

4 September 2017

Dear Commissioners

Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

We are four research colleagues with a strong interest in the area of enquiry being undertaken, and particularly alternatives to incarceration such as Justice Reinvestment. We make this submission in our individual research capacities. We are:

- A senior Research Fellow at the National Centre for Epidemiology and Population Health at The Australian National University, where my work is on health-related research projects with a particular focus on the relationship between criminal justice and justice. (Dr Jill Guthrie)
- A Senior Researcher at the Cairns Institute, James Cook University (Cairns), with a research focus on Indigenous social justice (including in a criminal justice context); research consultant for Justice Reinvestment pilots in both the Northern Territory and in Queensland (Fiona Allison)
- A senior lecturer at UNSW Law, chief-investigator on the ARC funded Discovery project The Australian Justice Reinvestment Project, co-author of *Justice Reinvestment, Winding Back Imprisonment* (Palgrave, 2016) (Melanie Schwartz)
- A Professor of Criminology at UNSW and an Adjunct Professor at James Cook University, chief-investigator on the ARC funded Discovery project The Australian Justice Reinvestment Project, co-author of *Justice Reinvestment, Winding Back Imprisonment* (Palgrave, 2016) (Professor Chris Cunneen).

In making our submission we also have regard to working relationships we have developed with other research and policy colleagues interested in the area of Justice Reinvestment and other alternatives to incarceration for Aboriginal and Torres Strait Islander Australians. In that context, over the past two years, we have conferred with a large group of individuals from several stakeholder organisations to share knowledge and to create a community of practice. We are in discussions on how to formalise our working group.

Our submission addresses the particular Inquiry Question 13–1: *What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?* We are pleased to note that you are also interested in learning of programs and criminal justice responses that are relevant to the principles of Justice Reinvestment, such as proposals to provide for community-led diversion programs and bail support networks for Aboriginal and Torres Strait Islander peoples and the requirement for community-led collaboration and whole-of-government responses. It is in that context that we make our submission.

Thank you for the opportunity to provide a submission to the Enquiry. We look forward to learning of your recommendations. Please let us know if there is any further information we may be able to provide.

Yours sincerely

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Submission to the

**Australian Law Reform Commission Inquiry into the
incarceration rate of Aboriginal and Torres Strait Islander
peoples**

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Introduction

To close the gap in disparities between Indigenous and non-Indigenous Australians, innovative approaches and strategies for reducing the hugely disproportionate rates and impact of incarceration on Indigenous Australians, such as Justice Reinvestment (JR), must be implemented. JR originated in the United States of America (US). Initially developed by the Open Society Institute in 2003, it has since been adopted in various forms in some 27 US States.

Demographic mapping and cost analysis has identified so-called ‘million dollar blocks’; that is, geographic locations from which high proportions of the incarcerated population emanate. The first argument for JR is that because of this high concentration of offenders in small areas, there should be a commensurate concentration of restorative health, economic, housing and other social welfare services, programs and initiatives to prevent offending flowing to those same areas. As a policy option, JR diverts a portion of funds intended to be spent in the criminal justice system back to local communities with a high concentration of offenders, into service provision, programs and other strategies that address the underlying causes of crime, thus preventing people from initially entering and/or re-entering in the criminal justice system.

The second argument for JR is that imprisonment cannot be considered a success because it is ineffective in reducing re-offending and thus does not make good financial sense. JR retains detention as a measure of last resort for dangerous and serious offenders, but actively shifts penal culture away from imprisonment to restoration within the community.

Methodologically, JR can be said to involve a four-step process:

1. Analysis and mapping of offender patterns at a local level and the identification of key drivers of imprisonment;
2. Development of options to generate savings and improve local communities;
3. Quantification of savings from incarceration and potential to reinvest in high needs communities; and
4. Measurement and evaluation of the impact of that reinvestment [1].

Government commitment to JR

It is difficult to dispute the inherent logic of the concept and underlying philosophy of JR. Its appeal is self-evident - invest in communities and individuals with high rates of criminal offending to address the conditions that give rise to offending, thereby reducing expenditure associated with incarceration. However, much of the published literature in Australia has been limited to articulating and advocating for the concept and has yet to set out how a JR policy might be realised.

Further, while a number of policies and frameworks at Commonwealth and State level have referenced JR, there is yet to be direct and clear adoption and implementation by the Commonwealth government of a national JR reform program. At the federal level, in 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs investigated the high level of involvement of Indigenous juveniles and young adults in the criminal justice system, lending support to the idea of JR [2]. Rather than agreeing to adopt JR in any meaningful way, however, the Commonwealth government’s response was to accept a recommendation to conduct further research into the potential for JR in Australia, as well as the establishment of a national working group to consider JR and to develop options for its next steps in Australia. Added to this, the government’s response noted that the

primary responsibility to implement JR approaches fell to States and Territories rather than to the Commonwealth government [3]. There has been little evident movement in the Commonwealth government's position since its response to the report.

