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**Throughcare for Indigenous peoples leaving prison:  
 Practices in two settler colonial states**

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 Manuscripts

## Throughcare for Indigenous peoples leaving prison: Practices in two settler colonial states

### Abstract

The concept of throughcare as a means to prevent recidivism continues to attract considerable attention in Australia over the last couple of years. This is particularly the case for Indigenous peoples, as the transition to life after imprisonment proves to be particularly challenging for them, resulting in the high rates of recidivism ~~is one of the drivers of their~~ and ongoing overrepresentation in Australian prisons. In this contribution, we report on research we conducted in two Australian jurisdictions. After identifying the problems in developing effective throughcare strategies for Indigenous peoples leaving prison, we turn to Canada for examples of good practice. Canada was chosen for comparison as it is also a settler colonial state, experiencing similar problems of overrepresentation of their Indigenous population in the prison. After a critical analysis of these practices, we conclude that the reasons for a problematic reintegration of Indigenous peoples are related to a tendency to impose solutions and strategies developed in the white mainstream onto Indigenous communities without acknowledging traditional cultures and structures.

### Keywords

Indigenous, prison, throughcare, colonisation, Australia, Canada

## Introduction: A shared history of colonisation and Indigenous dispossession

Australia and Canada, along with other British origin settler colonies such as the USA and

Aotearoa / New Zealand (often referred to as the CANZUS societies), –share a history of

Indigenous dispossession and disproportionately high levels of Indigenous overrepresentation

in their criminal legal system<sup>1</sup>. ~~However, We are not suggesting that settler colonisation was~~

~~not accomplished in a uniform fashion across these places. There were differences between~~

~~Australia and the other CANZUS societies, in that Australia was deemed to be Terra Nullius~~

~~(literally, ‘no man’s land’), and therefore there was no acknowledgement of prior occupation~~

~~by Indigenous peoples. Whereas white settlers of Aotearoa/New Zealand acknowledged~~

~~Maori treaty rights, under the Treaty of Waitangi (1840), – Australia’s Indigenous population~~

~~had to wait until 1992 under the ‘Mabo’ High Court ruling which acknowledged Native Title~~

~~to land.~~

Settler colonisation differs from other forms of colonisation, in that settler colonists come to stay and consciously re-construct the colony into their new ‘home’. Patrick Wolfe (2006) states that settler colonisation involves an ongoing process of sovereign extinguishment, that does not cease over time, it is a structure not an event. Settlers want the land itself and privileged access to its resources. As Bird (1996) suggests, all Indigenous peoples<sup>2</sup> needed to do to

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<sup>1</sup> The term criminal legal system is used ~~in replaceinstead~~ of criminal justice system as it is not considered to deliver just outcomes for Indigenous peoples.

<sup>2</sup> We refer to ‘Aboriginal peoples’ and ‘Indigenous peoples’, acknowledging the distinct cultures and societies of different First Nations peoples. The term ‘peoples’ is also used to recognise the collective dimension of the livelihoods of Indigenous peoples, with distinct cultural beliefs that differentiate them from others.

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3 become a ‘problem’ for settlers was to stay at home. Institutions such as prisons were employed  
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5 on a pervasive scale to warehouse the dispossessed, as their land and its resources were  
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7 systematically plundered (Blagg and Anthony, 2019). There have been similar patterns of  
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9 intervention by settler states across the globe, including the mass removal of children as a  
10  
11 means of destroying Indigenous cultures and enforcing mainstream norms and values.  
12  
13 ‘Residential’ schools in Canada and ‘missions’ in Australia played similar roles in terms of  
14  
15 severing connections between children and families, and the intergenerational trauma left in  
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17 their wake continues to haunt Indigenous societies and fuel the cycle of repeated contact with  
18  
19 the prison system, as well as problems associated with mental health, alcohol use and family  
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21 violence (Blagg and Anthony, 2019; Chartrand, 2019; Cunneen and Tauri, 2018; McGuire and  
22  
23 Murdoch, 2021; Martel and Brassard, 2008; Monchalin, 2016; Turnbull, 2014). The  
24  
25 criminalisation of Indigenous peoples was a central pillar of the settler colonial project. Only  
26  
27 through this way could the wholesale dispossession of sovereign peoples be justified within  
28  
29 the framework of settler law. As Stark (2016) argues in relation to Canada and the USA,  
30  
31 imposing settler colonial law was ‘facilitated by casting Indigenous men and women as savage  
32  
33 peoples in need of civilization and constructing Indigenous lands as lawless spaces absent legal  
34  
35 order’. Criminalisation necessitated the ‘forceful violent constructions of Indigenous men as  
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37 savages, criminals, and lawless figures’ and Indigenous women as ‘deviant, immoral beings’  
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39 in need of domestication.  
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47 These stereotypes and myths of Indigenous men and women persist and continue to inform  
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49 policy and practice: they circulate not only in the wider settler population but also in the  
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51 cultures and worldviews of the police, prison officers, social workers and medical  
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53 professionals. Meanwhile, we do acknowledge that there have been reforms to justice systems,  
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55 following pressure from Indigenous organisations, human rights advocates, and researchers,  
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57 that now acknowledge the importance of Aboriginal Law and Culture in framing new  
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3 diversionary options, using Indigenous 'Country' as a site for healing offenders and victims,  
4  
5 and generating innovations such as Aboriginal courts (where Elders sit with magistrates and  
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7 judges).

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10 However, criminologists argue that forms of systemic racism, premised on stereotypes of  
11  
12 Indigenous people as dysfunctional and criminogenic, survive in the present (Baldry &  
13  
14 Cunneen, 2014). For example, the 'Ms Dhu' case in Western Australia involved an Indigenous  
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16 woman who died in police custody from pneumonia and septicaemia having been detained for  
17  
18 non-payment of fines. The police and medical staff at a local clinic colluded in denying her  
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20 calls for help, insisting she was just coming off drugs, and/or faking it to avoid her just deserts  
21  
22 (Blue, 2017).

