



**Australian
Human Rights
Commission**

**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

Mick Gooda

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Committee Secretary
Senate Finance and Public Administration Committee
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Dear Secretary

Inquiry into the Aboriginal and Torres Strait Islander experience of law enforcement and justice services

Thank you for the opportunity to make a submission to this Inquiry.

I monitor issues of access to justice and equity in law enforcement and justice systems for Aboriginal and Torres Strait Islander peoples as part of my obligations under section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth).

Throughout my term as Social Justice Commissioner, I have emphasised that we are at crisis point regarding the incarceration of Aboriginal and Torres Strait Islander people. In 2014, the Productivity Commission reported that justice outcomes continue to decline, with adult imprisonment rates worsening and no change in high rates of juvenile detention or family and community violence.¹

The types of justice issues raised for consideration in this Inquiry are some of the most urgent human rights issues facing Australia.

In this letter, I set out the human rights framework within which these issues should be addressed. I then highlight some of my most significant concerns regarding Aboriginal and Torres Strait Islander people's experiences of the justice system, as they relate to the terms of reference (TOR) of the Inquiry. I also provide some suggestions to the Committee regarding its work in this Inquiry.

Human rights framework

Issues of access to justice and equity in law enforcement and justice systems raise concerns under a number of international human rights treaties, as they relate to Aboriginal and Torres Strait Islander peoples, including:

- *International Covenant on Civil and Political Rights*² (ICCPR) articles 2, 7, 9, 10, 14, 24, 26, 50
- *Convention on the Rights of the Child*³ (CRC) articles 2, 3, 37, 40
- *International Convention on the Elimination of Racial Discrimination*⁴ (ICERD) articles 2, 5.
- *International Covenant on Economic, Social and Cultural Rights*⁵ (ICESCR) articles 1, 2.
- *Convention on the Rights of Persons with Disabilities*⁶ (CRPD) articles 4, 5, 7, 12, 13, 14, 3.

In addition to these formal treaties, the *United Nations Declaration on the Rights of Indigenous Peoples*⁷ (the Declaration) is the most comprehensive and advanced international instrument dealing with indigenous peoples' rights.

The Declaration defines the minimum standards necessary for the survival, dignity and well-being of indigenous peoples of the world.⁸ It articulates how existing international human rights principles and standards apply to the unique cultural, historical, social and economic circumstances of indigenous peoples.⁹

The four main principles that underpin the Declaration are: self-determination; participation in decision-making, underpinned by free, prior and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination.¹⁰ The specific articles engaged by this Inquiry include articles 1, 2, 7, 13, 19, 21, 22, and 23.

The Declaration and its key principles, along with the other international treaties mentioned, provide the framework for a human-rights based approach to address the concerns of this Inquiry – and indeed all social justice concerns regarding Aboriginal and Torres Strait Islander peoples.

I understand that, generally, justice-related issues are state and territory responsibilities. However, there are a number of areas, particularly regarding Aboriginal and Torres Strait Islander people's experience of the justice system, in which the Australian Government has a role to play, for example in leadership, coordination and funding. Further, the Australian Government has the ultimate responsibility to ensure national consistency with Australia's human rights obligations. Provisions of the ICCPR (article 50) and ICERD (articles 2.1(a), 2.1(c) and 6) specify Australia's obligation to ensure compliance with these treaties at all levels of government. Further, the federal government has the power to override mandatory sentencing laws under sections 51(xxix) and 122 of the Commonwealth Constitution.

Alternatives to imprisonment and justice reinvestment

These comments relate to TOR (d), (e), (f), and (g).

The Australian Human Rights Commission (the Commission) has long advocated for alternatives to imprisonment to reduce the rates of Aboriginal and Torres Strait Islander criminalisation, imprisonment and recidivism, and most importantly, to create safer communities.¹¹

In the case of juveniles in particular, international human rights law requires that imprisonment be a sanction of last resort.¹² Twenty-four years ago, the Royal Commission into Aboriginal Deaths in Custody recommended that governments which had not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.¹³

There are a number of different forms of alternatives to imprisonment, including, for example: crime prevention and early intervention programs addressing underlying causes of crime such as poverty and homelessness; diversionary programs such as cautions and victim-offender conferencing; and non-custodial sentencing options such as community service orders and treatment programs.¹⁴

The existing data tells us that diversionary options are used less frequently for Aboriginal and Torres Strait Islander offenders, particularly juveniles and women.¹⁵ Fewer cautions are issued to Aboriginal and Torres Strait Islander young people compared with non-Indigenous young people and it appears that Aboriginal and Torres Strait Islander offenders are disproportionately ineligible for diversionary programs, for example because of previous offences, a non-guilty plea or alcohol addiction.¹⁶

The success of alternatives to imprisonment (in terms of reduced recidivism and safer communities) can be difficult to measure, especially in the short term.¹⁷

Justice reinvestment

Since the *Social Justice Report 2009*, the Commission has advocated strongly for justice reinvestment as a way of addressing the underlying causes of the disproportionate crime and imprisonment rates. There are now organised community campaigns for justice reinvestment, including by victims' groups.¹⁸

Justice reinvestment is an evidence-based crime prevention strategy to create safer communities and reduce rates of imprisonment. Justice reinvestment diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. That money is reinvested in services that address the underlying causes of crime in those communities.¹⁹

Justice reinvestment has been considered in at least six government inquiries in the past five years. Table 4.1 in *Social Justice and Native Title Report 2014* itemises those inquiries and is attached at **Appendix A**.

In the *Social Justice and Native Title Report 2014*, I reported on some positive developments towards implementing a justice reinvestment approach.

I urge the Committee to consider the Bourke justice reinvestment project in more detail.²⁰ The Bourke community has confronted its crime problems using a justice reinvestment approach. The community has owned and driven this process: building its capacity over many years, collaborating with diverse organisations from different

sectors, and resourcing a project team to properly ready the community for the justice reinvestment project.

The *Social Justice Report 2014* also considered some of the challenges in implementing justice reinvestment, including the need for a commitment to localism and devolution of budget management.

For ease of reference, I have attached an excerpt from the *Social Justice and Native Title Report 2014*, at **Appendix A**.

Justice targets

These comments relate to TOR (e), (f), and (h).

I refer the Committee to the Commission's ongoing advocacy in favour of including justice targets in the Council of Australian Governments' (COAG) Closing the Gap strategy.²¹ I provided an update on this recently in the *Social Justice and Native Title Report 2014*, and expressed my disappointment that the Australian Government has reversed its commitment to introduce justice targets.²²

For ease of reference, I attach at **Appendix B** an excerpt from the *Social Justice and Native Title Report 2014* which contains a discussion about justice targets.

Under the human rights principle of progressive realisation in ICESCR,²³ States parties have an obligation to work incrementally towards the realisation of a range of economic, social and cultural rights. Setting clear targets with timeframes for progression towards realisation of rights is one of the hallmarks of a human rights-based approach.²⁴

I recognise that developing targets can be both a complex and contested task. However, we have a solid base of empirical evidence from which to set justice targets and there is significant work regarding target-setting from which to draw lessons.²⁵ The Productivity Commission's *Overcoming Indigenous Disadvantage* framework provides a useful basis for developing 'headline' justice targets and a range of sub-targets or proxies.²⁶ A consultation process could start from there.

If targets are to be useful in encouraging and tracking progress, then Aboriginal and Torres Strait Islander individuals and organisations must play a central role in their formulation.²⁷

The high incarceration rates of Aboriginal and Torres Strait Islander people

These comments relate to TOR (d), (e), and (g).

It is well understood that extreme levels of poverty and disadvantage faced by Aboriginal and Torres Strait Islander peoples lead to the high incarceration rates.²⁸ The Commission has reported on this repeatedly over the last two decades.²⁹ A detailed consideration of this disadvantage reveals a complex interaction of factors.

The bigger picture cannot be ignored: the history of colonisation and dispossession has had enduring effects on Aboriginal and Torres Strait Islander communities and individuals. For example, there is a strong correlation between having a family

member removed and arrest and incarceration.³⁰ The high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.³¹ Dr Don Weatherburn argues that the key risk factors for Aboriginal and Torres Strait Islander involvement with the criminal justice system are:

- poor parenting, neglect and child abuse
- poor school attendance, performance and retention
- unemployment
- drug and alcohol abuse.³²

High levels of victimisation, particularly in Indigenous young people, are linked to trauma and, in turn, to further violent behaviour;³³ and Aboriginal and Torres Strait Islander people are victims of crime at far higher rates than other Australians.³⁴

Within this broader context, other systemic factors make Aboriginal and Torres Strait Islander people vulnerable to incarceration.

The policing of public order offences, in particular, is highly discretionary. Public order offences have long been seen as one of the first steps in the process of Indigenous criminalisation.³⁵

As noted above, Aboriginal and Torres Strait Islander people receive fewer cautions and court attendance notices by police compared with non-Indigenous people; and diversionary measures are used less often for Aboriginal and Torres Strait Islander offenders.

Increasing remand populations, particularly of Aboriginal and Torres Strait Islander women, account for a large part of the overrepresentation of this group in detention.³⁶ Aboriginal and Torres Strait Islander prisoners, particularly women, tend to be serving shorter sentences than non-Indigenous prisoners, indicating that sentences of imprisonment are being imposed on Indigenous people for more minor offences.³⁷

Mandatory sentencing

A significant cause of the high incarceration rates of Aboriginal and Torres Strait Islander people is mandatory sentencing, specifically those laws operating in the Northern Territory³⁸ and Western Australia.³⁹

Mandatory sentencing regimes, particularly those which prescribe imprisonment for property offences as in Western Australia and the Northern Territory, have a disproportionate impact on disadvantaged, vulnerable people.⁴⁰ Further, they impact on 'low level' offenders disproportionately, as more serious offenders would be sentenced to imprisonment regardless of the mandatory sentencing laws.⁴¹

It is therefore unsurprising that mandatory sentencing has a disproportionate impact on Aboriginal and Torres Strait Islander people, in particular young people.⁴²

Over more than 15 years, the Commission has reported concerns with the human rights implications of mandatory sentencing.⁴³

Mandatory sentencing raises concerns under a number of international human rights

treaties.⁴⁴ In particular, the ICCPR prohibits arbitrary detention (article 9(1)) and provides that sentences must be reviewable by a higher tribunal (article 14(5)). The CRC provides that detention of children must only be used as a last resort and for the shortest appropriate period (Article 37(b)); sentences must be reviewable by a higher or appellate court (Article 40(2)(b)(v)); children who come into conflict with the law must be dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence (Article 40(4)).⁴⁵

The Committee on the Elimination of Racial Discrimination has expressed concern that where legislative schemes target offences that are committed disproportionately by, Aboriginal and Torres Strait Islander people, or where a pattern of sentencing reveals that a particular group, such as Aboriginal and Torres Strait Islander people, are more likely to receive the harshest penalties, those schemes are likely to be incompatible with Australia's obligations under ICERD,⁴⁶ as direct or indirect discrimination.⁴⁷ The Committee has recommended that Australia abolish its mandatory sentencing regimes for these reasons.⁴⁸ Discriminatory sentencing schemes are also more likely to be arbitrary in breach of the ICCPR.⁴⁹

Mandatory sentencing regimes in Australia have been criticised by United Nations Committees for removing judicial discretion, resulting in disproportionate punishments,⁵⁰ and for the disproportionate impact on Aboriginal and Torres Strait Islander people.⁵¹

Resources and access to justice

These comments relate to TOR (a), (b), (c), (e), (f), and (h).

