Have Aboriginal and Torres Strait Islander legal services failed? A response to Weatherburn

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ABSTRACT

In this article, we consider Don Weatherburn's claim that Aboriginal Torres Strait Islander Legal Services (ATSILS) have a limited role in reducing Indigenous incarceration. We argue that Weatherburn understates the role of ATSILS. We make our argument in three parts: first, we assess the Weatherburn thesis as it relates to ATSILS. Second, we examine the weaknesses of Weatherburn's methodology, which overlooks the complexity of Indigenous over-representation in Australian prisons. Third, we explore five counterfactual scenarios of a world without ATSILS, showing the major role ATSILS have regarding the myriad of cross-cultural and socio-economic issues Indigenous people contend with when coming in contact with the justice system. We argue that ATSILS play an important role in addressing Indigenous over-representation in Australian prisons.

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Introduction

In 1970, the first Aboriginal Legal Service was founded in Redfern—as a response to oppressive and unfair treatment of the local Aboriginal community by the criminal justice system (Aboriginal and Torres Strait Islander Commission 2003). The Aboriginal Legal Service provided a model for future Aboriginal community-controlled organisations in health, housing and child-care (Aboriginal and Torres Strait Islander Commission 2003). Aboriginal and Torres Strait Islander Legal Services (ATSILS) now operate in every Australian jurisdiction. As originally conceived, ATSILS were not only to provide legal representation, but also prevention, diversion and rehabilitation programs as well as community legal education and government advocacy. While the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987–1991) brought attention to Indigenous over-incarceration, ATSILS have been consistently underfunded. This underfunding has limited ATSILS primarily to the provision of legal services (Schwartz & Cunneen 2009). Most recently, the security of funding for ATSILS beyond 2016 has been brought into question. It is timely that we critically assess the role of ATSILS and their contribution in the context of a growing crisis in Indigenous incarceration.

Don Weatherburn's *Arresting Incarceration* (2014) is prominent in the current literature on the disproportionate rates of Indigenous incarceration in Australia. The book provides the first national level survey of the statistical data on the over-representation of Indigenous people in Australian prisons. Weatherburn states that 'Between 2001 and 2011, the Indigenous imprisonment rate increased (on an age-standardised basis) by more than 51 per cent, while the (age-standardised) non-Indigenous imprisonment rate in Australia increased by less than four per cent' (Weatherburn 2014, p. 3). He also takes the important next step of reflecting on the Government policy response to this crisis, since the Royal Commission into Aboriginal Deaths in Custody. Yet Weatherburn is critical of ATSILS, arguing: 'there is no reason to believe that lack of legal representation was a major cause of Indigenous over-representation in prison. Nor is there any evidence that the provision of legal aid significantly reduced that over-representation' (2014, p. 35).

Weatherburn's analysis has attracted significant attention from both policy-makers and commentators, but it is necessarily limited by the quality of the available data—which are notably poor in the context of Indigenous offending. Further, we find that many policy-makers and commentators have a narrow conceptualisation of ATSILS, which means they under-recognise the other holistic legal and justice services these services provide.

In this paper, we consider Weatherburn's analysis by examining his claim that ATSILS have a limited role in reducing Indigenous incarceration. We counter-claim that Weatherburn's analysis dramatically underestimates the role of ATSILS. First, we

introduce Weatherburn's thesis on Indigenous incarceration. Second, we assess the Weatherburn argument as it relates to ATSILS. Third, we pose five counterfactual scenarios of a world without ATSILS, using reasoned speculation to identify the many ways ATSILS contribute to reducing incarceration, as they respond to the myriad cross-cultural and socio-economic issues Indigenous people contend with when coming in contact with the justice system.

Weatherburn's thesis on Indigenous incarceration

In his book *Arresting Incarceration*, Don Weatherburn (2014, p. 35) argues that ATSILS have a limited role in reducing Indigenous incarceration rates in Australia. This conclusion is based on his understanding that Indigenous over-representation is not a problem so much of limited legal representation. To Weatherburn, this is because many Indigenous people are being incarcerated for violent and major crimes, and not so much for minor crimes. To Weatherburn, if the statistics favoured the conclusion that Indigenous people were incarcerated for minor crimes, then legal representation may be able to negotiate non-custodial sentences. Instead, he argues that Indigenous incarceration is high because of [the severity of the crimes for which they are convicted and because of their very high rate of recidivism; the latter is an effect, he suggests, of] socio-economic factors such as poor school performance, unemployment and substance abuse (Weatherburn 2014, p. 155; Weatherburn & Fitzgerald 2006, p. 366).

Weatherburn begins his account by testing a number of what he identifies as prominent 'theories' of Indigenous incarceration: the 'systemic bias theory', which holds that high incarceration is caused by the disproportionate impact of the criminal justice system; the 'cultural theory', that Indigenous violent offending is caused by Indigenous culture; the 'conflict theory', that Indigenous violent offending is caused by continued Indigenous resistance to colonisation; the 'social disorganisation theory', that Indigenous offending is caused by the breakdown of Indigenous society in the face of colonisation; the 'strain theory', that Indigenous offending is caused by socio-economic disadvantage; and 'the lifestyle theory', that Indigenous offending—particularly violent offending—is caused by factors such as alcohol and substance abuse (Weatherburn 2014, pp. 55–73).

