug-charges-and-dangerous-driving/6639358.

Daly, Elizabeth. 'Alternatives to Secure Youth Detention in Tasmania'. Hobart: Commissioner for Children Tasmania, 2013. https://www.childcomm.tas.gov.au/wp-content/uploads/2015/07/Alternatives-to-Secure-Youth-Detention-FINAL-2013.pdf.

Damjanovic, Dijana. 'Indigenous Warlpiri Elders Want to Blend Traditions into App to Help Tackle Suicide Risk'. *ABC News*. 4 April 2017. https://www.abc.net.au/news/2017-04-04/reducing-indigenous-suicide-through-tradition-and-technology/8414248.

Davis, Megan. 'Listening but Not Hearing'. *Griffith Review* 51: Fixing the System (2016). https://www.griffithreview.com/articles/listening-but-not-hearing/.

———. 'Mentoring Indigenous Young People: The Tribal Warrior Program'. *Judicial Officer's Bulletin* 23, no. 1 (2011). https://www.judcom.nsw.gov.au/wp-content/uploads/2014/12/JOB_Vol23_No1-tribal-warrior.pdf.

Degenhardt, Louisa. 'Opioid Overdose Deaths in Australia: 2000 Edition'. Sydney: National Drug and Alcohol Research Centre, UNSW, 2001.

Degenhardt, Louisa, Elizabeth Conroy, Stuart Gilmour, and Linette Collins. 'The Effect of a Reduction in Heroin Supply in Australia Upon Drug Distribution and Acquisitive Crime'. *British Journal of Criminology* 45 (2005): 2–24.

Degenhardt, Louisa, Carolyn Day, Stuart Gilmour, and Wayne Hall. 'The "Lessons" of the Australian "Heroin Shortage"'. *Substance Abuse Treatment, Prevention and Policy* 1, no. 11 (2006): 1–7.

Deloitte Access Economics. *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Department of Prime Minister and Cabinet, August 2018).

Delreux, Tom, and Bart Kerremans. 'How Agents Weaken Their Principals' Incentives to Control: The Case of EU Negotiators and EU Member States in Multilateral Negotiations'. *Journal of European Integration* 32, no. 4 (2010): 357–74.

Department of Families, Housing, Community Services and Indigenous Affairs, Northern Territory Government, Minister for Central Australia, Central

Desert Shire, Norbert Patrick, and Lajamanu Reference Group Representatives. 'Local Implementation Plan: Lajamanu'. Lajamanu: Commonwealth of Australia, 2010.

Department of the Attorney-General and Justice, Northern Territory Aboriginal Justice Agreement 2021-2027' (Darwin NT: Northern Territory Government, 2021).

Department of Prime Minister and Cabinet. 'Closing the Gap: Prime Minister's Report 2018'. Canberra: Department of Prime Minister and Cabinet, 2018.

Department of the Attorney-General and Justice. 'Northern Territory Aboriginal Justice Agreement 2019-2025: Draft Agreement for Consultation'. Darwin NT: Northern Territory Government, 2019.

Desert Knowledge Australia. 'RemoteFOCUS: Revitalising Remote Australia - Prospectus'. Alice Springs: Desert Knowledge Cooperative Research Centre, Alice Springs, 2008.

DeVoe, Jennifer. 'A Policy Transformed by Politics: The Case of the 1973 Australian Community Health Program'. *Journal of Health Politics Policy and Law* 28, no. 1 (2003): 77–108.

Dexter, Barrie Graham. *Pandora's Box: The Council for Aboriginal Affairs 1967-1976*. Southport, QLD: Keeaira Press, 2015.

Dietze, Paul. 'Interpreting Changes in Heroin Supply in Melbourne: Droughts, Gluts or Cycles?' *Drug and Alcohol Review* 21 (2002): 295–303.

Dijkstra, Hylke. 'Explaining Variation in the Role of the EU Council Secretariat in First and Second Pillar Policy-Making'. *Journal of European Public Policy* 17, no. 4 (2010): 527–54.

———. 'Information in EU Security and Defence'. In *The Politics of Information: The Case of the European Union*, edited by Tannelie Blom and Sophie Vanhoonacker, 229–41. Basingstoke: Palgrave, 2014.

Dixon, R.M.W. *The Languages of Australia*. 2nd ed. Melbourne: Cambridge University Press, 2010.

Dodson, Patrick. 'National Press Club Address with Patrick Dodson, Indigenous Leader and Australian Labor Senate Nominee'. National Press Club, 13 April 2016.

Dodson, Patrick. *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry into Underlying Issues in Western Australia*. Canberra: Australian Government Publishing Service, 1991.

Downer, Sidney. *Patrol Indefinite: The Northern Territory Police Force*. Adelaide: Rigby, 1963.

Doyle, Arthur Conan. '"The Adventure of Silver Blaze"'. In *The Penguin Complete Sherlock Holmes*, (1892). London: Penguin Books, 1981.

Duff, Eamonn. 'Teens Shot by Police after Car Takes to Footpath'. *The Sydney Morning Herald*. 21 April 2012. https://www.smh.com.au/national/nsw/teens-shot-by-police-after-car-takes-to-footpath-20120421-1xdce.html.

Dunbar, G.K. 'Notes on the Ngemba Tribe of the Central Darling River, Western New South Wales'. *Mankind* 3, no. 5 (1943): 140–48.

Dunlevie, James. 'Local Police Officer Kicking Goals in Effort to Keep the Peace at Wadeye'. *ABC News*. 17 December 2015. https://www.abc.net.au/news/2015-12-14/nt-police-scott-rose-wadeye-football-final-2015/7026522?nw=0&r=HtmlFragment.

Dunlevie, James, and Xavier La Canna. 'Kenbi Land Claim: Hand-Back to Aboriginal Owners 37 Years in the Making'. *ABC News*. 21 June 2016. https://www.abc.net.au/news/2016-06-21/kenbi-land-claim-hand-back-to-aboriginal-nt-owners/7528270.

Durkheim, Emile. *Suicide: A Study in Sociology*. Edited by George Simpson. Translated by John A. Spaulding. New York: The Free Press, 2010.

Dwyer, Anna, John Scott, and Zoe Staines. 'Strangers in a Strange Land: Police Perceptions of Working in Discrete Indigenous Communities in Queensland, Australia'. *Police Practice and Research* 21 (2020): 1–17.

Dye, Thomas R. *Understanding Public Policy*. 12th ed. Upper Saddle River, NJ: Pearson Prentice Hall, 2012.

Eastley, Tony. 'Clare Martin Defends Anti-Social Behaviour Laws'. *ABC: AM*. 17 June 2005. https://www.abc.net.au/am/content/2005/s1394325.htm.

Editorial. 'In the Eye of the Storm'. *The Sydney Morning Herald*. 30 June 2007. https://www.smh.com.au/national/in-the-eye-of-the-storm-20070630-gdqidb.html.

———. 'Redfern Riot Leaves City on Edge'. *Sydney Morning Herald*. 16 February 2004. https://www.smh.com.au/national/redfern-riot-leaves-city-on-edge-20040216-gdid9o.html.

Eggleston, Elizabeth Moulton. *Fear, Favour Or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*. Canberra: Australian National University Press, 1976.

Eliot, Luke. 'Police Chief Says Face Up to Aboriginal Crime'. *The West Australian*. 3 October 2011. https://au.news.yahoo.com/thewest/wa/a/10385601/police-chief-says-face-up-to-aboriginal-crime/.

Elsig, Manfred. 'The EU's Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?' *Journal of Common Market Studies* 45, no. 4 (2007): 927–48.

Emery, Ryan. 'Anniversary of Deaths in Custody Royal Commission'. *SBS News*. 22 September 2013. https://www.sbs.com.au/news/anniversary-of-deaths-in-custody-royal-commission_1.

Epstein, David, and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*. New York: Cambridge University Press, 1999.

Evera, Stephen van. *Guide to Methods for Students of Political Science*. Ithaca, NY: Cornell University Press, 1997.

Exworthy, Mark, and Martin Powell. 'Big Windows and Little Windows: Implementation in the "Congested State"'. *Public Administration* 82, no. 2 (2004): 263–81.

Feneley, Rick. 'Swing and a Miss: Funding Gaps Hit Scheme Slashing Crime Rates'. *The Sydney Morning Herald*. 2013. https://www.smh.com.au/national/nsw/swing-and-a-miss-funding-gaps-hit-scheme-slashing-crime-rates-20130313-2g0l8.html.

Fickling, David. 'If You Oppress People Long Enough, Things Will Erupt. Riots Will Happen.' *The Guardian*. 2004. https://www.theguardian.com/world/2004/feb/22/australia.davidfickling.

Finlay, Summer May. 'What Drives Action? CCTV Footage, Spit Hoods and "Australia's Shame"'. *NITV, SBS*. 21 November 2017. https://www.sbs.com.au/nitv/article/2017/11/20/what-drives-action-cctv-footage-spit-hoods-and-australias-shame-1.

Fitzgerald, Jacqueline, and Don Weatherburn. 'Aboriginal Victimisation and Offending: The Picture from Police Records'. Crime and Justice Statistics Bureau Brief. Sydney: NSW Bureau of Crime Statistics and Research, 2001.

Flood, Josephine. *The Original Australians: The Story of the Aboriginal People*. St Leonards: Allen and Unwin, 2006.

Forsyth, Miranda. *A Bird That Flies with Two Wings: Kastom and State Justice in Vanuatu*. Canberra: ANU E-Press, 2009. https://press-files.anu.edu.au/downloads/press/p49351/pdf/book.pdf.