### 23 24 25 26 27 **Indigenous overrepresentation**

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29  
30 Australia and Canada also share an overrepresentation of Indigenous peoples in their criminal  
31  
32 legal system. In both countries, the overrepresentation of First Nations peoples started from the  
33  
34 1960s onwards, after Indigenous peoples were no longer held in other 'total institutions' such  
35  
36 as missions and residential schools, in a move away from formal separation and assimilation  
37  
38 policies, but leaving colonising structures in place (Chartrand, 2019; Hogg, 2001; McGuire and  
39  
40 Murdoch, 2021). As Chartrand puts it (2019: 77) 'the prison took over as the new expression  
41  
42 of colonialism'. We shortly outline the magnitude of this overrepresentation in both countries.  
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47 At the last census date in 2016, 2.8% of Australian people identified as Aboriginal and / or  
48  
49 Torres Strait Islander, while the last prison census on 30<sup>th</sup> June 2020 revealed they comprise  
50  
51 29% of the Australian prison population. Indigenous peoples are 13 times more likely to find  
52  
53 themselves in prison than non-Indigenous people. Besides of the detrimental effect of  
54  
55 imprisonment on Indigenous lives, it is also demonstrably ineffective: 79% of Indigenous  
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57 peoples in prison have a known prior imprisonment, while this is 51% for non-Indigenous  
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3 people (Australian Bureau of Statistics, 2020). Further, we know that Indigenous peoples often  
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5 do not apply for parole and are released at the end of their sentence, extending their time in  
6  
7 prison (Council of Australian Governments, 2016).  
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10  
11 Canada is facing a similar situation as regards the overrepresentation of Indigenous Canadians  
12  
13 in the prison system, and the situation is deteriorating. Whereas the population of non-  
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15 Indigenous people in federal prisons<sup>3</sup> has decreased by 14% since 2010, the Indigenous  
16  
17 population has increased by 43%. Indigenous peoples, who comprise less than 5% of the  
18  
19 Canadian population, now account for 30% of the federal prison population and they are six to  
20  
21 seven times more likely to experience incarceration (Office of the Correctional Investigator,  
22  
23 2020). Further, Indigenous Canadians are serving more of their sentences in the institution  
24  
25 before their first release – which is most likely statutory release at the two-third mark of their  
26  
27 sentence, instead of parole. Also in Canada Indigenous peoples are returned to custody at much  
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29 higher rates than non-Indigenous people (Office of the Correctional Investigator, 2019;  
30  
31 Turnbull, 2014).  
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37 Finally, in both countries, Aboriginal women are the fastest growing incarcerated population.  
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39 This is of particular concern as Aboriginal women have specific social and cultural obligations  
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41 in their communities, and their absence can result in gaps in the social structures, causing  
42  
43 intergenerational trauma and ongoing contact with the criminal legal system (Baldry and  
44  
45 Cunneen, 2014; McGuire and Murdoch, 2021; Marques and Monchalin, 2020; Tubex and Cox,  
46  
47 2020).  
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### 51 **Literature review on throughcare in Australia**

52  
53 ~~Due to the failure of populist punitive policies to either deter or rehabilitate people in prison,~~  
54  
55 ~~particularly Indigenous peoples~~ Over the last years, the transition from prison to community is  
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60 <sup>3</sup> Administering sentences of two years and more.

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3 increasingly seen as a critical moment in reducing the likelihood of re-imprisonment.

4  
5 Australian research demonstrated that supervised early release is more effective in reducing  
6 recidivism than unsupervised release, particularly with active supervision and a focus on  
7 rehabilitation, instead of compliance (Wan et al., 2014). Consequently, ~~over the last years,~~ the  
8 Australian government and academic scholarship expressed an increasing interest in the  
9 reintegration of (Indigenous) peoples into community life. In turn, this raises the question of  
10 preparation in the prison for life beyond the walls, and cooperation between correctional  
11 authorities and community-based organisations, ~~referred to as ‘throughcare’.~~

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22 As Day et al. (2019) note, there is no settled or consistent terminology referring to these  
23 practices, with different names being used, such as re-entry, re-settlement, re-integration, or  
24 continuum of care, which makes it harder to provide a concise overview of what is happening  
25 in this space. In our research, we opted for the term ‘throughcare’ which is defined as:

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32 Prisoner through care projects provide comprehensive case management for a prisoner  
33 in the lead up to their release from prison and throughout their transition to life outside.  
34 Projects aim to make sure prisoners receive the services they need for successful  
35 rehabilitation into the community during the course of their transition from inside to  
36 out. (Council of Australian Governments, 2016: 62)

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44 In the selected research sites and at the time of the research, throughcare services were provided  
45 by Men’s Outreach Services (Kimberley, WA), NAAJA and CAALAS (Northern Territory).  
46 Both services engage with people in prison six months prior to release to help them prepare for  
47 life outside and assist them to get parole. They provide several programmes to address  
48 underlying issues of criminal behaviour and to prevent recidivism. Furthermore, they remain  
49 with prisoners post release in order to ensure that they have the greatest possibility of creating  
50 a better life for themselves and their families. Case management includes ongoing

