

# INCARCERATING ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN IN AUSTRALIA: FINDING A BALANCE IN DEFINING THE 'JUST PRISON'

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## I Introduction

The over-representation of First Peoples,<sup>1</sup> generally, and women specifically, in Australian prisons is beyond debate.<sup>2</sup> However, Australia has seen a revalorisation of the prison and punitive measures like incarceration as the primary solution to social problems and social disadvantage, despite an array of abolitionist and prison rights campaigns, particularly across New South Wales and Victoria, that have impacted upon governmental and correctional penal reform policies.<sup>3</sup>

A wealth of research has been conducted on and with Australian First Peoples, covering experiences of criminal justice such as net-widening and over-policing,<sup>4</sup> the nature of the offences that most-likely bring First Peoples into contact with the criminal justice system (violent offences (eg, assault) versus less serious offences (eg, public order offences)),<sup>5</sup> and the comparative harshness or leniency experienced by First Peoples during sentencing across a variety of Australian jurisdictions.<sup>6</sup> However, what is yet to be extensively studied is the lived experience of incarceration for Australian First Peoples, particularly women.

The consideration of the carceral experience is especially timely, given the trialling of the United Kingdom derived *Measuring the Quality of Prison Life* ('MQPL') instrument<sup>7</sup> across a number of Australian jurisdictions. Arguably, the investment in prison performance assessment tools correlates with the shift in correctional (and criminological) reframing of penal policy away from penal welfarism (rehabilitation),<sup>8</sup> and towards a more positivist management of risk identified in the new penology.<sup>9</sup> In the Australian context, the new penology relocates accountability to performance measures and quantitative evaluation (eg, Productivity Commission),

devaluing the dehumanising and painful aspects of incarceration to instead judge the effectiveness of any given institution's ability to deliver on its mission of population management, as opposed to deterrence, rehabilitation or retribution. However, the MQPL stands apart from customary prison performance mechanisms, in that it looks beyond the easily measurable key performance indicators ('KPIs') to instead measure a prison's subjective quality,<sup>10</sup> building upon a tradition of prison climate research that prioritises the lived experience of incarceration.<sup>11</sup>

Yet despite the prima facie promise of the MQPL, due to its proven reliability and validity for United Kingdom Prison Service institutions,<sup>12</sup> and its apparent cross-jurisdictional consistency based upon research in the United Kingdom and the United States,<sup>13</sup> its appropriateness for Australian prisons is uncertain. In particular, due to the over-representation of First Peoples in Australian carceral institutions,<sup>14</sup> and further due to the non-consideration of gender differences in the needs and experiences of women generally, and racialised women specifically, in the development of the MQPL.<sup>15</sup>

In order to understand how the MQPL may require adjustment to better reflect the needs of First Peoples generally, and First Peoples women specifically, the authors reflected on the discourses that created the foundation of the first generation MQPL. Encapsulating dimensions such as 'humanity' and 'decency', the first iteration of the MQPL was built on a foundation of human rights language.<sup>16</sup> Therefore, it is argued that to best understand how the MQPL may manifest and be understood by First Peoples populations in the Australian context, it is important to intersperse key human rights principles and themes by reflecting upon important United Nations human rights instruments concerned with

indigeneity/minority populations, gender/sex, and prisons/detention, in conjunction with foundational instruments that have helped to develop the universal definition of human rights standards (such as the *Universal Declaration on Human Rights*).<sup>17</sup>

Moreover, the authors argue that given the over-representation of First Peoples in Australian correctional institutions,<sup>18</sup> it is imperative that (appropriate) interviews be conducted with members of the First Peoples carceral population, in conjunction with Elders and respected community members, where possible, in order to define what 'prison quality' means to them. To ignore the possibility of subjective difference not only in the experience of incarceration, but in the definition of dimensions as found in the MQPL, ultimately positions the well-meaning implementation of the innovative United Kingdom initiative as a source of deep colonisation.<sup>19</sup>

Therefore, this article proposes a continuation of the prison quality tradition, by investing in the first hand experiences of First Peoples men and women in Australian correctional institutions. In particular, the authors focus on the need to consider how the MQPL may require re-imagination, grounded in gender-based differences in the experience of incarceration, especially given the plethora of literature that critiques the blind application of risk-based instruments founded on the aggregate patterns of (Anglophone) males with women, especially racialised women.<sup>20</sup> Moreover, the authors draw attention to the rationale for re-grounding a First Peoples-appropriate measure of prison quality in human rights discourses, despite Australia's notorious lack of engagement with international human rights.<sup>21</sup> Ultimately, the extension of the MQPL, equipped to reflect cultural/racial and gendered differences is rebranded as 'the just prison', a model that, depending upon the institution to be measured, can be adjusted along cultural/racial and gendered lines to provide a frame through which to understand the prison's performance.

To begin, the authors briefly consider the innovative prison quality measure, the MQPL, identifying the promise of this instrument. Second, given the proposed usage of the MQPL in Australian jurisdictions, the vast over-representation of First Peoples women in Australian carceral institutions is noted. First Peoples women, in particular, are considered due to the vast increase in the rate of Aboriginal and Torres Strait Islander women captured by Australian corrections, demanding a re-imagination of the way prisons are assessed;

it is not enough to simply focus on frontend service delivery in the criminal justice system, while negating the impact the prison itself has on the re-incarceration of First Peoples women. Third, given the unique challenges faced in the Australian carceral climate, an argument is made that if the MQPL is to be appropriately implemented in Australia, changes may be required. Such an argument is founded on the custom of critical feminist scholarship regarding the need for gender-responsivity in both risk and actuarial justice. Fourth, the authors propose an extended concept—the just prison—that uses prison quality as its inspiration and foundation. It suggests a reinvestment in the human rights foundation found in the first iteration of the MQPL, while furthermore suggesting the need to engage in culturally appropriate interviews with imprisoned Aboriginal and Torres Strait Islander women, and Elders and respected persons from community, where able, to better understand how the MQPL could look in the Australian carceral climate. Thus, this new concept—the just prison—represents an extension of the current literature on the quality of prisons, as opposed to a subsumption of it.

## II Innovation in the Assessment of Correctional Institutions: Prison Quality and the MQPL

Prison quality is an assessment tool that looks beyond the easily measurable to instead focus on the intangible aspects of incarceration that identifies a prison's subjective quality.<sup>22</sup> Built on a tradition of prison climate research that prioritises the lived experience of incarceration,<sup>23</sup> prison quality and the MQPL—the *Measuring the Quality of Prison Life* instrument—establishes those aspects of a prison sentence that makes the experience of incarceration less dehumanising or painful.<sup>24</sup> Unlike other risk-focused assessment instruments that suppress the individual experience of incarceration to privilege the 'objective' and 'clinical' aspects of actuarial assessment, prison quality values the impressions of those living imprisonment in a bid to capture how the prison 'feels'.<sup>25</sup>

Motivated by initial works on suicide in prison,<sup>26</sup> Liebling sought to understand what it was from prison officers and prisoners perspectives that made for an interiorly legitimate prison.<sup>27</sup> In this context, 'legitimacy' is embedded in fairness and consistency within the prison regime.<sup>28</sup> For instance, a comparatively harsh regime may still be legitimate where there is fairness across the prisoners and the prisoner experience.<sup>29</sup> Therefore, a more lenient regime may lack legitimacy and constitute a more 'painful' experience for

prisoners, where that leniency results in inconsistency and uncertainty for the captured population.<sup>30</sup> Ultimately, a well-disciplined, and fair, regime may still be legitimate.<sup>31</sup>