In the *Social Justice Report 2014*, I expressed concern regarding the Australian Government's proposed cuts to legal assistance services for Aboriginal and Torres Strait Islander peoples.⁵² The Commission has welcomed the recent reversal of this policy.⁵³

However, I remain concerned about the changes in funding arrangements to legal services including Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). I urge the Committee to ask for greater transparency with regard to these funding arrangements.

Under existing arrangements, these legal assistance services operate with limited resources. I support the Productivity Commission's recommendation that \$200 million should be urgently injected into legal assistance services, particularly for civil legal assistance.⁵⁴

As the Productivity Commission noted, it can be a false economy to provide inadequate legal services, as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. There are net public benefits from legal assistance expenditure.⁵⁵

It is particularly important that ATSILS and FVPLS be adequately resourced because Aboriginal and Torres Strait Islander people need not just any legal services, but *culturally competent* legal services. There are many complex factors involved in the contact between Aboriginal and Torres Strait Islander people and the justice system.

Further, in many areas it is important that legal services have an understanding of local community needs.⁵⁶

FVPLS are particularly important for Aboriginal and Torres Strait Islander women and children because of the disproportionate rates of family violence they experience.⁵⁷ ATSILS specialise in providing criminal law assistance and therefore women and children facing family violence situations rely on the targeted and specialised legal services of FVPLS rather than ATSILS.⁵⁸ FVPLS have the cultural competence as well as the specific expertise in family violence, and even more specifically, family violence in in Aboriginal and Torres Strait Islander communities.⁵⁹

ATSILS provide services in rural and remote areas, sometimes where no other legal services exist. However, this often presents issues for clients or the ex-partners of clients as ATSILS are unable to act for both parties, due to a conflict of interest.⁶⁰ Women or children who are affected by an issue such as family violence have been denied legal assistance through ATSILS or Legal Aid because those organisations have already represented the perpetrator in previous or related criminal, family or civil matters.⁶¹ This conflict of interest means that, often, FVPLS are the only available legal service for Aboriginal and Torres Strait Islander women and children, where they exist.⁶² For this reason FVPLS needs to be adequately funded, even in locations where ATSILS or Legal Aid exist.

Another crucial service provided by ATSILS and FVPLS is policy advocacy. These bodies are best placed to inform policy development and reform because their clients experience it first-hand. It is critical that the legal services sector is resourced adequately for its advocacy as well as its frontline services.

Adequacy of data and evaluation

These comments relate to TOR (e), (f), (g), and (h).

There is a substantial amount of data available which tells us that Aboriginal and Torres Strait Islander people are represented disproportionately as offenders and victims in the criminal justice system. However, the many gaps in research and data mean that we do not have all the information needed to know what works from a policy perspective.

One of the key factors in developing a more complete evidence base is culturally appropriate data collection. For example, it is estimated that 90% of violence against Aboriginal and Torres Strait Islander women is not reported to police and is therefore not captured in police data.⁶³ More culturally appropriate, targeted data collection would give us a clearer picture of the reality of Indigenous women's experience of crime.

Rynne and Cassematis have recently published on the need for a research approach to understand prison quality from the perspective of Aboriginal and Torres Strait Islander peoples.⁶⁴ The authors argue that a more culturally appropriate approach to researching prisons could not only glean more useful information, but also empower the research participants, potentially countering some of the damage of imprisonment to individuals and communities.⁶⁵

There is also a lack of reliable information on the effectiveness of diversion programs for Aboriginal and Torres Strait Islander offenders.⁶⁶ The success of diversionary programs can be difficult to measure, particularly in the short term. One reason for this is simply that many initiatives are not designed to be measured in the short term. Another reason is that programs based on cultural connection, for example, are not necessarily suited to traditional evaluation methods. Children's Commissioner Megan Mitchell noted this issue in her *Children's Rights Report 2014* regarding the Yiriman Project of Western Australia. The Yiriman Project aims to 'build stories in young people' and keep them alive and healthy by reacquainting them with country.⁶⁷ Dr Dave Palmer of Murdoch University described it as:

One of the country's most impressive stories of local people's attempts to deal with the central and pressing public policy challenge of securing the future for Indigenous young people living in remote communities.⁶⁸

There needs to be appreciation of alternative, substantive evaluation methods which are able to reflect the successes of culturally based programs, with medium and long term success.

One of the critical gaps in our knowledge of the justice system is regarding people with cognitive impairment. We know that people with cognitive impairment are over-represented in the criminal justice system, and Aboriginal and Torres Strait Islander people with such disabilities are particularly over-represented.⁶⁹ However, we do not know specifically how many people in Australian prisons have intellectual disabilities or cognitive impairments.⁷⁰

In particular, there is a need for a better understanding of the rates of Foetal Alcohol Spectrum Disorder (FASD) in Aboriginal and Torres Strait Islander people in prison.⁷¹ Understanding the prevalence rate of FASD is critical to ensuring a pathway out of prisons for those individuals, and sustainable alternatives to prison where public safety is in issue.

I am available to discuss these issues in further detail with the Committee if required.

Yours sincerely

Mick Gooda
**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

¹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014), chs 4.11-4.12. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2015).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007).

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007), art 43.

⁹ J Anaya, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Report by the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council 9th session, UN Doc A/HRC/9/9 (2008), para 40. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx> (viewed 7 April 2015).

¹⁰ I have written extensively about these principles in the *Social Justice and Native Title Reports* over the past three years. See M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), ch 3. At <https://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 7 April 2015); M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011), ch 3. At <https://www.humanrights.gov.au/publications/native-title-report-2011> (viewed 7 April 2015); M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At <https://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 7 April 2015); M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 2. At <https://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 7 April 2015).

¹¹ See, for example, M Dodson, *Social Justice Report 1995*, HREOC (1995), ch 1. At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report95.pdf (viewed 7 April 2015); M Dodson, *Social Justice Report 1996*, HREOC (1996), ch 2. At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report96.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 1999*, HREOC (1999), ch 5. At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report99.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 2001*, HREOC (2002), chs 4, 5. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport01/sjreport.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 2002*, HREOC (2002), ch 5. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf (viewed 7 April 2015); T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), ch 2. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf (viewed 7 April 2015); M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), ch 4. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

¹² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b).

¹³ Royal Commission into Aboriginal Deaths in Custody, *National Report: Volume 3* (1991), rec 92. At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/> (viewed 7 April 2015).

¹⁴ See Australian Human Rights Commission, *Submission to the Inquiry by the Senate Legal and Constitutional References Committee into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (1999). At

http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/mandatory_sentencing_submission_99.pdf (viewed 7 April 2015).

¹⁵ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014), ch 11. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2015); L Bartels, *Diversions programs for Indigenous women*, Australian Institute of Criminology (2010). At <http://www.aic.gov.au/publications/current%20series/rip/1-10/13.html> (viewed 7 April 2015).

¹⁶ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014), ch 11. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2015); T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 46. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf (viewed 7 April 2015); Close the Gap Clearinghouse, *What works to overcome Indigenous disadvantage: key learnings and gaps in the evidence 2011-12*, Australian Institute of Health and Welfare and Australian Institute of Family Studies (2013), p 36. At <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2013/15161.pdf> (viewed 7 April 2015).

¹⁷ Closing the Gap Clearinghouse, *What works to overcome Indigenous disadvantage: key learnings and gaps in the evidence 2011-12*, Australian Institute of Health and Welfare and Australian Institute of Family Studies (2013), p 37. At <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2013/15161.pdf> (viewed 7 April 2015).

¹⁸ See, for example Family Violence and Legal Services Prevention Services Victoria, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the value of justice reinvestment in Australia* (March 2013). At <http://www.fvpls.org/images/files/FVPLS%20Victoria%20-%20Justice%20Reinvestment%20Submission.pdf> (viewed 7 April 2015).

¹⁹ M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), p 102. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

²⁰ M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), pp 108-113. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

²¹ See, for example T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), rec 2.1 At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf (viewed 9 April 2015); M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), pp 117-119. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015); M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2013), rec 3.11. At https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_native_title_report_2013.pdf (viewed 7 April 2015); Australian Human Rights Commission, 'Commissioner Gooda calls for justice targets' (Media Release, 5 December 2014). At <https://www.humanrights.gov.au/news/stories/commissioner-gooda-calls-justice-targets> (viewed 7 April 2015).

²² M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), p 117. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

²³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2. See also Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, UN Doc E/2007/82 (2007). At http://www.ohchr.org/Documents/Issues/ESCR/E_2007_82_en.pdf (viewed 7 April 2015); Office of the

United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights* (2008), p 13. At

<http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (viewed 7 April 2015).

²⁴ See for example Office of the United Nations High Commissioner for Human Rights, *Frequently asked questions on a human rights-based approach to development cooperation* (2006), p 37. At www.ohchr.org/Documents/Publications/FAQen.pdf (viewed 7 April 2015); Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, UN Doc E/2007/82 (2007) paras, 41, 53; Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights Fact Sheet No 33* (2008), p 16. At <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (viewed 7 April 2015).

²⁵ For example, National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide* (2010), pp 6-7.

²⁶ See M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), pp 122-123. At

<https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 9 April 2015).

²⁷ National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide* (2010), p 5.

²⁸ For recent statistics on the incarceration rates of Aboriginal and Torres Strait Islander people see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014). At

<http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2014).

