

The problem of Indigenous over-representation in prison

In the beginning

Not long after the First Fleet arrived in Sydney Harbour, the local Cadigal people began harassing the new arrivals to get them out. The colonial authorities were so angered by this behaviour they resolved to kidnap and imprison some Aboriginal people in order to ‘unveil their mysterious conduct’ (Tench 1793). On 31 December 1788, two Navy lieutenants sailed down to Manly Cove where a number of Cadigal people had been seen standing on the beach. After enticing one of them closer with a few presents, they seized him and fastened him with ropes to the thwarts of the boat, whereupon he let out what one contemporary observer described as piercing and lamentable cries of distress (Tench 1793). Those cries of distress have continued ever since. Aboriginal people² now make up about 2.5 per cent of the Australian adult population but account for 26 per cent of all adult Australian prisoners (Australian Bureau of Statistics (ABS) 2012a). The rate of Indigenous imprisonment is nearly eighteen times that of non-Indigenous Australians — six times larger than the disparity between African-American and white imprisonment rates in the United States (Guerino, Harrison & Sabol 2011, p. 27).

This is not what Indigenous Australians were led to expect when former Prime Minister Paul Keating proclaimed in Federal Parliament that:

...there is no more central issue to our national identity and self-esteem than the injustices brought home to us all by the Royal Commission into Aboriginal Deaths in Custody.³

So how did it come to this? Why, after all the hope and effort over the last twenty years, are rates of Indigenous imprisonment higher now than they’ve ever been? Opinions on the reason for this state of affairs are sharply divided, and the division is acrimonious. Some see the first unwarranted Indigenous detention on 31 December 1788 as emblematic of what followed. According to this view, the institutional racism that led to the first Indigenous detention by colonial authorities is alive and well today, albeit in more subtle forms; in the laws we frame, in the way we enforce them, in the institutions of justice and in the exercise of police and judicial discretion. Some share the view that colonialism is the root cause of Indigenous imprisonment but take a

different tack on the transmission mechanism, arguing that colonisation and dispossession led to the destruction of Aboriginal society and that the resulting legacy of economic and social disadvantage inevitably fostered high rates of Indigenous offending and imprisonment. Some reject the historical explanation altogether, arguing that the antecedents of Indigenous imprisonment are to be found in contemporary events and processes, such as alcohol abuse and/or welfare dependence.

In due course we will examine all of these explanations. For now, it suffices to note that hardly any of them are informed by a careful and dispassionate analysis of the facts. This is puzzling because there is no shortage of evidence to analyse. The ABS regularly publishes reports detailing the number of Indigenous and non-Indigenous Australians in prison, the offences for which they are being held in custody, their legal status (sentenced or on remand) and their expected length of stay in prison. It also conducts a periodic national representative sample survey of Indigenous Australians which contains a wealth of information relevant to an understanding of why Aboriginal people are arrested, imprisoned and become victims of violence. As if this were not enough, a number of studies have now been conducted on issues highlighted by the Royal Commission (e.g. racial bias in the criminal justice system, the correlates of Indigenous imprisonment) as central to Indigenous over-representation in prison. And yet the advent of this data and research has done little to stimulate scholarly interest in testing alternative explanations for Indigenous imprisonment, or political interest in finding ways of reducing the number of Indigenous Australians in custody. But we are getting ahead of ourselves. To fully understand the dimensions of Indigenous over-representation in custody, we need to look more closely at it.

Indigenous adult over-representation in custody

The depth and breadth of Aboriginal contact with the criminal justice system is so extraordinary, it almost defies belief. Consider first the differences in imprisonment rates (see Figure 1). In Tasmania, the state with the lowest rate of Indigenous imprisonment, there are nearly four times as many Indigenous Australians in prison, per capita, as there are non-Indigenous Australians. Western Australia has the highest rate of Indigenous imprisonment at more than twenty times higher than the non-Indigenous imprisonment rate. The Indigenous inhabitants of Canada and New Zealand also have high rates of contact with their prison systems but their rates of contact are nowhere near as high as Australia.⁴ The rate of Indigenous imprisonment is even higher for Indigenous women than it is for Indigenous men. It is impossible to obtain age and gender adjusted figures but the *differential* in crude imprisonment rates per 100,000 Indigenous women compared with non-Indigenous women

