Governing through crime?

Explaining the Increasing Incarceration of Indigenous Australians.

Candidate Number: 436316

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Abstract

My thesis addresses the following research question: why have incarceration rates of Indigenous Australians persistently and dramatically increased despite Government policy designed to achieve the obverse outcome? As no such explanatory account exists, my enquiry is necessarily exploratory. To develop hypotheses, I supplement the Australian literature with the well-developed American literature on racialized incarceration. I then test these hypotheses at the national level in Australia, and in two state jurisdictions: New South Wales and Queensland. I do so according to a mixed methodology: first, I examine trends in the available quantitative data; secondly, I conduct a process trace of the implementation of criminal justice policy using interviews of service providers. In this manner, I use the limited data to build an initial causal explanation of the persistent increase in Indigenous incarceration rates.

The enclosed work is dedicated to:

Brandon Brookdale

(1986-2012)

Rest in peace, brother.

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I would like to thank all who participated in my research. Working in criminal law does not lend itself to participation in academic studies; I appreciate the inconvenience many people went to in order to assist my enquiry.

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Table of Abbreviations

ABS	Australian Bureau of Statistics
AIC	Australian Institute of Criminology
ATSIC	Aboriginal and Torres Strait Islander Commission
NATSIS Survey	National Aboriginal and Torres Strait Islander Social Survey
NSW	New South Wales

'A multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody and tragically to die there…'
Royal Commission into Aboriginal Deaths in Custody, National Report 1991.

Introduction

Since 2001, the incarceration rate of Indigenous Australians[1] has increased by 49%.[2] In and of itself, this is a remarkable and troubling statistic. However, it is also paradoxical given Government policy. In 1991, all Australian Governments formally committed to *reducing* Indigenous imprisonment levels. This consensus followed a *Royal Commission into Aboriginal Deaths in Custody*, which concluded that imprisonment of Indigenous offenders should only be used as a 'sanction of last resort'.[3] In an effort to decrease Indigenous incarceration, the Commonwealth Government devoted $400million (AUD) to a range of programs and initiatives. Simultaneously, State and Territory Governments implemented a list of recommendations to reform their criminal justice systems.[4] The consensus commitment to reducing Indigenous incarceration has been consistently reaffirmed since 1991: most recently, the Council of Australian Governments named it a 'core goal' of the 'National Indigenous Justice Framework 2011-2015'.[5]

Twenty years later, the clear disconnect between stated Government policy and the reality of increasing Indigenous incarceration represents an important challenge for existing scholarship. My thesis addresses the following

[1] I use the word 'Indigenous' as a commonly accepted abbreviation to refer to 'Aboriginal and Torres Strait Islander Australians'. Some sources I quote use the word 'Aboriginal' in a similar manner; this is particularly prevalent in New South Wales, which only has a small population of Torres Strait Islanders.
[2] See: Australian Institute of Health And Welfare, 'The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People: An Overview 2011', (Canberra: Australian Institute of Health and Welfare, 2011) at 29-30.
[3] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 3', (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991a) at 63-64 [22.1.14]. Volume 3, Recommendation 92.
[4] Aboriginal and Torres Strait Islander Justice Commissioner, 'Indigenous Deaths in Custody 1989 to 1996: Second Report', (Canberra: Human Rights and Equal Opportunities Commission, 1996a).
[5] Standing Committee of Attorneys-General Working Group on Indigenous Justice Council of Australian Governments, 'Report: National Indigenous Law and Justice Framework 2009-2015', (2009) at 6.

research question: why have incarceration rates of Indigenous Australians persistently increased between 2001 and 2011, despite Government policies designed to achieve the obverse outcome? This question is of clear importance to the Australian literature on Indigenous incarceration because it addresses a large-scale but unexplained failure of policy that has been both tragic for Indigenous Australians and very expensive for Australian Governments.[6]

My research question is also significant within the international comparative literature on race politics and incarceration. This is for two reasons. First, Indigenous Australians offer one of the few case studies with an incarceration rate comparable to that experienced by African Americans;[7] as a consequence, it has important implications for current debates over the global applicability of the large American literature on racialized incarceration. [8] Secondly, and perhaps more importantly, the Australian case is a rare example of Government policymakers being unable to reverse increasing racialized incarceration – even after firmly committing to do so. As such, the Australian case is illustrative of potential future challenges for the large normative literature (in American and elsewhere) that advocates reversing tough-on crime policies. Indeed, Australia's experience suggests that changing policy is only the beginning.

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[6] Existing Australian accounts are criminological in focus. They focus primarily upon either the criminal drivers of Indigenous offending or institutional bias within the criminal justice system. Richard W. Harding et al., *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (Sydney: Federation Press, 1995), Chris 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,* 17/3 (2006), 329-46, (cf) Don Weatherburn, Jackie Fitzgerald, and Jiuzhao Hua, 'Reducing Aboriginal over-Representation in Prison', *Australian Journal of Public Administration,* 62/3 (2003), 65-73.

[7] For a comparison with other Indigenous peoples see: 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: NSW Bureau of Crime Statistics and Research, 2006) at 1, Chris Cunneen, 'Indigeneity, Sovereignty and the Law: Challenging the Process of Criminalisation', *Faculty of Law Research Series: Working Paper* (11: University of New South Wales, 2011b).

[8] There remains debate as to whether the 'penal surge' is occurring across a large number of countries or is a form of American 'exceptionalism'; this is particularly relevant for racialized incarceration. See: Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham N.C.: Duke University Press, 2009), David Brown, 'Neoliberalism as a Criminological Subject', *Australian and New Zealand Journal of Criminology,* 44 (2011), 129-42, Vanessa Barker, 'The Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation', *Punishment and Society,* 8 (2006), 5-32.

The soaring rates of Indigenous incarceration have sporadically attracted media commentary in Australia.[9] Most recently, over several weeks in January 2013, *The Australian* newspaper devoted significant coverage to the 'crisis', which it described as both 'perverse' and a 'criminal waste of young lives'.[10] However, academic engagement with Indigenous incarceration has been more limited. There have been few attempts to causally explain the persistent increase in incarceration rates since 2001, and none at the national level.[11] While much was written at the time of the Royal Commission, there has been no attempt to account for the subsequent failure of Government policy to curb the increase. Moreover, while the potential relevance of the American experience has been acknowledged,[12] there has been little attempt at comparative analysis.

My research is directed towards filling this lacuna. However, it must be acknowledged from the outset that my study is necessarily exploratory. One reason why the Australian literature is less developed than its American counterpart is that there are significant limitations in the data available to study Indigenous Australian incarceration;[13] these present a significant barrier for large-N comparative analyses. Consequently, I adopt a mixed methodology directed specifically at the Australian case.

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[9]For example, the annual press release from the Australian Bureau of Statistics is usually reported: Stephen Johnson, 'Indigenous Prison Rates Jump by 52%', *Sydney Morning Herald* 5 May 2011.

[10] Rosanne Barrett, 'Juvenile Detention Talks Get the Boot', *The Australian,* 13 January 2013, Editorial, 'Juvenile Crime Crisis Needs Resolve', ibid.8 January, Chip Le Grand, 'Rehab 'a $110k Saving over Jail'', ibid.3 February, Patricia Karvelas, 'Children Ill-Served by Courts', ibid.January 15, Patricia Karvelas, 'Children's Justice System Lacking (Northern Territory)', *The Australian,* 13 January 2013a, Natasha Robinson, 'Push for Sentencing Break for Aborigines', ibid.29 January, Natasha Robinson, 'A Criminal Waste of Young Lives', *The Australian,* January 12 2013a, Natasha Robinson, 'Disparity in Black Sentences 'Perverse'', *The Australian,* 9 January 2013b.

[11] A 2010 report to the Senate Select Committee on Remote and Regional Indigenous Communities could cite only one causal explanation of the ABS data and that was limited to the state of NSW: Senate Select Committee on Regional and Remote Indigenous Communities, 'Indigenous Australians, Incarceration and the Criminal Justice System', (Parliament of Australia, 2010), Jacqueline Fitzgerald, 'Why Are Indigenous Incarceration Rates Rising?', *Crime and Justice Statistics: Bureau Brief* (41: NSW Bureau of Crime Statistics and Research, 2009).

[12] For example: Chris Cunneen, 'Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment', *Australian Indigenous Law Review,* 15/1 (2011a), 8-17 at 10, Harry Blagg et al., 'Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System', (Melbourne: Equal Opportunity Commission, 2005).

[13] I will examine these limitations further below: Australian Bureau of Statistics, 'Appendix 3: Quality of Indigenous Status Data in the 2006 Census', *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006* (2007).

To explain the persistent rise in incarceration rates I intend to draw hypotheses from the well-developed American literature on racialized incarceration then examine them in light of the descriptive statistics that can be produced from the available data. I will then supplement this analysis using a technique that has been deployed to explain other instances of policy failure in Australian Indigenous affairs: detailed interviews with the policy 'service providers' on the ground in Indigenous communities.[14] Within the scope of this thesis, my enquiry is conducted in three case studies: first, at the national level; then at the subnational level in New South Wales and Queensland.

1.1 Literature Review

Three separate bodies of literature are relevant to an understanding the failure of Australian Governments to reverse rising Indigenous incarceration rates: (1) the existing Australian literature on racialized incarceration; (2) the international body of comparative literature on racialized incarceration, which is extensive but is only recently being applied outside of the American context; and (3) the public-policy theory literature that seeks to explain policy failure both generally and specifically in the context of Indigenous affairs. From each of these bodies of literature I draw hypotheses for my enquiry.

(1) The Australian Indigenous affairs literature

The Australian academy's engagement with the issue of Indigenous incarceration takes as its starting point the *Royal Commission into Aboriginal Deaths in Custody* (the 'Royal Commission').[15] The Royal Commission was announced on 10 August 1987 by Prime Minister Hawke in response to public concern following a number of deaths among Indigenous prisoners. It examined all deaths in custody in each State and Territory that occurred between 1 January 1980 and 31 March

[14] For example, this technique was adopted by Mals et al to account for the failure of health policy in the context of Indigenous anger management plans: Peter Mals et al., 'Indigenous Service Providers Perspectives on Anger Programs', in Martin Nakata Andrew Day, Kevin Howells (ed.), *Anger and Indigenous Men* (Melbourne: Federation Press, 2011), 31-36.
[15] See: Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 3', Lahrissa Behrendt, 'Deaths in Custody Still Haunt Indigenous Communities', *The Sydney Morning Herald,* 15 April 2011.

1989. After finding that Indigenous prisoners were dying at a rate proportionate to their level of incarceration, [16] the Commission turned its attention to the overrepresentation of Indigenous people in the criminal justice system.[17] The Commission released a five-volume *National Report*, as well as State and Territory Reports and Reports into Individual Deaths in Custody;[18] it remains the most thorough examination of the relationship between Indigenous Australians and the institutions of criminal justice.

While the Royal Commission acknowledged that 'a multitude of factors, both historical and contemporary'[19] cause Indigenous incarceration, Volume 5 of its report suggested that the problem might be explained from 'two angles': first, as a problem of Indigenous offending, explained by the socio-economic factors that bring Indigenous people into contact with criminal justice; and second, as a problem of criminal justice institutions, explained by those institutional characteristics that disproportionately affect Indigenous people.[20] A dichotomy between these 'two angles' continues to characterise the current literature. Indeed, there has been prominent debate between those who attribute the persistent rise of incarceration rates primarily to 'Indigenous offending'[21] and those who emphasise 'systemic bias' in criminal justice.[22]

On the first side of this debate, Weatherburn and others argue that 'the leading cause of Aboriginal over-representation in prison is Aboriginal over-

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[16] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991b) at 1.3.1.
[17] Ibid., at 1.3.2-7.
[18] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 3', Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 2', (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991c), Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 4', (Canberra: Royal Commission into Aboriginal Deaths in Custody 1991d), Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 5', (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991e).
[19] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 2', at 1.
[20] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 5', at 6.
[21] Don Weatherburn and Jackie Fitzgerald, 'Reducing Aboriginal over-Representation in Prison: A Rejoinder to Chris Cunneen', *Current Issues in Criminal Justice,* 18/2 (2006), 366-70, Weatherburn, Fitzgerald, and Hua, 'Reducing Aboriginal over-Representation in Prison', , Don Weatherburn, Lucy Snowball, and Boyd Hunter, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 Natsiss Survey', *Crime and Justice Bulletin* (104: NSW Bureau of Crime Statistics and Research, 2006).
[22] Cunneen, 'Racism, Discrimination and the over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues', , Cunneen, 'Indigeneity, Sovereignty and the Law: Challenging the Process of Criminalisation'.

representation in crime'.[23] The high rate of Indigenous offending is understood to be a product of socio-economic disadvantage. Studies have identified 'causal effects' from the following independent variables that can be linked to disadvantage: community violence;[24] alcohol and substance abuse;[25] mental health problems;[26] limited employment opportunities;[27] limited education opportunities;[28] inadequate accommodation and housing;[29] the legacies of colonisation;[30] and remoteness.[31] A number of studies have also monitored changes in these variables using the Australian Bureau of Statistics' periodic *National Aboriginal and Torres Strait Islander Social Survey* (*NATSIS Survey*) – although these have not been updated for the 2007 *NATSISS* Survey.[32]

Combined, these studies represent a thorough catalogue of potential variables that might cause changes in Indigenous offending. Their central proposition – that socio-economic disadvantage in a community is causally related to high rates of criminal offending – is well established in the international criminology literature.[33] In this thesis, I take it as my first hypothesis:

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[23] Weatherburn, Fitzgerald, and Hua, 'Reducing Aboriginal over-Representation in Prison',
[24] For example: Lucy Snowball and Don Weatherburn, 'Theories of Indigenous Violence: A Preliminary Empirical Assessment', *Australian and New Zealand Journal of Criminology,* 41/2 (2008), 216-35, Peter Sutton, *The Politics of Suffering* (Melbourne: Melbourne University Press, 2009).
[25] Judy Putt, Jason Payne, and Lee Milner, 'Indigenous Male Offending and Substance Abuse', *Trends and Issues in Crime and Criminal Justice* (293: Australian Institute of Criminology, 2005).
[26] See: Ruth Mccausland, 'Indigenous Trauma, Grief and Loss', in Martin Nakata Andrew Day, Kevin Howells (ed.), *Anger and Indigenous Men* (Melbourne: Melbourne University Press, 2011).
[27] See: John Walker and David Mcdonald, 'The Overrepresentation of Indigenous People in Custody in Australia', *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, 1995).
[28] Ibid., at 5.
[29] Eileen Baldry et al., 'Ex-Prisoners, Homelessness and the State in Australia', *Australian and New Zealand Journal of Criminology,* 29/1 (2006), 1-14.
[30] For example: Cunneen, 'Indigeneity, Sovereignty and the Law: Challenging the Process of Criminalisation'.
[31] For example: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report: 2009', (Canberra: Human Rights and Equal Opportunities Commission, 2010). See particularly Table 2.2.
[32] Snowball and Weatherburn, 'Indigenous over-Representation in Prison: The Role of Offender Characteristics', Weatherburn, Snowball, and Hunter, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 Natsiss Survey'.
[33] American criminologists have long reported that high crime rates and serious violence are concentrated in the poorest communities: Alfred Blumstein, 'Disaggregating the Violence Trends', in Alfred Blumstein and Joel Wallman (eds.), *The Crime Drop in America* (New York: Cambridge University Press, 2000), Judith Blau and Peter Blau, 'The Cost of Inequality: Metropolitan Structure and Violent Crime', *American Sociological Review,* 47 (1982), 114-29, Gary Lafree and Kriss A. Drass, 'The Effect of Changes in Intraracial Income Inequality and

Hypothesis One: Socio-Economic disadvantage causes high rates of criminal offending.

The Australian literature's engagement with the Royal Commission's 'second angle' for explaining Indigenous incarceration rates – systemic bias in criminal justice – has been more limited. Reform of criminal justice institutions was a key aim of the Royal Commission; indeed, of its 339 recommendations 106 related to the role of criminal justice institutions in causing overrepresentation of Indigenous prisoners (and a further 107 related specifically to deaths in custody).[34] Since the Commission's Report, bias within the institutions of criminal justice has received significant media attention.[35] Moreover, policy response to the Commission's recommendations has been subject to three official reviews, commissioned by: a Commonwealth Parliamentary standing committee;[36] the Aboriginal and Torres Strait Islander Social Justice Commissioner;[37] and the former Aboriginal and Torres Strait Islander Commission ('ATSIC'), which was the peak representative body for Indigenous Australians.[38] These reviews thoroughly cover changes in criminal justice policy in the five years following the Royal Commission. However, the role of criminal justice institutions in rising incarceration has not been explained for the period post-2001.[39]

Educational Attainment on Changes in Arrest Rates for African Americans and Whites, 1957 to 1990', ibid.61 (1996), 614-34, Steven F. Messner, Lawrence E. Raffalovich, and Richard Mcmillan, 'Economic Deprivation and Changes in Homicide Arrest Rates for White and Black Youths', *Criminology,* 29 (2001), 591-613.

[34] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 5'.

[35] See, for example: Johnson, 'Indigenous Prison Rates Jump by 52%', Robinson, 'Push for Sentencing Break for Aborigines', Robinson, 'A Criminal Waste of Young Lives', Robinson, 'Disparity in Black Sentences 'Perverse'', Behrendt, 'Deaths in Custody Still Haunt Indigenous Communities'.

[36] 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.', (Canberra: Parliament of Australia 1994).

[37] Aboriginal and Torres Strait Islander Justice Commissioner, 'Indigenous Deaths in Custody: 1989-1996', (Canberra: Human Rights and Equal Opportunities Commission, 1996b).

[38] Chris Cunneen and David Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', in Atsic Office of Public Affairs (ed.), (Canberra: Aboriginal and Torres Strait Islander Commission, 1997).

[39] This said, Cunneen and others have defended the importance of criminal justice institutions as causal factors relative to socio-economic explanations. See: Cunneen, 'Racism, Discrimination and the over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues', 17.

I position my thesis within this lacuna in the Australian literature. In order to offer an explanation that accounts for criminal justice policy, I derive hypotheses from two further sources: the well-developed American literature on racialized incarceration; and the literature on policy failure, which considers the unpredictable effects of poorly implemented policy.

(2) The American race and crime politics literature

I intend to supplement the Australian literature's treatment of criminal justice institutions and incarceration rates by drawing from the extensive American literature on crime politics. While the relevance of the American literature to Australia has been suggested by a number of scholars,[40] comparative study is not without controversy. There remains international debate over whether American incarceration politics are part of a global phenomenon or are an example of 'American exceptionalism'.[41] Undeniably, there are some significant differences between the American and Australian contexts.[42] However, I argue that the American literature provides conceptual tools that may be used to form an initial causal explanation of the Australian case. I utilise three concepts in particular: (a) a complex relationship between offending and incarceration; (b) the role of criminal justice institutions in 'governing through crime'; and (c) the interaction between socio-economic disadvantage and criminal justice that occurs in 'mass imprisonment'.

(a) Offending and Incarceration

The first concept I draw from the American literature on racialized incarceration is the notion of a 'complex relationship' between offending and incarceration. While much of the Australian literature assumes a causal link between offending

[40] For example: Eileen Baldry et al., 'Imprisoning Rationalities', *Australian and New Zealand Journal of Criminology,* 44/1 (2011), 24-40, Chris Cunneen, 'Fear, Crime and Punishment ', *Dialogue,* 29/2 (2010), 44-54 at 45, Cunneen, 'Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment', (at 10-12).
[41] See above, note 8.
[42] For example, Schwartz notes that the remoteness of many Australian Indigenous communities distinguishes them from the highly urbanised African American population: Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous over-Imprisonment', *Australian Indigenous Law Review,* 14/1 (2010), 2-17 at 10.

rates and incarceration rates,[43] this has been the subject of significant debate between American scholars. Problematically, the debate is characterised by strong and contrary voices. Christie, for example, argues that incarceration rates in America 'cannot be explained' by offending – or 'crime rates' – but are instead caused by 'penal policy'.[44] But, others have indeed found strong causal links, attributing a large decline in crime rates between 1980 and 2000 to the rise in imprisonment.[45] Moreover, others still have argued that crime and offending levels are best understood as a 'context' to incarceration changes rather than a cause – a context, which takes effect through related variables, such as 'fear of crime' or 'social anxiety'.[46]

I agree with Western's analysis that the differences in these analyses are often a matter of perspective: looking at race or class differences in crime at a point in time suggests that crime and incarceration are closely linked; looking at changes in overall rates of serious offending suggests that trends in imprisonment and crime are unrelated.[47] Consequently, I support the argument that trends in incarceration are, at best, only weakly related to trends in crime.[48] From this I take my second hypothesis:

> ***Hypothesis Two: Incarceration rates are only weakly related to Indigenous offending.***

(b) Governing Through Crime

The second concept I am importing from the American literature directly concerns the Royal Commission's 'second angle': the role of criminal justice institutions. Australian scholars have recognised that 'systemic racial bias' within the institutions of criminal justice does not operate as a single independent variable upon incarceration rates. Baldry, Cuneen and others have

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[43] Weatherburn and Fitzgerald, 'Reducing Aboriginal over-Representation in Prison: A Rejoinder to Chris Cunneen'.
[44] Nils Christie, *Crime Control as an Industry* (3rd edn.; New York: Routledge, 2003).
[45] See works cited in: Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2007) at 39.
[46] Ibid., at 48. See, 'Inequality Crime and the Prison Boom'.
[47] Ibid., at 38-39.
[48] Ibid., at 33-34, Steven a Donziger, *The Real War on Crime: The Report of the National Criminal Justice Commission* (New York: Harper, 1996) at 42-43, Marc Maurer, *Race to Incarcerate* (New York: The New Press, 1999) at 30-32, Nils Christie, *Crime Control as Industry: Towards Gulags Western Style* (3rd edn.; London: Routledge, 2000) at 105-8.

persuasively argued for Australian criminal justice to be understood as an institution that is both 'communicative' and 'didactic'.[49] This sentiment is echoed by both Simon[50] and Garland,[51] in the American literature, who conceptualise criminal justice policy as a 'government rationality'. Similarly, prominent commentators, such as Michelle Alexander, have empirically observed that the influence of criminal justice on racialized incarceration operates through a complex, aggregated pattern of variables.[52]

For the purpose of my thesis I adopt the conceptualisation of a pattern of institutional behaviour in criminal justice institutions that has a causal effect upon racialized incarceration – the pattern which Simon dubs 'governing through crime'. Following both Simon and Alexander, I understand this pattern to include the following: (1) a 'crime auction' resulting in increasingly severe legislative penalties; [53] (2) the reduction of judicial discretion; [54] (3) the increased empowerment of police;[55] and (4) the subordination of racial or 'civil rights' concerns to 'tough on crime' rhetoric.[56] As an aggregated pattern, these variables inform my third hypothesis:

> ***Hypothesis Three: Changes in the institutions of criminal justice are strongly related to changes in incarceration rates.***

(c) Interaction between variables and 'Mass Imprisonment'

The final concept I draw from the American literature concerns the interaction between the numerous variables that influence changes in incarceration rates.

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[49] See Baldry et al., 'Imprisoning Rationalities'.
[50] Jonathon Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007). See particularly: Chapter One
[51] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002).
[52]See 'Chapter Two: The Lockdown' for a detailed taxonomy: Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York The New Press, 2010) at 59-96.
[53] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapters 1 and 9. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 42-58.
[54] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* at 112-23. Chapter 4, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
[55] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapter 5. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 65-74.
[56] See particularly 'The Occupation', in: Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 123-39.

An unfortunate consequence of the debate among Australian scholars over the relative importance of either Indigenous offending or criminal justice institutions in causing incarceration has been that little consideration is given to the potential interaction of these variables. This is a significant weakness.

It has been compellingly argued with regard to the American case that the interaction between institutional and socio-economic variables is critical to understanding racialized incarceration and, thus, should be a consideration for scholars in determining an appropriate methodology.[57] Western's study, *Punishment and Inequality in America*, demonstrates the particular importance of this interaction in the context of 'mass imprisonment'.[58] The concept of mass imprisonment refers to rates of incarceration that can be characterised in two ways: first, as being markedly above the historical and comparative norm for societies of this type; and second, as being demographically concentrated so as to cause the 'systemic imprisonment of whole groups of the population'.[59] Western's empirical study shows compellingly that 'mass imprisonment' is occurring in the American case.[60] Moreover, Western and Pettit show that in the context of mass imprisonment, incarceration begins to strongly affect socio-economic disadvantage and vice-versa: widespread imprisonment makes certain communities more disadvantaged; simultaneously, it significantly changes the 'meaning' of criminal justice institutions in these communities by reducing their stigma and their ability to deter offending.[61] From this I draw my fourth hypothesis:

> ***Hypothesis Four: Interaction between socio-economic/offending variables and criminal justice variables changes their effect upon incarceration rates.***

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[57] Sharon Davies, 'Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality', *Law and Contemporary problems, Special Issue, The New Data: Over-representation of Minorities in the Cirminal Justice System,* 66/1 (2003), 17-48, Carolyn Wolpert, 'Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories', *The American Criminal Law Review,* 36/2 (1999), 265-89.
[58] See Western, *Punishment and Inequality in America*, Chapter Two.
[59] David Garland, 'Introduction: The Meaning of Mass Imprisonment', in David Garland (ed.), *Mass Imprisonment: Social Causes and Consequences* (London: Sage Publications, 2001), 1-22 at 2.
[60] Bruce Western and Becky Pettit, 'Chapter One: Mass Imprisonment', in Bruce Western (ed.), *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006), 11-33 at 20-33.
[61] Ibid., at 30-33.