Much of what is counterproductive in the assessment of prisons by administrators, and just as often, researchers, are the instruments employed to establish a regime's efficacy. Evaluations in correctional institutions are regularly renovated instruments appropriated from other departments, such as psychiatric facilities and hospitals,<sup>32</sup> which aim to identify therapeutic effectiveness. Though appropriate to a point, with behaviour modification (rehabilitation) being a theoretical, if not practical, aspect of the correctional mission, the prison represents more than the treatment of the captured 'Other'.<sup>33</sup> Prison quality and the MQPL is thus uniquely suited to remedy such a gap, as it represents a step towards a seldom considered, and yet integral, component of the prison—the day-to-day experience of incarceration, and how that environment impacts upon an individual's ability to survive or even 'flourish'.<sup>34</sup>

Prison quality was developed in close consultation with a variety of (male) prisoners and correctional staff members across Britain,<sup>35</sup> using a method of appreciative inquiry ('AI'),<sup>36</sup> an organisational tool that searches for 'what is life-giving out of what is experienced as painful'.<sup>37</sup> The resulting instrument, the MQPL, encompasses three key dimensions, and 15 key categories (see Table 1):

Table 1: MQPL key dimensions and categories.<sup>38</sup>

Dimensions	Categories
Relationship	respect; humanity; staff-prisoner relationships; trust; support.
Regime	fairness; safety, wellbeing; personal development; family contact; decency.
Social structure and meaning	power/authority; prisoner social life; meaning of imprisonment; quality of life.

Source: Adapted from Liebling.<sup>39</sup>

Despite variations in subjective labels, representative factors of prison quality appear to hold cross-jurisdictional consistency, as indicated by research in the United Kingdom and the United States.<sup>40</sup> Further, recent research suggests an

increased likelihood of improved uptake in rehabilitation programmes and behavioural change where better prison quality exists,<sup>41</sup> thus supporting the movement away from risk-based thinking, which is especially relevant in the current consideration given the criticisms mentioned in Part IV. The widespread acceptance and application of the MQPL through the United Kingdom and the interest of departments of corrections across Australia, moreover, indicates a pattern of institutional investment for improving prison conditions.

While the MQPL holds promise in reflecting the lived experience of incarceration, there nevertheless may still be limitations relevant to its use in Australia, especially in regards to regional prisons. Transplanting and adopting the MQPL in its current form in Australia, and thus incidentally to First Peoples lives by virtue of criminal justice processes that perpetuate agendas of mass incarceration,<sup>42</sup> or hyperincarceration,<sup>43</sup> may ultimately represent a process of deep colonisation,<sup>44</sup> yet another benevolent means of attempting to better conditions unilaterally while imposing the values and ideals of the Anglophone conqueror.<sup>45</sup> 'Deep colonisation' refers to mechanisms, agents or instruments ostensibly aimed at reducing the impact of colonisation—such as instruments purported to better conditions for Australian First Peoples—while simultaneously advancing the colonising agenda.<sup>46</sup> Thus, blindly implementing prison quality ultimately de-privileges the experience of incarceration for Aboriginal and Torres Strait Islander peoples. Furthermore, the MQPL was developed based on values identified by male prisoners and both male and female correctional staff.<sup>47</sup> In developing the MQPL, Liebling expressly excluded female prisoners, noting the tendency for women to 'evaluate the prison in a significantly different way'.<sup>48</sup> Therefore, the MQPL, and prison quality, in its current form may not reflect the specific needs and values of women generally, and First Peoples women specifically, creating a need to understand the intersectional differences in gendered and racial and/or ethnic experiences of incarceration. Such a proposition is especially timely given the vast over-representation of Aboriginal and Torres Strait Islander women in Australian carceral institutions.

### III The Over-Representation of Aboriginal and Torres Strait Islander Women in Australian Prisons

Aboriginal and Torres Strait Islander peoples represent approximately 2.5 per cent of the Australian population,<sup>49</sup>

while constituting over 27 per cent of the Australian prisoner population.<sup>50</sup> The immense over-representation of First Peoples men and women in Australian prisons stresses the need to suppress the perpetuation of trauma, the continuation of colonisation, and the removal of individuals not only from community, but also from families, clans and skin groups. According to the Australian Bureau of Statistics, 9,885 people who identified as being Aboriginal and/or Torres Strait Islander were incarcerated nationally between 30 June 2014 and 30 June 2015.<sup>51</sup> Of all adult First Peoples incarcerated, women represented 10.4 per cent ( $n=1025$ ),<sup>52</sup> while non-First Peoples women constituted 7.1 per cent ( $n=1849$ ) of the adult non-First Peoples prisoner population ( $n = 26\ 214$ ).<sup>53</sup> Approximately 39 per cent of all First Peoples women incarcerated nationally were located in Western Australia ( $n=264$ ) and the Northern Territory ( $n=131$ ), with Queensland ( $n=237$ ) and New South Wales ( $n=302$ ) constituting a further 53 per cent.<sup>54</sup>

Notwithstanding the percentage of First Peoples women housed in Queensland and New South Wales correctional institutions, the rate at which First Peoples women are incarcerated in Western Australia and the Northern Territory signals a possible agenda of mass incarceration,<sup>55</sup> or hyperincarceration,<sup>56</sup> that requires immediate attention. While incarcerated at rates of 371.7 per 100,000 of the adult First Peoples female population in Queensland, and 416.9 per 100,000 in New South Wales, First Peoples women in Western Australia and the Northern Territory are imprisoned at rates of 845.6 per 100,000 and 501.0 per 100,000 respectively.<sup>57</sup> Both sit above the national rate of 445.7 per 100,000,<sup>58</sup> with Western Australia in particular being of concern. However, the number of First Peoples who move through the criminal justice system in Australia is greatly underestimated by the numbers recorded in any given census.<sup>59</sup> With significant amounts of sentenced and unsentenced First Peoples prisoners serving less than 12 months, many are not captured in the statistical snapshot of Australian criminal justice.<sup>60</sup>

Over two-thirds (67.5 per cent) of incarcerated First Peoples women nationally have served a prior term of imprisonment.<sup>61</sup> Conversely, 40.4 per cent of non-First Peoples women nationally returned to prison.<sup>62</sup> The high percentage for re-incarceration of First Peoples women raises questions concerning the efficacy of prison as a form of punishment. Research has shown that First Peoples' views on punishment, particularly those more closely involved in customary life, are largely divergent from traditional Western understandings of criminal justice.<sup>63</sup> Customary First Peoples

punishment processes are principally restorative, despite the physical consequences of corporal punishments such as spearing, intended to mend the bond between the offender and the victim and/or victim's family, as well as the wider community.<sup>64</sup> Therefore, punishment is often not exacted for an offender's wrongdoing until he or she has undergone traditional forms of punishment ('payback'), despite having been processed through the Australian Westminster system of criminal justice (ie, incarceration).

