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Governing through crime in the Northern Territory: Are criminal justice system changes contributing to rising Indigenous imprisonment?

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Executive summary

Almost 25 years on from the landmark Royal Commission into Aboriginal Deaths in Custody Indigenous imprisonment in Australia continues to rise at an alarming rate, leading to further overrepresentation in the criminal justice system. A number of academics have applied the theory of 'governing through crime' in the context of Indigenous imprisonment to argue that the strategic use of crime has led to a targeting of Indigenous offenders in an increasingly punitive and risk based system. If correct this would imply a disconnection between rising imprisonment and actual levels of crime and safety in the community — a finding which could have significant policy implications. However, evidence to support this claim is currently limited, a gap which this thesis seeks to address through a case study of the Northern Territory.

Inquiry is conducted at two levels: firstly by asking what criminal justice law and policy changes could have contributed to rising Indigenous imprisonment and secondly by asking why these changes could have disproportionately impacted Indigenous persons. A mixed methods approach is used, combining a review of academic literature, a review of legislation and policy and analysis of quantitative data sources.

Long term crime rates have been trending downwards for most offence categories in the Northern Territory in recent years. Comparison of these trends to the prison population supports the contention that increased imprisonment cannot be adequately explained by increased offending and broader system changes may be playing an important role.

The past decade has been one of rapid changes to legislation and policy governing various aspects of the criminal justice system. Significant changes which have potentially impacted on Indigenous imprisonment were enacted in the areas of sentencing, bail, non-custodial sentencing options, alcohol regulation, domestic violence, parole and police powers. From analysis of these changes a number of key trends emerge that support the governing through crime hypothesis. These are: a heightened focus on protection of the community through the use of broad categories of risk; placement of seriousness of the crime as the

central consideration in decision making to the exclusion of individual offender circumstances; intensified surveillance and enforcement; and encroachment of the criminal justice system into areas traditionally the domain of social policy.

Analysis of available data, as well consideration of the contextual circumstances in which these changes apply, suggests a heavy impact of many of the changes on the Indigenous population. A typical explanation for this heavy impact relies on high levels of offending among the Indigenous population and a tendency for many of the types of crimes and offenders targeted by changes to correlate with Indigeneity. However, adding another layer to this explanation by looking at the historical context for Indigenous disadvantage and the political context in which law and policy changes are made suggests that this explanation is overly simplistic. By examining these contextual factors it is argued that heavy impacts on Indigenous persons are not merely an unfortunate coincidence but at least in part product of a political process that views crime through a racialised lens and targets Indigenous persons accordingly. This concerning as it implies that policy makers are being driven by popular fears and conceptions of crime and race rather than rational evidence. As a result many of the changes implemented are directly contrary to a growing evidence base as to what works in both reducing Indigenous disadvantage and reducing crime.

Overall support is found for the hypothesis that an increasingly punitive criminal justice system and a shift towards governing through crime is contributing to rising Indigenous imprisonment in the Northern Territory. This finding is qualified by an acknowledgement that this is not a comprehensive explanation and a range of complex factors are at play in Indigenous overrepresentation. Nevertheless, it does highlight the importance of criminal justice law and policy settings in Indigenous overrepresentation and point towards a need for structural changes which place impacts on Indigenous persons at the centre of the decision making process. Approaches such as racial impact statements are promising in this regard and deserving of further research.

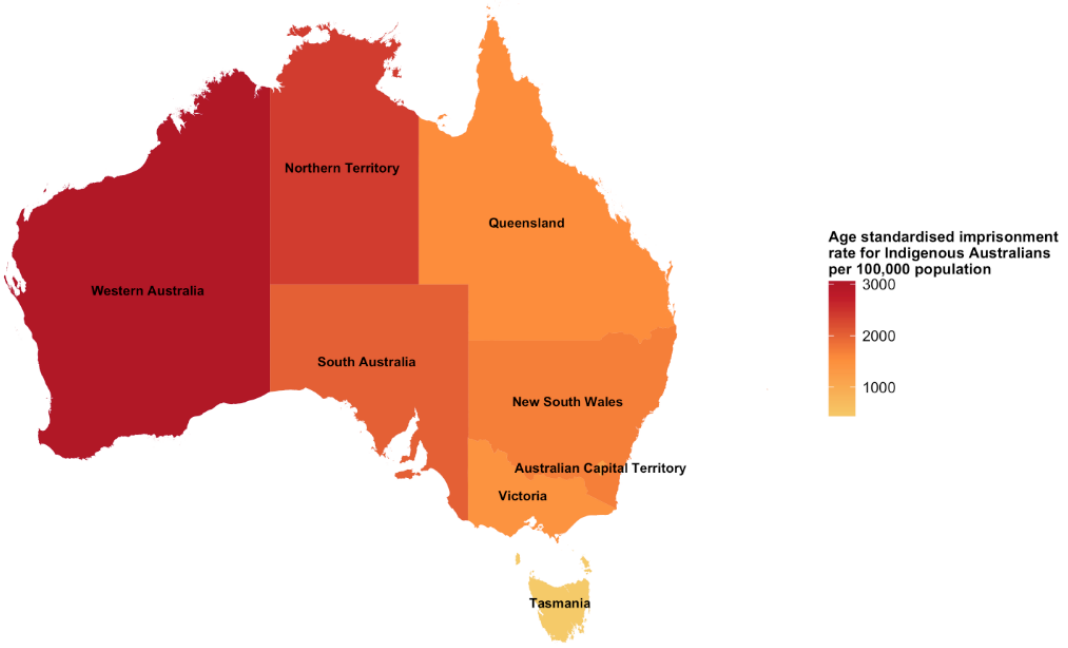
1. Introduction

The problem of Indigenous overrepresentation in the criminal justice system was first brought to Australia's attention by the landmark Royal Commission into Aboriginal Deaths in Custody (the Royal Commission). The Royal Commission attributed high levels of deaths of Indigenous persons in custody to extremely high rates of contact with the criminal justice system relative to the general population, making a reduction of Indigenous imprisonment central to its 339 recommendations (RCIADIC, 1991). Despite a suite of policy measures designed to address the recommendations being introduced since that time (for an overview see Cunneen & McDonald, 1997), and a continued policy focus on reducing Indigenous overrepresentation in the criminal justice system (see eg SCAGWGIJ, 2010), almost 25 years later rates of Indigenous imprisonment continue to rise. Latest figures show a 52 percent increase in rates of Indigenous imprisonment across Australia over the past ten years (ABS, 2014)[1]. Even more concerning is that this compares to an increase of just 11 per cent for the general population. As shown by Figure 1 it is a problem that is not spread evenly across the country, meaning that the ratio of the Indigenous imprisonment rate to the non-Indigenous imprisonment rate varies from a high of 18.1 in Western Australia to a low of 3.5 in Tasmania.

Rising imprisonment rates stands out in recent reporting on the Coalition of Australian Government's (COAG, 2008) agreement to 'close the gap' in Indigenous disadvantage, which shows (some) progress in key areas such as employment, education and health (SCROGSP, 2014). This anomaly has not escaped the attention of Indigenous groups, with calls intensifying for the introduction of justice targets as part of the closing the gap agenda; as well as the introduction of novel approaches to improve Indigenous justice outcomes such as justice reinvestment schemes (see eg Aboriginal and Torres Strait Islander Social Justice Commissioner, 2014; McConnel, 2015). However, latest indications are that the Federal Government is unlikely to act on these calls anytime soon. On the contrary, cuts to justice related Indigenous services are likely as part of reforms announced in the 2014-2015 Budget to centralise and cut funding to Indigenous services by $534 million (The Treasury, 2014).

[1] Age standardised imprisonment rate per 100,000 of adult population.

FIGURE 1 **INDIGENOUS IMPRISONMENT RATES, BY STATES AND TERRITORIES 2014**



SOURCE: PRISONERS IN AUSTRALIA, ABS CATALOGUE 4517.0 (ABS, 2014D)

Australia is not alone in its experience of rapidly increasing imprisonment rates. Many scholars have argued that the United States is experiencing an era of 'mass imprisonment' (Garland, 2001). One prominent theory developed to explain mass imprisonment is 'governing through crime'. Simon (2007) first developed the theory in the context of the war on crime in the United States, arguing that crime became a significant strategic issue, with the 'technologies, discourses and metaphors of crime' used to legitimise intrusive forms of governance (p. 4). As a result, criminalisation and imprisonment was increasingly used as a tool of social policy, with a focus on the risk of crime occurring as opposed to just actual crime. The theory argues that such an environment leads to increased levels of surveillance and punishments targeted at those on the margins of society seen as high risk or dangerous.

A number of Australian scholars have applied the theory of governing through crime to the context of rising Indigenous imprisonment (see Anthony, 2010; Baldry et al, 2013; Cunneen, 2011). In particular criminologist Chris Cunneen has argued that rising Indigenous imprisonment is due to an increasingly punitive and risk based criminal justice system, as manifested in harsher sentencing, limitations on judicial discretion, restrictions on bail eligibility, changes in parole surveillance, limited availability of non-custodial sentencing options and a general judicial and political perception of a need to be tough on crime (Cunneen, 2009, 2011a, 2011b).

What makes this idea so powerful is the implication of a disconnection between rising imprisonment and actual levels of crime and safety within the community — a finding which could have significant policy implications. However, evidence to support this claim remains limited. Some support is provided by a 2009 study of rising Indigenous imprisonment in New South Wales, which found that, rather than being due to increased levels of offending, increases were largely driven by longer sentences and increased numbers of Indigenous offenders being held on remand (Fitzgerald, 2009). However, this study does not provide supporting analysis of what criminal justice law and policy changes could have contributed towards harsher treatment, nor does it extend to other jurisdictions. Separate research documenting criminal justice legislative trends has tended to take a narrow focus on specific areas of law such as bail (see eg Brown, 2013; Steel, 2009). No studies as yet have attempted to systematically construct evidence as to overall trends in criminal justice law and policy and their impact on Indigenous imprisonment, nor has research adequately addressed the question of why changes might lead to such disproportionate impacts on the Indigenous population.