———. 'Legal Pluralism: The Regulation of Traditional Medicine in the Cook Islands'. In *Regulatory Theory: Foundations and Applications*, 233–46. Canberra: ANU E-Press, 2017.

Franchino, Fabio. ‘Control of the Commission’s Executive Functions: Uncertainty, Conflict and Decision Rules’. *European Union Politics* 1, no. 1 (2000): 63–92.

———. ‘The Commission’s Executive Discretion, Information and Comitology’. *Journal of Theoretical Politics* 12, no. 2 (2000): 155–81.

Friedrichs, Jörg, and Friedrich Kratochwill. ‘On Acting and Knowing: How Pragmatism Can Advance International Relations Theory and Methodology’. *International Organisations* 63, no. 4 (2009): 701–31.

Furness, Mark. ‘Who Controls the European External Action Service? Agent Autonomy in EU External Policy’. *European Foreign Affairs Review* 18, no. 1 (2013): 103–26.

Gale, Fay, Rebecca Bailey-Harris, and Joy Wundersitz. *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* Sydney: Cambridge University Press, 1990.

Gallagher, Patricia, and Patrizia Poletti. ‘Ethnic Diversity, Aboriginality and Sentencing Young Offenders’. *Current Issues in Criminal Justice* 10, no. 1 (1998): 89–90.

Garrick, Matt, and Sowaibah Hanifie. ‘AFL Match Stoush Leads to Arrest of 30 People in Isolated NT Community’. *ABC Radio Darwin*. 19 June 2019. https://www.abc.net.au/news/2019-06-19/wadeye-unrest-thirty-people-arrested-court-evacuated-nt/11223666.

Gate, Deborah. ‘Developing Theories of Change for Social Programmes: Co-Producing Evidence Supported Quality Improvement’. *Nature* 4 (17 June 2018): Article number: 90.

Gibson, Jano. ‘Indigenous Elders Want Tougher Controls on Takeaway Alcohol Sales at the Top Springs Hotel’. *ABC News*. 6 February 2014. https://www.abc.net.au/news/2014-02-06/nt-licensing-commission-top-springs-hotel-takeaway-alcohol-sale/5242928.

Gleeson, Justice Murray. ‘Confidence in the Judiciary’. Presented at the Judicial Conference of Australia, Launceston, Tasmania, 27 April 2002.

———. ‘Courts and the Rule of Law’. Presented at the The Rule of Law Series: Melbourne University, Melbourne, 7 November 2001.

Gleeson, Murray. *The Rule of Law and The Constitution*. The Boyer Lectures. Sydney: ABC Books, 2000.

Glowczewski, Barbara. *Les Reveurs Du Desert: ‘Desert Dreamers’*. Translated by Paul Buck and Catherine Petit. 1st ed. Minneapolis MN: Univocal: University of Minnesota Press, 1989.

Goddard, Cliff, and Anna Wierzbicka. 'What Does Jukurrpa ("Dreamtime", 'the Dreaming') Mean? A Semantic and Conceptual Journey of Discovery'. *Australian Aboriginal Studies* 11 (2015): 43–65.

Goggin, Malcolm L., Ann Bowman, James Lester, and Laurence O'Toole. *Implementation Theory and Practice: Toward a Third Generation*. Glenview: Scott Foresman and Company, 1990.

Goldsmith, Michael, and Helge Larsen. 'Changing Government Relations in Europe: From Localism to Intergovernmentalism'. *International Journal of Urban and Regional Research* 28, no. 1 (n.d.): 121–33.

Goldsworthy, Terry. 'The Australian Federal Police Needs to Do Its Job without Political Interference'. *The Conversation*. 26 October 2017. https://theconversation.com/the-australian-federal-police-needs-to-be-free-to-do-its-job-without-political-interference-86300.

Gooda, Mick, and Pat Dudgeon. 'The Elders' Report into Preventing Indigenous Self-Harm and Youth Suicide'. Darwin: People Culture Environment (in Partnership with Our Generation Media), April 2014.

Grabosky, Peter N. 'Chapter 5: An Aboriginal Death in Custody: The Case of John Pat'. In *Wayward Governance: Illegality and Its Control in the Public Sector*, 79–92. Canberra: Australian Institute of Criminology, 1989.

Gray, William, and William Sanders. 'Views from the Top of the "Quiet Revolution": Secretarial Perspectives on the New Arrangements in Indigenous Affairs'. Centre for Aboriginal Economic Policy Research Working Paper. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2006.

Greasley, Stephen, and Gerry Stoker. 'Urban Political Leadership'. In *Theories of Urban Politics*, edited by Jonathan S. Davies and David L. Imbroscio, 125–36. London: Sage, 2009.

Gridneff, Ilya. 'I Thought They Must Be Bad Guys, Then I Saw It Was Kids'. *The Sydney Morning Herald*. 22 April 2012. https://www.smh.com.au/national/nsw/i-thought-they-must-be-bad-guys-then-i-saw-it-was-kids-20120421-1xdq8.html.

Grogan, Haylene. '"Taking a Rightful Place in Our Own Country": Bring First Peoples' Voice into Government Policy'. *Australian Journal of Public Administration* 77 (2018): S47–51.

Hall, Louise. 'From Ghetto to Grove, a Housing Success Story'. *The Sydney Morning Herald*. 29 April 2010. https://www.smh.com.au/national/nsw/from-ghetto-to-grove-a-housing-success-story-20100428-tsh7.html.

'Hard Truths'. Transcript. *Qand A*. Sydney: Australia Broadcasting Corporation, 8 July 2020. https://www.abc.net.au/qanda/2020-08-06/12319542.

Harding, R., R. Broadhurst, A. Ferrante, and N. Loh. *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*. Sydney: Hawkins Press, 1995.

Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1994.

Hawkins, Darren G., and Wade Jacoby. 'How Agents Matter'. In *Delegation and Agency in International Organisations*, edited by Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney. Cambridge, UK.: Cambridge University Press, 2006.

Hay, Colin. 'Process Tracing a Laudable Aim or a High Tariff Methodology?' *New Political Economy* 21, no. 5 (2016): 500–504.

Henderson, Anna. 'Bill Shorten Pledges to End "national Shame" by Reviving Indigenous Imprisonment Reduction Targets', 19 November 2015. http://www.abc.net.au/news/2015-11-19/labor-pledges-to-revive-indigenous-justice-targets/6953032.

Hendrix, Burke A., Danielle Delaney, Richard C. Witmer, Mark Moran, William Sanders, and Elizabeth Ganter. 'Building Capacity in Indigenous Governance: Comparing the Australian and American Experiences'. *Australian Journal of Public Administration* 79, no. 1 (March 2020): 26–40.

Hewett, T. 'Aborigines Find Allies Abroad'. *Sydney Morning Herald*. 1 September 1987.

Hill, Michael, and Peter Hupe. *Implementing Public Policy: An Introduction to the Study of Operational Governance*. 3rd Edition. London: Sage, 2014.

Hinds, Lyn, and Kristina Murphy. 'Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy'. *Australian and New Zealand Journal of Criminology* 40 (2007): 27–42.

Hinkson, Melissa, and Jon Altman, eds. *Coercive Reconciliation*. Melbourne: Arena Publications, 2007.

Hitch, Georgia. 'Scott Morrison Says National Cabinet Here to Stay, Will Replace COAG Meetings in Wake of Coronavirus'. *ABC News*. 29 May 2020. https://www.abc.net.au/news/2020-05-29/coag-scrapped-national-cabinet-here-to-say-coronavirus-update/12300636.

Hitch, Georgia, and Kristy O'Brien. 'Clan Violence, Incarceration Rates Drop in Remote Aboriginal Town Due to Love for AFL'. *ABC News*. 21 June 2018. https://www.abc.net.au/news/2018-06-21/remote-aflnt-program-turns-hobby-into-jobs-for-communities/9861960.

Hoar, Jennifer. 'Dubbo Community Gets behind Push for Drug and Alcohol Rehabilitation Centre'. *Daily Liberal*. 27 May 2015. https://www.dailyliberal.com.au/story/3105196/community-behind-rehab-for-city/.

———. ‘Lynn Field Steps Down’. *Narromine News*. 8 November 2016. https://www.narrominenewsonline.com.au/story/4278844/down-and-maybe-out/.

———. ‘Nguumambiny Indigenous Corporation CEO Manager Lynn Field Says Dubbo’s Ice Issues Are Far from Over’. *Daily Liberal*. 6 July 2015. https://www.dailyliberal.com.au/story/3190457/dubbos-ice-issues-are-far-from-over-lynn-field/.

Holmes, Catherine, and Eva McRae-Williams. ‘NDLERF: An Investigation into the Influx of Indigenous “visitors” to Darwin’s Long Grass from Remote NT Communities - Phase 2’. Monograph Series. Hobart: National Drug Law Enforcement Research Fund, 2008.

Homel, Ross. ‘Justice Reinvestment as a Global Phenomenon’. *Victims & Offenders* 9, no. 1 (2014): 6–12.

Hood, Christopher. *The Blame Game: Spin, Bureaucracy and Self-Preservation in Government*. Princeton, NJ: Princeton University Press, 2010.

Hooper, Chloe. *Tall Man: Death And Life On Palm Island*. Melbourne: Penguin Books, 2008.

Hope, Zach. ‘Drop in Violence and Theft Figures in Wadeye, NT, Linked to Rise of Local Football League’. *The Herald Sun*. 29 November 2015. https://www.heraldsun.com.au/sport/afl/drop-in-violence-and-theft-figures-in-wadeye-nt-linked-to-rise-of-local-football-league/news-story/4b19266de9ff56566abd4d44aa062cef.

