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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir or Madam,

This submission to the Senate Committee on Legal and Constitutional Affairs Inquiry into the value of Justice Reinvestment approach to criminal justice in Australia is on behalf of the National Centre for Indigenous Studies (NCIS) at The Australian National University, the Indigenous Offender Health Research Capacity Building Group (IOHR-CBG) ¹ and researchers on an Australian Research Council funded grant (ARC grant No IN130100048 research project 'Reducing Indigenous incarceration using Justice Reinvestment: an exploratory case study') ².

While the expertise of all personnel involved in this collaboration is acknowledged, particular thanks go to Ms Hilary Russell (ANU), Mr Paul Simpson (IOHR-CBG) and Professor Pene Mathew for their input to its development.

On behalf of all co-contributors to the submission, I would be pleased to make a verbal submission to the Committee if invited.

Yours sincerely

(delivered by email)
Jill Guthrie

15 March 2013

1. See <http://www.healthinonet.ecu.edu.au/population-groups/offender-health/iohr-capacity-building-group>

2. Researchers are: Dr Jill Guthrie, Professor Mick Dodson, Dr Tom Calma, Professor Michael Levy, Professor Tony Butler, Dr Phyll Dance, Professor Lisa Strelein, Dr Kamalini Lokuge, Professor Pene Mathew, Professor Todd Clear

Senate Inquiry into the value of a Justice Reinvestment approach to criminal justice in Australia

Executive Summary

To close the gap in disparities between Indigenous and non-Indigenous Australians, innovative approaches and strategies for reducing the hugely disproportionate impact of incarceration on Indigenous Australians, such as Justice Reinvestment, must be implemented.

We propose a national reform agenda, essential to move from a mere 'concept' of Justice Reinvestment to a tangible and measurable policy. Further, to achieve reform genuine partnerships between 'community' in all its forms, and governments at all levels must be established and maintained.

Our recommendations are that the Australian Government:

1. Enacts uniform Commonwealth and State legislation to establish an *Australian Justice Reinvestment Authority* that has a mandate to comprehensively implement and evaluate Justice Reinvestment policy.
2. Allocates adequate 'start-up' funding to establish the Authority.
3. Through COAG, works with all jurisdictions to determine agreed levels, targets and timeframes by which incarceration levels in each jurisdiction will be reduced.
4. Enacts amendments to Commonwealth and States crimes sentencing legislation to ensure incarceration rates for certain categories of offence are held static, allowing diversion of saved funds to Justice Reinvestment initiatives which would be monitored through the Authority.

The rationale for each recommendation is discussed in the body of this submission.

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Section A

This section deals with the Inquiry's following terms of reference

- (a) drivers behind the past 30 years of growth in the Australian imprisonment rate;
- (b) economic and social costs of imprisonment;
- (c) over-representation of disadvantaged groups within Australian prisons, including Aboriginal and Torres Strait Islander peoples and people experiencing mental ill-health, cognitive disability and hearing loss;
- (d) cost, availability and effectiveness of alternatives to imprisonment, including prevention, early intervention, diversionary and rehabilitation measures;

Drivers, Overrepresentation of Indigenous Australians

Characterised by extreme socio-economic and psychological disadvantage, prisoners are amongst Australia's most stigmatised and socially excluded citizens. Typically, those exposed to the criminal justice system are poorly educated, unemployed, socially isolated and financially dependent [1, 2]. There are also high levels of psychiatric illness [3], violence [4] physical ill health [1, 2] and engagement in risk-taking behaviours associated with alcohol, tobacco and other drug use including injecting [1, 2, 5, 6]. High proportions (61% and 72% respectively) of Inmate Health Survey respondents in NSW [1] and ACT [7] stated that their current incarceration was linked to being intoxicated at the time of offence, demonstrating the link between alcohol and other drug use and incarceration. Concurrent mental health problems and substance use are common among offender populations [8]; people with mental illness are often incarcerated rather than treated, largely because of a lack of appropriate mental health and other services [9, 10]. Substance misuse and co-existing mental illness are closely linked to high levels of Indigenous offending particularly violent offending [11], resulting in high levels of incarceration as violent offenders are often not eligible for entry into treatment and diversion programs [12].