2. This study

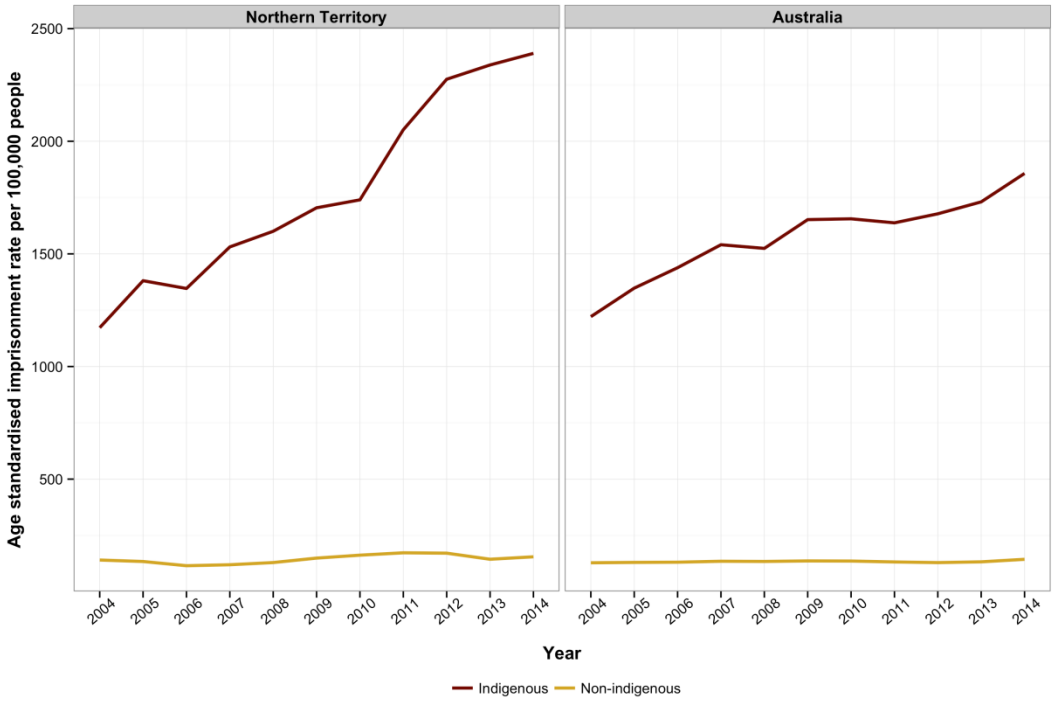
2.1 Research questions and case study

This thesis tests the hypothesis that governing through crime and a shift towards a more punitive law and order culture is contributing towards rising Indigenous imprisonment. It does so by firstly asking what criminal justice system law and policy changes have been implemented that could have contributed towards rising Indigenous imprisonment and secondly by asking why these changes could have disproportionately impacted Indigenous persons.

These questions are examined through a case study of the Northern Territory. Indigenous imprisonment has been rising in the Northern Territory much faster than the rest of the country, with rates more than doubling in the past ten years (see Figure 2 below). The high proportion of the population that is Indigenous — 30 per cent, compared to 3 per cent nationally (ABS, 2014a) — highlights the large impact of this increase. It has pushed the Indigenous imprisonment rate to the second highest in the country (see Figure 1) and

means that Indigenous prisoners now constitute 86 per cent of the total Northern Territory prisoner population.

FIGURE 2 **IMPRISONMENT RATES, NORTHERN TERRITORY AND AUSTRALIA 2004-2014**



SOURCE: PRISONERS IN AUSTRALIA, ABS CATALOGUE 4517.0 (ABS, 2014D)

Australia's federal system of government assigns responsibility for criminal law largely to the states, meaning that there are significant variations in law and policy across jurisdictions. However, the Australian Constitution gives exclusive power over territories (such as the Northern Territory) to the Commonwealth Government (section 122 – the 'territories power'). The Northern Territory can and does make its own laws under the Northern Territory (Self-Government) Act 1978 (Cth), but the Commonwealth Government may override these laws using the territories power. This means that the legislative context in the Northern Territory is distinctive from other jurisdictions, making it a unique case study.

2.2 Methodology

Research employed a mix of qualitative and quantitative methods through three stages: literature review, law and policy review, and data analysis.

The first stage reviewed academic literature which attempts to explain Indigenous overrepresentation in the criminal justice system in order to provide

a framework for the remaining analysis. The literature review focused on Australian sources, as well as some international sources where the Australia literature is thin.

The second stage undertook a detailed review and analysis of relevant criminal justice system law and policy changes in the Northern Territory over the past decade. Inquiry focused on areas of most relevance to Indigenous imprisonment, including sentencing, bail, parole, policing, diversionary programs, creation of criminal offences and drug and alcohol regulation. Sources included all relevant acts and subordinate legislation passed by the Northern Territory Government and, where relevant, the Commonwealth Government. Interpretation of legislative intent was aided by examination of explanatory memoranda and second reading speeches. Policy changes not implemented via legislation were identified through a review of other documents, which included Northern Territory Government Budgets, Northern Territory Police Annual Reports and Northern Territory Parole Board Annual Reports. Relevant case law from the Northern Territory Supreme Court was also examined in relation to sentencing. Minor legislative changes, such as those intended to aid interpretation, improve operation of existing legislation or make small procedural changes were excluded from analysis, as well changes that dealt only with the monetary value of penalties.

The final stage analysed data to provide context and help identify the impact of law and policy changes on the Indigenous population. Data sources included Northern Territory Department of Correctional Services (NTDOCC) annual statistics, Australian Bureau of Statistics (ABS) annual prison census data, Northern Territory Magistrates Court data, Northern Territory Parole Board statistics and Northern Territory Department of Attorney General and Justice (NTDOAGJ) reported crime statistics. Data metrics of interest included reported crime, sentences and average sentence length by offence type, number of prisoners held on remand; number of bail breaches; usage of non-custodial sentencing options; and parole releases.

2.3 Limitations

Research on Indigenous contact with the criminal justice system is challenging due to high complexity and interactions across a range of policy fields. As a result there are a number of limitations in the methodology. Firstly,

analysis is confined to the influence of the criminal justice system, while at the same time acknowledging that the overall rate of Indigenous imprisonment is the product of a range of broader social and economic factors. As such, care should be taken in interpretation, with results suggesting areas for further inquiry rather proving causal linkages. Secondly, it is important to highlight that as the contextual circumstances of the Northern Territory are very unique within Australia findings are not expected to be directly applicable to other states and territories. Nevertheless, it is hoped that the process will have broader relevance by drawing attention to the issues involved and the need for this type of analysis in other jurisdictions. Thirdly, research has been constrained by the fact that it is a desktop review only. While this method enables comprehensive analysis of change at the legislative level, it is recognised that some types of policy changes, in particular in relation areas such as police practices, occur at an internal level and may not be evident in desktop based research. Finally, analysis was hampered to some extent by a lack of available data, as well as cases of a lack of comparability for some data across reporting periods. These data gaps are acknowledged as appropriate, and where possible additional sources of information are used.

3. Explaining Indigenous overrepresentation in the criminal justice system

Theories on the reasons for disproportionate Indigenous contact with the criminal justice system can be broadly divided along two perspectives: termed here ‘empiricist’ and ‘contextual.’

The empiricist perspective explains Indigenous contact with the criminal justice system through a range of social and economic risk factors. The criminal justice system is viewed through a neutral lens, with Indigenous overrepresentation attributed to Indigenous people being more often involved in crimes that warrant imprisonment, which in turn is linked to a high prevalence of social and economic risk factors among the Indigenous population (see eg Weatherburn, Fitzgerald, & Hua, 2003). Research has identified key determinants to include substance abuse, unemployment, poor school performance, welfare dependence and membership of the stolen generation (Vivian & Schnierer, 2010; Weatherburn, Snowball, & Hunter, 2006). Most recently Weatherburn (2014) employed this perspective to argue that

addressing Indigenous overrepresentation requires a focus on addressing the underlying determinants of crime, with a priority on reducing substance abuse, improving school attendance and providing better offender rehabilitation programs. This has been an influential view in federal politics of late, as evidenced by Prime Minister Tony Abbott stating in relation to the issue of rising Indigenous imprisonment that the 'total preoccupation' of the government is school attendance and employment (Davidson, 2015b).

The contextual perspective locates Indigenous contact with the criminal justice system within a 'historical framework formed by processes of colonial dispossession, genocide and assimilation' (Blagg, 2008). As a result of a range of historical and cultural factors application of seemingly neutral laws and policies disadvantages and targets Indigenous people, contributing to overrepresentation. The reasons for this are rooted in Australia's colonial history and a nation building process that hinged on oppression, violence and discrimination against Indigenous peoples, leading to marginalisation and vulnerability to the state (Cunneen, 2009). Law and the criminal justice system have an important role to play in this narrative as a tool used by the dominant social group to manage and control the Indigenous population. During this process the dominant social group 'necessarily project certain fantasies and anxieties of their own — images of the dangerous other, self-images of respectability and decency…and "realise" these projections in the practices of institutions' (Garland, 2004, p. 172). As a result Indigenous persons are 'transformed into a "law and order" threat to national unity' (Cunneen & Cook, 2011).

Different underlying reasons for Indigenous overrepresentation provided by the contextual perspective necessitate a different policy response. The implication is that real progress requires Indigenous empowerment, with a focus on rebuilding Indigenous identity and social control: a so called 'decolonisation of justice' of (Blagg, 2008). Specific measures to achieve this include self-policing, Indigenous sentencing courts, and the involvement of community elders and Indigenous practices in the trial process.

The contextual perspective has been dismissed by empiricist proponents as lacking support of any substantive evidence of systematic racism (see Weatherburn, 2014). It is true that robust empirical evidence in the

Australian context is somewhat lacking. Empirical research has largely been confined to studies which have searched for discrimination in judicial sentencing decisions (see eg Bond, Jeffries, & Weatherburn, 2011; Jeffries & Bond, 2010; Snowball & Weatherburn, 2007). Results of these studies have been mixed and subject to criticism as a result of methodological limitations (see eg Baldry et al 2013), on the whole providing limited evidence of direct judicial discrimination in sentencing Indigenous offenders. However, this alone does not dismiss the contention that the criminal justice system acts in a discriminatory manner. Imprisonment is the final step in a cumulative process involving discretionary decision making by a range of actors, including police and prosecutors. Empirical studies on the impact of Indigeneity at other points in the justice system are scarce in the Australian context, however the international literature does suggest that pre-sentence decision making can ultimately lead to substantial racial disparity in criminal justice system outcomes (see eg Fitzgerald & Carrington, 2011; Starr & Rehavi, 2013). United States empirical research also provides support for the idea that the white majority view problems of crime through a racialised lens, and that race is a significant contributing factor to imprisonment rates (see Smith, 2008; Unnever & Cullen, 2010).

Drawing on evidence provided by the international literature suggests that the empirical perspective and its race neutral lens is overly simplistic. As much was recognised by the Royal Commission through its central finding that a multitude of factors, both historical and contemporary, interact to cause Indigenous overrepresentation (RCIADIC, 1991). The social and economic factors underlying high rates of offending are themselves inextricably linked to the historical context that has led to existing high levels of marginalisation and entrenched disadvantage among Indigenous persons. This dimension of the race and crime relationship is overlaid by a popular perception of problems of crime through a race coloured lens, which can manifest itself through law and order policies and practices that disproportionately impact Indigenous persons. As such, the analysis of this thesis takes place through a framework that recognises the complexity of the relationship between race and crime. It assumes that law and policy changes that appear neutral may have differential impacts according to race, and that these differential impacts are the result of

both different population characteristics and a political environment sensitive to a perceived threat of racialised crime.

