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CHAPTER SIX
THE PLACE OF INDIGENOUS PEOPLE: LOCATING CRIME AND CRIMINAL JUSTICE IN A COLONISING WORLD

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Since British colonisation began at the end of the eighteenth century, the history of Australia has been a struggle between Indigenous peoples and the colonisers over place. This is often represented as a struggle over land – it's control and use. Yet for Indigenous people, land was never simply an economic commodity to be exploited. It was 'place' in a deeper sense of the word, a fundamental part of Indigenous cosmology and a necessary foundation to a person's and group's ontology or *being* in the world. Place, then, can be conceptualised as both a physical and metaphysical domain. Indeed both domains are intertwined, perhaps inseparable.

This might seem somewhat extraneous to a discussion on matters of crime and criminal justice, yet as this chapter will argue, the struggle over place in its broader meaning remains core to understanding the social and political positioning of Indigenous people within the criminal law and its institutions. Such an argument is both theoretical in its consideration of the place of Indigenous people within their law and the law of the coloniser, and also deeply 'practical' in its implications. The argument goes to the heart of understanding why Indigenous people start their discussions on reform and change within the criminal justice system with a demand for recognition, negotiation and respect for Indigenous self-determination; a demand for a repositioning of Indigenous people as colonised peoples.

An appreciation of the historical struggle over the place of Indigenous people within colonising processes and discourses also requires a more nuanced approach to understanding the potential application of concepts of such as 'rurality'. While spatiality and place were fundamental to the longer-term attempts to control and regulate the colonised, the notion of a distinctly 'rural' or 'regional' perspective and it's utility needs to be contextualised. Indigenous people in contemporary Australia are about 13 times more likely to live in remote or very remote areas, and are less than half as likely to live in a major city compared to non-Indigenous people (ABS 2010, p. 13). However, the explanatory value of this difference in relation to crime and criminal justice needs careful unpacking. The relationship between remote, rural, regional and urban location and crime is complex and deeply conditioned by colonial processes (Cunneen 2001; 2007).

Placing Indigenous People: A Brief History

The place of Indigenous people in Australia within English law was determined during the early part of the nineteenth century, at least to the satisfaction of the British. Although the object of some debate, various judgements confirmed that Aboriginal people were subject to colonial courts. The New South Wales Supreme Court held in *R v Lowe* (1827) NSWSC 32 that Aboriginal people in conflict with Europeans were subject to its jurisdiction. In *R v Murrell* (1836) NSWSC 35 the Supreme Court found that the court had jurisdiction to determine criminal matters between Aboriginal people. In *Murrell* Burton J held that the 'various tribes' had not attained either the numbers or

the status of 'civilised nations' that could be recognised as sovereign states governed by laws of their own. Upon settlement and possession of the land there was only one sovereign, the King of England, and only one law, English law. Aboriginal people in the colony became the subjects of the King. The Privy Council was to confirm the doctrine of settlement and terra nullius in *Cooper v Stuart* (1889) 14 App. Cas. 286. According to the law of the coloniser, the place of Indigenous people in Australia was settled: they were without sovereignty and without law. Their land had been peacefully annexed to the British dominions.

These bold strokes of pen dispossessed Indigenous peoples of their law and their land. However, the positioning of Aboriginal people as British subjects (and later, Australian citizens) was always (and remains) deeply ambiguous and contested. In many parts of Australia, police were not simply enforcing the criminal law: they were extending the reach of British jurisdiction over resisting Indigenous peoples. For Aboriginal people the first contact they may have had with the criminal justice system was with the police acting as a paramilitary force of dispossession, dispensing summary justice and on some occasions involved in the indiscriminate massacre of clan and tribal groups. There was never any doubt at the time that the Indigenous people and the colonisers were indeed at war: during the late eighteenth and early nineteenth century in parts of south-eastern Australia (Goodall 1996); in Tasmania during the 1820s and early 1830s (Reynolds 1995); and in Queensland and Western Australia during the mid to later half of the nineteenth century (Reynolds 1993). Prosecution of police or civilians for the murder of Aboriginal people was rare. The war of extermination, as it was sometimes referred to, led to a 'rubbery attitude to the law' on the part of the authorities (Kercher 1995, p. 6). The rule of law as a constraint on arbitrary power and as a guarantee of equality before the law was suspended in relation to the killing of Aboriginal people (Neal 1991, p. 154). Indigenous people were simultaneously placed inside the legal space of English law, but outside its protection. The rule of law could be cast aside when necessary.