²⁹ See, for example T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), ch 2. At

https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf (viewed 7 April 2015); See also W Jonas, *Social Justice Report 1999*, HREOC (1999), chs 2, 5. At

https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report99.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 2001*, HREOC (2002), ch 4. At

https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport01/sjreport.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 2002*, HREOC (2002), ch 5. At

https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf (viewed 7 April 2015); T Calma, *Social Justice Report 2004*, HREOC (2005), ch 4. At

https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport04/social_justice_report_2004.pdf (viewed 7 April 2015); M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 1. At

https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_report_2012.pdf (viewed 7 April 2015); M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission (2014), ch 4. At

<https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

³⁰ M Dodson and B Hunter, 'Selected crime and justice issues for Indigenous families' (2006) 75 *Family Matters* 34.

³¹ See for example, T Allard, *Understanding and preventing Indigenous offending*, Indigenous Justice Clearinghouse, Brief 9 (2010). At www.indigenousjustice.gov.au/briefs/brief009.pdf (viewed 9 April 2015).

³² D Weatherburn, *Arresting incarceration – Pathways out of Indigenous Imprisonment* (2014), p 74.

³³ See D Smart, N Richardson, A Sanson, I Dussuyer, B Marshall, *Patterns and precursors of adolescent antisocial behaviour: Outcomes and connections*, Australian Institute of Family Studies and Crime Prevention (2005), ch 3. At <http://www.aifs.gov.au/atp/pubs/reports/cpv/report3.pdf> (viewed 7 April 2015).

³⁴ See, for example, C Bryant, M Willis, *Risk Factors in Indigenous violent victimisation*, Australian Institute of Criminology Technical and Background Paper (2008), pp 19-26. At http://www.aic.gov.au/media_library/publications/tbp/tbp030/tbp030.pdf (viewed 7 April 2015); Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage*:

Key Indicators 2014, Productivity Commission (2014), pp 4.88, 4.93, 4.94. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/04-key-indicators-2014-chapter4.pdf> (viewed 7 April 2015).

³⁵ T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 49. At: https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_09_web.pdf (viewed 7 April 2015).

³⁶ L Bartels, *Diversion programs for Indigenous women*, Australian Institute of Criminology (2010). At <http://www.aic.gov.au/publications/current%20series/rip/1-10/13.html> (viewed 7 April 2015).

³⁷ L Bartels, *Diversion programs for Indigenous women*, Australian Institute of Criminology (2010). At <http://www.aic.gov.au/publications/current%20series/rip/1-10/13.html> (viewed 7 April 2015). See evidence of Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the value of a justice reinvestment approach in Australia*, Senate, 1 May 2013 (J Sharp), p 14. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/hearings/index (viewed 7 April 2015).

³⁸ *Sentencing Act 1995* (NT), ss 78D-78DI.

³⁹ *Criminal Code Compilation Act 1913* (WA) ss 297(7), 318(4), 401(4).

⁴⁰ See for example, W Jonas, *Social Justice Report 2001*, HREOC (2002), ch 4. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport01/sjreport.pdf (viewed 7 April 2015).

⁴¹ N Morgan, H Blagg and V Williams, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, Aboriginal Justice Council (2001), pp 35-37, 57-72. At http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2002_04/hra_mandsent/submissions/sub89_pdf.ashx (viewed 7 April 2015).

⁴² W Jonas, *Social Justice Report 1999*, HREOC (1999), pp 85-87. At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report99.pdf (viewed 7 April 2015); N Morgan, H Blagg and V Williams, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, Aboriginal Justice Council (2001), pp 35-37, 57-72. At http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2002_04/hra_mandsent/submissions/sub89_pdf.ashx (viewed 7 April 2015); Department of Justice of Western Australia, *Review of Section 401 of the Criminal Code* (2001), pp 24-25.

⁴³ See for example, W Jonas, *Social Justice Report 1999*, HREOC (1999), ch 5. At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/sj_report99.pdf (viewed 7 April 2015); W Jonas, *Social Justice Report 2001*, HREOC (2002), chs 4, 5. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport01/sjreport.pdf (viewed 7 April 2015); T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009) ch 2. At

https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_09_web.pdf (viewed 9 April 2015); M Gooda, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission, ch 4. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 9 April 2015); Australian Human Rights Commission, *Mandatory detention laws in Australia* (2001). At <https://www.humanrights.gov.au/publications/mandatory-detention-laws-australia-2001> (viewed 9 April 2015).

⁴⁴ *International Covenant on Civil and Political Rights*, 1966, arts 2(1), 9(1), 10(3), 14(4), 14(5), 24(1), 26, 50; *United Nations Convention on the Rights of the Child*, 1989, arts 3(1), 37(b), 40(2)(b), 40(4); *International Convention on the Elimination of Racial Discrimination*, 1965, arts 2, 5; *International Covenant on Economic, Social and Cultural Rights*, 1966, art 2.

⁴⁵ See for example, HREOC, *Human Rights Brief No 2: Sentencing Juvenile Offenders* (1999), p 5. At <https://www.humanrights.gov.au/publications/human-rights-brief-no-2#6> (viewed 7 April 2015).

⁴⁶ Committee on the Elimination of Racial Discrimination, *Concluding observations on the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/304/Add.101 (2000), p 4. At: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2f304%2fAdd.101&Lang=en (viewed 7 April 2015).

⁴⁷ Committee on the Elimination of Racial Discrimination, *Concluding observations on the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/AUS/CO/14 (2005), p 5. At

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f14&Lang=en (viewed 7 April 2015).

⁴⁸ Committee on the Elimination of Racial Discrimination, *Concluding observations on the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/AUS/CO/14 (2005), p 5. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f14&Lang=en (viewed 7 April 2015).

⁴⁹ HREOC, *Human Rights Brief No 2: Sentencing Juvenile Offenders* (1999), p 5. At <https://www.humanrights.gov.au/publications/human-rights-brief-no-2#6> (viewed 7 April 2015).

⁵⁰ Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc HRC/A/55/40 (2000), paras 522 – 523.

⁵¹ Committee on the Rights of the Child, *Concluding Observations on Australia*, UN Doc CRC/C/15/ADD.79 (1997), paras 22-23; Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101 (2000), para 16.

⁵² M Gooda, *Social Justice Report 2014*, Australian Human Rights Commission (2014), chs 1, 3. At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0> (viewed 7 April 2015).

⁵³ Australian Human Rights Commission, 'Commissioner Gooda welcomes reversal on funding cuts', (Media Release, 26 March 2015). At <https://www.humanrights.gov.au/news/stories/commissioner-gooda-welcomes-reversal-funding-cuts> (viewed 7 April 2015).

⁵⁴ Productivity Commission, *Access to Justice Arrangements: Overview*, Inquiry Report No 72 (2014), rec 21.4. At http://www.pc.gov.au/data/assets/pdf_file/0016/145402/access-justice-overview.pdf (viewed 7 April 2015).

⁵⁵ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014), pp 30-31. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2015).

⁵⁶ See for example M Gooda, *Social Justice Report 2014*, Australian Human Rights Commission (2014), p 25. At <https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf> (viewed 7 April 2015).

⁵⁷ See Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014), ch 4. At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014> (viewed 7 April 2015).

⁵⁸ Productivity Commission, *Access to Justice Arrangements: Overview*, Inquiry Report No 72 (2014), p 761. At http://www.pc.gov.au/data/assets/pdf_file/0016/145402/access-justice-overview.pdf (viewed 7 April 2015).

⁵⁹ Productivity Commission, *Access to Justice Arrangements: Overview*, Inquiry Report No 72 (2014), p 26. At http://www.pc.gov.au/data/assets/pdf_file/0016/145402/access-justice-overview.pdf (viewed 7 April 2015).

⁶⁰ S Duffy, *Submission to the Family Law Council of Australia: Indigenous and Culturally and Linguistically Diverse Clients in the Family Law System* (23 May 2011). At <http://www.atsils.org.au/wp-content/uploads/2014/11/Submission-2011-Family-Law-Council-Indigenous-and-Culturally-and-Linguistically-Diverse-Clients-in-the-Family-Law-System.pdf> (viewed 7 April 2015).

⁶¹ Aboriginal and Torres Strait Islander Legal Services, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander People in Australia* (February 2013), p 20. At <http://www.natsils.org.au/portals/natsils/NATSILS%20Access%20to%20Justice%20submission%20to%20EMRIP%20Feb%202013.pdf> (viewed 7 April 2015).

⁶² Aboriginal and Torres Strait Islander Legal Services, *Submission to the Expert Mechanism on the Rights of Indigenous Peoples: Access to Justice for Aboriginal and Torres Strait Islander People in Australia* (February 2013), p 20. At <http://www.natsils.org.au/portals/natsils/NATSILS%20Access%20to%20Justice%20submission%20to%20EMRIP%20Feb%202013.pdf> (viewed 7 April 2015).

⁶³ See B Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, Department of Aboriginal and Torres Strait Islander Policy and Development (2000); N Taylor

and J Putt, *Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia*, Australian Institute of Criminology, No 345 (2007). At

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M Willis, *Non-disclosure of violence in Australian Indigenous communities*, Australian Institute of Criminology, No 405 (2011).

⁶⁴ J Rynne and P Cassematis, 'Assessing the Prison Experience for Australian First Peoples: A Prospective Research Approach' (2015) 4(1) *International Journal for Crime, Justice and Social Democracy* 96. At:

http://apo.org.au/files/Resource/ijcjsd_assessingtheprisonexperienceforaustralianfirstpeoples_mar_2014.pdf (viewed 7 April 2015).

⁶⁵ J Rynne, P Cassematis, 'Assessing the Prison Experience for Australian First Peoples: A Prospective Research Approach' (2015) 4(1) *International Journal for Crime, Justice and Social Democracy* 96, p 96.

⁶⁶ See for example, L Bartels, *Diversion programs for Indigenous Women*, Australian Institute of Criminology, Research in Practice No 13 (2010). At

<http://www.aic.gov.au/publications/current%20series/rip/1-10/13.html> (viewed 7 April 2015).

⁶⁷ M Mitchell, *Children's Rights 2014*, Australian Human Rights Commission (2014), p 107. At https://www.humanrights.gov.au/sites/default/files/document/publication/Children%27s%20Rights%20Report%202014_2.pdf (viewed 7 April 2015).

⁶⁸ D Palmer, *Yiriman is like a school for our young people: the Yiriman Project*, Kimberley Aboriginal Law and Culture Centre (2012), p 124.