(3) The Public Policy Literature

As stated above, this thesis differentiates itself from the existing Australian literature on Indigenous incarceration by approaching the rising rates as a failure of government policy. The policy failure lens allows me to draw upon a broad literature within public policy that provides explanatory accounts of policy failure – both generally and in the specific context of Australian Indigenous affairs. Most persuasive among these, is Sanders' pioneering study of 'generational revolutions' in Australian Indigenous affairs. Sanders argues that the high frequency of policy failure in Indigenous affairs can be attributed to 'an iron law of cross-cultural unintended consequences and unrealised expectations', which renders it 'very easy for participants in Indigenous affairs to begin to lose faith in what they are doing.'[62] Within broader public policy theory, Sanders' empirical finding fits within Hood's taxonomy of types of organisational response to frequent policy failure.[63] Drawing on a cultural theory framework, Hood identifies four categories of management, one of which is a 'fatalist response'; this response occurs when policy implementation faces 'unpredictability and unintended effects'.[64] From Hood's theory and Sanders' empirical observations, I draw my final hypothesis:

> ***Hypothesis Five: Unsuccessful policy implementation results in unintended effects upon incarceration rates.***

1.2 Methodology

Drawing from the above literature, I intend to use the following five hypotheses to explain the persistent increase of incarceration rates for Indigenous Australians, despite the government policies designed to achieve the obverse outcome. I focus my enquiry upon the 49% increase in the rate during the ten year period from 2001 to 2011.

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[62] William Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', in Chris Aulich and Roger Wettenhall (eds.), *Howard's Fourth Government: Australian Commonwealth Administration 2004-2007* (Sydney: University of New South Wales Press, 2008), 187-205 at 200.
[63] Christopher Hood, *The Art of the State: Culture, Rhetoric and Public Management* (Oxford: Oxford University Press, 2000c).
[64] Christopher Hood, 'Calamity, Conspiracy and Chaos in Public Management', *The Art of the State: Culure, Rhetoric and Public Management* (Oxford: Oxford University Press, 2000b), 25-48 at 26. See Table 2.1: 'Four Responses to Public Management Disasters in a Cultural Theory Frame'.

Hypotheses

(1) Socio-Economic disadvantage causes high rates of criminal offending.

(2) Offending rates are weakly related to incarceration rates.

(3) Changes in the institutions of criminal justice are strongly related to changes in incarceration rates.

(4) Interaction between 'socio-economic/offending' variables and 'criminal justice' variables changes their effect upon incarceration rates.

(5) Unsuccessful criminal justice policy implementation results in unintended effects upon incarceration rates.

My methodology is shaped by the limitations of the available data; I utilise a mixed methodology, producing descriptive statistics from the available quantitative data and then supplementing these with a causal narrative of policy implementation developed from documentary and interview data. In the following section, I outline and justify: (1) the structure of my enquiry; (2) my case selection; (3) my data gathering; and (4) my techniques of data analysis.

(1) Structure of Enquiry

My enquiry proceeds in two stages: first, in Chapter One, I examine the question of persistently rising Indigenous incarceration at the national level; second, in Chapters Two and Three, I continue this enquiry at the State jurisdiction level through the case studies of New South Wales and Queensland.

(1)(a) Stage One: The National Level

It is logical to begin the enquiry into Australian Indigenous incarceration at the national level. Since the 1967 Constitutional Referendum included Indigenous Australians in the census, 'Indigenous affairs' has been a prerogative of the Commonwealth Government under the Australian Constitution.[65] Consequently, this is where the policy narrative starts. It is also, unsurprisingly, where the most

[65] *Constitution of Australia*, Section 51(xxvi)

detailed data has been collected for Indigenous Australians by Commonwealth agencies.

I begin my enquiry with a detailed history of policy-making at the national level, focusing on the Report of the *Royal Commission into Aboriginal Deaths in Custody*. I then consider my first two, linked, hypotheses: *Hypothesis One* – that socio-economic disadvantage causes high rates of offending; and *Hypothesis Two* – that offending rates are only weakly related to incarceration rates. Descriptive statistics at the national level are able to shed some light on *Hypothesis One*. Both indicators of socio-economic disadvantage and offending rates are high for the Indigenous population; this potential correlation does not confirm the hypothesis but it does affirm its relevance.

More importantly, I argue that *Hypothesis Two* can be confirmed on the available data; this is because there has been no significant change in socio-economic status or offending during the period that corresponds with the 49% increase in Indigenous incarceration. Thus, we must conclude that the increase in incarceration was not simply caused by a corresponding increase in Indigenous offending. As a consequence of this conclusion, I turn my attention to the variables associated with the institutions of criminal justice, which leads to the second stage of my enquiry.

(1)(b) Stage Two: The State Jurisdiction Case Studies

In the Australian federal system criminal law is a prerogative of state legislatures and there are significant differences between the jurisdictions. As a result, it is logical to continue my enquiry at the level of State jurisdictions. I do so in Chapters 3 and 4 through the case studies of New South Wales and Queensland (these are justified below, see: 1.2(2) *Case Selection*).

I re-commence with *Hypotheses One* and *Two*: that socio-economic disadvantage causes high rates of offending; and that offending rates are only weakly related to incarceration rates. As at the national level, *Hypothesis One* is affirmed but not confirmed by high levels of both offending and disadvantage being present in both state jurisdictions. *Hypothesis Two* is again confirmed.

This leads me to *Hypothesis Three* – that changes in the institutions of criminal justice are strongly related to changes in incarceration rates. For both state jurisdictions, I utilise the *Prisoners in Australia* survey data from the Australian Bureau of Statistics to produce a statistical description of the increase in incarcerated Indigenous people.[66] This affirms the relevance of *Hypothesis Three* and is suggestive of some elements of the 'governing through crime pattern' or 'disaggregated variables' from which this hypothesis is derived in the literature.[67]

For both state jurisdictions, I then supplement this necessarily limited statistical analysis with a causal narrative of implementation of criminal justice policy in selected Aboriginal communities (see 1.2(2) 'Case Selection') which I produce from a combination of documentary and interview data (see: 1.2(3) 'Data Gathering'). Through a process tracing of policy implementation in these communities I test *Hypothesis Three* and also the subsequent two hypotheses*: Hypothesis Four* – that interaction between 'offending' variables and 'criminal justice' variables changes their effect upon incarceration rates; and *Hypothesis Five* – that unsuccessful criminal justice policy implementation results in unintended effects upon incarceration rates. On the basis of my process tracing analysis I argue that these three hypotheses may be confirmed (see 1.2(4) 'Data Analysis' below).

(2) Case Selection:

It is important to acknowledge from the outset that case selection and data gathering present problematic issues for all studies of Government policymaking towards Indigenous Australians. This is for three reasons: first, it is because the more than 250 language and cultural groups which comprise Indigenous Australia are notably heterogeneous, both in terms of culture and experience of

[66]For example: Australian Bureau of Statistics, 'Prisoners in Australia 2011', (Canberra: Australian Bureau of Statistics, 2011).
[67] See above '1.1 (2)(b) Governing Through Crime'. Also Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapter One, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, generally.

colonisation; [68] second, it is because the geographical remoteness and cultural difference of some Indigenous communities makes them quite inaccessible to both scholars and policymakers; [69] and finally, it is because historically the Indigenous experience of both Government policy and academic study has often been traumatic, which can result in an understandable reticence to engage with future projects.[70] Combined, these issues render comparative study of Indigenous affairs policy in Australia challenging (and relatively rare).

In light of this, I justify two aspects of my case selection: (a) the merit of a small-N analysis of the Australian case; and (b) my use of two Australian state jurisdictions, New South Wales and Queensland, as case studies.

(a) Small-N Analysis of the Australian Case

At the core of my enquiry is the application of an increasingly global American literature on crime politics to a single national case study, and two sub-national case studies. This type of 'small-N' methodology has a long tradition within comparative politics. [71] However, it has recently been subject to prominent criticism within the discipline. [72] Most notably, King, Keohane and Verba have justly criticised whether small-N analyses, such as mine, can form a viable basis for causal inference, given the difficulty of controlling for variables the analyst considers extraneous. [73] At best, it is alleged, such analyses can only provide a heavily qualified correlation analysis.

This is strong criticism and demands a response. I consider my small-N methodological approach to the Australian case justified for three reasons. First,

[68] This is particularly problematic as these communities are often the most disadvantaged: Josephine Flood, *The Original Australians: The Story of the Aboriginal People* (St Leonards, NSW: Allen and Unwin, 2006).
[69] For experience of this from the perspective of mainstream scholars see: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report: 2009'.
[70] Henry Reynolds, *This Whispering in Our Hearts* (St Leonards, NSW: Allen and Unwin, 1998), Henry Reynolds, *Why Weren't We Told?* (Melbourne: Penguin, 2000).
[71] For prominent examples from this debate see: John Stuart Mill, *A System of Logic* (London: Penguin, 1972(1843)), Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (New York: Wiley, 1970).
[72] Barbara Geddes, 'How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics', *Political Analysis,* 2/131-150 (1990), John A. Goldthorpe, 'Current Issues in Comparative Macrosociology: A Debate on Methodological Issues', *Comparative Social Research,* 16 (1997), 1-26, Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry* (Princeton N.J.: Princeton University Press, 1994).
[73] King, Keohane, and Verba, *Designing Social Inquiry*. 'Chapter 1'.

I consider that a small-N methodology is justified for this enquiry, as this is an exploratory study intending to correct a lacuna in the Australian literature. There remains strong support for the continued use of small-N methodology in such circumstances. Brady and Collier have persuasively argued that the small-N comparative approach is 'truly invaluable in concept formation and in formulating explanatory ideas'. [74]

Secondly, I argue that my exploratory small-N methodology is justified by the importance of the Australian case. As stated above, Indigenous Australians offer one of the few case studies with an incarceration rate comparable to that experienced by African Americans rendering this an important case for the international comparative literature on race and crime.[75] While there are legitimate concerns about such comparisons being selected upon the dependent variable, the practical benefits in the context of varying policy outcomes are also well established; [76] the failure of Australian governments to curb rising incarceration, despite consensus commitment, is unique within the literature.

Finally, the complex and cross-cultural nature of Indigenous affairs policy in Australia necessitates a small-N foundation. This context activates many of the concerns raised by Hall regarding the problem of complex ontologies for comparativists.[77] Indeed, cross-cultural ontological differences have been cited as a factor contributing to policy failure in Indigenous affairs;[78] they have also been cited by prominent Indigenous leaders as a reason for advocating refusal to participate in certain quantitative studies.[79]

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[74] Henry E. Brady and David Collier, *Rethinking Social Inquiry: Diverse Tools and Shared Standards* (New York: Rowman and Littlefield, 2010) at 10. 'Introduction'.
[75] See above, note 9.
[76] See: Douglas Dion, 'Evidence and Inference in the Comparative Case Study', *Comparative Politics,* 30/11 (1998), 127-46.
[77] For example: Peter A. Hall, 'Aligning Ontology and Methodology in Comparative Research', in James Mahoney and Dietrich Rueschemeyer (eds.), *Comparative Historical Analysis in the Social Sciences* (Cambridge: Cambridge University Press, 2003), 373-404 at 373.
[78] Morgan Brigg, 'Biopolitics Meets Terrapolitics: Political Ontologies and Governance in Settler Colonial Australia', *Australian Journal of Political Science,* 42/3 (2007), 403-17.
[79] Peter Yu, 'The Power of Data in Aboriginal Hands: Speech at the Conference "Social Science Perspectives on the 2008 Natsi Social Survey"', in Centre for Aboriginal Economic Policy Research (Caepr) (ed.), *Topical Issue No.4/2012* (Canberra: Australian National University 2012).

(b) Two State Jurisdictions: New South Wales and Queensland

To engage with policy implementation in criminal justice institutions it is necessary to break the Australian case study down further. Under the *Australian Constitution* criminal laws are a matter for State Legislation.[80] As each State jurisdiction is different, it is usual for Australian scholars to consider all State case studies before drawing national-level conclusions. Unfortunately, it is not possible to do this in sufficient detail within the constraints of this thesis. Consequently, I have selected two State jurisdictions in which to conduct my enquiry: NSW and Queensland.

While no two States can be representative of the diversity of Indigenous Australia, there are three reasons I consider my selection of NSW and Queensland justified. The first reason is that between them NSW and Queensland account for over half of the total Indigenous prison population.[81] Consequently, they are best placed to shed light upon the national level trend that motivated this enquiry.[82] The second reason for my selection of these States is they have a representative range of urban, regional and remote communities from which to gather interview data (see 1.2(3) 'Data Gathering). The final reason for my selection is that Queensland, despite its large Indigenous prison population, did not experience as bigger increase as NSW or Western Australia (which has the only other comparatively large Indigenous prison population); consequently, it merits inclusion to avoid selecting too much on the dependent variable.

(3) Data Gathering

Research into the incarceration of Indigenous Australians poses distinct challenges for data gathering. As has been stated above, this is partly due to the unique challenges of the case study: there are limitations in the available quantitative data sets;[83] the Indigenous population is often difficult for scholars

[80] Although there are some Commonwealth legislative powers for specific crimes as well as for the criminal law of the Territories, which are administered by the Commonwealth Government.
[81] Australian Bureau of Statistics, 'Prisoners in Australia 2011', at 57. Table 4.3
[82] See: Australian Human Rights Commission, 'Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia', (Canberra: Australian Human Rights Commission, 2008).
[83] See above note 13. Also: Australian Bureau of Statistics, 'Appendix 3: Quality of Indigenous Status Data in the 2006 Census'.

to access both logistically and culturally;[84] and, Indigenous Australians are also sometimes distrustful of participating in academic studies.[85]

However, data gathering issues are also inherent in the nature of the causal processes I am studying. Criminal justice policy does not take effect through simple variables that are easily accessible to scholars. Indeed a number of the hypotheses I draw from the literature include variables that are, in effect, aggregated patterns of government policy – such as 'governing through crime' or 'poor policy implementation'[86] – and are difficult to quantitatively measure. Moreover, the policies relevant to incarceration rates inevitably take effect in circumstances that are legally and emotionally charged, and therefore difficult for scholars to access.

With these challenges in mind, I conducted a two stage data gathering process to support my proposed analysis (see below 1.2(4) 'Data Analysis'): first, I gathered the available quantitative data with a view to producing descriptive statistics; and second, I conducted interviews with the actors most relevant to policy implementation in selected Indigenous communities.

(a) Quantitative Data: Descriptive Statistics

Quantitative data gathering with regard to Indigenous Australians is highly problematic. The culturally and geographically diverse population of Indigenous Australia makes the creation of representative samples difficult. Consequently, most studies necessarily focus upon census data, although this is also problematic. The Australian Bureau of Statistics acknowledges that the four principal sources of potential error it identifies in census data – respondent error, partial response, processing error and undercount – are all troublingly present for the Indigenous population.[87] In combination, these can result in some significant distortions. For example, between the 2006 and 2011 censuses the measured Indigenous population increased by an anomalous 20.5%, which has

[84] Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report: 2009'.
[85] Yu, 'The Power of Data in Aboriginal Hands: Speech at the Conference "Social Science Perspectives on the 2008 Natsi Social Survey"'.
[86] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 123-129.
[87] Australian Bureau of Statistics, 'Appendix 3: Quality of Indigenous Status Data in the 2006 Census'.

been attributed to an increased willingness to identify as Aboriginal or Torres Strait Islander in a more tolerant Australian society.[88] These distortions are particularly perverse because they result in data being least reliable in those remote communities most strongly correlated with disadvantage.[89]

Within this thesis, I utilise data from two ABS sources: the *NATSIS Survey*; and the *Prisoners in Australia* Survey. The *NATSIS Survey* was conducted in 1994, 2002 and 2008 and thus covers most of my period of enquiry (the next survey will not be conducted in 2014). Unfortunately, the *NATSIS Survey* data is subject to all of the limitations of Indigenous survey data suggested above; as such, it has been prominently criticised, most recently by Kimberly Aboriginal leader Peter Yu, who sits on the survey's Indigenous consultative committee.[90] Nonetheless, it remains the most reliable quantitative measurement of socio-economic conditions in Indigenous Australia. Within my thesis, I consider *NATSIS Survey* data sufficient to identify general trends over the period, as these may be corroborated with the interview data I have gathered.

By contrast, the data gathered in the *Prisoners in Australia* surveys is far more reliable; this is because the ABS has far better access to the population of incarcerated prisoners. Here the problems lie in the limitations of the data set. Despite the recommendation of the Royal Commission to develop detailed data sets concerning Indigenous contact with police and court appearances,[91] these do not yet exist for a sufficient period. In 2007 the Bureau of Statistics began publishing the *Recorded Crime – Offenders* series, which includes such data; although this has not yet gained full cooperation from a number of State jurisdictions, it represents a potential boon for future scholarship.[92] However, proceeding on the basis of the available *Prisoners in Australia* data I am limited to producing a statistical description of the increase in the prison body that underpins rising incarceration rates.

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[88] Australian Bureau of Statistics, 'Media Release: The Changing Face of Aboriginal and Torres Strait Islander Australians', in Australian Bureau Of Statistics (ed.), (118/2012; Canberra, 2012).
[89] See: Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report: 2009'. See particularly Table 2.2.
[90] Yu, 'The Power of Data in Aboriginal Hands: Speech at the Conference "Social Science Perspectives on the 2008 Natsi Social Survey"'.
[91] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 5'. See Recommendations 42-47.
[92] Australian Bureau of Statistics, 'Recorded Crime - Offenders 2011-12', (Canberra: Australian Bureau of Statistics, 2011-12).

(b) Qualitative Data: Interviews

In this thesis, I supplement the available quantitative data with qualitative data to build a causal narrative of the process of policy implementation in the two State jurisdiction case studies: NSW and Queensland. Aside from a desktop survey of the available documentation, my qualitative data is primarily gathered through interviewing the 'service providers', implementing criminal justice policy in Indigenous communities. Three aspects of my interview data gathering require justification: first, my decision to use non-probability sampling; second, my purposive selection of certain Indigenous communities in which to conduct interviews; and third, my use of 'snowball' or 'chain-referral' sampling to identify appropriate subjects to interview.

Non-Probability Sampling

Rather than selecting my interviewees at random from a large population of service providers in Indigenous communities, I have deliberately selected those most relevant to my enquiry. This decision was derived from my use of the interview data to support a 'process trace'. A number of scholars have compellingly argued the merits of utilising 'elite interview' data in this manner.[93] Where my study differs slightly from these studies is that the actors I am interviewing would not normally be classed as 'elites' – at least in the sense of being 'at the top levels of government'.[94] However, I argue that 'elites' is the most useful way to classify the role of service providers in Indigenous communities. Elite interviewing is premised on a desire to 'obtain testimony of individuals who were most closely involved in the process of interest'.[95] Due to cultural diversity and geographic remoteness, service providers 'on the ground' play a role of singular importance in implementing policy in Indigenous communities: community leaders and elders are usually the paramount representative of their

[93] Oisin Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling', *PS: Political Science and Politics,* 40/4 (2007), 765-72, Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Boston: MIT Press, 2005), James Mahoney, 'Strategies of Causal Inference in Small-N Analysis', *Sociological Methods and Research,* 28/4 (2000), 387-424.
[94] Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling', (at 766).
[95] Ibid., at 766-77.

nation, clan or language group; Police Sergeants are frequently the highest present Government authority in a particular community; magistrates the highest judicial officer etc. In these circumstances, I consider the techniques of non-probability elite interviewing to be the most appropriate.

Purposive Selection of Communities

The cross-cultural and logistical difficulties, which prevent the gathering of reliable survey data in remote Indigenous Australia, are equally problematic for interviews.[96] Logistical realities constrain my analysis to consideration of three Indigenous communities for every State jurisdiction. Given this, I have decided to select communities according to the commonly used classification within Australian Government service provision: urban, regional and remote communities.[97] Selection along these lines is considered best practice to ensure that the diversity of regional and remote Indigenous community perspectives are represented. It is also useful from the perspective of examining the failures of Government policy as these classifications are used in Government programs.

The communities I conducted interviews in were: in New South Wales – Redfern (urban Sydney), Dubbo (regional) and Bourke (remote) and in Queensland – Brisbane (urban), Townsville (regional) and Doomadgee (remote). To demonstrate their cultural and geographic diversity, these communities are marked on the Aboriginal map of Australia[98] below.

[96] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[97] These three categories are defined in Parts I and II of Schedule 2 of the *Income Tax Assessment Act 1936* (Cth).
[98] Reconciliation Australia, 'Map of Australian Aboriginal Language Groups', http://www.reconciliationsa.org.au/pdf%20and%20docs/Aboriginal%20Australia%20Map.pdf.

Figure 1: Map of Australian Aboriginal Language Groups with selected communities marked.

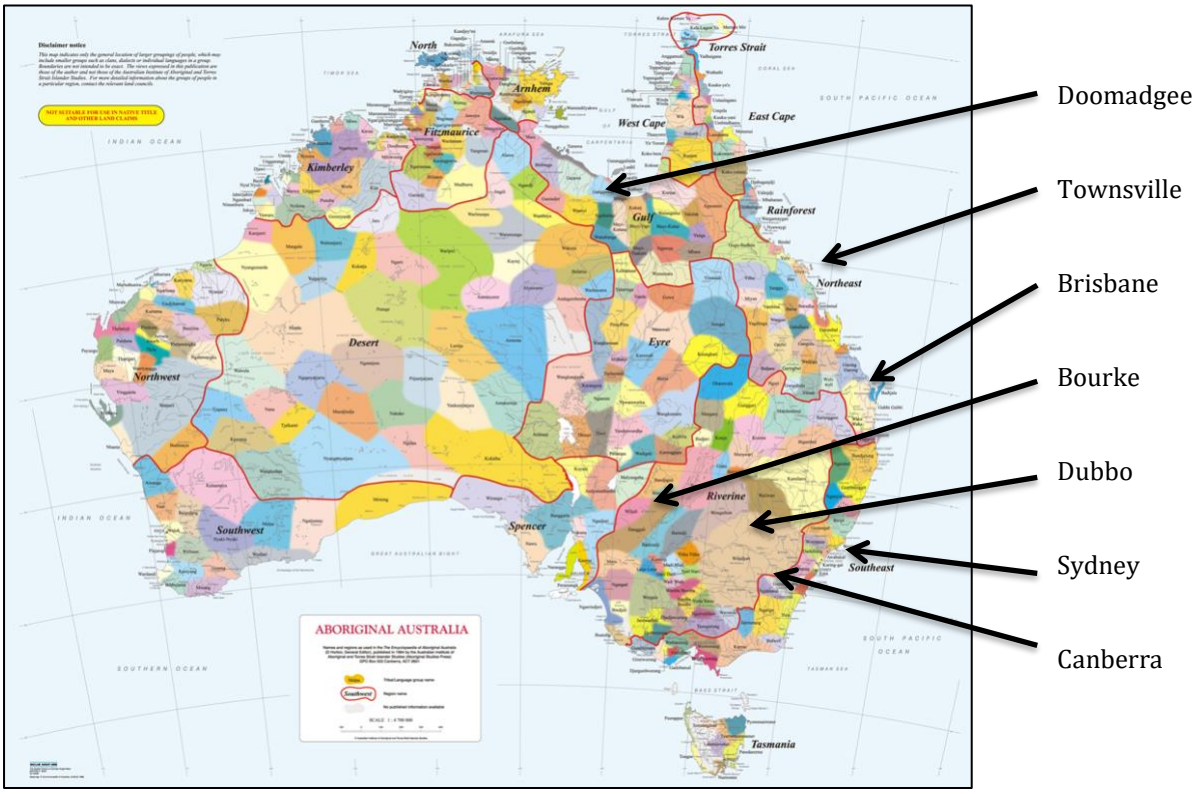

Figure 1: Source *Reconciliation Australia*

<u>Chain Referral Selection of Interviewees</u>

Within the chosen communities, an additional sampling challenge was posed by the choice of interviewees. My enquiry was focused upon those actors involved in implementing criminal justice policy within communities, specifically: magistrates; the legal profession; police; and community leaders. This decision was motivated by the success of others in using similar samples of 'service providers' to examine other exploratory studies of policy failure in Indigenous communities.[99]

In identifying these actors I found it necessary to employ the technique of 'chain referral' or 'snowballing': where discussions with interviewees and others

[99] Mals et al., 'Indigenous Service Providers Perspectives on Anger Programs', at 32-36.

were used to identify other interviewees.[100] Within the literature this technique is considered 'particularly suitable when the population of interest is not fully visible';[101] as a result it is frequently used in crime and justice studies.[102] It was necessary in my data gathering because of the sensitive nature of relations between Indigenous communities and criminal justice. Invariably, I was directed to the 'appropriate person' who would speak on behalf of the community or institution in question. I do not consider this problematic, as it is consistent with the purpose of my non-probability sampling: to interview the key actors in policy implementation.