For Indigenous prisoners disadvantage is further compounded by greater incidence of ill-health, dying younger, lower levels of educational attainment and income, high rates of unemployment and poorer housing conditions [13]. Indeed, alcohol abuse and illicit drug use have been shown as the most powerful correlates of Indigenous arrest along with welfare dependence, unemployment, financial stress, being a member of the Stolen Generations and being a member of a one-parent family all also exerting strong effects on risk of arrest [14]. Incarceration has a particularly serious impact on Indigenous Australians, affecting families and entire communities, and representing one of Australia's greatest social policy failings.

Some twenty one years after the 1991 Royal Commission into Aboriginal Deaths in Custody National Report little improvement is evidenced: Indigenous law and justice remains an ongoing priority for the Australian government, and while there has been a decrease in the number of deaths in custody over the past two decades involving both non-Indigenous and Indigenous Australians, Indigenous Australians remain highly over-represented in the criminal and juvenile

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justice systems [15]. The age-standardised imprisonment rate for Indigenous prisoners at 30 June 2012 was 1,914 per 100,000 adult Aboriginal and Torres Strait Islander population, 15 times higher than that for non-Indigenous prisoners (129 per 100,000) and an increase in the ratio from 2011 (then 14 times higher) [15], and believed to be the highest rate of Indigenous incarceration in the Organisation for Economic Co-operation and Development [16]. The highest ratio of Aboriginal and Torres Strait Islander to non-Indigenous imprisonment rates is in Western Australia, at 20 times higher [15].

Alternatives to incarceration, economic costs

The economic costs of imprisonment are well-documented with evidence that even a modest reduction in the rate at which prisoners, particularly Indigenous prisoners, are initially imprisoned and re-imprisoned would result in substantial savings [17]. Recent analysis comparing imprisonment with residential treatment for Indigenous people affected by drug and alcohol issues showed that the total financial savings associated with diversion to community residential rehabilitation compared with prison are over \$111,000 per offender [18].

Section B

This section deals with following terms of reference:

- (e) methodology and objectives of Justice Reinvestment;
- (f) benefits of, and challenges to, implementing a Justice Reinvestment approach in Australia;
- (g) collection, availability and sharing of data necessary to implement a Justice Reinvestment approach;

Methodology and objectives

Justice Reinvestment originated in the United States of America (US). Initially developed by the Open Society Institute 2003, it has since been adopted in various forms in some 27 States. Demographic mapping and cost analysis has identified so-called ‘million dollar blocks, that is, geographic locations from which high proportions of the incarcerated population emanate. The Justice Reinvestment argument is that because of this high concentration of offenders in a small area, there should be a commensurate concentration of restorative health and social welfare services and programs to prevent offending flowing to those same areas. As a policy option, Justice Reinvestment diverts a portion of funds intended to be spent in the criminal justice system back to local communities with a high concentration of offenders into programs and services that address the underlying causes of crime, thus preventing people from ever engaging with the criminal justice system. The second Justice Reinvestment argument is that imprisonment cannot be considered a success because it does not make good financial sense, nor does it prevent re-offending. Justice Reinvestment retains detention as a measure of last resort for dangerous and serious offenders, but actively shifts the culture away from imprisonment to restoration within the community. In summary, Justice Reinvestment involves a four-step process: 1. Analysis and mapping of offender patterns (‘million dollar blocks’); 2. Development of options to generate savings and improve local communities; 3. Quantification of savings from

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incarceration and potential to reinvest in high needs communities, and 4. Measurement and evaluation of the impact of that reinvestment [19].