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3 rehabilitation, assisting with accommodation, employment, education and training, health, life  
4 and problem solving skills, and reconnection to family and community (for more detail, see  
5 Tubex et al., 2020a). As a result, throughcare only exists for people serving a sentence of at  
6 least six months. People sentenced to short sentences do not have access to this kind of support,  
7 which is particularly problematic for Indigenous peoples, as they tend to serve shorter  
8 sentences and cycle in and out of prison (Baldry, 2013).  
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18 Several government reports and academic writings have recently been dedicated to the topic of  
19 the reintegration of Indigenous peoples after leaving prison (Abt Associates, 2019; Australian  
20 Law Reform Commission, 2017; Council of Australian Governments, 2016; Day et al., 2019;  
21 Schwartz et al., 2020). They were based on desktop research, consultations with government  
22 organisations, service providers and other stakeholders, resulting in recommendations for  
23 better practice. In an overview of this literature (Author1Tubex, 2021) we stated that structural  
24 transitional support for Indigenous peoples is lacking. It is not so much that there are not  
25 enough throughcare services, but they operate in a scattered and fragmented way, without much  
26 evidence about their effectiveness. This is related to unstable funding and a lack of evaluation  
27 frameworks (Council of Australian Governments, 2016; Day et al., 2019; Schwartz et al.,  
28 2020). There is, however, some agreement in the reviewed literature of how effective  
29 throughcare strategies might be formed. There is a strong emphasis that initiatives need to be  
30 developed in co-design with Indigenous communities and services, based on their knowledges  
31 and strengths, and with the involvement of the extended family structures, Elders and respected  
32 persons. Further, in order to prevent return to prison, it is crucial that some basic provisions  
33 regarding employment, accommodation and support are available. However, for Indigenous  
34 peoples, these provisions need to be tailored to the local realities of the communities to which  
35 they return, and throughcare strategies therefore need to be place-based and provided by  
36 services with strong awareness and relationships with these communities; this has been a  
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3 consistent finding from research on Aboriginal peoples and criminal justice (Baldry and  
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5 Cunneen, 2014; Blagg and Anthony 2019; Cunneen and Tauri 2018). They need to start from  
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7 a holistic approach, also addressing broader aspects of intergenerational trauma, substance  
8  
9 abuse and mental health issues. Further, for throughcare to be effective, it is important that it  
10  
11 is not limited to interventions towards the end of imprisonment, in preparation for release, but  
12  
13 that it is developed as a process, from the start of criminal legal interventions in Indigenous  
14  
15 peoples' lives (Tubex, 2021). We now turn to our own research in this area.

## 19 20 **Throughcare research in two Australian jurisdictions**

### 21 22 *Positioning statement: Doing research in the Indigenous space*

23  
24 In 2016-17 we conducted empirical research in two Australian jurisdictions to investigate  
25  
26 throughcare needs for Indigenous peoples leaving prison (Author1, Author2 and  
27  
28 Author3 Tubex et al., 2020a, 2020b)<sup>4</sup>. As all three authors are non-Indigenous researchers  
29  
30 working in this space, our research methodology was built around the active involvement of  
31  
32 Indigenous peoples and their communities. Criminological research has for too long been  
33  
34 dominated by the Western / non-Indigenous view on theory and research, which is no longer  
35  
36 acceptable. As Blagg (2017) states, the days that we referred to ourselves as working *in* the  
37  
38 Aboriginal domain are over, we have to work *with* Aboriginal communities. Therefore, the  
39  
40 starting point of our research was that Indigenous peoples are the experts on their own lives  
41  
42 and, to be effective, throughcare strategies should be based on the knowledge and expertise of  
43  
44 local Indigenous peoples and services. Consequently, the research design used a community-  
45  
46 led approach, seeking the perspectives of people released from prison, their community  
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48 members and local service providers. Further, our methodology and data collection tool were  
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59 <sup>4</sup> The research was supported by the Australian Institute of Criminology through their Criminology Research  
60 Grants Scheme: CRG23/15-16.

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2  
3 developed in respect of the two sets of guidelines that are available in Australia regarding  
4 research with Indigenous peoples, as requested by our University Ethics Commission<sup>5</sup>.  
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### 8 *Methodology and sampling*

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11 In Australia, legal and policy responsibilities are divided between the federal and state and  
12 territory governments, with criminal law being primarily a state / territory responsibility. While  
13 Indigenous overrepresentation in the prison is a problem in all Australian jurisdictions, it is  
14 most ~~outspoken~~ prevalent in Western Australia and the Northern Territory, where we  
15 conducted our research. Within these jurisdictions, we selected the Kimberley region in the  
16 North of Western Australia and three research settings in the Northern Territory (Darwin, Alice  
17 Springs and one of the Tiwi Islands<sup>6</sup>). While the majority of Aboriginal and Torres Strait  
18 Islander peoples in Australia live in major cities or regional areas, about 19% live in (very)  
19 remote areas (Australian Bureau of Statistic, 2018). These ~~research~~ settings selected for our  
20 research are characterized by their vastness, with long distances between communities, the  
21 remoteness of some communities, and limited service delivery. The research sites were selected  
22 because of the researchers having strong relationships with the local communities and services,  
23 which allowed us to respect Indigenous research protocols while visiting the communities. In  
24 the Kimberley region, the research was supported by Men's Outreach Services. The researchers  
25 accompanied re-entry staff from Men's Outreach Services on two of their field trips, visiting  
26 communities in Broome, the Dampier Peninsula, Derby and Fitzroy Crossing. In the Northern  
27 Territory, NAAJA and CAALAS were the main facilitators of the research. NAAJA provided  
28 the researchers with names and contact details of Elders and respected people in the town  
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54 <sup>5</sup> The National Health and Medical Research Council 'Ethical guidelines for research with Aboriginal and Torres  
55 Strait Islander Peoples'.  
56 The Australian Institute of Aboriginal and Torres Strait Islander Studies' 'Guidelines for Ethical Research in  
57 Australian Indigenous Studies'.  
58 Ethics approval was obtained from the Human Research Ethics Committee at UWA on 22 February 2016:  
59 RA/4/1/8047.