First and foremost, Weatherburn (2014) argues that the evidence does not support the 'systemic bias' theory and, therefore, that the disproportionate Indigenous incarceration is caused by disproportionate Indigenous offending. This is a position that he has maintained over a long period of time (see, for example, Cunneen 2006; Weatherburn & Fitzgerald 2006). Weatherburn cites research by Jeffries and Bond to dispel any suggestion of deliberate discrimination:

> Once crucial sentencing factors are held constant (especially, current and past offending), sentencing outcomes for Indigenous and non-

> Indigenous offenders either achieve parity or the gap is considerably reduced … In circumstances where the disparity remains, there is evidence to suggest that, Indigenous defendants are at times treated leniently in comparison with their non-Indigenous counterparts (Jeffries & Bond 2012, p. 24 cited in Weatherburn 2014, p. 52).

Yet as argued by Anthony (2013), statistical analysis used by Weatherburn and Jeffries and Bond tend to overlook wider socio-historical relations of power which cannot be neatly reduced to variables. Analysis would be enriched through qualitative analyses that positions incarceration within the post-colonial condition. For example, Indigenous criminality has a particular neo-colonial element to it, where only particular activities understood within settler society are considered criminal (Anghie 2007). Within the neo-colonial frame, colonisation and denial of Indigenous sovereignty and political autonomy are not considered to be criminal (Anghie 2007; Anthony 2013). Rather, offence in the Australian criminal justice system is defined in settler society terms, coherent within Western modernity. These definitions shape how crime is measured, such that what counts as crime (and what does not) becomes important. Thus, measurement plays a role in wider processes of power and knowledge production (Engle-Merry 2011), and reflects normative ideas about 'crime' and 'incarceration' that are seldom scrutinised.

From this perspective, Weatherburn's dismissal of the argument that changes in criminal law have had an unintentional, disproportionate effect upon Indigenous Australians, creating 'systemic bias' or discrimination in effect (Blagg et al. 2005) seems less convincing. While Weatherburn makes a justifiable semantic point that describing such an outcome as 'racist' may be unduly harsh, his dismissal of the effects of changes in criminal law in neo-colonial Australia seems premature. There is evidence that particular laws have had a greater impact on Indigenous Australians, which points to a systematic bias in criminal law. For example, in their 2001 review of the Section 401 of the Criminal Code, the Western Australian Department of Justice found that approximately 81 per cent of the 119 young people sentenced under the mandatory sentencing laws in Western Australia were Aboriginal (Morgan, Blagg & Williams 2001).

Having narrowed his consideration to explanations of Indigenous offending, Weatherburn tests the remaining theories. He finds 'tentative evidence that lifestyle factors (particularly drug and alcohol abuse) and, to a lesser extent, financial and social stress are strongly correlated with Indigenous violence, arrest and imprisonment' (Weatherburn 2014, p. 73). He finds no evidence to support the cultural theory of Indigenous violence. He acknowledges that some of the contemporary conflict between Indigenous Australians and police will reflect lingering resentment toward police passed down over generations, although there is plenty of evidence that Indigenous hostility toward police has its origins in more

contemporary events and processes (Weatherburn & Fitzgerald 2006). He also argues that conflict is an intuitively less convincing explanation of the majority of Indigenous violence, which is intra-communal.

These conclusions lead Weatherburn to reflect critically on the recommendations of the Royal Commission into Aboriginal Deaths in Custody, and particularly those parts of the policy response that focused upon potential discrimination in the justice system and what he terms Indigenous 'empowerment' (Weatherburn 2014; Weatherburn & Fitzgerald 2006).

Weatherburn on 'empowerment'

Weatherburn places his critique of ATSILS within his broader critique of 'empowerment'. He asserts that the suite of policies delivered after the Royal Commission were underpinned by an ideology of 'empowerment'. Yet, although he refers to the term many times, Weatherburn does not directly define what he means by empowerment. Instead, he hints that his idea of empowerment is some kind of investment in processes and services relating to land, employment and industry support. For example, in his assessment of the Keating Government's response to the Royal Commission, he writes that:

> A significant proportion of the funding was directed at measures designed to empower Aboriginal people and Torres Strait Islanders. Of the total $400 million package, $60 million (15 per cent) was allocated to land acquisition, $23.3 million (5.8 per cent) to a community economic initiative scheme, $6.6 million (1.65 per cent) to Aboriginal rural resources, and $15 million (3.75 per cent) to Aboriginal industry strategies in the pastoral, arts and tourism areas. The logic of this investment, as we have seen, was that Indigenous empowerment would lead to a reduction in Indigenous disadvantage, which would lead in turn to a reduction in the over-representation of Indigenous Australians in prison (Weatherburn 2014, p. 37).

Weatherburn assumes not only that the $89.9 million spent on 'empowerment' is substantive enough to address the needs and aspirations of Indigenous people, he also assumes that such investment actually gets to those targeted and that investment into programs and services constitute empowerment. Clearly, investment in land, employment and industry support is important. However, this is a narrow way to conceptualise empowerment, and Weatherburn does not engage with the more encompassing conceptualisations others have put forward. For example, Campbell and colleagues (2007) argues that for policy to be empowering, it needs to focus on creating feelings of control over one's life, and Tsey and Every (2000), and Dudgeon and colleagues (2012) call for building psychological efficacy. Kabeer (1999) argues for a distribution of power, or what Gegeo (1998) terms self-determination.