Implementation challenges at the *local* level

Justice Reinvestment has not been implemented in Australia as a policy option: consequently no Australian evidence is available. The ‘art and science’ of implementation, either large or small scale, requires high levels of skills, knowledge and understanding of community development as well as issues surrounding Australia’s socio-political history, particularly the experiences of Indigenous Australians in the context of the criminal justice system.

Several of us are meeting this challenge through involvement in a three-year Australian Research Council funded project commencing in March 2013 which *adapts* Justice Reinvestment methodology. The research uses an action research, community-driven approach and specific case study site and age demographic to produce community and stakeholder agreements for improving the social and economic lives of individuals in that particular community¹. Our research adapts Justice Reinvestment methodology, focusing on community-led options to explore the circumstances under which juvenile offenders may be able to return to and remain in their community. The research project is not an intervention study: it is exploratory, aimed at testing Justice Reinvestment theory and research methodology. Once this phase has been conducted and provided there is consensus and commitment to trialling agreements by key stakeholders (including all levels of government) an intervention study may ensue, contingent upon provision of resources and services to enable juvenile offenders to return to and remain in their community. Inherent in the research design is that the town and stakeholder constituents with whom we are working² will be phased into the research at the appropriate and strategic stage. It is hoped that timely negotiations with NSW and Commonwealth governments will result in funding to enable the town to trial community-driven Justice Reinvestment initiatives. A subsequent intervention study, aimed at comparing Town A (having Justice Reinvestment agreements) with Town B (town with similar demographics but no such Justice Reinvestment agreements), we hope will ensue – again, contingent upon funds to undertake the research – to examine differences in effects for each town, including social and economic costs.

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1. The study site is a medium size regional town in NSW, chosen because it has a 6% Indigenous population (greater than the 2% national average), it has no economic reliance on a prison as an economic base, and it ranks highly on selected remedial crimes. The research involves the whole town and is inclusive of Indigenous and non-Indigenous juveniles coming into contact with the criminal justice system: importantly, therefore key stakeholders are the local Aboriginal Land Council and the local Shire Council. Early planning meetings have indicated the imperative for these localised stakeholders to ‘own’ and guide the research. In this way the research is underpinned by community development frameworks.
 2. All levels of government and governance – local, State and Commonwealth, and relevant Indigenous governance structures.

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Implementation challenges at the *political* level

In addition to the challenges at the local community level, challenges for its *political* adoption are evident at the Federal and State levels.

At the Federal level, in 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs investigated the high level of involvement of Indigenous juveniles and young adults in the criminal justice system, lending support to the idea of Justice Reinvestment [20]. Rather than agreeing to adopt Justice Reinvestment in any meaningful way, however, the Commonwealth government's response was to accept a recommendation to conduct further research into the potential for Justice Reinvestment in Australia, as well as the establishment of a national working group to consider Justice Reinvestment and to develop options for its next steps in Australia. Added to this, the government's response noted that the primary responsibility to implement Justice Reinvestment approaches fell to States and Territories rather than to the Commonwealth government [21]. There has been little evident movement in the Commonwealth government's position since its response to the report.

In NSW, the potential for Justice Reinvestment as a strategy for reducing over-representation of Indigenous people in juvenile detention was promoted in 2010 in the *Strategic Review of the New South Wales Juvenile Justice system* commissioned by then NSW Minister for Juvenile Justice, Mr Graham West [22]. This report concluded that despite efforts of Commonwealth and State governments to address the deep disadvantages experienced particularly by Indigenous Australians, reductions in the rate of Indigenous juvenile detention had been negligible, and moreover, that any amendment of current approaches to criminal justice would be unlikely to yield significant changes. The NSW government did not accept the recommendation that it adopt a Justice Reinvestment policy, reporting that it 'continues to invest significant effort and resources in prevention and early intervention services and programs' and that it is 'working across portfolios to improve life outcomes for children and young people so that they do not turn to crime' [23],pp21]. The language of the response avoided any indication that the government would divert funds otherwise spent on additional juvenile justice centres (a fundamental element of Justice Reinvestment methodology requiring a political decision for inter-agency budget transfer), determinedly making the point that the government was working across portfolios.