The qualitative difference in the understanding of 'punishment', especially given the high rate at which First Peoples women are re-incarcerated, questions the prison's ability to deliver on its mission of deterrence and behaviour modification. Yet, this failure may be a symptom of wider justice-based policies regarding the way crime is 'managed'. There has been a marked shift in criminal justice policy away from an agenda of penal welfarism, or rehabilitation, to that of population management.<sup>65</sup> Instead of attempting to reduce crime through behaviour management policies of rehabilitation and deterrence in correctional institutions, prisoners are re-imagined as risky populations requiring constant supervision.<sup>66</sup> Historically, and arguably in contemporary Australian society, the plethora of coercive government policy regarding Aboriginal and Torres Strait Islander peoples in the wake of colonisation earmarks Australia's First Peoples as in need of similar (general) control. This overlaying of political and historical action prioritises the urgency with which the over-representation of First Peoples women in Australian prisons must be addressed.

#### IV The Problem of Risk and Actuarial Justice

As noted above, penal welfarism (rehabilitation) has largely been replaced by an agenda of population management that minimises individualisation and prioritises the employment of 'objective' aggregate patterns to control risky populations.<sup>67</sup> High recidivism rates, especially among First Peoples, arguably indicate the prisons' inability to deliver in regard to deterrence, further reinforcing the movement towards a risk-management retributive model that aims to govern as opposed to reduce crime. An increased focus on retributive justice encourages evidence-based practices and risk assessment regimes, ultimately perpetuating the population management policy.

Despite the rationale for employing a risk management agenda, actuarial risk assessment instruments have

been widely criticised for failing to take into account intersectionality,<sup>68</sup> because actuarial tools such as the *Level of Service Inventory-Revised* ('LSI-R') are primarily developed through empirical research on Anglophone males. While some argue that such risk assessment tools apply equally across populations,<sup>69</sup> suggesting that race, class and gender constitute discrete risk factors,<sup>70</sup> critical examinations still position the qualitative difference in the carceral experience for women and racial minorities at the forefront of their critique.<sup>71</sup> Moreover, risk as a concept lacks a conclusive definition, adding a further layer of complication. In the context of the Risk-Needs-Responsivity instrument widely utilised in corrections, 'risk' represents the predictability of criminal behaviour and the matching of treatment services to an offender's level of risk,<sup>72</sup> however, this definition is not universally applied. Further, risk and its interpretation are 'contingent upon specific cultural, political and moral evaluations of behaviours and events',<sup>73</sup> yet despite this, gradations of colonisation, systemic oppression and gendered experience are often negated when crime becomes a calculable, avoidable, and governable risk.<sup>74</sup>

Current conceptualisations further minimise the responsibility of the State in the mitigation of the risk for any given individual, group of individuals, class, or subsection of society.<sup>75</sup> In this setting, risk for women becomes 'about misogyny and the continued perpetuation of women's oppression through fear of crime and blame for their situation',<sup>76</sup> requiring women to mitigate their likelihood of offending, and be offended against. Societal and structural relationships are ignored or constructed as individual inadequacies that are the responsibility of the autonomous subject, dissociating the understanding of risk and need from broader political constructs.<sup>77</sup> For First Peoples women, the effects of colonisation, the Stolen Generation, and other systemic forms of discrimination are individually focused and become the primary concern of discrete autonomous subjects, no longer the responsibility of the State.

The critiques of risk and actuarial justice in terms of their ability to reflect the qualitative differences in the needs of men and women, however, are of primary importance here. Feminist scholars widely contest indiscriminately adopting the conceptualisation of 'risk' and 'need' as developed by reference to the Anglophone male experience of incarceration across other populations, as these values are not neutral statistical categories.<sup>78</sup> Intersectionality (ie,

gender, race/ethnicity, class), therefore, remains important in the consideration of the appropriate identification of individuals' risk and needs. The gender and cultural responsivity literature has established that regardless of whether generic risk factors are relevant or predictive (ie, substance abuse, marital/familial difficulties, employment) across populations, there remain differences in the qualitative experience.<sup>79</sup> With men and women having different needs and posing different risks, feminist scholars argue for the inclusion of 'gender specific needs' with particular reference to minority women.<sup>80</sup>

Women are multiply oppressed by gender, class and race,<sup>81</sup> however, intersectional characteristics are not clearly separable, coexisting and mutually affecting the experience of each layer of oppression.<sup>82</sup> The experiences of First Peoples women, then, 'embody and exemplify the intersections between colonial and neocolonial oppression and the multiple sites of gender disadvantage and inequality that stem from patriarchal domination'.<sup>83</sup> There has been sparse consideration of the implications of intersectional oppression for penal policy however, despite racial and ethnic disparities becoming intensified once risk-based thinking is introduced to criminal justice.<sup>84</sup> Further, the uncritical adoption of risk assessment instruments may reproduce and embed systemic discrimination when considering racial, ethnic and social inequality.<sup>85</sup> Moreover, studies concerning risk and race have tended to emphasise the experience of racialised men, though concern has been expressed regarding the racialised nature of female offending and the formulaic and discriminatory foundation of penalty.<sup>86</sup>

'Aboriginal feminists'<sup>87</sup> often highlight the colonising process of criminal justice when critiquing Western systems.<sup>88</sup> Risk and risk assessment tools may similarly be constructed as agents of the colonising agenda. Though feminists argue that the movement against patriarchy champions change for minority women, 'Aboriginal feminists' criticise feminist commentary concerning criminal justice as perpetuating the oppression of indigenous and minority status women globally by assuming the ubiquitous sisterhood and the homogenous nature of women,<sup>89</sup> prioritising the experience of patriarchal domination of Western women to the longstanding violent colonisation of indigenous women by both male and female Anglophone conquerors.<sup>90</sup> Thus, 'Aboriginal feminism' is invested in the construction of instruments and policies that disrupt the colonising agenda.

It is with all of the above in mind that an argument is made for a re-imagination of prison quality to reflect the voices and experiences of First Peoples women in Australia,<sup>91</sup> with a reinvestment in prison quality's original foundation in human rights. The possibility for deep colonisation, if the MQPL in its current form is transplanted for use with Australian First Peoples women, is too high to simply ignore.

## **V Building an Understanding of 'the Just Prison': a New Extension of the Prison Quality Tradition**

Prison quality and the MQPL, as discussed above, represent a divergent way of thinking about the assessment of correctional institutions.<sup>92</sup> Embedded in the intangible experience of incarceration that identifies how the prison is experienced by the captured 'Other' who are warehoused in these (largely) criminogenic settings, prison quality rebukes the easily measurable to instead focus on 'what matters' to those living in prison.<sup>93</sup> It is in the spirit of this mechanism that 'the just prison' is proposed, a model with the flexibility to be adjusted to suit the needs of discreet populations. Returning to prison quality's original foundation in human rights language,<sup>94</sup> a suite of United Nations human rights instruments serve as the building blocks upon which themes are drawn to inform this extended understanding. Subsequently, culturally appropriate interviews, which utilise an interface of yarning and AI,<sup>95</sup> are proposed to identify 'what matters' to First Peoples women in Western Australian and Northern Territory prisons, given the aforementioned severe over-representation of Aboriginal and Torres Strait Islander women in these jurisdictions. The subsequent values identified in these interviews serve as the flesh to the bones created in the analysis of the United Nations human rights instruments, providing context and form to create 'the just prison'.