(4) Data Analysis: Process Tracing

Given the limitations of the available data sources, I adopt a mixed methodology to in order to test my hypotheses. At the centre of this analysis is the technique of 'process tracing'. Process tracing involves the examination of 'diagnostic' pieces of evidence within a case that contribute to supporting or overturning explanatory hypotheses.[103] The technique is particularly useful as a method of discovering hypotheses and establishing their causal direction in exploratory studies such as this one.[104] In a recent, forceful defence of process tracing, Collier highlights the technique's strength, as a tool of causal inference, in explaining the unfolding of situations *over time*, provided the change can be understood in 'snap shots';[105] an example, he gives is Lerner's analysis of rapid modernisation in a Turkish rural village, conducted on the basis of intense interviews.[106] I consider the method appropriate to the study of developments in criminal justice policy because these policies are 'implemented' in a single 'snap-shot moment' when offenders come into contact with criminal justice in Indigenous communities.

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[100] Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling', (at 770.
[101] Earl Babbie, *The Practice of Social Research* (Belmont: Wadsworth Publishing, 1995).
[102] Patrick Biernacki and Dand Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling', *Sociological Methods and Research,* 10 (1981), 141-63.
[103]See: Andrew Bennett, 'Chapter 10: Process Tracing and Causal Inference', in Henry Brady and David Collier (eds.), *Rethinking Social Inquiry* (2nd edn.; Plymouth (UK): Rowman and Littlefield, 2010).
[104] David A. Freedman, 'Chapter 11: Causal Inference', *Rethinking Social Inquiry: Diverse Tools Shared Standards* (2nd edn.; Plymouth UK: Rowman and Littlefield, 2010).
[105] David Collier, 'Understanding Process Tracing', *PS: Political Science and Politics,* 44/4 (2011), 824-30 at 824.
[106] Ibid., at 825.

Van Evera[107] and later Bennett[108] have developed a table containing the possible ways in which causal inferences can be drawn from diagnostic evidence in small-N analyses. I have extracted it below:

Figure 2: Causal Inference in Small-N analyses

	Sufficient for Affirming Causal Inference	
	Yes	**No**
Yes (*Necessary for Affirming Causal Inference*)	**1. Straw in the wind:** • **Passing:** affirms relevance of hypothesis but does not confirm it. • **Failing:** Hypothesis is not eliminated but is slightly weakened.	**2. Smoking-Gun:** • **Passing:** confirms hypothesis • **Failing:** hypothesis is not eliminated but is somewhat weakened.
No	**3. Hoop Test** • **Passing:** affirms relevance of hypothesis but does not confirm it. • **Failing:** Eliminates hypothesis.	**4. Doubly Decisive** • **Passing:** confirms hypothesis and eliminates others. • **Failing:** eliminates hypothesis.

Figure 2 Process Tracing Tests for Causal Inference

I utilise both quantitative and qualitative sources to produce my causal inferences.

(a) Descriptive Statistics

On the basis of the *Prisoners in Australia* survey I am able to produce an accurate measure of the trends in Indigenous incarceration rates (per 100,000 of adult population). This can be compared to broad trends, measured with less accuracy from the *National Aboriginal and Torres Strait Islander Social Survey*, in Indigenous socio-economic status and offending. I am also able to measure trends in the Indigenous prison population that have accompanied the increase, including: changes in sentence type, prior imprisonment, and sentence length. These trends may then be used to inform and corroborate my qualitative narrative of the implementation of criminal justice policy.

[107] Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997) at 31-2.
[108] Bennett, 'Chapter 10: Process Tracing and Causal Inference', at 210.

(b) Tracing the Process of Policy Implementation

The second stage of my analysis, for each case, relies upon the interview data from service providers in the three types of Indigenous communities outlined above. The interviews were conducted using a semi-structured interview technique. The interviews focus upon the 'snap shot' moment of policy implementation that the subject of the interview has experienced as a 'service provider' in their respective Indigenous community. On the basis of the content of these interviews, I draw causal inferences according to Figure Two above.

While the use of interviews avoids many of the data constraints that severely limit the scope of statistical analysis in Indigenous affairs, it does have acknowledged weaknesses. Two in particular are relevant to my enquiry: (1) monitoring convergent and discriminant validity; and (2) preventing contamination of data and monitoring external validity. Convergent validity and discriminant validity refer to the consistency of the respondents views and their identification of the relevant issue respectively. These can be problematic in Indigenous communities where there is often poor communication about, and low understanding of, government policy processes. Both forms of validity can, however, be checked within careful interview technique.[109] Contamination of data in interview data is caused by inaccuracies in the response to interview questions due to contrary agendas or other factors. Contamination is best controlled for by checking the external validity of data against multiple data sources.[110] Good sampling technique is important to avoid contamination, however my mixed methodology is also useful; it allows me to corroborate trends observed in the interview data with those present in the descriptive statistics.

[109]Charles Judd, Rick H. Hoyle, and Monica J. Harris, *Research Methods in Social Relations* (7th edn.; London: Wadsworth Publishing Co, 2001).
[110] Lewis Anthony Dexter, *Elite and Specialized Interviewing* (Evanston: Northwestern University Press, 1970).

Chapter Two: The National Case

2.1 Introduction

At the national level, despite Commonwealth and State government policies designed to achieve the obverse outcome, the Indigenous incarceration rate rose by 49% between 2001 and 2011.[1] In this chapter I examine this paradoxical outcome. I do so in two stages. First, I outline a brief history of race and crime policy at the national level in Australia, as it relates to incarceration rates. The policy history is of vital importance as it forms a backdrop for my subsequent enquiries at the State level. Second, I use the available quantitative data to form a preliminary appraisal of these policies against observable trends in outcomes at the national level.

Figure 3: Age Standardised Incarceration Rates

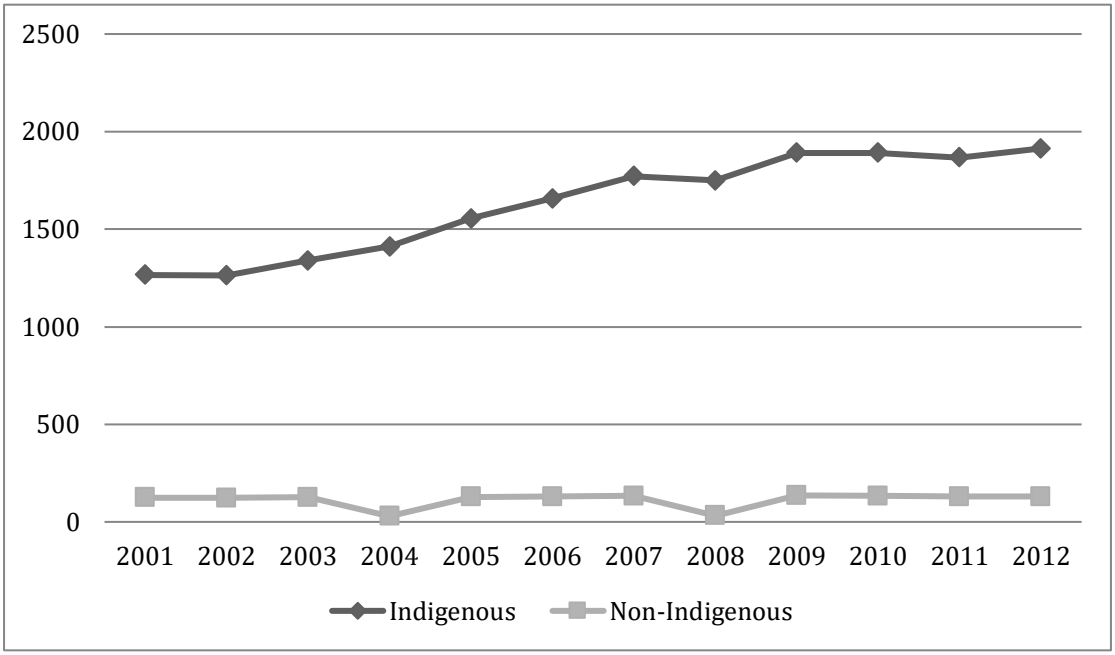

Figure 3 (y = per 100,000 of age-adjusted adult population) – Source: *Prisoners in Australia* 2001 and 2011.

[1] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.

2.2 Policy History: The Royal Commission into Aboriginal Deaths in Custody.

As noted earlier, under the Australian Constitution, the Commonwealth Government is not specifically responsible for most criminal justice policymaking, which is a State Government prerogative.[2] However, since the 1967 referendum the Commonwealth Government has been empowered to make policy for Indigenous Australians – under its 'races power'.[3] From this time, it has been common for the Commonwealth to assume leadership in Indigenous affairs policy making. With regard to Indigenous incarceration rates, the Hawke Government did this in 1987 through the mechanism of conducting a *Royal Commission into Aboriginal Deaths in Custody*, with very broad terms of reference. While dated, the Royal Commission's reports remain the formal statement of national policy on Indigenous incarceration.

It must be acknowledged that there have been significant changes in the broader landscape of Australian Indigenous affairs policymaking in the twenty-years since the Royal Commission. Chief among these, were changes associated with the Howard Government's 2007 *Northern Territory National Emergency Response* – a military intervention into designated remote Aboriginal communities. It is widely acknowledged among scholars that 'the Intervention' represented a fundamental change or 'paradigm shift' away from the policy of self-determination and towards a policy of 'mainstreaming'.[4] Sanders characterises this policy change as a 'generational revolution'.[5] For Sanders, the 2007 Intervention marks the end of the paradigm of 'self-determination', which had been ascendant since 1967. It also marks the culmination of a 'period of doubt' commencing in 2001 with the publication of two prominent critiques of

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[2] *Constitution of Australia.* Chapter V.
[3] Ibid. Sec 51 (xxvi).
[4] See for example: Jon Altman, ''In the Name of the Market?'', in Jon Altman and Melinda Hinkson (eds.), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Melbourne: Arena Publications Association, 2008), 307-21, Melinda Hinkson, ''In the Name of the Child'', ibid.(Areana Publications Association), 1-14, Marcia Langton, 'Indigenous Affairs', in Robert Manne (ed.), *Dear Mr Rudd: Ideas for a Better Australia* (Melbourne: Black Inc, 2008), 220-33..
[5] See: Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', at 197, Gillian Cowlishaw, Emma Kowal, and Tess Lea, 'Double Blinds', in Gillian Cowlishaw, Emma Kowal, and Tess Lea (eds.), *Moving Anthropology: Critical Indigenous Studies* (Darwin: Charles Darwin University Press, 2006).

Government policy, Pearson's *Our Right to Take Responsibility* and Sutton's 'The Politics of Suffering'.[6] These changes formed an important backdrop to the implementation of the Royal Commission's recommendations during the period of my enquiry.

(1) The Royal Commission into Aboriginal Deaths in Custody and its Implementation

In the decade between 1980 and 1989, 99 Indigenous Australians are known to have died whilst in police custody. At the beginning of that decade, relatives of a number of the dead began campaigning for a National inquiry. On 10 August 1987, Prime Minister Hawke announced the Royal Commission following the death of an Aboriginal man in the New South Wales town of Brewarrina – the sixteenth Indigenous prisoner to die that year.

The final *National Report* of the Royal Commission was tabled in Commonwealth Parliament on the 9 May 1991. The culmination of a four-year process – 99 case studies and four regional reports – it was hailed as a landmark: 'the most comprehensive review of the needs and opportunities for change ever produced.'[7] Twenty years later, its continuing significance to policymakers should not be underestimated; for example, the *Reports* of the Commission were on the desk of every police officer I interviewed for this thesis.

The Royal Commission's *Final Report* stated its 'central conclusion' as follows:

> 'The work of the commission has established that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. However, what is overwhelmingly different is the rate at which Aboriginal people come into custody compared with the rate of the general community…'[8]

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[6] Noel Pearson, *Our Right to Take Responsibility* (Cairns: Noel Pearson and Associates, 2000), Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s ', *Anthropological Forum,* 11/2 (2001), 125-73.

[7] Cunneen and Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', at 5.

[8] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', at 6.

The Royal Commission made seventy-four recommendations specifically directed toward reducing the incarceration rates of Indigenous Australians. Below I will examine these recommendations in the context of the three official Reports that were conducted to evaluate their implementation: in 1994, 1996 and 1997.[9] For convenience, I have divided the recommendations into five thematic groupings:

(1) Imprisonment as a Last Resort [Recommendations 92,94,95,101,103,111-115, 116-121];

(2) Court Processes, Legislation and Aboriginal Representation [Recommendations 93,96-100,102,105-108, 234];

(3) Police Practices and Police/Community Relations [Recommendations 86-91, 60-61, 214-233];

(4) Adequacy of Information [Recommendations 42-44, 47]; and

(5) Self-determination [Recommendation 188].

(1) *Imprisonment as Last Resort* - [Recommendations 92,94,95,101,103,111-115, 116-121]

In the two decades since the Royal Commission's report was handed down, it's most quoted Recommendation has been 92: 'That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a *sanction of last resort* (my emphasis)'.[10] In practice, Recommendation 92 was intended to operate with Recommendation 87, which refers to using arrest only when no other option is available.[11]

These two Recommendations were formally adopted by all State jurisdictions prior to the consideration of my period of enquiry in 2001.[12]

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[9] Cunneen and Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', Aboriginal and Torres Strait Islander Justice Commissioner, 'Indigenous Deaths in Custody: 1989-1996', 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.'.

[10] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1'. Rec 92.

[11] Ibid. Rec 87.

[12] Although the Northern Territory and Tasmania stopped short of legislating, instead adopting the Recommendations as 'policy and police practice'. Cunneen and Mcdonald, 'Keeping

However, in order for the 'imprisonment as a sanction of last resort' principle to have meaning it requires the availability of other options – and these were not present in 2001. In 1997, Cunneen and McDonald conducted a thorough review of the implementation of the Royal Commission Reports on behalf of the Aboriginal and Torres Strait Islander Commission ('ATSIC').[13] They argue that part of the problem was with the Recommendation's drafting, which 'simply refers to the need for legislation in this area, rather than the need for rigorous implementation to ensure that imprisonment really is a last resort.'[14] This was particularly evident in remote communities where – in spite of Rec 112,113,114 and 116's insistence that non-custodial sentencing options be provided in rural areas – Government compliance often meant little on the ground.[15]

Moreover, even by 1997, it was noticeable that 'the political and legislative shift' had been away from 'sanction of last resort.' Cunneen and McDonald conclude that: 'it is difficult to avoid the conclusion that at a policy level imprisonment is not used as a last resort sentencing option for Aboriginal people. It is patently ridiculous for States and Territories to claim that it is the case when the general thrust of sentencing policy has been in the opposite direction.'[16]

(2) *Court Processes*, *Legislation* and *Aboriginal Representation* – [Recommendations 93,96-100,102,105-108, 234]

These recommendations focused upon improving funding to ensure Indigenous representation. Here the Commonwealth made a promising start to implementation – as Aboriginal legal services around Australia are funded federally. Recommendations 106, 107, 108 and 234 were adopted and the legal services were funded through ATSIC.[17] Subsequent to Cunneen and McDonald's review however, this funding structure changed with the abolition of ATSIC. Indigenous legal services are still funded federally, but a number of their law

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Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody'.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

reform functions have been lost: for example, Cunneen and McDonald's review, which was funded by ATSIC, has not been repeated since 1997.

(3) *Police Practices and Police/Community Relations* – [Recommendations 86-91, 60-61, 214-233]

The Royal Commission made a large number of Recommendations about police practice and relations between the police and Indigenous communities.

At the time of the Royal Commission there was a widespread perception of police racism.[18] Commendably, a large number of these recommendations had been adopted as policy by the Australasian Council of Police Ministers by the time of Cunneen and McDonald's review in 1997.[19] However, specific problems remained: for example, Recommendations related to decriminalising public drunkenness (Rec 79) were not adopted in Victoria, Queensland and Tasmania; moreover the specific recommendations concerning the policing of motor vehicle offences (Rec 95) were only partially adopted.

Moreover, at the nexus of the Court Procedures Recommendations and the Police Practice Recommendations, Recommendations concerning the problematic situation with Indigenous offenders and Bail was neglected. Recommendations 89, 90 and 91 argue for the establishment of State wide processes of monitoring and reviewing the use of bail with Indigenous defendants. This had not been completed by the time of Cunneen and McDonald's Review and has been neglected since.[20]

(4) *Adequacy of Information* – [Recommendations 42-44, 47]

Having conducted its pioneering enquiry, the Royal Commission also made a number of Recommendations about improving the adequacy of information with regard to the Indigenous prisoner population. Recommendations 42, 43 and 44

[18] Hal Wooten, 'Regional Report of Inquiry in New South Wales, Victoria and Tasmania', (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991).
[19] Cunneen and Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody'.
[20] Ibid.

to this effect were immediately adopted by the Commonwealth,[21] which tasked the Australian Institute of Criminology and the ABS to comply. Twenty years on, the data-sets available are still insufficiently accurate and detailed in this area – largely for the same reason identified by Cunneen and McDonald in their ATSIC review in 1997: State Governments and State police forces have been reluctant to fully comply.[22]

Importantly, Recommendation 47 – that Ministers report annually to parliaments as to the size and composition of the custodial populations – was not implemented by any jurisdiction.[23] Later experience of 'Closing the Gap' Reports in the Federal parliament suggests that this was a lost opportunity to spur data gathering.[24]

(5) *Self-Determination* – [Recommendation 188]

The Royal Commission concluded that all of its recommendations should be read in light of a fifth and final category of Recommendation 188:

> '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.'[25]

In their review, Cunneen and McDonald note that the importance of Recommendation 188's focus upon self-determination 'cannot be overemphasised'; 'it encompasses both the philosophical and political basis of action to implement the recommendations.'[26] Of all the recommendations of the Royal Commission, Rec.188 was the most affected by changes in broader Indigenous affairs policy during the period of my enquiry. As noted above, the

[21] These are: Rec 42 - Publish detailed information on the police custody population; Rec 43 and 44 – Regularly conduct research into the size and composition of police custody population. Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1'.
[22] Cunneen and Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody'.
[23] Ibid.
[24] The Hon Julia Gillard, 'Closing the Gap: Prime Minister's Report 2011', (Canberra: Department of Families, Aging, Health, Community Services and Indigenous Affairs, 2011).
[25] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1'.
[26] Cunneen and Mcdonald, 'Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody', at 67.

policy paradigm of self-determination was comprehensively rejected following the Howard Government's Northern Territory Intervention in 2007[27] – after sustaining heavy criticism since 2001.[28] In this context, Government commitment to Recommendation 188 declined steadily throughout my enquiry.

(2) Conclusion

The Royal Commission into Aboriginal Deaths in Custody lay down both a foundational explanation of Indigenous overrepresentation in incarceration and a lengthy set of policy recommendations for the future. Subsequent official policy reviews, most notably that by Cunneen and McDonald in 1997, suggest that there were issues surrounding the implementation of these recommendations – even before the commencement of my period of enquiry in 2001.

2.3 Explaining the Increase

Having examined the history of policies aimed at reducing Indigenous incarceration at the national level in Australia, it is timely to turn to the paradoxical increase in incarceration rates. Between 2001 and 2011 national Indigenous incarceration rates rose by 49% - in spite of the policies outlined above.[29] In order to explain this persistent rise, and the clear failure of Government policies, I consider the five Hypotheses I have drawn from my literature review.

Hypothesis One: Socio-economic disadvantage causes high rates of offending.

My first hypothesis is that socio-economic disadvantage causes high rates of offending. As outlined above, both Indigenous disadvantage and high rates of Indigenous offending were central concerns of the Royal Commission.[30]

[27] Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', at 127.
[28] For example, see: Sutton, 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s ', (at 170.
[29] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[30] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', at 208.

Moreover, Indigenous disadvantage has also been a central concern of Commonwealth Indigenous affairs policy between 2001 and 2011.[31]

The best available data regarding the socio-economic conditions of Indigenous Australians comes from the *NATSIS Survey*, which was conducted in 2002 and 2008.[32] There are significant weaknesses in this survey data, which I have acknowledged above (see 1.2(3) 'Data Gathering'). However, socio-economic outcomes between the two available surveys may be usefully compared to identify general trends in socio-economic conditions. Figure Four below includes socio-economic variables identified in the literature as being particularly germane to involvement in crime.

Figure Four: National Level: Socio-Economic Variables (2002 and 2008)

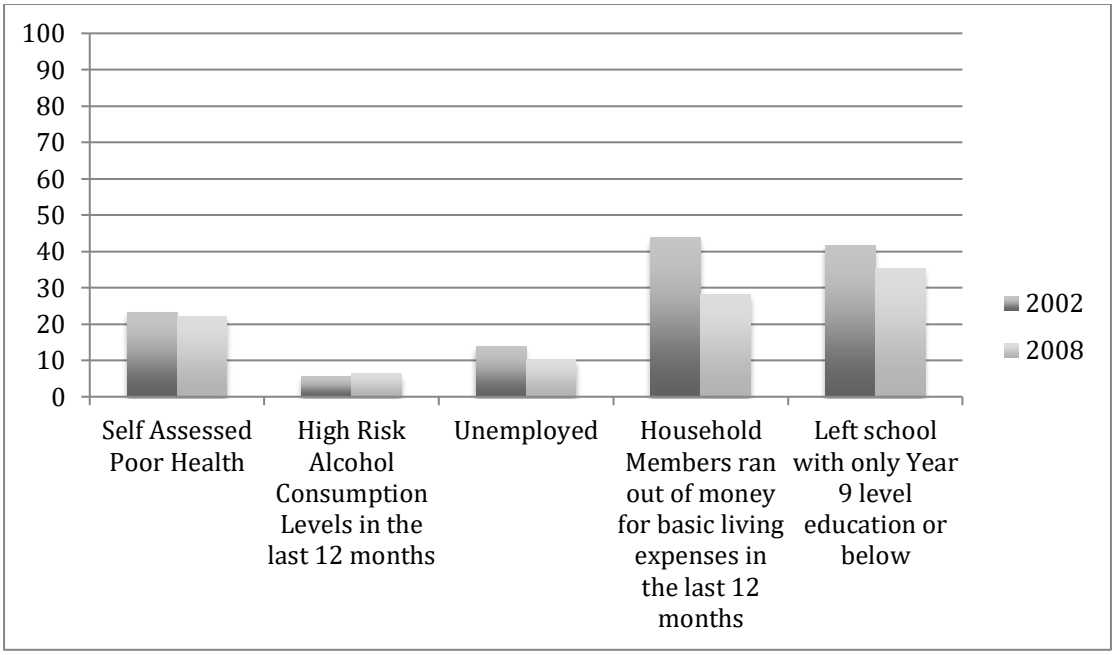

Figure 4 (y = % of Indigenous Persons aged 15 and over): Source – *National Aboriginal and Torres Strait Islander Social Survey 2002* and *2008*.

From Figure Four, it is clear that a high percentage of Indigenous respondents aged 15 years and over experience socio-economic disadvantage in the relevant categories; this is perhaps particularly true in terms of unemployment, housing and education. Poor health and alcohol consumption rates are also quite high,

[31] See: Gillard, 'Closing the Gap: Prime Minister's Report 2011'.
[32] Australian Bureau Of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey', (Canberra: Australian Bureau of Statistics, 2002), Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey', (Canberra: Australian Bureau of Statistics, 2008).

when the well acknowledged respondent bias away from self-identifying with these categories in surveys is taken into account.[33]

The *NATSIS Survey*s also give us our best measure of 'offending rates'. The difficulty of accurately measuring offending is widely acknowledged in the literature – particularly in the absence of police data on contact with police. As it is self-reported, the survey data used here has certain clear limitations. However, I argue it may be usefully employed to observe trends in Indigenous 'involvement in crime' at a very general level. Figure Five contains the four measures of 'involvement in crime' from the two *NATSIS Surveys.* For these measures, the survey may be usefully compared with its earlier incarnation, the *National Aboriginal and Torres Strait Islander Survey*, which was conducted once, in 1994.[34]

Figure Five: Indigenous 'Involvement in Crime'

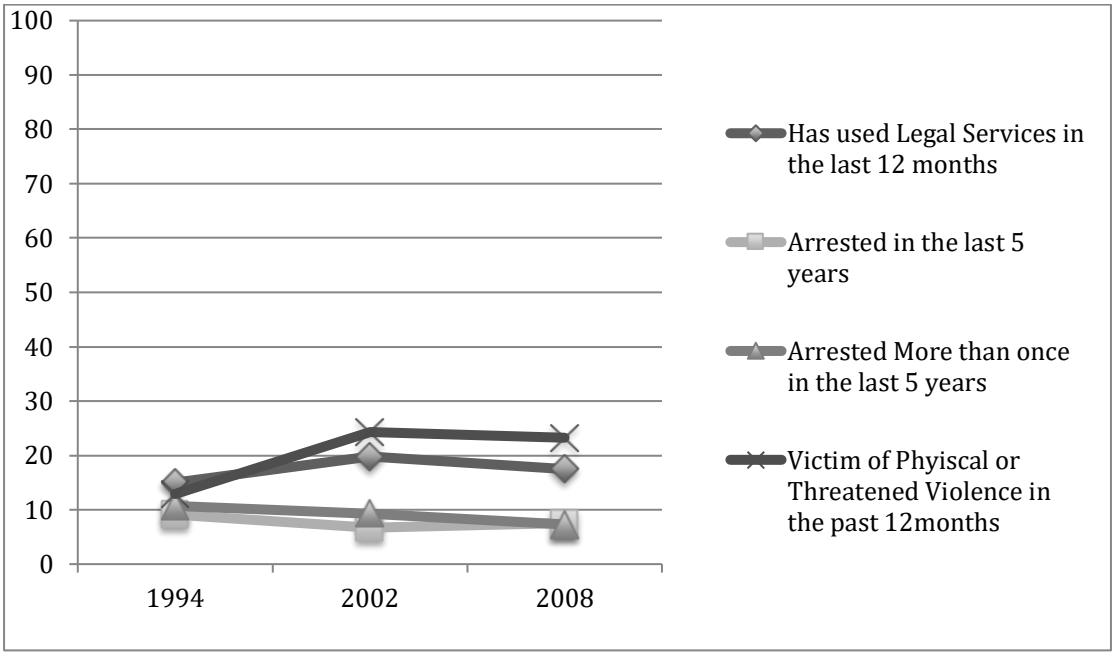

Figure 5: (y = % of Indigenous persons 15 years and older): Source - *National Aboriginal and Torres Strait Islander Social Survey* 1994, 2002, 2008.