In the Australian Capital Territory, the Blueprint for Youth Justice in the ACT 2012-2022 commits \$5.5m over four years, setting out strategies for early intervention and prevention programs for youth, and invokes the philosophy of Justice Reinvestment as its focus [24] which is laudable rhetoric, however, there is no indication of how Justice Reinvestment approaches will be implemented or evaluated.

Data collection issues

As discussed, implementation of Justice Reinvestment methodology and approaches, either large or small scale, requires high levels of skills, knowledge and understanding of community development as well as issues surrounding Australia's socio-political history, particularly the experiences of Indigenous Australians in the context of the criminal justice system. Meetings

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already undertaken within the town as part of the aforementioned ARC-funded research have comprised the representatives from the local Aboriginal Land Council and the local Shire Council, illuminating the need for relationship building within the town itself (communities within communities) and between the town and the researchers. Data collection and sharing is contingent upon building and maintaining trusting relationships between all the stakeholders and should not be underestimated in terms of the time and resources required.

Different methodological approaches to the collection and sharing of data are also worth noting. Our aforementioned community-driven approach, if given political endorsement through adequate funding, contrasts with that of the NSW government initiative, Youth on Track [25]³. This initiative is arguably underpinned by the justice mapping 'million dollar block' element of Justice Reinvestment methodology, but not its community-driven element.

Evidence shows that it costs approximately \$200,000 per year to maintain a juvenile in custody [26]. As mentioned, we hope that timely negotiations with NSW and Commonwealth governments will result in funding to enable the town to trial community-driven Justice Reinvestment initiatives. We make the point that, in monetary terms, a minimum of just five juveniles receiving Justice Reinvestment resources for one year rather than being incarcerated equates, literally, with the 'million dollar block' concept.

An Australian Justice Reinvestment Authority (see recommendation 1) would be well placed to co-ordinate and monitor data collection and data sharing issues necessary to implement a Justice Reinvestment approach in Australia, including of projects such as ours, as well as the Youth on Track initiative and various others that may also have Justice Reinvestment elements.

3. Youth on Track targets youth mostly in the 10 to 14 year age range and also up to 17 years of age and is to be implemented in three regions of NSW reported to have the largest number of young people meeting the criteria for participating in the scheme. The NSW government has called for tenders for a single service provider to provide case management for up to 300 youths with the criminogenic features of most likely having their first contact with the police before the age of 14 years, male, of Aboriginal descent, with anger, violence and mental health issues, problems with substance or alcohol use and poor literacy and numeracy levels, in these three regions.

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Section C

This section deals with the following terms of reference:

- (h) implementation and effectiveness of Justice Reinvestment in other countries, including the United States of America;
- (i) scope for federal government action which would encourage the adoption of justice reinvestment policies by state and territory governments; and
- (j) any other related matters.

Implementation and effectiveness in other countries

In the decade since Justice Reinvestment was introduced in the US, some 27 States have participated in various ways to data-driven reform in that country. Of those 27 States, approximately 18 have enacted Justice Reinvestment legislation for the purpose of stabilising corrections populations and budgets [27]. In a systematic review of the cost benefit of over 500 interventions aimed at improved State-wide outcomes in the US, Drake, Aos and Miller report that a range of Justice Reinvestment program initiatives were found to have a positive financial benefit far in excess of cost [28].

A notable strength of the US model of Justice Reinvestment is the availability of technical and research supports to States and Counties which are implementing policy and undertaking research. The Sentencing Project [29], the Council of State Governments Justice Centre [19] and the Justice Mapping Centre [30], the Urban Institute [31] and the Vera Institute [32] have all played an important role in elevating the policy from a ‘good idea’ to a rigorous evidence-based program of reform.

Scope for Australian federal government action

The successful implementation of Justice Reinvestment as a policy option in Australia will require a similar allocation of resources as has occurred in the US to measure the impact of change and to assist local communities in design and implementation. It will also require cross sector collaboration and alignment between the policies of sentencing and Justice Reinvestment.