The authors are acutely aware of the dangers of Whiteness,<sup>96</sup> as well as the embedded privilege in their positions as (largely) non-First Peoples researchers interfacing with concerns vested intrinsically with the Aboriginal and Torres Strait Islander experience. In this context, Whiteness represents 'a historical construct which conveys the European monopolisation of culture ... [often] buttressed by the historical construct of the '[First Peoples] Other'.<sup>97</sup> Furthermore, there is the need to ensure that the engagement with First Peoples and Aboriginal and Torres Strait Islander communities is not merely an act of tokenism. According to Long Laws, tokenism is likely to manifest in environments

where 'a dominant group is under pressure to share privilege, power, or other desirable commodities with a group which is excluded';<sup>98</sup> an advertisement of mobility that ultimately remains restricted in quantity and quality.<sup>99</sup> Australian First Peoples often suffer from acts of tokenism;<sup>100</sup> frustration frequently arises in individuals and communities when they are unable to bring about meaningful change, despite being included in mechanisms of the dominant Anglophone culture.<sup>101</sup> Therefore, the extension of prison quality to include not only gendered but racial, ethnic and cultural nuances needs to not merely constitute a token attempt to capture the initial support of First Peoples, whether individually or in community. To ensure that the resulting mechanism does not simply represent a deep colonising process, or a token attempt to pacify First Peoples, the instrument needs to be crafted in such a way that it reflects the subjective truth of First Peoples participants, their beliefs, and the core values identified. This aim may best be achieved through enduring relationships with Elders and respected persons, in conjunction with Aboriginal and Torres Strait Islander colleagues and scholars.

### **A Defining 'the Just Prison'**

Rather than subsuming the original concept of prison quality, 'the just prison' instead represents a natural progression that includes collaboration between human rights themes and data collected from First Peoples prisoners regarding their experience of incarceration. Though in its initial stages it is primarily concerned with First Peoples women, there is the potential to operationalise the meaning of 'the just prison' for subsequent populations by conducting (culturally, where necessary) appropriate interviews with individuals within those groups to identify 'what matters', and thus construct what 'the just prison' represents in that context. It is the reinvestment in prison quality's origins in human rights principles while simultaneously accounting for gendered, and racial difference in the experience of incarceration that sets 'the just prison' apart from the propensity to drown recognition of individual experience for the sake of what is easily captured for measurement and assessment.

### **B The Inclusion of Human Rights in a Model of Prison Performance Assessment**

As eluded to previously, human rights discourses found some expression in the appreciative exercise conducted in the development of the first iteration of the MQPL, with a

number of identified core values (ie, 'respect', 'humanity') finding some manifestation in human rights instruments.<sup>102</sup> Further, there has been a continued relationship with human rights themes and principles in subsequent iterations, with the most current version encompassing concepts such as 'care for the vulnerable' and 'decency',<sup>103</sup> concepts that are also arguably born from obligations and responsibilities arising from human rights instruments. It should be noted, however, that interpretations of these terms by international tribunals and legal actors are often conservative,<sup>104</sup> with some commentators warning that discourses on rights require qualification and supplementation by discourses on responsibilities.<sup>105</sup>

Australia's engagement with human rights and the United Nations has been arguably lacklustre with the former and tense with the latter, especially in regards to racial discrimination and the effects of colonisation on Australian First Peoples. There is little avenue for the United Nations human rights treaty bodies to enforce the compliance of a country to their obligations under the conventions, declarations, or other instruments to which the State is a party.<sup>106</sup> Where there are contraventions of a State Party's obligations, the United Nations human rights treaty body may simply direct them to correct the contravening behaviour. However, there is no recourse should the State Party fail to do so. For instance, the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, advised Australia that the Northern Territory Intervention stood in violation to Australia's obligations,<sup>107</sup> under such instruments as the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>108</sup> and the *Declaration on the Rights of Indigenous Peoples*.<sup>109</sup> The Special Rapporteur's comments were widely condemned by politicians in the media, a position consistent with the government's previous interactions with United Nations directions,<sup>110</sup> when they involved a criticism of Australia's coercive and 'protectionist' policies with First Peoples. The Howard Coalition government, for example, took great offence to the concerns raised by the Committee on the Elimination of Racial Discrimination ('the Committee') in 2000 regarding Australia's twelfth periodic report.<sup>111</sup> Rejecting the Committee's findings on First People's issues, the Howard government subsequently adopted a more limited engagement with the treaty system.<sup>112</sup>

It is not only on the international stage, however, that the human rights abuses of First Peoples in Australia have been considered. The National Inquiry into the Separation of

Aboriginal and Torres Strait Islander Children from Their Families ('NISATSIC'), more commonly known as the Stolen Generation Inquiry, identified that 'the policy adopted by Governments, which led to the forcible separation of [First Peoples] children from their families and communities, constituted genocide within the international law meaning of the term'.<sup>113</sup> The basic safeguards that protected non-First Peoples families were discarded in regards to First Peoples children, with the policy of forced removal continuing in Australia well after the voluntary subscription to treaties that outlawed racial discrimination and genocide.<sup>114</sup> Despite the NISATSIC's findings, Australian governments have engaged in a process of genocide denial, often rationalising or trivialising the outcomes of the Stolen Generation and similar protectionist policies to argue that children of the Stolen Generation were often 'better off' by being removed, and that therefore removal was in their best interests.<sup>115</sup> These denials often misinterpret the concerns and the desires of First Peoples communities, assuming the discussion is one of 'guilt' as opposed to 'responsibility'.<sup>116</sup>

Notwithstanding Australia's political relationship, criminology as a discipline has had a longstanding scholarly relationship with human rights.<sup>117</sup> In some instance, scholars within this discipline have been able to utilise human rights discourses in an emancipatory fashion, publicising ignored victimhood in a bid to create awareness and change.<sup>118</sup> Importantly for this discussion, postcolonial criminology is, according to Cunneen, obliged to recognise the human rights abuses of colonised and enslaved peoples.<sup>119</sup> Therefore, to ignore human rights instruments, and the themes that can be synthesised from them, in the construction of a measure of prison performance assessment inspired to address the short fallings of others, may ultimately undermine the initiative. Furthermore, in regard to the interests of prison managers and administrators, the infusion of human rights with the measurement of prison performance allows for corrections to minimise organisational and reputational risks that exist in the form of prisoner litigation, and the reputational damages incurred by such allegations.<sup>120</sup>

### **C Developing a Preliminary Understanding of 'the Just Prison'**

The above serves to create an argument for the extension of the prison quality literature to not only consider gendered and racial differences in understanding the experience of incarceration, but also the need to reinvest in human

rights. Rather than constructing an apparatus based on aggregate patterns of offending that presupposes the individual conformity of women (and in this instance First Peoples women) to a masculine model of confinement, the development of 'the just prison' is a three-step process as outlined below.

(i) Step One: Synthesising Human Rights Instruments

First, appropriate United Nations documents are identified according to four selection criteria suitable to building a foundation for 'the just prison for First Peoples women in Australia':

- (a) indigeneity/minority peoples;
- (b) gender/sex;
- (c) prison/detention; and
- (d) influential international United Nations documents.

This process located a total of 34 United Nations human rights instruments between 1948 and 2010. Each of these criteria is geared to capture the human rights instruments that relate to a specific aspect of the population: incarcerated First Peoples women.