Figure Five shows relatively high rates of Indigenous experience of all four categories of 'involvement in crime', with 8% of respondents in 2008 having reported being arrested once and 7% being arrested more than once.[35] Also, the

[33] See: Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey'. Explanatory Notes: 4.1.
[34] Ibid. Explanatory Notes: 4.1
[35] Ibid.

'victim of physical or threatened violence' variable is particularly high for the Indigenous community, with 23% of respondents self-identifying.[36]

Acknowledging that these are only very broad trends that I am observing on the available data, I use these Figures Four and Five to conduct a 'Straw-in-the-Wind' test of *Hypothesis One* (See above Figure 2: Causal Inference in Small-N Studies).[37] High levels of disadvantage and high levels of offending are both present among Indigenous respondents to the surveys, throughout the period of my enquiry. This correlation does not confirm the hypothesis that socio-economic disadvantage is causing the high rates of offending. But – as per the Van Evera's conception of a 'Straw in the Wind' test – it does affirm its relevance to the enquiry.[38] I will reconsider it in more detail at the level of State jurisdictions in subsequent chapters.

Hypothesis Two: A weak relationship between offending and incarceration

The general trends I have just observed in Figure Five are also relevant to my second hypothesis. While it is not possible, on the available data, to construct a rate of offending, the measures contained in Figure Five give us the best measurement of trends related to criminal offending in Indigenous communities. Figure Five displays a gently declining trend of arrests and multiple arrests. On the associated measurements of 'victim of physical violence' and 'use of legal services' there is some movement prior to the 2002 survey, but relative stability between the 2002 and 2008 surveys.

It is acknowledged that these trends can only be observed at a very general level. However, I consider this sufficient in order to conduct what Van Evera describes as a 'smoking gun test', which will either confirm the hypothesis or weaken but not eliminate it.[39] Because the trend in incarceration rates is so pronounced – a 39% increase between 2002 and 2008 in Figure 2 – I argue that the absence of any noticeable corresponding increase in the measures associated

[36] Ibid.
[37] Bennett, 'Chapter 10: Process Tracing and Causal Inference', Van Evera, *Guide to Methods for Students of Political Science*.
[38] Van Evera, *Guide to Methods for Students of Political Science*.
[39] Ibid.

with offending rates is sufficient to confirm Hypotheses two: at the national level in Australia, Indigenous offending rates and Indigenous incarceration rates *are only weakly related.*

Criminal Justice Policy and Trends in Incarceration

The conclusion that offending and incarceration rates are only weakly related eliminates the most simple explanation offered for the increase in Indigenous incarceration rates: that they reflect an increase in Indigenous offending. This leads me to consider the impact of criminal justice institutions. This leads my to my final three hypotheses.

To test Hypothesis Three, Four and Five requires a detailed understanding of the operation of criminal justice policy in Indigenous communities. As criminal justice policy is a State Government prerogative in Australia, it is not possible to examine implementation at the national level – this makes a causal explanation based on Hypotheses Three, Four and Five unfeasible. However, it is possible to describe general trends in the prison population on the basis of quantitative data, which will inform my analysis at the State level in subsequent Chapters.

As noted above, the *Prisoners in Australia* survey, produced each year between 2001 and 2011, allows me to produce a number of reliable measures of the increase in the prison population. On the basis of the *Prisoners in Australia* survey I can produce three measures of the change in prison population caused by the increase: (1) the change in primary offence of Indigenous prisoners; (2) the change in sentence length for Indigenous prisoners; and (3) the change in the proportion of prisoners with prior convictions.

Figure Six: Indigenous Prisoners in Australia - Change in Primary Offence (2001-2011)

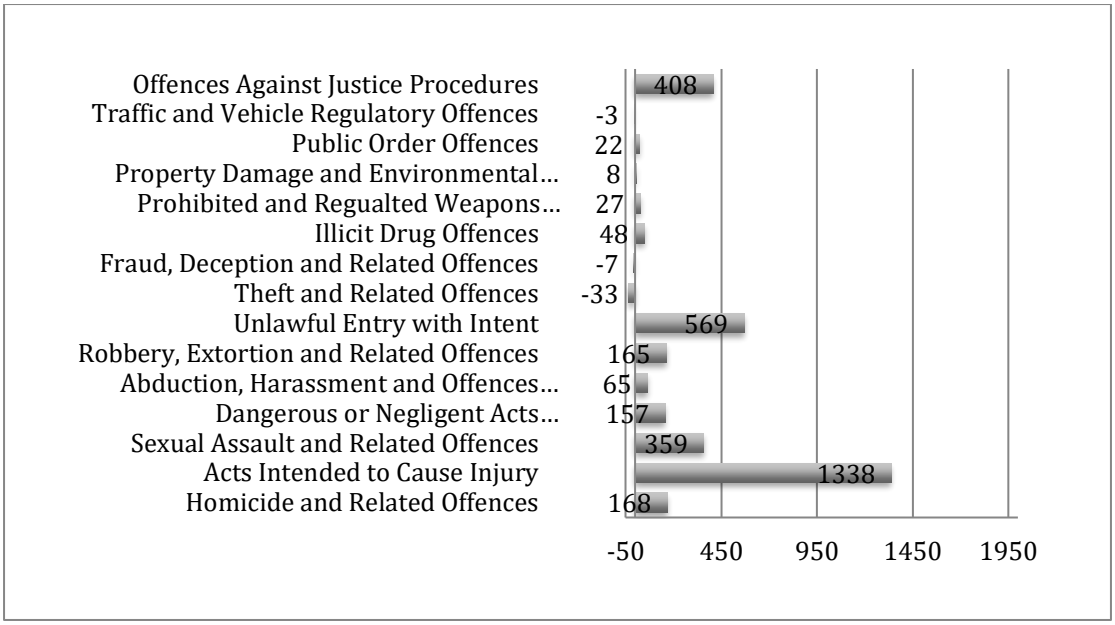

Figure 6 (y = change in primary offence between 2001 and 2011 by no. of prisoners): Source – *Prisoners in Australia* 2001 and 2011.

Figure Six shows that there have been significant changes in the composition of the Indigenous prison population according to primary offence, as a result of the increase in prisoners between 2001 and 2011. In summary the most significant increases have occurred in: acts intended to cause injury (1338 more prisoners); unlawful entry (569 more); and offences against justice (408). These changes are not necessarily caused by criminal justice policy alone – for instance, they may reflect changes in Indigenous offending patterns. However, two factors are suggestive of the influence of 'governing through crime'. First, the large increase in 'offences against justice'[40] can only be explained in terms of stricter penalties for breaches of court orders. Second the increases in both 'acts intended to cause injury' and 'unlawful entry' are not matched by corresponding increases in related offences such as 'harassment' (or 'homicide') and 'theft' respectively. This suggests a potential change in specific penalties and sentence lengths.

Sentencing lengths are directly examined in Figure Seven, which shows the mean aggregate sentence length and the mean expected time to serve for Indigenous prisoners in both 2001 and 2011.

[40] This broad category of offences includes all breaches of court orders; this ranges from being held in contempt for failing to appear to breaching bail conditions or the conditions of parole.

Figure Seven: Mean Aggregate Sentence Length and Mean Expected Time to Serve (2001 and 2011).

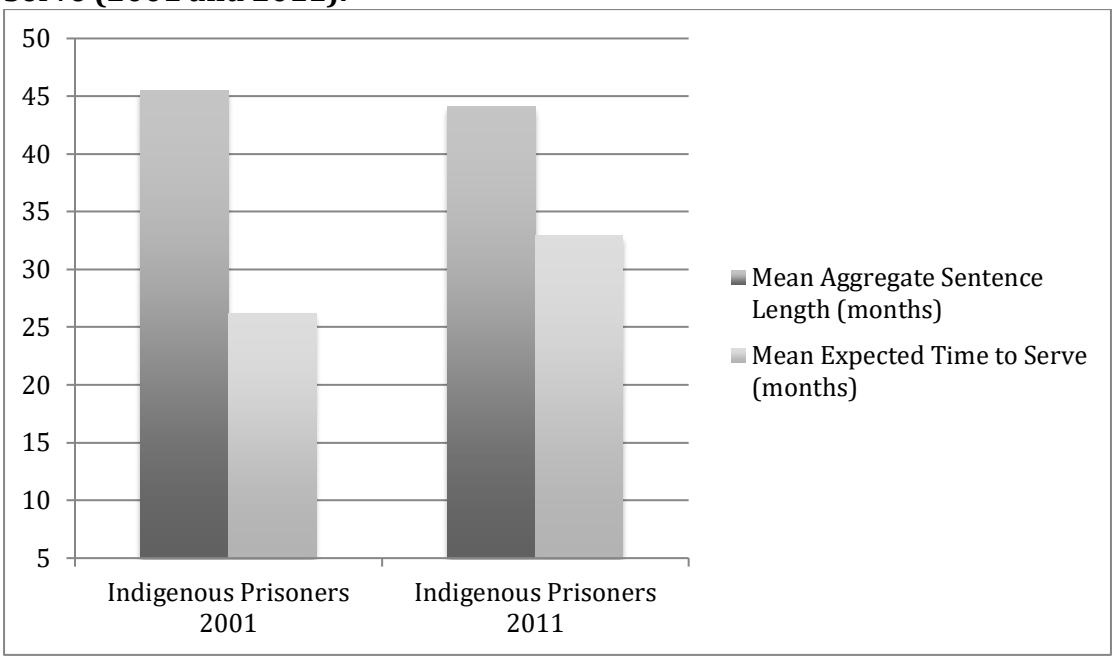

Figure 7 (y = sentence length (months): Source – *Prisoners in Australia* 2001 and 2001.

Figure Seven shows that between 2001 and 2011 there has been no significant increase in average sentence length for Indigenous prisoners at the national level; indeed, it has declined slightly. However, there is a significant increase in the expected time to serve. This has two important consequences for my analysis. First, it is strong evidence that Indigenous prisoners are finding it harder to obtain parole in 2011 than they did in 2001; this is interesting because of the trend towards implementing minimum non-parole periods that has been evident in some Australian State jurisdictions during the period.[41] The second consequence for my analysis is that it allows us to draw inferences about the severity of the offences being committed within the typological categories noted above in Figure Six. For example, we can infer that the large increase in prisoners being sentenced for 'offences intended to cause physical harm' was not comprised of people committing particularly severe assaults or there would have been a noticeable increase in sentence length.

Related to considerations of sentencing is the measurement of the number of prior offences within the prisoner population. This is measured in Figure Eight.

[41] See below, Chapter 3: New South Wales.

Figure 8: Indigenous Prisoners by Prior Imprisonment

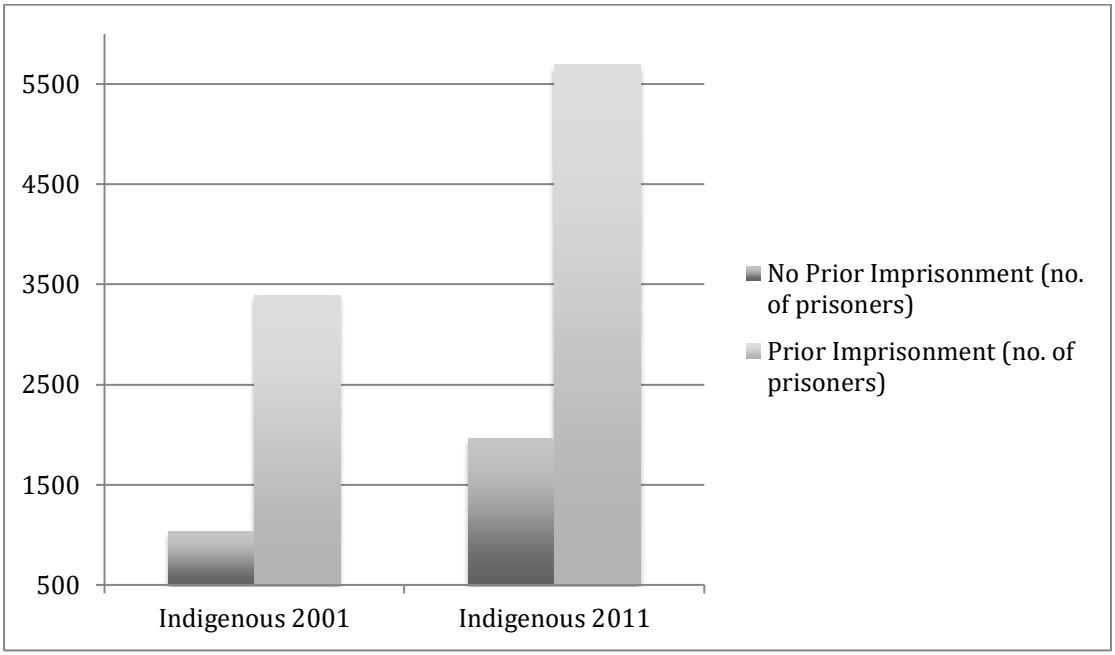

Figure 8 (y = no. of prisoners): Source – *Prisoners in Australia* 2001, 2011.

Figure Eight reveals a marked increase in the number of Indigenous prisoners with a history of prior imprisonment between 2001 and 2011. This increase in recidivist offending also has a number of important implications but most importantly at this stage of my enquiry it confirms the importance of criminal justice institutions to my explanation – because it suggests a large-scale failure to rehabilitate Indigenous offenders.

Figures Six, Seven and Eight are not sufficient to confirm my hypothesis that changes in criminal justice institutions are strongly related to changes in incarceration. However, they do show that there have been distinct patterns within the changed prison population that are suggestive of variables associated with criminal justice. This is a strong incentive to continue the analysis at the State jurisdiction level, where these policies are implemented and may be examined in more detail.

2.4 Conclusion

At the national level in Australia there is not sufficient data to offer a causal explanation of the increase in incarceration rates. However, a number of conclusions may be drawn. Firstly, the trends in the data show that incarceration

rates increased sharply during the period. This increase coincided with high but stable levels of disadvantage among Indigenous Australians and high levels of 'involvement in crime'. These trends suggested the relevance of *Hypothesis One* – that socio-economic disadvantage causes high offending rates – and confirmed *Hypothesis Two* – that offending rates are only weakly related to incarceration rates. This suggested the relevance of criminal justice institutions, which may be examined through examining *Hypotheses Three*, *Four* and *Five* at the State jurisdiction level in subsequent chapters.

Chapter 3: New South Wales

3.1 Introduction

Between 2001 and 2011 the Indigenous incarceration rate in NSW rose by 29%.[1] As Figure Nine makes clear, there was no corresponding rise in the non-Indigenous prisoner population, which declined during the same period. In this Chapter, I intend to continue the analysis I conducted at the national level by explaining this paradoxical increase at the State level in NSW.

Figure 9: Age Standardised Incarceration Rates NSW

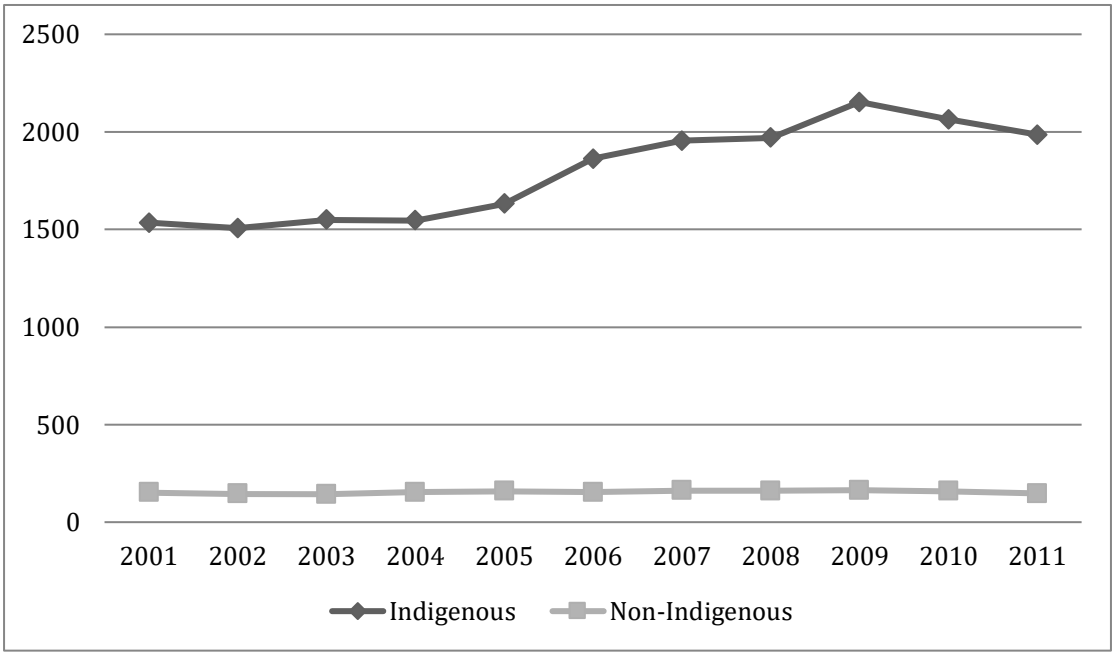

Figure 9 (y = per 100,000 of age-adjusted adult population): Source - *Prisoners in Australia* 2001, 2011

In this chapter I proceed in two stages. First, I outline the history of policy-making with regard to Indigenous incarceration in NSW. Second, I proceed to examine my five hypotheses in light of the available data. As with the national case, I am able to examine the *Hypothesis One* and *Hypothesis Two* on the basis of general trends in the quantitative data. For the final three *Hypotheses* I require a much more detailed understanding of the increase in incarceration. I am able to gain the necessary detail by supplementing the data with interview

[1]Australian Bureau of Statistics, 'Prisoners in Australia 2011'.

data from service providers; this allows me to trace the process of criminal justice policy at the critical implementation stage.

3.2 Policy History

There are three main streams of policy making that affect Indigenous incarceration in NSW: (1) the 'Aboriginal Justice Plan'; (2) judicial decision making by NSW courts; (3) and changes in NSW criminal legislation. I will examine each in turn.

(1) The New South Wales 'Aboriginal Justice Plan'

In 1997, a 'National Indigenous Deaths in Custody Summit' was held to examine the failure to reduce Indigenous incarceration rates in line with the intention of the Royal Commission. At this summit, all State Governments committed to developing a comprehensive 'Aboriginal Justice Plan' containing strategies to reduce Indigenous incarceration. The NSW plan, entitled *Beyond Justice 2004-2014*, was launched in 2003.[2] The plan represents the defining document of NSW Government policy on Indigenous incarceration rates during the period of my enquiry.

Beyond Justice was expressly directed at the State's failure to achieve the goals of the Royal Commission during the previous decade. Indeed, the plan's first goal was: 'To reduce the number of Aboriginal people coming into contact with the criminal justice system in its entirety – for offenders, Aboriginal victims of crime and the broader Aboriginal community.'[3] The plan identified 'Seven Strategic Directions for Improvement'. Of these, the fifth – the criminal justice system – will be my focus here. The *Beyond Justice* plan outlines the NSW State government's goals to reform the criminal justice system between 2004 and 2014. Including to:

- (Recommendation One) Improve Aboriginal community trust and confidence in the criminal justice system by establishing local Aboriginal community justice mechanisms;

[2] New South Wales Aboriginal Justice Advisory Council, 'Beyond Justice 2004-2014: N.S.W. Aboriginal Justice Plan', (Sydney: New South Wales Aboriginal Justice Advisory Council, 2003).
[3] Ibid., at 8.

- (Recommendation Eight) Ensure that criminal justice processes act to reduce offending behaviours to reduce the number of Aboriginal defendants proceeding through the criminal justice system;
- (Recommendation Nine) Establish high quality services for Aboriginal inmates to facilitate their transition into the community and reduce the likelihood of their reoffending; and,
- (Recommendation Ten) Establish the on-going review and reform of criminal legislation, policy and initiatives to ensure they meet the needs of Aboriginal communities.[4]

The *Beyond Justice* plan proposes to achieve Recommendation Eight by 'developing Aboriginal diversion and intervention strategies to target specific offences' and 'develop and utilise a full range of Aboriginal community based alternatives to avoid Aboriginal prosecution for minor summary offences.[5] In order to reduce recidivism, Recommendation Nine proposes to 'establish high-quality services for Aboriginal inmates to facilitate their transition into community' and, ambitiously, to 'gradually develop options for state-wide Aboriginal community controlled alternatives to prison'. Additionally, and perhaps most significantly, Recommendation Ten suggests that an on-going review of Indigenous justice policy should be facilitated by requiring 'Aboriginal impact statements' for all criminal law proposals.

(2) New South Wales Courts

The second source of change in criminal justice institutions during the period of my enquiry originates in decisions made by the NSW judiciary. While they are strictly separate from Government policy, the Courts are obviously entwined in the issue of Indigenous incarceration; this is even more so because they have frequently moved ahead of Government policy makers. It is in this context that I analyse the history of judicial decision-making prior to the history of legislation, because some judicial innovations 'at common law' were subsequently overridden by the NSW Parliament during my enquiry.

The key involvement of State level courts with Indigenous incarceration hinges upon their approach to sentencing. The NSW Supreme Court adopted the Royal Commission's principle of 'incarceration as a sanction of last resort' in the

[4] Ibid., at 20-22.
[5] Ibid., at 21.

case of *Parker v DPP*;[6] this was subsequently codified in legislation through s5(1) of the *Crimes Sentencing Procedure Act 1999* (NSW).[7]

The centrepiece of the approach adopted by NSW courts to the sentencing of Indigenous offenders were the principles outlined in *Fernando's Case*.[8] In this seminal case Justice Wood outlined eight principles.[9] The *Fernando* principles implemented many of the concepts at the heart of the Royal Commission specifically: 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 on appeal.[10]

Since Justice Wood's decision in 1992, the application of the principles in *Fernando* have been narrowed by courts: a distinction has been made between 'full' and 'part' Indigenous people;[11] between people from urban and remote communities;[12] the level of disadvantage has also been required to be 'exceptional', precluding those with high school education.[13] Nonetheless, the largest inhibitor to the operation of the *Fernando* principles has been the passage of overriding legislation, which has eroded judicial discretion throughout the period by constraining sentencing options.

(3) *New South Wales Legislation*

During the period of my enquiry there were two major 'reform packages' of criminal legislation undertaken in the NSW: in 2003 and again in 2007. Both of these reform programs followed elections that were widely characterised by commentators as 'crime auctions'.[14]

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[6] *Parker v DPP* (1992) 28 NSWLR 282.
[7] New South Wales Law Reform Commission, 'Sentencing Aboriginal Offenders', (96; Sydney: New South Wales Law Reform Commission, 2000). [2.47], [3.88].
[8] *R v Stanley Edward Fernando* (1992) 72 A Crim R 58 (NSW) 58.
[9] Ibid., at 62-3.
[10] 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.
[11] *R v Ceissman* [2001] NSWCCA 73; *R v Morgan* [2003] NSWCCA 230.
[12] *R v Newman, R v Simpson* (2004) 145 A Crim R 361 (NSW).
[13] *Anderson v R* [2008] NSWCCA 211at 214-5; *R v Knight* [2004] NSWSC 498.
[14] In 2002, NSW Labor's catch cry was 'Jail not Bail', a promise which then became contested at the 2007 election: Editorial, 'State Election Special: More Cops, Tougher Sentences, Less

The first of these reforms came into effect on 1 February 2003, when significant changes to NSW criminal sentencing law were made by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW).[15] 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).