Horn, Allyson. ‘Super Shires Condemned as Worse than Intervention’. *ABC News*. 31 January 2012. https://www.abc.net.au/news/2012-01-31/20120131-mick-gooda-on-super-shires/3802586.

Horton, David R. *Encyclopaedia of Aboriginal Australia*. Vol. 2. 2 vols. Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994.

House of Commons Justice Committee. ‘Cutting Crime: The Case for Justice Reinvestment’. First report of session 2009-10. London: House of Commons, 2010.

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. ‘Doing Time-Time for Doing: Indigenous Youth in the Criminal Justice System’. Canberra: Parliament of Australia, June 2011.

———. ‘Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody’. Parliamentary Paper. Canberra: Parliament of Australia, 1994.

House of Representatives Standing Committee on Indigenous Affairs. 'Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities'. Canberra: Parliament of Australia, 2015.

Howard, The Hon. John. ''Ministerial Statement: Administration of Aboriginal Affairs'. House of Representatives. Debates. Canberra: Parliament of Australia, 11 April 1989.

Howlett, Michael, Allan McConnell, and Anthony Perl. 'Streams and Stages: Reconciling Kingdon and Policy Process Theory'. *European Journal of Political Research* 54 (2014): 419–34.

Howse, Christopher. 'State and Territory Implementation of the Recommendations of the Royal Commission: Northern Territory'. *Indigenous Law Bulletin* 5, no. 6 (2001).

Hudson, Sara. 'Panacea to Prison? Justice Reinvestment in Indigenous Communities'. CIS Policy Monograph. Sydney: Centre for Independent Studies, 2013.

Hudson, Sarah. 'Liberating Aboriginal People From Violence'. *Centre for Independent Studies: Policy Magazine*, 2013.

Human Rights and Equal Opportunity Commission. 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'. Sydney: Human Rights and Equal Opportunities Commission, 1997.

Hunter, Ernest. *Aboriginal Health and History: Power and Prejudice in Remote Australia*. Cambridge, UK.: Cambridge University Press, 1993.

Idriess, Ion. *Nemarluk: King of the Wilds*. Sydney: Angus and Robertson, 1941.

'Image of Ballot Paper: 1967 Referendum - Ballot Papers'. Item Barcode: 1843611. Commonwealth Electoral Office, National Archives of Australia, 1967.

Ivory, Bill. 'Kunmanggur, Legend and Leadership: A Study Indigenous Leadership and Succession Focussing on the Northwest Region of the Northern Territory of Australia'. Charles Darwin University, 2009.

Jacobs, Alan M. 'Process Tracing the Effects of Ideas'. In *Process Tracing: From Metaphor to Analytic Tool*, edited by Andrew Bennett and Jeffrey T. Checkel, 41–73. Cambridge, UK.: Cambridge University Press, 2014.

Jarrett, Stephanie. *Liberating Aboriginal People from Violence*. Brisbane: Connor Court, 2013.

Jenkins-Smith, Hank, and Paul A. Sabatier. 'Evaluating the Advocacy Coalition Framework'. *Journal of Public Policy* 14, no. 2 (1994): 175–203.

Jobes, P.C., J.F. Donnermeyer, and Barclay, E. 'A Tale of Two Towns: Social Structure, Integration and Crime in Rural New South Wales''. *Sociologica Ruralis* 45, no. 3 (2005): 224–44.

John, Peter. 'Frank R. Baumgartner and Bryan D. Jones, Agendas and Instability in American Politics.' In *The Oxford Handbook of Classics in Public Policy Administration*, edited by Steven Balla J., Martin Lodge, and Edward C. Page. Oxford: Oxford University Press, 2015.

John, Peter, and Alistair Cole. 'Political Leadership in the New Urban Governance: Britain and France Compared'. *Local Government Studies* 25, no. 4 (1999): 98–115.

Johnston QC, Elliott. '*Royal Commission into Aboriginal Deaths in Custody: National Report Volume 1*'. Canberra: Australian Government Publishing Service, 1991.

———. '*Royal Commission into Aboriginal Deaths in Custody: National Report Volume 2*'. Canberra: Australian Government Publishing Service, 1991.

———. '*Royal Commission into Aboriginal Deaths in Custody: National Report Volume 3*'. Canberra: Australian Government Publishing Service, 1991.

———. '*Royal Commission into Aboriginal Deaths in Custody: National Report Volume 4'*. Canberra: Australian Government Publishing Service, 1991.

———. '*Royal Commission into Aboriginal Deaths in Custody: National Report Volume 5'*. Canberra: Australian Government Publishing Service, 1991.

———. 'Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of John Peter Pat'. Canberra: Australian Government Publishing Service, 1991.

Jonas, William. 'The Recognition of Aboriginal Customary Law'. Sydney: Human Rights and Equal Opportunity Commission and International Lawyers Association (Australian Division) Workshop, 20 November 2003.

Jordan, Kirrily, Thalia Anthony, Tamara Walsh, and Francis Markham. 'Joint Response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody'. *CAEPR Topical Issue*. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2018.

Just Reinvest NSW. 'Justice Reinvestment in Bourke', 2018. https://www.justreinvest.org.au/justice-reinvestment-in-bourke/.

———. 'Policy Paper: Key Proposals #1: Smarter Sentencing and Parole Law Reform'. Sydney: Just Reinvest NSW, 2017.

Kamien, Max. *The Dark People of Bourke: A Study of Planned Social Change*. Canberra: Australian Institute of Aboriginal Studies, 1978.

Karp, Paul. 'Tony Abbott Incorrectly Claims "no Evidence" Indigenous Australians Face Justice System Discrimination'. *The Guardian Australia*. 14 June 2020. https://www.theguardian.com/australia-news/2020/jun/14/tony-abbott-claims-no-evidence-indigenous-australians-face-justice-system-discrimination.

Karskens, G. *The Colony: A History of Early Sydney*. Sydney: Allen and Unwin, 2010.

Keating, The Hon. P.J. 'Parliamentary Statement Announcing the Commonwealth's Response to the Royal Commission into Aboriginal Deaths in Custody.' Presented at the Australian House of Representatives, Canberra, 24 June 1992.

Kenny, Justice Susan. 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium'. *Federal Judicial Scholarship* 1 (1999).

Kidd, Rosalind. *The Way We Civilise: Aboriginal Affairs - the Untold Story*. Brisbane: University of Queensland Press, 1997.

King, Gary, Robert O. Keohane, and Sidney Verba. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton, NJ: Princeton University Press, 1994.

Kingdon, John. *Agendas, Alternatives and Public Opinion*. 2nd ed. Boston: Little Brown, 1995.

———. *Agendas, Alternatives and Public Policies*. Boston, MA: Little, Brown, 1984.

———. *Agendas, Alternatives and Public Policies*. New York, NY: Harper Collins, 2003.

Kingshott, Brian F., Kathleen Bailey, and Suzanne E. Wolfe. 'Police Culture, Ethics and Entitlement Theory'. *Criminal Justice Studies* 17, no. 2 (2004): 187–202.

Kirby AC CMG, The Hon Justice Michael. 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty'. *Melbourne University Law Review* 30 (2006): 576–93.

Kirk, Alexandra. 'Labor Would Abolish ATSIC (Transcript)'. *PM: ABC Radio*. 30 March 2004. https://www.abc.net.au/pm/content/2004/s1077404.htm.

Kohen, James. *The Darug and Their Neighbours: The Traditional Aboriginal Owners of the Sydney Region*. Blacktown, NSW: Darug Link and Blacktown and District Historical Society, 1993.

Kohen, J.L. 'Tedbury (?-1810)'. In *Australian Dictionary of Biography: Supplemental Volume*. Canberra: Australian National University, 2005.

KPMG. 'Maranguka Justice Reinvestment Project: Impact Assessment'. Bourke, NSW: KPMG/Maranguka Justice Reinvestment Project, 2018.

https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf.

———. ‘Unlocking the Future: Maranguka Justice Reinvestment in Bourke - Preliminary Assessment’. Sydney: JustReinvest NSW/KPMG, September 2016. https://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf.

Kurdiji Law and Justice Group. ‘Court List Data: Lajamanu’. North Australian Aboriginal Justice Agency (NAAJA) and Central Land Council (CLC), 2014.

———. ‘Kurdiji Group - Background Pamphlet’. Lajamanu: Kurdiji Law and Justice Group, 2013.

La Rose, Laura. ‘The Point Recap - Royal Commission into Aboriginal Deaths in Custody Review; Juunkan Gorge Detonation’. *The Point, NITV SBS*. 12 June 2020. https://www.sbs.com.au/nitv/article/2020/06/12/point-recap-royal-commission-aboriginal-deaths-custody-review-juukan-gorge.

‘Lajamanu Community Law and Justice Plan’. Darwin NT: The Office of Aboriginal Development, Northern Territory Government, 1998.

‘Lajamanu Community Profile’. 17th National Remote Indigenous Media Festival. Lajamanu: First Nations Media: Australia, 27 October 2015. https://firstnationsmedia.org.au/events/remote-indigenous-media-festival/17th-national-remote-indigenous-media-festival-lajamanu-nt.

Langton, Marcia. ‘Medicine Square’. In *Being Black*, edited by K. Keen, 16–22. Canberra: Aboriginal Studies Press, 1988.

———. ‘The End of “Big Men” Politics’. *Griffith Review* 22 (September 2008): 48–73.

