

# UNSW



Faculty of law

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### **Access to legal assistance services (Aboriginal and Torres Strait Islander experience)**

The Australian Justice Reinvestment Project (AJR Project) welcomes the opportunity to make a submission to the Access to legal assistance services inquiry.

The AJR Project is an Australian Research Council-funded project which examines the characteristics of justice reinvestment in other jurisdictions, and analyses whether such programs can be developed in the Australian context.

This submission addresses the following terms of reference:

- e. the reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;**
- f. the adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice;**
- g. the cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander justice;**
- h. the benefits of, and challenges to, implementing a system of justice targets.**

The members of the AJR Project welcome the opportunity to discuss the submission, attached publications or any other issues relating to the applicability of Justice Reinvestment to Indigenous people in Australia.

Yours sincerely,

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## **Submission to the Senate inquiry into Access to legal assistance services (Aboriginal and Torres Strait Islander experience)**

### **e. the reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;**

This is an issue of national importance for which there already exists a significant body of Australian literature. Some of that literature is referred to below and attached to this submission.

The key drivers of increased imprisonment rates in general are longer sentence lengths brought about predominantly by a range of legislative measures restricting judicial discretion; parole changes making it harder to get and easier to lose; and constant punitive amendments to restrict access to bail for a widening category of offences. When considering the rates of Indigenous imprisonment, there are additional and often deeper or structural drivers to take into account.

The contemporary burden of rising imprisonment rates falls squarely on the shoulders of particular social groups that have been subjects of varying institutional practices over long periods of time. As the climate of punitiveness intensifies, the weight they carry increases -they have become the ballast in expanding penal practices. Of particular note are three social groups: those with mental and cognitive impairment; women; and Indigenous peoples. In relation to Indigenous people, we recognise the continuity in the use of reserves, missions and prisons as places of confinement. Indigenous women have shown the greatest increases in imprisonment.

Increased rates of imprisonment among Indigenous people has occurred at a time when there is concurrently an emphasis on developing public policies for the benefit of that group: these include Indigenous-focussed prisons, the recognition of healing, circle sentencing and other Indigenous processes in sentencing and within prison regimes. Yet for all this apparent change, the rate of imprisonment for these social groups has continued to grow.

As exemplified by Indigenous-focussed prisons, the prison at least in part has been reconstituted as a 'therapeutic institution' providing a solution not only to serious criminal behavior but also to behavior seen as too difficult to manage in the community. We argue that these institutions appear to value Indigenous culture while at the same time they further cement the centrality of criminal justice responses to a social group deemed as high risk. The rise of risk thinking and the influence of a criminogenic needs model *individualises* the profound collective economic and social disadvantage which itself has been the outcome

of colonial policies. There is insufficient attention paid to the ‘penal/colonial complex’ and race in the construction of imprisonment rates. Unless reform movements confront the highly selective nature of penalty and the way it bears so disproportionately on marginalised groups, then any gains to be made through political and popular attitudinal shifts towards decarceration are likely to be limited in practice.

For Indigenous communities, the stigmatisation of imprisonment may give way to the prison as a contested site of political/social power, for example some prisons become spaces for reclaiming an Aboriginal domain. Here, the experience of imprisonment as a meaningful life event merges with the reality of the destabilising impact of mass incarceration on whole communities. This multi-faceted, sometimes internally contradictory role of the prison is illustrated through the phenomenon of ‘community prisons’ like Balund-a at Tabulum in NSW, a new carceral space disguised as a voluntary place for *avoiding* the penal gaze and gaining cultural knowledge. (see Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M. and A. Steel (2013) *Penal Culture and Hyperincarceration. The Revival of the Prison*, Ashgate, Farnham, 209-245)

The following works touch on this issue and are attached.

- Cunneen, Chris (2011) ‘Punishment: two decades of penal expansionism and its effects on Indigenous imprisonment’ Australian Indigenous Law Review, Vol 15(1), 8-17 (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2201357](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201357))
- Stubbs, Julie (2011) ‘Indigenous women in Australian criminal justice: Over represented but rarely acknowledged’ Australian Indigenous Law Review Vol 15(1), 47-63 (attached).

**f. the adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice;**

The independent compilation of data is an essential first step to implementing justice reinvestment in Australia.

The US Bureau of Justice Assistance requires that sites seeking grants for local JR projects can produce the following data:<sup>1</sup>

- Annual and monthly jail/prison admissions and releases for the last 5-10 years
- Average daily jail/prison population for the last 5-10 years
- Average length of jail/prison stay by offense type
- Composition of jail/prison population (e.g., breakdown by conviction offense, age, race, gender, etc.)

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<sup>1</sup> Adapted from ‘Guidance for Submitting Phase 1 Letters of Interest for Local Jurisdictions’ *BJA* <<https://www.bja.gov/Programs/JRILocalGuidance.pdf>> at 12 March 2013 quoted in Brown et al, Submission No 114 to Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, 15 March 2013, 14.