In his second reading speech to parliament, the Hon. Bob Debus (Attorney-General) was at pains to stress that the scheme did not erode judicial discretion; but rather it aimed to 'provide further guidance and structure to judicial discretion' and 'promotes consistency and transparency'.[16] To this end, the Attorney-General noted, court discretion with regard to maximum penalties was expressly maintained in s21 of the *Crime Sentencing Procedure Act 1999* (NSW).

However, in spite of this intention, the effect of the 2003 legislation has been to curtail judicial discretion – and, by implication, the operation of the *Fernando Principles.* In particular, the introduction of standard non-parole periods, intended to provide 'a further important reference point' alongside the maximum sentence, had the effect of structuring judicial decision-making towards both higher head-sentences and higher non-parole periods. The intent behind this outcome became more evident in 2007, when the Government defended its record in a second 'crime auction' election.

Approaching the 2007 NSW State election, the then Premier Morris Iemma promised a new suite of laws 'that will make sure judges have no excuse

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Paperwork', *Sydney Morning Herald,* 25 Feburary 2007, Ean Higgins, 'Labor Bids High in the Law and Order Auction', *The Australian,* 26 February 2007.

[15] *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW)

[16] Ibid. p. 5815.

to go soft on criminals'. Again, the Premier was careful to stress his 'respect for judicial independence' but argued that courts have 'a duty to ensure their sentences reflect community standards.'[17] 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.[18] 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.

By 2007, the NSW parliament was less concerned about acknowledging the importance of judicial discretion. The then Attorney-General, the Hon. John Hatzistergos, stated:

> 'These new standard minimum terms send a clear message to the community that the Government will not tolerate crimes of personal violence, which are especially abhorrent when done in company. Crimes of this nature destroy lives and tear at the very fabric of our community.'[19]

The increased minimum sentences also came with a range reforms designed to boost the size and effectiveness of the New South Wales Police Force, with Police Minister John Watkins stating: 'We've been negotiating with courts, the Attorney-General, NSW Police and also Corrective Services to free up some of the red tape burden on our police.'[20]

It should be acknowledged that neither the 2003 nor 2007 legislative packages, nor the 'crime auction' elections which preceded them, were directly targeted at Indigenous Australians. Indeed, the political rhetoric was focused elsewhere: in 2003 upon offences using concealed weapons, which is atypical for Indigenous offending inNSW;[21] and in 2007 on offences which victimise children – with Premier Iemma claiming, 'if you hurt children, I am your enemy'.[22] However, the effect of these legislative policy changes upon Indigenous Australians was nonetheless significant, as will be seen in my analysis below.

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[17] Lisa Carty, 'Tough New Laws to Target Child Killers', *Sydney Morning Herald,* 20 September 2007.
[18] *Crimes Sentencing (Procedure) Amendment Act* 2007 (NSW)
[19] The Hon. John Hatzistergos, Speech, Sydney, NSW, 17/10/2007.
[20] Editorial, 'State Election Special: More Cops, Tougher Sentences, Less Paperwork'.
[21] Higgins, 'Labor Bids High in the Law and Order Auction'.
[22] Carty, 'Tough New Laws to Target Child Killers'.

3.3 Explaining the Increase

It is in the context of the above policies that the 29% increase in incarcerations occurred in NSW between 2001 and 2011. In this next section I explain that increase using the five hypotheses I have drawn from the literature.
As with the national case, I examine *Hypothesis One* and *Hypothesis Two* on the basis of the available quantitative data. Turning my attention to the operation of criminal justice institutions, I will then proceed to outline a more detailed narrative of the rise in incarceration rates using: first, the *Prisoners in Australia* data to examine the salient characteristics of the prisoner body; and second, interviews of service providers in the Indigenous communities of Redfern (Sydney), Dubbo and Bourke, to examine the process of implementation.

(1) Hypothesis One: Socio-economic disadvantage causes high rates of offending

As outlined above, both Indigenous disadvantage and the high rates of Indigenous offending were central concerns of the Royal Commission;[23] this concern is reflection in the NSW *Aboriginal Justice Plan*.

As at the national level, the best available data regarding the socio-economic conditions of Indigenous Australians in NSW comes from the *NATSIS Survey* (2002 and 2008).[24] The weaknesses in this data at the national level are also present for the state jurisdictions. These are acknowledged and, thus, I limit my analysis here to the identification of broad changes between surveys. Figure Ten below includes those variables from the survey that are most germane to incarceration rates.

[23] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', at 208.
[24] Statistics, 'National Aboriginal and Torres Strait Islander Social Survey', Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey'.

Figure 10: New South Wales Socio-Economic Variables (2002 and 2008)

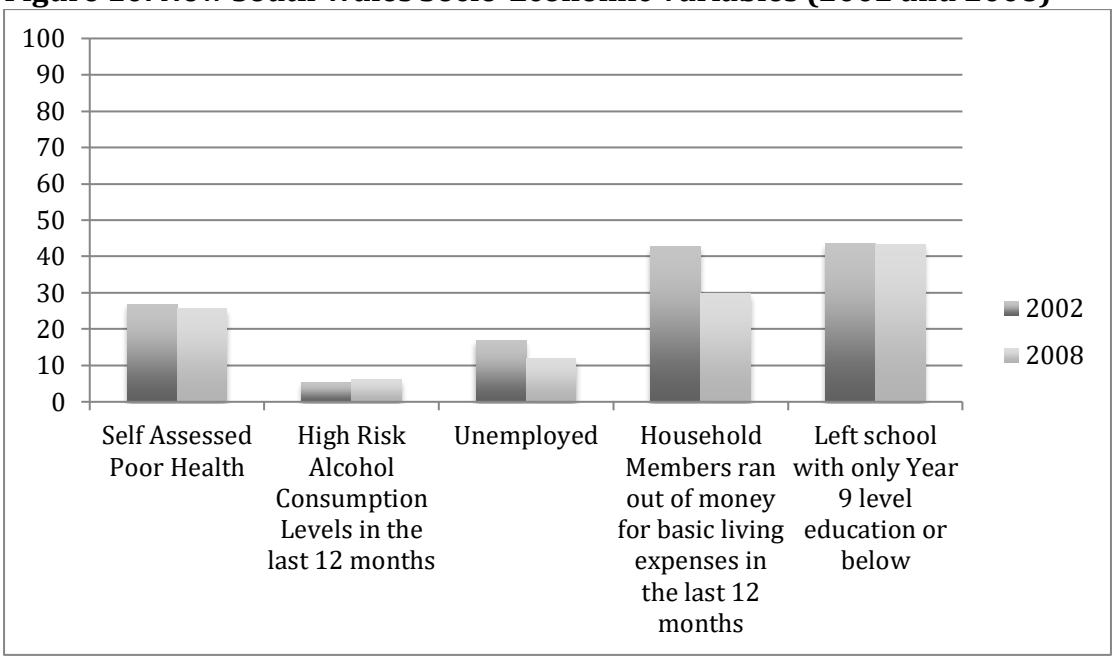

Figure 10 (y = % of Indigenous persons 15 years and over): Source - *National Aboriginal and Torres Strait Islander Social Survey 2002* and *2008.*

Figure Ten makes clear that a high percentage of Indigenous respondents aged 15 years and over in NSW experience socio-economic disadvantage in the relevant categories; indeed, the only difference between the NSW data and that at the national level is that the national improvement in education outcomes is less evident.

The *NATSIS Survey* and the earlier *National Aboriginal and Torres Strait Islander Survey* also give measures of 'involvement with crime' at the State level. Again acknowledging the limitations of this self-reported data, I utilise it to produce the most accurate measurement available for patterns in Indigenous offending in NSW.

Figure Eleven: Indigenous 'Involvement in Crime' in New South Wales

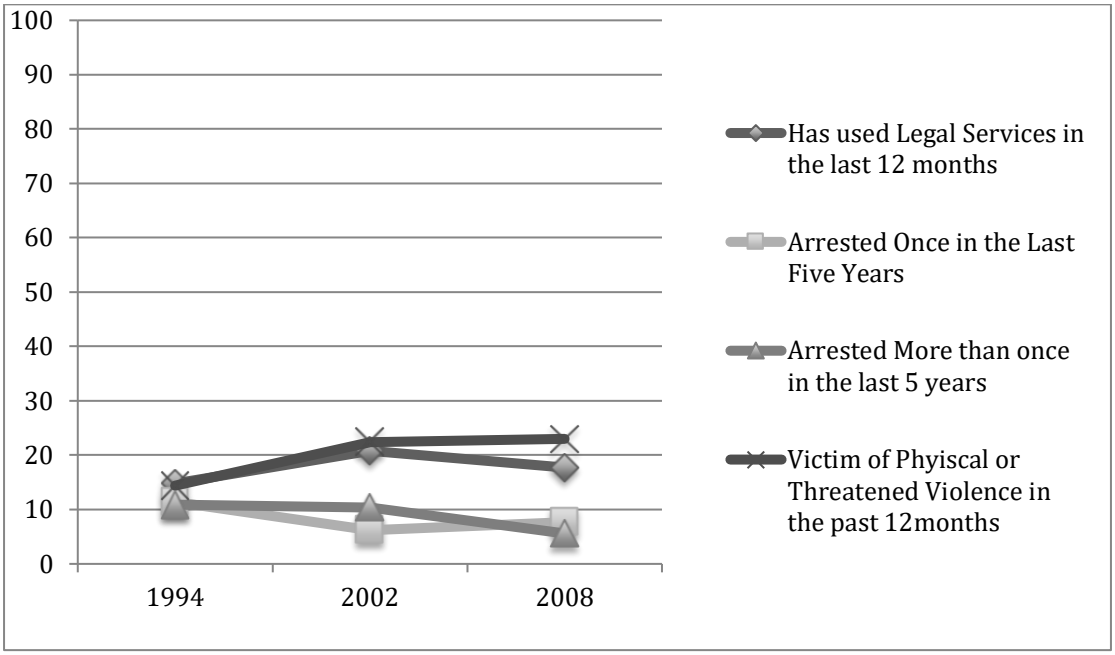

Figure 11: (y = % of Indigenous persons 15 years and older): Source - *National Aboriginal and Torres Strait Islander Social Survey* 1994, 2002, 2008.

The involvement in crime measures in Figure Eleven show that the trends in NSW echo the national level experience. 'Involvement with crime' variables are notably high for the Indigenous community in NSW: 8% were arrested in the last five years, 6% more than once; also 23% of Indigenous citizens of NSW been a victim or threatened with physical violence in the past 12-months.

As at the national level, on the basis of these broad trends I conduct a 'straw-in-the-wind'[25] test of *Hypothesis One*: the correlation of high levels of socio-economic disadvantage with high levels of offending does not confirm this hypothesis, but it affirms the relevance of this *Hypothesis* for the NSW case.

(2) Hypothesis Two: There is a weak relationship between offending and incarceration.

These trends observed above are also relevant to my second hypothesis. As at the national level, Figure Eleven shows that the levels of 'involvement in crime' measured in NSW were high, but also relatively stable. This is significant in light of the 29% increase in the incarceration rates.

[25] Van Evera, *Guide to Methods for Students of Political Science*.

I consider these paradoxical outcomes sufficient to conduct Van Evera's 'smoking gun test' with regard to *Hypothesis* Two.[26] While there was some minor movement in 'involvement in crime' in NSW it was not sufficient to explain the pronounced increase in incarceration rates – these increased by 31% in the same period.[27] As per Van Evera's test I am thus willing to conclude that *Hypothesis Two* is confirmed: offending rates are only weakly related to incarceration rates.

3.4 Explaining the Role of Criminal Justice Policies

My analysis of *Hypothesis One* and *Hypothesis Two* eliminates the most simple explanation for why incarceration rates rose in NSW between 2001 and 2011, despite Government policies: that increasing incarceration reflects increases in Indigenous crime. Consequently, I must now turn my attention to the role of variables associated with Government policy by examining my final three hypotheses.

As I have outlined above, the variables that underpin *Hypotheses Three*, *Four* and *Five* require a more detailed understanding of the increase in incarceration; this is because the trends in criminal justice policy I am seeking to identify are understood in the literature as patterns of aggregated variables. Following both Simon and Alexander, I understand 'governing through crime' to include the following: (1) a 'crime auction' resulting in increasingly severe legislative penalties; [28] (2) the reduction of judicial discretion; [29] (3) the increased empowerment of police;[30] and (4) the subordination of racial or 'civil rights' concerns to 'tough on crime' rhetoric.[31] Moreover the interactions

[26] Ibid.
[27] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[28] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapters 1 and 9. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 42-58.
[29] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* at 112-23. Chapter 4, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
[30] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapter 5. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 65-74.
[31] See particularly 'The Occupation', in: Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 123-39.

between these policies and socio-economic variables, implicit in *Hypotheses Four* and *Five* are equally complex.

In order to achieve a sufficiently detailed understanding of the operation of criminal justice policy in the context of Indigenous incarceration in, I proceed in two stages: first, I will use the available quantitative data to analyse the increase in the prison population; second, I will use interviews with service providers in the Indigenous communities of Redfern (Sydney), Dubbo and Bourke to identify themes from their experience of implementing Government policy.

(1) Trends in the Statistical Increase

As noted above, the *Prisoners in Australia* survey, produced each year between 2001 and 2011, allows me to produce a number of reliable measures of the increase in the prison population: (1) the change in primary offence of Indigenous prisoners; (2) the change in sentence length for Indigenous prisoners; and (3) the change in the proportion of prisoners with prior convictions.

Figure Twelve below shows the change in the NSW Indigenous prison population by primary offence or charge. Upon inspection it is evident that there have been significant changes in the primary offence of Indigenous prisoners during the period of the increase. The most significant changes in NSW are reflected in the large increase in the following primary offences: 'acts intended to cause injury' increased by 272 inmates; 'offences against justice' increased by 181; 'unlawful entry' by 160; and there was also an increase in 'traffic offences' by 50 inmates, which was not experienced at the national level.

Figure Twelve: Changes in the New South Wales Indigenous Prison Population by Primary Offence (2001-2011)

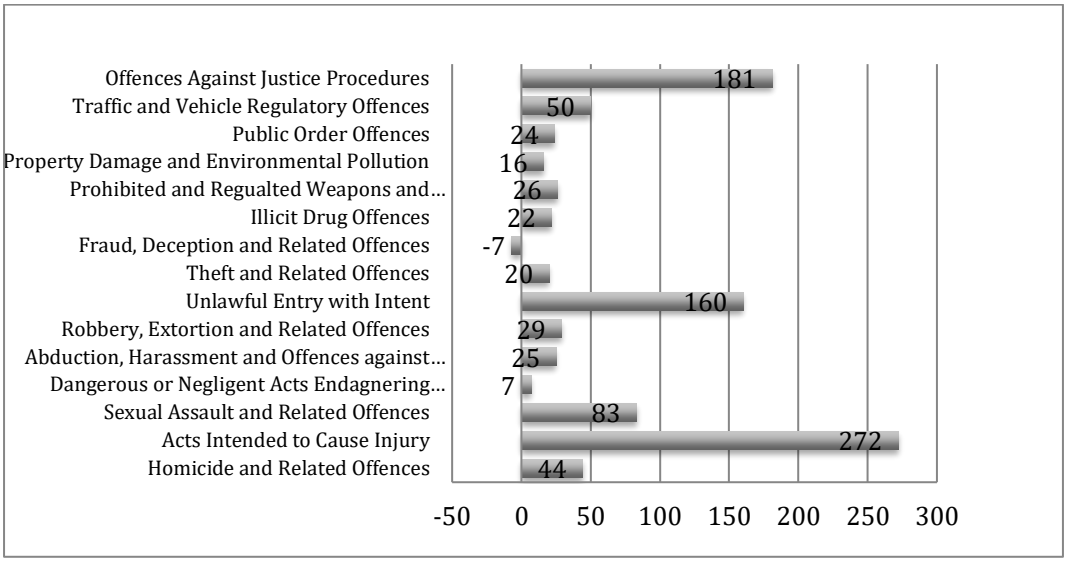

Figure 12 (y = change in primary offence between 2001 and 2011 by no. of prisoners): Source – *Prisoners in Australia* 2001 and 2011.

The second change in the prison population, which I can measure using the *Prisoners in Australia* data sets, is the change in sentence lengths. This is contained below in Figure Thirteen.

Figure Thirteen: Mean Aggregate Sentence Length and Mean Expected Time to Serve for Indigenous Prisoners in NSW

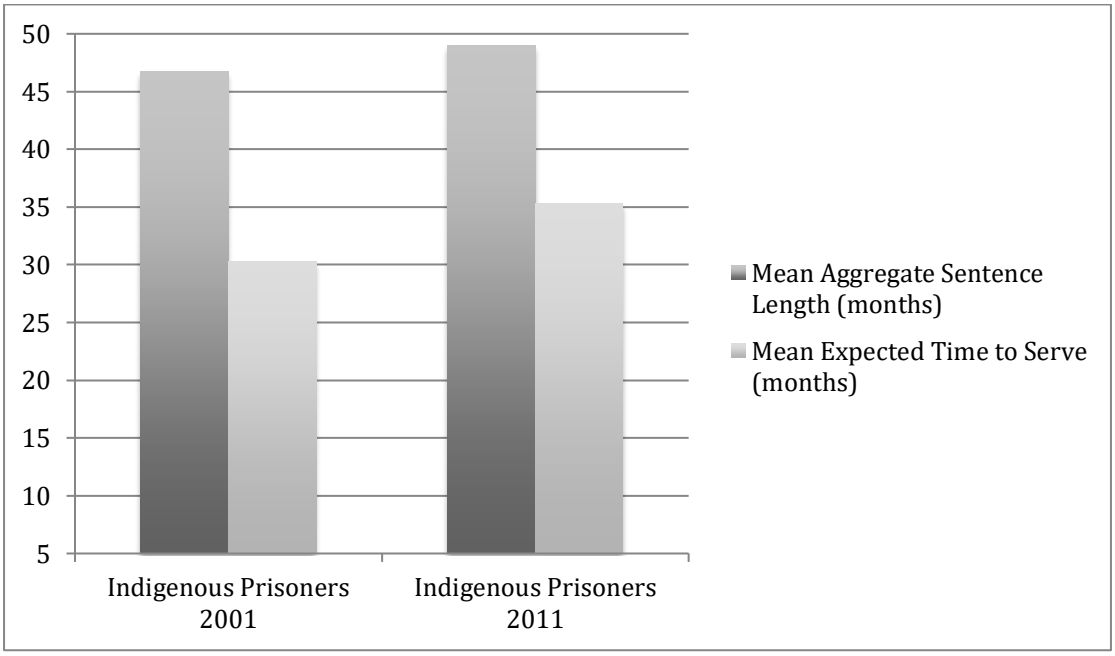

Figure 13 (y = sentence length (months): Source – *Prisoners in Australia* 2001 and 2001

Figure Thirteen shows that there have been increases in both the average sentence length and the average expected time to serve for Indigenous prisoners in NSW during the period. The increase in expected time to serve is noticeably larger – 17% compared to 5% - consequently we can infer that Indigenous prisoners were less likely to get parole during the period.

Related to considerations of sentencing is the measurement of the number of prior offences within the prisoner population. This is measured below in Figure Fourteen.

Figure Fourteen: Change in Indigenous Prison Population in New South Wales by Prior-Imprisonment

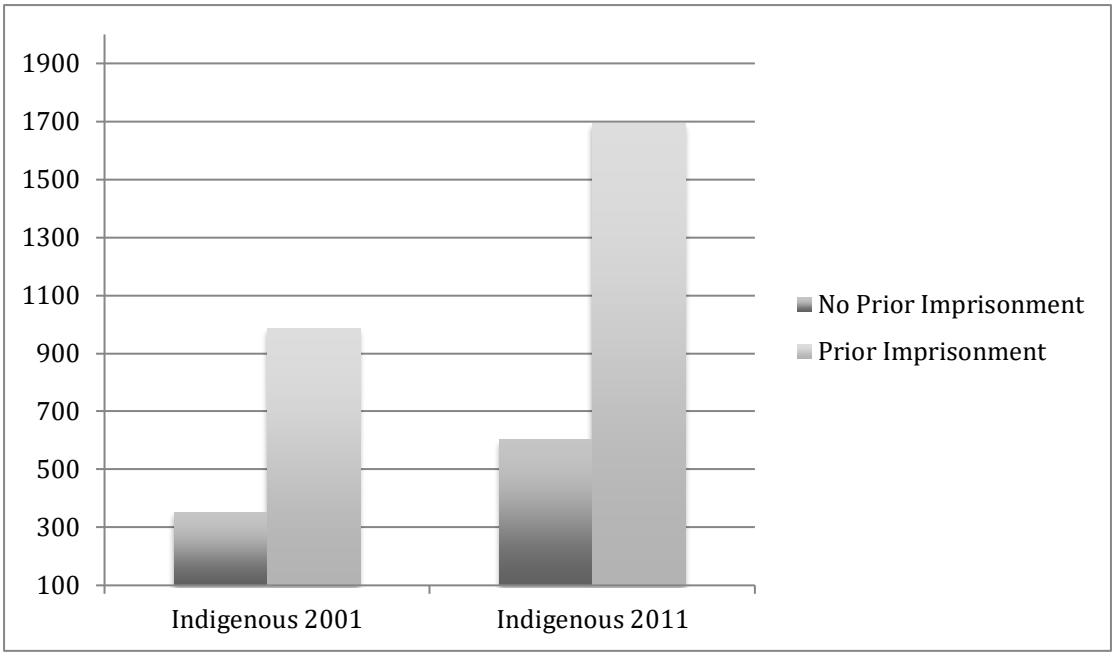

Figure 14 (y = no. of prisoners): Source – *Prisoners in Australia* 2001, 2011.

Figure Fourteen shows that a very large proportion (74%) of the increase in the prison population was comprised of prisoners who had previously been imprisoned.[32] This suggests that recidivism is playing a very large role in the increase in incarceration rates – even more so when we consider that the 'prior

[32] Australian Bureau of Statistics, 'Prisoners in Australia 2011', Australian Bureau of Statistics, 'Prisoners in Australia 2001', (Canberra: Australian Bureau of Statistics, 2001).

imprisonment' measure does not include recidivists whose prior conviction did not result in incarceration.

(2) Tracing the Process of Implementation: Interviews with service providers

Unlike at the national level, in NSW I am able to supplement the limited conclusions drawn from the available data with insights into the implementation of criminal justice policy in Indigenous communities. To achieve this, I conducted interviews with 'service providers' who were implementing criminal justice policy in NSW Indigenous communities between 2001 and 2011. As outlined above, subjects for interview were drawn from three Indigenous communities in New South Wales: Redfern (Sydney), Dubbo and Bourke, which are classed as urban, regional and remote, respectively. A full list of NSW interviewees is contained in Appendix One; it includes lawyers, police, magistrates and Indigenous community leaders.[33]

The interviews were conducted using a 'semi-structured' template.[34] Interviewees were asked, from their perspective as implementers of criminal justice policy on the ground, to reflect upon the causes for rising incarceration rates. During the interviews, six themes emerged strongly in multiple issues. First, there were three common observations about the operation of criminal justice policy: (a) the context of socio-economic dysfunction; (b) the reality of diversionary options for bail and sentencing decisions; and (c) the singular importance of recidivism. Alongside these, three further themes emerged about specific Indigenous offences: (d) substance abuse; (e) family violence and (f) traffic offences. I will examine the interview data on each of these themes in turn.

(a) The context of dysfunction

While socio-economic disadvantage may not have increased during the period of my enquiry, all of my interview subjects stressed the importance of 'dysfunctional communities' as a context for their other comments. Assistant

[33] See Appendix One.
[34] See Appendix Two.

Commissioner Geoff McKechnie in Command of NSW Police in the Western Region (including Dubbo and Bourke) described the context of disadvantage as 'the crux of the problem'. 'I think it is indicative of the more serious problems facing Indigenous Australians', he said. '…it's the dependence on social welfare, drugs, alcohol; it's the prevalence of domestic violence and child abuse. You know these kids are so damaged by the time they reach 18 that the courts don't have too many option left.' Indigenous leaders echoed Commissioner McKechnie's concerns. Uncle Alistair Ferguson[35], a community spokesperson in the remote community of Bourke stressed the importance of 'dysfunction' as a background factor:

> 'It has always been on the radar of the community because one of our concerns amongst many is that a lot of these people are going to return one day, unfortunately returning to the same old cycle of day-to-day roles with respect to family structures that were the problem…So we can't ignore the realisation that we have a lot of dysfunction.'

In this way, the context of dysfunction was omnipresent in the discussion of other themes. Redfern police noted repeatedly the likelihood that youths coming into contact with the police had not 'had a feed'. While John McKenzie, the head solicitor of the Aboriginal Legal Service in New South Wales, noted his suspicion that criminal justice policy was often used to distract from these deeper failures of Government policy: 'it's real bandaid stuff. It is action taken to be able to say "we are doing something" but they are not doing anything.'[36]

(a) <u>Judicial discretion and the availability of programs</u>

The second theme that emerged strongly from the interviews with policy implementers was that the decision to incarcerate was powerfully influenced by the availability of alternatives – such as diversionary programs including drug and alcohol rehabilitation and community service (as well as alternatives to bail and parole).