Langton, Marcia, and Josephine Cashman. ‘Don’t Forget Victims in Push to Cut Indigenous Numbers in Prison’. *Sydney Morning Herald*. 9 May 2016, sec. Comment. http://www.smh.com.au/comment/dont-forget-victims-in-push-to-cut-indigenous-numbers-in-prison-20160508-gop4fh.html.

Langton, Marcia, and Lisa Palmer. ‘Indigenous Peoples, Settler States and the Significance of Treaties and Agreements: Overview of the Series’. Melbourne: Institute of Postcolonial Studies, 2002.

Lasswell, Harold. *A Pre-View of Policy Sciences*. New York, NY: American Elsevier, 1971.

———. *The Decision Process*. College Park, MD: University of Maryland Press, 1956.

———. ‘The Policy Orientation’. In *The Policy Sciences*, edited by D. Lerner and Lasswell, H.D. Stanford, CA.: Stanford University Press, 1951.

Law Reform Commission of Western Australia. ‘Aboriginal Customary Laws Final Report’. Perth: Law Reform Commission of Western Australia, 2006.

Lee, Jane, and Fergus Hunter. ‘George Brandis Announces Inquiry into Indigenous Incarceration “National Tragedy”’. *Sydney Morning Herald*. 27 October 2016. http://www.smh.com.au/federal-politics/political-news/george-brandis-announces-inquiry-into-indigenous-incarceration-rates-20161026-gsbrsh.html.

Lind, E. Allan, and Tom Tyler. *The Social Psychology of Procedural Justice*. New York: Plenum Press, 1988.

Lindquist, Evert, and John Wanna. ‘Is Implementation Only About Policy Execution?: Advice for Public Sector Leaders from the Literature’. In *New Accountabilities, New Challenges*, edited by John Wanna, Evert Lindquist, and Penelope Marshall, 209–42. Canberra: Australian National University Press, 2015.

Lindy Kerin. ‘Funds Needed to Continue Redfern Success Story’. *AM: ABC Radio*. 12 March 2013. https://www.abc.net.au/am/content/2013/s3713255.htm.

Lintner, Bertil. *Blood Brothers: Crime, Business and Politics in Asia*. Sydney: Allen and Unwin, 2002.

Lowndes, Vivian, and Steven Leach. ‘Understanding Local Political Leadership: Constitutions, Contexts and Capabilities’. *Local Government Studies* 30, no. 4 (2004): 557–75.

Luke, Garth, and Chris Cunneen. ‘Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System’. Sydney: Juvenile Justice Advisory Council, 1995.

Lynch, Mona. ‘Mass Incarceration, Legal Change and Locale: Understanding and Remediating American Penal Overindulgence’. *Criminology and Public Policy* 10, no. 3 (2011): 673–98.

Lyons, Gregory. ‘Aboriginal Legal Services: Essays in Memory of Elizabeth Eggleston’. In *Aborigines and the Law*, edited by Peter Hanks and Bryan Keon-Cohen. Sydney: Allen and Unwin, 1984.

Mabo v State of Queensland (No. 2), 174 Commonwealth Law Reports 1 (High Court of Australia 1992).

Machamer, Peter. ‘Activities and Causation: The Metaphysics and Epistemology of Mechanisms’. *International Studies in the Philosophy of Science* 18, no. 1 (2004): 27–39.

Machamer, Peter, Lindley Darden, and Carl F. Craver. 'Thinking about Mechanisms'. *Philosophy of Science* 67, no. 1 (2000): 1–25.

MacKnight, Campbell. 'Macassans and Aborigines'. *Oceania* XLII, no. 4 (1972): 283–319.

———. *The Voyage to Marege: Macassan Trepangers in Northern Australia*. Melbourne: Melbourne University Press, 1976.

Maddison, Sarah. *Black Politics: Inside the Complexity of Aboriginal Political Culture*. Crows Nest, NSW: Allen and Unwin, 2009.

Maine, George. *Gunderbooka: A 'stone Country' Story*. Kingston, ACT: Resource Policy and Management, 2000.

Maine, Samantha. 'Nick Cave Lends Support to Suicide Prevention App'. *NME*. 29 April 2017. https://www.nme.com/news/music/nick-cave-suicide-prevention-app-2062213.

Marchetti, Elena. 'Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody'. *Macquarie Law Journal* 5 (2005): 103–25.

Marchetti, Elena, and Kathleen Daly. 'Indigenous Courts and Justice Practices in Australia'. *Trends and Issues in Crime and Criminal Justice* 277, no. May (2004): 1–6.

———. 'Indigenous Sentencing Courts: Towards a Theoretical Jurisprudential Model'. *Sydney Law Review* 29, no. 3 (2007): 415.

Marsh, David, and Paul Furlong. 'A Skin Not a Sweater: Ontology and Epistemology in Political Science'. In *Theories and Methods in Political Science*, 2nd ed., 17–41. Basingstoke: Palgrave Macmillan, 2002.

Martin, Brian R. 'Customary Law - Northern Territory'. Presented at the JCA Colloquium, Darwin, 5 October 2007.

Martin, D.F. 'Aboriginal and Non-Aboriginal Homicide: Same but Different'. In *Homicide: Patterns, Prevention and Control - Proceedings of a Conference Held 12-14 May*, edited by H. Strang and S. Gerull, 167–76. Canberra: Australian Institute of Criminology, 1993.

Mazmanian, Daniel A., and Paul A. Sabatier. *Implementation and Public Policy*. Glenview: Scott Foresman and Company, 1983.

McAllister, Jai, and Alexis Moran. 'The Life of Aboriginal Warrior Pemulwuy, a Figure of Resistance'. *ABC News*. 1 May 2020. https://www.abc.net.au/news/2020-05-01/the-story-of-aboriginal-resistance-warrior-pemulwuy/12202782.

McCausland, R., and A. Vivian. 'Why Do Some Aboriginal Communities Have Lower Crime Rates than Others? A Pilot Study''. *Australian and New Zealand Journal of Criminology* 43, no. 2 (2010): 301–30.

McCluskey, John David. *Police Requests for Compliance: Coercive and Procedurally Just Tactics*. New York: LFB Scholarly, 2003.

McConnell, Allan. 'A Public Policy Approach to Understanding the Nature and Causes of Foreign Policy Failure'. *Journal of European Public Policy* 23, no. 5 (2016): 667–84.

———. 'Policy Success and Failure'. In *Oxford Research Encyclopedia of Politics (Online)*, 1–28. Oxford: Oxford University Press, 2017.

———. 'Policy Success, Policy Failure and Grey Areas in-Between'. *Journal of Public Policy* 30, no. 30 (2010): 345–62.

———. 'What Is Policy Failure? A Primer to Help Navigate the Maze'. *Public Policy and Administration* 30, no. 3–4 (2015): 221–42.

McIlroy, Tom. 'Closing the Gap Progress Can't Take 73 Years: Ken Wyatt'. *Australian Financial Review*. 3 July 2020. https://www.afr.com/politics/federal/closing-the-gap-progress-can-t-take-73-years-ken-wyatt-20200703-p558r4.

McLennan, Chris. 'Police Make Six Arrests after Wadeye Riots'. *Katherine Times*. 5 November 2020. https://www.katherinetimes.com.au/story/7000223/police-make-six-arrests-after-wadeye-riots/.

———. 'Police Officers Assaulted - Wadeye'. *Katherine Times*. 2 November 2018. https://www.katherinetimes.com.au/story/5736374/police-officers-assaulted-wadeye/.

Meldrum-Hanna, Caro, and Elsie Worthington. 'Evidence of "torture" of Children Held in Don Dale Detention Centre Uncovered by Four Corners'. *ABC News*. 25 July 2016. https://www.abc.net.au/news/2016-07-25/four-corners-evidence-of-kids-tear-gas-in-don-dale-prison/7656128?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web.

Memmott, P., R. Stacey, C. Chambers, and C. Keys. 'Violence in Indigenous Communities'. Canberra: Crime Prevention Branch, Attorney General's Department, 2011.

Merton, Robert King. *Social Theory and Social Structure*. Glencoe: The Free Press, 1968.

Mestrovic, Stjepan Gabriel. *Emile Durkheim and the Reformation of Sociology*. Lanham: Rowan and Littlefield, 1993.

Middleton, Karen. 'Australia's Indigenous Youth Suicide Crisis'. *The Saturday Paper*. 2 April 2016. https://www.thesaturdaypaper.com.au/news/politics/2016/04/02/australias-indigenous-youth-suicide-crisis/14595156003074.

Milliken, Robert. 'Unlocking Indigenous Incarceration'. *Inside Story*, 31 July 2015. http://insidestory.org.au/unlocking-indigenous-incarceration.

Milne, T. 'Aborigines and the Criminal Justice System'. In *Issues in Criminal Justice Administration*, edited by Mark Findlay, Sandra J. Egger, and Jeff Sutton, 184–99. Sydney: George Allen and Unwin, 1983.

Moore, Sally Falk. 'Treating Law and Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts'. *Law and Society Review* 26, no. 1 (1992): 11–46.

Moran, Mark. 'How Community-Based Innovation Can Help Australia Close the Indigenous Gap'. *The Conversation*, 4 March 2016. https://theconversation.com/how-community-based-innovation-can-help-australia-close-the-indigenous-gap-54907.

———. *Serious Whitefella Stuff: When Solutions Became the Problem in Indigenous Affairs*. Melbourne: Melbourne University Press, 2016.