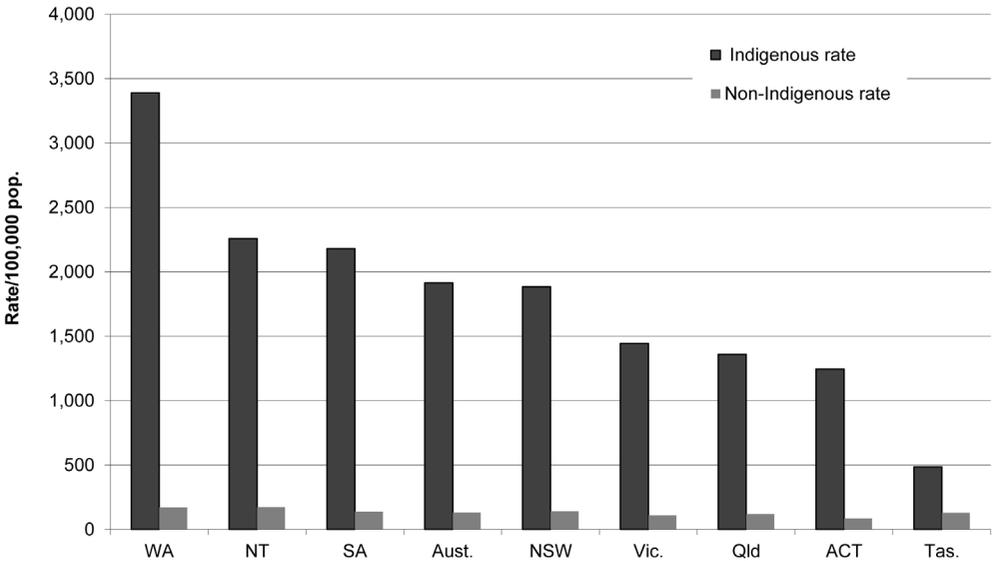


Figure 1: Indigenous and non-Indigenous age-standardised imprisonment rates (2012). Source: ABS (2012).

(375.5 versus 16.2) is higher than that for Indigenous men compared with non-Indigenous men (4227.5 versus 236.9) (ABS 2012a).

The problem is getting worse (see Figure 2). Between 2001 and 2011, the Indigenous imprisonment rate increased (on an age-standardised basis) by more than 51 per cent, while the (age-standardised) non-Indigenous imprisonment rate in Australia increased by less than four per cent. The ratio of Indigenous to non-Indigenous imprisonment rates rose from 10.2 in 2001 to 14.8 in 2012, an increase of more than 40 per cent (ABS 2012a, p. 56). This increase cannot be entirely attributed to an increase in the willingness of people to identify as Indigenous, although this may account for some of it (Corben 2011).

The growth in Indigenous imprisonment has not been uniform across the country but, as Figure 3 shows, every state and territory has experienced an increase. The size of the change on an age-standardised basis ranges from more than 124 per cent in the Northern Territory to 14 per cent in Queensland.

Shocking as they are, these figures hardly begin to convey the true magnitude of Indigenous contact with the criminal justice system. We may reasonably suppose that many of those who do not have any contact with the criminal justice system in any one year have had contact with it in the past or will have contact with it in the future. We can test this by taking a cohort of Australians born in a particular year and watching how the relative rates of Indigenous and non-Indigenous contact with courts and prisons change over time. Figure 4 (see p. 5) does this for a cohort of New South Wales residents born