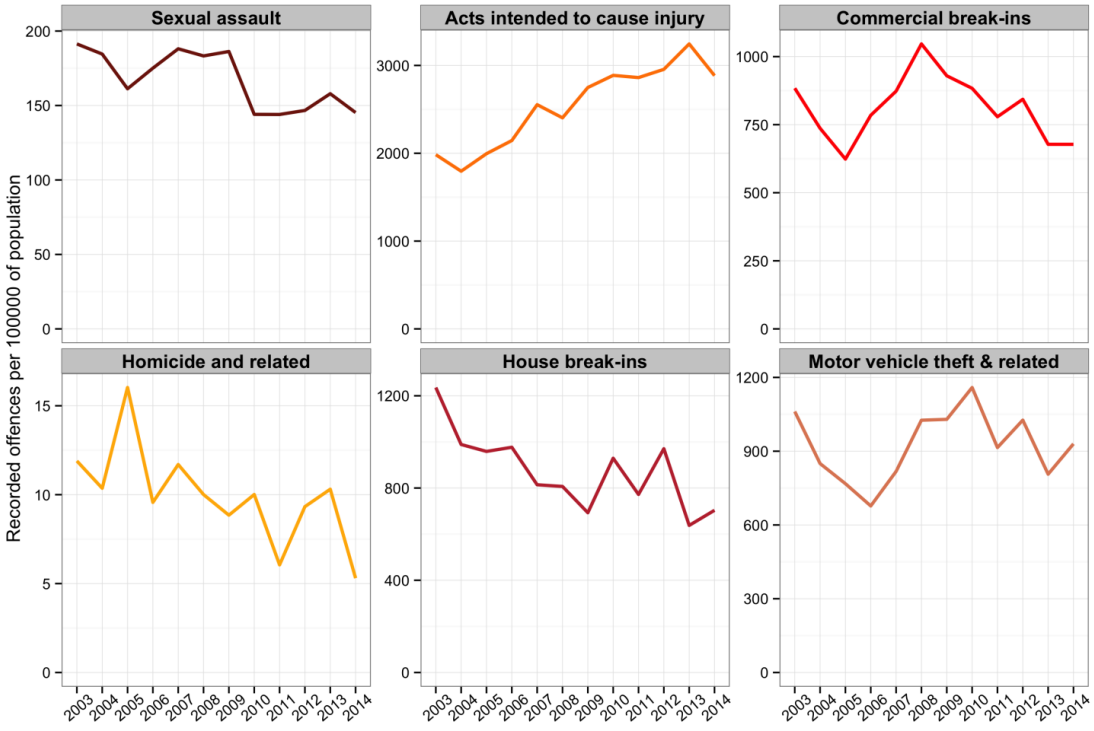
4. What criminal justice law and policies changes could have contributed to rising Indigenous imprisonment?

4.1 Context

Crime rates in the Northern Territory persistently outstrip other states and territories: in 2013 assault victimisation rates were triple that of any other state or territory and the murder rate was six times the national average (ABS, 2013). As a result of high crime levels politics in the Northern Territory has long been awash with a tough on crime rhetoric. Both major parties have campaigned and won elections on such a platform. Most recently, the Country Liberal Party returned to power in 2012 after campaigning on a promise to 'crackdown on crime' by ten per cent.

Despite continued prominence of concerns about crime in the political sphere, analysis of long term crime rates shows that for most offence types crime is on a downwards trend. This is illustrated by Figure 3 below, which shows rates of reported crime for key offences in the Northern Territory since 2003. Over this period there has been a general downwards trend for homicide, sexual assault, and house break-ins. Crime rates for commercial break-ins and motor vehicle theft peaked in 2008 and 2009 respectively and have trended downwards since that time. The exception is rates of recorded assault, which increased 65 per cent between 2003 and 2013 before dipping slightly in 2014.

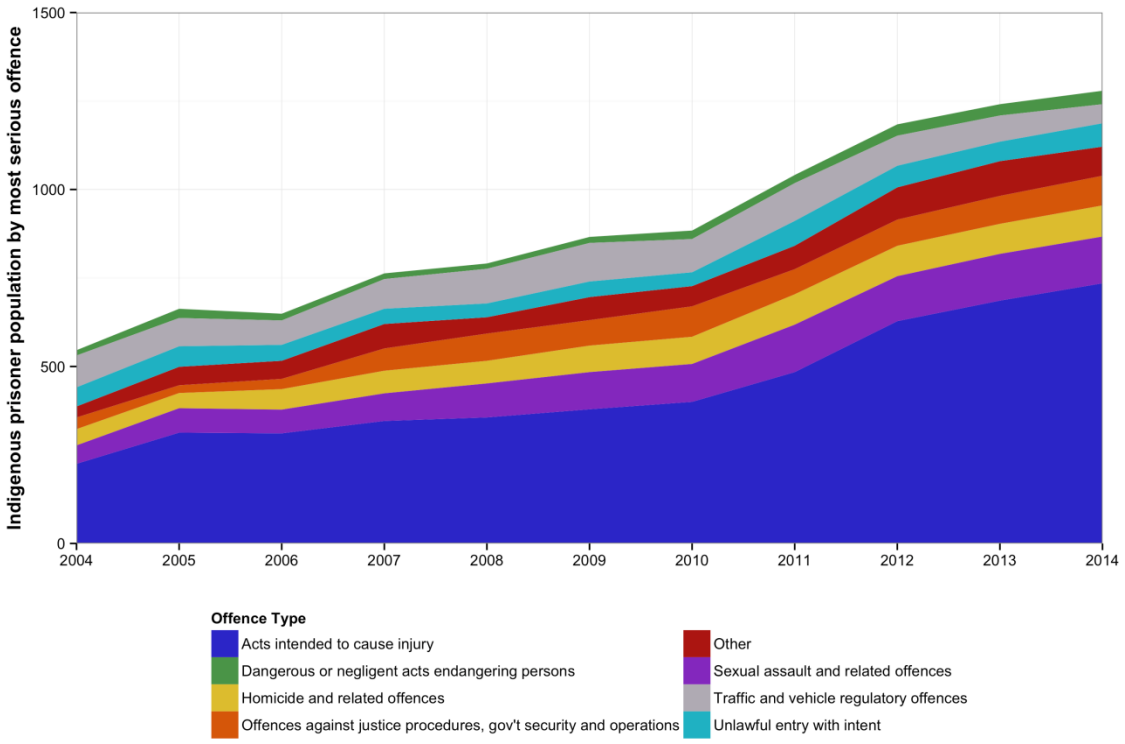
FIGURE 3 **TRENDS IN RECORDED CRIME IN THE NORTHERN TERRITORY 2003-2014**



SOURCE: NTDOAGJ, 2013, 2015

Growth in Indigenous imprisonment has been overwhelmingly driven by the offence acts intended to cause injury (assault). Indigenous prisoner numbers for this offence grew 227 per cent from 2004 to 2014, constituting 71 per cent of the total growth in Indigenous imprisonment (see Figure 4). Other areas of significant growth were sexual assault and related offences and offences against justice procedures, which grew 154 per cent and 155 per cent respectively. The only offence category to see a decline in prisoner numbers was ‘traffic and regulatory offences’, with prisoner numbers declining by 40 per cent between 2004 and 2014.

FIGURE 4 **NORTHERN TERRITORY INDIGENOUS PRISON POPULATION, BY MOST SERIOUS OFFENCE 2004-2014**



Note: Prison population measured as at 30 June each year.
SOURCE: ABS CATALOGUE 4517.0, 2004-2014

Comparison of Figure 3 and Figure 4 suggests that changes in Indigenous imprisonment are out of step with crime levels. For some key offences, including sexual assault and unlawful entry with intent, prisoner numbers are growing rapidly despite reported crime trending downwards. While the rate of recorded assaults has risen, the Indigenous prison population has grown far more rapidly, suggesting that the rise in imprisonment for acts intended to cause injury cannot be explained by increased offending alone. This confirms that the rise in imprisonment is not a direct function of increased offending. Broader features of the criminal justice system may also be playing a role, including police numbers and practices, prosecution procedures, sentence length, use of non-custodial sentencing options, bail eligibility and parole. The settings of these broader features are in turn critically linked to public concerns about high crime levels in the Northern Territory, creating a political environment where it is desirable to be seen as tough on crime.

An overwhelming prevalence of the socio-economic problems that link closely with crime are well documented in Northern Territory Indigenous communities. Around 80 per cent of the Indigenous population live in areas that are considered remote or very remote (ABS, 2014a). According to the Socio-Economic Indexes for Areas (SEIFA) these remote areas are among Australia's most disadvantaged (ABS, 2011). Indigenous persons in the Northern Territory are four times less likely to have completed year twelve, two and a half times less likely to be employed and have an average median household income of around one third that of the non-Indigenous population (SCROGSP, 2014).

Since 2007 unprecedented levels of federal government control of Indigenous communities in the Northern Territory has been introduced under a raft of measures which are collectively known as the Northern Territory Emergency Response (NTER). The official catalyst for the NTER was release of the 'Little Children are Sacred' report by the Board of Inquiry into Aboriginal Sexual Abuse in June 2007. The report set out strategies to protect Indigenous children in the Northern Territory from sexual abuse, violence and neglect, focusing on localised interventions and genuine consultation with Indigenous communities (Wild & Anderson, 2007). The Federal Government responded swiftly to the report, declaring a state of 'national emergency' across Northern Territory Indigenous communities in order to 'ensure the protection of Aboriginal children from harm' (Brough, 2007). Two months later this announcement was formalised by a package of legislation which included compulsory income management of welfare payments, compulsory acquisition of land leases in Indigenous communities, alcohol restrictions, restrictions on pornography and computer access and deployment of Australian Federal Police.[2]

A full examination of the NTER is outside the scope of this thesis, the remainder of which will examine only specific law and order measures contained therein. However, the NTER is symptomatic of a fundamental shift in

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[2] Measures were enacted by the Northern Territory National Emergency Response Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth) and Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth). This legislation expired after a period of five years, however measures were continued with only minor changes by the Stronger Futures in the Northern Territory Act 2012 (Cth).

the way problems in Indigenous communities are conceptualised and addressed by government, thus providing an important contextual backing for law and order changes. Problems of violence and sexual abuse in Indigenous communities have been well documented over a number of decades — the 'Little Children are Sacred' report itself recognised that there was nothing 'new or extraordinary' about the allegations it contained (Wild & Anderson, 2007 p.5). However, it was delivered into an environment of growing awareness about problems of sexual abuse in Indigenous communities, fuelled by a number of sensationalised media reports and claims by the then Minister for Indigenous Affairs, which were later proved to be unfounded, that there were 'paedophile rings' in Northern Territory Indigenous communities (McKenzie, 2009). Anthony (2013 p.108) has argued that within this context the report served to escalate a 'moral panic' that 'tapped into anxiety about unfinished colonialism'. In this way the report was a politically expedient means to legitimise an extraordinary range of interventions into Indigenous communities, many of which were directly contrary to the report's emphasis on localised responses and genuine consultation.