The place of Indigenous people in Australia was to change again from the end of the nineteenth century and during the course of the twentieth century with a shift in government policy towards 'protection'. Protection legislation saw many Indigenous individuals and communities, particularly those who were seen as unable to demonstrate the level of 'civilisation' required to exercise citizenship rights, spatially segregated on reserves and missions. Reserves and missions administered their own penal regimes outside of, and essentially parallel to, existing formal criminal justice systems (Cunneen 2001). Other processes of racialised justice abounded through curfews and segregation (Cunneen & Robb 1987), while child removal policies created further generations of institutionalised Indigenous people (NISATSIC 1997). These policies and practices reflected various racial assumptions, some built on 'science' like eugenics, others reflecting popular prejudices about the social, cultural and biological inferiority of Indigenous people. Indigenous people under protection legislation did not appear in the ledgers of the courts and prisons of the day, but were, nonetheless, imprisoned as if they had been locked in the formal prison system (Baldry & Cunneen 2014).

Numerous legislative controls and restrictions existed on movement, residence, education, healthcare, employment, voting, workers compensation and welfare/social security entitlements. For example, Indigenous people were largely excluded from the right to social security. Legislation explicitly disqualified Aboriginal people from receiving government entitlements claimable by non-Indigenous Australians, including old age, invalid and widow's pensions, child endowment and maternity allowances. The

discriminatory restrictions on social security benefits were not completely lifted until 1966 (Chesterman & Galligan 1997). Various Australian governments put in place legislative and administrative controls over the employment, working conditions and wages of Indigenous workers. These controls allowed for the non-payment of wages to some Aboriginal workers (which amounted to forced labour and bordered on a type of slavery), the underpayment of wages to other Aboriginal workers (in Queensland the minimum wage for Aboriginal and Torres Strait Islander workers was set at one eighth the 'white' wage), and the diversion of wages into Aboriginal trust funds and savings accounts (which were then rorted through various negligent and corrupt practices) (Senate Standing Committee on Legal and Constitutional Affairs 2006).

Aboriginal people who resided in or near rural towns were often regarded as a 'law and order' problem that required constant control. Segregation in all spheres of life continued in these towns until well into the 1960s. Theatres had roped off special sections, hotels refused drinks, schools refused access, hospitals had special 'wards' (Aboriginal women were often precluded from giving birth in the maternity ward), recreational and service clubs refused Aboriginal membership and entry, clothing stores refused to let Aboriginal people try-on clothing, and cemeteries had separate burial areas (Cunneen 2001, pp. 71-2; Goodall 1996, pp. 174-8). These restrictions were part of a spatial politics that denied Aboriginal people access to basic services and conditions of life that became the exclusive right of non-Indigenous people. In Chesterman and Galligan's (1997) suggestive phrase, Indigenous people were 'citizens without rights'.

This brief historical overview provides the context for locating the place of crime and crime control. At the heart of much of the interaction between coloniser and colonised in Australia, including dispossession, the introduction of English law and development of specific legal policies which regulated Indigenous lives, was the aim to create new spaces which provided for the individual ownership of land and capitalist exploitation of labour and resources. The contemporary marginalisation of Indigenous people, and their consequent socio-economic disadvantage, was forcibly constructed through a range of governmental controls (see for example, Senate Standing Committee on Legal and Constitutional Affairs 2006, p. 68). The spatial separation of Indigenous people through social, political, economic and legal mechanisms created a very particular place for Indigenous people outside of the body politic but very much within a highly regulated state sphere, and subject to an 'originary violence' which disavowed the existence of Indigenous law and sovereignty (Watson 2009).

Place and Community

The very fabric of rural and urban life in Australia has been spatially patterned through the processes of colonising strategies, policies and practices. To take one example, the remote New South Wales town of Bourke was first established as a frontier stockade in the 1830s. The Indigenous population declined dramatically and did not begin to re-establish itself until the 1930s when Aboriginal people began to return with the opportunity for employment. An Aboriginal reserve was declared in the 1940s and Aboriginal people were forced to move there. The Aboriginal reserve was located outside the town's levee banks and situated adjacent to the sewerage treatment works and the local garbage dump – a strong symbolic and material statement by the dominant society about the perceived worth of Aboriginal people (Cunneen 2001, p. 182).

