

Dr Phillip Lee

## Indigenous incarceration: a national disgrace and nobody cares



*Although Aboriginal and Torres Strait Islander adults make up around 2 per cent of the national population they constitute 27 per cent of the national prison population. Picture: Shutterstock*

Recent reports confirm the exponential rise in the rate of indigenous incarceration. The current rate of indigenous incarceration is higher than what was recorded in the 1991 land mark Royal Commission Report on Aboriginal Deaths in Custody.

The then Attorney-General, the Hon George Brandis QC, and the Hon Nigel Scullion MP, then minister for indigenous affairs, on October 27, 2016 announced a proposed Australian Law Reform Commission (ALRC) inquiry into "the national tragedy of indigenous incarceration." The Terms of Reference for the Inquiry were released on February 16, 2017 and the inquiry was conducted by His Honour Judge Matthew Myers AM, of the Federal Circuit Court. The report *Pathways to Justice - Incarceration Rate of Aboriginal and Torres Strait Islander (ATSI) Peoples* was delivered to the government in December 2017 and tabled in the Parliament on March 28, 2018. With the second anniversary of the tabling of the ALRC Report just passed the Federal government continues to ignore it.

Only one of the ALRC report's recommendations has been partially implemented, with the WA government agreeing to join the National Scheme which requires state and federal police forces to notify the nearest Aboriginal Legal Aid Service within 24 hours of an ATSI person being taken into custody. The Commonwealth government withdrew funding for this service in 2018 but restored it following criticism from a number of state governments and Aboriginal legal aid bodies.

The ALRC Report contains 35 recommendations which Justice Myers concludes would, if implemented, reduce the disproportionate rate of incarceration of ATSI peoples and improve community safety.

The ALRC Report noted that ATSI men are 14.7 times more likely to be imprisoned than non-indigenous men and that ATSI women are 21.2 times more likely to be imprisoned than non-indigenous women. The report also noted that although ATSI adults make up around 2 per cent of the national population they constitute 27 per cent of the national prison population. In 2016 around 20 in every 1000 ATSI people were incarcerated. Over-representation is both a persistent and growing problem - ATSI incarceration rates increased 41 per cent between 2006 and 2016, and the gap between ATSI and non-indigenous people over the decade widened. The report noted that the over incarceration rate for indigenous women was higher than for indigenous men.

The report also noted that the incarceration rate for ATSI people was higher in 2016 than what was reported in the 1991 report into Aboriginal deaths in custody. In 1991 indigenous peoples made up 14 per cent of the national prison population, by 2015 this had increased to 27 per cent.

A recent report from the Keeping Women Out of Prison Coalition, *Profile of women in prison in NSW*, highlighted that ATSI females account for 32 per cent of the female prison population of NSW although they only represent 2.9 per cent of the total female population of NSW. The report noted that there had been a 49 per cent increase in the prison population of ATSI females in NSW since 2013 compared with a 6 per cent increase in non ATSI females. The report further noted that 87 per cent of ATSI female prisoners had been incarcerated previously compared to 72 per cent of women in total. The report concludes that "the over- representation of ATSI women further reflects the unacceptably high levels of disadvantage and discrimination experienced by indigenous people within the criminal justice systems across Australian jurisdictions".

Dr Andrew Leigh MP, member for Fenner, has sought to raise the profile of this important issue. In his Evatt Foundation address on September 17, 2019, Dr Leigh referred to his recent paper *The Second Convict Age: Explaining the return of mass imprisonment in Australia*. Dr Leigh also spoke on this issue in the House of Representatives on November 25, 2019 on a matter of public importance.

Dr Leigh has noted that the incarceration rate for ATSI people is 2.5 per cent: 2481 prisoners per 10,000 adults and that almost one in four indigenous men born in the 1970s will go to jail during their life. It was noted that the national incarceration rate per 100,000 for adults had increased by 130 per cent between 1985 to 2018 whilst the national indigenous incarceration rate had increased, in the same period, by 250 per cent.

Indigenous Australians are more likely to be in prison than African Americans and Indigenous people in Canada and New Zealand.

Noel Pearson has argued that Indigenous Australians are "the most incarcerated people on the planet Earth", and he appears to be right.

Significant recommendations of the ALRC Report include:

- the establishment of an independent justice reinvestment body
- sentencing legislation should provide that when sentencing ATSI people, courts take into account unique systemic and background factors affecting ATSI people
- improved access to community-based sentencing
- repeal of mandatory sentencing laws
- fine default should not result in the imprisonment of the defaulter
- the introduction of culturally appropriate throughcare programs
- programs and services delivered to female ATSI offenders should take into account their particular needs
- noting the high rate of the removal of ATSI children into out-of-home care and the links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth government should establish a national inquiry into child protection laws and processes affecting ATSI children
- The Commonwealth government, in consultation with state and territory governments and ATSI organisations, should develop national criminal justice targets for indigenous persons.

As Justice Myers has noted "Law reform is an important part of the solution. Reduced incarceration, and greater support for ATSI people in contact with the criminal justice system, will improve health, social and economic outcomes for ATSI peoples, and lead to safer society for all."

The Commonwealth government does not include indigenous incarceration rates in the measures which form part of the Closing the Gap Strategy, despite calls from a number of state governments and ATSI bodies. There is no doubt that the inclusion of indigenous incarceration rates in the strategy would be a significant step towards developing criminal justice targets aimed at reducing incarceration rates.

It is well recognised that incarceration has a significant negative effect on ATSI people unless they have access to culturally appropriate cognitive development programs. Unfortunately very few states and territories offer these programs and they have been gradually defunded.

Throughcare programs have a demonstrated positive benefit for ATSI peoples and reduce recidivism. A recent report from the Australian Institute of Criminology *Throughcare needs of indigenous people leaving prison in Western Australia and the Northern Territory* (February 2020) highlights the importance of the programs. The ACT government pioneered Throughcare programs in 2012 and they have been adopted by most state and territory governments.

The only government to show a proactive approach to indigenous incarceration is the ACT government, which in October 2019 committed \$1.35m to fund ATSI bodies to develop culturally - appropriate programs, including justice reinvestment, to address indigenous incarceration rates in the ACT. This followed earlier funding for the Winnunga Aboriginal Health Service to develop a justice reinvestment program.

The Commonwealth government stands condemned for failing to implement the recommendations of an ALRC report on the rate of Indigenous incarceration which it commissioned almost three years ago.

Does anybody care?

- Philip Lee was the Deputy Chairperson of the Sentence Administration Board of the ACT from May to September 2005 and Chairperson from September 2005 to February 2010.

<https://www.canberratimes.com.au/story/6733323/indigenous-incarceration-a-national-disgrace-and-nobody-cares/>