First, 'influential international United Nations documents' help to create the footing for the subsequent variations, including such instruments as the *Universal Declaration on Human Rights*,<sup>121</sup> the *International Covenant on Civil and Political Rights*,<sup>122</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>123</sup> Documents such as these created the foundation for all of the subsequent United Nations instruments, representing human rights in their broadest form. Second, 'indigenous/minority peoples' identify those instruments intrinsically concerned with the human rights of oppressed minorities and indigenous peoples globally that suffer under programs of colonisation or other forms of discriminatory management and treatment, such as the *Declaration on the granting of independence to colonial countries and peoples*,<sup>124</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>125</sup> and the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>126</sup> Third, 'gender/sex' detects those instruments concerned with the oppression of women and the unequal treatment endured at the hands of patriarchal systems, including the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>127</sup> the *Declaration on the Elimination of Violence against Women*,<sup>128</sup> and the *United Nations Rules for the Treatment of Women*

*Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*.<sup>129</sup> Lastly, 'prison/detention' discerns those instruments that are primarily concerned with the conditions experienced by prisoners and/or detainees, including the *United Nations Standard Minimum Rules for the Treatment of Prisoners*,<sup>130</sup> the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>131</sup> and the *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*.<sup>132</sup>

The 34 instruments undergo processes of content analysis,<sup>133</sup> to identify the core values represented in not only each instrument, but also each criterion. Once these values have been refined through a process of moderation, and subsequent consultation between the authors, they are ordered into a series of meaningful models that create the basis for understanding 'the just prison' across a number of populations: 'the just prison for men' (themes derived from criteria (c) and (d)), 'the just prison for women' (themes derived from criteria (b), (c) and (d)), 'the just prison for First Peoples men' (themes derived from criteria (a), (c) and (d)), and for the purposes of this research, 'the just prison for First Peoples women' (themes derived from criteria (a), (b), (c) and (d)). These models create the bones for understanding what 'the just prison' looks like to each of these populations. It is the second step, however, that creates the flesh to give those models meaning and relevance.

(ii) Step Two: Conducting (Appropriate) Interviews with the Target Population

Given the research's focus on First Peoples experience, the (largely non-First Peoples) researchers decided that adopting Western research methods and methodologies was largely inappropriate if not informed by First Peoples knowledges. Instead, a composite method was proposed that interfaced AI,<sup>134</sup> the tool utilised in the development of the original prison quality instrument,<sup>135</sup> and yarning, a traditional form of First Peoples knowledge acquisition and sharing.<sup>136</sup> AI created the paradigm or frame, giving the research scholarly credibility, while yarning represented the mode of data collection, a way of prioritising cultural safety and First Peoples epistemologies, axiologies, and ontologies.

Research at the interface 'aims to harness the energy from two systems of understanding in order to create new knowledge that can then be used to advance understanding in two worlds'.<sup>137</sup> Rather than assuming the subsumption of yarning



as simply another tool in the researcher's repertoire,<sup>138</sup> the method of First Peoples cultural conversation was used with the consent and advice of Elders, respected persons, and other First Peoples colleagues and scholars consulted with during the course of the research.

*a. Appreciative Inquiry*

The original conceptualisation of prison quality was built using AI.<sup>139</sup> Fundamentally, AI seeks to understand 'what works' and 'what matters' within an institution or space, subverting the usual problem-based text of research to identify,<sup>140</sup> for current purposes, how individuals survive incarceration, and what in particular is valued most.<sup>141</sup> Developed primarily as a tool for organisational change,<sup>142</sup> AI encourages participants to reflect upon their most positive experiences,<sup>143</sup> in an attempt to generate an image of the institution (or other space) at its current best so that a collaborative interpretation of 'what might be' can be achieved.<sup>144</sup> Identified values are founded in memories and narratives of individual's experiences.<sup>145</sup> It is less concerned with the predictive validity of generated theories, and instead prioritises the transformation of organisations and/or individuals.<sup>146</sup>

The appropriateness of AI for use with First Peoples in Australia is vested in not only its prior use in prisons across the United Kingdom in the development of the MQPL,<sup>147</sup> but also its successful application with marginalised communities, minority and First Peoples on an international level, and in Australia with Aboriginal and Torres Strait Islander peoples.<sup>148</sup> Blagg, for instance, applied the transformative tool to appraise the performance of Red Dust Role Models, a program working with young people in remote communities in the Northern Territory.<sup>149</sup> The Indigenous Youth Arts and Culture Program in Fremantle, Victoria, was similarly assessed using AI.<sup>150</sup> The prior use of AI with Australian First Peoples across Australia earmarks the research paradigm as arguably suitable for implementation in the appreciation of qualitative difference in the experience of incarceration for First Peoples women.

The strengths-based focus of AI negates the usual propensity to employ 'vocabularies of deficit',<sup>151</sup> a common problem of research concerning Aboriginal and Torres Strait Islander and other indigenous and minority status peoples.<sup>152</sup> Resilience and strength in First Peoples are often denied in the completion of scholarly research,<sup>153</sup> problematising populations through

the erection of barriers and the attention paid to a project, situation, individual or population's shortfalls.<sup>154</sup> Therefore, the fundamental privileging of positive experiences, along with the inclusive and empowering possibilities of the research paradigm, uniquely position AI as an arguably decolonising agent.

However, AI does not simply accentuate the positive and deprioritise the negative experiences of individuals.<sup>155</sup> Instead, negative experiences are interrogated to identify the value or need that is being denied, reframing the negative experience to recognise other instances where the denied value has been felt within the institution or elsewhere.<sup>156</sup> This reframing supports the cultivation of an appreciative mindset,<sup>157</sup> while simultaneously acknowledging the validity of the negative experience and creating an environment conducive to organisational or individual change. Transformational change is not guaranteed simply by identifying peak experiences and positives in an institution or an individual.<sup>158</sup> Used as a collective problem-solving exercise, AI may ultimately leave the organisational culture intact.<sup>159</sup> Instead, the generative nature of the research paradigm must be emphasised, along with the cultivation of an appreciative mindset,<sup>160</sup> where positive intent is prioritised instead of positive feelings.<sup>161</sup> Individuals, by using an appreciative mindset, identify the granules of what they want more of in the current system or environment, extrapolating from this to create the motivation for change.<sup>162</sup>

Intrinsically, AI concerns an appreciation of the 'lived experience' of an institution or setting, gathering the narrative and meaning through a creative qualitative process concerned with theory generation that is relevant to the individuals or organisations concerned.<sup>163</sup> As AI constructs an understanding of individual experiences through memories and stories of individuals,<sup>164</sup> it is uniquely suited for use with First Peoples in Australia. Notwithstanding the above, scholars have argued that emphasising and privileging Australian First Peoples' voices and social mores is essential when engaging in research about Aboriginal and Torres Strait Islander experiences.<sup>165</sup> AI's investment in the inherent storytelling associated with image generation and the conveyance of the narrative represents an advantage in regard to its use with Australian First Peoples.<sup>166</sup> Moreover, this emphasis on developing individual narratives and acknowledging the importance of emotion in the reflection upon memories of

what it means for someone, or something, to be at its 'best', uniquely positions AI alongside traditional First Peoples modes of knowing, doing, and understanding.