Place and community for Indigenous people have also been affected by colonial policies of removing and concentrating different tribal and language groups. Many contemporary communities on former reserves and missions were constructed through the forcible relocation of different Indigenous groups. The example of Cherbourg in Queensland has been repeated in various parts of the country: by 1934 there were 28 different linguistic groups living on the settlement (Cunneen 2001, p. 183). The spatial politics that emerged as a result of the colonial process involved different and sometimes traditionally antagonistic groups being forced to live together. The construction of 'community' took people away from their traditional areas and prevented the use of some traditional means of diffusing conflict (such as temporary exile). The provision of various types of infrastructure and services (such as housing, health and education) reinforced a particular form of sociality: service provision both presupposed and regulated a sedentary, family-based living arrangement. In addition, anthropologists and ethnographers have been critical of the application of the term 'community' to describe Aboriginal social organisation (Rowse 1992, p. 53). In this context, the application of the term 'community' to the complex inter-relationships and heterogeneous groups of Indigenous people, while administratively convenient, can be misleading. Perhaps more importantly, 'community' is a discursively powerful concept: people living in 'communities' are expected to live in certain cooperative and harmonious ways.

It was noted earlier in this chapter that Indigenous people are proportionately more likely to be living in remote areas and less likely to be living in urban areas than non-Indigenous people, and further that the social, economic and spatial location of Indigenous people in Australia today is an outcome of a range of complex processes associated with the colonial experience. In terms of the location of Indigenous people, some 32 per cent live in cities, 42 per cent live in regional locations and 26 per cent live in remote and very remote areas (ABS 2010). In general, the Indigenous population in Australia is younger, living out of cities in regional, rural and remote areas, and experiencing very significant levels of disadvantage across a range of social, educational, economic and health indicators (SCRGSP 2011).

Again, in general terms, the measures of poverty and disadvantage are exacerbated in more remote communities (SCRGSP 2011). In addition, Indigenous people in remote areas are more likely to report having been arrested and incarcerated than Indigenous people in regional and urban areas (although slightly less likely to be a victim of violence) (ABS 2008). Counterpoised against this are elements of cultural strength. Measures of cultural attachment were reported at much higher rates in remote areas where 44 per cent of Indigenous people (aged 15 years and over) were living on their homelands, 80 percent identified with a clan, tribal or language group, 42 percent spoke an Aboriginal or Torres Strait Islander language as their *main* language, and 73 per cent spoke, or spoke some words of, an Aboriginal or Torres Strait Islander language (ABS 2008). It is also worth noting that Indigenous peoples living in remote communities have been directly affected by colonisation far more recently than Indigenous peoples of south eastern Australia, Tasmania and the south west of Western Australia.

Indigenous people living in regional centres and country towns of Australia have experienced their own set of issues, such as forcible relocation to missions and reserves near rural townships (Cunneen 2007, pp. 144-5). Today, people live on this land, now controlled under various land rights legislation or other land titles, but still locally known as 'missions' or 'reserves'. Alternatively, when reserve areas were revoked

during the course of the twentieth century, Aboriginal people were forced to the fringes of country towns (Goodall 1996). In other areas, town camps have emerged, as for example in Alice Springs. Town camps have both permanent residents and transient people moving to and from remote communities, often to access services such as health, or because of criminal justice requirements. In addition, some regional centres have seen increases in Indigenous populations because of the location of public housing (for example, Dubbo in New South Wales). Aboriginal people have essentially been forced out of smaller country towns to access public housing in regional centres.

Urban Indigenous populations also vary from small residual populations of Indigenous people that have remained in Australian cities since the early colonial period (such as La Perouse in Sydney), while new urban populations have grown with public housing relocations after the 1970s and 1980s. For example, in contemporary Sydney the largest Indigenous population is in the western suburbs – a relatively recent population that has moved from other urban and rural locations. A further factor cutting across these divisions is the high mobility of Indigenous people between different communities. Individuals may spend time with extended family in remote, rural and urban locations, and frequently move between the three.