Whiteside (2009) and Feeney (2009) argue that empowerment must also involve cultural and spiritual dimensions.

Considering these more robust framings of empowerment, it is possible to ask whether the Royal Commission actually went far enough? Defining empowerment as a broad multi-dimensional concept suggests that the initiatives implemented following the Royal Commission were not failures; rather, they were insufficiently implemented, and the distribution of power and resources was inadequate. For example, while some may argue that the transfer of land ownership to Indigenous peoples is an improvement, it has been documented that Native Title legislation and related policies are too limiting to be fully empowering (Watson 2009). Specifically, the failure to provide commercial rights to traditional land holders or placing restrictions on land that is commercially valuable are two areas which have come under criticism (Barnett 2000).

Further, Weatherburn suggests that, by focusing funds post RCIADIC on programs he terms as 'empowerment', government lost the opportunity to spend on programs targeting what he considers to be the most significant factors to Indigenous over-representation: employment, drug and alcohol rehabilitation and education. Yet this argument is also problematic, because it is not true to suggest that measures newly implemented or further supported post RCIADIC did not address the socio-economic factors Weatherburn outlines. For example, the Community Development Employment Program (CDEP) provided a wage to Indigenous people for their productive labour. This program provided dignified employment for Indigenous people across Australia—including in remote areas, where employment opportunities are scarce (Altman 2001; Hunter 2002). Yet CDEP more recently has been dismantled, resulting in increased unemployment rates, as recipients have moved from CDEP to unemployment benefits (Klein 2014). The assumption that by removing CDEP would automatically lead to higher employment rates of Indigenous people was incorrect. For example Jon Altman has documented the rising unemployment from dismantling CDEP in four communities included in the Cape York Reform Trial[1]. Specifically,

[1] The Cape York Reform Trial (CYRT) replaced CDEP, implementing measures to instil 'responsibility', including attaching behavioural conditions to welfare payments through income management. The idea is that unemployment was a behavioural problem and quarantining large parts of welfare payments would incentivise people into 'real employment' (not CDEP). The Cape York model was introduced in 2008, targeting only Indigenous people in the populations of four communities; Aurukun, Coen, Hope Vale and Mossman Gorge. The CYRT followed the Northern Territory Emergency Response that first introduced income management measures in 2007.

> The rate of unemployment as measured by the ABS has grown in all trial communities most dramatically from zero in 2006 to 40% in 2011 and 5% to 33% at Mossman Gorge and Hope Vale respectively. These changes largely reflect the shift of people of working age from CDEP participation or active workfare onto Newstart, now supervised welfare where people can be breached for non-compliance (Altman 2014, p. 107).

It is important to highlight the flaws in the Weatherburn thesis on 'empowerment' because he positions his argument that ATSILS have a limited role in reducing over-representation within a critique of the broader set of responses stemming from the Royal Commission. Yet, many of the measures implemented since the Royal Commission not only address the socio-economic factors that Weatherburn highlights, but also tackle important aspects of Indigenous over-representation overlooked by Weatherburn. ATSILS are a case in point. We will now show how ATSILS are a fundamental (although not exclusive) actor in addressing the over-representation of Indigenous people in Australian prisons.

Weatherburn on ATSILS

ATSILS undertake a broad range of work for Indigenous peoples in the justice system. This includes criminal, family and civil law advice and representation, advocacy and education and most recently, prisoner intensive case management. Although only one part of his analysis, Weatherburn claims that ATSILS have a limited role in reducing Indigenous incarceration rates in Australia. For example, he writes:

> Many of the Commission's recommendations and much of the Keating Government's reform package had very limited, if any, capacity to reduce Indigenous imprisonment. Nineteen per cent of the reform package was devoted to the provision of Aboriginal legal services and to various reforms involving criminal law, custodial arrangements, judicial proceedings and coronial enquiries. Legal representation is doubtless critical in ensuring a defendant's rights are properly protected but there is no reason to believe that lack of legal representation was a major cause of Indigenous over-representation in prison. Nor is there any evidence that the provision of legal aid significantly reduced that over-representation (2014, p. 35).

Weatherburn's claim that ATSILS have not significantly reduced over-representation is problematic for two reasons. First, it is questionable whether Weatherburn's assertion that Aboriginal legal representation does not reduce significantly Indigenous incarceration is warranted by the data he uses to justify it. Second, by viewing ATSILS narrowly as providing only criminal legal representation, Weatherburn neglects the other work these services currently do (and how worse off

incarceration rates could be without their services). Importantly, much of the broader work of ATSILS is specifically directed at addressing the socio-economic factors Weatherburn identifies as being responsible for Aboriginal and Torres Strait Islander peoples overrepresentation in the criminal justice *system*. We deal with each of these points below.

The response to Weatherburn

Weatherburn (2014) identifies a number of socio-economic correlates of Indigenous offending such as low school attendance, unemployment and substance abuse (p. 155). Yet there is insufficient data to capture the influence of each of these variables on offending, and to disentangle cause from effect. As such, Weatherburn cannot account for how socio-economic variables might interact with each other—or with external variables, such as changes in the criminal justice system—to 'cause' the increase in Indigenous incarceration rates. The inability to account for all variables, and how they may interact with each other is problematic for Weatherburn's assessment of the work of ATSILS, as he cannot quantitatively capture the extent ATSILS operate as brokers between the socio-economic realities of Indigenous Australians and the criminal justice system (Skyring 2011). Weatherburn's approach can also create a challenging tendency to dismiss those variables that are, by their nature, harder to measure: for example, the policies directed towards intangible outcomes such as 'empowerment' or the effects of colonialism.