In Bourke, Uncle Alistair pointed out that, regardless of the legislation, Magistrates had little discretion because of an absence of alternatives to prison: 'One of the challenges and difficulties that magistrates have here is with the limited alternatives or sentencing options, because of the lack of infrastructure

[35] 'Uncle' is a term of respect applied to an Aboriginal community leader.
[36] John Mckenzie, 'Interview for Mphil Thesis 'Govering through Crime?'', in Michael Jones (ed.), (Redfern, Sydney, 2012).

or programs.' In his view 'zero tolerance' policing was particularly problematic 'without any sort of flexibility for looking at diversionary programs.'

A number of subjects also noted what John McKenzie from the Aboriginal Legal Service described as a 'ratcheting up of sentencing':

> 'When we step back at and look at our results the length of sentences or the number of people being given non-custodial sentences, we can see an ever increasing trend towards the more serious end. Especially the all important non-parole period, which is usually the period that the prisoner has got to serve as a minimum.'

The rise in non-parole periods is clearly indicative of the influence of the 'minimum non-parole periods' introduced following the 2003 NSW state election. But McKenzie also suggested that the problem originated within the judiciary: 'I think if you waved a magic wand and gave all magistrates and judges discretion you would get an improvement, but I do think that our judiciary have been seriously influenced by the media campaign.'

Policy implementers also noted that the decision to refuse bail was particularly significant in the eventual incarceration of Indigenous offenders. John McKenzie stated that the Aboriginal Legal Service had seen 'an astronomical increase in the number of our clients who just can't get bail anymore in NSW.'[37] Similarly, Luke Freudenstein, the Commander of the Redfern Police Station noted:

> 'I've heard statistics (anecdotally, and I can't say this is confirmed) that for around 70% of Aboriginal youth offenders having bail refused…Either the matter is not sustained in court – ie they are found not-guilty – or they are found guilty but not given a custodial sentence. To me that just shows that perhaps they are being incarcerated when really they shouldn't be. But again: what's the option?'

The *Prisoners in Australia* statistics do not consistently measure the proportion of the prison population refused bail at the state level during the period of my enquiry, which is a significant weakness in the data. Respondents in my interviews attribute the salience of bail refusal to a lack of diversionary programs. With reference to Redfern Police's 'Clean Slate without Prejudice Program' (see more below) Commander Freudenstien noted: 'we have an option here…other places I don't think so'. Moreover the absence of programs was

[37] Ibid.

particularly problematic for Indigenous offenders. Sergeant Victoria Beresford, also of Redfern Police, pointed out that:

> 'The reasons we refuse bail, unfortunately, will always disadvantage this community. For example: previous fails to report, extensiveness of their criminal record…so once they hit the police system they are not going to escape it unfortunately.'

(b) Recidivism

As was already evident from the descriptive statistics above, perhaps the one thing that overshadowed all responses in the interviews was the prevalence of recidivism among Indigenous offenders. From the perspective of the Aboriginal Legal Service, John McKenzie noted a pervasive despair and sense of 'hopelessness' among some Indigenous offenders:

> 'That person in an Aboriginal community who is not part of the emerging middle class but is just trying to make ends meet and bring up a family, have got to a point of hopelessness…It's a greater proportion of them just churning through, that are making up the numbers. And, these people get out of gaol, who muck around for 6-9months and then go straight back to gaol, they absolutely epitomise the hopelessness I am talking about. They really just see their release, unfortunately, as just a different time before they go back to where their real home is.'

McKenzie continued, 'if we can break the back of the recidivism, we can go a long way towards reducing overall imprisonment.' But, he despaired that:

> 'We see the whole thing as going backwards. Not only does the violence seem to be continuing but the people doing it are being dealt with in a way that will only turn them into worse offenders. Because nothing is actually being done to address their issues…So it is really just a game of taking them off the streets for a month or two then putting them back: angrier, meaner, having learnt some more tricks from less-than-good role models that they are going to associate with in goal.'

Perhaps less surprisingly, a number of police sources agreed. Assistant Commissioner McKechnie noted: 'I would suspect that the piece of paper doesn't affect their behaviour too much. This is particularly for those who have been incarcerated before: prison holds no fear for them.' From his perspective as a community leader in Bourke, Alistair Ferguson touched on a similar phenomenon, which he attributed to 'generational trauma': 'they're still carrying

the burden of past Government policy.' But Ferguson also acknowledged that things had gotten worse for this group of young offenders in the past ten years:

> '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. 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 town anyway.'

A counter-story to emerge from the interview data concerned the way in which the cycle of 'hopelessness' and recidivism had been reversed in Redfern. In that community – a historically very troubled neighbourhood in Sydney – cooperation between local community leaders and the Redfern Police had lead to the founding of the *Clean Slate Without Prejudice Program*. This program (which functions as a diversionary program for bail, parole, and also potentially head-sentences) is comprised of mandatory fitness and leadership/development sessions for young offenders hosted by the Redfern police. It's anecdotal success was nothing short of remarkable.[38] One constable reported:

> 'I've noticed a big change. I've noticed the difference with young offenders and adults originally coming in and not wanting to say anything: "Nup. I didn't do it, I didn't do it." Even though you may have seen them do it and have 3 witnesses that saw them: "Nup, Nup". It seems though, over this period of time that I've been here, that there has been a slow building of confidence in the older people in the community that has seeped down to the youth. It has been a slow progression of this trust and it has taken a while but now we are at this stage where even I get shocked at some of the young people where they done something wrong and you can see the remorse: "I am so sorry". That would have never happened when I first started.'

An interesting focus of the Redfern program has been to acknowledge the change in the 'meaning' of imprisonment that occurs in the 'hopeless' circumstances of widespread incarceration noticed elsewhere. Commander Freudenstien stated:

> 'As one of our Aboriginal Leaders, Shane Philips, says: You used to be a bit of a hero if you'd been 'inside' – in a goal – and you'd come out and you'd say 'yeah, I'm a legend…now they are disrespected; it's no great achievement, you're a loser. Now the big ego is about how fit you can get.'

[38] Indeed, in the week prior to my interviews it had received positive publicity in the *Sydney Morning Herald*: Stephanie Wood, 'There Goes the Neighbourhood', *Sydney Morning Herald: Sydney Magazine,* September 2012.

(d) Substance Abuse

The fourth factor identified in the interview data is strongly linked to the above discussion of hopelessness. Substance abuse was regularly mentioned in the interviews as a variable that had changed significantly during the 2001 to 2011 period. This is not to say that substance abuse was not prevalent before 2001, but that the types of substances abused have changed. Commenting on offending in Dubbo, Assistant Commissioner McKechnie explained: 'Ice and amphetamine probably make people more prone to violence than cannabis did in the past. And, there certainly would have been an increase in those drugs during the period' Similar trends were noticed in Redfern. In remote Bourke, Alistair Ferguson graphically described how things had changed in recent years:

> 'I think it is appalling where, yes, this was an epidemic, but I think it has now moved on to be a pandemic…some discreet areas of the community where 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'

(c) Family Violence

Several of the interviewees noted that – in combination with substance abuse – much of the 'acts intended to cause injury' offending could be explained with reference to violence within families. John McKenzie noted that family violence had been a priority of several 'tough on crime' political agendas during the period:

> 'There has been increased rhetoric from both Government and Opposition parties about how they are going to protect the victims of crime, particularly in domestic violence and particularly women and children. This has flowed down to have an impact at the grass-roots policing level of the whole system, whereby police will now almost always err on the side of arresting people and refusing bail for breaches of apprehended violence order.'

The trend towards increasing use of apprehended violence orders was conceded by police both at Redfern and by Assistant Commissioner McKechnie in Dubbo: 'You know its in my view probably an order that is put in place pretty expediently without often a lot of support or intervention around it, which to most Indigenous people you know, I would suspect that piece of paper isn't going to affect their behaviour too much.' This is significant for Indigenous offenders

because harsh penalties for breaches of apprehended violence orders were instituted following both the 2003 and 2007 elections in New South Wales.

(d) Traffic Offences

The most common example of a failure of criminal justice policy raised in the interviews was to do with traffic offences – which comprise an anomalously large statistical increase in the prison population in New South Wales. John McKenzie and Uncle Alistair, in particular, were scathing in their assessment of the operation of traffic laws upon the indigenous community:

> 'See offences against justice procedures, I think in those statistics they incorporate such things as people driving when they've been disqualified by a court. And, that happens in NSW completely without the say so of the Magistrate or the Judge because the legislation gives absolutely not sentencing discretion to the judicial officer. If you get a third offence within so many years, then the penalty must be this. And, that can quite often mean gaol.'

John McKenzie then went further to explain how this process is in turn made more unjust for Indigenous offenders because of operation of additional policies connected to the State Debt Recovery Officer; these policies freeze the ability of anyone, with a debt to the government from being able to conduct other Government transactions, such as registering a car or getting a drivers licence. This is particularly problematic when Aboriginal people in remote areas are issued fines:

> 'Now what we're finding is that people like a 12 year old who is fined for riding their bike without a helmet, in a country town when the Copper wants to get tough on the black kids. That's not paid because the black families and the black kids say: 'Oh, stuff that, why should I pay it?" and they don't. They get to the age when they want to get a licence or register a car and they can't. This is because there is a block put on their Government transactions until the original fine, plus the penalty rates have been paid. So we've got this whole cohort of Aboriginal people who can never be legally licenced or register a vehicle, many of whom live in areas not serviced by public transport at all. So you get to a situation where there remote communities around NSW of 100 or 200 people where there is not one legally licenced driver.
>
> And yet, these communities are sometimes 10, sometimes 20 from the next serviced regional town. So, just for normal business to go about, to work or hospital or whatever people have got an option: do I drive illegally or do I not do these things? And, when it comes to stuff like having to help family – especially old people with their

> medical arrangements or getting to *Centrelink*[39] to get their pension organised – the way things work in the Aboriginal culture a young man can't say: "Sorry Aunty, I haven't got a licence, I can't do that".

This explanation was mirrored by Uncle Alistair Ferguson's experience as a community leader in Bourke:

> 'See if you take road traffic offences, what we have is young people here…say there will be a funeral at Biduga. Young people and adults…nine times out of ten are unregistered, uninsured, but they take the risk of paying their respects and they'll drive up the backroads and nothing will get in the way of them paying their respects. And then, before the funeral or after or during they're caught…'

Alistair also described the Bourke community's efforts to take action on this misguided policy. Other leaders and himself commissioned a ($30,000) *Driver Education Feasibility Study* by an independent consulting firm to look at solutions to getting drivers in Bourke registered. But this was met by silence from Government:

> 'Absolutely one of the difficulties is lack of interest. Obviously, once again, we all appreciate that there is a lack of funding opportunities. We understand that. But obviously it is also very difficult when you have built up expectations and confidence and trust within the community (and have everything all evidence based) and then it is just ignored.'

(3) Hypothesis Three: Changes in the institutions of criminal justice are strongly related to changes in incarceration rates.

Process tracing the implementation of criminal justice policy in NSW provides me with a sufficiently detailed account of the operation of criminal justice policies to examine *Hypothesis Three*. As my literature review above makes clear, most scholars accept a complex understanding of criminal justice institutions: a 'government rationality' that takes causal effect through an 'aggregated pattern of variables'. Following both Simon and Alexander's analysis in the American case,[40] I understand criminal justice institutions to influence incarceration rates through 'governing through crime', a pattern of variables which includes: (1)

[39] Australia's primary welfare agency.
[40] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapters, 1,2,4,5 and 9, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 59-96.

increasingly severe legislative penalties; (2) the reduction of judicial discretion; (3) the increased empowerment of police; and (4) the subordination of racial or civil rights concerns to tough on crime rhetoric.

There is significant evidence of this aggregated pattern of causation in the NSW Case. The policy history outlined above shows evidence of changes towards increasingly severe penalties, the reduction of judicial discretion and the empowerment of police. Moreover, the effect of these changes upon incarceration is evident in statistical trends in the prison population and corroborated in interviews with service providers. Focusing upon the process of implementation however, highlights the particular salience of the fourth component of the pattern: the subordination of racial concerns to tough on crime rhetoric.

The experience of service providers in NSW suggests that the severity of penalties and the reduction of judicial discretion are exacerbated in Indigenous communities by the lack of diversionary programs. These programs exist in New South Wales, but interviewees – from Commander Freudenstien in inner city Redfern to Uncle Alistair Ferguson in remote Bourke – suggested that there is not sufficient commitment for the programs to be implemented in many Indigenous communities. Instead, as the policy narrative makes clear, the bulk of funding has flowed to the 'tough-on-crime' priorities.

Piecing these diagnostic pieces of evidence together, I argue that *Hypothesis Three* may be confirmed for NSW Indigenous communities. Applying Van Evera's 'smoking gun' test for causation, there is sufficient evidence of the causal effect of criminal justice institutions to conclude that they are strongly related to the increase in incarceration. This does not preclude the operation of other variables, but it does confirm my hypothesis.

(4) Hypothesis Four: Interaction between socio-economic/offending variables and criminal justice variables changes their effect upon incarceration rates.

Having confirmed that criminal justice institutions are affecting the rise in incarceration rates, it is important to consider the prospect of this causation occurring through interaction with other variables.

As noted above, it has been persuasively argued in the American context that interaction between institutional and socio-economic variables is critical to understanding racialized incarceration.[41] Western and Pettit have empirically observed that the dialectic interaction between these two sets of variables becomes mutually reinforcing in circumstances of 'mass-imprisonment', with incarceration compounding inequality and vice versa.[42]

While the quantitative data are not sufficiently detailed to measure interactions between socio-economic and criminal justice institutions, there is a wealth of evidence to confirm this hypothesis at the implementation stage in New South Wales. Indeed, interviews with service providers engaged in the process of implementing criminal justice policy suggest that this interaction is critical to understanding the causal effects upon incarceration. Most powerfully, evidence lies in the descriptions of the 'hopelessness' driving the cycle of Indigenous recidivism, which pervaded every interview conducted and is described in detail above.

On the basis of this large body of evidence, I consider *Hypothesis Four* to be 'doubly' confirmed within Van Evera's taxonomy of small-N causation.

(5) Hypothesis Five: Unsuccessful policy implementation results in unintended effects upon incarceration rates.

The final prospect, which must be considered in explaining the impact of criminal justice policy upon incarceration rates, is the reality of unintended consequences arising from failed or poorly implemented policies. Sanders has noted the prevalence of 'unintended consequences' in Indigenous affairs policymaking in Australia,[43] an outcome which fits within Hood's theoretical categorisation of a 'fatalistic' response to policy failures.[44]

Unintended consequences are only evident at the implementation stage of policy making – and even then evidence is potentially difficult for researchers to access. The process trace of implementation in NSW revealed one piece of

[41] Western, *Punishment and Inequality in America* at 10.
[42] Western and Pettit, 'Chapter One: Mass Imprisonment', at 20-33.
[43] Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', at 200.
[44] Christopher Hood, 'Calamtiy, Conspiracy and Chaos in Public Management', *The Art of the State: Culture, Rhetoric and Public Management* (Oxford: Oxford University Press, 2000a), 25-48.

evidence that I consider a 'smoking gun' within Van Evera's taxonomy: the incarceration of traffic offenders resulting from unrelated Government fines. This phenomenon was evident in interviews with John McKenzie from the Aboriginal Legal Service and also Uncle Alistair Ferguson in Bourke. It demonstrates how the efforts to reduce Indigenous incarceration have been undermined by the unintended effect of a separate Government policy. On the basis of this evidence, I confirm *Hypothesis Five*.

3.5 Conclusion

On the basis of the above analysis, *Hypotheses Two* to *Five* have been confirmed. This suggests that in NSW, the increase in Indigenous incarceration despite Government policy designed to achieve the obverse outcome, has a four part explanation:

- It has not been caused by increased Indigenous offending alone;
- It has been caused by changes in criminal justice policy; although,
- These changes have primarily taken effect through interaction with other socio-economic variables; and,
- The result of unsuccessful policy implementation has been unexpected outcomes, which have in some instances worsened the increase in incarceration.

Chapter Four: Queensland

4.1 Introduction

Between 2001 and 2011, the Indigenous incarceration rate in Queensland increased by 17%, whilst the non-Indigenous incarceration rate remained stable.[1] This increase is lamentably high – however, it must be acknowledged that it is notably lower than the increase in both New South Wales, and the national case study.

Figure 15: Queensland Age Standardised Incarceration Rates

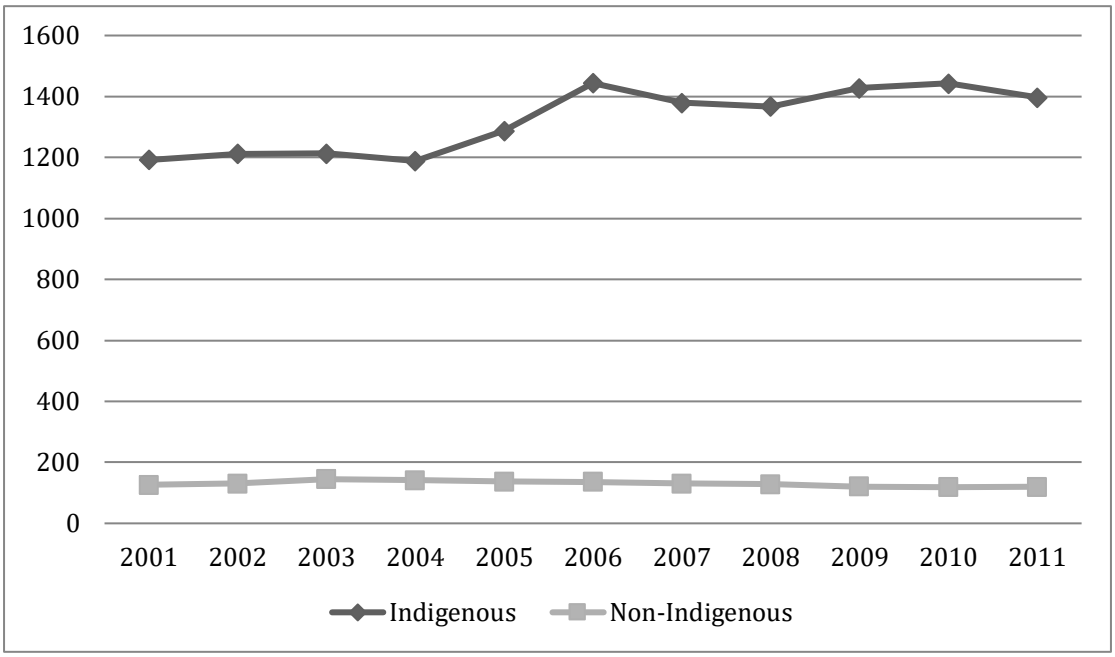

Figure 15 (y = per 100,000 of age-adjusted adult population): Source - *Prisoners in Australia* 2001-2011

In this Chapter, I analyse the increase in incarceration rates in Queensland using the five hypotheses I have utilised in the preceding cases. I proceed in two stages. First, I outline the history of policymaking in the Queensland state jurisdiction. Second, I build a causal explanation by testing the hypotheses in light of the available data. Again I supplement the quantitative data from the *Prisoners in Australia* survey with interview data collected from

[1] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.

service providers. In Queensland subjects for interview were drawn from the Indigenous communities of Brisbane, Townsville and Doomadgee – these are classified as urban, regional and remote respectively.

4.2 Policy History

Three sources of policy-making are relevant to Indigenous incarceration in Queensland: (1) the Queensland 'Aboriginal Justice Plan'; (2) decision by Queensland Courts; and (3) criminal law legislation.

(1) Queensland's 'Aboriginal Justice Plan'

Like New South Wales, Queensland attended the 1997 National Indigenous Deaths in Custody summit and committed to producing an 'Aboriginal Justice Plan'. In Queensland, this took the form of three separate policy products: first, the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (2000);[2] second, *Partnerships Queensland: Future Directions Framework for Aboriginal and Torres Strait Islander Policy in Queensland 2005-2010* (2005);[3] and finally *Just Futures 2012-2015* (2011).[4] These separate policy packages were intended to overlap and are not mutually exclusive in their aims. Nonetheless, important changes of emphasis are apparent over time.

The *Queensland Aboriginal and Torres Strait Islander Justice Agreement* was signed on 19 December 2000. It was developed through a partnership between Queensland Government justice-related agencies and the Aboriginal and Torres Strait Islander Advisory Board. Directly referencing the Royal Commission, the aim of the Agreement was to reduce the rate of Aboriginal and Torres Strait Islander people coming into contact with criminal justice institutions, 'at least to the same rate as other Queenslanders'. Ambitiously, at the time of signing in 2000 the *Agreement* specified the target of a 50% reduction in the number of Indigenous people incarcerated to be achieved by 2011.

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[2] Queensland Government, 'Queensland Aboriginal and Torres Strait Islander Justice Agreement', (2000).

[3] Queensland Government, 'Partnerships Queensland: Future Directions Framework for Aboriginal and Torres Strait Islander Policy in Queensland', (Brisbane: Queensland Government, 2004).

[4] Queensland Government, 'Just Futures: 2012-2015: Growing Community, Family, Opportunity and Justice for Aboriginal and Torres Strait Islander Queenslanders', (Brisbane: Queensland Government, 2011).

The *Agreement* introduced a number of specific strategies for reducing incarceration. These included:

- Crime prevention programs in remote communities such as Police Youth Clubs (PCYCs) and Community Based Officers;
- Community-based diversionary programs in remote and rural areas for Indigenous offenders;
- Driver licensing projects;
- Community Justice Groups; and,
- 'Murri Courts'.

These programs were all implemented by the Government within three years of the Agreement, although some concern has been raised over whether the funding and level of support was adequate.[5]

In November 2004, the Queensland Government endorsed a whole of government program for improving the outcomes for Indigenous people: *Partnerships Queensland: Future Directions Framework for Aboriginal and Torres Strait Islander Policy in Queensland.* The *Partnerships Queensland* framework included 'continued commitment' to implementing the Recommendations of the Royal Commission and to meeting the ambitious goals of the prior *Agreement*. But, it brought these policies from the *Agreement* under the same banner as other Government initiatives with which they had overlapping agenda.

Among these other initiatives was *Making Choices, Meeting Challenges* (2002), which contained alcohol management and violent crime prevention strategies particularly directed at remote communities in Queensland. Also included in *Partnerships Queensland* was a focus on family violence. In 2004, the Government had endorsed the draft *Family Violence Agreement: Safe and Strong Families* (2004). This contained a range of measures intended to reduce domestic violence in Indigenous communities, which had a direct impact upon policing. From this time, police were empowered to make an application for a protection order without the consent of the victim-party; while in the past this had not often occurred, it now became practice for police to routinely make

[5] See: Neva Collings, Chris Cunneen, and Nina Ralph, 'Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement', (Australian Institute of Criminology, University of Sydney Law School, 2005) at 1-20.

applications if police had a suspicion that domestic violence was going to happen again.[6]

Finally, at the very end of my period of enquiry, Queensland policy changed again with the adoption of *Just Futures 2012-2015: Growing Community, Family, Opportunity and Justice for Aboriginal and Torres Strait Islander Queenslanders*. This new policy described the target of reducing Indigenous incarceration by 50% before 2011 as both 'aspirational' and 'ambitious'. But, it contained a change in logic. In presenting its explanation of the 'causes of overrepresentation' of Indigenous people in the justice system, *Just Futures* turns first to Indigenous offending: 'The fact that Indigenous people begin offending at younger ages, re-offend in higher numbers, offend more seriously, and are more likely to breach their non-custodial sanctions has been shown to result in higher rates of imprisonment.'

(2) Queensland Courts

Alongside Government policymakers, the decisions of Queensland's courts are also relevant to explaining Indigenous incarceration rates. The Queensland Court of Criminal Appeal in *R v Friday* (1985) and *R v Bulmer* (1987) noted with approval the Court's practice of imposing more lenient sentences on Aboriginal defendants, although it warned that concern for the victim and deterrence must not be disadvantaged.[7]

In applying these principles, the Queensland Courts have taken notice of *Fernando's Case* (outlined in detail in the New South Wales case study above). [8] However, the use of the principles in *Fernando* has been selective. For example, relying upon Justice Wood's insistence in *Fernando* that courts 'avoid any hint of racism, paternalism or collective guilt', President McMurdo wrote in *R v KU*; *ex parte A-G* (2008):

> 'To adopt an approach which proceeds on the basis that the courts may take judicial notice of the supposed effects of a community's dysfunction upon all or any of its members, is to engage in the kind of stereotyping which was deprecated by this and other Australian courts in the cases to which we have referred. This approach

[6] Ibid.
[7] *R v Friday* (1985) 14 A Crim R 471 (Qld); *R v Bulmer* (1987) 25 A Crim R 155 (Qld).
[8] *R v Daniel* [1998] 1 Qd R 499; *R v KU; ex parte A-G* [2008] QCA 154.