⁶⁹ M Sitori, P McGee and E Baldry, *No End In Sight: The imprisonment and indefinite detention of Indigenous Australians with A Cognitive Impairment*, Aboriginal Disability Justice Campaign (2012). At [http://rffada.org/images/stories/documents/No_End_in_Sight -](http://rffada.org/images/stories/documents/No_End_in_Sight_-_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf)

[Report from the Aboriginal Disability Justice Campaign on the Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment-1.pdf](http://rffada.org/images/stories/documents/No_End_in_Sight_-_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf) (viewed 7 April 2015).

⁷⁰ E Baldry, L Dowse and M Clarence, *Background Paper for the National Legal Aid Conference: People with mental and cognitive disabilities: pathways into prison*, (2011). At

<http://www.ntlac.nt.gov.au/doco/bpcpapers/People%20With%20Mental%20and%20Cognitive%20Disabilities%20-%20Pathways%20Into%20Prison.pdf> (viewed 7 April 2015); National Disability Services, *Submission to the to the Senate Standing Committees on Legal and Constitutional Affairs into the value of a justice reinvestment approach to criminal justice in Australia* (March 2013). At

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⁷¹ M Sitori, P McGee and E Baldry, *No End In Sight: The imprisonment and indefinite detention of Indigenous Australians with A Cognitive Impairment*, Aboriginal Disability Justice Campaign (2012). At [http://rffada.org/images/stories/documents/No_End_in_Sight -](http://rffada.org/images/stories/documents/No_End_in_Sight_-_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf)

[Report from the Aboriginal Disability Justice Campaign on the Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment-1.pdf](http://rffada.org/images/stories/documents/No_End_in_Sight_-_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf) (viewed 7 April 2015); J

Stewart, 'Aboriginal woman's jailing highlights plight of intellectually impaired Aboriginal offenders', *ABC News Online*, 13 March 2015. At <http://www.abc.net.au/news/2014-03-12/intellectually-disabledaboriginal-people-stuck-in-legal-limbo/5316892> (viewed 7 April 2015).

Appendix A

Extract: Social Justice and Native Title Report 2014, pages 102-117

4.2 Justice reinvestment in Australia five years on

In the past five years, it has been encouraging to see so many different people and groups embrace justice reinvestment. However, in all of this enthusiasm we have seen some confusion around what justice reinvestment actually involves. Some academics have warned of the potential pitfalls if justice reinvestment becomes a:

catch-all buzz word to cover a range of post release, rehabilitative, restorative justice and other policies and programs and thus lose both any sense of internal coherence and the key characteristic that it involves a redirection of resources.⁷

In my view, it is not necessarily detrimental that advocates in Australia are already trying to adapt justice reinvestment for the Australian context. What works in the United States can be a powerful catalyst for action, but will require thoughtful adaptation to the Australian context. Nonetheless, if the Australian brand of justice reinvestment strays too far from the evidence we may lose some of the strength of this approach.

There is now a growing body of literature on justice reinvestment,⁸ so this chapter will only briefly summarise some of the key principles and processes of justice reinvestment to provide clarity and context.

(a) Justice reinvestment explained

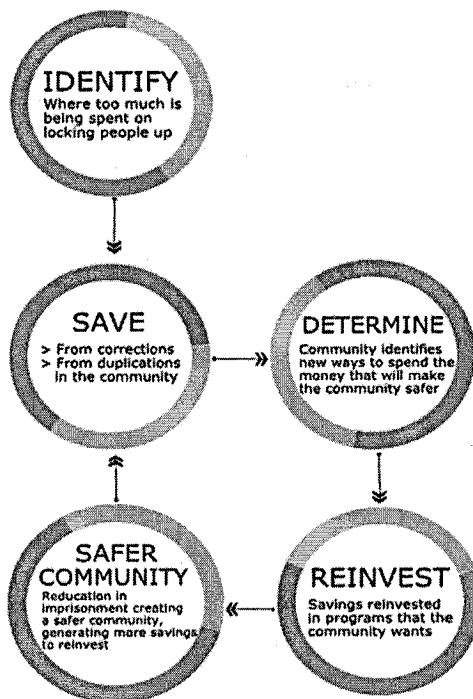
Justice reinvestment is a powerful crime prevention strategy that can help create safer communities by investing in evidence based prevention and treatment programs. Justice reinvestment looks beyond offenders to the needs of victims and communities.

Justice reinvestment diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities. Figure 4.1 illustrates the primary process of justice reinvestment.

⁷ D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment' (2012) 37(2) *Alternative Law Journal* 96, p 97.

⁸ J Austin and G Coventry, 'A Critical Analysis of Justice Reinvestment in the United States and Australia' (2014) 9(1) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice* 126; University of New South Wales, *Australian Orientated Sources*, <http://justicereinvestment.unsw.edu.au/node/31> (viewed 1 October 2014).

Figure 4.1: Justice reinvestment



Justice reinvestment was developed in the United States by George Soros' Open Society Foundation. There are currently 30 states in the United States pursuing justice reinvestment at the state level, and at least 18 counties in six states undertaking justice reinvestment at the local level.⁹

While justice reinvestment approaches vary depending on the needs of communities, justice reinvestment does have a consistent methodology around analysis and mapping. This work is the basis for the justice reinvestment plan.¹⁰ Justice reinvestment approaches also require commitment to localism and budgetary devolution¹¹ and are only made possible through political bipartisan support.¹²

⁹ Australian Justice Reinvestment Project, *Newsletter* (July 2014). At <http://justicereinvestment.unsw.edu.au/sites/justicereinvestment.unsw.edu.au/files/AJRP%20Newsletter%20July%202014.pdf> (viewed 1 October 2014).

¹⁰ Council of State Governments Justice Center, *Justice Reinvestment*, <http://csgjusticecenter.org/jr/> (viewed 1 October 2014).

¹¹ D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', note 7, p 97.

¹² D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', above, p 97.

The success of justice reinvestment in the United States has been well documented.¹³ Moves to justice reinvestment are also underway in the United Kingdom.¹⁴

(b) *Developments towards justice reinvestment*

Since 2009, justice reinvestment has been the subject of significant community advocacy. There are organised campaigns for justice reinvestment under way at the national level, as well as in New South Wales, Victoria, Western Australia, South Australia, the Northern Territory, Queensland and the Australian Capital Territory.¹⁵ Supporters include grass roots community members, service providers, academics, lawyers, Police and judges.

Importantly, we have also seen support from victims' groups. Prominent victims' advocate Ken Marslew, has made supportive comments about justice reinvestment in the media:

Some people see it as a soft option, when in fact it is a very powerful tool. Some would be a little reluctant to see offenders have more money spent on them, but if we're going to look at the big picture we really need to develop justice reinvestment across our communities.¹⁶

Aboriginal and Torres Strait Islander victims' groups have also supported justice reinvestment.¹⁷

This wave of community support has been instrumental in placing justice reinvestment onto the political agenda. Justice reinvestment has been considered in at least six government inquiries in the past five years. In particular, the 2013 Senate *Inquiry into the Value of a justice reinvestment approach to criminal justice in*

¹³ Council of State Governments Justice Center, *Facts and Trends*, <http://csgjusticecenter.org/justice-reinvestment-facts-and-trends/> (viewed 1 October 2014).

¹⁴ D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment' (2012), note 7, p 98.

¹⁵ For Victoria see: Smart Justice Project, *Welcome to Smart justice*, <http://www.smartjustice.org.au/>; for Western Australia see: Deaths In Custody Watch Committee, *Build Communities Not Prisons Campaign*, <http://www.deathsincustody.org.au/build-communities-not-prisons-campaign>; for Queensland see: Project 10%, *Project 10%*, <http://www.project10percent.org.au/>; for the Australian Capital Territory see: Australian National University, *Justice Reinvestment Forum: 2 August 2012*, http://ncis.anu.edu.au/events/past/jr_forum.php (all pages viewed 1 October 2014).

¹⁶ C Heard, *The Future of Justice Reinvestment*, SBS TV (27 July 2013). At <http://www.sbs.com.au/news/article/2013/07/27/blog-future-justice-reinvestment> (viewed 1 October 2014).

¹⁷ Family Violence and Legal Services Prevention Services Victoria, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the value of justice reinvestment in Australia* (2013). At <http://www.fvpls.org/images/files/FVPLS%20Victoria%20-%20Justice%20Reinvestment%20Submission.pdf> (viewed 1 October 2014); See also North Australian Aboriginal Family Violence Legal Service, National Family Violence Prevention Legal Services, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the value of justice reinvestment in Australia* (2013). At http://www.nationalfvpls.org/images/files/National_FVPLS_Forum_-_Justice_Reinvestment_Submission.pdf (viewed 1 October 2014).

Australia received over 130 submissions.¹⁸ Table 4.1 contains a summary of all of these inquiries and their recommendations.

Table 4.1: Government inquiries into justice reinvestment	
Inquiry	Recommendations
<p>Parliament of Australia, Senate Legal and Constitutional Affairs Committee:</p> <p><i>Value of a justice reinvestment approach to criminal justice in Australia</i>¹⁹</p> <p>(2013)</p>	<p><i>Recommendation 1:</i> The committee recommends that the Commonwealth take a leading role in identifying the data required to implement a justice reinvestment approach and establish a national approach to the data collection of justice indicators.</p> <p><i>Recommendation 2:</i> The committee recommends that the Commonwealth make a commitment to sharing relevant data held by Commonwealth line agencies with justice reinvestment initiatives in other jurisdictions.</p> <p><i>Recommendation 3:</i> The committee recommends that the Commonwealth, State and Territory Governments recognise the importance of long term, sustainable funding for programs including adequate provision for robust evaluation.</p> <p><i>Recommendation 4:</i> The committee recommends that the Commonwealth consider the establishment of a justice reinvestment clearinghouse to compile, disseminate, and promote research and program evaluation in all communities.</p> <p><i>Recommendation 5:</i> The committee recommends that the Commonwealth adopt a leadership role in supporting the implementation of justice reinvestment, through the Council of Australian Governments.</p> <p><i>Recommendation 6:</i> The committee recommends that the Commonwealth commit to the establishment of a trial of justice reinvestment in Australia in conjunction with the relevant states and territories, using a place-based approach, and that at least one remote Indigenous community be included as a site. Further, the committee recommends that any trial actively involve local communities in the process, is conducted on the basis of rigorous justice mapping over a minimum time frame beyond the electoral cycle and be subject to a robust evaluation process.</p> <p><i>Recommendation 7:</i> The committee recommends that the Commonwealth provide funding for the trial of justice reinvestment in Australia.</p> <p><i>Recommendation 8:</i> The committee recommends that the Commonwealth, through the Standing Committee on Law and Justice, promote the establishment of an independent central coordinating body for justice reinvestment (roles outlined).</p> <p><i>Recommendation 9:</i> The committee recommends that the Commonwealth refer to the Council of Australian Government justice targets for Aboriginal and Torres Strait Islander people as part of the Closing the Gap initiative, directed to reducing the imprisonment rate of</p>

¹⁸ Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, above.