- Any other statistics that may describe the nature of the jurisdiction's criminal justice population such as:
  - recidivism rates
  - % of population with mental health issues
  - % of individuals cycling in and out of jail or prison more than twice a year
  - % of pre-trial detainees
  - % of admissions due to probation and/or parole revocation
  - % of individuals released to post-release community supervision
  - distribution of inmates by offense type
- The site is able to easily analyze data to understand the drivers of its corrections population.
- The site will work to develop jail/prison population projections for the next 5-10 years.

While there is a tradition of collection of crime statistics across the country, there is no practice of mapping where prisoners come from, and 'asset mapping' exploring existing strengths in communities which can be built upon in place-based programs to reduce contact with the criminal justice system.

There are significant issues arising from the way that imprisonment data is collected. Imprisonment rates which are aggregated nationally and not disaggregated by race, gender and age, run the risk of obscuring more than they reveal. In their 'representativeness' of a total population, they severely distort the overall picture of the combined operations of criminal justice agencies, and of effects on specific vulnerable sectors of the population and specific communities and neighbourhoods.

This is not the only such distortion. Prison census figures taken on one day obscure the extent to which much larger numbers of prisoners are cycling through the prison system on short-term sentences for less serious crimes. One effect of this 'on one day' census focus, rather than a record of all those received into prisons over the course of a year, is to understate the number of people caught up in the penal system, multiplied many times over if we include the effects on family, partners and children. Another is to over-emphasise the seriousness of the crimes for which people are imprisoned, obscuring imprisonment for public order offences, break and enters and justice offences such as non-payment of fines or non-performance of non-custodial sentences or courts orders such as drivers licence cancellation and parole revocations. Yet a third is to obscure the fact that a higher proportion of Indigenous prisoners (and particularly Indigenous women) are serving shorter sentences, so that once again, their centrality to contemporary penalty is diminished or obscured.

The overall picture thus obscured by the way standard statistical data are compiled, presented and interpreted, is one of selectivity, of a penalty falling heavily on particular, vulnerable groups, predominantly the still largely marginalised Indigenous minority (who incidentally are also over-represented among subgroups within prison such as those with mental illness or cognitive impairments). Such a starting point or acknowledgement is not unproblematic, for it opens the door to a range of characterisations, including those of an 'inherent Indigenous criminality' (see Cunneen et al, *Penal Culture and Hyperincarceration*, 182-3).

The AJR Project considers that the current inquiry has the potential to make significant contributions to the advancement of data collection in Australia through

- a. the identification of the type of data that is currently collected by state and federal agencies,
- b. the identification of any gaps in the collection of relevant data and statistics,
- c. the direction for the appropriate agencies to begin collecting the required data and statistics, and
- d. the determination of an appropriate mechanism for collating and making the data and statistics available.

**g. the cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander people, including prevention, early intervention, diversionary and rehabilitation measures.**

The response of the AJR Project to this term of reference focuses on the potential for justice reinvestment (JR) for addressing levels of Indigenous incarceration in Australia. The contents of this section draws in part on the submission of the AJR Project to the Senate Inquiry into the Value of a Justice Reinvestment approach to Criminal Justice in Australia (2013).

**The methodology and objectives of justice reinvestment**

JR involves advancing “fiscally sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer”.<sup>2</sup> It has been described as a form of “preventative financing, through which policy makers shift funds away from dealing with problems ‘downstream’ (policing, prisons) and towards tackling them ‘upstream’ (family breakdown, poverty, mental illness, drug and alcohol dependency)”.<sup>3</sup>

The key JR strategy is the quantification of savings in the corrections realm, followed by reinvestment of those funds in high-stakes neighbourhoods to which large numbers of people released from custody return - for example, in redeveloping “abandoned housing and better coordinat[ing] such services as substance abuse and mental health treatment, job training, and education”.<sup>4</sup>

There is a strong strand of localism in much of the JR literature, encompassing local community organisations, NGOs, church and welfare agencies, and the private sector. Some JR initiatives in the USA work at state-level, examining the overall drivers of high incarceration rates and looking to address them through legislative change; others work more at the local level, looking at the issues that face particular counties or communities and addressing those programmatically or via better service delivery addressing things like access to stable housing, rates of parole breaching, or substance abuse issues.

**Justice reinvestment makes good fiscal sense**

Since 2006, JR strategies have realised millions of dollars of savings in corrections budgets in the USA through reduced levels of imprisonment. Some of these savings have been reinvested in capacity building and crime prevention projects in communities that produce high numbers of offenders. On an early

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<sup>2</sup> Council of State Governments Justice Centre (2010) ‘About the project: The strategy’ Justice Reinvestment <<http://www.justicereinvestment.org/about>> at 7 Feb 2013.