> diminishes the dignity of individual defendants by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of observing the standards of decent behavior set by law.'[9]

President McMurdo's statement should not be taken out of context: her decision was with regard to a horrific crime, that had been appealed by the Attorney-General (with special leave from the Court of Appeal) after public outrage over the relatively minor sentence received in the first instances.[10] Nevertheless, the movement of her emphasis from the characteristics of the Aboriginal offender to the dignity of the Aboriginal victim is reflective of a broader trend in Queensland jurisprudence during the period.

(3) Queensland Criminal Law Legislation

Unlike in New South Wales, criminal justice policy has not been so much of an electoral issue in Queensland during the period of my enquiry.[11] Consequently, legislative changes that might impact Indigenous incarceration rates were more piecemeal. Three are of potential relevance: an increase in police powers; the introduction of alcohol management plans; and a toughening of domestic violence laws.

The *Police Powers and Responsibilities and Other Legislation Amendment Act 2003* (Qld) was significant for Indigenous incarceration because it created a new offence of 'public nuisance'; this is perhaps particularly significant for Indigenous offenders who are frequently homeless or living in overcrowded housing. It is also compounded by the impact of the establishment of alcohol management plans in the *Indigenous Communities Liquor Licences Act* 2002 (Qld), which introduced new powers in relation to the management, consumption and possession of alcohol in Indigenous communities. The range of

[9] *R v KU; ex parte A-G* [2008] QCA 154.
[10] Ibid, Margaret Mcmurdo, *'R v Ku; Ex Parte A-G*(Qld) and Warwick Thornton's Award Winning, Internationally Acclaimed Film 'Samson and Delilah': Life Imitating Art? Why We Must and How We Might Do Better', *James Cook University Law Review,* 17/6 (2010), 6-23.
[11] Ana Caldwell, 'Minimum Sentence Plan to Fill Queensland's Jails: Civil Libertarians', *The Courier Mail,* 25 October 2010, Daniel Hurst, 'Violent Offenders Face Sentencing Crackdown', *Brisbane Times,* 25 October 2010, Daniel Hurst, 'Lnp Mandatory Sentencing Policy Goes Full-Circle', *Brisbane Times,* 30 April 2012, Jessica Marszalek, 'Judges Benched on Minimum Sentences', *Sydney Morning Herald,* 25 October 2010.

offences relating to breaches of local alcohol management plans under this legislation were intended to underpin the *Making Choices, Meeting Challenges* policy. Finally the *Drug Diversion Amendment Act 2002* (Qld) incorporated measures which aimed to reduce Indigenous incarceration by providing for drug assessment and education sessions for persons appearing before drug diversion courts. Alongside this, *The Drug Rehabilitation (North Queensland Court Diversion Initiative Amendment) Act 2002* (Qld) set up a specific program with similar aims for remote communities in North Queensland.

4.3 Explaining the Change

In the context of the above policies, I will now examine the 17% increase in Queensland's Indigenous incarceration rate between 2001 and 2011.[12] In so doing, I will use the five hypotheses I have drawn from the literature:

(1) Hypothesis One: Socio-economic disadvantage causes high rates of offending

The relationship between socio-economic disadvantage and offending was central to the analysis of the Royal Commission,[13] as well as Queensland Government policy during the period, particularly: *The Agreement* and *Partnerships Queensland.*

As with the national case and the New South Wales case, I will here use measures of socio-economic conditions from the *NATSIS Survey* (2002 and 2008).[14] Acknowledging the weaknesses in that data, I limit my analysis here to the identification of broad changes between surveys. Figure Sixteen below includes those variables from the survey that are most germane to incarceration rates. Indigenous Queenslanders over the age of 15 experience socio-economic disadvantage at high levels. The Queensland statistics do however show a noted improvement in some areas between the surveys; this is particularly true of the ability to meet 'household expenses', unemployment, and self-assessed health variables.

[12] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[13] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', at 208.
[14] Statistics, 'National Aboriginal and Torres Strait Islander Social Survey', Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey'.

Figure Sixteen: Queensland Socio-Economic Variables (2002 and 2008)

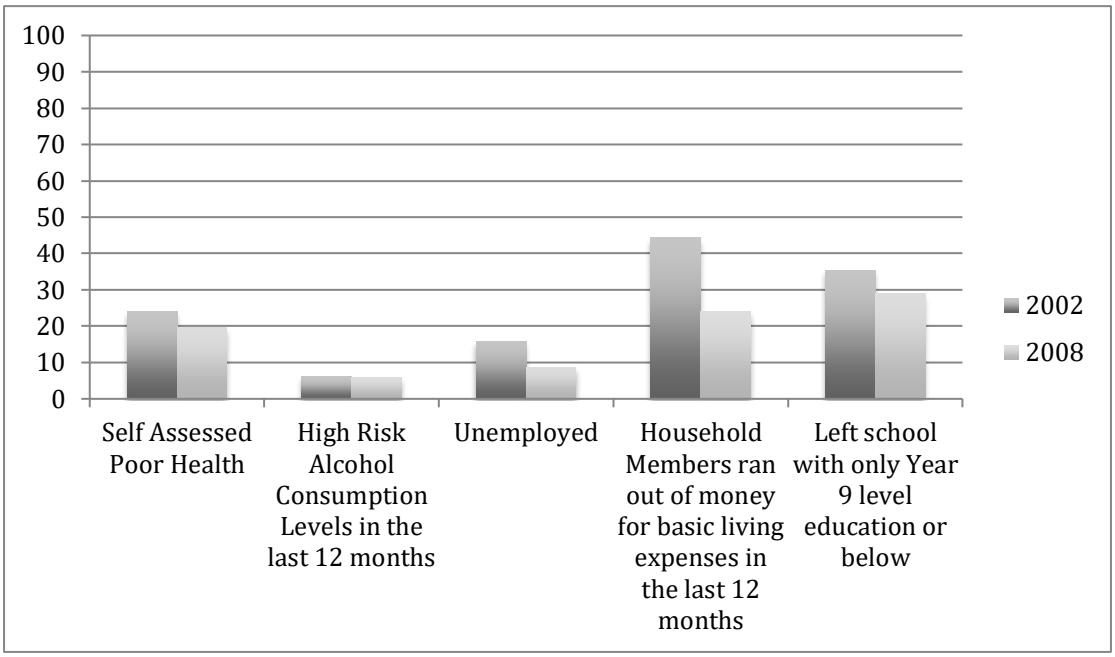

Figure 16 (y = % of Indigenous Persons 15 years and over) – Source: *National Aboriginal and Torres Strait Islander Social Survey 2002* and *2008.*

The *NATSIS Survey* also provides measures of a number of 'involvement in crime' variables, which I use to examine broad trends in Indigenous crime in Queensland.

Figure 17: Indigenous Involvement in Crime, Queensland, (1998, 2001, 2008)

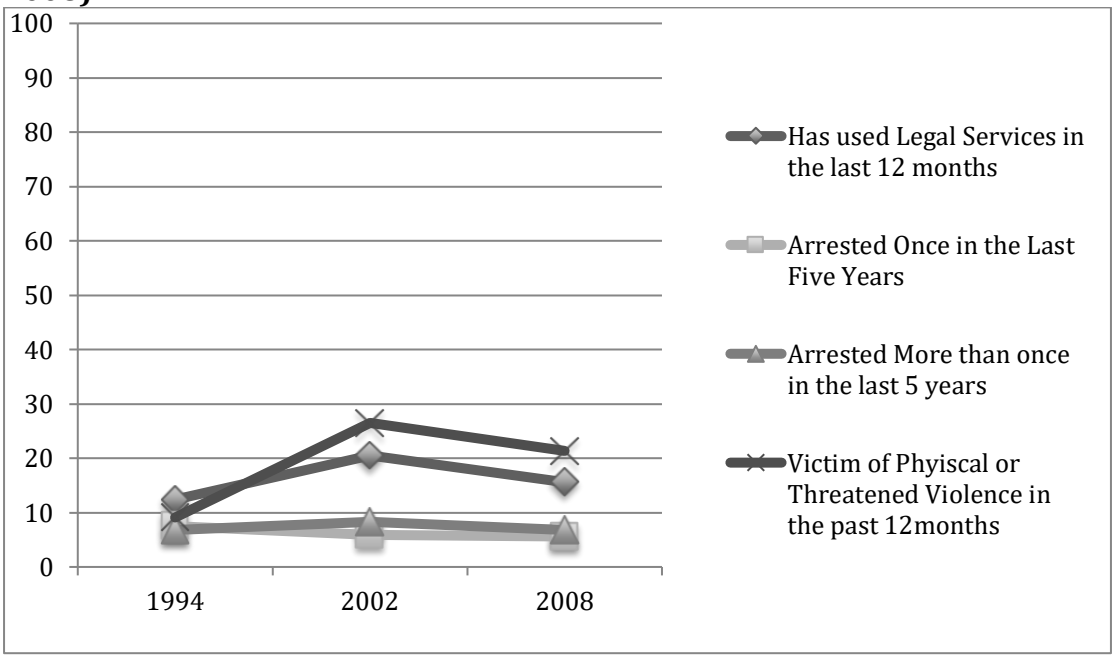

Figure 17 (y = % of Indigenous persons 15 years and older): Source - *National Aboriginal and Torres Strait Islander Social Survey* 1994, 2002, 2008.

Figure Seventeen shows that in Queensland, as in New South Wales and nationally, Indigenous people self-identify notably high 'involvement in crime' variables: 21% of Indigenous respondents in Queensland had been a victim of physical violence in the past 12months; 13% had been arrested.[15] In Queensland though, there is a more noticeable decline in these variables during the period.

As in the other case studies, I argue that these trends may be used to conduct a 'straw-in-the-wind' test of *Hypothesis One*.[16] On this basis, while the correlation between high socio-economic disadvantage and high levels of offending does not prove or disprove the *Hypothesis*, it affirms the *Hypothesis's* relevance.

(2) Hypothesis Two: There is a weak relationship between offending and incarceration.

These trends observed above are also relevant to my second hypothesis. Figure Seventeen shows that while Queensland's levels of Indigenous 'involvement in crime' were high during the period, they noticeably declined.

I argue that this decline is sufficient to constitute 'smoking gun test' with regard to *Hypothesis Two*.[17] The declining statistics show that changes in offending alone cannot have caused the increase of 17% in Queensland's Indigenous incarceration rate. Consequently, I conclude that *Hypothesis Two* is confirmed: offending rates are only weakly related to incarceration rates.

4.4 Explaining the Role of Criminal Justice Policy

As it did in New South Wales, my analysis of *Hypothesis One* and *Hypothesis Two* in light of the available quantitative data in Queensland eliminates the most simple explanation for rising incarceration rates between 2001 and 2011: that increasing incarceration reflects increases in Indigenous offending. Consequently, I must now turn my attention to the role of variables associated with Government policy by examining my final three hypotheses.

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[15] Australian Bureau of Statistics, 'Prisoners in Australia 2011'.
[16] Van Evera, *Guide to Methods for Students of Political Science*.
[17] Ibid.

As I have outlined above, the variables that underpin *Hypotheses Three*, *Four* and *Five* require a more detailed understanding of the increase in incarceration in order to identify patterns of aggregated variables, such as Simon's 'Governing Through Crime'.[18]

I proceed using the same method as that adopted in the New South Wales case (see: 3.4 above).

(1) The Statistical Increase

As noted, the *Prisoners in Australia* survey data allows me to produce a number of reliable measures of the increase in the prison population: (1) the change in primary offence of Indigenous prisoners; (2) the change in sentence length for Indigenous prisoners; and (3) the change in the proportion of prisoners with prior convictions.

Figure Eighteen shows the change in the Queensland Indigenous prison population by primary offence or charge. It shows that, as with New South Wales, the increase of prisoners in Queensland is concentrated in certain primary offences: 'acts intended to cause injury' had the largest increase with 274 more inmates; then 'unlawful entry' with 154; and 'sexual assault' with 90. Interestingly, Queensland had a far smaller increase in 'offences against justice' than New South Wales, with only 39 more prisoners, and it had a net decline in traffic offences. These are significant differences in light of the discrepancy in incarceration increase between the states: a 29% increase was experienced in New South Wales while only a 17% increase occurred in Queensland.

[18] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*.

Figure 18: Change in the Queensland Indigenous Prison Population by Primary Offence/Charge

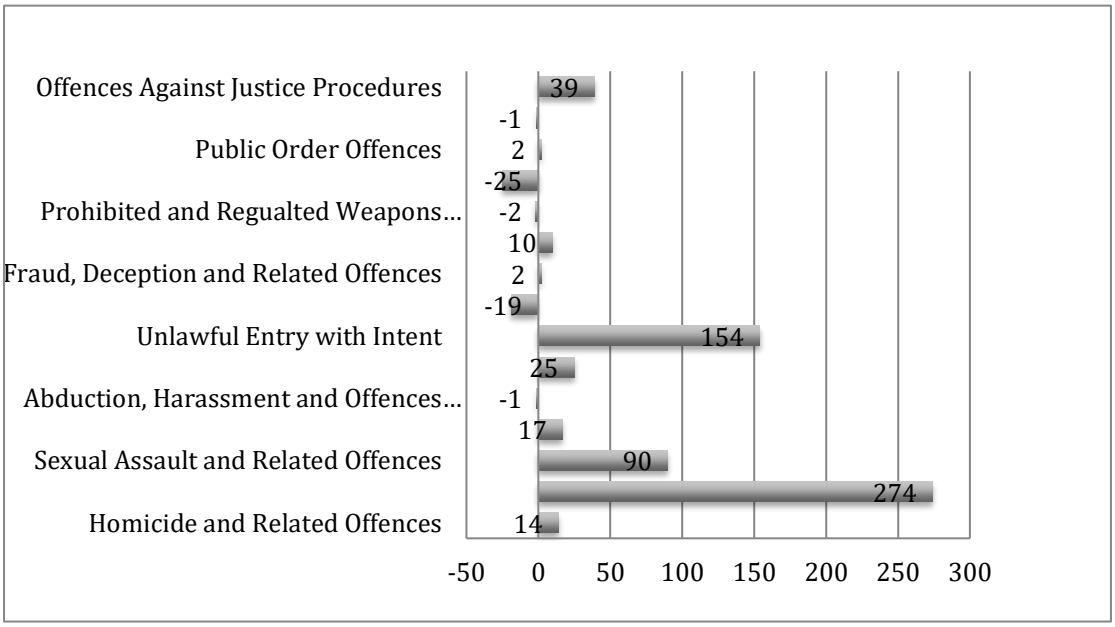

Figure 18 (y = change in primary offence between 2001 and 2011 by no. of prisoners): Source – *Prisoners in Australia* 2001 and 2011.

The second change in the prison population concerns sentence lengths. This is contained in Figure Nineteen, which demonstrates a contrary movement within sentencing. Average sentence lengths declined for Indigenous prisoners in Queensland, but expected time to serve rose considerably. This highlights the impact of different approaches to sentencing in Queensland but also evinces the national trend towards Indigenous prisoners having more difficulty gaining parole.

Figure Nineteen: Mean Aggregate Sentence Length and Mean Expected Time to Serve for Indigenous Prisoners in QLD

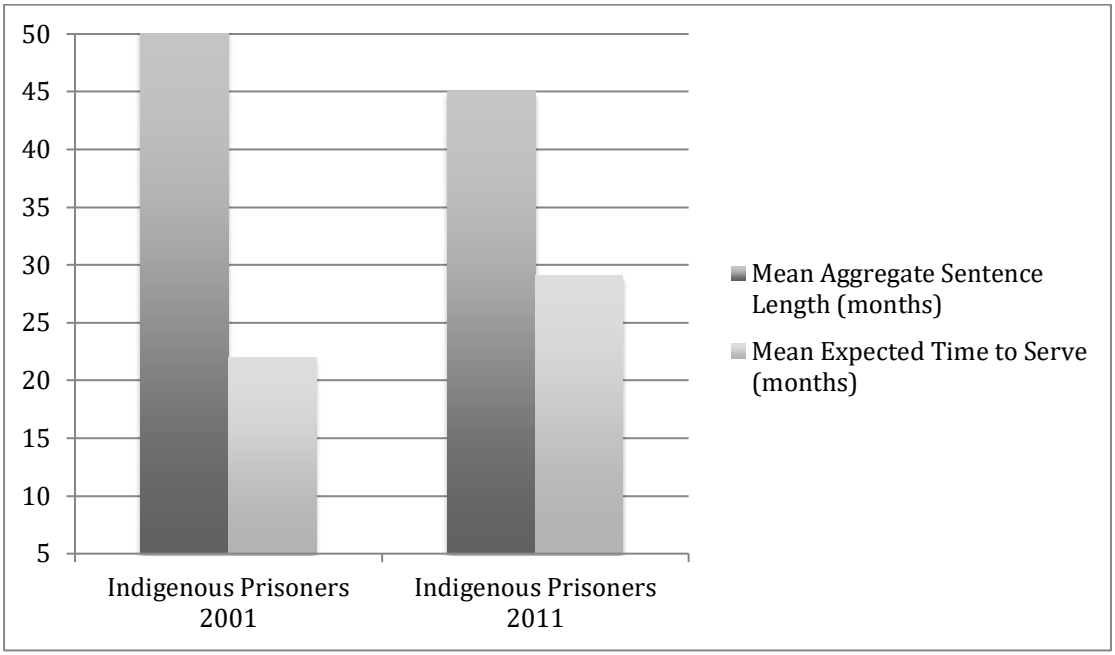

Figure 19 (y = sentence length (months): Source – *Prisoners in Australia* 2001 and 2001.

Related to considerations of sentencing is the measurement of the number of prior offences within the prisoner population.

Figure Twenty: Indigenous Prison Population by Prior Imprisonment

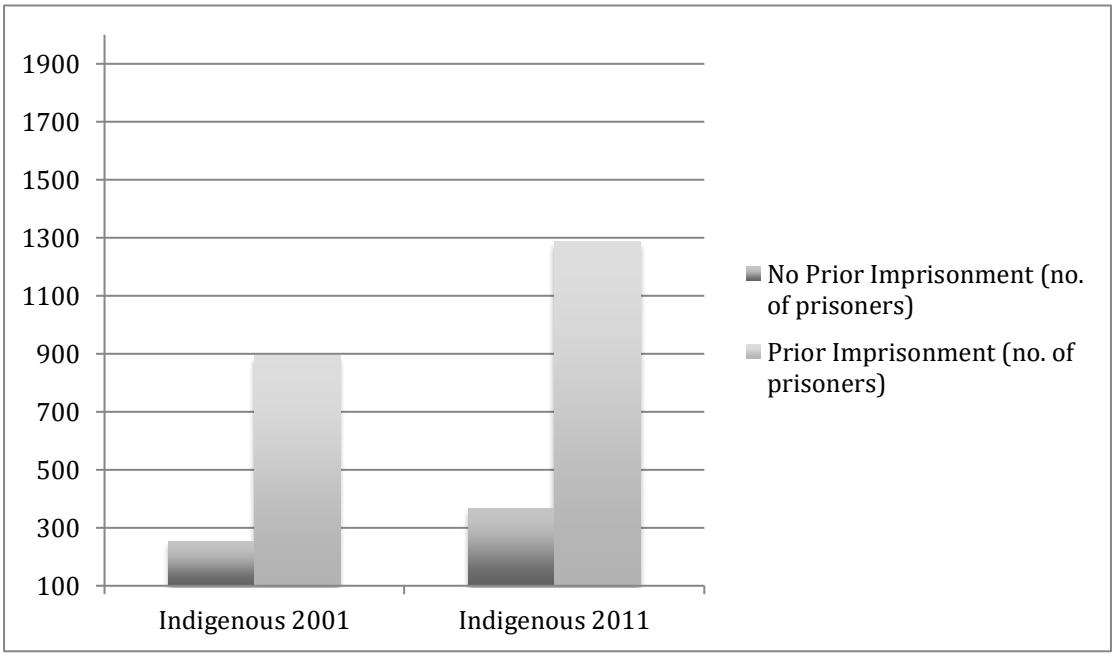

Figure 20 (y = no. of prisoners): Source – *Prisoners in Australia* 2001, 2011.

Figure Twenty shows that a very high proportion (93%) of the increase in the prison population was comprised of prisoners who had previously been imprisoned.[19] This remarkably high figure suggests that recidivism is playing a very large role in the increase in incarceration rates.

(2) Process Tracing the Implementation of Policy: Interviews with Service Providers

As in the NSW case, in Queensland I supplement the limited quantitative data by conducting interviews with service providers who were implementing criminal justice policy between 2001 and 2011. In Queensland, participants for the interviews were drawn from three communities: Brisbane, Townsville and Doomadgee. In line with the purpose of process tracing, I selected interviewees according to their proximity to the implementation of criminal justice policy. A full list of Queensland interviewees is contained in Appendix One; it includes lawyers, police, magistrates and Aboriginal community leaders.[20]

Similarly to NSW, the interviews in Queensland were semi-structured with interviewees asked to reflect upon the causes of rising incarceration rates from their perspective as implementers.[21] Seven themes emerge from the interviews in Queensland. First, there are three observations about the operation of criminal justice policy: (a) socio-economic dysfunction; (b) judicial discretion and the availability of diversionary programs; and (c) high rates of recidivism. Four further observations also emerged: (d) the management of substance abuse; (e) family circumstances and violence; (f) declines in traffic offences; and (g) remoteness.

<u>(a) Context of Dysfunction</u>

All interviewees in Queensland noted that Indigenous incarceration occurs in a context of severe socio-economic disadvantage, which a number characterised as

[19] Australian Bureau of Statistics, 'Prisoners in Australia 2011', Australian Bureau of Statistics, 'Prisoners in Australia 2001'.
[20] See Appendix One.
[21] See Appendix Two and Three.

'community dysfunction'. Aunty Lenore Ketchup,[22] a community leader and the 'Indigenous Justice Group' co-ordinator in Doomadgee noted:

> 'We've got a lot of children here with health problems – they've got ear infections, there is not enough money at home so they are not on proper diets, there is a lot of late night alcohol and gambling at home…so they are not getting the food and sleep that they require. And, a large part of that is housing. We've now got great-grandchildren having children. Where are we going to put all these children?'

To a degree, this socio-economic disadvantage is apparent from the statistical survey above. What is not apparent from the quantitative data are two exacerbating factors, which compound disadvantage for Indigenous Queenslanders: remoteness and homelessness.

Some Indigenous communities in Queensland are significantly more remote than those in NSW. Inspector John Fox, who commands the Queensland Police Service's Office of Cultural Liaison, explained the impact of remoteness:

> 'You would have seen this in Doomadgee: when it's the wet season and that causeway is up, as it is 3 months of the year, you are not going to get out…unless you are going to fly out and the average community member can't afford to fly out. So they're trapped in that environment, with no escape for a rest or a break.'

Remoteness has a particularly severe impact upon employment opportunities. As Inspector Fox continues, the placement of Indigenous communities often reflects the former-colonial ideology of mission-settlements rather than any economic reality.

> 'Take Pormpuraaw. You will drive for hours and hours, a thousand kilometres, across saltpans and bad country. It is just such a remote area. Originally it was chosen because the hunting there is good and things, but in terms of employment opportunities they are just not there. So anyone who wants employment has to move out of the community. This brain drain, where the best and brightest are leaving to find work, just ruins community leadership.'

A second exacerbating factor is related to remoteness: homelessness. This takes effect in regional centres, such as Townsville, when the 25% of Indigenous Queenslanders who live in more remote areas travel to town. Senior Sergeant Gary Chamberlain, a cross-cultural liaison officer at the Townsville Police station noted the following:

[22] The title 'Aunty' is used a mark of respect for an Aboriginal leader.

> 'What we have here in Townsville, and in regional towns like it, we've identified a core group of itinerants who are, by definition, homeless: they have either short term accommodation at a boarding house, or are staying with friends, or are just sleeping rough in the park. Sometimes they are taken out to a drunk-diversionary centre, where they get a bed for the night – but then the next day they are back in the park'

In this way, homelessness exacerbates both disadvantage and incarceration because it becomes a catalyst: Senior Sergeant Chamberlain continues, 'Homelessness is not a problem, in itself. It's when alcohol is introduced, or drugs are introduced and the fighting begins. When that becomes disorderly, the Police will be called in – because it is happening in public.'

(b) Judicial Discretion and the availability of programs

While Queensland did not experience the 'crime auctions' that drove up sentence lengths in NSW, a number of interviewees noted that judicial discretion had nonetheless been constrained. Northern Circuit Magistrate Ross Mack, whose jurisdiction includes Townsville as well as remote communities like Doomadgee, described it thus: 'There's been changes in the maximum penalties for some offences. Once the maximum penalty goes up the prospect of imprisonment becomes greater because it is deemed a more serious offence.'

However, the most noted constraint on judicial discretion among policy implementers in Queensland was a lack of diversionary programs – this effectively forces Magistrates to proscribe a prison sentence, when 'diversionary programs' are realistically not available. In Townsville, Senior Sergeant Chamberlain described the diversionary programs that had been created under the *Aboriginal Justice Plan* as a significant improvement: 'If you look back at the '80s or the early '90s the judiciary didn't have that much discretion on diversion in custody, they'd look at their penalties and they would have to go on that. Now in Queensland there is a number of options…' He went on to describe the operation of Murri Courts[23] and Queensland Indigenous Drug and Alcohol Diversion Programs as having been significant for the Townsville community.