Consequently, it is essential to supplement the limited quantitative evidence with the qualitative evidence relevant to Indigenous incarceration. Further, although Weatherburn focuses on over-representation of Indigenous people in Australian prisons, it also should be noted that ATSILS aim to reduce Indigenous incarceration rates more broadly and not just over-representation. The two phenomena are not the same. Over-representation is a relationship between two rates; the rate of Indigenous incarceration compared to the rate of non-Indigenous incarceration. Indigenous over-representation could change without any change in the Indigenous rate of incarceration, if, for example, non-Indigenous incarceration rates increased. In this case, the number of Indigenous people incarcerated could remain high, even if Indigenous over-representation was reduced. This is clearly not a desired outcome. Therefore, although Weatherburn's focus is over-representation, it is wise not to lose sight of incarceration rates either, since these could capture some of the residual effects of the growing precariousness and insecurity people face in the neoliberal era (Wacquant 2009). We proceed below in two parts: first, we critically assess the quantitative approach Weatherburn uses, as it relates to ATSILS; second, we examine the crucial functions ATSILS currently play in addressing Indigenous over-representation in Australian prisons.

The quantitative evidence on Indigenous incarceration

There are two main sources of quantitative data available for analysis of Indigenous Australian incarceration. Both create problems for those relying on quantitative analysis of Indigenous over-representation. First, the *Prisoners in Australia* report is produced annually by the Australian Bureau of Statistics (ABS). This provides reliable data about the Australian prison population, but is unfortunately limited. For example, it cannot be broken down by the community of the offender (Australian Bureau of Statistics 2006a). The second set of data—upon which Weatherburn relies heavily—are the National Aboriginal and Torres Strait Islander Social Survey (NATSISS), conducted by the ABS in 1995,[2] 2004 and 2008–09. These surveys contain self-reported measurements of whether respondents have been arrested or have been victims of crime, which can be used as correlates of Indigenous offending. But the quality of this survey data creates limitations.

The ABS acknowledges that the four principal sources of potential error it identifies in census data—respondent error, partial response, processing error and undercount—are all troublingly present for the Indigenous population (Australian Bureau of Statistics 2006b). In combination, these can result in some significant distortions. Most notably, between the 2006 and 2011 censuses the measured Indigenous population increased by an anomalous 20.5%, which has been attributed to an increased willingness to identify as Aboriginal or Torres Strait Islander (Australian Bureau of Statistics 2012). This anomaly alone renders any time-series analysis problematic.

Weatherburn is not unaware of these data limitations. Throughout *Arresting Incarceration*, Weatherburn acknowledges the limitations of the available data. For example, he states there are 'no regular national surveys on self-reported involvement in crime that could be used to test theories about the causes of Indigenous involvement in crime' (2014, p. 68). Subsequently, Weatherburn settles on basing his arguments on the National Aboriginal and Torres Strait Islander Social Survey 2008, which is carried out at irregular intervals and contains no question to capture self-reported involvement in crime. Weatherburn also notes that this dataset has 'inherent limitations when it comes to testing causal hypotheses' and that 'it is impossible in such surveys to sort out the causal order of events' (Weatherburn 2014, p. 73).

Even more significant than the limitations in the available survey data such as the National Aboriginal and Torres Strait Islander Social Survey, is the fact that those using these datasets cannot disaggregate to the community level. Given the cultural heterogeneity of Indigenous Australia and the geographic diversity of socio-

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2 The 1995 survey was titled National Aboriginal and Torres Strait Islander Survey (NATSIS).

economic characteristics of communities, the inability to disaggregate to the community level is especially problematic. Further, due to the shortage of suitable data, Weatherburn, through his own methodology, can only identify correlates of Indigenous offending not the causation of Indigenous incarceration. Therefore, the inability to identify causation is a major caveat and must be highlighted when considering the implications of Weatherburn's conclusions for policy, especially when considering the quality of data used in rejecting causal links between ATSILS and the reduction of Aboriginal incarceration.

Further, Weatherburn's epistemological approach of positivism is another challenge as it does not support sufficiently comprehensive analysis of the complexity of Indigenous incarceration. Positivism advocates that the social and natural world have inherent truths which can be known through Western scientific method (Bryman 2008). According to Anthony (2013), positivism within criminological research 'seeks to ascertain concrete evidence for explaining criminogenic behaviour and risk factors. It assumes that there are criminogenic variables that are fixed, quantifiable and knowable truths' (Anthony 2013, p. 66, fn 5). Yet positivism is problematic in social science research as many social processes are difficult to be quantified and explained in a simple measure. This is particularly important regarding social processes around Indigenous incarceration, empowerment and the colonial legacies of dispossession, violence, displacement, forced incarceration for 'protection' and then assimilation, impoverishment, state neglect and discrimination. Further, Cunneen (2001), Anthony (2013) and others show that using positivist methodologies under the veil of 'objective science' becomes a strategy of power to exclude social complexity such as relations of power found in neo-colonial Australia. Specifically, the very processes of using 'objective' statistics reproduce neo-colonial and neo-assimilationist doctrine. It is contended that because Weatherburn deploys positivist statistical methodology, rather than a critical case study based approach, he fails to appreciate the multiple roles ATSILS play in reducing not only Indigenous over-representation in prison but Indigenous imprisonment more broadly.