60 <sup>6</sup> The Tiwi Islands are part of the Northern Territory, located 80 kilometres north of Darwin.

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3 communities around Darwin. The researchers contacted these people by mail and over the  
4  
5 phone and made appointments for visits to their convenience. CAALAS in Alice Springs  
6  
7 organised a focus group with their transition officers. Other services were contacted by the  
8  
9 researchers. Regarding the Tiwi Islands, one of the researchers had conducted a number of  
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11 projects on the Islands and is well known to the Elders and community. Communities were  
12  
13 visited by two researchers; one researchers was present at all the visits, accompanied by a  
14  
15 second researcher in each of the two jurisdictions. To gain access to potential participants, the  
16  
17 senior Elder was contacted for approval to conduct the study and suggestions on who should  
18  
19 be interviewed. We talked to as many people as possible, as representative sampling was not  
20  
21 appropriate or possible. In total 18 days of fieldwork were conducted for the data collection.  
22  
23 We interviewed people released from prison, as well as their family / community members and  
24  
25 service providers. Potential participants were informed about the aims of the research, the use  
26  
27 of the results and the nature of their involvement. Their consent was witnessed and / or  
28  
29 recorded. We developed a topic list for the interviews, but the flow of the conversations was  
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31 steered through a yarning approach as discussed below.  
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38 Data was collected from a total of 38 interviews with individuals or in focus groups, involving  
39  
40 59 people of which 20 women. Of those interviewed, 18 interviews included Indigenous  
41  
42 community members with and without lived experience of imprisonment. We held 20  
43  
44 interviews with service providers, both Indigenous and non-Indigenous, some also with lived  
45  
46 experience. The duration of the interviews varied greatly, from half an hour to two hours for  
47  
48 focus groups. The interviews were recorded and professionally transcribed. Analysis of the  
49  
50 interviews was conducted via a grounded theoretical approach of open, axial and reflective  
51  
52 coding using NVivo (Strauss and Corbin, 1990).  
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57 After the interviews were analysed, a consultation paper was developed, summarising our  
58  
59 understanding of what we had been told in the interviews. This consultation paper was emailed  
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3 to all the participants with available contact details. Participants had the opportunity to give  
4  
5 feedback over email or were contacted to discuss the findings in a follow-up visit or over  
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7 Skype. Their comments were integrated in the final reporting.  
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For Peer Review

### *Yarning as a research tool*

Our interviews adopted a yarning approach. Yarning as a data collection method is being increasingly employed across a range of research fields by non-Indigenous researchers (Bessarab and Ng'andu, 2010; Leeson et al., 2016; Rynne and Cassematis, 2015). When used correctly, yarning is a data collection method that is respectful of Indigenous people's ontology and epistemology. The yarning approach embeds its respectful approach through ensuring that in collecting data, cultural safety and respect for participants is maintained through a values-driven collaborative process (Cunneen and Rowe, 2014). That is, power does not remain directly with the non-Indigenous researcher as it can be in existing neo-colonising empirical research approaches. Typically, a non-Indigenous definition of yarning implies a casual conversation. However, for Indigenous peoples, yarning is a formal process of knowledge sharing. Each participant engaged in the process has appropriate opportunity, responsibility, and accountability in the sharing of information (Dean, 2010).

A yarning method or approach involves a two-step process (Bessarab and Ng'andu, 2010). In stage one, the researcher and the participant engage in social yarning. Social yarning is an informal conversation about matters usually not involved in the research topic. Through relaxed, informal and non-contrived conversation, social yarning establishes trust and respect through both the participants sharing information about themselves, their backgrounds, and life in general. The success of stage one is determined by the trust and respect for each participant's story and for the grounding of that participant in their world. Provided stage one has successfully resulted in a shared knowledge of each participant's story, in stage two, retaining a collaborative approach, non-directive questioning regarding the research topic can commence. This involves knowledge sharing through stories, examples and building on themes as they occur during the conversation that inform the research questions or aims. A yarning approach embodies action research, in that through the sharing of stories and subsequent

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2  
3 discussion, all participants' understanding of the issues are empowered through better  
4 comprehension of the others' perspectives and knowledge of the issues (Fredericks et al.,  
5  
6 2011).  
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### 10 11 *Research findings* 12

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14 From our research, we reached the conclusion that the development of effective throughcare  
15 strategies for Indigenous peoples leaving prison, need to start from the acknowledgement that  
16 Indigenous' experiences with the criminal legal system are different from non-Indigenous  
17 people, and therefore need a tailored approach. **This was stated earlier in relation to Aboriginal  
18 women leaving prison (Baldry, 2013) and is confirmed in this research.** In the following  
19 sections, we will explore why and how Indigenous perceptions are different, based on what  
20 was shared with us in the interviews. Reflective of our methodological approach, the findings  
21 are illustrated with numerous quotes, giving Indigenous peoples a voice without reframing  
22 through non-Indigenous perspectives. To ensure anonymity, the references to the quotes are  
23 kept general, referring to Participant / Service Provider and the location of the interview  
24 (Western Australia / Northern Territory).  
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### 40 *The impact of colonisation* 41

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43 Indigenous communities in Australia are based on strong cultural traditions and practices,  
44 which were developed over 60,000 years. While not explicitly questioned about the impact of  
45 colonisation, it was regularly referred to as the underlying cause of many contemporary  
46 problems. Colonisation had a very disruptive impact on traditional lifestyles, the loss of self-  
47 determination and intergenerational trauma, and has ongoing effects on the daily lives of  
48 Indigenous peoples.  
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57 And, you know, the bottom line is I think we've been looking at this in really the wrong  
58 way and part of that is because they have a colonial history and it's only personal feeling  
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3 from the experiences I've had is that people are saying that all of these behaviours and these  
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5 outcomes are culturally based, when in fact they're trauma based and they're trauma based  
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7 on people's relationships over a long period of time... I mean there's no one issue that  
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9 we're dealing with that is just total mismanagement of Aboriginal people for 200 years,  
10  
11 really. (Service Provider NT)