State and Territory government policy approaches to JR have varied. Some State Departments, such as Youth Justice in Queensland (QLD) (see below), are actively involved in local projects. The ACT government, for instance, has funded development of a JR strategy with the purpose of 'developing a smarter, more cost-effective approach to improving criminal justice outcomes by reducing crime, improving public safety and strengthening communities' [4]. This jurisdiction is developing a whole-of-government JR approach focused on understanding the local drivers of crime and responses that will reduce or prevent people's contact with the criminal justice system. The ACT's JR Strategy includes a justice reinvestment trial focused on supporting Aboriginal and Torres Strait Islander families in contact with the justice system, the development of a justice system costing model, an ACT Justice Services and Programs map to support offenders or those at risk of contact with the justice system, and an ACT Aboriginal and Torres Strait Islander data snapshot of the justice and human services systems. All these components are central to the evidence base to be used by the ACT JR Advisory Group, that consists of government, community sector and academic representatives, to drive decision making about key JR priorities for the ACT.

In addition, in February 2015, the NSW Labour party made a pre-election commitment to invest \$4 million in three JR pilot projects to be run by non-government organisations across the state, and to set up a coordinating unit within the Department of Justice to research and monitor program effectiveness. The NSW government has provided some limited support to the Just Reinvest project in Bourke. The launch of a Just Reinvest Policy Paper *Smarter Sentencing and Parole Law Reform* at Parliament House in August 2017 also suggested growing cross-party agreement around and support for JR in NSW.

Community level momentum around JR

Meanwhile, there is considerable momentum building around JR at a community level across Australia, underpinned both by an acknowledgement that current justice responses to offending are not working and optimism that JR provides an alternative way forward.

Most States and Territories are now exploring potential for implementation of, or are already implementing JR in at least one community. JR initiatives are in motion in communities that include Katherine (Northern Territory (NT)), Cherbourg and Doomadgee (QLD), Cowra and Bourke (NSW), Ceduna (South Australia), and communities in the ACT, as noted above, but there is significant interest in JR emerging in other locations [5]. This is demonstrated by the range and frequency of inquiries made from communities to those working with JR about potential implementation.

It is worth noting, given the nature of this Inquiry, that whilst JR projects already in place vary with respect, for instance, to how they have been initiated and funded, their focus is often on working with Indigenous communities to reduce incarceration of young Indigenous people (10-25 years of age). This focus is due not only to a sense of urgency around the need for reduction of Aboriginal and Torres Strait Islander over-representation in our prison systems. It also derives from the fact that key to JR is use of a community development approach to tackling offending. Within this approach, there is potential in an Indigenous context to realise principles of Indigenous self-determination and for application of Indigenous culture, authority and knowledge – essential contributors to any strategy designed to reduce Indigenous over-representation. Significantly, Indigenous people are empowered through JR to lead local responses to crime, including through resources diverted from

correctional budgets and as government and service providers are required to work quite differently with Indigenous communities; that is, in a way that places Indigenous people firmly at the centre of the design and implementation of relevant JR initiatives (note too Cowra's approach to Indigenous leadership within JR, detailed below). As a previous Social Justice Commissioner explains:

Justice reinvestment provides a framework for what we have been trying to achieve in reducing Indigenous over-representation for some time. Imagine if the huge amount spent on Indigenous imprisonment could be spent in way that prevents crime and increases community functioning, there was increased accountability and scrutiny about how tax payer funds on corrections are spent, communities were involved in identifying the causes and solutions to crime and there was a shift away from the mindset that imprisonment is the only option – instead it becomes the last resort.... Combine that with what we know about engaging Indigenous communities in partnerships and community development and we might just have a real life solution to the problem [[6] pp 41-2].

Three JR Projects

Given that the ALRC will receive submissions on behalf of at least some of the individual JR projects, extensive detail about the work they are undertaking will not be provided here. Two of the researchers making this submission are working 'on the ground' with JR in three different communities (Cherbourg, Katherine and Cowra), and for this reason brief detail about these projects is set out below. This detail provides some insight into how JR is currently working 'in action'.

Cowra

From 2013-2016, Dr Jill Guthrie led an ARC-funded project exploring JR theory and methodology in Cowra, NSW. Within the broader framework of JR as placed-based, an understanding of 'communities within communities' was important in that context, where it was emphasised from the outset that potential JR initiatives to be explored *were not* whole-of-community observing an Indigenous problem: instead, it was the whole Cowra community observing issues affecting the whole community, including for non-Indigenous people. In this way, the Cowra Indigenous community applied leadership for the whole community. This position was embraced and sustained throughout: the entire Cowra Community – Indigenous and non-Indigenous – represented by health, education, housing, employment and criminal justice stakeholders, participated, enabling whole-of-community responses.