¹⁹ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index (viewed 1 October 2014).

	<p>Aboriginal and Torres Strait Islander people.</p> <p>A Minority Report was issued by Coalition Senators. While the Coalition Senators 'warmly endorse the principles of justice reinvestment',²⁰ they raised concerns around the lack of evidence base and possible over reach of the Commonwealth in the area of criminal law, which is traditionally the responsibility of the states and territories.</p>
<p>Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs:</p> <p><i>Doing Time –Time for Doing Report</i>²¹</p> <p>(2011)</p>	<p><i>Recommendation 40:</i> The Committee supports the principles of justice reinvestment and recommends that governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate the justice reinvestment approach in Australia.</p> <p>The Australian Government accepted (in whole, in part or in principle) all of the Report's recommendations.²²</p>
<p>Parliament of Western Australia, Community Development and Justice Standing Committee:</p> <p><i>Making our prisons work</i>²³</p> <p>(2010)</p>	<p><i>Recommendation 22:</i> The Committee recommends that as part of the implementation of the justice reinvestment strategies a mapping exercise be undertaken to identify those communities currently delivering the highest percentage of population to the prison system.</p> <p><i>Recommendation 23:</i> The Committee recommends that the government initiates a properly funded, evidence based, collaborative Justice Reinvestment strategy in one metropolitan and one regional 'high stakes' community identified by the recommended mapping exercise, as a pilot, to be evaluated against adequate performance measures. This pilot would measure the effectiveness of the role of each of the individual participating agencies as well as specific outcomes relating to the interagency collaboration on the ground.</p> <p><i>Recommendation 24:</i> The Committee recommends that government at the highest level charge a lead agency to establish the proposed pilot Justice Reinvestment strategy to:</p> <ul style="list-style-type: none"> - have an overarching responsibility for each of the agencies collaborating in the strategy insofar as their deliverables to

²⁰ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Minority Report from Coalition Senators on the value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/d01 (viewed 1 October 2014).

²¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time –Time for Doing: Indigenous youth in the criminal justice system* (2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm (viewed 1 October 2014).

²² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time –Time for Doing*, above, p 36.

²³ Community Development and Justice Standing Committee, Parliament of Western Australia, *Making our prisons work: An inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies*, Report No. 6 (2010). At [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(WebInquiries\)/6228E6A9C090FDB9482578310040D2B8?opendocument](http://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/6228E6A9C090FDB9482578310040D2B8?opendocument) (viewed 1 October 2014).

	<p>the strategy are concerned; and</p> <ul style="list-style-type: none"> - have control and be accountable for the pooled Justice Reinvestment budget.
<p>Parliament of New South Wales, Legal and Constitutional Affairs References Committee:</p> <p><i>Access to Justice</i>²⁴</p> <p>(2009)</p>	<p><i>Recommendation 21:</i> In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.</p>
<p>New South Wales Minister for Juvenile Justice, Strategic Review of the New South Wales Juvenile Justice System:</p> <p><i>Juvenile Justice Review Report</i>²⁵</p> <p>(2010)</p>	<p><i>Recommendation 52:</i> NSW Government adopt a Justice Reinvestment policy based on diverting funds that would otherwise be spent on additional juvenile justice centres, to preventative and early intervention programs that address the underlying causes of crimes in communities.</p> <p><i>Recommendation 75:</i> The NSW Government engage with Indigenous communities to develop long-term strategies to address the underlying causes of juvenile offending. Preventative and early intervention strategies are to be funded in local communities based on the Justice Reinvestment approach outlined in Recommendation 52.</p>

To date, the thinking around justice reinvestment in Australia has mainly been in relation to Aboriginal and Torres Strait Islander communities. There are persuasive arguments for trialling this approach in the Aboriginal and Torres Strait Islander contexts given the high levels of overrepresentation and disadvantage faced by these communities. The principles of a justice reinvestment approach include localism, community control and better cooperation between local services. These also align with what we know about human rights-based practice in Aboriginal and Torres Strait Islander service delivery.

Beyond these reasons, the reality is that if we were to map the locations with the highest concentrations of offenders, many of these locations would have very high numbers of Aboriginal and Torres Strait Islanders living in them.²⁶

(c) Community justice reinvestment initiatives

Governments have not yet adopted justice reinvestment in Australia. However, at the community level, we are seeing some very exciting work about what justice

²⁴ Legal and Constitutional Affairs References Committee, Parliament of New South Wales, *Access to Justice* (2009). At www.nswbar.asn.au/circulars/2009/dec09/access.pdf (viewed 1 October 2014).

²⁵ Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (April 2010). At <http://www.djj.nsw.gov.au/pdf.htm/publications/general/Juvenile%20Justice%20Review%20Report%20FINAL.pdf> (viewed 1 October 2014).

²⁶ D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', note 7, p 99.

reinvestment could look like in Australia. This section will provide case studies for the Bourke Justice Reinvestment Project that I have been involved in, and for an innovative community research project in Cowra.

(i) Bourke Justice Reinvestment Project

Bourke is a small remote town in far western New South Wales with a population of nearly 3,000 people. 30% are Aboriginal and Torres Strait Islanders.²⁷ Like many similar communities, Bourke has a young population, high levels of unemployment and disengagement from education, and high imprisonment rates. Text Box 4.1 provides more detailed demographic information.

Text Box 4.1: Snapshot of the Bourke Aboriginal community

Bourke is within the traditional lands of the Ngemba peoples - occupying the east bank of the Darling River around Bourke and Brewarrina. A recent mapping exercise identified the presence of Aboriginal people from over 20 language groups. The traditional owners, the Ngemba, are a minority alongside other major language groups including the Wanggamurra, Murrawari and Barkindji.²⁸

There is a marked gap between the life experiences of Aboriginal and Torres Strait Islander peoples and non-Indigenous residents. For instance:

- in 2011, the median income of Aboriginal and Torres Strait Islander adults living in Bourke was approximately \$416 per week, which was 39% less than the median income for all adults (\$678).²⁹
- 17% of the Aboriginal and Torres Strait Islander workforce were unemployed, compared with 2% of the non-Indigenous workforce in Bourke.³⁰
- compared with non-Indigenous residents of Bourke of the same age, there were:
 - 31% fewer Aboriginal and Torres Strait Islander 15–19 year olds in education
 - 7% fewer Aboriginal and Torres Strait Islander 5–14 year olds in education.³¹

Bourke faces significant challenges in relation to community safety. According to the Bureau of Crime Statistics and Research (BOCSAR) the Bourke Local Government Area has consistently ranked

²⁷ Office of Communities, *Community Portrait, Bourke: A portrait of the Aboriginal community of Bourke, compared with NSW, from the 2011 and earlier Censuses*, Aboriginal Affairs NSW Government (2011). At <http://aboriginalaffairs.nsw.gov.au/wp-content/uploads/2013/09/130910-Community-Portrait-Bourke.pdf> (viewed 1 October 2014).

²⁸ A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW: a pilot study in Bourke and Lightning Ridge: Community Report November 2010*, Jumbunna Indigenous House of Learning University of Technology (2010). At <http://www.jumbunna.uts.edu.au/pdfs/research/FinalCommunityReportBLNov10.pdf> (viewed 1 October 2014).

²⁹ A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

³⁰ A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

³¹ A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

highest in the state for the rate of recorded incidents of domestic violence, sexual assault and breach of bail in recent years.³²

Australian Bureau of Statistics (ABS) data in 2011 shows that out of a total 223 Aboriginal young people/young adults in the Bourke Local Government Area, almost a quarter (21%) were on remand or sentenced. This does not include others in contact with the criminal justice system, for instance, those charged and on bail, or those on non-custodial orders. Crimes identified with youth include:

- car related crimes (car theft, stealing from cars and breaking windows)
- breach of bail
- property crimes (criminal trespass, break and enter and malicious damage).³³

At the same time, service mapping shows there are over 50 community organisations servicing the area and 40 Police. The problems of service integration have been well documented by the New South Wales Ombudsman.³⁴

In February 2013, Bourke was the subject of the dubious headline, 'Bourke tops the list: more dangerous than any country in the world'.³⁵ While this media reporting lacked nuance and sensationalised issues in the community, there is no denying the depth of challenges that need to be addressed to create a safer community in Bourke.

The Aboriginal community leadership in Bourke has courageously stepped up to take on the challenge of creating a safer community. The Bourke Aboriginal Community Working Party (BACWP), led by Mr Alistair Ferguson, approached Just Reinvest NSW in October 2012. They told the organisation that they had been working over many years to build the capacity of the Aboriginal community. Based on this work, they felt ready to trial justice reinvestment to try and break the intergenerational cycle of offending and incarceration.

One of Bourke's strengths is the established local governance structure. Since 2002, the BACWP has been the peak representative organisation for the local Aboriginal community. The BACWP includes community members and representatives from 18 different organisations and receives funding from the New South Wales Government.

The Bourke Aboriginal leadership has also developed a comprehensive agenda for change. The strategy and structure is called Maranguka, a word from the language of the Ngemba Nation which, when translated into English, carries the meanings of 'to

³² Bureau of Crime Statistics and Research, *Trends and patterns in domestic violence assaults*, http://www.bocsar.nsw.gov.au/bocsar/bocsar_mr_bb61.html (viewed 1 October 2014).

³³ A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, note 28.

³⁴ NSW Ombudsman, *Inquiry into service provision to the Bourke and Brewarrina communities - A special report to Parliament under section 31 of the Ombudsman Act 1974* (2010). At http://www.ombo.nsw.gov.au/data/assets/pdf_file/0018/3348/SR_ServiceProvisionBourke_Dec10.pdf (viewed 1 October 2014).

³⁵ R Olding and N Ralston, 'Bourke tops list: more dangerous than any country in the world', *The Sydney Morning Herald*, 2 February 2013. At <http://www.smh.com.au/nsw/bourke-tops-list-more-dangerous-than-any-country-in-the-world-20130201-2dq3y.html> (viewed 1 October 2014).

give to the people', 'caring' and 'offering help'. The first priority of Maranguka is to reduce Aboriginal contact with the criminal justice system.