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15 We don't normally talk about [colonisation] as much because there's a potential to just carry  
16  
17 on in a negative way ... colonisation and the impacts of that - people been taken away from  
18  
19 Country lands has been ... Massive impact on people's belonging – no sense of belonging  
20  
21 is a real part of who we are – we need to belong to some – somewhere (Service Provider  
22  
23 WA)

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26  
27 Colonisation came with the imposition of Western culture over Aboriginal culture, including  
28  
29 the Westminster criminal legal system, which overruled the traditional model of conflict  
30  
31 resolution (lore). However, traditional negotiated punishment, such as payback, is still an  
32  
33 important feature of Indigenous life in the communities we visited, it was described to us as  
34  
35 being hard but fair and needed to restore the community peace and get redemption. In this  
36  
37 context, the Western criminal legal system is irrelevant in solving the conflict, as from an  
38  
39 Indigenous perspective, this can only happen through traditional lore. This is important for  
40  
41 throughcare practices, as if no punishment was being negotiated before imprisonment, the  
42  
43 unresolved conflict can cause stress and anxiety for release and return to community.  
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49 Yeah that's the way it is that's our system. We run our system in our own way. White men  
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51 way just came in. Our system was working very well. When that happens you got payback  
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53 and you're not gonna be dead but they'll pay you back though. (Participant NT)  
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3 Yeah. All the emotions hitting you at once and because you're happy you're out and you're  
4 happy you're going to your Country, but you're scared because – "I got to face them now  
5 when I go there. Now I've got to face the family I'd done wrong to". (Service Provider WA)  
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10 The Western criminal legal system being imposed results in the fact that many Aboriginal  
11 peoples do not engage with the 'white men's' system, which can lead to higher conviction rates  
12 and longer prison stays, as a lot of Aboriginal peoples do not apply for parole, but refer to walk  
13 free after serving the full sentence.  
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20 They plead guilty to most things, whether I did it or not, especially in the old days, it was  
21 just plead guilty, like shooting fish in a barrel. (Service Provider NT)  
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26 No, I didn't wanna – because I had thought about this way. Even though that was my first  
27 time in prison, I got off with the parole. But I didn't want the parole because I'm thinking,  
28 if I'm gonna have this parole, I'll go out – me and my missus will probably argue or  
29 whatever. Something will come up and we'll argue. It might happen the same day, two,  
30 three weeks after. Halfway through my parole, we'll probably have an argument or  
31 whatever then ... That's why I didn't want it. I wanted to do my full stretch and come out  
32 clean slate. (Service Provider WA)  
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### 43 Being away from Country

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45 Imprisonment often means being taken away from Country<sup>7</sup>, which, given the strong  
46 connection of Indigenous peoples to their ancestral lands, adds an extra punitive dimension.  
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49 When Indigenous peoples are imprisoned away from home, and due to the 'tyranny of distance'  
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55 <sup>7</sup> For an explanation of the meaning of 'Country' we refer to the following citation: 'For Aboriginal peoples,  
56 country is much more than a place. Rock, tree, river, hill, animal, human – all were formed of the same  
57 substance by the Ancestors who continue to live in land, water, sky. Country is filled with relations speaking  
58 language and following Law, no matter whether the shape of that relation is human, rock, crow, wattle. Country  
59 is loved, needed, and cared for, and country loves, needs, and cares for her peoples in turn. Country is family,  
60 culture, identity. Country is self.' (Kwaymullina, 2005: 12).



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3 in the selected research sites, they are no longer connected to their community, which creates  
4 uncertainty and anxiety. Moreover, Indigenous peoples have many cultural obligations, such  
5 as attending funerals, which do not stop while they are in prison, and not being able to fulfil  
6 them comes with feelings of grief and guilt, but can also lead to payback.  
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13 And spirituality isn't about religion, it's actually about relationships, your relationship  
14 to the land, your kinship groups, your stories and all those and without them, if you take  
15 an Aboriginal away from his family and his country, he might as well be dead because  
16 he has nothing. (Service Provider NT)  
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23 When they come back out, they feel anger 'cause they missed their families' funeral or  
24 they're angry about family not visiting and because they're well away from family and  
25 they have that bit of closure inside of them. And when they come out, they drink so  
26 they can – some of them, they – majority of them, they drink to let out all their anger  
27 or their emotional feeling, what they feel inside. (Participant WA)  
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35 But my point is that person who misses out on the law, on the funeral, he's being  
36 punished already in prison. Now he's gonna come out, he's gonna be punished again  
37 from the Aboriginal society. See? And that's not right. That's not – like he'd probably  
38 get severely punished for not being there if it's somebody close or like I – mentor that  
39 been put you through law and stuff like that. (Service Provider WA)  
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#### 47 *Disconnect from culture while in prison* 48 49