It is difficult to dispute the inherent logic of the concept and underlying philosophy of Justice Reinvestment. Reflecting on the reluctance by Australian governments to adopt Justice Reinvestment as policy – discussed earlier – we contend that a Justice Reinvestment policy, agreement or framework will have little impact unless it is enacted through legislation. The appeal of Justice Reinvestment is self-evident – invest in communities and individuals with high rates of criminal offending to prevent the conditions that give rise to offending thereby reducing expenditure associated with incarceration. However, much of the published literature in Australia has been limited to articulating and advocating for the concept and has yet to set out how a Justice Reinvestment policy might be realised. Further, while a number of policies and frameworks at Commonwealth and State level have referenced Justice Reinvestment there is yet

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to be a direct and clear adoption and implementation of a national Justice Reinvestment reform program.

In 2007, the Commonwealth of Australian Governments (COAG) adopted the National Indigenous Reform Agreement, the focus of which is on increasing life expectancy, student literacy and numeracy and an educational attainment of Year 12. In 2009, COAG adopted the National Indigenous Law and Justice Framework 2009-2015 [33]. Arguably, Goal 1⁴ relates to investment in the criminal justice system. Goals 2–5 inclusive⁵ focus on people and communities, thereby reflecting the central tenets of Justice Reinvestment. The Framework's intention is conservative, however, aiming to provide jurisdictions with strategies and actions that could be undertaken as good practice, rather than prescriptive strategies. Indigenous Justice Agreements (IJAs) in various jurisdictions have been negotiated between government and peak Indigenous bodies, assessed as valuable mechanisms to shape policy. However, as Allison and Cunneen point out, IJAs were not intended to, nor are they capable of carrying the legal weight to advance national reform [34] such as that needed for Justice Reinvestment. In addition, evaluations of IJAs or of justice agency strategy plans have been rare, impacting upon both cross-jurisdictional and national analysis of the effectiveness of planning in the area [34].

We hold the view that because successful implementation will be contingent on States and Territories, COAG will need to take an active part in a national Justice Reinvestment reform program. Furthermore, in order to move beyond in-principle agreements and mere consideration of recommendations, the Commonwealth Government must lead the national reform agenda. Precedents reflecting such Commonwealth action which have subsequently resulted in successful implementation occur in other sectors such as health, namely the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008* [35] and the *National Health and Hospitals Network Act 2011* [36].

Four recommendations for national reform

To achieve this national reform agenda, we propose four reforms essential to move from a mere concept of Justice Reinvestment to a tangible and measurable national reform agenda. To achieve this, genuine partnerships between community (in all its forms) and governments at all levels must be established and maintained, from the proposed national governing *Australian Justice Reinvestment Authority* to local implementation sites.

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4. Goal 1: Improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner.
 5. Goal 2: Reduce over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system; Goal 3: Ensure that Aboriginal and Torres Strait Islander people feel safe and are safe within their communities; Goal 4: Increase safety and reduce offending within Indigenous communities by addressing alcohol and substance abuse; Goal 5: Strengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvements in justice and community safety'

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Our recommendations are that the Australian Government:

1. Enacts uniform Commonwealth and State legislation to establish an *Australian Justice Reinvestment Authority* that has a mandate to comprehensively implement and evaluate Justice Reinvestment policy.