I have visited Bourke four times since 2013 to undertake community consultations. I have been impressed with the significant community commitment to face these issues in an inclusive way for change.

The National Children's Commissioner, Megan Mitchell, has also been involved with these community consultations. I believe involvement from the National Children's Commissioner has helped to enable the young people to have a voice in this process. There was a watershed moment at the end of our community meeting in October 2013, when one of the Elders said that this was the first time she had seen the young people take part in a meeting like this, and how proud she was of them. You could see those young people sitting up straighter and feeling really valued and heard. This foundation of respect and inclusion will help broad community ownership of any justice reinvestment plan.

As the project has evolved, the concept of 'collective impact' has come to inform the methodology for a justice reinvestment plan in Bourke. Text Box 4.2 provides a summary of collective impact.

Text Box 4.2: Collective impact explained

Collective impact can be summarised as diverse organisations from different sectors committing to a common agenda to solve a complex social problem. Collective impact is based on the premise that no single individual or organisation can create large-scale, lasting social change in isolation, and acknowledges that systematic social problems may only be solved by the coming together of organisations and programs.

There are five key elements underlying the collective impact model:

- a common agenda for change, including a shared understanding of the problem and joint approach
- shared measurement for alignment and accountability
- mutually reinforcing activities, whereby differentiated approaches are coordinated through a joint plan of action
- continuous communication focusing on building trust, and a backbone of support including the resources, skills and staff to convene
- the coordination of participating organisations.³⁶

Collective impact initiatives that have been employed around the world to address various social issues have shown substantive results. Some initiatives targeting complex social problems include those relating to education, healthcare, homelessness, the environment and community development.

Collective impact has synergies with community development and may translate the more conceptual elements of justice reinvestment to a practical level.

³⁶ Collective Impact Australia, *What is collective impact?*, <http://collectiveimpactaustralia.com/about/> (viewed 1 October 2014).

With the community support established, the BACWP, Just Reinvest NSW and the Australian Human Rights Commission developed a project proposal. In August 2013, this proposal was distributed to philanthropic, corporate and government sectors, and the Australian Human Rights Commission hosted an engagement meeting with funders and stakeholders.

This approach has been successful in establishing funding and in-kind support to commence the justice reinvestment project. Starting in March 2014, for a two-year period, a consortium of partners will work with, and alongside, the Bourke community to develop a watertight social and economic case for justice reinvestment to be implemented in Bourke. The Bourke Community, the champions and supporters of Just Reinvest NSW and others will then take that compelling case for change to the New South Wales Government for response and action.

The Bourke Justice Reinvestment team now has the financial support and resources required to pursue this work. The team comprises of:

- **Executive Officer:** Alistair Ferguson is the Executive Officer in Community Development, and will be based in Bourke over the two-year project period. The position of Executive Officer is funded by the Vincent Fairfax Family Foundation and the Dusseldorp Skills Forum.
- **Facilitator:** Lend Lease is releasing Cath Brokenborough, Chair of Indigenous Engagement and Reconciliation, to fill the role of External Facilitator, and to be based in Bourke for three days per month.
- **Data Manager:** Aboriginal Affairs NSW has agreed to provide an in-house Data Manager to coordinate the collection and collation of data on Bourke.
- **Data Reference Group:** A Data Reference Group has been established, and includes representatives from the University of New South Wales (UNSW), the ABS and BOCSAR. Both the ABS and BOCSAR are providing data for this project. Aboriginal Affairs NSW will assist the Data Reference Group by conducting data relevant research for this project. As the project's university partner, UNSW will further provide advice on best practice responses to achieve the agreed shared measures.
- **Economic Modelling Team:** Over the next two years, KPMG will lead the work of costing the implementation of justice reinvestment in Bourke. KPMG will also produce an economic modelling of the cost savings for government observers.
- **Project Coordinator:** The project will be coordinated by Sarah Hopkins, Chair of Just Reinvest NSW.
- **Collective Impact Consultant:** Kerry Graham will provide advice on the collective impact framework.
- **New South Wales Police support:** Sergeant Mick Williams, a respected Aboriginal Police Officer and recipient of the Australian Police Medal, has been assigned to support the project and Maranguka more broadly.

- **Project Officer:** St Vincent De Paul has funded a Project Officer to assist Alistair Ferguson for a 12 month term.

The project team has engaged with a range of stakeholders in the community and is currently working with the Courts, Police and other community stakeholders to develop a number of initial circuit breakers. Proposals include an amnesty on warrants for young people in Bourke, and a set of protocols relating to the imposition of bail conditions and the circumstances in which bail will be breached by the Police. The initial focus of this collaborative work will lead to a dialogue on a variety of underlying issues that impact on imprisonment, such as housing, employment and education.

Why is the Bourke Justice Reinvestment Project different?

The Bourke Justice Reinvestment Project is an innovative example of communities taking control for positive change. So far, I have identified two key differences in the process.

Firstly, this project is not just about creating a community plan. In my many years in Indigenous Affairs, I have seen numerous community plans, often initiated by government. Despite good intentions, many of these plans languished because there was too much emphasis on the creation of the plan, and not enough on building the relationships and commonalities of the stakeholders. Actions always speak louder than words. Or in this case, actions and relationships speak louder than plans.

In the Bourke Justice Reinvestment Project, we are seeing this process reversed. It is no accident that we spent such a significant period of time building relationships and expectations before we commenced the project. This goodwill is allowing us to find common ground and shared goals, for instance, around the initial circuit breaker proposals. Developing from our projects, relationships and learning, will be a justice reinvestment plan. The crucial difference will be that it will be built on achievements, not just aspirations.

Secondly, the funding consortium for the Bourke Justice Reinvestment Project is different. While the government is providing support to the project, the major funding and pro bono services come from philanthropic and corporate sources. Government funding requirements can be complex and cumbersome to manage, while corporates and philanthropists recognise and reward innovation. Corporates and philanthropists can also be nimble enough to provide resources more quickly and flexibly. This approach gives the Bourke Justice Reinvestment Project the correct degree of support and flexibility over the next two years.

(ii) Cowra Justice Reinvestment Project

Researchers from the Australian National University, led by Dr Jill Guthrie, are conducting an exploratory study in Cowra to evaluate the theory, methodology and potential use of a justice reinvestment approach to addressing crime, and particularly the imprisonment of the town's young people.

Cowra is located in the central west region of New South Wales and has a population of 10,000 residents.³⁷ Aboriginal and Torres Strait Islander peoples make up 6.5% of the population.³⁸ While Cowra has not received the high level of attention for justice issues that Bourke has, Cowra has been described as an 'ideal case study site'³⁹ due to its stable population and middle range crime profile. Further to this, there is no direct economic benefit drawn from having a prison in the community. Although the impact of incarceration is far greater for Australian Indigenous populations, the study will focus on issues of incarceration of all young people from Cowra.

Dr Jill Guthrie explains the focus of the research:

This study is a conversation with the town to explore what are the conditions, the understandings, the agreements that would need to be in place in order to return those juveniles who are incarcerated in detention centres away from the town, back to the town, and to keep those juveniles who are at risk of incarceration from coming into contact with the criminal justice system.⁴⁰

Participation in the project by the Cowra community has enabled the team to identify issues underlying the incarceration of its young people. Specifically, community groups and organisations have been consulted throughout the project to assist in identifying effective alternatives to prison which ought to be invested in, such as holistic and long-term initiatives, and better integrated services. Young people will also be interviewed about their experiences and suggestions for change.

The project will continue until March 2016, having commenced in April 2013. The project's outcomes may lead to recommendations for addressing the levels of young people coming into contact with the criminal justice system. Similar to the Bourke Justice Reinvestment Project, the Cowra research will build an evidence base for justice reinvestment that may be used for future advocacy.

(d) Challenges

Five years on, it is worth considering some of the challenges that lay ahead in adapting justice reinvestment for the Australian context, about how we move from the speculative to the practical and how we can learn from the international experiences.

³⁷ Australian Bureau of Statistics, *2011 Census Quickstats*, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/POA2794?opendocument&navpos=220 (viewed 1 October 2014).

³⁸ Australian Bureau of Statistics, *Cowra (A) LGA*, http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=12350&dataset=ABS_NRP9_LGA&geoconcept=REGION&datasetASGS=ABS_NRP9_ASGS&datasetLGA=ABS_NRP9_LGA®ionLGA=REGION®ionASGS=REGION (viewed 1 October 2014).

³⁹ 'Rethinking the justice system', *Cowra Guardian*, 5 June 2013. At <http://www.cowraguardian.com.au/story/1552398/rethinking-the-justice-system/> (viewed 1 October 2014).

⁴⁰ 'Rethinking the justice system', *Cowra Guardian*, above. At <http://www.cowraguardian.com.au/story/1552398/rethinking-the-justice-system/> (viewed 1 October 2014).

(i) Learning from the United States

The United States is now nearly ten years down the track with justice reinvestment. Even in the five years since justice reinvestment was first introduced in Australia, the concept has evolved in the United States and there is now a growing body of evidence and analysis.

Australian researchers have also been applying a critical lens to the way justice reinvestment has developed in the United States, in the context of Australian adaptations. Text Box 4.3 provides a summary of the preliminary findings of this research project.

Text Box 4.3: Australian Justice Reinvestment Project

The Australian Justice Reinvestment Project (AJR Project) is a two year Australian Research Council funded project which draws together senior researchers across the disciplines of law and criminology, to examine justice reinvestment in other countries, and to analyse whether such programs can be developed in Australia. Researchers recently visited six states (Texas, Rhode Island, North Carolina, Hawaii, South Dakota and New York) to examine implementation.

Researchers noted that 'justice reinvestment has come to mean different things in different contexts',⁴¹ with a mix of initiatives affiliated with the government funded Justice Reinvestment Initiative (JRI) of the Bureau of Justice Assistance, as well as newer local level initiatives.

At the state level, JRI:

tends to emphasise the passage of legislation enshrining general criminal justice reform and ... typically this is no place-based component and as such, the 'reinvestment in high-stakes' communities contemplated in the original vision of justice reinvestment is largely absent. Local level initiatives were more likely to take up a particular issue (eg housing for people involved with the criminal justice system).⁴²

Researchers note that 'worthwhile criminal justice reform is occurring under the justice reinvestment banner'⁴³ although it might be different to the original concept.