ARRESTING INCARCERATION

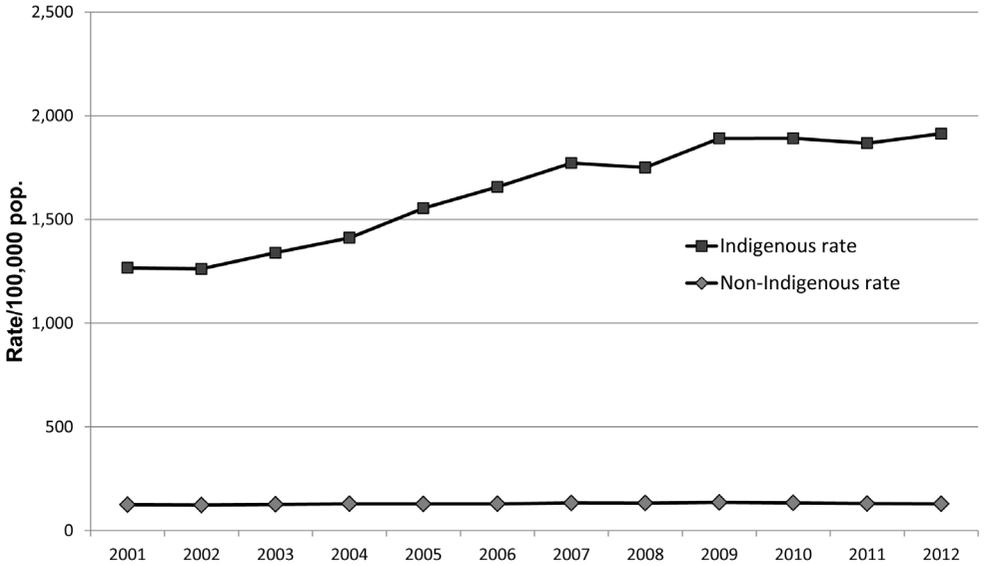


Figure 2: Trend in Indigenous and non-Indigenous age-standardised imprisonment rates (2001-12). Source: ABS (2012a).

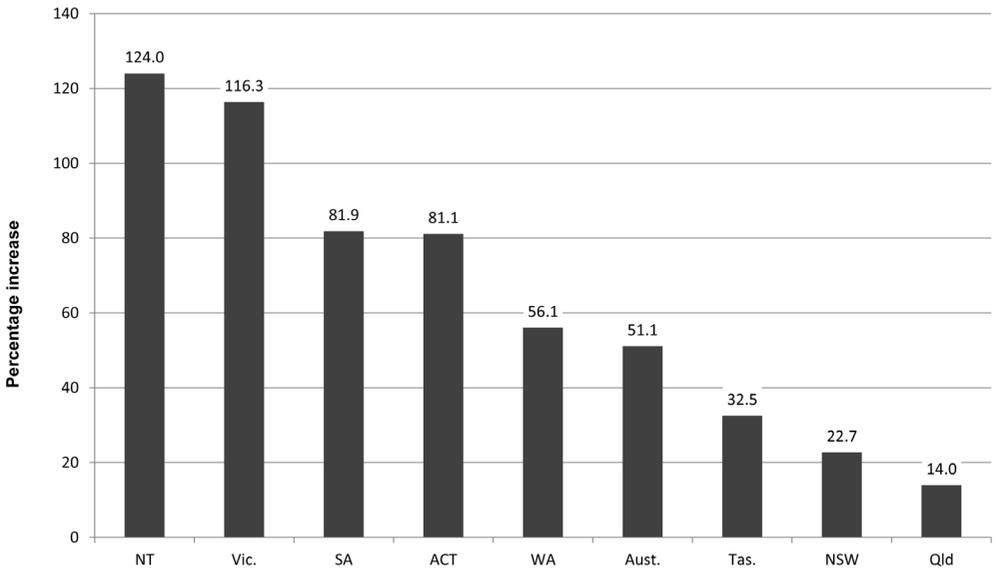


Figure 3: Growth (%) in age-standardised Indigenous imprisonment rates by jurisdiction (2001-02). Source: ABS (2012a).