4.2 Sentencing

Mandatory imprisonment for violent offences and sexual offences has been in place in the Northern Territory since the late 1990's. Despite consistent criticism that mandatory sentencing is arbitrary and disproportionately impacts Indigenous persons (see eg UN Committee against Torture, 2014) the scheme has been intensified in recent years for violent offenders. The Sentencing Amendment (Violent Offenders) Act 2008 (NT) tightened the regime by preventing the court from suspending any part of a sentence for repeat violent offenders. Further amendments passed in 2013 by the newly elected Country Liberal Party widened the types of offenders subject to a mandatory term of imprisonment. The Sentencing Amendment (Mandatory Minimum Sentences) Act 2013 (NT) established five levels of violent offences, with mandatory sentences of varying lengths for all repeat offenders; as well as first time offenders committing all but a level one offence. During the Bill's second reading speech the Attorney General and Minister for Justice stated that the intention was to send a message to offenders that there 'is a mandated bottom

line' to the sentence that they will receive and demonstrate to the victims that the 'perpetrator will suffer the consequence of prison' (Elferink, 2012).

Judicial discretion has also been reduced via restrictions on the ability to take into account customary and cultural considerations in sentencing Indigenous offenders. From the 1970s the Northern Territory Supreme Court recognised disadvantage and 'social breakdown' in Indigenous communities as potential mitigating factors in sentencing decisions (Anthony, 2012). This was formalised by the Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT), which allowed consideration of Indigenous customary law or the views of members of the Indigenous community in sentencing an offender, subject to meeting certain procedural requirements. However, these arrangements were altered by the NTER Act 2007 (Cth)[3], which introduced a prohibition on the use of customary law or cultural considerations in determining the seriousness of the offence in sentencing Indigenous offenders.

The government told two stories to support this change: that there was an epidemic of culturally condoned sexual assaults in Indigenous communities and that leniency in criminal sentencing was contributing to the crime problem (Anthony, 2013). It should be noted that before these legislative restrictions were introduced Indigenous disadvantage as a mitigating factor in sentencing had been watered down by the Northern Territory Supreme Court, which has stressed a need to send 'the correct message' that 'Aboriginal women, children and the weak will be protected against personal violence' (Wurramara v R 1999)[4]. The language of the Supreme Court suggests a shift away from considering the individual circumstances of the offender towards a focus on the objective seriousness of the harm and the wider interests of the community. As argued by Anthony (2013), the often extremely disadvantaged context of Indigenous offending ceased to draw sympathy, instead leading to judicial condemnation of Indigenous communities for their supposed complicity in crime. As such, representations of Indigenous circumstances were 'channelled into a concern that 'Indigenous communities present a risk to their members who are putative victims' (Anthony, 2013 p.16).

[3] This Act was repealed in 2012 and equivalent provisions inserted to the Crimes Act 1914 (Cth) s.16AA.

[4] Wurramara v R (1999) 105 A Crim R 512.

A final punitive turn in relation to sentencing was introduced with the Serious Sex Offenders Act 2013 (NT), which enables the continued detention or supervised release of serious sex offenders who are deemed to be such an unacceptable risk to the community that regulation is warranted post sentence. In the second reading speech for the Bill the Attorney General acknowledged that recidivism rates for sex offenders are no higher than for other offences, instead justifying indefinite detention based on community concerns about the release of these kinds of offenders and potential 'devastating' impacts on victims (Elferink, 2013).

While difficult to make a precise assessment due to incompleteness of available data, what information is available does suggest a general increase in sentence lengths for Indigenous offenders in recent years. The median sentence length for Indigenous offenders for 'acts intended to cause injury' — which has been shown as the main driver of increased Indigenous imprisonment — remained flat at around 120 days between 2005-2006 and 2008-2009. Data for the past three years shows significantly higher median sentences, with a high of 169 and a low of 141 days. Other key offences also show substantial increases in recent years, in particular for unlawful entry with intent and breach of a justice order (see Table 1 below). This data is not sufficient to prove that increases in median sentence length are being driven by the law changes outlined in this section. However, it does provide an indication that increased sentence length is a contributing factor towards rising Indigenous imprisonment and that the reasons for this is an area for further inquiry.

TABLE 1 **NORTHERN TERRITORY SENTENCED EPISODE COMMENCEMENTS MEDIAN SENTENCE LENGTH (DAYS), INDIGENOUS OFFENDERS**

Offence	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
Acts intended to cause injury	135	119	118	120	120	-	-	165	169	141
Sexual assault and related	941	1247	1929	963	2189	-	-	1126	1917	1535
Unlawful entry with intent	-	-	-	101	122	-	-	213	151	152
Exceeding the prescribed content of alcohol	-	-	-	91	90	-	-	122	120	121
Driving licence offences	-	-	-	66	60	-	-	91	90	69
Breach of a justice order	-	-	-	11	27	-	-	55	41	31
Total	118	90	91	90	98	-	-	134	121	121

Note: Comparable data not reported for 2009-2010 and 2010-2011 and for some offences prior to 2007-2008. Large variations in sentence length for sexual offence is likely due to relatively low offender numbers.

SOURCE: NORTHERN TERRITORY DEPARTMENT OF CORRECTIONAL SERVICES, 2012, 2013, 2015; NORTHERN TERRITORY DEPARTMENT OF JUSTICE, 2005, 2006, 2007, 2008

4.3 Bail

A series of legislative amendments have tightened bail eligibility for repeat offenders accused of a serious violent offence or a serious sexual offence. The Bail Amendment (Repeat Offenders) Act 2005 (NT) introduced a presumption against bail for repeat offenders accused of serious violence while on bail for another serious offence; provisions which were broadened to all repeat violent offenders by the Serious Violent Offenders (Presumption Against Bail) Amendment Act 2008 (NT). Similar provisions were introduced in relation to serious sexual offences by the Bail Amendment Act 2007 (NT) and offenders with a repeat breach of a domestic violence order by the Bail Amendment Act 2015 (NT). The amendments in relation to sexual offences were framed as necessary to protect the community from violent crime, and to give 'women and children the right to feel safe from their alleged attacker' (Sterling, 2007).

Changes in the bail process for Indigenous defendants were also introduced by the NTER Act 2007 (Cth), which removed the ability for courts to

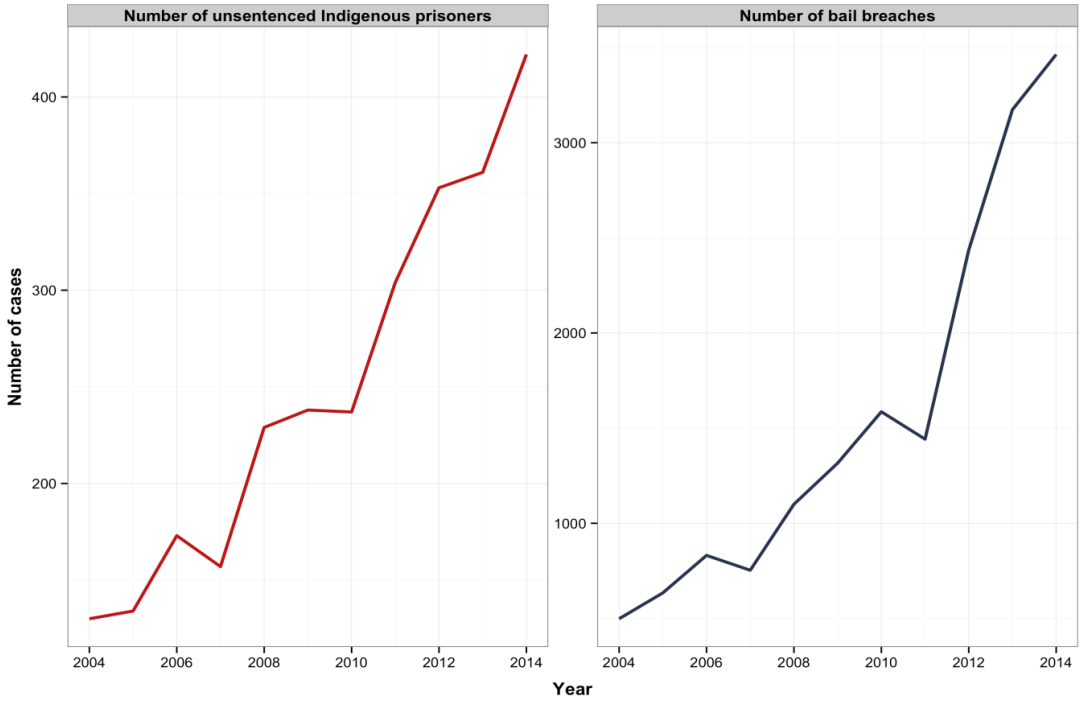
consider customary law or cultural practices in determining the seriousness of an offence in bail decisions. Similar to the sentencing amendments discussed in section 4.2 these amendments evidence a shift away from consideration of individual circumstances towards an emphasis on protection of the community. It is a trend that has been heavily criticised by justice groups in the Northern Territory, as well as in other jurisdictions, as focusing unduly on the nature of the offence and a person's history rather than a balanced assessment of whether a person should be released (NSWLRC, 2012; NAAJA, 2013).

In addition to tightened bail eligibility, penalties for those breaching bail were toughened by the Bail Amendment Act 2011 (NT). The Act created a criminal offence for a breach of bail, either by failing to appear or failing to comply with a bail condition, punishable by a maximum of two years imprisonment. The amendments were in response to police frustrations with juvenile offending in Alice Springs following a release on bail (Lawrie, 2011). For adults — who would generally be remanded in custody following a breach of bail in any case — it is likely that the amendment had little substantive impact beyond the creation of a new charge for each breach (Pyne, 2012). However for juvenile defendants there have been reports of a significant increase in numbers held on remand. As at 1 January 2013, 65 per cent of young Indigenous persons held in detention were on remand, with creation of the new offence combined with tough police enforcement of bail conditions pointed to as large contributors to this extremely high rate of remand (NAAJA, 2013).

Police practices in enforcing bail conditions is another important ingredient in the overall prison remand population. Crime reduction through bail breaching has been a core policing strategy in the Northern Territory over the past decade (Evenhuis, 2013). This strategy rests on the assumption that by taking individuals off the street through extremely pro-active enforcement of bail conditions they will be unable to reoffend, thus reducing overall crime levels. Enforcement occurs via daily (if resources allow) checks on conditions such as compliance with curfew and testing for compliance with drug and alcohol restrictions. Enforcement mechanisms were also strengthened by introduction of electronic monitoring and electronic voice recognition by the Justice (Corrections) and other Legislation Amendment Act 2011 (NT).