———. 'The Courage to Reform: Fixing the Commonwealth's Indigenous Policies'. *Griffith Review* 60, no. (Online) (30 April 2018). https://www.griffithreview.com/articles/courage-to-reform-commonwealth-indigenous-policies-moran/.

Moran, Mark, and Ruth Elvin. 'Coping with Complexity: Adaptive Governance in Desert Australia'. *GeoJournal* 74, no. 5 (2009): 415–28.

Moran, Mark, Douglas Porter, and Jodie Curth-Bibb. 'Funding Indigenous Organisations: Improving Governance Performance through Innovations in Public Finance Management in Remote Australia'. Canberra: Closing the Gap Clearing House, 2014.

———. 'The Impact of Funding Modalities on the Performance of Indigenous Organisations'. *Australian Journal of Public Administration* 75, no. 3 (2016): 359–72.

Morgan, David R., and Sheilah S. Watson. 'Mayors of American Cities: An Analysis of Powers and Responsibilities'. *American Review of Public Administration* 26, no. 1 (1996): 113–25.

Morrison, Rt Hon. Scott. 'Why I Cherish Jan 26 in All Its Complexity'. *The Australian*. 4 September 2017. https://www.theaustralian.com.au/commentary/opinion/scott-morrison-why-i-cherish-january-26-in-all-its-complexity/news-story/95188e5f46ddb18c23e2b39e1e801225.

Muirhead QC, James. 'Royal Commission into Aboriginal Deaths in Custody: Interim Report'. Canberra: Australian Government Publishing Service, 28 December 1988.

Murdoch, Lindsay. 'Brough Flies into NT Violence'. *The Age*. 4 May 2006. https://www.theage.com.au/national/brough-flies-in-to-nt-violence-20060504-ge28y1.html.

Murphy, Kristina. 'Procedural Justice and Its Role in Promoting Voluntary Compliance'. In *Regulatory Theory: Foundations and Applications*, edited by Peter Drahos, 43–58. Canberra: ANU Press, 2017.

———. 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy and Tax Non-Compliance'. *Journal of Law and Society* 32 (2005): 562–89.

———. 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders'. *Law and Human Behaviour* 28 (2004): 187–209.

Murphy, Kristina, Lyn Hinds, and Robyn Fleming. 'Encouraging Public Cooperation and Support for Police'. *Policing and Society* 18 (2008): 138–57.

Nakamura, Robert, and Frank Smallwood. *The Politics of Policy Implementation*. New York, NY: St. Martin's Press, 1980.

National Indigenous Australians Agency. 'Empowered Communities: Empowered Peoples - Design Report'. Canberra: National Indigenous Australians Agency, Commonwealth Government, 2015.

Native Title Act 1993 (Cth) (1993).

Neustadt, Richard E. *Presidential Power and the Modern Presidents*. New York: Basic Books, 1990.

New South Wales Anti-Discrimination Board. *Study of Street Offences by Aborigines: A Report of the Anti-Discrimination Board in Accordance with Section 119 of the Anti-Discrimination Act 1977*. Sydney: New South Wales Anti-Discrimination Board, 1982.

New South Wales Government. 'Statement of Commitment to Aboriginal People'. Sydney: New South Wales Government, November 1997.

'New South Wales Government General Standing Orders (...) 1802'. State Library of New South Wales, 22 November 1801. https://dictionaryofsydney.org/media/3020.

New South Wales Law Reform Commission. 'Sentencing: Aboriginal Offenders'. Sydney: New South Wales Law Reform Commission, October 2000.

New South Wales Office of Aboriginal Affairs. 'Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody'. Sydney: New South Wales Government, 1993.

New South Wales Police Force, Public Affairs Branch. 'Personal Use of Social Media Policy and Guidelines'. New South Wales Police Force, 14 August 2015.

Northern Territory Licensing Commission. 'Reasons for Decision Top Springs Hotel'. Darwin NT: Northern Territory Licensing Commission, 17 July 2014.

NSW Aboriginal Affairs, Department of Education. 'Aboriginal Identification in NSW: The Way Forward'. Sydney: NSW Government, 2015.

NSW Law Reform Commission. 'Sentencing'. Sydney: NSW Law Reform Commission, 2013.

NSW Ombudsman. 'Inquiry into Service Provision to the Bourke and Brewarrina Communities'. Sydney: NSW Ombudsman, December 2010.

O'Brien, Kerry. *Keating*. St Leonards, NSW: Allen and Unwin, 2016.

Office of the Registrar of Aboriginal Corporations (ORAC). 'Annual Report 1989-90'. Office of the Registrar of Aboriginal Corporations (ORAC), 1990.

Office of the Registrar of Indigenous Corporations (ORIC). 'Practical Help Puts Lives Back on Track'. Canberra: Office of the Registrar of Indigenous Corporations, November 2015.

Olding, Rachel, and Nick Ralston. 'Bourke Tops List: More Dangerous than Any Country in the World'. *Sydney Morning Herald*. 2013.

OzArk Environmental and Heritage Management Pty Ltd. 'Bourke Shire Aboriginal Heritage Study'. Bourke: Bourke Shire Council, 2019.

Papalia, Paul. 'Justice Reinvestment: An Option for Western Australia?' 37 (2010): 18.

Patrick, Aaron. 'In Australia, Black Lives Do Matter'. *Australian Financial Review*. 10 June 2020. https://www.afr.com/policy/health-and-education/in-australia-black-lives-do-matter-20200608-p550fa.

Patterson, Michelle. 'Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs'. *50 Years of Commonwealth Public Administration in Aboriginal and Torres Strait Islander Affairs: Indigenous Affairs Group (IAG) Discussion Paper*, Department of Prime Minister and Cabinet, Number 1 (2017).

'Paul Keating Ignored Advice to Do Nothing over Mabo'. *The Australian*. 30 December 2016.

Pawu-Kurlpurlurnu, Wanta Jampijinpa. Conversation with Wanta Jampijinpa Paw-Kurpurlurnu, August 2015.

Pawu-Kurlpurlurnu, Wanta Jampijinpa, Miles Holmes, and Alan Box. 'Ngurra-Kurlu: A Way of Working with Warlpiri People'. Desert Knowledge CRC. Alice Springs: Central Land Council, 2008.

Pearson, Noel. 'On the Human Right to Misery Mass Incarceration and Early Death'. Presented at the Dr Charles Perkin Memorial Oration, University of Sydney, October 2001. http://sydney.edu.au/koori/documents/oration/oration-2001-noel-pearson.pdf.

———. *Our Right to Take Responsibility*. Cairns: Noel Pearson and Associates, 2000.

———. 'White Guilt, Victimhood and the Quest for the Radical Centre'. *Griffith Review* 16 (2007). https://www.griffithreview.com/articles/white-guilt-victimhood-and-the-quest-for-a-radical-centre/.

Pedersen, Anne, Pat Dugeon, Susan Ellen Watt, and Brian Griffiths. 'Attitudes toward Indigenous Australians: The Issue of "Special Treatment"'. *Australian Psychologist* 41, no. 2 (2006): 85–94.

Pedley, Nick. 'NT and WA to Ignore UN's Call to Review Mandatory Sentencing as Indigenous Incarceration Rate Remains High'. *ABC News*. 10 December 2014. http://www.abc.net.au/news/2014-12-10/nt-and-wa-to-ignore-calls-to-review-mandatory-sentencing/5958410.

Perche, Diana. 'Cabinet Papers 1992-93: Keating Government Fights for Indigenous Rights on Multiple Fronts'. *The Conversation*, 1 January 2017. https://theconversation.com/cabinet-papers-1992-93-keating-government-fights-for-indigenous-rights-on-multiple-fronts-70059.

———. 'Recalibrating the Machinery of Government for Indigenous Affairs: Towards a New Policy Design for Self-Determination'. *Australian Journal of Public Administration* 77, no. S1 (2018): S28–36.

Peters, B. Guy. 'State Failure, Governance Failure and Policy Failure: Exploring the Linkages'. *Public Policy and Administration* 30, no. (3-4) (2015): 261–76.

———. 'Steering, Rowing, Drifting or Sinking? Changing Patterns of Governance'. *Urban Research and Practice* 4, no. 1 (2011): 5–12.

Peterson, Nicholas. 'What Was Dr Coombs Thinking? Nyirrpi, Policy and the Future'. In *Experiments in Self-Determination: Histories of the Outstation Movement in Australia*, edited by Nicholas Peterson and Fred Myers, E Press Edition. Canberra: ANU E-Press, 2016.

Pimentel, David. 'Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?' *Harvard International Review* 32, no. 2 (2010): 32–36.

———. ‘Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique’. *Yale Human Rights and Development Journal* 14, no. 1 (2011): 59–104.

Pintupi-Anmatjerre-Warlpirri Media and Communications (PAW). *Ngurra-kurlu*. Alice Springs, 2007. https://www.youtube.com/watch?v=iFZq7AduGrc&t=9s.

Plim, Caroline. ‘Bourke Aboriginal Heritage Study Report: Commissioned by Bourke Shire Council for the Bourke Shire Aboriginal Heritage Study’. Bourke: Bourke Shire Council, 2007.

Pollack, Mark A. ‘Delegation, Agency and Agenda Setting in the Treaty of Amsterdam’. *European Integration Online Papers* 3, no. 6 (1999).

———. *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*. Oxford: Oxford University Press, 2003.

Potas, Ivan, Jane Smart, Georgia Brignell, Brendan Thomas, and Rowena Lawrie. ‘Circle Sentencing in New South Wales: A Review and Evaluation’. Sydney: Judicial Commission of New South Wales, October 2003.