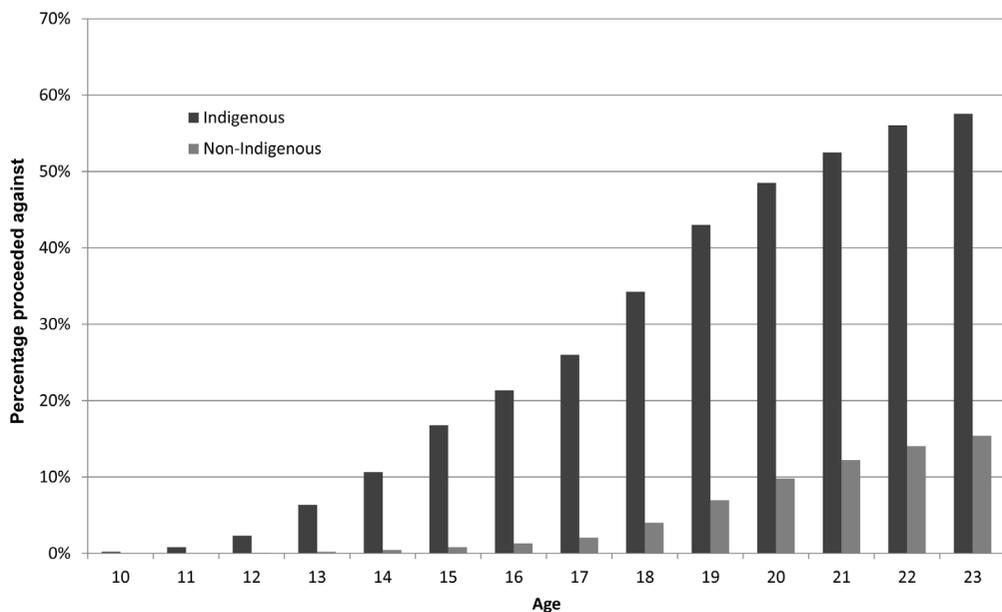


Figure 4: Cumulative per cent proceeded against for a criminal offence by Indigenous status (1984 birth cohort). Source: NSW Bureau of Crime Statistics and Research (2012a).

in 1984. It shows the percentage of Indigenous and non-Indigenous New South Wales residents proceeded against by police for a criminal offence (i.e. Indigenous persons cautioned, referred to a youth justice conference or proceeded against to court) between 1994 (when they reached the age of criminal responsibility) and 2007, when they reached the age of 23. Figure 5 shows the same result for those who had at least one spell in prison (either on remand or as a sentenced prisoner) during this time.

By the time they reached the age of 23, more than three quarters (75.6 per cent) of the New South Wales Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a New South Wales criminal court. The corresponding figure for the non-Indigenous population of New South Wales was just 16.9 per cent. By the same age, 24.5 per cent of the Indigenous population, but just 1.3 per cent of the non-Indigenous population, had been refused bail or given a custodial sentence (control order or sentence of imprisonment). There is nothing unusual about those born in 1984 and nothing unusual about New South Wales. Similar findings have been obtained in South Australia (Skrzypiec 2005) and Western Australia (Harding et al. 1995).

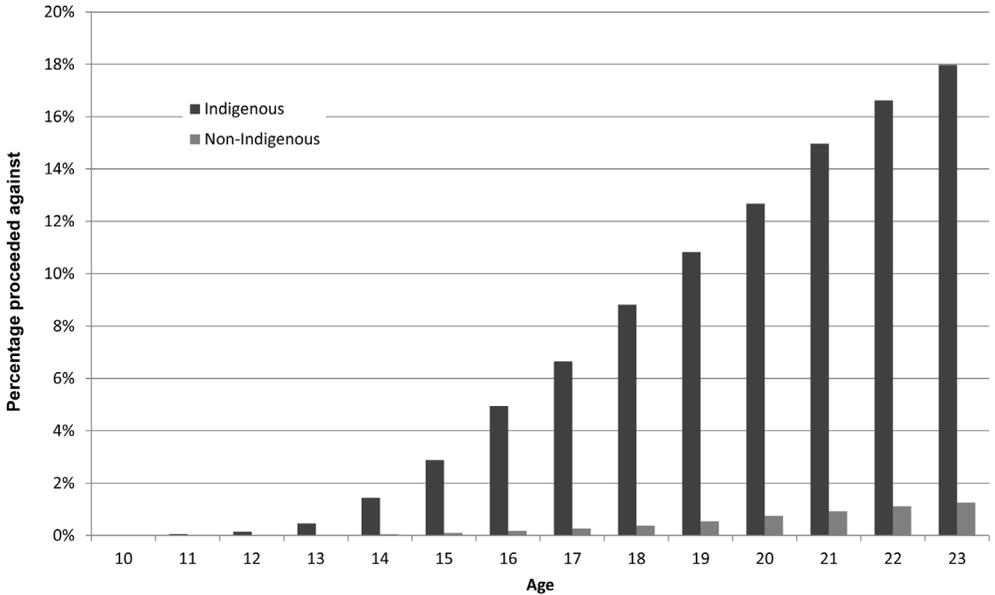


Figure 5: Cumulative per cent imprisoned or bail refused by Indigenous status (1984 birth cohort). Source: NSW Bureau of Crime Statistics and Research (2012a).