*b. Yarning*

Indigenous scholars are widely critical of the blind application of traditional social science research paradigms that privilege Western epistemologies, axiologies and ontologies.<sup>167</sup> Though non-First Peoples are still encouraged by First Peoples commentators to complete critical research that supports and informs the struggle for self-determination,<sup>168</sup> cultural appropriateness and the non-exploitative form of the research is of primary concern.<sup>169</sup> A common challenge to the research conducted on First Peoples by non-First Peoples researchers is the lack of investment in the use of Aboriginal and Torres Strait Islander ontologies, despite the focus on Australian First Peoples.<sup>170</sup> Moreover, many of the methods used by non-First Peoples researchers are inappropriate for long-term change.<sup>171</sup>

The use, then, of yarning as a data collection tool creates a means through which First Peoples ontology, epistemology and axiology is prioritised in the completion of this research. While difficulties exist in defining 'yarning' as a research tool,<sup>172</sup> it can be loosely explained as a form of First Peoples' cultural conversation,<sup>173</sup> which is suited to processes of research generation and development, as well as data collection.<sup>174</sup> Though some have identified it as an 'informal' process,<sup>175</sup> Dean has argued that framing yarning in this way undermines its strength, appropriateness, and veracity, denying the intentional purpose and negotiation intrinsic in the yarn's development.<sup>176</sup> As such, yarning 'reflects a formal process of sharing knowledge that is reliant upon relationships, expected outcomes, responsibility and accountability between the participants, country and culture'.<sup>177</sup>

Yarning as a tool for collecting data provides a way through which appropriate knowledge may be shared and transferred between the participant and the researcher. The focus on relationships demands reciprocity on behalf of the researcher,<sup>178</sup> unable to sit outside of the data as an objective observer, as doing so would ultimately undermine the data collected, fashioning the researcher as the owner and 'knower' of knowledge, while typecasting the participant as an object through which information may be extracted. Data collected using yarning, instead, requires researchers to largely situate themselves as 'learners', journeying with

participants through story and memory to places aligned with the topic or purpose of the research.<sup>179</sup> Locating researchers as listeners or learners in the data collection process positions First Peoples as the authority with respect to their knowledge,<sup>180</sup> strengthening the development of the First Peoples' research paradigm.

Thus, yarning as a data collection tool is useful in developing an understanding of the experience of incarceration for First Peoples women. It is invested in the strength of First Peoples' culture,<sup>181</sup> and shows respect for traditional cultural practices and philosophies by not merely superimposing the core values and beliefs of Western academic scholarship. Further, it encourages the engagement of incarcerated First Peoples women by creating a secure space based on agreed rules and boundaries, marking the participants as the knowers of knowledge as opposed to the objects through which knowledge can be extracted.<sup>182</sup>

*c. The Interviews: Purposive Conversations*

To inform the proposed re-imagining of prison quality to account for projected qualitative difference in the experience of incarceration for First Peoples women, 60 purposive conversations were conducted in four institutions across the Northern Territory and Western Australia with correctional staff and incarcerated women of both First Peoples and non-First Peoples descent. Participants were recruited using a mixture of snowball and purposive sampling identified from the target population of available subjects,<sup>183</sup> namely correctional staff and imprisoned women. Sessions ranged from 15 minutes to two hours either with individuals or small groups, depending upon rapport, established as compared to establishing relationships, and the demands of busy prison regimes. Sessions with correctional staff were more likely to include only one or two participants, capturing the impressions of 20 individuals. Yarning sessions with imprisoned women, however, tended to include a mix of First Peoples ( $n \approx 64$ ) and non-First Peoples ( $n \approx 12$ ) women, with three to six participants in each session.

To enhance the comfort of the participants, who already exist in the challenging context of the prison, the data were collected in as natural a manner as possible. Instead of using enclosed spaces such as interview rooms, the purposive conversations were largely conducted in other open, less overtly regulated spaces such as those areas located for visitation. Informed consent was established by explaining to

participants, in appropriate language, who the researcher(s) were and the purpose of the research, in conjunction with the anonymity of the participants. Confidentiality was insured insofar that any information provided could not be identified as having been conveyed by any one participant, but that the words, stories, and experiences of those choosing to be involved would inform the creation of a measure of prison performance that reflected the needs of Australian First Peoples women. Further, assurances were made that any recordings, tapes, and field notes would be de-identified, and not transmitted to prison staff or managers in their raw form. A recording device was used, to ensure accuracy in later transcription of the experiences shared with the researcher(s), which could be, and was, turned off at any point the participants indicated.

#### *d. Analysis*

Similar to the treatment described above in regards to the analysis of the United Nations' instruments, the purposive conversations went through a process of content analysis,<sup>184</sup> demarcating recurring themes and patterns regarding the core values identified by the participants. Preliminary results showed that main, or higher order, factors remained true across non-First Peoples and First Peoples populations, however, the meaning or semantics may have manifested differently. For instance, how 'respect' and 'decency' was understood was influenced by experiences of racial discrimination and (colonial and/or patriarchal) oppression. Furthermore, a number of additional higher order factors are projected to develop around areas such as 'self-respect', 'pride', and the 'ability to feel like a woman'.

#### (iii) Step Three: Defining 'the Just Prison for First Peoples Women in Australia'

Using the results from steps one and two, the authors aim to create a meaningful instrument that gives a broader understanding of prison performance assessment. As argued above, though cross-jurisdictional validity exists with prison quality and the MQPL,<sup>185</sup> there are unique challenges that exist in the Australian carceral climate that may require the instrument to be amended. Rather than subsuming the MQPL and denying its viability for use in Australian corrections, the authors propose that 'the just prison' represents the next step along the continuum of the instrument's evolution, taking into account the possibility for gendered and racial difference in how the prison is survived.

#### **D Defining 'the Just Prison' for Subsequent Populations**

This article provides a snapshot for how prison performance assessment, using prison quality as its inspiration, can be re-imagined with the acknowledgement that gendered and racial differences need to be able to be captured. The three-step process outlined here provides a guide for how 'the just prison' can be operationalised for subsequent populations once the described model is refined. Additional human rights instruments can be included through a process of content analysis to synthesise the themes, thus ensuring relevance, consistency, and the currentness of the instrument. Furthermore, the categories of documents used can be tailored for appropriateness with different populations. As noted above, in the development of the understanding of 'the just prison for First Peoples women in Australia', the documents identified can also be used to demarcate the foundations for 'the just prison' for the following other populations: men, women, and First Peoples men.

Once the relevant foundational human rights principles are identified and arranged in a suitable way, appropriate interviews can be conducted with the target population to confirm whether prison quality in its current form holds meaning with the participants, or whether amendments are required to capture the unique experience of incarceration for that population. Subsequent to analysis of the interviews to delineate the core values of the population, the results from the human rights exercise can be added and arranged so that an understanding of 'the just prison for an unnamed population' can be reached.

#### **VI Limitations and Barriers to the Understanding of 'the Just Prison'**

A number of limitations, challenges or barriers exist in attempting to construct an idea of 'the just prison'. Of particular concern to the authors are questions regarding 'less eligibility' and the general criticisms of gendered- or culturally-responsive instruments or programs.

#### **A Complications that Arise Given the Concept of 'Less Eligibility'**

While this article represents a conceptual piece that proposes a novel way of understanding and assessing the experience of incarceration for First Peoples in Australia, with specific

reference to women, there are inherent complications that exist in the Australian carceral climate. Prison quality, and, by extension, 'the just prison', are primarily concerned with improving prison conditions,<sup>186</sup> encouraging a movement away from dehumanising and painful practices that devalue the individuals captured by carceral institutions.<sup>187</sup> As such, there is an inherent challenge for corrections in Australia as the improvement of prison conditions may pose less of a deterrent to incarceration in regard to some remote communities, or others that have high levels of domestic and family violence, alcoholism, and substance abuse.