50 During the interviews, people shared their concerns about the impact of involvement in the  
51 criminal legal system on Aboriginal culture. If too many people are 'missing' in the  
52 community, this endangers the passing on of traditional knowledge, language and respect,  
53 particularly because of the oral nature of Aboriginal culture. This concern was mainly related  
54 to young people in the criminal legal system, not being exposed to the traditional involvement  
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3 of Elders and other respected persons, which can result in a loss of cultural awareness. Further,  
4 if these Elders and respected peoples become entangled in the criminal legal system  
5 themselves, they are not around to pass on this knowledge and exercise control.  
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10 So the young guys go to the prison. They don't see their – out of the influence of the Elders,  
11 they don't build the respect for the Elders and when they come back, there's no respect  
12 anymore. They haven't got the respect for their Elders. The Elders can't go in there to see  
13 them to rehabilitate them. (Participant NT)  
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20 And we lost a lot of old people. Majority of people are now just – the imprisonment is  
21 getting higher and higher and a lot of them are going into prison. It's because of all these  
22 strong Elders is not around for them. And you're left with people with anger and hate and  
23 argument. That's what really is something I can't understand is that I think it is because we  
24 don't have Elders – strong Elders that takes people to – keeping up with the cultural side  
25 of things, like going out to a bush, fishing, hunting, teaching the young ones. (Participant  
26 WA)  
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37 It was put to us that in order to ensure Indigenous peoples don't get disconnected from their  
38 culture during imprisonment, or to re-connect them with their culture while in prison, contact  
39 with Elders is essential.<sup>8</sup>  
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45 So I think the best thing to do is that you empower the Elders of the Elders Visiting  
46 Programme and then you have these other agencies working with them. You have the  
47 correctional service, the justice working with them, the parole, court, and everyone else  
48 working with the Elders. I think that needs to happen. The other thing, if you're talking  
49 about what the Elders would like to see, is more Aboriginal people employed in the  
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59 <sup>8</sup> We do note however that both jurisdictions have a Aboriginal / Elders Visiting Programme, which is  
60 particularly well developed in the Northern Territory.

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3 department, much more. The other thing is that people in the department need to be  
4  
5 trained, culturally appropriate training. They need to do that. (Participant NT)  
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9 *The transition back to communities*

10 The moment of release is a crucial one and, from a throughcare perspective, probably the most  
11  
12 perilous. It is therefore most important that people nearing release have a safe place to go to. It  
13  
14 is the practice of corrective services in Western Australia and the Northern Territory to contact  
15  
16 the leaders of the community the person wants to be released to. Given the community lifestyle  
17  
18 and Indigenous caring and sharing responsibilities, this comes with a certain duty of care, for  
19  
20 which the community leaders sometimes don't feel they have the capacity and / or support.  
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24  
25 Well, our board is quite split on whether we want people here on parole or whether we want  
26  
27 them here once they're clean and finished and everything. There's people who go – if they  
28  
29 come back while they're on parole, we've got a little bit of – not power, but we've got  
30  
31 something to hold over them a little bit while we get them readjusted into the community,  
32  
33 and there are people who say, “Well, that's actually too much responsibility 'cause if  
34  
35 anything goes wrong, it's gonna fall back on us and we would rather them come back once  
36  
37 there's no parole left anymore.” (Participant WA)  
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41  
42 Some people decide to not return to their community, out of fear for payback or to prevent  
43  
44 them from getting into the same situation which brought them to prison. Not being able to  
45  
46 return to community, and being on others land creates feelings of insecurity, discomfort and  
47  
48 ‘not belonging’.  
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50  
51 I was a big shot bloke in somebody else's country, so that's how they look at it, and the  
52  
53 other people and communities. When you try and do something good in another people  
54  
55 community especially when you're not from there, you're regarded as a big shot. Don't  
56  
57 go there. I tried to do that and it didn't work. (Participant WA)  
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3 As a result, people end up in towns in ‘the long grass’<sup>9</sup>, which is a shortcut to falling back into  
4 criminal behaviour: ‘People are now fringe-dwelling on their own culture’<sup>10</sup>. (Service Provider  
5  
6  
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8 WA)

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11 *Being torn between two worlds*  
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14 One of the strongholds of Indigenous community life is the traditional obligation to look after  
15 extended family members, the duty of caring and sharing. However, this traditional lifestyle  
16 does not fit with our contemporary Western individualistic society, which causes a clash of  
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20  
21 cultures.

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23 I mean when you're an Aboriginal person, you don't just have an obligation to you, you and  
24 yours, your immediate – I mean, your immediate children, your wife, and your partner. You  
25 have an obligation to your brother. You have an obligation to their kids and you must treat  
26 their kids exactly the same as I treat my kids. So I'm totally responsible for everything  
27 pretty much... For instance, just yesterday, I got an – phone call from a nephew. His missus  
28 was in a blue with her family, and there's a family feud happening and he wants me to go  
29 down there and bloody break the fight up, and get involved and stuff. Guys, I've got  
30 children who have learning disabilities and growing disabilities, and I've got four children.  
31 I've got a job to do. I don't have time for this fairly much. So it's really hard, guys, to be  
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45 able to juggle both cultures, basically. (Service Provider WA)

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47 This clash of cultures can also impact on other commitments related to housing and work. It is  
48 a reality for very many released Indigenous peoples that they do not have their own place to go  
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60 back to, and have to rely on family and relatives for their housing. Sharing accommodation

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<sup>9</sup> Referring to homeless people camping in public spaces.

<sup>10</sup> Living on the outskirts because of being excluded.