Going beyond the numbers: Critical functions of ATSILS overlooked

For the past four decades, ATSILS have played important brokerage and representational roles in the relationship between Indigenous Australians and the Australian legal system. Although Weatherburn does not completely discount the role ATSILS have played in addressing Indigenous over-representation (lack of legal representation was not a major cause of Indigenous over-representation), he does severely underestimate their role.

In the absence of appropriate empirical data, we present a counterfactual analysis of Indigenous incarceration in scenarios without ATSILS. Such counterfactual analysis uses reasoned speculation to explore how the Indigenous incarceration rate might be

worse if ATSILS were not around. This method enables us to identify attributes of ATSILS that address not only the socio-economic factors that Weatherburn himself identifies as leading to Indigenous over-representation, but also factors Weatherburn overlooks, such as interrupting broader processes of power within the post-colonial condition. Above all, this exercise will help assess Weatherburn's argument that the ATSILS play only a minor role in reducing Indigenous over-representation in the criminal justice system.

Through examining five counterfactual scenarios, we argue that Weatherburn overlooks the full range of work undertaken by ATSILS, which is often invisible within dominant Indigenous policy discourse. In discounting the role of ATSILS in reducing Indigenous over-representation, Weatherburn fails to appreciate the 'opportunity cost' of how dramatically worse incarceration rates might be without these services.

The five counterfactual scenarios presented here examine each stage of interaction with the criminal justice system at which ATSILS play a role: offending, arrest, bail, conviction and sentencing. The counterfactuals also assume that there is no other Indigenous legal service body available, which, as explained below, is a fair assumption given the culturally specific work and expertise ATSILS have (Schwartz & Cunneen 2009; Aboriginal and Torres Strait Islander Commission 2003).

Counterfactual 1: Offence rate of Indigenous Australians in a world without ATSILS

We argue that in a world without ATSILS, it is likely that more Indigenous people would offend. This is because ATSILS provide a broad range of services to prevent Indigenous peoples coming in contact and/or further within the settler criminal justice system. This work includes community education about the legal system, proving legal assistance in civil disputes to avoid situations escalating into criminal jurisdiction, and community development initiatives (such as supporting community-initiated liquor licencing proposals). ATSILS also work on transformational justice and reforming the neo-colonial justice system. We will now examine these claims in detail below, arguing that because of this work, in a world without ATSILS, offence rates of Indigenous people would be higher. These measures are not merely 'diversion' as they specifically contribute to reducing the very socio-economic factors that Weatherburn views as contributing to incarceration (Cunneen 2006, p. 339).

First, as Aboriginal community-controlled organisations, ATSILS have the ability to understand local contexts and needs and to build relationships to develop and deliver legal services and community justice initiatives. In describing the diverse and important role community-based legal organisations have, Cunneen argues:

> The strength of these community-based programs is their localised role in community governance and their capacity to operate in the margins of state regulation and control. To simply characterise them as "diversion" is to miss their most critical functions and to fail to understand why they may have such important impacts on reducing offending behaviour (2006, p. 339).

ATSILS employ local staff to ensure localised and community driven responses and to build relationships with families within communities. Notwithstanding funding constraints, ATSILS' localised approach helps them work with, and implement important community driven initiatives that help tackle factors which make people more vulnerable to coming in contact with the criminal justice system. For example, Brady and colleagues (2003) document the role the local ATSILS played in the Yalata community's struggle to have the liquor licence at Nundroo roadhouse cancelled (Brady, Byrne & Henderson 2003). The cancellation, in turn, was an important element in the Yalata community's battle to reduce excess alcohol consumption and associated problems. Weatherburn asserts that alcohol consumption is a leading cause in the increase in Indigenous incarceration. The case of the Yalata community illustrates the broader political economy influencing alcohol consumption, and the role ATSILS played in a community driven solution to alcohol consumption.

Another example of community development work undertaken by ATSILS can be found in the Community Legal Education team of the North Australian Aboriginal Justice Agency (NAAJA) in the Northern Territory (North Australian Aboriginal Justice Agency 2013). This team works with existing law and justice groups (such as the Ponki Mediators in Wurrumiyanga, the Bunawarra in Maningrida, the Kurdiji in Lajamanu) and elders groups (such as the Makarr Garma in Galiwinku) with the view to promote better community understanding of, and engagement with, the criminal justice system.[3] This has included delivering legal education on topics such as sentencing, facilitating meetings with visiting magistrates, assisting drafting of character references for criminal matters (canvassing community views of the offending, community-driven solutions to offending and the personal circumstances of the offender) and making referrals of matters for mediation.

Moreover, ATSILS engage in legal education frequently with youth, with the view to educate young people and other community members about the law so they can avoid or minimise, contact with the criminal justice system. For example, ATSILS have carried out programs through sessions delivered at the Don Dale Youth Detention Centre in Darwin, and at schools and youth centres in remote communities (North Australian Aboriginal Justice Agency 2015). Recently, a music

[3] This example has been gathered from consulting with the NATSILS network.

clip ('Break the Cycle') was produced with the Indigenous Hip Hop Projects in Don Dale on this topic, and has subsequently been incorporated in legal education sessions with young people in remote communities (with the assistance of community leaders). Similarly, legal education sessions with Night Patrol teams in remote communities and the facilitation of meetings with Night Patrol teams and other community members support the Night Patrol teams' work in diverting Indigenous people from contact with the criminal justice system. Recently, NAAJA facilitated a meeting between the Bunawarra Law and Justice group and the Night Patrol team in Maningrida, where discussions of how Bunawarra's cultural knowledge, family relationships and role as community mediators could be used to support Night Patrol in their work (North Australian Aboriginal Justice Agency 2013).