When we apply some of the research reflections to the development of justice reinvestment in Australia, what strikes me is that the community driven approach of justice reinvestment that we are seeing in Bourke is in fact closer to the pure principles of justice reinvestment than some of the initiatives that have emerged in the United States.

Despite the promise of a place-based approach with strong community engagement, the United States experience has become more focused on state-wide criminal justice reforms and investment into community corrections, such as probation and parole services. That is not to discount this approach or the reductions in imprisonment that have been achieved. However, to me at least, the real underlying

⁴¹ University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

⁴² University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

⁴³ University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

power of justice reinvestment has always been in the place-based approach of community involvement and capacity building to create safer communities. In this respect, I believe we are on the right track in Australia.

The current lack of government initiatives in justice reinvestment in Australia may even be a blessing in disguise, as it gives the community the time to set up robust governance, sustainable systems and a 'watertight case' for justice reinvestment. With this in place, justice reinvestment will be on community, not government, terms.

Community governance, capacity and involvement are crucial in developing justice reinvestment plans with Aboriginal and Torres Strait Islander communities. Without these necessary elements, there is a risk that justice reinvestment will become yet another well-meaning plan that is rolled out by government but ultimately makes little difference.

This means that doing justice reinvestment well is not an overnight solution. It may take some time to see the returns of investing in social rather than corrective services. However, if communities are in control through this process, I believe the rewards will be deep seated and dramatic over time.

(ii) Bipartisan support for alternative to imprisonment

Bipartisan political support is unanimously cited as one of the greatest assets and challenges for justice reinvestment. All sides of politics need to put aside populist 'tough on crime' rhetoric and punitive policies in favour of an economically, socially and morally responsible approach to criminal justice issues.

Unfortunately, over the past five years we have seen a continuation and, in some cases, expansion of punitive policies. We have mandatory sentencing in New South Wales, Victoria, the Northern Territory, Western Australia, Queensland and South Australia.⁴⁴ Researchers also argue that tough bail legislation continues to contribute to imprisonment rates.⁴⁵

In the Northern Territory, we have seen some concerning legislation in relation to alcohol, which also reflects this mood of popular punitive policies. As I mentioned in last year's *Social Justice and Native Title Report*,⁴⁶ I am concerned about implications of Alcohol Mandatory Treatment and Alcohol Protection Orders. Both of these measures raise human rights concerns. Alcohol Protection Orders also have the potential to criminalise harmful alcohol use, and may lead to over policing of Aboriginal and Torres Strait Islander peoples, particularly those who are homeless.

⁴⁴ Appendix 2 of this report has full details of the current mandatory sentencing legislation.

⁴⁵ D Brown, 'Looking Behind the Increase in Custodial Remand Populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80. At <https://www.crimejusticejournal.com/article/view/84> (viewed 1 October 2014).

⁴⁶ M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), ch 4. At <http://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013> (viewed 1 October 2014).

At the same time, we have also seen considerable cuts to legal and prevention services. Aboriginal and Torres Strait Islander Legal Services are uniquely qualified to provide culturally secure services, and have the skills to ensure fair representation of Aboriginal and Torres Strait Islander defendants.

Punitive policies emerge because that is what politicians believe the public demands. There is no denying that there are times when heinous crimes do galvanise public opinion around punishment and deterrence, rather than rehabilitation and prevention. Indeed, I have always been clear that there are some people, including Aboriginal and Torres Strait Islander peoples, who need to be separated from society for a while.

However, I believe there is a serious need to reorientate the conversation towards safe communities. If we can create safer communities, this will lead to less offending which in turn means less people going to jail. This may show that imprisonment is not cost effective in these times of economic restraint. This, then, becomes something we can all agree on. Shifting this discourse is a major challenge but, as I will argue later in this chapter, I believe it is a challenge that we have the determination to tackle.

Appendix B

Extract: Social Justice and Native Title Report 2014, pages 117-123

4.3 Justice targets

In the *Social Justice Report 2009*, Dr Tom Calma AO recommended that justice targets be added to the existing Closing the Gap targets. Like justice reinvestment, justice targets have now become one of the key advocacy points in addressing involvement with the criminal justice system.

In 2011, the Standing Committee on Aboriginal and Torres Strait Islander Affairs *Inquiry into Indigenous youth in the criminal justice system* recommended that justice targets be included in the Closing the Gap targets.⁴⁷ Justice targets were an area of further discussion at the July 2011 meeting of the Standing Committee of the Attorneys-General, where an agreement was made to:

- (a) significantly reduce the gap in Indigenous offending and victimisation and to accurately track and review progress with a view to reviewing the level of effort required to achieve outcomes
- (b) ask First Ministers to refer to COAG the possible adoption of justice specific Indigenous closing the gap targets, acknowledging that in many instances their relative occurrence are due to variable factors outside the justice system.⁴⁸

In August 2013, the Coalition committed to 'provide bipartisan support for Labor's proposed new Closing the Gap targets on incarceration rates'.⁴⁹ I welcome the Australian Government's position but unfortunately, we are yet to see any progress on this.

In my request for information for this report, the Minister for Indigenous Affairs Nigel Scullion provided the following response:

- The Government considered the inclusion of additional targets in the Closing the Gap framework, including a justice-related target. The Council of Australian Governments agreed to a new target on school attendance at its meeting in May this year.
- The Government does not support the development of more targets than have already been agreed at this time. It considers that the adoption of too many targets may result in a loss of impact and focus for the existing targets.
- The Government is focused on making a practical difference on the ground to the lives of Indigenous Australians. Getting children to school and adults to work is the most effective approach to improving community safety and reducing incarceration.

⁴⁷ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing*, note 22.

⁴⁸ Standing Committee of Attorneys-General, *Communique 21 & 22 July 2011* (2011). At http://www.lccsc.gov.au/agdbasev7wr/scj/documents/pdf/scag_communique_21-22_july_2011_final.pdf (viewed 1 October 2014).

⁴⁹ N Scullion, 'Labor's Indigenous Affairs plans short on results' (Media Release, 8 August 2013). At <http://www.nigelscullion.com/media-hub/indigenous-affairs/labor%E2%80%99s-indigenous-affairs-plans-short-results> (viewed 1 October 2014).

- The Government will seek to engage with State and Territory governments, Indigenous communities and other stakeholders about what else can be done to achieve better justice-related outcomes.⁵⁰

I welcome the new targets on school attendance. However, I am severely disappointed that the Minister is backing away from his previous commitment to justice targets. As I will argue below, there remains a compelling case for holistic justice targets.

(a) *What are justice targets and why are they important?*

In policy terms, targets are 'goals which define the standard of success through assigning a value to an indicator that is expected to reach by a particular date'.⁵¹

Over the past five years, justice targets have come to refer to targets to address the overrepresentation of Aboriginal and Torres Strait Islander peoples as both offenders and victims in the criminal justice system. For instance, the National Congress of Australia's First Peoples' Justice Policy recommended that targets be set to:

halve the gap in rates of incarceration for Aboriginal and Torres Strait Islander people [and] ... halve the rate at which Aboriginal and Torres Strait Islander people report having experienced physical or threatened violence in the past 12 months.⁵²

Targets, along with other performance measurement tools like performance indicators and benchmarking, are considered best practice in public policy development. Drawing on the perspective of developing health targets, the National Indigenous Health Equality Council states that:

Setting targets is one way to provide leadership, guidance and strategic direction. Targets can also be used effectively in monitoring progress towards strategic objectives.⁵³

Targets encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payer's money is being spent in a results-focused way.

There is also a compelling human rights argument to be made for justice targets. Progressive realisation is a human rights concept embedded in art 2 of the *International Covenant on Economic, Social and Cultural Rights* to which Australia is

⁵⁰ N Scullion, *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 August 2014.

⁵¹ National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide* (2010), p 4.

⁵² National Congress of Australia's First Peoples, *National Justice Policy* (2013), p 16. At <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (viewed 1 October 2014).

⁵³ National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, note 52, p 4.

a party. It is recognised that achieving the full realisation of economic, social and cultural rights may take time, particularly for groups who have experienced historical patterns of discrimination. Progressive realisation means that States parties have an obligation to progressively work towards the realisation of a range of economic, social and cultural rights. Setting specific, time bound and verifiable targets is necessary to ensure progress is being made.

Many of these economic, social and cultural rights, for example the right to an adequate standard of living, the right to education, the right to work and the right to the highest standard of physical and mental health, are also linked to the underlying causes of crime.⁵⁴ Setting clear targets and timeframes for progression towards realisation of rights is one of the hall marks of the human rights-based approach.

(b) *Lessons from Closing the Gap targets*

There is much that we can learn from the process of setting targets, particularly in the health area, as part of Closing the Gap. I have been very supportive of the Closing the Gap targets for all the above reasons around accountability, strategic direction and leadership. While progress has been uneven in some areas, at the very least we know how we are tracking.

Of course, it is not the targets in and of themselves that have led to changes but the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.

Targets have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians visible. This is exactly what needs to happen on the issue of overrepresentation with the criminal justice system as victims and offenders. I would argue that most Australians know little about this problem, but many would be alarmed at the statistics. Raising the profile of the issue through targets can help build sustained pressure for improvement.

Targets were not just pulled out of thin air. There was a considered and technical process which examined options for ambitious, but also realistic, targets. Based on this experience, the National Indigenous Health Equality Council has recommended the usage of the 'SMART' model for setting targets:

- **Specific**
- **Measurable**
- **Achievable**

⁵⁴ Human Rights Law Centre, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the value of a justice reinvestment approach in Australia* (2013), p 10. At http://www.hrlc.org.au/wp-content/uploads/2013/04/HRLC_Submission_Justice_Reinvestment.pdf (viewed 1 October 2014).

- Realistic
- Time-bound.⁵⁵

The National Indigenous Health Equality Council has also identified the importance of consultation.⁵⁶ Aboriginal and Torres Strait Islander individuals and organisations had a central role in formulating health targets.

Finally, we have seen a high level of commitment to the Closing the Gap targets. The level of bipartisan support has been a significant key to the success of Closing the Gap.

(c) *Options for developing justice targets*

Part of the reason that justice targets have not been developed yet may be that setting targets can be both a complex and contested task. There are certainly challenges in data collection that would hamper measuring progress against targets.⁵⁷ Agreeing on the actual targets will also require stakeholder engagement and consensus building.