Consequently, there has been an alarming increase in the number of bail breaches reported by police (see Figure 5). The increase has been particularly rapid in recent years, with a 140 per cent increase between 2011 and 2014 alone. While a breakdown of these figures for Indigenous persons is not available, a range of factors particular to the cultural, geographic and socio-economic circumstances of Indigenous persons can contribute towards breach of bail, suggesting that intensive enforcement is likely to have had a heavy impact on Indigenous persons. For example, for many Indigenous persons English is a second or even third language, leading to significant language barriers and misunderstandings about the legal obligations surrounding bail (NAAJA, 2013). Bail conditions in the Northern Territory have also been criticised for failing to accommodate the common modes of behaviour and living circumstances of Indigenous persons, which can include problems of mobility and remoteness, as well as lack of a stable residential address (Evenhuis, 2013).

FIGURE 5 **TRENDS IN BAIL BREACH AND UNSENTENCED INDIGENOUS PRISONER NUMBERS, NORTHERN TERRITORY 2004-2014**



SOURCE: ABS CATALOGUE 4517.0, 2004-2014; NORTHERN TERRITORY POLICE ANNUAL REPORTS 2003-2004 TO 2013-2014

A rapid increase in the numbers of Indigenous prisoners held on remand (see Figure 5) — at a rate that far outstrips the growth in sentenced

prisoners — suggests that that tighter bail eligibility and more intensive enforcement may be having an impact on Indigenous imprisonment rates. The amount of Indigenous prisoners being held on remand in the Northern Territory increased 225 per cent between 2004 and 2014. This increased the proportion of total Indigenous prisoners being held on remand from 17 per cent in 2004 to 30 per cent in 2014 (ABS, 2014a). Increases in the remand population were particularly high for offences for which a presumption against bail was introduced. Around two thirds of the total increase in the Indigenous remand population was attributable to the offence acts intended to cause injury, with numbers growing 353 per cent between 2004 and 2014. For sexual assault there were just 8 Indigenous prisoners being held on remand in 2004, a number that increased to 49 by 2014 even considering a reduced number of recorded sexual assaults, suggesting that the introduction of a presumption against bail may have had an impact.

4.4 Regulation of alcohol

A burst of legislative amendments enacted in recent years have progressively tightened regulation of alcohol consumption in the Northern Territory. This has occurred at two levels: restrictions on the locations where alcohol can be consumed and individual restrictions for those with a history of public drunkenness or alcohol related offending.

Location based restrictions on alcohol

Restrictions on alcohol consumption in Northern Territory Indigenous communities is nothing new: since the late 1970's more than 100 communities have voluntarily banned or restricted consumption of alcohol under provisions of the Liquor Act 1978 (NT). However during the past decade there has been a marked shift in alcohol restrictions towards top down controls and increasing levels of criminalisation. The impetus for this shift was the 'Little Children are Sacred' report and associated media coverage where report author Pat Anderson was quoted as saying that 'alcohol is absolutely and totally destroying our communities and our families…something serious needs to be done to curb this river of grog' (Anderson, 2007).

The metaphor 'rivers of grog' was quickly adopted by politicians and the media to justify a change in in approach to alcohol regulation in Indigenous communities under the NTER Act 2007. Blanket restrictions on alcohol

consumption were introduced through creation of a criminal offence for the consumption, control or possession of alcohol on Indigenous lands. These restrictions directly overlaid any voluntary restrictions already in place. The Stronger Futures in the Northern Territory Act 2012 (Cth) continued the restrictions in substance, with some amendments including increased penalties for possession of alcohol on Indigenous land of up to six months imprisonment for a single can of beer and 18 months for more than 1.35 litres of alcohol and the ability for restrictions to be displaced by voluntary arrangements.

Changes by the Northern Territory Government complemented the Commonwealth restrictions. The Liquor Legislation Amendment Act 2007 (NT) further widened the restrictions provided for under the Commonwealth legislation, which applied to Indigenous communities only, by creating a Ministerial power to declare 'special restricted areas'. In special restricted areas no liquor can be bought, possessed, consumed or disposed of without a licence or permit with breaches punishable by a $1,000 fine or 6 months imprisonment. Police powers of enforcement were aided by amendments which allow for police to search vehicles or people suspected of breach. These special restricted areas had a very different flavour to existing general restricted areas, which are declared through a cooperative approach involving the community, rather than simply imposed by the Minister. The second reading speech for the Bill couched its introduction as part of the government's 'commitment to protecting Indigenous children from any form of abuse' (Burns, 2007).

Blanket criminalisation of alcohol consumption on Indigenous land was blatantly discriminatory, even requiring Commonwealth legislation to explicitly exclude operation of the Racial Discrimination Act 1975 (Cth). As much was recognised by the NTER Review Board, which found that the alcohol restrictions 'ran over the top of existing arrangements without consideration of the impact on them and did so in a manner that was racially discriminatory' (NTER Review Board, 2008). Furthermore, research has suggested that interventions imposed without control of the local Indigenous community are unlikely to be effective (see Gray & Wilkes, 2010), drawing into question effectiveness of the restrictions in achieving their goal of reducing alcohol related harm (Walker, 2012). As a side effect to all this is concerns, as expressed by the Australian Human Rights Commission (2012), that the restrictions may result in higher Indigenous imprisonment. These concerns are

supported by findings of the NTER Evaluation (FaHCSIA, 2011), which found that there were clear increases in alcohol related offences in NTER communities in the post NTER period, including those offences created by the NTER.

Individual restrictions on the supply or consumption of alcohol

An extra layer of alcohol regulation has been added in recent years through introduction of restrictions targeted towards individual problem drinkers. Banning Alcohol and Treatment (BAT) notices, introduced by the Alcohol Reform (Prevention of Alcohol Related Crime and Substance Misuse) Act 2011 (NT), prohibited individuals from possessing, purchasing or consuming alcohol. They could be issued by the police to persons charged with an alcohol related offence or held in alcohol related protective custody at least three times in the previous three months. Enforcement occurred by listing those subject to a BAT notice on a Banned Drinkers Register (BDR) and preventing the sale of alcohol to anyone on the register. The onus was placed on licensees to conduct identification checks by introducing an offence for selling alcohol to anyone on the BDR. Consistent with the objective, as stated in the explanatory statement, of prevention, rehabilitation and reduction of harm, breaching a BAT notice was not a criminal offence, with penalties only leading to an extension of the BAT notice period.

The BDR was removed in August 2012 as part of an election promise by the Country Liberal Party, a move that sparked widespread condemnation, including from then Prime Minister Julia Gillard who stated that she ‘feared "rivers of grog" that wreaked havoc among indigenous communities were beginning to flow again’ (Gillard, 2013). A new regime was introduced in 2013 through the Alcohol Protection Orders Act 2013 (NT) and Alcohol Mandatory Treatment Act 2013 (NT).

Alcohol Protection Orders can be issued by the police where an individual is charged with an alcohol related crime which carries a penalty of six months or more. They prohibit consumption or possession of alcohol, as well as the entering of licenced premises. While providing similar types of prohibition to the repealed BAT notices, the underlying approach and hence outcomes of Alcohol Protection Orders differ dramatically. Unlike BAT notices, breach is a criminal offence, punishable by three months imprisonment. The enforcement

mechanism also varies — rather than enforcement at the level of supply by licensees, the onus is placed on the individual. A police practice of stationing officers outside of bottle shops to check Alcohol Protection Orders (NT Police Fire and Emergency Services, 2014) suggest that this onus is being energetically enforced. As at 30 June 2014 there were 927 persons on an Alcohol Protection Order (NT Police Fire and Emergency Services, 2014). A breakdown of Alcohol Protection Orders according to Indigenous status is not available, however reports have suggested that Alcohol Protection Orders are being handed out like 'lolly paper', predominantly to Indigenous people (Coggan, 2014).

The Mandatory Alcohol Treatment Act 2013 (NT) provides for the mandatory assessment, treatment and management of misusers of alcohol. Mandatory treatment is triggered where an individual has been in police protective custody for public intoxication three times in two months. The process can include admission and detention at an assessment centre for the purpose of assessing treatment options, which can include secure residential treatment, community residential treatment and income management. The original legislation included an offence for absconding from a treatment centre, punishable by up to three months imprisonment. The offence provision was removed in 2014[5] following heavy criticism that it criminalised what is inherently a health issue, creating new pathways into the criminal justice system for already vulnerable individuals (see eg APONT, 2013). No data is publicly available on the amount of people who were charged with absconding during operation of the offence provision, making it difficult to assess whether it had a direct impact on the prison population.

While the legislation regulating individual alcohol consumption is drafted in a neutral manner, a consideration of the operational context suggests an undeniable racial tinge to the laws. Alcohol restrictions in Indigenous communities and town camps mean that Indigenous people are unable to drink in their own homes, pushing problem drinkers into the streets of Northern Territory towns. The majority of people sleeping rough in Northern Territory towns are Indigenous itinerants, known as 'long grassers', visiting from remote areas. As a result measures such as Mandatory Alcohol Treatment which are

[5] Alcohol Mandatory Treatment Amendment Act 2014 (NT), clause 11.

targeted at public drunkenness overwhelmingly impact Indigenous persons. This is confirmed by the fact that around 90 per cent of individuals taken into protective custody by the Northern Territory police — the trigger for Mandatory Alcohol Treatment — are Indigenous (NTDOAGJ, 2012). In relation to Alcohol Protection Orders a disproportionate impact on Indigenous persons also arises due to the already extremely high rates of contact of Indigenous persons with the criminal justice system, including high rates of alcohol related crime. On this basis Alcohol Protection Orders are currently being challenged in the Northern Territory Supreme Court as racially discriminatory (Davidson, 2015a), however at the time of writing judgement was yet to be handed down.