Second, in addition to the crucial role ATSILS play in providing representation for Indigenous people struggling with the legal system, they also play a role in diverting Indigenous people from entering the justice system. While criminal law makes up a substantial portion of ATSILS' work, an increasing focus of ATSILS service provision is in family and civil law due to rising legal need in these areas (NATSILS 2015). Through this civil and family law work, ATSILS can limit the number of Indigenous people involved in the criminal justice system. This is because unresolved civil and family law issues can lead to criminal prosecution (Cunneen & Schwartz 2011). For example, a housing eviction can lead to homelessness or overcrowding in a relative's house, which can in turn result in criminal behaviour. The Productivity Commission came to similar conclusions in its report on access to justice:

> if left unresolved, civil problems can have a big impact on the lives of the most disadvantaged … [services are] vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people (Productivity Commission 2014, p. 24).

Civil law cases are an important part of the work ATSILS engage in, because they affect the likelihood of criminal behaviour and impact socio-economic factors such as unemployment, low education and substance abuse. Yet recent research suggests that funding limitations restrict ATSILS' ability to meet the civil and family law needs of Indigenous communities (Allison, Cunneen, & Schwartz 2013). Weatherburn does not consider these domains of ATSILS' work, which cannot be apprehended by individual-level, quantitative data.

Further, ATSILS' field staff have a unique commitment to understanding the family and social contexts of their clients, which can also help people avoid contact/further contact with the justice system. For example, in one case, a field officer from a local ATSILS also had close family ties to those in her local community (National

Aboriginal and Torres Strait Islander Legal Services 2013, p. 14). She also spoke the local language and was a qualified interpreter. Because of her ties with the community, the field officer was attuned to community dynamics and tensions. As there was a lot of tension in the community, problems arose on court days when plaintiffs and defendants were forced to be together in the proximity of the courthouse. The ATSILS' field officer, using her cultural knowledge to calm the situation, looked at the lists, identified the likely tensions and liaised with the court to split the list over two days to ensure as far as possible that warring parties were not in contact. It was a significant benefit to all parties to the point of probably avoiding more trouble and additional criminal charges. Required knowledge of the community and family relationships, good language, impartiality and knowledge of the legal system are essential for such preventative interventions.

Third, ATSILS play a role in helping people understand the justice system in relation to everyday situations more broadly. For example, the national peak body of ATSILS, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), in their 2013 submission to the Productivity Commission's *Inquiry into Access to Justice Arrangements* outlined the importance of community legal education for Indigenous people:

> Community legal education plays a key role in prevention and early intervention as it provides people with the necessary information and skills to prevent the development of civil and family law issues and/or advice and information about ways to resolve such issues where they have developed. It can also play a significant role in preventing relatively minor civil issues from escalating into criminal matters (Productivity Commission 2014, p. 16).

Moreover, ATSILS generate awareness through community education initiatives around civil issues such as management of personal debt, vehicle and gun licence suspension or cancellation and social security matters. Such interventions can reduce exposure to further vulnerabilities. For example, by not understanding how to go about creating/administering wills, Indigenous people may be restricted from accessing much needed funds, and thereby unnecessarily find themselves in precarious financial situations. Such problems can often be linked later to criminal activity (Strang 1999; Braithwaite 2000). Helping people to understand these situations before they escalate into crime is a very important element of the ATSILS' work. Again, when ATSILS do this kind of work, they may contribute to addressing some of the socio-economic drivers of incarceration that Weatherburn raises, such as substance abuse, limited education and unemployment.

Finally, through understanding the parameters and context of Indigenous 'offending', ATSILS play a role in advocating for transformative justice initiatives.

Transformative justice acknowledges Indigenous subordination within the settler legal system and works towards strengthening Indigenous-owned legal structures and processes within the justice space (Anthony 2012). Specifically, transformative justice recognises the need to challenge 'institutionalised patterns of subordination (instrumentally and epistemologically) so as to place the "recognised" status group on a par with the "recogniser", improving the status of marginalised groups and dismantling "white" claims to dominance' (Anthony 2012, p. 592). The Australian Law Reform Commission, in the report *The Recognition of Aboriginal Customary Laws*, argued that recognition of the inequality within the judicial system was not enough, and stated that a 'greater degree of local control over community-identified crime problems would be more effective' (Australian Law Reform Commission 1986, p. 688). Examples of transformative justice vary but can include circle courts for communities, in which traditional law is binding, to help in the resolution of matters, mediation and healing.

Counterfactual 2: Arrest rates of Indigenous Australians in a world without ATSILS

Our counterfactual reasoning suggests that arrest rates of Indigenous people in Australia would be higher in a world without ATSILS. This is not due only to the broad portfolio of work ATSILS undertake to prevent Indigenous peoples coming in contact and/or further within the criminal justice system, as outlined above, but also because ATSILS work to build better relationships between police and community members, so arrest is the absolute last option (Aboriginal and Torres Strait Islander Legal Services 2010; Commonwealth of Australia 2011). ATSILS' work reflects the recommendations in the Royal Commission, of which recommendation number 87 was 'All police services should adopt and apply the principle of arrest being the sanction of last resort'. This work is undertaken at both the community level through individual initiatives, and through providing best practice to law enforcement agencies.