Poulos, Roslyn, Alex Donaldson, and Caroline Finch. ‘Towards Evidence-Informed Sports Safety Policy for New South Wales, Australia: Assessing the Readiness of the Sector’. *Injury Prevention* 16, no. 2 (2010): 127–31.

Powell, Alan. *Far Country: A Short History of the Northern Territory*. Melbourne: Melbourne University Press, 1992.

Power, Julie. ‘Death in Custody Report Advises Urgent Law Reform’. *Australian Financial Review*. 29 December 1988. https://www.afr.com/politics/death-in-custody-report-advises-urgent-law-reform-19881229-k36lv.

Pratt, Angela. ‘Make or Break? A Background to the ATSIC Changes and the ATSIC Review’. Current Issues Brief. Canberra: Australian Parliament House Library, 26 May 2003.

Pratt, Angela, and Scott Bennett. ‘The End of ATSIC and the Future Administration of Indigenous Affairs’. Current Issues Brief. Canberra: Australian Parliament House Library, 9 August 2004.

Pressman, J., and Aaron Wildavsky. *Implementation. How Great Expectations in Washington Are Dashed in Oakland*. Berkeley CA: University of California Press, 1973.

Quiggin, Robynne. ‘What Does Democracy and Self-Determination Mean for Indigenous Australians?’ *Australian Journal of Public Administration* 77 (2018): S53-58.

Rawat, Pragati, and John Charles Morris. 'Kingdon's "Streams" Model at Thirty: Still Relevant in the 21st Century?' *Politics and Policy* 44, no. 4 (2016): 608–38.

Reay, M. 'Native Thought in Rural New South Wales'. *Oceania* 20, no. 2 (1949): 89–118.

Referendum Council. 'Uluru Statement from the Heart'. Uluru, N.T.: National Constitutional Convention, May 2017. https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF.

Reisig, Michael D., and Gorazd Mesko. 'Procedural Justice, Legitimacy and Prisoner Misconduct'. *Psychology, Crime and Law* 15 (2009): 41–59.

Reykers, Yf, and Derek Beach. 'Process Tracing as a Tool to Analyse Discretion'. In *The Principal Agent Model and the European Union*, edited by Tom Delreux and Johan Adriaensen, 255–81, 2017.

Reynolds, Henry. *The Breaking of the Great Australian Silence: Aborigines in Australian Historiography 1955-1983*. University of London, Institute of Commonwealth Studies, Australian Studies Centre, 1984.

Ridde, Valery. 'Policy Implementation in an African State: An Extension of Kingdon's Multiple-Streams Approach'. *Public Administration* 87, no. 4 (2009): 938–54.

Roche, Chris, and James Ensor. 'Independent Evaluation of the Central Land Council's Community Development and Governance Programs'. Alice Springs: Central Land Council, 2014.

Ronalds, Chris, Murray Chapman, and Kevin Kitchener. 'Policing Aborigines'. In *Issues in Criminal Justice Administration*, edited by Mark Findlay, Sandra J. Egger, and Jeff Sutton, 168–83. Sydney: George Allen and Unwin, 1983.

Rowley, Charles Dunford. *Outcasts in White Australia*. Australian National University Press, 1971.

———. *The Destruction of Aboriginal Society*. Australian National University Press, 1970.

Rowse, Tim. 'Global Indigenism: Genealogy of a Non-Racial Category'. In *Rethinking the Racial Moment: Essays on the Colonial Encounter*, edited by A. Holland and B. Brookes, 229–53, 2011.

———. 'Historical Reasoning About Indigenous Imprisonment: A Community of Fate?' *Australian Review of Public Affairs* 13, no. 1 (2015): 1–21.

———. *Obliged to Be Difficult: Nugget Coombs' Legacy in Indigenous Affairs*. Cambridge: Cambridge University Press, 2000.

———. *Remote Possibilities: The Aboriginal Domain and the Administrative Imagination*. Darwin: North Australia Research Unit, Australian National University, 1992.

Ruda, Simon, and Katherine Tindall. 'BX2018: Taking a Behavioural Approach to Stopping Crime'. BX2018. Sydney: Behavioural Insights Team, 30 May 2018.

Rundle, Guy. 'Distant Goals, Rather than Immediate Action, Means New Closing the Gap Is a Squib'. *Crikey*. 31 July 2020. https://www.crikey.com.au/2020/07/31/new-closing-the-gap-is-a-squ/?fbclid=IwAR31IVvyouq3FGrI3Fa1b6zjXvyIolGx12_1JctToer6fRoiTpxH-z3WCZg.

Ryan, Peter. 'Submission to the Review on Indigenous Law and Justice: Project Officer - Kurduju Committee'. Submission. Darwin NT: Parliament of Australia, Public Accounts and Audit Committee, 15 June 2004.

Saetren, Harald. 'Facts and Myths about Research on Public Policy Implementation: Out-of-Fashion, Allegedly Dead, but Still Very Much Alive and Relevant'. *Policy Studies Journal* 33, no. 4 (2005): 559–82.

Sanders, William. 'Administrative Arrangements in Australian Indigenous Affairs: Will They Ever Settle?' *Australian Journal of Public Administration* 76, no. 4 (2017): 400–402.

———. 'Changing Agendas in Australian Indigenous Policy: Federalism, Competing Principles and Generational Dynamics'. *Australian Journal of Public Administration* 72, no. 2 (2013): 156–70.

———. 'Experimental Governance in Australian Indigenous Affairs: From Coombs to Pearson via Rowse and the Competing Principles'. CAEPR Discussion Paper. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2014.

———. 'In the Name of Failure: A Generational Revolution in Indigenous Affairs'. In *Howard's Fourth Government: Australian Commonwealth Administration 2004-2007*, edited by Chris Aulich and Roger Wettenhall, 187–205. Sydney: University of New South Wales Press, 2008.

SBS News. 'The Royal Commission into Aboriginal Deaths in Custody: Timeline of Events and Aftermath'. *SBS News*. 14 April 2016. https://www.sbs.com.au/news/nitv-news/timeline-aboriginal-deaths-in-custody.

Scambary, Benedict. '"No Vacancies at the Starlight Motel": Larrakia Identity and the Native Title Claim Process'. In *The Social Effects of Native Title: Recognition, Translation, Coexistence.*, edited by B.R. Smith. CAEPR Research Monograph. Canberra: ANU E-Press, 2007.

Schoenfeld, Heather. 'Putting Politics in Penal Policy Reform'. *Criminology and Public Policy* 10, no. 3 (2011): 715–24.

School Principal. Wadeye Fieldwork 2015, 2015.

Schwartz, Melanie. 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment'. *Australian Indigenous Law Review* 14, no. 1 (2010): 2–17.

Senate Community Affairs Reference Committee. 'Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia'. Canberra: Parliament of Australia, 2016.

Senate Standing Committees on Finance and Public Administration. 'Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services'. Parliament of Australia, 2016.

Senserrick, Teresa, Marilyn Lyford, Reece Hinchcliff, Soufiane Boufous, Kathleen F. Clapham, Sally Torr, and Rebecca Ivers. 'Evaluation of the Bourke Alcohol Action Plan: Final Report'. The George Institute for Global Health, University of Sydney, June 2012.

Sharp, Elaine B. 'Paradoxes of National Anti-Drug Policymaking'. In *The Politics of Problem Definition: Shaping the Policy Agenda*, edited by David A. Rochefort and Roger W. Cobb, 98–116. Lawrence, Kansas: University Press of Kansas, 1994.

Shorten, Bill. 'The Injustice Dealt to Indigenous People Is a Stain on Our Whole Nation'. *The Guardian Australia*, 19 November 2015. http://www.theguardian.com/commentisfree/2015/nov/19/the-injustice-dealt-to-australias-indigenous-people-is-a-stain-on-our-whole-nation.

Sil, Rudra, and Peter J. Katzenstein. *Beyond Paradigms: Analytical Eclecticism in the Study of World Politics*. Basingstoke: Palgrave Macmillan, 2010.

Snowball, Lucy, and Don Weatherburn. 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' *Australian & New Zealand Journal of Criminology* 40, no. 3 (1 December 2007): 272–90.

———. 'Indigenous Over-Representation in Prison: The Role of Offender Characteristics'. *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 99 (2006): 1–19.

Standing Committee of Attorneys General on Indigenous Justice Council of Australian Governments. 'Report: National Indigenous Law and Justice Framework 2009-2015'. Canberra: Council of Australian Governments, 2009.

Stayner, Tom. 'What the 16 New Closing the Gap Targets Will Actually Mean for Indigenous Australians'. *SBS News*. 30 July 2020.

https://www.sbs.com.au/news/what-the-16-new-closing-the-gap-targets-will-actually-mean-for-indigenous-australians.

Steen, Martjin van der, Jorren Scherpenisse, Mark van Twist, and Paul 't Hart. 'How to See Failure: Attempts by the Inspectorate of Education to Detect and Disarm Failure in Dutch Education Policy'. *Public Policy and Administration* 30, no. 3–4 (2015): 320–41.

Stewart, Cameron. 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law'. *The Macquarie Law Journal* 4 (2004): 135–62.

Stojanovski, Andrew. *Dog Ear Cafe: How the Mt Theo Program Beat the Curse of Petrol Sniffing*. Melbourne: Hybrid Publishers, 2010.

Stone, Clarence N. 'Political Leadership in Urban Politics'. In *Theories of Urban Politics*, edited by David Judge, Gerry Stoker, and Harold Wolman, 96–116. London UK; Thousand Oaks CA: Sage Publications, 1995.