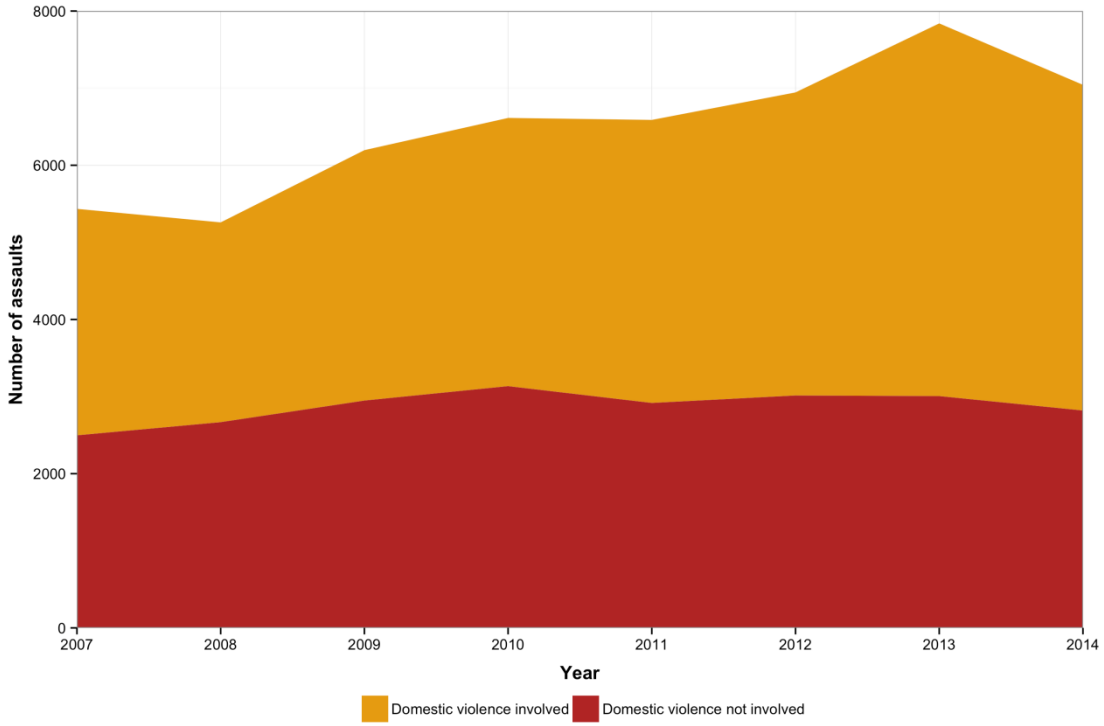
Introduction of Alcohol Protection Orders and Mandatory Alcohol Treatment moved away from treating alcoholism as a social and health problem towards a criminal justice approach to alcohol regulation — a shift that has been criticised by many as the effective criminalisation of alcoholism (see eg Buckley, 2013). The actual impacts of these alcohol restrictions on the prison population are unclear based on available data. However, the nature of the orders is likely to lead to an overwhelmingly disproportionate impact on Indigenous persons, which would flow through to any increase in the prison population. At a more subtle level, applying a punitive regime for alcohol consumption which uses police as a point of entry is likely to increase negative interactions between Indigenous people and the police, which could damage the already fragile relationship between police and Indigenous communities and have flow on effects for Indigenous contact with the criminal justice system.

4.5 Domestic violence

Around 60 per cent of all assaults in the Northern Territory are associated with domestic violence (NTDOAGJ, 2015), making law and order responses to domestic violence a central component of the criminal justice system. This is particularly the case for the Indigenous population, among which an extremely high prevalence of domestic violence is well known. In 2011-2012 Indigenous females made up 73 per cent of all domestic violence victims in the Northern Territory, experiencing domestic violence at a rate almost 23 times that of non-Indigenous females (NTDOAGJ, 2012). During the same year, among all Indigenous victims of assault domestic violence was associated with 82 per cent of female victims and 54 per cent of male victims (NTDOAGJ,

2012). The importance of domestic violence to rising Indigenous imprisonment is further highlighted by the fact that increases in reported assaults in recent years — the offence that contributes most towards Indigenous imprisonment — are overwhelmingly attributable to assaults which are associated with domestic violence (see Figure 6).

FIGURE 6 **NORTHERN TERRITORY ANNUAL RECORDED ASSAULT OFFENCES BY DOMESTIC VIOLENCE ASSOCIATION**



Note: Data breaking down assaults according to domestic violence associated not reported prior to 2007.
SOURCE: NTDOAGJ, 2013, 2015

Increased recorded assaults associated with domestic violence have occurred against a backdrop of significant policy change. In 2007 a new domestic violence regime in the Northern Territory was introduced by the Domestic and Family Violence Act 2007 (NT). The Act extended the range of relationships covered by the domestic violence regime, as well as making a range of other procedural changes, with an intention to ensure the safety of people who experience domestic violence as well as to ensure that perpetrators accept responsibility for their actions (Sterling, 2007). It also increased the maximum penalty for breach of a domestic violence order from six months to two years imprisonment, with a requirement to impose an actual term of imprisonment for a second or subsequent breach of a domestic violence order

where harm has been cause to the victim. Further changes were introduced two years later by the Domestic and Family Violence Amendment Act 2009 (NT), which created an offence for adults that do not report domestic violence to the police if they think someone has, or is likely to, suffer serious physical harm from domestic violence.

On top of these legislative changes, significant changes have occurred in police practices in responding to domestic violence. In 2012 the Northern Territory Police introduced Project Respect, a 'zero tolerance and pro-arrest' approach to domestic violence (NT Police Fire and Emergency Services, 2013). Under this approach when police respond to an incident where a victim has signs of having been assaulted but is unwilling to press charges the police actively initiate a charge and take the incident to court. This was a significant change from the approach prior to April 2012, under which police would generally not initiate proceedings if the victim did not wish to pursue a charge. Introduction of this policy coincided with a 23 per cent jump in the number of recorded domestic violence associated assaults between 2012 and 2013, at the same time as the number of assaults not associated with domestic violence remained steady (NTDOAGJ, 2015).

Apart from the obvious impact of increased sentences, mandatory reporting and pro-arrest practices on the Indigenous population as a result of a very high relative prevalence of domestic violence, a number of cultural factors suggest a heavy impact. Research has shown that Indigenous women are often reluctant to report domestic violence due to the nature of family and kinship relationships, as well as a fear of subsequent intervention by child protection authorities and removal of children (Cuneen, 2009). This suggests that that the changes would bring more Indigenous families within the net of criminal justice system responses to domestic violence. While this may, on the one hand, be seen as a positive development in providing Indigenous persons, in particular Indigenous females, with greater protection from the law against violence, an alternative reading suggests that mainstream criminal justice responses to domestic violence are entirely inappropriate to the Indigenous cultural context and may even exacerbate problems.

Indigenous perspectives on domestic violence are based on different understandings and explanations of the reasons for violence and as such call

for different responses (Cunneen & Cook, 2011). These approaches do not necessarily place the criminal justice system at the centre, instead emphasising impacts on the family as a whole and healing and re-integration of offenders (Blagg, 2008). In practice this will generally involve a combination of elements of Indigenous and non-Indigenous law. When looked at through this perspective it is unclear whether bringing more Indigenous persons within the criminal justice system through the domestic violence regime achieves its objective of making the community safer, or simply exacerbates community tensions, separates families and risks further violence from perpetrators that return from prison more violent than before.

4.6 Non-custodial sentencing options

Over the past decade a number of diversionary programs have been introduced, however some have been short lived and overall evidence of effectiveness in reducing the prison population is very weak. First up was the Alcohol Court Act 2006 (NT), which established a specialist court with power to make orders for alcohol dependent defendants facing a likely term of imprisonment. This could mean full or partial suspension of a prison sentence on the condition of treatment for alcohol dependency or rehabilitation. While promising on paper, a deeper analysis suggests that the actual impact of the Alcohol Courts on imprisonment was marginal at best. The orders were criticised as not offering any advancement on the conditions that could be attached to a regular suspended sentence, as well as requiring a lengthy assessment process during which time the offender was generally held on remand (Pyne, 2012 p.6).

The Alcohol Court was replaced by the Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court 'SMART') Act 2011 (NT), which provided enhanced powers to make alternative sentencing orders for people with a history of substance abuse. Despite being broadly supported by justice groups in the Northern Territory as a more rehabilitative and restorative approach to justice (see eg Buckley, 2013; Pyne, 2012), usage of the SMART Court was low and it was abolished by the newly elected Country Liberal Party in 2013 after only 18 months of operation. Low usage was at least partly a result of exclusion by regulations of violent offenders from the court's operation, which, as shown earlier, make up the majority of the Indigenous prison

population. Low usage in relation to Indigenous defendants has also been blamed on low referral numbers due to a lack of cultural appropriateness (Pyne, 2012). Even considering low usage levels abolition of the SMART Court is notable in that it left the Northern Territory without a single specialised court to deal with problems of substance abuse — a startling omission considering that around 60 per cent of assaults in the Northern Territory involve alcohol (NTDOAGJ, 2015).

Two new sentencing options were introduced by the Justice (Corrections) and other Legislation Amendment Act 2011 (NT): community based orders and community custody orders. Both are targeted towards non-violent, non-sexual offenders facing imprisonment of up to 12 months to enable sentences to be carried out under the supervision of community corrections and can include community work, rehabilitation and training requirements. Introduction of the new orders was applauded by Northern Territory justice groups (see eg Collins & Barson, 2011). However, data on usage of the orders suggests that stringent eligibility requirements may be limiting their impact. Only 7 community based orders were issued in 2013-2014. Usage of community custody orders has picked up the past two years, with 82 orders issued in 2013-2014. However this has occurred at the same time as a decrease in usage of home detention, suggesting the impact may have been a shifting of sentencing options as opposed to new diversions (see Appendix Table A1).

A finding that the new orders have had a limited impact is supported by analysis of the overall usage of non-custodial sentencing options. Between 2005 and 2014 there was a 28 per cent increase in the Indigenous community based corrections population (ABS, 2014a) — a very small increase when compared with changes in the custodial population. This suggests that in recent years, despite the availability of new sentencing options, there may even have been a decrease in the propensity of the courts to use non-custodial versus custodial sentencing options. Analysis of sentencing outcomes in the Northern Territory Magistrates Court (which hears the bulk of criminal matters) supports this contention. The overall proportion of defendants proven guilty receiving a custodial order has jumped in the past three years, rising from a previously steady rate of around 30 per cent to 36 per cent. Increases are also apparent in key offence categories: between 2005 to 2014 the percentage of custodial orders increased from 77 per cent to 81 per cent for acts intended to cause

injury; 28 per cent to 37 per cent for theft; and 32 per cent to 43 per cent for breach of a justice order (see Appendix Table A2). The only offence category where the proportion of custodial sentences has decreased is traffic and regulatory offences — one of the few offence categories that can benefit from the new non-custodial sentencing options.

These figures are not available broken down according to Indigenous status, however, given that around 80 per cent of defendants before the magistrates court are Indigenous (ABS, 2015), an impact on the Indigenous prison population from an increased propensity to use custodial sentencing options can be presumed. The reasons for this may to some extent be related to law changes which have reduced judicial discretion (as discussed in section 4.2). Another possibility is that it may be a judicial reaction to the political mood and a perceived need to be tough on crime, as expressed by the former Attorney General Delia Lawrie's claim that 'sexual and violent offenders ought to go to jail, not off into a therapeutic drug and alcohol rehabilitative program' (Hind, 2011). Most likely it is the combined impact of a range of factors which have meant that, within the current policy environment imprisonment is the dominant response to the crimes most often committed by Indigenous offenders.