According to the principle of 'less eligibility':

if imprisonment is to act as a deterrent the treatment given a prisoner should not be superior to that provided a member of the lowest significant social class in the free society.<sup>188</sup>

Originating in the English Poor Laws,<sup>189</sup> this pervasive concept poses a unique barrier or obstacle in the Australian context. As interviews with First Peoples women in the Northern Territory and Western Australia have suggested, even in their current state prison often represents a place of respite, providing an escape from domestic and other violence, and Humbug, along with a place to 'get healthy', and gain access to services that they cannot access in community, thereby feeding into the prison industrial complex.

That being said, the prison is still experienced as painful,<sup>190</sup> due to its often vast dislocation from country, separation from family, and the oppressive experiences of boredom (and the subsequent problems that arise from it, such as gossiping and altercations between the incarcerated women) when rehabilitative and/or educational programs and other forms of activities are denied. Furthermore, regardless of how much prison reform occurs without investment in First Peoples epistemologies, axiologies and ontologies, to some First Peoples, prisons will continue to represent the 'new missions—a place to rest, do nothing, and learn some things'.<sup>191</sup>

As it pertains to less eligibility, there is little that can be done, the authors suggest, at the correctional level. Instead, the responsibility falls on outside social forces to reduce the level of inequality and discrimination suffered by First Peoples *in community*. To lower the delivery of services in prisons in order to deliver on the principle of less eligibility poses real dangers concerning trauma and victimisation

for the captured population. Not only this, but often media (and other) commentators misunderstand the purpose of incarceration; the curtailment of liberty is the form in which punishment for wrongdoing can manifest in the worst criminal (and civil) cases, which should not be confused with the mistreatment of those housed in correctional institutions.

## B Gendered - and Cultural - Responsivity

The disproportionate number of socially disadvantaged and First Peoples women being incarcerated in Australia has been a source of concern for activists for decades.<sup>192</sup> In particular, campaigns have addressed the discriminatory conditions evident in Australian women's prisons, and the dislocation between international and national human rights standards for the treatment of prisoners.<sup>193</sup> Despite official rhetoric surrounding the Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody that accepted the simultaneous and compounding disadvantage experienced by First Peoples women, they are still housed in prison systems that are designed for use with non-First Peoples men, magnifying the punishment and the trauma suffered as a result.<sup>194</sup> The work of activists on the experience of incarceration for marginalised and oppressed populations such as First Peoples women has helped to create a demand for gendered- and culturally-responsive programs.<sup>195</sup>

However, the promises of these programs are often overshadowed by their inability to address 'entrenched structural and systemic disadvantage and discrimination'.<sup>196</sup> The Victorian experience with the *Better Pathways Strategy* ('*Better Pathways*') is particularly important here. *Better Pathways* was based on Bloom's gender justice framework,<sup>197</sup> and claimed to address the distinctive needs of incarcerated women, including a number of policy frameworks and initiatives to 'enhance the gender responsivity of a targeted range of prevention, early intervention, diversion, rehabilitation and transitional support interventions, with the aim of reducing women's offending, imprisonment, re-offending and victimisation'.<sup>198</sup> Though well-regarded by policymakers, and used as evidence to show the Victorian government's commitment to recognising and responding to both women's needs and cultural diversity, and as a counter to allegations of systemic discrimination,<sup>199</sup> *Better Pathways* has served to bolster the prison industrial complex by providing superficial reform while concurrently serving the interests of the system.<sup>200</sup> Gender-responsive approaches in Australia and elsewhere still have the eventual impact

of problematising the individual, emphasising individual responsibilities and needs rather than taking into account the impact of state action and social factors beyond their control, such as gendered, racial, or classist oppression.<sup>201</sup>

In a bid to reduce or combat the dangers posed by gendered- and culturally-responsive initiatives, 'the just prison' represents the evolution of a measure that has been shown to have transformational and positive impacts on correctional institutions in the United Kingdom.<sup>202</sup> Often, 'responsive' ideologies in correctional reform involve the 'problematic assumption that men's prisons and programs adequately meet men's needs, despite vast evidence to the contrary',<sup>203</sup> however, prison quality and the MQPL have not yet been shown to suffer from this deficit. Further, because 'the just prison' is designed and built on the voices and experiences of First Peoples women, it is less likely to make problematic assumptions about their 'needs'; instead, they are determined by the express communications of First Peoples women.

## VII Conclusion

First Peoples women are substantially over-represented in Australian correctional institutions,<sup>204</sup> with high recidivism rates,<sup>205</sup> which demonstrates the failure of current regimes to actively deter re-incarceration. However, new tools are being developed that move away from the departmental propensity to utilise instruments that capture the easily measurable in-prison performance assessment as opposed to 'what matters' to those living incarceration. Prison quality, measured by the MQPL, represents one such initiative.<sup>206</sup> Though its original form has evolved and expanded,<sup>207</sup> the crux of prison quality attempts to identify the subjective quality of an institution based on how the prison is experienced by its inhabitants.<sup>208</sup> Substantial promise has been shown in the instrument's ability to reflect the day-to-day experience of incarceration for prisoners, highlighting areas for administrators that require attention. Furthermore, the MQPL has been shown to have cross-jurisdictional validity,<sup>209</sup> supporting its proposed use in Australian correctional institutions.

However, the authors express concern that the original content of the MQPL may not appropriately capture the qualitative difference in experience of incarceration for First Peoples populations generally, and as discussed in more detail here, in regard to First Peoples women. The original prison quality measure expressly chose not to include incarcerated women in its construction,<sup>210</sup> as research tends to suggest that women

may 'evaluate the prison in a significantly different way'.<sup>211</sup> Moreover, feminist critiques of actuarial risk assessment tools utilised within prison settings highlight the need to reduce the oppression of difference in favour of more gender- and culturally-responsive instruments that do not problematise the individual.<sup>212</sup> Further, the blind transplantation of prison quality in its current form, no matter the benevolent intention, may ultimately constitute a form of deep colonisation.<sup>213</sup> It negates the possibility for differences in experience based on cultural or racial lines, further denying the impact of colonisation and de-prioritising the compounding effects of inequality on any group or individual's ability to 'survive' the prison.

Given the above, a re-imagining of prison quality is envisaged that moves the concept along its evolutionary continuum to include elements of both racial and gendered inclusivity. It further proposes a reinvestment in the human rights discourses that created the foundation of the original concept.<sup>214</sup> In this way, a method is proposed to understand how First Peoples women define prison quality, bolstered with additional human rights principles and themes, across a number of institutions across the Northern Territory and Western Australia. This new understanding of the concept is re-branded as 'the just prison', with a brief discussion of how it can be adapted for use with other populations. 'The just prison', as an expression of prison performance assessment, finds its foundations in agreed international standards of best practice not only within the prison, but the general treatment of all human beings, giving priority to the need to address injustices and inequalities suffered by vulnerable populations such as minority peoples and women. Further, 'the just prison' attempts to privilege the voices of those who are so often denied a say in assessing the performance of carceral institutions before the development of instruments such as the MQPL.