[23] 'Murri' is an Aboriginal word for Indigenous person, which is used widely in Queensland. The 'Murri Courts' are courts that are advised on matters of sentencing by Indigenous Elders; they were introduced by the *Aboriginal and Torres Strait Islander Justice Agreement* in 2000.

But, from the perspective of a remote community Justice Group, Aunty Lenore put the problem of diversionary programs more bluntly:

> '…We don't really have any. I mean we are talking about the Gulf Region here – um – we just don't get the programs that somebody in Mt Isa or Townsville would get. It's because of our location and it's because of the funding that would have to be attached. We have to have at least 23 offenders, who would attend a whole week workshop, before it would be profitable to bring somebody out to run those programs...'

The effect of this absence of programs on sentencing was acknowledged. Magistrate Mack conceded that

> 'Someone being charged with a significant offence, say a drunken assault – which we deal with a lot – if he were, by virtue of some Government program, able to go into rehabilitation or engage in some sort of rehabilitative work, that would be taken into account in the sentence and reduce the sentence…'

Aunty Lenore in Doomadgee reiterated this:

> 'You can't refer people to programs that don't exist. And, it does put the magistrate in a bad place. They've got to exhaust all avenues. And, as a justice coordinator I am in court, and I know for a fact that they do try to exhaust all avenues. But, like I say, if we don't have those programs...'

(c) Recidivism

The salience of recidivism in the incarnation of Indigenous Queenslanders is apparent from the above statistics on prior-imprisonment. The phenomenon also emerged powerfully from the interviews in Queensland.

Inspector Fox, in Brisbane, noted:

> 'One thing that I have noticed, and I don't have hard evidence for it, but going through the justice system is having the wrong effect. Fortunately, we do now have Murri Courts where there are options other than jail – but even in the Murri Courts we have noticed that sometimes it has no affect on the young people.'

In Townsville, Senior Sergeant Chamberlain echoed the sentiment from New South Wales that the experience of incarceration had become normalised for many offenders:

> 'You know, talking to young people sometimes they will say that it is safer to be in gaol than it is to be at home. They've got a bed, they've got food and there is education there if they wish to participate. That's not the same with everyone, but there is a small group who say that'

Senior Sergeant Chamberlain also noted the great difficulties experienced by police in trying to break the cycle of recidivism with Indigenous offenders:

> 'I've worked with young people in the past where we take them away on two-week camps and you see the change in their confidence. You know they get that self-confidence while you are supporting them and you recognise that these are great young people. But you also know in the back of your mind that if they are not strong enough to cope with what they are going back to…in their environment or in their community they will just got straight back to the way they were behaving and people will say: "they were just set up to fail".'

However a number of interviewees suggested that the problem was more severe than a failure of rehabilitation. Magistrate Ross Mack acknowledged that, in the Magistrates Court, he only saw the worst of community life in North Queensland, but was still despairing about rehabilitation:

> 'I mean, what chance has a four year old kid in Doomadgee got if the only thing he sees is his parents drunk or violent. If there is no hope, no encouragement for them to attend school, no encouragement for them to broaden their horizons and look past the community, and we see a dissolute or…I don't know what it is…a lack of ambition in young people. In 16 year old boys who should be looking to the ends of the earth, but they don't look past the end of their communities. So until the communities – and I mean every one of them – seek to encourage a better life from their youth rather than the bad examples that are present, it won't change. It simply can't. Because the young people just don't know any different. '

In Doomadgee, Aunty Lenore admitted to being 'quite frightened' by the increasing role incarceration was playing in the community:

> 'You go around the community, and you'll overhear kids playing "gaols": "I'm going to lock you up and throw you in the car – you're going to gaol." It just makes my hair stand up…Kids that should be playing sport or with dolls, they're playing gaols now. I never knew what a gaol was until I got my drivers licence. Now children are playing goals…when they act out putting the offender in the car they talk exactly like the police talk. It's just like watching someone get arrested, except these are tiny kids.'

Aunty Lenore strongly confirmed the 'sense of hopelessness' that had been noted elsewhere, but she stressed that this feeling was caused by a complex combination of factors in offenders:

> 'I do reports on offender's backgrounds for the courts and there could be all sorts of things going on. It could be grief. You know: "I've grown up in to a young man now, but nobody cared that I lost my uncle when I was younger, but I was sad when he left because he looked after me. I felt safe with him, but he died." There are all these things that contribute to them acting out the way they do – and that's what gets them in to contact with the justice system.'

But she also acknowledged:

> 'Once they've gone there (to prison) some like it, to be honest. They've got a structured day. They go to bed at night-time. They get up in the morning and they are going out to work at the farm, or to work somewhere. They get a feed when they come home at night. Their girlfriends will be allowed to ring three times a week…they'll even send money.'

(d) Management of Substance Abuse

As noted in the history of policymaking above, one of the key differences between Queensland and the earlier case study of New South Wales is the introduction of 'alcohol management plans' and the proscription of 'dry communities.' A number of respondents reflected on this policy in their interviews, reflecting a range of experience across communities. Inspector Fox, acknowledged these differences:

> 'We initially found that there was an increase (in incarceration) associated with those policies, but after that initial period it was less predictive. In some communities where – say in the wet season it got cut off – and there was a total inability to supply alcohol within the restrictions then we saw a reduction in incarceration.'

A number of interviewees questioned the success of the policies at limiting alcohol. Lenore Ketchup noted that in Doomadgee:

> 'We are under the alcohol management plan, which is no spirits or hot stuff in the community – but that doesn't mean they don't drink it outside of the community and come back intoxicated.'

Also some interviewee suggested that dry communities just shifted the problem. Magistrate Mack observed this from the perspective of the Magistrates' Court:

> 'People who were alcohol dependent had to move to other communities, and that brought with it social issues. I mean, they were determined to be drinking – that's the reason they left the place that became 'dry' – and that gives rise to more violence because of the dislocation, they are less comfortable where they are, and they've got chronic problems with alcohol. So they drift around the North of Australia trying to find a place where they can source alcohol.'

Additionally, a number of interviewees noted that where Alcohol Management Plans had worked to control the supply of alcohol, this had not always had predictable outcomes for substance abuse. With reference to his experience on the Magistrates Court in Mornington Island – which is totally 'dry' – Magistrate Mack suggested that the demand-side of the problem is equally important:

> 'They just brew home brew and, you know, it is such poor quality that who knows what effect it has on everyone. And then on top of that are the prohibitions on alcohol, which are fairly draconian in their penalties. The maximum penalty for a third offence is something like $38,000 (AUD) or more and 6 to 18 months imprisonment.'

In addition, all respondents also noted increasing presence of other forms of substance abuse in Indigenous Communities. This is particularly problematic when combined with alcohol (especially home brew) to increase potency, which – as Magistrate Mack noted – 'consistently fuels extreme violence.'

(e) Offences Against Justice

Another significant difference between Queensland incarceration statistics and those of NSW and the national case is the far smaller increase in 'offences against justice'. A number of respondents reflected on Queensland's relative success in this area; particularly through the effectiveness of policies such as Community Justice Groups and Police Liaison Officers, which were introduced at the start of the period in Queensland's *Aboriginal and Torres Strait Islander Justice Agreement.*

Having worked alongside the Community Justice Groups, Senior Sergeant Chamberlain in Townsville reflected that their flexibility had been a key to their success:

> 'I worked with a Community Justice Group in Toowoomba many years ago and they focused on youth. And they work closely with all agencies and work together to come up with projects and programs for youth. In Townsville the justice group is more focused on the courts and reducing offending – but we aim to link the community in with government and non-government service providers to address those issues. So it is a holistic approach.'

He also reflected that Community Justice Groups underpinned the success of 'Murri Courts' in certain communities:

> '…the Community Justice Group here has a 'Murri Court' coordinater who manages the Murri Courts. Through that person we recruit elders from the community who volunteer their time to sit with the Magistrate, in the court, to talk to the offenders coming through. What they will do is do an assessment on the offender – get a bit of history and background – and then provide a cultural report as to the reasons why and where for. This assists with sentence mitigation – obviously, the elders don't make the sentencing decision the magistrate does that – but they provide advice to the magistrate and we find that to be a positive step on reducing the incarceration.

In her role as the Community Justice Group Co-ordinator in Doomadgee Aunty Lenore stressed that the importance of the Community Justice Groups lay in the low level of understanding about criminal justice still prevalent in Doomadgee – despite its high rate of incarceration.

> 'Often somebody who comes before the court does not know what they are saying and does not understand what is being said to them…For example, to explain that if they want to plead guilty or not guilty it is there free will. A lot of people don't understand the difference between guilty and not-guilty. A Community Justice Group can stand up and slow that down for them.'

The community organising provided by Community Justice Groups also intervenes directly to prevent 'offences against justice' offences accumulating through the breach of a simple court order. Aunty Lenore notes that: 'it is not always the offences that get our people incarcerated, it is often the process of the justice system that gets them to where they go into prison'.

> 'A lot of people do not understand why they get incarcerated. If you look at something like the offence, the offence could be a minor offence but if they fail to appear, if they are on an order and they breach the probation order, all those things can end up getting

> them incarcerated. And, that is what I try and stress to the people…if you've got a date to go to court, go to court.'

With oversight for these programs, Inspector Fox was happy to highlight their success. However, he also noted that it was not universal: 'unless you have those right people in place, you are always going to have blow outs'.

(f) Traffic Offences

The other area in which there is significant divergence between the Queensland statistics and those in NSW concerns traffic offences. Queensland has been largely successful at halting the increase in Indigenous incarceration for traffic offences during the 2001-2011. Through his role in the Cultural Advisory Unit and his earlier experience in Traffic Policing, Inspector Fox was able to highlight how the Queensland Indigenous Drivers Licence Program was developed:

> 'A number of years ago, in my work, I was aware of a Senior Sergeant who was actually delivering a licensing program to our remote communities. He did that off their own budget and their own bat. When I moved here I actually got him seconded across to work for me here, and he was with me until he retired – about three or four years or so. During that time we were able to gain some internal funding and then we passed it on to the Department of Transport who have responsibility, and we were able to assist them in the writing of their (successful) cabinet submission for $6million dollars to implement a program, with the Queensland University of Technology, based on the Queensland Police program.'

While it was run by the Queensland Police, Inspector Fox noted that the program had a 99% success rate in securing licences for Indigenous participants across urban regional and remote communities. This success was then acknowledged when the Queensland Justice Plan was independently reviewed in 2008:

> 'In the whole report, the only program that could be pointed to that reduced incarceration was the "Queensland Indigenous Drivers Licence Program" – that is in the report. So, again, it is a good example of the problems generally with traffic and how you can find solutions. We do know that the program has now been absorbed by Queensland Transport into their normal services. I can't comment further on its success.'

(3) Hypothesis Three: Changes in the institutions of criminal justice are strongly related to changes in incarceration rates.

The process trace of implementation of criminal justice policy in Queensland provides with sufficient detail to examine *Hypothesis Three.* As my literature review above makes clear, most scholars accept a complex understanding of criminal justice institutions. As in the NSW case, I will here focus upon the aggregated pattern of variables identified by Simon and Alexander: (1) increasingly severe legislative penalties; (2) the reduction of judicial discretion; (3) the increased empowerment of police; and (4) the subordination of racial or civil rights concerns to tough on crime rhetoric.[24]

Unlike NSW, Queensland did not experience 'crime auction' elections during the period of my enquiry.[25] However, increasingly severe penalties, reductions in judicial discretion, and empowerment of police were nonetheless evident in the interviews of policy implementers. As in NSW, the availability of diversionary programs was a major constraint upon the actual discretion of judges with regard to incarceration: Aunty Lenore Ketchup noted that these were often totally absent, particularly in remote communities. The degree to which remoteness exacerbated the empowerment of police in the implementation of criminal justice policy was particularly evident in Queensland, which has more remote communities than NSW. Often remoteness resulted in a quite literal 'governing through crime': Inspector Fox observed that, in very remote communities, 'police tend to be the main front for Government because they are on the ground all the time.'

> Yeah, we have teachers there, but 6-7 hrs a day and they are out. Weekends, if they can get off the community – they're gone. And, it was the same when I was at Woorabinda in 1976. Police tend to be the catch all for everything that happens after that.'

Additionally, some of Queensland's notable successes at slowing the increase in incarceration rates, relative to other jurisdictions, evidenced the importance of

[24] Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Chapters, 1,2,4,5 and 9, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 59-96.
[25] Although, it did in 2012, immediately following. See: Hurst, 'Lnp Mandatory Sentencing Policy Goes Full-Circle'.

criminal justice institutions. At the implementation stage, the success of initiatives – such as Community Justice Groups in reducing 'offences against justice' incarceration and Inspector Fox's Cultural Advisory Unit in reducing 'traffic offences' incarceration – was achieved by acting as an intermediary *between* criminal justice policy and Indigenous offenders to soften the effects of policy.

Collecting the diagnostic evidence from the available quantitative data and the process trace of implementation, I argue that *Hypothesis Three* may be confirmed in the Queensland case. Following Van Evera's taxonomy of causation in small-N studies there is sufficient evidence to 'doubly-decisively' confirm the Hypothesis; this is because the effects of criminal justice policy are clearly evident – and the mitigating effects of reforms such as Criminal Justice Groups or Cultural Liaison Units would *not be* evident, unless criminal justice policies were causing incarceration.

(4) Hypothesis Four: Interaction Between Variables

Having confirmed that criminal justice institutions are strongly related to increases in incarceration, it is necessary to consider the prospect that their effects occur through interaction with other variables.

As noted above, it has been persuasively argued in the American context that interaction between institutional and socio-economic variables is critical their effect upon incarceration;[26] this interaction has been empirically observed to be particularly acute in circumstances of 'mass imprisonment', where incarceration compounds inequality and vice versa.[27]

While this interaction cannot be measured with the available quantitative data, it was repeatedly emphasised in the interviews with service providers. As well as being implicit in a number of the themes identified above, interaction between disadvantage and incarceration was explicitly referenced by Senior Sergeant Chamberlain: 'there are a number of factors that need to be taken into account when asking why a person might offend, young or old. And, it is a case of never judging the book by its cover'. Similarly, Inspector Fox used a concept of

[26] Western, *Punishment and Inequality in America* at 10.
[27] Western and Pettit, 'Chapter One: Mass Imprisonment', at 20-33.

interaction to caveat his reflections upon causation, 'which is all, interrelated': 'It is something you absolutely cannot explain in isolation, you cannot say "the high rate of unemployment leads to boredom, or family angst, or that poverty is going to cause someone to go out and steal something or to commit an assault and that this causes incarceration".'

On the basis of this widespread evidence at the implementation stage, I consider that Van Evera's 'smoking gun' test has been confirmed for *Hypothesis Four*.

(5) Hypothesis Five: Unsuccessful policy implementation results in unintended effects upon incarceration rates

As in NSW, having confirmed the other hypotheses related to criminal justice policy, the final prospect we must consider is the possibility of unintended consequences where policies are poorly implemented. This final hypothesis is significant because Sanders has noted the prevalence of 'unintended consequences' in Indigenous affairs policymaking in Australia,[28] an outcome which fits within Hood's theoretical categorisation of a 'fatalistic' response to policy failures.[29]

There was significant evidence in the interview data concerning policy implementation in Queensland of divergent outcomes across different communities, which are not picked up the broad state-level data. This was particularly true of remote communities, where Inspector Fox noted: 'The unknown factor in all of that, is the ability of community – in terms of their leadership, their governance, their ability to gather community consensus, which we often refer to as a 'community will'

In the specific context of the policy of alcohol management, Magistrate Mack noted a significant unintended effect; a policy designed to reduce alcohol fuelled offending in selected communities had resulted in people shifting to strained regional centres where they had less support. Ultimately this unintended consequence resulted in increasing incarceration rates. I take this example as a sufficient 'smoking gun' to tentatively confirm *Hypothesis Five*.

[28] Sanders, 'In the Name of Failure: A Generational Revolution in Indigenous Affairs', at 200.
[29] Hood, 'Calamtiy, Conspiracy and Chaos in Public Management'.

Unsuccessful implementation of policies has caused unintended consequences for incarceration in Queensland during the period of my enquiry.

3.5 Conclusion

As in New South Wales, my above analysis confirms *Hypotheses Two* to *Five*. This suggests that in both state case studies the following tentative conclusions may be drawn about the increase in Indigenous incarceration between 2001 and 2011:

- It has not been caused by increased Indigenous offending alone;
- It has been caused by changes in criminal justice policy; although,
- These changes have primarily taken effect through interaction with other socio-economic variables; and,
- The result of unsuccessful policy implementation has been unexpected outcomes, which have in some instances worsened the increase in incarceration.

'Too many Aboriginal people are in custody too often'[30]

Elliot Johnston QC, Commissioner
Royal Commission into Aboriginal Deaths in Custody (1991)

Conclusion

In this thesis I have sought to explain why Indigenous incarceration rates increased dramatically between 2001 and 2011, despite Government policies designed to achieve the obverse outcome. As no such explanatory account existed, my enquiry was necessarily exploratory.

I drew five hypotheses from the literature, relying in part upon the well-developed American scholarship on racialized incarceration. Examining these hypotheses within New South Wales and Queensland has led me to draw similar conclusions in each case about rising incarceration:

- It has not been caused by increased Indigenous offending alone;
- It has been caused by changes in criminal justice policy; although,
- These changes have primarily taken effect through interaction with other socio-economic variables; and,
- The result of unsuccessful policy implementation has been unexpected outcomes, which have in some instances worsened the increase in incarceration.

Taken together, these conclusions form an initial explanatory account of the increase in Indigenous incarceration. However, their significance should not be overstated. As has been acknowledged from the outset, limitations in the available data render this a preliminary consideration of the Australian case. My methodology has been designed accordingly: I have used a small-N analysis and mixed-method to draw together available data and make causal inferences about broad hypotheses.

Nonetheless, I submit that this thesis represents a promising foundation for further consideration of Indigenous incarceration in Australia. My initial

[30] Royal Commission into Aboriginal Deaths in Custody, 'National Report: Volume 1', at 6.

account of increasing incarceration rates has identified the salient causal variables behind this process in NSW and Queensland. In the first instance, this analysis could be usefully extended to the remaining five Australian jurisdictions (something beyond the scope of this MPhil thesis).

Additionally, a larger and better-funded study could usefully extend the methodology of interviewing service-providers further within the context of criminal justice policy. I submit that my thesis has confirmed the usefulness of this technique – particularly given the paucity of other reliable data sources. In this context, it is lamentable that it has not been done more often.

Moreover, the explanation offered in this thesis has not only been useful for identifying relevant variables, it has also affirmed the relevance of the American literature and concepts, which underpin them. This presents a fruitful avenue for further study by Australian scholars; it also demonstrates the merit of the Australian case to the growing comparative literature that seeks to apply the American concepts globally.

For an explanatory account to reach the level of detail necessary for it to be useful to policymakers, I submit that these American concepts should be further analysed in the Australian context. Certainly detailed comparative analysis would be greatly aided by the availability of better data on Indigenous incarceration – a conclusion, which was also reached by the Royal Commission in 1991.[31] Twenty-two years later it is lamentable that this has not been fulfilled.

Finally, it should be noted that my explanation of the increase in Indigenous incarceration rates presents some hope for Australian policymakers – although it will require a recalibration of expectations. Promises, such as the Queensland Government's commitment in the year 2000 to halving Indigenous imprisonment in ten years,[32] appear laughable in the face of steadily increasing incarceration rates. However, my interviews identified some inspiring successes at the local level – these include the Queensland Indigenous Drivers Licence program and the heroic success of Redfern police in reducing recidivism and the cycle of 'hopelessness'. The people implementing these programs talked

[31] Ibid. Recommendations 42-44 and 47.
[32] Government, 'Queensland Aboriginal and Torres Strait Islander Justice Agreement'.

hopefully of reaping a 'thirty-year generational dividend', which might see this problem solved for their grandchildren.

Such long-term thinking would require an unprecedented commitment of resources from Australian Governments. But – perhaps – it represents a feasible solution for policymakers seeking to balance the concerns of a nation that is simultaneously sensitive to the issue of Indigenous incarceration and passionately 'tough on crime'.

Appendix One: Table of Interviews

New South Wales

Interviewee	Relevant experience as a in criminal justice policy	Community (Urban/Regional/Remote)	Aboriginal or Torres Strait Islander Descent
Bernadette Boss	Magistrate, ACT and New South Wales.	Canberra/Queenbeyan. (urban)	No.
John McKenzie	Chief Solicitor, Aboriginal Legal Service, NSW/ACT. 32 years working for ALS.	Redfern (urban) Although his post covers all of New South Wales.	No.
Luke Freudenstien	Superintendent, New South Wales Police Commander, Redfern Local Area Command.	Redfern (urban)	No.
Victoria Beresford	Constable, Redfern Local Area Command.	Redfern (urban)	No.
Geoff McKechnie	Assistant Commissioner, New South Wales Police. Commander New South Wales Police, Western Region.	Dubbo (regional), Bourke(remote). Command includes a number of other regional and remote communities.	No.
Alistair Ferguson	Community leader, Bourke.	Bourke (remote)	Yes.

Queensland

Interviewee	Relevant experience as a in criminal justice policy	Community (Urban, Regional or Remote)	Aboriginal or Torres Strait Islander Descent
Ross Mack	Magistrate, Northern District Court, Townsville.	District includes urban, regional and remote communities.	No.
Gary Chamberlain	Senior Sergeant, Queensland Police Service. Cultural Liaison Officer, Townsville.	Townsville (regional)	Aboriginal.

Lenore Ketchup	Community Leader, Justice Group Coordinator, Doomdagee.	Doomadgee (remote)	Aboriginal.
John Fox	Inspector, Queensland Police Service. Officer Commanding the Cultural Advisory Unit, Brisbane.	Brisbane (urban). Command is Queensland wide though.	No.
Matthew Campbell*	Senior Sergeant, Officer Commanding Doomadgee Police Station.	Doomadgee (remote)	No.

*Consented to interview but not to be quoted.

Appendix Two: Interview Guide Given to Participants

Interviewing Guide

Governing Through Crime? Explaining the Rise in Indigenous Incarceration
August-September 2012

Hello my name is Michael Jones and I am studying for a Masters in Politics (Comparative Government) at the University of Oxford. As part of this course, I am producing a thesis; it is my intention that this thesis will go on form a part of Doctoral research.

My thesis seeks to explain the national increase of 49% in the rate of incarceration for Indigenous people between 2001 and 2011. As part of this research I am conducting interviews a number of state jurisdictions with people involved in the criminal justice system. The increase in Indigenous incarceration rate for your state jurisdiction during this period has been _____%.

The interview is semi-structured. The following questions provide a guide as to what will be asked. Some flexibility has been kept in the questioning to allow you to best express your opinion.

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. You have my statistical analysis in front of you showing 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?

Appendix Three: Interview Participant Information Form

Participant Information

Project Name: "Governing Through Crime? Explaining the Increasing Incarceration of Indigenous Australians"
Researcher: Michael William Jones
Status: Candidate, Masters of Philosophy in Politics (Comparative Government), University of Oxford
Contact:

- **Phone:** +61407257335; +61299595252
- **Email:** michael.jones@magd.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:

- The purpose of this study is to explain why the incarceration rate of Indigenous Australians (the number of people imprisoned) has increased between 2001 and 2011.
- This research will be a valuable resource for future policymaking. The increase in incarceration being examined is paradoxical given that reducing Indigenous imprisonment is the policy of all Australian Government and that the rise in imprisonment has not been accompanied by a corresponding rise in offending.
- The study intends to compare the Australian experience with concepts developed in the American context including the concept of *Governing Through Crime*; this refers to institutional changes that perpetuate high rates of imprisonment in societies.
- The research is intended for submission as part of the degree of MPhil in Politics Comparative Government at the University of Oxford.
- It is my intention that it will be incorporated into a subsequent Doctoral project and eventually published. *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 opinion, based upon this experience, as to why the incarceration rate has risen.

Time Commitment

- It is envisaged that the interview should take no longer than one hour.

- The interview will be conducted in person at a location that is convenient for you.

Recording

- The interview will be recorded.
- This recording will eventually be destroyed however a transcript of the interview will be submitted with the research as an annex.

Questions or Concerns?

- Any questions or concerns arising from the study may be raised directly with myself before during or after the study. (See above for contact details.)
- **Participants may withdraw from the study or withdraw consent for their opinions to be published at any time.**

Appendix Four: Sample Consent Form

Consent to Participate Form

Project: *Governing Through Crime? Explaining the Incarceration Rate of Indigenous Australians*
Researcher: Michael Jones, Graduate Student, University of Oxford

Purpose: To explain the paradoxical increase in the incarceration rate of Indigenous Australians over the past decade.

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@magd.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 Masters Thesis as that this will be stored by the University of Oxford and may be published by the University of Oxford as an electronic document.

As a consequence, I agree to participate in this study.

Name:_____ Sign_____ Date_____

Researcher: _____Sign_____ Date_____

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