4.7 Parole

The amount of prisoners released on parole in the Northern Territory has not moved in line with the prison population. Numbers fell sharply in 2005 and remained very low until 2010, then increasing again in the past three years. Analysis of data on parole releases and applications over this time suggests that falling numbers of prisoners released on parole was not due to lower application numbers (with exception of 2009), but was in a large part due to a declining propensity for applications to be granted (see Appendix Table A3). However, the most recent available data for 2012 and 2013 suggests that this trend has been reversed, with the ratio of applications to releases similar to 2004 levels. The reasons for this are unclear based on available information. Changes to the legislative framework do not provide an explanation, with changes largely limited to amendments enabling an increase in the number of

members on the Parole Board.[6] It is possible that internal procedures and practices of the Parole Board have an important role to play here, which in turn may reflect the political mood or changes in public opinion in relation to releasing prisoners on parole.

For prisoners that are released there seems to be an increased risk of quickly returning to prison. By the end of 2004 parole orders had been revoked for 19 per cent of prisoners released on parole that year, while a further 19 per cent had completed their orders and the balance of orders remained active. In 2013 the per cent of parole orders revoked by the end of the year had increased to 38 per cent, with completion of just 7 per cent of orders. One factor underlying this trend could be an increased tendency towards attaching additional conditions to parole orders. Comparison of the conditions attached to parole orders in 2013 and 2004 shows that the per cent of orders with various types of conditions attached has generally increased, with particularly pronounced increases in non-consumption of alcohol, general counselling and nil victim contact (see Table 2 below).

TABLE 2 **PER CENT OF PRISONERS RELEASED ON PAROLE WITH ADDITIONAL CONDITIONS ATTACHED: 2004 AND 2013**

Type of condition	2004	2013
Non-consumption of drugs	37%	44%
Non-consumption of alcohol	67%	85%
Breath testing	67%	85%
Urinalysis	37%	44%
Residence - treatment/program	32%	50%
Residence - community/outstation	31%	33%
Counselling - sex offenders	1%	0%
Counselling - general	12%	77%
Counselling - other	31%	11%
Nil contact - victim	4%	48%

SOURCE: PAROLE BOARD OF THE NORTHERN TERRITORY, 2005, 2014

[6] Parole of Prisoners Amendment Act 2013 (NT)

Indigenous persons constitute around 75 per cent of all prisoners released on parole in the Northern Territory (Parole Board of the Northern Territory, 2014). Research has suggested that Indigenous persons may face particular barriers in applying for and complying with parole, in particular where a large amount of stringent conditions are attached. These include cultural and linguistic barriers, a lack of stable accommodation and employment and a lack of understanding of the surrounding legal processes (Apted, Hew, & Sinha, 2013). This could suggest a heavy impact on Indigenous persons in any move towards imposition of additional bail conditions and more stringent enforcement. However, at the same time it should be noted that recent years have seen some positive developments in helping Indigenous persons apply for and comply with bail through the introduction of targeted programs. These include introduction in 2009 of prisoner support officers to assist Indigenous prisoners with their parole applications, as well as introduction in 2010 of a Prisoner Through Care Project to assist Indigenous prisoners released on parole transition back into the community. The Northern Territory Parole Board is also in the process of developing Indigenous language resources to help overcome linguistic barriers and promote understanding about community based orders.

4.8 Policing

Increased police powers

Increases in police powers in the Northern Territory have been introduced over the past decade with astonishing regularity. Amendments have included introduction of powers which enable police to: issue urgent restraining orders without involvement of a magistrate in certain circumstances[7]; seize and dispose of volatile substances[8]; detain someone for up to 14 days in order to prevent a terrorist attack;[9] stop, search and seize in areas of mass transportation to prevent terrorism[10]; issue notices to prohibit loitering in public places for up to 72 hours[11]; saliva test for drugs where it is suspected a person

[7] Domestic Violence Amendment (Police Orders) Act 2005 (NT)

[8] Volatile Substance Abuse Prevention Act 2005 (NT) and Misuse of Drugs Amendment Act 2005 (NT)

[9] Terrorism (Emergency Powers) Amendment Act 2006 (NT)

[10] Terrorism (Emergency Powers) Amendment Act 2006 (NT)

[11] Justice Legislation Amendment (Group Criminal Activities) Act 2006 (NT)

has committed an offence[12]; and to detain somebody for the purposes of applying for and serving a domestic violence order[13]. One of the more significant amendments was introduced in 2010 to enable police to ban a person from a licensed premises in a designated area, or the area itself, for up to 48 hours if the police officer believes on reasonable grounds that the person has committed a specified offence — which can range from failing to leave a licenced premises to serious assault.[14] More recently the Police Administration Amendment Act 2014 (NT) introduced powers of 'paperless arrest', enabling an individual believed to have committed, or about to commit, a summary offence to be held without charge for up to four hours. The rationale for the new power, as expressed in the second reading speech, is to allow police to arrest individuals without becoming bogged down in paperwork, as well as addressing potential situations of public disorder prior to escalation (Elferink, 2014).

Statistical information on the use of these powers is not available, challenging any kind of precise assessment of their impacts. However, at a more general level it can be observed that many of the areas of increased power and police discretion correlate with those that tend to have heavy impacts on Indigenous persons, including move on powers and policing of minor public disorder offences (see Cunneen, 2001). Justice groups have been particularly critical of the new 'paperless arrest' laws, which are currently under challenge in the High Court due to concerns that they 'will result in more Indigenous people being locked up for minor offences' (Human Rights Law Centre, 2015).

The NTER and Taskforce Themis

The NTER and associated Taskforce Themis provided substantial additional resources for policing remote Indigenous communities. This included extending a permanent police presence to 18 communities, adding to the 39 stations that previously serviced the Northern Territory (Allen Consulting Group, 2010), as well as the deployment of additional Australian Federal Police and Northern Territory Police to some communities. The NTER Evaluation found that increased police resources and a new police presence in some remote

[12] Police Administration Amendment Act 2012 (NT)

[13] Domestic Violence Amendment Act 2010 (NT)

[14] Liquor Legislation Amendment Act 2008 (NT)

Indigenous communities did contribute to an increase in recorded offences between 2007 and 2010, with increases most pronounced in traffic and regulatory offences (61 per cent); offences against justice procedures (54 per cent); assault (44 per cent); and public order offences (43 per cent) (FaHCSIA, 2011). Increases were largest in communities that received a new police station for the first time. An overall increase in recorded offences of 142 per cent in these communities (FaHCSIA, 2011) suggests that at least some of the overall increase in offence rates was a result of increased police activity rather than a reflection of increased crime within the community. In some respects this may be a positive development, as evidence by community support for additional police resources and feelings of increased safety (Allen Consulting Group, 2010; FaHCSIA, 2011). However, research has suggested that this may have been coupled with increasing levels of criminalisation for minor offences, in particular in relation to minor driving offences, which on some reports take up the majority of cases in remote courts (Anthony, 2010).

5. Discussion

5.1 Overall criminal justice system trends

From analysis of the criminal justice system law and policy changes discussed in the previous section a number of trends emerge that broadly align with the governing through crime hypothesis. These are: a focus on protection of the community from risk; placement of seriousness of the crime at the centre of decision making; intensified modes of surveillance and enforcement; and encroachment into areas traditionally the domain of social policy.

A heightened focus on protection of the community and victims of crime has been a common thread running through the objective of many legislative amendments as expressed in second reading speeches. What this has meant in practice is providing broad definitions of categories of persons deemed to be risky and assigning certain consequences to these categories under the banner of crime prevention. The concern is not actual crime, but a perceived risk of crime occurring. Examples include the NTER measures, which were implemented with the objective of protecting children from child abuse; introduction of a presumption against bail for sexual offenders to enable victims to feel safe from their alleged attacker; and introduction of indefinite post

sentence detention for serious sex offenders in order to address community concerns about the dangers posed by released sex offenders.

The second trend is a shift towards consistent treatment according to the objective seriousness of the crime rather than equal treatment according to the individual circumstances of the offender: in effect prioritising equality of treatment over substantive equality. Judicial discretion in areas such as bail and sentencing, which previously enabled the court to balance the needs of the community and offenders through a holistic assessment of individual circumstances, have come to be perceived as a 'chink in the coercive armoury of the state' (Anthony, 2013). Removal of the ability to account for these factors in judicial decision making has tended to universalise the criminal justice system, ensuring harsh penalties that place seriousness of the crime as the central consideration. This trend is most evident via changes to the sentencing regime, including mandatory sentencing and an inability to take into account cultural considerations and customary law in sentencing Indigenous offenders. In addition, limited availability of alternative sentencing options for certain crime types acts to ensure that offences regarded as serious result in a custodial sentence.

Intensified modes of surveillance and enforcement have come via both legislative change and changes in the policies and practices of institutions such as the Northern Territory Police and Parole Board. Legislative changes have included introduction of new technologies to enable electronic surveillance of those characterised as high risk, as well as enactment of 'paperless arrest' laws to facilitate arrest for minor offences. A range of other amendments have expanded police powers to search and seize, ban individuals from particular areas and test for drugs. Heavy handed police enforcement practices have included increasing bail breaches as a crime reduction strategy and strategic deployment of police outside liquor stores in order to enforce Alcohol Protection Orders. There is also evidence of a trend towards an increasing number of conditions placed on prisoners released on parole and more and more of those released on parole quickly returning to jail.

The final trend is encroachment of the criminal justice system into areas that would have previously been the domain of social policy or health policy. Simon (2007) argues that in societies governed through crime actions

are legitimised where they are seen as acting to prevent crimes or other troubling behaviours that can be closely analogised to crime. Crime in the Northern Territory has been strategically used, perhaps most notably by the NTER and its usage of problems of child abuse in Indigenous communities to legitimise a range of very coercive measures. Introduction of measures such as Alcohol Protection Orders and Alcohol Mandatory Treatment have been legitimised through an association between alcohol and crime, leading to the application of a criminal justice approach to an issue that was once considered a health problem. A final example is found in changes to the domestic violence regime. Mandatory reporting of domestic violence, coupled with police practices that apply a pro-arrest approach even against the wishes of the victim signifies a very definite intention to bring problems of violence within the home within the ambit of the criminal justice system.

5.2 Why have changes disproportionately impacted Indigenous persons?

For the most part the law and order measures implemented in the Northern Territory over the past decade do not discriminate directly on the basis on the basis of race. The exception is the NTER measures, such as alcohol restrictions, which applied only on Indigenous lands and explicitly excluded operation of discrimination legislation. While the other measures were not overtly designed to discriminate against Indigenous persons, analysis undertaken in the preceding chapter has shown a tendency for many of the changes to have a disproportionately heavy impact on the Indigenous population, suggesting that the system itself is at least a contributing factor towards the growing gap in rates of Indigenous imprisonment versus non-Indigenous imprisonment. However, this leaves us wondering why the impacts on the Indigenous population have been so disproportionate, an issue that is not adequately explained by the governing through crime theory.

