

# Time to arrest rising Aboriginal prison rates

*Thanks in large part to the Victorian Aboriginal Justice Agreement, Victoria's Aboriginal imprisonment rate remains lower than the national average. But, warns Professor Chris Cunneen, tougher penalties are having a disproportionate effect on Aboriginal Victorians and pushing up rates.*

I am not sure that Victorians would enjoy being compared with the Northern Territory in terms of prison policy backwardness. However they certainly have one thing in common: a dramatic race to the bottom in locking up more and more Aboriginal people. Between 2008 and 2012 Aboriginal imprisonment rates rose by 34 per cent in the Northern Territory; in Victoria the rise was 43 per cent, with much of that occurring recently. In 2011-12 alone, the Victorian Aboriginal imprisonment rate rose by 26 per cent.<sup>1</sup> In the Northern Territory, they can blame the 'Intervention'<sup>2</sup> for these changes, but what is causing this dramatic shift in punitiveness in Victoria?

These changes represent a turn of events. Victoria had traditionally experienced relatively low rates of both Aboriginal and non-Aboriginal imprisonment; for decades they were half that of New South Wales. There are multiple layers to this story of change, and I want to try and unpack some of the salient features. Like most explanations, it will be partial and open to differing interpretations and emphasis. In the final section I want to shift the discussion away from imprisonment and towards some of the positive aspects of the relationship between Aboriginal people and the justice system, particularly through the *Victorian Aboriginal Justice Agreement*.

## Royal Commission

It is important to begin this discussion with the 1987 Royal Commission into Aboriginal Deaths in Custody because of the wide acceptance of its 339 recommendations. A core finding was the need to reduce Aboriginal custody and imprisonment and there was optimism at the time that these changes would occur. However, over the last two decades, Aboriginal imprisonment rates have grown significantly rather than declined. Indeed, nationally, the rate of Aboriginal imprisonment doubled during the 1990s

and 2000s; at the same time the non-Aboriginal rate was both significantly lower and increased at almost half the Aboriginal rate.

At one level the changes in Victoria appear to reflect what is happening nationally. Yet the growth has been slower nationally than in Victoria. Between 2002 and 2012, Aboriginal imprisonment grew 52 per cent nationally, but 105 per cent in Victoria. Furthermore the growth in Aboriginal imprisonment rates has slowed nationally (9 per cent over the last five years), while Victoria is showing no signs of deceleration.

## Politics and policies

We know that increasing imprisonment rates generally do not appear to be the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time. Across Australia imprisonment rates have increased because of a range of factors, including:

- changes in sentencing law and practice
- restrictions on judicial discretion
- changes to bail eligibility
- changes in access to parole
- increased post-release surveillance, and
- judicial and political perception of the need for 'tougher' penalties.<sup>3</sup>

The overall environment within which sentencing and punishment occurs has been one of constantly changing criminal law. One study tracked 230 major changes to law and order legislation in Australian states and territories over three and a half years,<sup>4</sup> while another<sup>5</sup> noted how rapidly bail legislation has changed in some jurisdictions, usually in response to a politically expedient incident.

In Victoria average prison lengths increased by 19 per cent between 2001 and 2006 under the former Labor Government, and the remand population grew by 48 per cent.<sup>6</sup> At the same time the Victorian crime rate was decreasing.<sup>7</sup> Overall the prison population went up by 11 per cent during this period. However, the increase in Aboriginal prisoners was much higher at 43 per cent.<sup>8</sup>

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It is not clear why changes in sentencing are specifically affecting Aboriginal people, however similar trends have been noted in other states. In New South Wales a study of the 48 per cent rise in the Aboriginal imprisonment rate from 2001–2008 found that 25 per cent of the increase was caused by more Aboriginal people being remanded in custody and for longer periods of time, and 75 per cent by more Aboriginal people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and for longer periods of time.<sup>9</sup> None of the increase was a result of more Aboriginal people being convicted of a crime. In other words, the increase in imprisonment was not caused by increases in prosecutions.

We can expect imprisonment rates to continue to accelerate in Victoria under policies being pursued by the Coalition Government, and we can expect them to have a disproportionate impact on Aboriginal people. Sentencing options for the courts have been reduced with the abolition of intensive corrections orders, community-based orders, home detention and combined custody and treatment orders. Parole options have been reduced with the abolition of home detention orders which were previously available to the Adult Parole Board. Judicial discretion is being curtailed with the introduction of statutory minimum sentences of four years' imprisonment (without parole) for new offences related to 'gross violence'. A new 'community corrections order' has been introduced which allows for a combination of imprisonment and the serving of part of the order in the community. All of these changes clearly are intended to increase the use and length of imprisonment. As the Smart Justice coalition has noted, 'harsher sentencing will be the main driver of prison growth, not crime rates, which are falling'.<sup>10</sup>

### Aboriginal Justice Agreement

While this all shows the significant problem of increasing imprisonment rates in Victoria, it should also be acknowledged that the state still has an Aboriginal imprisonment rate lower than the national average and well

below states like Western Australia. An important part of the explanation for this has been the Victorian Aboriginal Justice Agreement (VAJA).<sup>11</sup>

Victoria was one of the first states to establish such a justice agreement, which was the outcome of a negotiation process involving criminal justice agencies and Indigenous advisory bodies, particularly Aboriginal Justice Advisory Councils (AJACs). They attempted to address Aboriginal over-representation through establishing key principles, the identification of specific strategic areas (such as youth justice diversionary alternatives and the development of non-custodial sentencing options), plus specific initiatives within each strategic area.