The problem of over-representation in custody is not confined to Indigenous adults. On an average day in 2009–10, only one in every 1886 Australian juveniles (0.4 per cent of young people aged 10–17) were in custody. The custody rate for Indigenous young people (1 in 146), however, was more than twenty-four times higher than the custody rate for non-Indigenous young people (1 in 3626). In 2009–10, Indigenous young people were being taken into juvenile justice custody at the rate of more than fifty a month. As with adults, the rate of entry into custody is increasing. In the four years to 2009–10, the number of Indigenous young people sentenced to a term of detention rose by 25 per cent (Australian Institute of Health and Welfare 2011a).

Indigenous prisoners are in a league of their own when it comes to physical, mental and social disadvantage. Surveys of the New South Wales prison population show that they are less likely than non-Indigenous prisoners to have completed year 10 (27 per cent versus 57 per cent); more likely to have been sentenced to detention as a juvenile (61 per cent versus 33 per cent for men, 34 per cent versus 17 per cent for women); more likely to have been unemployed in the six months prior to being imprisoned (64 per cent versus 43 per cent for men, 87 per cent versus 60 per cent for women); more likely to have been placed in care as a child (46 per cent versus 27 per cent); more likely

to have had a parent imprisoned during their childhood (31 per cent versus 12 per cent for men, 36 per cent versus 10 per cent for women); and more likely to have been previously imprisoned (81 per cent versus 56 per cent for men, 59 per cent versus 41 per cent for women). Three-quarters of Indigenous male inmates drink alcohol at hazardous or harmful levels, compared with 57 per cent of non-Aboriginal prisoners. Meanwhile, 51 per cent of Indigenous male inmates and 62 per cent of Indigenous female inmates used illicit drugs daily or almost daily in the year before entering prison (Indig et al. 2010).

The consequences of Indigenous over-representation in prison

Some non-Indigenous people will probably wonder why they should care about all this. As one sceptical observer said after hearing me speak on some of the issues covered in this book, ‘what appears to be a case of Aboriginal over-representation in prison is really nothing more than a case of Aboriginal over-representation in crime. If Aboriginal people end up in prison for committing crime, they have only themselves to blame.’ These sentiments may appear Hansonesque in their extremity, but public and political concern about Aboriginal over-representation in prison has faded considerably since the Royal Commission into Aboriginal Deaths in Custody. Whether because of compassion fatigue, cynicism, despair, racism or general indifference to the plight of others, large sections of the public and the media seem to have lost interest. Were it not for the exemplary work being done by the Productivity Commission through its reports, *Overcoming Indigenous disadvantage*, and a number of university scholars, the issue might have all but faded from view. There is never any joy in preaching to the converted, so here are six reasons why those who don’t usually give the matter any thought should be concerned about Aboriginal over-representation in prison.

Reason number one is that, when you reach the point where nearly a quarter of the Indigenous male population has been arrested by police in the last five years, more than one in ten (11.4 per cent) have been imprisoned in the last five years (ABS 2004) and one in every five Indigenous Australians have at some stage lost a parent to prison (Quilty 2005; Quilty et al. 2004), contact with the criminal justice system has probably lost much of its deterrent effect. Arrest, prosecution and imprisonment may have become a rite of passage for young Aboriginal people rather than a source of shame or embarrassment. For older offenders, the attractions of free accommodation and food, good health care, relative safety from violence and regular social contact with relatives and friends sometimes far outweigh the negative aspects of incarceration. This may be why Indigenous offenders return to prison at a rate which is substantially higher than that of non-Indigenous offenders (Weatherburn et al. 2009) but if so, it is a grotesque distortion of the purpose of prison. Those who want

something done about Indigenous crime had better start thinking outside the usual law and order square.

Reason number two is that, over the long-term, contact with the criminal justice system appears to be criminogenic. Good, Pirog-Good and Sickles (1986) observed employment and arrest records monthly for 300 youths aged 13–18 in a crime prevention program in inner-city Philadelphia. They found that having a prior criminal record reduced employability, leading in turn to higher rates of crime. Similar results were obtained by Thornberry and Christenson (1984) using data from the 1945 Philadelphia birth cohort and by Sampson and Laub (1993) in their re-analysis of the longitudinal data originally collected by Eleanor and Sheldon Glueck on 500 delinquents and 500 matched controls (i.e. non-delinquents matched on factors such as age, gender, socio-economic status, etc.). The high Indigenous imprisonment rate increases crime in another important way as well. The risk of involvement in crime is far higher for children living in poor sole parent families, children who are poorly supervised by their parents and children who experience child neglect and/or maltreatment (Weatherburn & Lind 2001). All these conditions are likely when a child loses a parent to prison. Large numbers of Aboriginal children are growing up in families where one or both parents are in prison for some or all of their formative years (Quilty 2005; Quilty et al. 2004). So here we have the perfect vicious circle, the high rates of Indigenous imprisonment in each generation help create ideal conditions for a high rate of imprisonment in the next.