One initiative implemented to develop better relations between police and community includes the example of the Law and Justice Committees operating in the Warlpiri communities in Central Australia. This program is specifically designed to provide a holistic approach to Indigenous people coming in contact with the law. Elders on the Law and Justice Committee work with local police, magistrate and officers of government agencies to place criminal justice issues in a deeper perspective of community violence, trauma and healing. Specifically:

> Components included a community-run night patrol and safe-house, pre-court meetings and traditional dispute resolution procedures. Aboriginal decision-making processes were recognised and taken into account within court proceedings. … A Community Law and Order Plan

> was developed to reduce substance abuse, improve safety, health, school attendance and to create sports and recreation activities. The plan was developed over a sustained period of time by the community, in consultation with government agencies and culminated in the signing of an agreement by all agencies as a means of coordinating their services in support of the plan (Aboriginal and Torres Strait Islander Legal Services 2010, p. 24).

Arrests were the last resort through this holistic approach in dealing with young Indigenous people. Further, ATSILS work for broader reform in the policing sector includes working with all levels of governments to improve cultural awareness in officer training. Such awareness includes new and old recruits (through refresher training) being made aware of cultural protocols, Royal Commission recommendations, the problems of racial profiling and over policing of Indigenous people. For example, when eighteen new police stations were constructed during the Northern Territory Emergency Response, NAAJA and the Central Australian Aboriginal Legal Aid Service (CAALAS) undertook research into community feedback to understand how this increase policing could work better with Indigenous peoples. This research was used to inform police officers and policy makers (Pilkington 2009).

Counterfactual 3: Indigenous rates of granting of bail/ and remanding in custody in a world with no ATSILS

We argue that in a world without ATSILS, it is likely that fewer Indigenous people would be granted bail and more would have been remanded in custody. ATSILS provide Indigenous-specific services that differ from mainstream legal services. ATSILS act as a cultural bridge, and give culturally appropriate support to those with socio-economic disadvantage.

First, in the context of bail applications, ATSILS are able to put together viable applications for bail because of their ability to work with the community and families of clients. The importance of cultural competency in legal representation should not be understated, as Schwartz and Cunneen explain:

> Cultural awareness is crucial to the provision of effective legal representation to any Indigenous client. Cross-cultural issues cover a broad range of matters, many of which are taken for granted in the ordinary course of providing legal services. This includes confusion about who has the right to speak; Indigenous kinship relations; gratuitous concurrence (where clients indicate agreement in situations where they feel uncomfortable, or because of the perceived authority of

> the solicitor); what is appropriate eye contact; and temporal and spatial definitions (Schwartz & Cunneen 2009, p. 2).

Cultural awareness and competency are not just important in Indigenous justice scholarship. Within medical service research, 'cultural safety' refers to the way medical practitioners' knowledge of cultural competency sustains successful patient care and reduces power imbalance within the hospital system (Smye & Browne 2002; Kruske, Kildea & Barclay 2006). Specifically, Kruske and colleagues explain that the convergence of the Indigenous and non-Indigenous cultures requires special attention, because the interaction may 'result in a power imbalance which can cause the recipient of care to feel intimidated and powerless' (2006, p. 2). ATSILS themselves have a high degree of cultural competency; they are sensitive to the need for flexible meeting appointment times and are aware of Indigenous communication difficulties and protocols. Because of ATSILS' ability to be culturally competent in their work, they are effective in collecting important cultural information as well as explaining this to judges when presenting bail applications.

Second, ATSILS provide a unique service to clients who are over-represented in multiple socio-economic correlates of disadvantage. For example, many ATSILS clients have low education status and limited English literacy and numeracy. Many ATSILS' clients also have health difficulties; especially ear disease, which affects hearing, and mental illness. Further, many Indigenous clients find it hard to access legal assistance because they live remotely and are poor. These factors compound to create significant barriers to effective participation in the Australian legal system, requiring a holistic specialist response that ATSILS are uniquely placed to provide. For example in the criminal context, ATSILS provide legal services not just on the day of court, but also on the day(s) prior to court. In the civil context, some ATSILS such as NAAJA, CAALAS, Aboriginal & Torres Strait Islander Legal Service Queensland (ATSILS Qld); and Aboriginal Legal Service of Western Australia (ALSWA) regularly travel to remote communities to provide civil and family law clinics. These communities would otherwise be limited to accessing telephone advice from mainstream services hundreds of kilometres away. Such services can help in developing bail applications.[4]

Counterfactual 4: Conviction rates of Indigenous Australians in a world without ATSILS

We argue that in a world with no ATSILS, conviction rates of Indigenous Australians would be higher than they have been. This is because ATSILS provide a culturally appropriate service to help Indigenous people in contact with the criminal justice

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4 This example has been gathered from consulting with the NATSILS network.

system. This matters to conviction rates because ATSILS' lawyers are typically highly skilled and take instructions conscious of issues such as gratuitous concurrence, working alongside Aboriginal field officers, taking the time to gather important context specific information from clients using interpreters and in a culturally safe context.