However, we are building on a strong base of empirical evidence to set justice targets. There is robust research identifying the underlying causes, or risk factors, for involvement with the criminal justice system. Dr Don Weatherburn argues that the key risk factors for Aboriginal and Torres Strait Islander involvement with the criminal justice system are:

- poor parenting, neglect and child abuse
- poor school attendance, performance and retention
- unemployment
- drug and alcohol abuse.⁵⁸

It is worth noting that these risk factors also apply to non-Indigenous individuals. However, research shows that Aboriginal and Torres Strait Islander people experience them at higher rates.⁵⁹ Dr Don Weatherburn argues that these risk factors form:

a vicious cycle. Parents exposed to financial or personal stress or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are

⁵⁵ National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, note 52, p 6.

⁵⁶ National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, above, p 5.

⁵⁷ National Congress of Australia's First Peoples, *National Justice Policy*, note 53.

⁵⁸ D Weatherburn, *Arresting Incarceration - Pathways out of Indigenous Imprisonment* (2014), p 74.

⁵⁹ D Higgins and K Davis, *Law and justice: prevention and early intervention programs for Indigenous youth* (2014), Closing the Gap Clearinghouse Resource Sheet no. 34. At http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Our_publications/2014/ctg-rs34.pdf (viewed 1 October 2014).

neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse.⁶⁰

I quote this example not to paint a picture of despair, but to illustrate how the current range of targets in Closing the Gap will struggle to be achieved if we do not do something about the powerful undercurrents of the criminal justice system. For instance, you cannot expect to achieve targets around education, employment or health if you do not look holistically at justice risk factors as well. Similarly, you cannot expect to achieve a justice target, for instance, a reduction in the rate of imprisonment or victimisation, without addressing these underlying factors.

In last year's *Social Justice and Native Title Report*, I argued that justice targets:

need to include obvious indicators such as rates of imprisonment, recidivism and victimisation but to be really successful we need to look more holistically... I would like to see indicators such as involvement with the child protection system, use of diversionary programs, successful transitions to school and employment also considered.⁶¹

(i) Overcoming Indigenous Disadvantage framework

Since 2002, the Steering Committee for Review of Government Services, within the Productivity Commission, has been regularly producing the *Overcoming Indigenous Disadvantage* report. These reports were originally commissioned by the Council of Australian Governments and provide a framework for reporting against key indicators of disadvantage. Reporting is based on a mixture of Census, survey and administrative data.⁶²

The Overcoming Indigenous Disadvantage framework, shown at Figure 4.2 sets out three tiers:

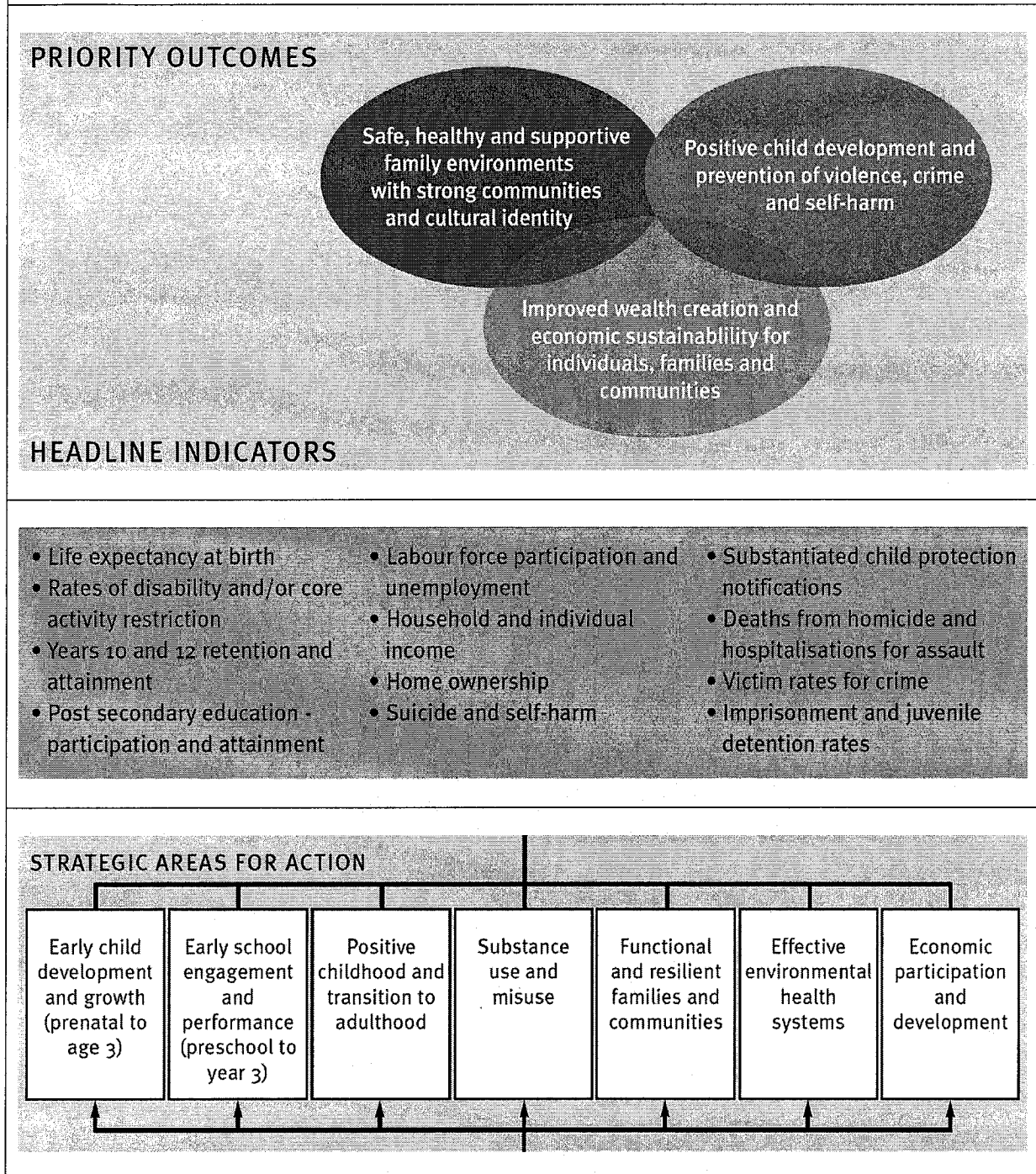
- priority outcomes
- headline indicators
- strategic areas for action.

⁶⁰ D Weatherburn, *Arresting Incarceration*, note 59, pp 86-87.

⁶¹ M Gooda, *Social Justice and Native Title Report 2013*, note 47, ch 4.

⁶² Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission (2003), p 4. At <http://www.pc.gov.au/gsp/overcoming-indigenous-disadvantage> (viewed 1 October 2014).

Figure 4.2: The framework⁶³



⁶³ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage*, above, p 4.

Under each of these headline indicators, there are measures which have been used in each report. Table 4.2 collates the relevant headline indicators and measures that loosely relate to the justice sector.

Table 4.2: Overcoming Indigenous Disadvantage headline indicators - 2011	
Indicator	Measure
4.10 <i>Substantiated child abuse and neglect</i>	<ul style="list-style-type: none"> • child protection substantiations • child protection substantiations by type of abuse or neglect • children on care and protection orders, by jurisdiction • placement in accordance with the Aboriginal Child Placement Principle • diagnoses of sexually transmitted infection in children • number and rate of diagnoses of chlamydia, gonorrhoea, and syphilis in children by age group.
4.11 <i>Family and community violence</i>	<ul style="list-style-type: none"> • people who had been victims of physical or threatened violence, by state and territory • hospitalisation rates for family violence related assaults and other assaults, and by remoteness • homicide death rates by state and territory • homicide victims by state and territory, and by remoteness • Indigenous adults and children with a valid need met request for immediate Supported Accommodation Assistance Program (SAAP) accommodation, by state and territory and by remoteness • SAAP support periods: main reason clients sought support, by state and territory and by remoteness • victims of assault, sexual assault and robbery, including relationship of offender to victim.
4.12 <i>Imprisonment and juvenile detention</i>	<ul style="list-style-type: none"> • imprisonment rates, age standardised, by jurisdiction • crude imprisonment rates, by sex and jurisdiction • sentenced prisoners by most serious offence and expected time to serve • imprisonment rates by age group • prisoners by legal status • juvenile detention rates, people aged 10-17 years, by sex, age group and jurisdiction • juvenile detention rates by legal status.

The next tier, below, includes strategic areas for action. Again, there are some measures that are very relevant to the task of setting justice targets, as shown in Table 4.3. For the purposes of this analysis, I have only included the measures that are outside the current Closing the Gap targets.

Table 4.3: Strategic areas for action

<i>Strategic areas for action</i>	<i>Relevant measure</i>
<i>Positive childhood and transition to adulthood</i>	<ul style="list-style-type: none"> • Indigenous cultural studies in the school curriculum and involvement of Indigenous peoples in the development and delivery of Indigenous studies • participation in organised sport, arts or community group activities • juvenile diversions as a proportion of all juvenile offenders • transition from school to work.
<i>Substance use and misuse</i>	<ul style="list-style-type: none"> • alcohol and tobacco consumption • alcohol related crime and hospital statistics • drug and other substance use.
<i>Functional and resilient families and communities</i>	<ul style="list-style-type: none"> • children on long term care and protection orders • repeat offending.

In the first instance, I believe that this list of indicators and measures provides a good basis for developing both 'headline' justice targets and a range of sub-targets or proxies. As we have seen from the experience of Closing the Gap, it is important to set both of these mechanisms. Headline targets will allow us to measure the overall outcome we want to achieve, while the sub-targets or proxies allow us to monitor how we are tracking towards the 'headline target'.

Further, we can be confident that these indicators used by the Productivity Commission are based on robust data collections that are readily accessible.

A process of consultation with Aboriginal and Torres Strait Islander organisations and other experts in the justice sector will be needed to confirm the relevance of these indicators and/or suggest additional indicators. For instance, the provision of post-release support services could be included, or there could be information about the provision of victim support services. The important thing is that we are not starting with a blank piece of paper. Instead, we are building on existing and available data and indicators to start the conversation in a focused way. The next challenging task is actually setting the target, once the indicators are decided.

The involvement of Aboriginal and Torres Strait Islander peoples and experts in the justice sector will be crucial to achieve success. As I will discuss below, I believe we are well placed to provide this input in a strategic way.

I strongly urge the Minister for Indigenous Affairs to reconsider his advice to me for this report and return to the pre-election commitment to develop justice targets as outlined above.