Reason number three is that the high rate of Indigenous imprisonment is a significant contributor to Indigenous economic and social disadvantage. Fagan and Freeman (1999), using data from a national panel study of 5332 randomly selected youths, found that incarceration produced a significant negative effect on future employment prospects, even after adjusting for the simultaneous effects of race, human capital (i.e. the economic value of a person's skills and abilities) and intelligence. Employment, on the other hand, produced a significant suppression effect on the subsequent likelihood of imprisonment, controlling for the simultaneous effects of race, human capital and intelligence. Bushway (cited in Fagan & Freeman 1999) has found similar results. Using data from a representative sample of 1725 American adolescents aged 11–17 in 1976, he found that, within three years of arrest, respondents who were arrested worked seven weeks less and earned \$92.00 per week less than would otherwise be expected.

Hunter and Borland (1999) found similar results in Australia. They examined the effect of an arrest record on Indigenous employment prospects using data from the 1994 National Aboriginal and Torres Strait Islander Survey (NATSIS). Controlling for age, years completed at high school, post-

school qualifications, whether the respondent had difficulty speaking English, alcohol consumption and whether the respondent was a member of the Stolen Generations, they found that an arrest record reduced Indigenous employment for males and females by 18.3 and 13.1 percentage points respectively. On this basis, Hunter and Borland estimated that differences in arrest rates for Indigenous and non-Indigenous Australians may explain about 15 per cent of the difference in levels of employment between these two groups.

Reason number four is that the high rate of Aboriginal imprisonment is very expensive. As at June 2012, there were 7929 adult Aboriginal offenders in prison across Australia (ABS 2012b). The average cost per day of keeping an adult in an Australian prison is \$275 (Steering Committee for the Review of Government Service Provision (SCRGSP) 2011, p. 8.23). It is therefore costing Australian taxpayers more than \$795 million per annum just to maintain the current level of adult Indigenous imprisonment. This figure almost certainly greatly underestimates the true direct cost of Indigenous imprisonment as it takes no account of the correctional resources consumed in juvenile detention centres, police resources in responding to offending, the cost of investigating and prosecuting suspected offenders and the health resources in responding to and treating victims. Because the Indigenous status of persons using mainstream government services is often unknown, it is impossible to obtain precise estimates of the relative rates of expenditure on law and order. One recent estimate, however, suggested that for every dollar spent on non-Indigenous Australians in the interest of public order and safety, \$5.83 is being spent on Indigenous Australians (SCRGSP 2012a, p. 226). Whether this figure is accepted or not, there can be no doubt that Indigenous Australians account for a disproportionate share of spending on law and order. This is money that might otherwise be spent on improving Indigenous education and health outcomes.

Reason number five is that Australia's high Indigenous imprisonment rate has been the subject of repeated international criticism. In March 2000, for example, the International Convention on the Elimination of all Forms of Racial Discrimination noted 'with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population' (United Nations 2000, para. 15). Coming as it did just months before the Sydney Olympics, this comment received headline coverage in the international media (BBC News 2000). It is easy to dismiss criticism like this as uninformed or partisan and the Australian Government at the time did just that. The adverse publicity it attracts, however, is prejudicial to Australia's international interests. It is far better to deal with a problem generating adverse publicity for a country than ignore it or seek to discredit the source of the complaint.

The sixth and final reason is moral. As former Prime Minister Kevin Rudd made clear in his apology on behalf of non-Indigenous Australians to Aboriginal people, the consequences of European settlement have been truly calamitous for Aboriginal Australians. The harm might not have always been deliberate and it may not have been inflicted by anyone alive today but it is no less real for that. An apology for past wrongs would be meaningless without a determined attempt to remedy the damage done. For this reason, if for no other, we owe it to the Aboriginal people of Australia to reduce the rate at which they are being arrested, prosecuted and imprisoned.