There are mainstream legal services that it can be assumed would take up cases for Indigenous people if ATSILS were not around. However, it has been well documented that mainstream legal aid cannot offer the same level of culturally competent service as ATSILS (Schwartz & Cunneen 2009; Productivity Commission 2014). ATSILS offer tailored legal aid (outlined above) to Indigenous people in contact with the criminal justice system—providing anything less would be discriminatory to Indigenous people.

Counterfactual 5: Non-custodial sentences for Indigenous Australians convicted in a world with no ATSILS

In a world without ATSILS it would be much harder for a convicted Indigenous person to receive a non-custodial sentence than it has been. This is because ATSILS are able to draw on local knowledge and relationships with communities to advocate for non-custodial sentencing dispositions such as community work orders, community-based treatment programs, or supervision by Elders and community leaders. This work undertaken by ATSILS also helps in reducing the length of sentences where ATSILS' lawyers use family and cultural information to inform judges. For example, in the case of *Goldsmith v R* (1995) 65 SASR 373, the South Australian Supreme Court showed leniency through understanding that the only way to set a deceased friend's spirit free was to set fire to their house (Anthony 2010).

Conclusions about 'failure'

We suggest that Weatherburn is mistaken in declaring the policy response to the Royal Commission into Aboriginal Deaths in Custody a 'failure'. Unfortunately, declarations of failure are not uncommon in Indigenous affairs. Sanders has observed a tendency among policy makers in Indigenous affairs to declare 'wholesale policy failure'. He attributes this, in part, to the status of Indigenous affairs as Australia's 'moral *cause celebre*' (2008, p. 197).

Recent work by political scientists warn of the complexity of 'policy failures' and the danger of hasty conclusions (Hay 2002; Marsh & Stoker 2010; Cairney 2013; McConnell 2014). Conceptualising success and failure in public policy, McConnell notes that: 'what one individual perceives as a failure, may be viewed by another as "not a failure" or even "a success"' (2014, p. 3).

It is certainly true that policy has had limited success at addressing rising Indigenous incarceration. But this does not mean that the whole suite of policy initiatives announced following the Royal Commission should be characterised as a 'failure'. It is, for example, possible that Indigenous incarceration rates would be higher without these policies. We simply do not have sufficient data to measure the causal effect of the policies—let alone their 'complex interdependencies' upon other factors, as McConnell hypothesises. Further, it is not true that the policies implemented post RCIADIC do not address the socio-economic factors Weatherburn identifies as being key to over-representation such as unemployment, drug and alcohol rehabilitation and education. ATSILS is one case in point, but there are others—such as CDEP. Perhaps, the measures following the Royal Commission did not go far enough.

In this article we have argued that ATSILS play a major role in addressing over-representation of Indigenous people in Australian prisons. Although Weatherburn has doubted the size of the contribution ATSILS make in the struggle to reduce Indigenous over-representation in Australian prisons, we contend that many of his arguments are not supported by evidence.

First, we have pointed out how problems both with the quantitative data Weatherburn relies on, and his methodological approach. Still, even if one is to accept Weatherburn's main thesis—that the major factors contributing to Indigenous over-representation are poor school performance, substance abuse and unemployment—one finds evidence that ATSILS provide specific services that directly address them.

Second, we explored five counterfactual scenarios about a world without ATSILS, and argued on the basis of our reasoning and some additional, qualitative evidence, that, through their unique and multi-faceted approach to Indigenous justice, ATSILS work in ways that significantly contribute to the reduction of Indigenous over-representation in Australian prisons at the levels of offence, arrest, remand, conviction and sentencing. The work that ATSILS do regarding community education about the legal system, providing legal assistance to civil disputes, reforming the legal system (such as community initiated liquor licencing) and other community development initiatives is not considered by Weatherburn. Nor is the myriad of cultural and socio-economic issues with which Indigenous people contend when coming in contact with the justice system. These include confusion about everyday court procedures, the nature of Indigenous kinship relations, and language and translation issues, which all affect equality before the law (National Aboriginal and Torres Strait Islander Legal Services 2013). Weatherburn overlooks the cultural safety role that ATSILS play in mitigating a complex and sometimes intimidating justice system for many Indigenous people. Such omissions lead Weatherburn to

mistakenly conclude that ATSILS do not have a substantive role in reducing Indigenous over-representation.

Further, Weatherburn overlooks the broader role ATSILS play in community development and in addressing civil and family law needs. The level of funding ATSILS receive constrains their capacity to pursue their broader aspirations to represent Indigenous people in criminal and family legal matters. However, by providing civil legal representation, ATSILS may ensure that some of their clients do not progress into the criminal legal space. Through community education initiatives, ATSILS help Indigenous people to access social services that may reduce their vulnerability. Moreover, in their community development work, ATSILS advocate for Indigenous community needs more broadly, for example, in assisting the pursuit of appropriate community-requested restrictions on alcohol consumption.

Finally, it is important to note the need for independent critical research that can consider locally-based services that ATSILS provide. These services differ from State or Territory to State or Territory, if not community-to-community. Indigenous incarceration is a complex issue, needing a broad and multifaceted approach to enhance understandings. In the meantime, it is clear that ATSILS are doing their fair share in delivering and advocating for justice for Indigenous peoples. Their further defunding will exacerbate an already unacceptable situation of excessive Indigenous engagement with the criminal justice system and associated disproportionally high levels of incarceration.

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