<sup>3</sup> Institute for Public Policy Research (2011) ‘Redesigning Justice: Reducing Crime Through Justice Reinvestment’, 4.

<sup>4</sup> Council of State Governments Justice Centre (2010) ‘The strategy: How justice reinvestment works – Step 3: Quantify savings and reinvest in select high-stakes communities’ Justice Reinvestment <<http://www.justicereinvestment.org/strategy/quantify>> at 7 Feb 2013.

assessment, JR in the US is therefore addressing two major concerns common to that jurisdiction and Australia: ever-increasing imprisonment rates and the huge budgetary commitment that flows from it. JR is ultimately concerned with increasing functionality and capacity in disadvantaged communities through the rationalisation and reinvestment of corrections spending. This then has the potential to impact on levels of offending in those communities.

The uptake of JR in the US and UK, and the potential benefit of it in Australia, comes in part as a response to the fact that growing imprisonment rates are hugely expensive at a time of fiscal stringency, yet provide very little return in addressing high recidivism rates, and indeed may be counter – productive and criminogenic, contributing to social breakdown and crime.<sup>5</sup>

Any reduction in crime rates, in recidivism rates, and in imprisonment rates that may be assisted by this research have clear and quantifiable national economic and social benefits. The establishment of a sound conceptual basis for the diversion of a portion of the \$3 billion p.a. of public expenditure currently spent on prisons, to effective social crime prevention programs engaging with local agencies, will contribute to a safer, healthier and more cohesive community. The impact of a successful translation of JR into the Australian context would provide welcome benefits to the high stakes communities which it targets, and in this jurisdiction, the focus has been almost exclusively on the potential benefit to Indigenous communities.

Effectively implemented, JR may improve prospects for Indigenous young people through early intervention, (“a healthy start to life”) and “help families and individuals live healthy, productive and fulfilling lives” particularly in the disadvantaged, high crime focus communities on which JR focuses.

### **Issues around effectiveness**

One criticism of JR is that it is conceptually vague and means different things to different people.<sup>6</sup> However, this has also meant that justice reinvestment is “tailored to fit the dynamics of each participating jurisdiction, [such that] the range of strategies is appropriately varied”.<sup>7</sup> It might be that its lack of a clear meaning and established theoretical base are strengths rather than weaknesses, enabling it to operate as a ‘floating signifier’ in the political field.<sup>8</sup>

Another potential challenge arises because JR is allied with both ‘evidence led’ approaches to criminal justice policy and the increasing concern with fiscal imperatives or ‘value for public money’ in criminal justice policy and incarceration in particular. A major limitation of JR is that it avoids facing up to a long history of scholarship on the *moral* underpinnings of punishment: the public may prefer to see perpetrators imprisoned even if it is not a fiscally sound choice: punishment defines and promotes community cohesion and a collective morality. It is important to investigate the extent to which JR approaches can overcome a

<sup>5</sup> See Brown, David, ‘The Limited Benefit of Prison in Controlling Crime’ (2010) 22(1) *Current Issues in Criminal Justice*, 141 (attached to this submission); Daoust, C ‘ The Paradox in Incarceration and Crime Directed Research’ (2008) *Justice Action*; Durlauf, S & Nagin, D, ‘Imprisonment and crime: Can both be reduced?’ (2011) 10 *Criminology & Public Policy* 13; Kovandzic, T & Vieratis, L ‘The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974 – 2002’, University of Texas; Rose, D & Clear, T ‘Incarceration, social capital and crime: Implication for social disorganisation theory’ (1998) 36 *Criminology* 441; Stemen, D ‘Reconsidering Incarceration: New Directions for Reducing Crime’ (2007) Vera Institute of Justice; Pritikin, M ‘Is prison increasing crime?’ (2008) *Wisconsin Law Review* 1049.

<sup>6</sup> Tonry, M, ‘Making peace, not a desert: Penal reform should be about values not justice’, (2011) 10(3) *Criminology & Public Policy*, 637; Maruna S, ‘Lessons for justice reinvestment from restorative justice and the justice model experience’ (2011) 10 *Criminology & Public Policy* 661.

<sup>7</sup> Clear T, ‘A private-sector, incentives-based model for justice reinvestment’ (2011) 10 *Criminology & Public Policy* 585, 591.