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3 with family can lead to overcrowding to the risk of losing the house, or create disputes and roll  
4  
5 on effects on other aspects of life.  
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7

8 I think culturally, you're not really supposed to say no to family who come for you – to  
9  
10 come to you for things, whether it's money, to sleep at your place, pretty much anything.  
11  
12 It's very hard for the people that I've helped to say no and I've had heaps of – a lot of times  
13  
14 where I'll have a client – they've got a job, they're doing really well, and then the whole  
15  
16 reason why they would lose their job is because of that – not saying no, people staying at  
17  
18 their place, drinking there, and doing whatever. Yeah. Which just causes them not to go to  
19  
20 work and not getting sleep. (Service Provider NT)  
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25 And it was a great system back then. But now, you get a job at the mines, you buy furniture  
26  
27 for your house and get yourself a nice car. Three weeks later someone has taken all your  
28  
29 furniture because it's a sharing process. Brought your car out of town, left it on the side of  
30  
31 the road and gone home. So, you think, 'Why would I go to work?' (Service Provider NT)  
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34

35 Unemployment and poverty is a reality for many Indigenous peoples, and when the spread of  
36  
37 welfare becomes too thin, sharing responsibilities become harder, which can cause Indigenous  
38  
39 peoples to give up on their attempts to earn an income or care for belongings, as it doesn't  
40  
41 improve their own lifestyle.  
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#### 45 **Recommendations for further practice**

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48 In our reporting, we drew attention to the need for effective (throughcare) interventions to  
49  
50 **acknowledge the ongoing consequences of colonisation and** the depth of the conflict between  
51  
52 the dominant Western lifestyle that forms the framework of our regulations and traditional  
53  
54 Indigenous values. It is clear that initiatives based on assumptions of the superiority of one set  
55  
56 of values over the other will fail. Therefore, we argued, if the fact of Indigenous peoples being  
57  
58 torn between two worlds is not addressed in suitable and flexible arrangements and support,  
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60

we are possibly setting people up to fail. Reversing this trend requires political engagement and operational structures that support and strengthen traditional systems and allow them to co-exist alongside the non-Indigenous world. Further, throughcare requires a holistic approach, a governmental collaboration between justice, community and welfare services, housing, and health. Unlike the Western approach, which addresses crime and punishment as an individual problem, this approach should involve extended families and community members, include the issues underlying offending behaviour (such as poverty, substance abuse and domestic violence), and acknowledge the importance of healing in a traditional sense. We suggested a bottom-up approach; making sure local organisations can develop good practice based on stable funding, which allows for better coordination, with each other and Indigenous communities, including an evaluation planning which looks at all aspects of a desistance process (Tubex, 2021; Tubex et al., 2020a and b).

### **Looking for examples of good practice in Canada**

Following the completion of our research, and in an attempt to find examples of good practice, we looked at the Canadian situation, as Canada is referred to as a ‘forerunner in the Indigenization of its correctional apparatus’ (Martel et al., 2011: 237). To address the problem of Indigenous over-incarceration, the Canadian state took initiatives to adjust their practices to make them more culturally appropriate (Chartrand, 2019; McGuire and Murdoch, 2021; Martel and Brassard, 2008; Martel et al., 2011).

In relation to throughcare, we particularly looked at Section 81 and 84 of the Corrections and Conditional Release Act (CCRA 1992). Section 81 was intended to give Correctional Service Canada (CSC) the capacity to enter into agreements with Aboriginal communities for the care and custody of Indigenous peoples in prison. It further allows Aboriginal communities to have a key role in delivering programmes within correctional institutions and in healing lodges. The purpose of healing lodges are to assist in the successful reintegration of Indigenous peoples

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2  
3 after release, by using traditional healing approaches and programmes. Two types of healing  
4 lodges have been put in place under section 81: those operated by CSC and those operated by  
5  
6 Indigenous communities in agreement with CSC (Monchalin, 2016). The intent of Section 84  
7  
8 was to enhance the information provided to the Parole Board of Canada, in response to criticism  
9  
10 that the ‘whitestream’ model of justice is failing Aboriginal peoples, as release on parole rates  
11  
12 are lower for Aboriginal peoples and the rate of parole revocations is higher. The Parole Board  
13  
14 of Canada therefore introduced Elder assisted hearings. Elder assisted hearings include an  
15  
16 Aboriginal Elder advising on Aboriginal tradition, culture and spirituality – not the decision-  
17  
18 making itself (Turnbul, 2014). Both initiatives sound very promising and in line with what  
19  
20 participants in our research were asking for.  
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27 However, reviewing academic commentaries on these practices highlight the risks involved  
28  
29 with the ‘Aboriginalisation’ of prisons in Canada. It is stated that formalising Aboriginal  
30  
31 interventions in the prison has confined and narrowed their contribution as well as it over-  
32  
33 simplified and over-generalised what is culturally appropriate and needed. This resulted in a  
34  
35 white Canadian interpretation of what it means to be ‘Aboriginal’, and this homogeneous  
36  
37 interpretation of ‘Aboriginality’ is being institutionally imposed, with Indigenous peoples  
38  
39 losing the power over their own culture and how to engage with it. Further, it emphasises the  
40  
41 ‘otherness’ of Indigenous peoples, resulting in ongoing colonisation and assimilation (McGuire  
42  
43 and Murdoch, 2021; Martel and Brassard, 2008; Martel et al., 2011). The system uses  
44  
45 ‘empowerment’ as a strategy to actually increase the power of the state over incarcerated  
46  
47 Indigenous [peoples] (Hannah-Moffat, 2000 cited in Reasons et al., 2016: 88). In doing so,  
48  
49 penal institutions are ‘the replication of the colonial logic that extracts people from their  
50  
51 communities and teaches them a more *appropriate* Indigeneity’ (Marques and Monchalin,  
52  
53 2020: 92, emphasis in original). It is stated that these forms of criminal justice reform are ‘a  
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3 *function* of penal power and not *transformative* of that power’ (Marques and Monchalin, 2020:  
4  
5 93, emphasis in original).