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- 1 For the purposes of this article, 'Aboriginal and Torres Strait Islander Peoples', 'First Peoples' and 'Australian First Peoples' are used to denote the traditional owners and custodians of Australian land. Subsequently, the terms 'indigenous' and 'indigenous and minority status peoples' are used to discuss all traditional owners and custodians worldwide collectively.
- 2 See Australian Bureau of Statistics, 'Corrective Services, Australia, June Quarter 2015' (Statistics No 4512.0, Australian Bureau of Statistics, September 2015).
- 3 Eileen Baldry, Bree Carlton and Chris Cunneen, 'Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-option' (2015) 41(3) *Social Justice* 168.
- 4 See Chris Cunneen, 'Problems in the Implementation of Community Policing Strategies' in Julia Vernon and Sandra McKillop (eds), *The Police and the Community: Proceedings of a Conference Held 23–25 October 1990* (Australian Institute of Criminology, 1992) 161; Crime and Misconduct Commission, 'Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities' (Report, Crime and Misconduct Commission, November 2009); John Williams-Mozely, *Overpolicing: A Critical Commentary on its Conceptualisation and Utility in Australian Criminological Explanations about Aboriginal Over-representation in Police Arrest and Custody Rates* (PhD Thesis, Charles Sturt University, 2009); Rick Sarre, 'An Overview of the Theory of Diversion: Notes for Correctional Policy Makers' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13-15 October 1999).
- 5 See Anna Ferrante, John Fernandez and Nini Sui Nie Loh, 'Crime and Justice Statistics for Western Australia: 2000' (Statistical Report, Crime Research Centre, University of Western Australia, November 2001); Australian Bureau of Statistics, 'Prisoners in Australia, 2015' (Statistics No 4517.0, Australian Bureau of Statistics, December 2015); Greg Gardiner and Tina-Maree Takagaki, 'Indigenous Women and the Police in Victoria: Patterns of Offending and Victimisation in the 1990s' (2002) 13 *Current Issues in Criminal Justice* 301; Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009); John Fernandez and Nini Sui Nie Loh, 'Crime and Justice Statistics for Western Australia: 2001' (Statistical Report, Crime Research Centre, University of Western Australia, November 2001); Nini Sui Nie Loh et al, 'Annual Imprisonment: Western Australia 2006' (Annual Statistical Report Series No 3, Crime Research Centre, University of Western Australia, November 2009); Sharon Payne, 'Aboriginal Women and the Law' in Patricia Weiser Eastaer and Sandra McKillop (eds), *Women and the Law: Proceedings of a Conference Held 24–26 September 1991* (Australian Institute of Criminology, 1991) 65. Both statistics and research show that Aboriginal and Torres Strait Islander women are most likely to convicted for assault ( $n = 319$ ; 31.1%), unlawful entry with intent/burglary/break and enter ( $n = 145$ ; 14.1%), and offences against justice procedures et cetera ( $n = 135$ ; 13.2%), which includes such offence types as breach of violence and non-violence orders. However, research surrounding policing data reveals that First Peoples women are more likely to come into contact with police in regards to petty offences such as fine default and public drunkenness: see Australian Bureau of Statistics, above n 5; Lorana Bartels, 'Indigenous women's offending patterns: A literature review' (AIC Reports: Research and Public Policy Series No 107); Helen Corbett and Marine Paxman, 'Aboriginal Women and the Law' in Women and Imprisonment Group (eds), *Women and Imprisonment* (Fitzroy Legal Service, 1995) 29; Larissa Behrendt, 'Aboriginal women and crime' in Nicole Hahn Rafter (eds), *Encyclopaedia of women and crime* (Onyx Press, 2000) 1; Marie Brooks, 'The Incarceration of Aboriginal Women' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996) 266; McRae and Nettheim, above n 5; Payne, above n 5.
- 6 See Christine E W Bond and Samantha Jeffries, 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts' (2010) 17 *Psychiatry, Psychology and Law* 70; Christine E W Bond and Samantha Jeffries, 'Harsher Sentences?: Indigeneity and Prison Sentence Length in Western Australia's Higher Courts' (2011) 48 *Journal of Sociology* 266; Christine E W Bond and Samantha Jeffries, 'Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts' (2011) 51 *British Journal of Criminology* 256; Christine E W Bond, Samantha Jeffries and Don Weatherburn, 'How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales' (2001) 44 *Australian & New Zealand Journal of Criminology* 272; Samantha Jeffries and Christine E W Bond, 'Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts' (2009) 42 *Australian & New Zealand Journal of Criminology* 47; Samantha Jeffries and Christine E W Bond, 'Narratives of Mitigation: Sentencing Indigenous Criminal Defendants in South Australia's Higher Courts' (2010) 46 *Journal of Sociology* 219.

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- 8 Barbara Hudson, *Justice Through Punishment: A Critique of the 'Justice' Model of Corrections* (Macmillan Education, 1987); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001); Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).
- 9 Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449; Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans, SAGE Publications, 1992) [trans of: *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (first published 1986)].
- 10 Liebling, above n 7; Liebling, Hulley and Crewe, above n 7.
- 11 John Rynne and Peter Cassematis, 'Assessing the Prison Experience for Australian First Peoples: A Prospective Research Approach' (2015) 4(1) *International Journal for Crime, Justice and Social Democracy* 96; Michael W Ross et al, 'Measurement of Prison Social Climate: A Comparison of an Inmate Measure in England and the US' (2008) 10 *Punishment & Society* 447; Rudolf H Moos, *Evaluating Correctional and Community Settings* (Wiley, 1975).
- 12 Liebling, above n 7; Liebling, Hulley and Crewe, above n 7.
- 13 Moos, above n 11; Ross et al, above n 11.
- 14 Australian Bureau of Statistics, above n 2.
- 15 Liebling, above n 7.
- 16 Ibid.
- 17 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
- 18 Australian Bureau of Statistics, above n 2.
- 19 See Deborah Bird Rose, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6; Elena Marchetti, 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33 *Journal of Law and Society* 451.
- 20 See Barbara Bloom, Barbara Owen and Stephanie Covington, 'Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders' (Report, National Institute for Corrections, US Department of Justice, June 2003); Merry Morash, 'A Great Debate Over Using the Level of Service Inventory-Revised (LSI-R) with Women Offenders' (2009) 8 *Criminology & Public Policy* 173; Patricia Van Voorhis et al, 'Women's Risk Factors and Their Contributions to Existing Risk/Needs Assessment: The Current Status of a Gender-Responsive Supplement' (2010) 37 *Criminal Justice and Behavior* 261.
- 21 See Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009); See also ABC, 'UN Labels Indigenous Intervention Racist', *Lateline*, 27 August 2009 (Kirrin McKechnie) <<http://www.abc.net.au/lateline/content/2008/s2669184.htm>>.
- 22 Liebling, above n 7; Liebling, Hulley and Crewe, above n 7.
- 23 Moos, above n 11; Ross et al, above n 11; Rynne and Cassematis, above n 11.
- 24 Liebling, above n 7; Liebling, Hulley and Crewe, above n 7.
- 25 Ibid.
- 26 Alison Liebling, *Suicides in Prison* (Routledge, 1992).
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- 28 See Richard Sparks, 'Can Prisons be Legitimate?: Penal Politics, Privatization and the Timeliness of an Old Idea' (1994) 34(S1) *British Journal of Criminology* 14; Richard Sparks, Anthony Bottoms and Will Hay, *Prisons and the Problem of Order* (Clarendon Press, 1996).
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- 30 Ibid.
- 31 Ibid.
- 32 See generally Liebling, Hulley and Crewe, above n 7.
- 33 Ibid.
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**INCARCERATING ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN IN AUSTRALIA:  
FINDING A BALANCE IN DEFINING THE 'JUST PRISON'**

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