Drawing back to the theories of Indigenous overrepresentation discussed in section 3 sheds some light in this regard. An empiricist perspective would tell a simple story of these disproportionate impacts being due to existing high levels of offending within the Indigenous population and a tendency for many of the types of crimes and offenders targeted by the changes to correlate with Indigeneity, leading to an inevitable racial skewing of impacts on the prison population. In many ways this is a convincing explanation: the changes have led

to increasing levels of criminality and harsher treatment for violent offenders, repeat offenders, and problem drinkers, all of which are statistically speaking highly prevalent among the Indigenous population. However, this is not the end of the story. Digging deeper into the reasons for Indigenous overrepresentation, via the so called 'contextual perspective', tells a more complicated story. This story does not dispute the fact that levels of crime and associated social problems are high among the Indigenous population, but adds another layer to the explanation by looking at the overall relationship of Indigenous persons with the criminal justice system and the context in which law and policy changes have been made.

Under the contextual perspective it ceases to be a coincidence that many of the law and policy changes introduced have targeted problems prevalent in the Indigenous population. There are two interrelated sides to the relevant context: the way in which the Indigenous population is conceptualised and the way in which problems of crime are conceptualised. In relation to conceptualisation of the Indigenous population Anthony (2013) argues that Indigenous communities have been 'reimagined from disadvantaged to dysfunctional', bringing new discourses on Indigeneity that seek to exclude and condemn with greater severity. Disadvantaged circumstances which in the past may have attracted sympathy are now seen as falling outside the moral community so as to warrant reprimand. Nowhere is this trend more apparent than in the moral panic which accompanied the NTER, during which then Prime Minister John Howard painted a picture of 'children living out a Hobbesian nightmare of violence, abuse and neglect' (Howard, 2007) and a senior government official described social dysfunction in Indigenous communities as manifesting in 'ad hoc and opportunistic violence' and emerging 'zones of violence and disorder' (Dillon, 2007).

This conceptualisation of Indigeneity and associated crime became extremely politically expedient in the context of community concerns about high rates of crime in the Northern Territory. Within a political game where it pays to be seen as doing something to combat problems of crime Indigenous persons became an easy target. Policies that would be politically unfeasible if they were likely to have wide ranging impacts for the majority were associated with and legitimised by a perceived need to avoid threats posed by dysfunctional Indigenous communities. When looked at through this conceptualisation each of

the trends outlined in the previous section has a distinctly racial flavour. Laws were implemented to protect the community from risk, with the categories used to define risk coloured by a popular perception that risk and Indigeneity is synonymous. Limitations on judicial discretion in favour of a focus on the seriousness of the crime becomes a mechanism to subjugate Indigenous culture and circumstances in decision making, helping to control what is seen as the threat of Indigenous difference. Increased police powers and surveillance levels grants broader discretion and tools to target law enforcement to contain the high risk Indigenous offender. Encroachment of the criminal justice system into areas such as alcohol act to send a visible message to voters that the government is addressing problems associated with crime by targeting highly visible issues such as public drunkenness of Indigenous 'long grassers.' The end result is that the system produces law and policy changes that overtly target and disadvantage the Indigenous population, contributing to further increases in an already shamefully high imprisonment rate.

5.3 Should rising Indigenous imprisonment be of concern to policymakers?

A high rate of Indigenous imprisonment is not a problem per se if it is a result of a system that is well designed and fulfilling its objectives. However, in the case of rising Indigenous imprisonment in the Northern Territory this does not seem to be the case. The law and order trends identified in section 5.1 indicate that criminal justice policy has tended to play to popular fears and conceptions of crime and race rather than drawing on any kind of rational evidence. On the contrary, many of the changes implemented fly in the face of a growing evidence base as to what works in both reducing Indigenous disadvantage and effectively responding to crime.

Research painstakingly built up over decades has repeatedly reiterated the importance of community empowerment and building trust in order to address the social and economic issues that underpin high rates of crime (see eg Closing the Gap Clearinghouse, 2013). Criminal justice changes for the most part have pushed against these principles by imposing top down controls that do not account for the Indigenous context, undermining any chance of empowering the community to deal with problems of crime or build a relationship of trust with law enforcers.

Whether a high rate of imprisonment is effective in achieving its assumed objective, that is, to reduce rates of crime and enhance community safety, is also extremely questionable. Falling crime rates for some offence types in the Northern Territory (see Figure 3) have been pointed at by politicians as evidence that their policies are working. However, to this it could be countered that falling crime rates is a nation-wide trend, and the majority of states and territories are also seeing falling assaults while assault rates in the Northern Territory continue to rise (ABS, 2013). Furthermore, wider research on the effectiveness of imprisonment in reducing crime suggests a limited and diminishing effect in most cases and in relation to groups such as Indigenous persons a potential criminogenic effect (Brown, 2008). High rates of imprisonment within a community can fracture social and family bonds, deprive communities of income and foster distrust of the legal system so that once a community reaches a certain 'tipping point' it is likely that higher imprisonment rates will actually increase crime levels (Rose & Clear, 1998). In addition, once Indigenous persons are brought within the criminal justice system chances are high that they will reoffend: 77 per cent of the Indigenous prisoner population in the Northern Territory as at 30 June 2014 had known prior imprisonment (ABS, 2014d). As such, current trends risk creating a downwards spiral in which more and more Indigenous persons become trapped within the criminal justice system.

6. Conclusion

This thesis finds support for the hypothesis that an increasingly punitive criminal justice system and a shift towards governing through crime is contributing to rising Indigenous imprisonment in the Northern Territory. The past decade has been a time of intensive legislative change for the Northern Territory criminal justice system. The broad thrust of these changes has been to place objective perceptions of risk and seriousness of the crime at the centre of decision making, at the same time as expanding levels of control through intensified surveillance and encroachment of the criminal justice system into new policy domains. Analysis of available data and relevant contextual considerations suggests that in many cases there has been a tendency for changes to target and disadvantage Indigenous persons and that this may be

due in part to a political incentive to support measures that are seen as addressing a threat of Indigenous dysfunction and crime.

This finding does not purport to provide a comprehensive explanation of rising Indigenous imprisonment in the Northern Territory. As recognised at outset, the relationship between Indigenous persons and the criminal justice system is a very complex one and a range of factors interact to cause overrepresentation. However, it does suggest that law and policy settings are an important contributing factor and that system change is a critical ingredient in reducing Indigenous overrepresentation. The challenge is creating a political environment where a policy objective of reducing Indigenous overrepresentation is not marginalised by broad punitive trends, as shaped by majority fears and perceptions of racialised crime. This requires structural changes which place the impacts of criminal justice system changes on Indigenous persons at the centre of the decision making process.

One promising approach being used in the United States is racial impact statements (see Parsons-Pollard, 2011). Similar to regulatory or environmental impact statements, racial impact statements require the measurement and evaluation of proposed legislative changes on particular racial groups prior to adoption. The findings of this thesis suggests that these kinds of measures, which force the pro-active consideration of racial disparities rather than simply allowing them to simply be tangled up in an overarching tough on crime rhetoric, could be a useful tool in reducing overrepresentation and is something that deserves further research. Other areas for further research include extending analysis to other states and territories in order to add a comparative perspective and provide an indication of whether the trends identified here are nationwide or are confined to the Northern Territory.

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Stronger Futures in the Northern Territory Act 2012 (Cth)

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Volatile Substance Abuse Prevention Act 2005 (NT) and Misuse of Drugs Amendment Act 2005 (NT)

Appendix A Supporting data

TABLE A1 **NOTHERN TERRITORY COMMUNITY BASED ORDER COMMENCEMENTS**

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
Community work order	370	305	303	217	192	-	203	220	356	397
Home detention	109	103	100	77	80	-	57	45	36	29
Parole	104	91	76	83	59	-	83	107	172	100
Probation	558	689	731	669	733	-	784	826	985	735
Community custody order	0	0	0	0	0	-	0	37	94	82
Community based order	0	0	0	0	0	-	0	4	5	7
Total	1141	1188	1210	1064	1064	-	1127	1239	1648	1350

Note: Comparable information not published for 2009-2010.

SOURCE: NORTHERN TERRITORY DEPARTMENT OF JUSTICE, 2005, 2006, 2007, 2008; NORTHERN TERRITORY DEPARTMENT OF CORRECTIONAL SERVICES, 2012, 2013, 2015

TABLE A2 **NOTHERN TERRITORY MAGISTRATES COURT SENTENCING OUTCOMES: PROPORTION OF DEFENDANTS FOUND GUILTY WITH A CUSTODIAL SENTENCE**

Offence	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Acts intended to cause injury	77%	78%	78%	78%	81%	81%	81%	84%	83%	81%
Sexual assault and related offences	-	100%	100%	100%	75%	75%	100%	79%	73%	60%
Dangerous or negligent acts endangering persons	26%	18%	20%	20%	24%	24%	23%	26%	28%	23%
Abduction, harassment and other offences against the person	-	-	-	-	44%	44%	40%	63%	48%	47%
Robbery, extortion and related offences	-	-	60%	-	-	-	-	100%	-	100%
Unlawful entry with intent	70%	67%	62%	68%	67%	67%	69%	74%	75%	75%
Theft and related offences	28%	28%	31%	27%	29%	29%	31%	39%	34%	37%

Offence	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Fraud, deception and related offences	52%	49%	38%	36%	43%	43%	45%	35%	50%	41%
Illicit drug offences	37%	34%	26%	29%	32%	32%	34%	33%	36%	36%
Prohibited and regulated weapons and explosives offences	21%	22%	26%	22%	31%	31%	24%	35%	30%	37%
Property damage and environmental pollution	22%	22%	22%	17%	20%	20%	28%	35%	38%	32%
Public order offences	8%	9%	12%	8%	7%	7%	6%	10%	13%	9%
Traffic and vehicle regulatory offences	18%	16%	17%	16%	16%	16%	16%	17%	14%	12%
Offences against justice	32%	43%	43%	48%	31%	31%	36%	39%	43%	43%
Miscellaneous offences	7%	13%	2%	3%	0%	0%	0%	9%	3%	12%
Total finalised	30%	32%	32%	29%	30%	30%	31%	36%	37%	36%

SOURCE: ABS CATALOGUE 4513.0, CRIMINAL COURTS IN AUSTRALIA, 2004-2005 TO 2013-2014

TABLE A3 **NORTHERN TERRITORY PAROLE STATISTICS 2003-2013**

Year	Prisoners released to parole	Parole applications total	Proportion of released prisoners with orders revoked at year end
2004	114	226	19%
2005	74	206	10%
2006	79	198	27%
2007	77	223	26%
2008	59	223	30%
2009	56	142	41%
2010	79	252	30%
2011	107	344	21%
2012	135	301	38%
2013	131	287	38%

SOURCE: NORTHERN TERRITORY PAROLE BOARD ANNUAL REPORTS 2004 – 2013