Stone Sweet, Alec, and Mark Thatcher. 'Theory and Practice of Delegation to Non-Majoritarian Institutions'. *West European Politics* 25, no. 1 (2002): 1–22.

Sturmer, John von. *Towards an Aboriginal Research Strategy*, 1984.

Sullivan, Patrick. *Belonging Together: Dealing with the Politics of Disenchantment*. Canberra: Aboriginal Studies Press, 2011.

Sunshine, Jason, and Tom Tyler. 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing'. *Law and Society Review* 37 (2003): 513–47.

Sutton, Peter. *The Politics of Suffering*. Melbourne: Melbourne University Press, 2009.

———. 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s'. *Anthropological Forum* 11, no. 2 (2001): 125–73.

Svara, James. *Official Leadership in the City: Patterns of Conflict and Cooperation*. Oxford: Oxford University Press, 1990.

Sydney Morning Herald. 'Redfern Riot Blamed on Heroin Trade'. *Sydney Morning Herald*. 17 May 2004. https://www.smh.com.au/national/redfern-riot-blamed-on-heroin-trade-20040517-gdixu3.html.

———. 'Three Inquiries into Redfern Riot'. *Sydney Morning Herald*. 2004. https://www.smh.com.au/national/three-inquiries-into-redfern-riot-20040216-gdid8j.html.

Tallberg, Jonas. 'Delegation to Supranational Institutions: Why, How and with What Consequences?' *West European Politics* 25, no. 1 (2002): 23–46.

Tan, Monica, and Freddy McConnell. 'Freedom Ride: Plenty of Lessons to Be Learned at Dubbo Juvenile Justice Centre'. *The Guardian Australia*. 19 February 2015. https://www.theguardian.com/australia-news/2015/feb/19/freedom-ride-plenty-of-lessons-to-be-learned-at-dubbo-juvenile-justice-centre.

Tatz, Colin. 'Aboriginal Violence: A Return to Pessimism'. *Australian Journal of Social Issues* 25, no. 4 (1990): 245–60.

———. *Race Politics in Australia: Aborigines, Politics and Law*. Armidale: University of New England Publishing Unit, 1979.

Teisman, Geert R. 'Models for Research into Decision-Making Processes: On Phases, Streams and Decision-Making Rounds'. *Public Administration* 78, no. 4 (2000): 937–56.

Thamarrurr Development Corporation. 'Wadeye', 2021. https://thamarrurr.org.au/.

The Allen Consulting Group. 'Independent Review of Policing in Remote Indigenous Communities in the Northern Territory: Policing Further Into Remote Communities'. Darwin NT: Northern Territory Government, April 2010.

The Senate Legal and Constitutional Affairs References Committee. 'Value of a Justice Reinvestment Approach to Criminal Justice in Australia'. The Senate, Parliament of Australia, June 2013.

Thomas, Tony. 'The Long History of Aboriginal Violence'. Sydney: Bennelong Society, 7 May 2013.

Thompson, Stephanie Lindsay. 'The Tribal Warrior Association: Reconstructing Identity'. In *Exploring Urban Identities and Histories*, 27–50. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2013.

Tickner, Robert. *Taking a Stand: Land Rights to Reconciliation*. Crows Nest, NSW: Allen and Unwin, 2001.

Tribal Warrior. 'Who We Are'. Accessed 30 September 2021. https://www.tribalwarrior.org/our-services.

Tucker, Susan, and Erica Cadora. 'Justice Reinvestment'. Ideas for an Open Society. New York: Open Society Institute, 2003.

Tummers, Lars. 'Public Policy and Behaviour Change'. *Public Administration* 79, no. 4 (October 2019).

Turnbull MP, The Hon. Malcolm, and Senator the Hon George Brandis QC. 'Joint Media Release - Royal Commission to Be Established into Don Dale Youth Detention Centre in the Northern Territory'. Parliament of Australia, 26 July 2016.

Turner AM, Pat. '"Our People Will Lead the Way" to Close the Gap'. *SBS News*. 2019. https://www.sbs.com.au/nitv/article/2019/02/15/our-people-will-lead-way-close-gap.

Turner, Mark, and David Hulme. *Governance, Administration and Development*. London, UK: Macmillan Press, 1997.

Tyler, Tom. *Why People Obey the Law*. New Haven, CT: Yale University Press, 1990.

United Nations General Assembly. United Nations Declaration on the Rights of Indigenous Peoples (2007).

Van Evera, Stephen. *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997).

Van Horn, Carl E. *Policy Implementation in the Federal System*. Lexington: Heath, 1979.

Vanstone, Senator Amanda. 'Address to the National Press Club by Minister for Immigration and Multicultural and Indigenous Affairs, Minister Assisting the Prime Minister on Indigenous Affairs'. National Press Club, Canberra, 23 February 2005.

Vinson, Tony. *Community Adversity and Resilience: The Distribution of Social Disadvantage in Victoria and New South Wales and the Mediating Role of Social Cohesion*. Richmond, Victoria: Jesuit Social Services, 2004.

———. *Unequal in Life - the Distribution of Social Disadvantage in Victoria and New South Wales*. Richmond, Victoria: The Ignatius Centre for Social Policy and Research, 1999.

Vinson, Tony, and Ross Homel. 'Crime and Disadvantage. The Coincidence of Medical and Social Problems in an Australian City'. *British Journal of Criminology* 15, no. 1 (1975): 21–31.

Vinson, Tony, Margot Rawsthorne, Adrian Beavis, and Matthew Ericson. *Dropping off the Edge 2015: Persistent Communal Disadvantage in Australia*. Richmond, Victoria: Jesuit Social Services, 2015.

Vinson, Tony, Margot Rawsthorne, and Brian Cooper. *Dropping off the Edge: The Distribution of Disadvantage in Australia*. Richmond, Victoria: Jesuit Social Services, 2007.

Wahlquist, Calla. 'Justice Reinvestment to Be Trialled in ACT to Reduce Indigenous Incarceration Rate'. *The Guardian*. 2017. https://www.theguardian.com/australia-news/2017/apr/27/act-announces-walk-tall-program-to-reduce-indigenous-incarceration-rates.

Walker, Bruce W, Douglas J Porter, and Ian Marsh. 'Fixing the Hole in Australia's Heartland: How Government Needs to Work in Remote Australia'. Alice Springs: remoteFOCUS: Desert Knowledge Australia, September 2012.

Walker, John, and David McDonald. 'The Overrepresentation of Indigenous People in Custody in Australia'. Trends and Issues in Crime and Criminological Justice. Canberra: Australian Institute of Criminology, 1995.

Warner, W. Lloyd. *A Black Civilisation: A Social Study of an Australian Tribe*. (Rev. edn 1958). New York: Harper & Brothers, 1937.

Watson, Don. *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM*. Sydney: Random House, 2002.

Weatherburn, Don. *Arresting Incarceration: Pathways Out of Indigenous Imprisonment*. Canberra: Aboriginal Studies Press, 2014.

Weatherburn, Don, and Jackie Fitzgerald. 'Reducing Aboriginal Over-Representation in Prison: A Rejoinder to Chris Cunneen''. *Current Issues in Criminal Justice* 18, no. 2 (2006): 366–70.

Weaver, R. Kent. 'The Politics of Blame Avoidance'. *Journal of Public Policy* 6, no. 4 (1986): 371–98.

Wenzel, Michael. 'A Letter from the Tax Office: Compliance Effects of Informational and Interpersonal Justice'. *Social Justice Research* 19 (2006): 345–64.

———. 'The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers Identity'. *Journal of Applied Psychology* 87 (2002): 629–45.

Whitbourn, Michaela. 'Call for Mandatory Sentencing Laws to Be Scrapped to Reduce Indigenous Incarceration Rates'. *Sydney Morning Herald*, 8 April 2016. http://www.smh.com.au/national/call-for-mandatory-sentencing-laws-to-be-scrapped-to-reduce-indigenous-incarceration-rates-20160406-gnzgv7.html.

Wild, Rex, and Pat Anderson. 'Ampe Akelyernemane Meke Mekarle - Little Children Are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse'. Darwin NT: Northern Territory Government, 2007.

Wildavsky, Aaron. *Speaking Truth to Power: The Art and Craft of Policy Analysis*. 2nd ed. New Brunswick, NJ: Transaction, 1987.

Williams, G. 'Black Deaths in Custody an Outrage'. *Sydney Morning Herald*. 26 June 1987.

Williams, Walter. *The Implementation Perspective: A Guide for Managing Social Service Delivery Programs*. Berkeley CA: University of California Press, 1980.

Williams, Walter, Richard F. Elmore, John S. Hall, Richard Jung, Michael Kirst, Susan A. MacManus, Richard P. Nathan, and Robert K. Yin. *Studying Implementation: Methodological and Administrative Issues*. Chatham NJ: Chatham House, 1982.

Willis, Matthew, and Madeleine Kapira. 'Justice Reinvestment in Australia: A Review of the Literature'. AIC Reports: Research Report. Australian Institute of Criminology, 2018. https://www.aic.gov.au/publications/rr/rr9.

Wolfe, Patrick. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*. London: Cassell, 1999.

Wolfgang, Marvin E., and Franco Ferracuti. *The Subculture of Violence*. London: Tavistock Publications Limited, 1967.

Woods, B. Dan, and Jeffrey S. Peake. 'The Dynamics of Foreign Policy Agenda-Setting'. *American Political Science Review* 92, no. 1 (1988): 173–84.