<sup>8</sup> Tonry, M, ‘Making peace, not a desert: Penal reform should be about values not justice’ (2011) 10(3) *Criminology & Public Policy*, 637; Clear T ‘A private-sector, incentives-based model for justice reinvestment’ (2011) 10 *Criminology & Public Policy* 585.

reliance on economic rationalities and be theoretically articulated with various moral and social approaches to penalty, particularly in the Indigenous context.<sup>9</sup>

Some of JR locations in Australian would be home to high numbers of Indigenous people. The JR process calls for a consciously democratic consensus-based approach to decision making in relation to the needs of high-stakes communities.<sup>10</sup> At first blush, this fits well with the observation of former Social Justice Commissioner Tom Calma that the only way that Indigenous service delivery and policy can succeed is through working in partnership with communities.<sup>11</sup> However, it has also been noted that the “rhetoric about ‘partnering’ with communities, too often ... is not translated into communities having genuine involvement in decision-making about the solutions to their problems”.<sup>12</sup> There is great need to explore whether the metropolitan bias of JR programs overseas can be rethought to allow it to deliver results to remote Australia, and to consider what the structural assumptions or practices in JR are that might inhibit its usefulness in the Australian geographical context.

Other issues that might represent obstacles to the successful implementation of JR in Australia include:

- A need to tread carefully with place-based models: Given that high crime communities in Australia have historically also been spaces of social, economic and political marginality and ‘Indigeneity’, how might JR approaches affect marginalised and socially excluded groups (eg Indigenous people, women, people with mental health or cognitive disorders, juveniles)? Is a focus on community as a ‘whole’ likely to mask gendered needs, or fail to take into account underlying community power-dynamics (along gendered or other lines) that may be present?
- JR requires a multi-partisan political commitment that transcends election timeframes. The JR framework takes years to play out, and has to be protected from dangers posed by ‘tough on crime’ campaigns and other politicking. While this might appear too onerous a requirement in Australian states, it must be kept in mind that every American state in which JR is currently employed has achieved bipartisan support for the initiative.
- In the USA, the Council of State Governments Justice Center - a national NGO which provides advice to policymakers – has become the principal auspicing body for JR implementation in the USA since the first pilot in 2006. It is essential that any implementation of JR in Australia take place under the guidance of an independent body. The body may have responsibility for coordinating the various stakeholders; developing choices for initiatives to initially reduce levels of incarceration/ make initial savings to the correction budget; brokering agreements as to the policy initiatives to be put into effect; conducting independent evaluations. The auspicing body would also ensure that an agreed proportion of the money saved from the corrections budget is actually reinvested in high stakes communities. In this way, the body has a crucial role in ensuring that JR is not in fact used as a foil for *disinvestment* in communities (where money saved is channeled to other government portfolios or back into criminal justice strategies alone, rather than into the high stakes communities). The Senate Inquiry into the potential for justice

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<sup>9</sup> Willis M ‘Indicators used internationally to measure Indigenous justice outcomes’, (2010) *Indigenous Justice Clearinghouse Brief 8*, NSW Dept of Justice & Attorney General.

<sup>10</sup> Council of State Governments Justice Center, ‘The strategy: How justice reinvestment works – Step 3: Quantify savings and reinvest in select high stakes communities.’ Justice Reinvestment, (2010) <<http://www.justicereinvestment.org/strategy/quantify>> at 7 February 2013.

<sup>11</sup> Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) Australian Human Rights Commission, 2.

<sup>12</sup> NSW Ombudsman, *Addressing Aboriginal Disadvantage: the need to do things differently* (Oct 2011) 2.2.

reinvestment in Australia recommended that the Commonwealth fund such a body to enable Australian pilots of JR.

- Detailed thinking must be done about the political and geographical differences between the USA, where JR has had most traction, and Australia. For example, while JR involves a devolution of funding to local authorities, what does this mean in the Australian context? The levels of government that exist in Australia are not equivalent to those in the USA. What will devolution of funding and authority mean in the Australian context? Can JR be rethought to allow it to deliver results to remote and rural Australian communities? The current limited availability of non-custodial options in remote and rural areas impact negatively on Indigenous imprisonment rates. How will the usual problems in remote service delivery be overcome in the roll out of JR?

The AJR Project refers the committee to the following articles which speak to this term of reference:

- Brown, David, Schwartz, Melanie & Boseley, Laura (2012) 'The promise of Justice Reinvestment' *Alternative Law Journal*, vol 37(2), pp. 96-102, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2078715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078715)
- Schwartz, Melanie (2010) 'Building communities, not prisons: justice reinvestment and Indigenous over-imprisonment' *Australian Indigenous Law Review*, vol 14(1), pp. 2-17, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2114146](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114146)

#### **h. the benefits of, and challenges to, implementing a system of justice targets**

One of the dynamics highlighted by place-based approaches like justice reinvestment is the interconnectedness of the complex of issues that face communities that produce large numbers of prisoners, including Indigenous communities. The excision of justice system considerations from Closing the Gap targets ignores the impact of the mass-incarceration of Indigenous people on individuals, families and whole localities. Taking into account the levels of over-representation of Indigenous people in the criminal justice system and the damaging effects of hyperincarceration on the robustness of families and communities, it is clear that in the converse, instituting justice targets will positively affect arenas of health, employment outcomes, and educational attainment.