6  
7  
8 Martel et al. (2011) illustrate how contradictory this Aboriginalisation approach works out in  
9  
10 in a risk-based system. Indigeneity is at the initial stages of risk assessment considered as a risk  
11  
12 factor; measuring poverty, under-education and under-employment as criminogenic factors,  
13  
14 **results in that-Aboriginal peoples in prison are being classified as high risk and ending up in**  
15  
16 high security institutions with a limited offer of treatment programmes. On the contrary, later  
17  
18 in their penal journey, ‘reconnecting’ to their culture is seen as a dynamic risk factor lowering  
19  
20 the risk of recidivism. Therefore, Indigenous peoples are forced to embrace their ‘rediscovered’  
21  
22 Aboriginality. It also puts the responsibility with the offender and the Aboriginal communities  
23  
24 in managing criminogenic factors. Further, Aboriginal community members become entangled  
25  
26 in the risk assessment process which compromises their role as they have to work within the  
27  
28 confines of the overall system regulating Aboriginal practices (Martel et al., 2011, see also  
29  
30 McGuire and Murdoch, 2021).

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36 The Aboriginalisation of the parole process has also been subject of debate. Turnbull (2014:  
37  
38 387) argues that the introduction of Elder assisted hearings ‘modify and Aboriginalise a  
39  
40 standardise practice (i.e. the parole hearing) to accommodate diversity demands, yet leaving  
41  
42 the dominant decision-making paradigm intact.’ The role of the Elders at these hearing is to be  
43  
44 a cultural and spiritual ‘translator’, to be ‘a bridge between the offender and Parole Board  
45  
46 members’ (Turnbull, 2014: 390). Limiting the role Elders are given in the overall normative  
47  
48 parole process is steering away from the responsibility of the system and the broader colonising  
49  
50 society leading to Indigenous overrepresentation in the first place. The focus on ‘culture’ leaves  
51  
52 the standard risk-based framework of the process intact. Further, streamlining the involvement  
53  
54 of the Elders through protocols of what and how things can happen does not provide for much  
55  
56 flexibility and might make the practice less relevant for the Aboriginal person – again, because  
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3 of the Aboriginal cultural heterogeneity. Turnbull also points to the process of ‘othering’,  
4 seeing the ‘alternative’ parole hearings as a deviation of what is normal (Turnbull, 2014).  
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8 Criticism is also found in the systematic investigation of these practices by the Canadian Office  
9 of the Correctional Investigator in 2012. They found that Section 81 healing lodges were under-  
10 utilised due to the limitation of the intake to minimum security offenders, or, exceptionally,  
11 ‘low risk’ medium security offenders, which excludes almost 90% of incarcerated Aboriginal  
12 peoples. Further, there is no guarantee of funding for community-based healing lodges, as they  
13 are subject to CSC priorities, and there is a huge difference between the investment in  
14 community-led healing lodges and those run by CSC. They also found a breach of trust between  
15 Aboriginal communities and CSC due to a lack of engagement of the latter in transferring CSC  
16 run healing lodges to community control. Regarding the Elder assisted hearings (Section 84),  
17 it was found that the process was cumbersome, time-consuming and misunderstood. Therefore,  
18 the Office of the Correctional Investigator concluded that ‘CSC has not met Parliament's intent  
19 with respect to provisions set out in Sections 81 and 84 of the CCRA. CSC has not fully or  
20 sufficiently committed itself to implementing key legal provisions intended to address systemic  
21 disadvantage.’ (Office of the Correctional Investigator, 2012: xiv).  
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41 This literature highlights the contradictions and risks involved in trying to achieve inclusion  
42 through the piecemeal introduction of formalised, homogenised and stigmatised aspects of  
43 Indigenous ‘culture’ into the system, leaving the structures, policies and practices of the  
44 criminal legal system intact. In the words of Marques and Monchalin (2020: 94) ‘We never  
45 seem to pause long enough to question the potentiality of reintegrating someone to society who  
46 was never integrated – and never meant to be integrated – in the first place’. Reasons et al.  
47 (2016) point to the fact that internal CSC reports and evaluations never challenge their own  
48 approach as a colonial construct, but lay the responsibility of the Indigenous  
49 ‘overrepresentation problem’ with the population and communities who are overrepresented,  
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3 instead of a failure of the state. In that respect, regardless these reforms, the overrepresentation  
4 of Indigenous peoples is still an ‘Indian problem’ instead of a ‘colonial problem’, as outlined  
5  
6 in the work of Monchalin (2016).  
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For Peer Review

## Conclusion

As set out in the first part of the article and confirmed in our research findings, the ongoing impact of colonisation and the imposition of an alien legal system onto traditional culture and ways of conflict resolution, is a strong component of the overrepresentation of Indigenous peoples in Australia. From the Canadian initiatives and literature, we learn that, to develop effective strategies for Indigenous peoples leaving prison, it is not enough to ‘paint the prison “red”’ (Martel and Brassard, 2008). Introducing Indigenous cultural practices into the prison and parole system in a way that leaves the inherently unfair colonialised and institutionalised structures untouched, is not enough. Further, by formalising and streamlining Indigenous interventions, reshaping them through a ‘white men’s’ lens, ignores the diversity and authenticity of Aboriginality. Incorporating the need to ‘reconnect’ with this reshaped ‘Aboriginality’ in the decision making process even increases the power of the criminal legal system over Indigenous lives and communities. Our research highlighted the need for an acknowledgement of how the ‘clash of cultures’ impacts on the experiences and consequences of imprisonment for Indigenous peoples. The different lifestyles and the throughcare needs that come with it, cannot be addressed by marginal adjustments to practices that fail about 30% of the prison population in both countries ([Australian Bureau of Statistics, 2020; Office of the Correctional Investigator, 2020](#)). Throughcare strategies for Indigenous peoples preparing for / leaving prison therefore need to be developed with Indigenous peoples and communities being in charge, and in acknowledgment of their cultures and traditional conflict resolution practices. This approach requires a model of respectful co-habitation instead of allowing for a peripheral deviation from the norm.

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