Woodward, Justice A.E. 'Aboriginal Land Rights Commission: Second Report April 1974'. Canberra: Government Publishing Service, 1974.

Wootten AC, QC, Hal. 'Aboriginal Legal Services'. In *Aborigines Human Rights and the Law*, edited by Garth Nettheim. Sydney: Australian and New Zeaalnd Book Company, 1974.

———. 'Foreword: 20 Years from the Royal Commission'. *Australian Indigenous Law Review* 15, no. 1 (2011): 1–6.

Wootten, Hal. 'Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody'. *Indigenous Law Bulletin* 7, no. 27 (December 2011): 3–8.

Wyatt AM MP, The Hon Ken Wyatt. 'Press Release: Tribal Warrior Building Stronger Communities'. Canberra: Department of Prime Minister and Cabinet, 9 December 2019. https://ministers.pmc.gov.au/wyatt/2019/tribal-warrior-building-stronger-communities.

———. 'Statement: Indigenous Incarceration Rates'. Canberra: Department of Prime Minister and Cabinet, 9 June 2020. https://ministers.pmc.gov.au/wyatt/2020/indigenous-incarceration-rates.

WYDAC. 'Warlpiri Youth Development Aboriginal Corporation (WYDAC) Overview'. Yuendumu: WYDAC, 2013.

Yeong, Steve, and Elizabeth Moore. 'Circle Sentencing, Incarceration and Recidivism'. Sydney: NSW Bureau of Crime Statistics and Research, April 2020.

Young, Wendy-Rea, and Tammy Solonec. 'Epidemic Incarceration and Justice Reinvestment: It's Time for Change'. *Indigenous Law Bulletin* 7, no. 26 (2011): 15–21.

Zahariadis, Nikolaos. 'The Multiple Streams Framework: Structure, Limitations, Prospects'. In *Theories of the Policy Process*, edited by Paul A. Sabatier, 2nd ed., 65–92. Boulder, CO: Westview Press, 2007.

Zahariadis, Nikolaos, and Christopher Allen. 'Ideas, Networks and Policy Streams: Privatisation in Britain and Germany'. *Policy Studies Review* 14, no. (1-2) (1995): 71–98.

Zillman, Stephanie. 'Indigenous Warlpiri Elders Helping Locals in Court System with Reference Letters'. *ABC News*. 21 October 2016. https://www.abc.net.au/news/2016-10-21/kurdiji-group-providing-letters-to-help-locals-in-justice-system/7955548.

Appendix A: Table of Interviews

Participant	Location	Year
The Hon. Robert Tickner, Former Minister	Sydney	2021
Lajamanu		
Steven Wanta Jampijinpa Patrick	Lajamanu	2015
Kurdiji Elder	Lajamanu	2015
Indigenous Engagement Officer, Prime Minister and Cabinet	Lajamanu	2015
Community Legal Education Manager	Lajamanu	2015
Former Lajamanu Case Manager, Northern Territory Correctional Services	Lajamanu	2015
CLC Lajamanu Governance Project Coordinator	Lajamanu	2015
Wadeye		
Wadeye First Nations Leader 1	Wadeye	2015
Wadeye First Nations Leader 2	Wadeye	2015
Wadeye First Nations Leader 3	Wadeye	2015
PWAC Wadeye Women's Corporation Group	Wadeye	2015
School Principal	Wadeye	2015

Participant	Location	Year
Bourke		
Bourke First Nations Leader 1	Bourke	2013/2015
Bourke First Nations Leader 2	Bourke	2015
Bourke General Practitioner	Bourke	2015
Bourke Aboriginal Legal Service Lawyer	Bourke	2015
Dubbo		
Dubbo First Nations Leader 1	Dubbo	2015
NSW Police Western Area Commander	Dubbo	2012
Redfern		
Superintendent Luke Freudenstein	Redfern	2013
Group Interview of Redfern Police	Redfern	2013
Aboriginal Legal Service Lawyer	Redfern	2013
Aboriginal Legal Service Lawyer	Wadeye	2015

Participant	Location	Year
Darwin		
Darwin First Nations Leader 1	Darwin	2015
Larrakia Nation Night Patrol Coordinator	Darwin	2015
Larrakia Nation CEO	Darwin	2015
St Vincent De Paul Coordinator	Darwin	2015

Appendix B: Consent to Participate Form

Project: *Explaining Mass Imprisonment in Indigenous Australia*
Researcher: Michael Jones, University of Oxford

I, the participant, declare that I have read the *Participant Information Sheet* and understand its contents. I acknowledge that I have had the opportunity to ask questions about this study and state that I have received satisfactory answers to my questions. I understand that I may make additional enquiries at any time during the interview.

I also understand that I may withdraw from this study, without penalty, at any time by advising the researcher (Michael Jones) of my decision. [michael.jones@politics.ox.ac.uk]

I understand that this project has been reviewed by, and received ethics clearance through the University of Oxford Central University Research Ethics Committee.

I understand that the researcher, Michael Jones, will have access to the recording of this interview and that the Board of Examiners may have access to a transcript of this interview. I understand that I may request these recordings or transcripts to be destroyed – for cultural or other reasons – by contacting the researcher.

I understand that my opinions will be included in Michael Jones's doctoral thesis and that this document will be stored by the University of Oxford. I also understand that the thesis may be published by the University of Oxford as an electronic document and that Michael Jones intends to publish his thesis as a book.

I agree to participate in this study.

Name:_____ Sign_____ Date_____

Researcher: Michael Jones_____ Sign_____ Date_____

Appendix C: Participant Information

Project Name: Brave Leaders in a Broken Down Machine: Public-administration and the failure to reduce Indigenous Australian incarceration.
Researcher: Michael William Jones
Status: Doctoral Student, University of Oxford
Contact:

- **Phone:** +61407257335;
- **Email:** michael.jones@oriel.ox.ac.uk

This project has received clearance from the University of Oxford Central University Research Ethics Committee.
It is conducted according to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Guidelines for Ethical Research.

Purpose:

- I intend this research to be useful to policymakers. The perspective of people working in the criminal justice system is currently absent from a growing debate over Indigenous incarceration rates; my thesis intends to remedy this.
- The research is intended for submission as part of a PhD in the Department of Politics at the University of Oxford. Subsequently, it is my intention that it will be published as a book.
- *Neither of these subsequent steps will be taken without first consulting interviewees.*

Participants:

- Participants have been chosen on the basis of their experience in implementing criminal justice policies in their state jurisdiction.
- It is intended that they share their opinions, based upon this experience.

Time Commitment

- It is envisaged that the interview should take no longer than one hour.
- The interview can be conducted in person at a location that is convenient for you. If this is not possible, it may be conducted by telephone or over Zoom or Skype.

Recording

- The interview will be recorded.
- This recording will eventually be destroyed. Any quotes used for the research will be provided to you for approval prior to publication.
- **Participants may withdraw from the study or withdraw consent for their opinions to be published at any time.**

Appendix D: Interviewing Guide

Project: Explaining Mass Imprisonment in Indigenous Australia

This project seeks to explain the national increase of 93% in the rate of incarceration for Indigenous people between 1991 and 2014. The increase is paradoxical because – since the *Royal Commission into Aboriginal Deaths in Custody* in 1991 – it has been the policy of all levels of Australian government to reduce the rate of incarceration among Indigenous Australians. Evidently, these policies have not achieved their objective.

Through these interviews, I am tracing the Government policy response to Indigenous incarceration rates from 1991 onwards. To do this, I am seeking perspectives from people involved in the criminal justice system in four states: New South Wales, Queensland, Western Australia and the Northern Territory.

The interview is semi-structured. The following questions provide a guide as to what will be asked. Flexibility has been kept in the questioning to allow you to best express your opinion in whatever manner you prefer.

This interview will be recorded. If at anytime you want me to cease recording or to make a note to strike your comments from the transcript please tell me. Following the interview, a transcript will be sent to you for your approval. Should you not be satisfied with the transcript you are able to withdraw your consent for the interview to be published.

I will warn you before I turn on the recorder.

*Turn on recorder

Background Questions

We are going to begin with some background questions

1. Would you please state your name?
2. Would you please state your age?
3. Are you of Aboriginal or Torres Strait Islander decent?
4. What is your occupation in or involvement with the criminal justice system?
5. How long have you been working that role?
6. How does your work in criminal justice bring you into contact with Indigenous Australians?

Questions about Indigenous Incarceration

I'd now like to turn your attention to the issue of Indigenous incarceration. My statistical analysis shows a _____% increase in incarceration for your jurisdiction and simultaneous _____% change in offending.

1. What is your initial reaction to this increase?

2. Were you aware that such an increase in incarceration was occurring?

3. Were you aware that these changes in offending patterns were occurring?

4. How has the increase in incarceration been evident in your work?

5. What do you think this increase means for the Government's policy of reducing the number of Indigenous Australians in prison?

6. Do you think that policy is succeeding?

Causation

My research is particularly concerned with trying to explain what has caused the increase in incarceration has occurred; this critical question cannot be determined by my statistical analysis alone. The following questions ask for your opinion based upon your professional experience.

1. What factors do you think are causing the increase in incarceration rate for Indigenous Australians?

2. How are those factors causing it?

3. Have you considered the following factors (Interviewer will possibly raise factors that have been raised in other interviews/or can be inferred from statistical analysis.)

4. What relation do you think the increase in Indigenous Australian incarceration has to changes in offending rates of Indigenous Australians?

5. How are the causes of Indigenous incarceration related to Indigenous offending?

6. What changes would you make in order to achieve the Government policy of reducing the number of Indigenous Australians incarcerated?