Rationale: Good intentions and ‘in principle agreement’ will have no lasting impact. We propose that an adequately funded, overseeing body is required to progress a national Justice Reinvestment reform agenda in Australia. A similar model has been successfully implemented in the US through the Council of State Governments. The statutory Authority should be overseen by a governing Board that *genuinely* includes community members, including, importantly, Indigenous and consumer representation. Its functions could include data collection and surveillance, economic cost benefit analysis, justice mapping⁶ and/or research incorporating the testing of Justice Reinvestment methodological approaches, including where those methodological approaches are informed by local community partnerships, such as our aforementioned community-driven ARC funded study. Analogous to the University of Adelaide’s Social Health Atlas [37], justice mapping uses geographic information systems to map the incarceration rates of neighbourhoods. This is an essential element enabling the identification of where projected savings will be re-invested into particular services and resources. An example of comparable uniform legislation is the enactment of uniform organ and tissue transplantation legislation in all jurisdictions.⁷

Furthermore, as Justice Reinvestment is a human rights issue that has greatest potential benefit for Indigenous Australians, the Commonwealth should consider whether it may enact legislation by relying on the external affairs power, which permits the Commonwealth to implement treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, and the race power.

2. Allocates adequate 'start-up' funding to establish the Authority.

Rationale: Programs of significant national reform requiring a partnership between the Commonwealth and the States are implemented through the Council of Australian (COAG), Australia’s peak intergovernmental forum. We propose that a national Justice Reinvestment reform program be funded in line with similar initiatives, and that adequate ‘start-up’ funding is allocated to establish and stabilize the Authority. An indicative period of three years could see results emanating from the aforementioned suggested activities for the Authority.

6. As undertaken by The Justice Mapping Centre (a collaboration of 14 partners examining data from some 30 US government agencies from the criminal justice sector).

7. See for example, [Australian Organ and Tissue Donation and Transplantation Authority Act 2008](#) (Commonwealth); [Transplantation And Anatomy Act 1978](#) (ACT); [Human Tissue Act 1983](#) (NSW); [Transplantation And Anatomy Act 1979](#) (Queensland); [Transplantation And Anatomy Act](#) (NT); [Transplantation And Anatomy Act 1983](#) (SA); [Human Tissue Act 1985](#) (Tasmania); [Human Tissue Act 1982](#) (Victoria); [Human Tissue And Transplant Act 1982](#) (WA).

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3. Through COAG, works with all jurisdictions to determine agreed levels, targets and timeframes by which incarceration levels in each jurisdiction will be reduced.

Rationale: Ultimately, national incarceration rates should reflect, *at the very most*, no more than the 2.5% Indigenous population rate. Accordingly, an indicative incarceration rate target for Australia should be set by the Authority. A number of Commonwealth and COAG reform programs have set targets against which success of a reform is measured. Examples include the National Indigenous Reform Agreement and the Australian Organ and Tissue Donation and Transplantation Authority. The National Indigenous Reform Agenda sets targets against in six areas - Indigenous life expectancy, mortality, access to early childhood education, literary, school attainment and employment. The National Congress of Australia First Peoples [38] and the Social Justice Commissioner [39] have publically called for justice targets to be integrated into the Indigenous Reform Agenda. We also hold this view, and suggest that achieving targets in each jurisdiction should be monitored through the proposed National Justice Reinvestment Authority. An example of a Justice Reinvestment target is provided by the State of Oklahoma, where a target of a 10% reduction in violent crime by 2016 [40]. Without an equivalent measure in Australia there will be little imperative for change. An associated indicative task could be that the Authority works with all jurisdictions to determine an agreed level by which the incarceration levels in each will be reduced and the commensurate savings would be diverted from the corrections sector for reinvestment to Justice Reinvestment initiatives in those jurisdictions.

4. Enact amendments to Commonwealth and State crimes sentencing legislation to ensure that incarceration rates for certain categories of offence are held static, allowing the diversion of 'saved' funds to Justice Reinvestment initiatives, which would be monitored through the Authority.

Rationale: A policy of Justice Reinvestment is based on shifting funds from the criminal justice and prison system to investment in local communities. This will necessarily require a reduction in the number of people given custodial sentences. Amendments to the crimes sentencing legislation in each jurisdiction for less serious offences such as a breach of parole or probation and reduced length of sentences for less serious crimes are examples of possible amendments.⁸

8. See for example, *Crimes (Sentencing Procedure) Act 1999* (NSW).

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