What this leads to is a kind of geographic mosaic of differing levels and types of contact with the criminal justice system. At a broad level there is a greater likelihood of arrest and incarceration for Indigenous people in remote areas, and there is a general correlation between contact with the criminal justice system and various measures of socio-economic disadvantage among Indigenous people. For example, of the six Indigenous regions in New South Wales, Murdi Paaki has the highest criminal offending and victimisation levels, the highest levels of disadvantage and the most remote Indigenous communities. A similar pattern can be seen in Queensland (Cunneen 2007, pp. 146-7).

However, once we go deeper than these broad categories the picture is far from uniform (Cunneen 2007; Lawrence 2007). There can be significant differences between geographically proximate remote communities with comparable Indigenous populations, and the level of contact with the criminal justice system (McCausland & Vivian 2009; 2010). A comparison between Wilcannia and Menindee showed pronounced differences in reported crime rates. Both New South Wales towns were remote and both had significant Indigenous populations (67 per cent in Wilcannia and 47 per cent in Menindee). However, Wilcannia was seen as a largely segregated town, with the majority of the Aboriginal population living on the outskirts, while Menindee was a more integrated town with better Aboriginal /police relations, better employment prospects, a stronger relationship between the community and the school, and a history of community mobilisation to deal with problems (McCausland & Vivian 2009, p. 10).

McCausland and Vivian (2010) argue for the need to guard against simplistic applications of 'social disorganisation' theory to Indigenous communities. In the case of Wilcannia and Menindee, both communities exhibited "dense networks of acquaintanceship and shared values and beliefs" (2010, p. 327). However, those in Wilcannia operated in a negative way with norms that tolerated criminal and antisocial behavior. Menindee, on the other hand, exhibited positive attributes of social cohesion: there were "strong and insistent expectations that institutions in the town such as the school and the health service would embody Aboriginal perspectives… Menindee could be better described as an Aboriginal domain that is confidently interacting with its non-Aboriginal neighbours" (McCausland & Vivian 2010, p. 326). Understanding the

complexity of social and cultural relations needs to be a starting point for considering the social dynamics of crime and victimisation in Indigenous communities. For example in Wadeye in the Northern Territory, a community with frequent problems of offending, Memmott and Meltzer found complex forms of social capital evident with networks based on kinship, social classes, language groups, land-owning clans and ceremonial groups (cited in Lawrence 2007, p. 5).

The Frontier

There have been some broad-brushed attempts to understanding location and crime. For example, Broadhurst (1997) argues that States with high Aboriginal cultural strength and socio-economic stress are also 'frontier' States and these are the most punitive with high levels of imprisonment. Thus, according to Broadhurst, the highest rates of Aboriginal imprisonment and police custody are in the 'frontier' jurisdictions of the Northen Territory and Western Australia and the lowest rates are in settled States such as Victoria and Tasmania. For Broadhurst, the 'frontier' is defined by those jurisdictions with low levels of urbanisation and population density, a large and independent Aboriginal population and a sizeable proportion of land in Aboriginal hands (1997, p. 457). The frontier areas are places of Indigenous cultural strength and these come into conflict with a more repressive non-Indigenous society that relies on punitive criminal justice policies and practices.

There is certainly *some* consistency with Broadhurst's argument when one looks at Indigenous imprisonment. The highest Indigenous imprisonment rate for March quarter 2014 was recorded in Western Australia (3,571 per 100,000 adult Indigenous population), followed by the Northen Territory (2,901) (ABS 2014, Table 14). Both the Northern Territory and Western Australia rate high on measures of both remoteness and cultural strength (ABS, 2008; 2010). For example, in the Northern Territory some 79 per cent of Indigenous people live in remote and very remote areas (ABS 2010, p.19). Measures of cultural attachment are high: in Northern Territory remote areas nearly two thirds of Aboriginal people spoke an Aboriginal language as their *main* language, nine in ten identified with a clan, tribal or language group, and almost one in two Aboriginal people were living on their homelands (ABS 2008).