Nationally the VAJA has been the most effective agreement in providing for ongoing Aboriginal ownership of, and participation in, strategic policy development.<sup>12</sup> The first VAJA emphasised the importance of ongoing Aboriginal input. This was achieved by setting up the statewide Aboriginal Justice Forum and the Regional and Local Aboriginal Justice Advisory Committees (RAJACs and LAJACs) to work alongside government agencies in progressing the VAJA. It is also only one of two national justice agreements that have been independently evaluated and found to have significantly improved justice outcomes for Aboriginal people.<sup>13</sup> A number of important initiatives have been developed through the Agreement including the Koori Courts.

Ultimately, it is by having government and Aboriginal communities being able to work together that will make efforts to address Aboriginal over-representation successful. The Victorian AJAC (established in 1993 and now decentralised into regional and local bodies) is the only advisory committee structure still in existence in Australia from the period immediately following the Royal Commission. This process has been enhanced in Victoria through the community-based peak coordinating body established under the VAJA, the Aboriginal Justice Forum. The VAJA meets the highest standards nationally in terms of Aboriginal participation, implementation, monitoring, and independent evaluation.

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## Conclusion

We know the significant limitations of prison as a rehabilitative institution and crime control option. We also have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will reduce re-offending.<sup>14</sup> Yet we see the opposite occurring when it comes to Aboriginal people. The Aboriginal re-imprisonment rate (58 per cent within 10 years) is much higher than the Aboriginal school retention rate from Year 7 to Year 12 (46.5 per cent) and the Aboriginal university retention rate (which is below 50 per cent).<sup>15</sup> As a society we do better at keeping Aboriginal people in prison than in school or university. Nationally, Aboriginal men are more than twice as likely to be found in prison than in university.<sup>16</sup>

One of the alarming aspects in Victoria is that the rapid rise in imprisonment rates has been particularly concentrated among Aboriginal Victorians. While Aboriginal imprisonment rates rose by 43 per cent during the last five years, the comparable non-Aboriginal rate rose by a little over 6 per cent. Whatever emphasis we might give to various changes occurring to prison policy, they are having a disproportionate impact on Aboriginal people. They will also undermine the significant efforts made in the *Victorian Aboriginal Justice Agreement* to reduce Aboriginal over-representation in the criminal justice system. Certainly if the imprisonment rates continue on their current trajectory it will only be a short period of time before we observe that Victoria is among the worse states in Australia for imprisoning its Aboriginal population.

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1. Australian Bureau of Statistics, *Prisoners in Australia*, Canberra, ABS, p56, 2012. Imprisonment data used in this article relies on this source unless otherwise indicated.
2. The Northern Territory National Emergency Response or 'Intervention' was a package of changes to income provision, law enforcement, land tenure and other measures introduced by the Australian Government in 2007.
3. C Cunneen, E Baldry, D Brown, M Brown, M Schwartz & A Steel, *Penal Culture and Hyperincarceration*, Ashgate, Farnham, forthcoming 2013.
4. L Roth, *Law and order legislation in the Australian States and Territories: 2003-2006*, Briefing Paper No 12/06, Parliamentary Library, Parliament of New South Wales, 2006, 1.
5. A Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' in M Segrave (ed), *Australia and New Zealand Critical Criminology Conference 2009: Conference Proceedings* (Monash University and the Australia and New Zealand Critical Criminology Network, 2009), 228-243.
6. G Fisher, *Victoria's Prison Population 2001 to 2006*, Sentencing Advisory Council, Melbourne, 2007, 5 & 7.
7. Although there were increases in offences against the person, motor vehicle offences and good order offences, *ibid*, p13.
8. *ibid*, p6.
9. J Fitzgerald, *Why are Indigenous imprisonment rates rising?*, Issue Paper No 41, New South Wales Bureau of Crime Statistics and Research, Sydney, August 2009.
10. Smart Justice, *More prisons are not the answer*, November 2011, available at [http://www.smartjustice.org.au/cb\\_pages/more\\_prisons\\_are\\_not\\_the\\_answer\\_to\\_reducing\\_crime.php](http://www.smartjustice.org.au/cb_pages/more_prisons_are_not_the_answer_to_reducing_crime.php)
11. Department of Justice, *Victorian Aboriginal Justice Agreement (2000)*, Melbourne. The first VAJA was released in 2000, the second in 2006, and the third in March 2013.
12. F Allison & C Cunneen, 'The Role of Indigenous Justice Agreements in improving legal and social outcomes for Indigenous people' *Sydney Law Review*, 32: 645-669, 2010.
13. Atkinson, Kerr & Associates, *Review of the Victorian Aboriginal Justice Agreement (2000/01-2003/02)*, Department of Justice, Melbourne, 2005; Nous Group, *Evaluation of the Aboriginal Justice Agreement : Phase 2 : final report*, Department of Justice, Melbourne, 2012.
14. D Brown, 'The limited benefit of prison in controlling crime', *Current Issues in Criminal Justice* 137, 142-143, 22(1), 2010.
15. Australian Bureau of Statistics, *Repeat Imprisonment*, Australian Social Trends, March Quarter 2010, Canberra, Catalogue No. 4102.0, 2; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: Key indicators 2009*, Productivity Commission, 2009, [4.50]; Universities Australia, Equity and Participation Action Plan, April 2008, 2.
16. Based on tertiary enrolment figures (Census 2006) and prison numbers (National Prisoner Census 2006). This estimate is also consistent with the results from the 2002 National Aboriginal and Torres Strait Islander Social Survey. In the 2002 Survey, 3 per cent of Indigenous people reported having a Bachelor degree or above, while 7 per cent reported being incarcerated in the previous five years. See ABS, *National Aboriginal and Torres Strait Islander Social Survey, 2002*, ABS, Canberra, Catalogue No 4714.0: 14, 2004.