Beyond Western Australia and the Northern Territory the picture is less clear. For example in New South Wales the Indigenous imprisonment rate was 2,013 per 100,000, while in Queensland it was lower at 1,824 (ABS 2014,p. Table 14). Yet Queensland has a much greater proportion of its Indigenous population living in remote areas than New South Wales (22 per cent compared to five percent) (ABS 2010, p. 19), and also generally rates higher on measures of cultural attachment (ABS 2008). The key issue here is the way in which criminal justice policy can strongly influence 'punitiveness' independently of the socio-demographic characteristics of Indigenous people living within a particular jurisdiction. The differences between the New South Wales and Queensland Indigenous imprisonment rates can be accounted for by the much higher rates of imprisonment of Indigenous prisoners who are unsentenced remandees. The rate of unsentenced Indigenous imprisonment in New South Wales is 579 compared to 387 in Queensland, while the rate of sentenced Indigenous imprisonment is almost the same (1,397 compared to 1,393) (ABS 2014, Table 16). The high rate of remand in New South Wales is the outcome of more than a decade of punitive changes to bail eligibility in that State (NSW Law Reform Commission, 2012; Cunneen et al 2013).

In States that were considered to have low imprisonment rates for Indigenous people, the situation has also been changing. In Victoria the general prison population went up by 11 per cent between 2001 and 2006 under the former Bracks Labor Government. However, the increase in Indigenous prisoners was much higher at 43 percent during this period (Fisher 2007, pp. 5,7). Under policies pursued by the more recent Baillieu/Napthine Liberal National Government (2010-14), sentencing options for the courts have been reduced with the abolition of intensive corrections orders, community-based orders, home detention and combined custody and treatment orders, parole options have been reduced, and a new 'community corrections order' has been introduced. All of these changes clearly have the intention of increasing the use and length of imprisonment (Cunneen 2013). Aboriginal imprisonment rates in Victoria have continued to rise. Between 2006 and 2013 the increase in Aboriginal imprisonment rates was 61 per cent, while the comparable non-Indigenous rate rose by 20 per cent (ABS 2013, Table 18).

Careful grounded analysis is needed to understand spatial relations, crime and criminal justice responses. As noted, Indigenous people living in remote areas may report higher levels of arrest and incarceration, but not higher incidents of victimisation. There also appears to be significant variations between Indigenous communities irrespective of their categorisation as regional, urban or remote. While there is some appeal to the 'frontier' thesis in thinking about the high incarceration rates in the Northern Territory and Western Australia, the argument does not appear as useful when we go beyond these jurisdictions. Nor does it appear as helpful in explaining sudden and dramatic shifts in crime control and penal policies. The Northern Territory Emergency Response (the Intervention) introduced in 2007 is a case in point. Certainly the Intervention was based on a 'primitivist' idea of 'traditional' Aboriginal culture that condoned male violence. However the criminal and welfare controls that were introduced were far-reaching and reminiscent of the earlier 'protection' period in their suspension of Indigenous citizenship rights. One longer-term consequence has been an escalation in Indigenous imprisonment rates in the Northern Territory (Cunneen et al 2013, pp. 108-9).

Access to Justice

The Northern Territory Intervention also raises some particular issues that Indigenous people have in relation to access to justice (see also Chapter 10), both in relation to criminal justice matters as well as other civil and family law areas such as housing, discrimination, child protection, debt and consumer law. Existing barriers that Indigenous people face in accessing legal services have been identified in various reports over the years (for an overview see Cunneen & Schwartz 2008; also Cunneen, Alison & Schwartz 2014). It has also been acknowledged that better access to legal services and remedies can play an important role in alleviating economic and social disadvantage (Curran & Noone 2007). Geographical isolation is a major inhibitor to access to justice for Indigenous communities. In remote communities, access to justice is "so inadequate that remote Indigenous people cannot be said to have full civil rights" (Senate Legal and Constitutional References Committee 2004, para 5.120).

The socio-economic disadvantaged position of Indigenous people is likely to compound both the need for, and problems in access to, legal assistance. Some categories of disadvantage are particularly relevant to the problems that Indigenous people may have in accessing legal services: for example, low levels of literacy and numeracy; higher levels of disability; and higher levels of psychological distress

compared with non-Indigenous people (SCROGSP 2011). In addition, higher rates of self harm, the effects of childhood removal and drug and alcohol issues are all likely to make Indigenous clients a particularly disadvantaged group for legal service providers to work with (Cunneen & Schwartz 2008).

There are particular problems in providing legal assistance in remote areas. First, it is important to note that legal assistance is overwhelmingly for criminal matters, comprising around 90 percent of case and duty matters provided by Aboriginal and Torres Strait Islander Legal Services (ATSILS) (Senate Legal and Constitutional References Committee, 2004: para 5.5). Providing legal services in remote communities are expensive (at a time of reduced legal aid funding) and inherently difficult. Contacting and obtaining adequate instructions from clients, the extraordinarily large numbers of cases listed before circuit courts, the infrequent use of interpreters, the seriousness of the matters listed, the inability to access other services for specialist reports, the high levels of guilty pleas, and the lack of sentencing alternatives are simply some of the more frequently noted problems (see Cunneen & Schwartz 2008).

Access to justice for non-criminal law matters is particularly problematic in remote areas at a time when changes in public policy over recent years have increased the prevalence of civil and family law problems for Indigenous people. The shift in welfare policy to principles of *conditionality*, whereby access to welfare is based on the 'responsibilisation' of citizens through ensuring behavioural change and the meeting of certain obligations, has generated a range of specific legal issues, particularly in social housing, social security and child protection. These legal problems arise in part because conditionality is governed by increased state regulatory processes, such as tenancy leases, requirements around anti-social behaviour, school attendance, and income management. Cunneen, Alison and Schwartz's (2014) research in the Northern Territory indicates that Indigenous people are ill-equipped to respond to these new demands, especially since the introduction of the Northern Territory Intervention in 2007 and the subsequent *Stronger Futures* policy and legislation in 2012. In addition legal assistance organisations, including ATSILS and Legal Aid, simply do not have the capacity to provide effective services, particularly in remote areas (Cunneen, Alison & Schwartz 2014). Noted elsewhere is that failure to respond adequately to civil and family law problems can lead to and compound processes of criminalisation (Schwartz & Cunneen 2009).

Conclusion

Contemporary Indigenous resistance to ongoing colonial governance through the criminal justice system can be seen in various 'grassroots' attempts to control crime in Indigenous communities. There are a wide variety of approaches including holistic healing programs, various anti-violence strategies, Indigenous sentencing courts, community justice groups, night patrols, safe houses and diversionary projects (Blagg 2008, pp. 182-99). What separates these approaches out from government-based initiatives is that they are more likely to be community-*owned* rather than simply community-*based* (Blagg 2008, p. 183).

A criminal justice reform process that has recently captured the imagination of many Indigenous leaders and others in Australia has been 'justice reinvestment'. Part of the reason for the attraction of justice reinvestment is that it opens up the possibilities of greater community capacity building and community negotiation and control over criminal justice priorities. The central idea of justice reinvestment is to make savings in

correctional budgets, and then reinvest those savings in localities that produce high numbers of offenders. Justice reinvestment is very much a 'place-based' strategy concerned with developing community infrastructure and support services. Resources that would be spent on incarcerating offenders are redirected to the local communities from which offenders come and to which they will return. Reinvestment might be in redeveloping housing, providing job training and education, treatment for substance abuse and mental health services. Justice reinvestment also requires changing the criminal justice system, for example, through reforms to sentencing legislation, bail, and probation and parole (Schwartz & Cunneen 2014).

Justice reinvestment, at its core, calls for a democratic approach to decision-making about the needs of communities. This fits well with an Indigenous agenda that emphasises negotiation between government and Indigenous people and their organisations (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010). One of the challenges will be re-imagining what was essentially an urban–based reform program in the United States so that it is applicable in remote and rural settings in the Australian context. Furthermore, one of the recognised failings of justice reinvestment in the United States, despite falling or stable prison numbers, is that there has been very little reinvestment back into communities. Savings have tended to stay within government (Austin et al 2013).

This final point brings us to a core problem: will governments support Indigenous initiatives without imposing their own solutions on Indigenous people? Given the long history of colonising processes that have been outlined in this chapter, perhaps this is unlikely. It also returns us to the problem of Indigenous crime and disorder. Colonising processes have had a profound impact on the spatial patterning of Indigenous lives in Australia. However, it is not possible to simply read off from assumptions about the criminogenic affects of either urbanisation or rural settings. Grounded analysis is needed to understand spatial relations, crime and criminal justice responses. While, at a very general level, Indigenous people living in remote areas may report higher levels of arrest and incarceration, there are many differences between actual communities. Furthermore, government law and order policies at a State level can play a significant role in the processes of criminalisation.

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