Further, community discussions and deliberations helped to estimate the total direct cost of incarcerating citizens for crimes which they deemed 'JR -amenable' - that is, if a JR policy existed there would be alternatives to imprisonment - was approximately \$23million - a notional \$2.3million per year over ten years.

Addressing the social determinants of health were identified as critical for supporting people affected by the criminal justice system: improving health, housing, employment, justice, family support, mental health and substance misuse services priorities emerged from Community deliberations. Participants prioritised the need for comprehensive service mapping, and for health services to be integrated (including for mental health, drug and alcohol and sexual health), along with collaboration to avoid duplication of services and to identify gaps.

Other priorities were ‘maintaining young people in education at all costs’; a suspension/homework centre and after-school activities; mentoring programs and employment and skills development; community transport, so that citizens, particularly young people, can access services, and the importance of personal safety and housing. Specifically, this included the need for emergency accommodation and halfway houses and/or hostels, one for adults and one for young people returning from detention.

Reducing rates at which Australian Indigenous children, young people, men and women are imprisoned is complex. There is no simple or straightforward solution. A multi-pronged approach including economic modelling is essential. Together with Cowra stakeholders, Dr Guthrie and other colleagues are currently in discussions with NSW government representatives who have indicated a willingness to provide three years funding for a JR trial [7].

Katherine and Cherbourg

Fiona Allison has been working in both Cherbourg and Katherine with JR. Work with the community of Cherbourg around JR, initiated by Youth Justice (QLD), is in its early days (having commenced in April 2017). In both communities, initial consultations have been or are being conducted with community (prior to commencement of Stage 1 of JR methodology) to determine if there is sufficient community interest in engaging with JR longer term. A decision is yet to be made by the community of Cherbourg as to longer-term engagement, whilst in Katherine (with work here initiated by the North Australian Aboriginal Justice Agency (NAAJA) and NT Council of Social Services (NTCOSS) in 2015), initial consultation work is completed and the community will now begin working through Stages 1 and 2 of JR [8].

It is possible to begin to identify commonalities across these two communities and their engagement with JR, despite the fact that their engagement is at different stages. In both communities there is keen interest in working with a more place-based, preventative and collaborative approach to addressing crime and related issues - an approach that also incorporates (i) high levels of community engagement with these issues and with potential solutions to them, (ii) community development or capacity-building objectives, (iii) prioritisation of longer-term change over short-term outcomes, and (iv) the building of evaluation of the effectiveness of work undertaken into its processes. Community perceives that current approaches are delivering poor justice and other outcomes, and that improving the lives of young people *must* be a priority for all in the community. As an Indigenous Elder stated in Katherine: ‘[We] certainly welcome the introduction of Justice Reinvestment, as we are very concerned for our young people. We want them to be our next leaders further down the track’ [[8] p 29].

The importance to reducing incarceration of identifying strategies or initiatives that address both justice-related *and* community or social level drivers of offending/incarceration has been identified in both communities. *Justice*-related drivers identified to date include failure of the justice system to meet the complex needs of young Aboriginal offenders, issues inhibiting access to and completion of non-custodial options and gaps in post-release support. *Social* drivers identified include a lack of belonging, connection and hope for young people; prior victimisation; substance, alcohol and mental health issues; problems within the family unit; disengagement from education and unemployment; and cultural dislocation and disempowerment of Indigenous people. Whilst these drivers are likely to be similar across all communities with higher levels of contact with the justice system, fundamentally important

to JR methodology is the *process* of engaging community to think collectively about these problems, why they occur and strategies and/or initiatives most likely to bring about change.

Strategies and initiatives identified to date in one or other or both of the two communities require reform of how government and service providers work with the communities they service *and* with each other; legislative and policy reform of the justice system (for e.g. to broaden eligibility criteria for diversionary initiatives); and introduction of community-based and led initiatives for offenders and prior to offending (including bush camps, peer-to-peer support for families that are struggling and mentoring of young people).

Justice Reinvestment National Network

In addition to specific JR initiatives, a national network of individuals and organisations with expertise in and/or working 'on the ground' with JR was established in November 2016, arising out of a two-day workshop in 2015 on Practical Implementation of JR Projects in Indigenous Communities held at UNSW [9]. Broadly speaking, the group seeks to advocate for implementation of JR initiatives in Australia, and to share knowledge and strategies currently being used by individuals and organisations working with JR in community, government, academic and NGO contexts. With 20 plus members, it meets on a quarterly basis by teleconference and in person (where possible). The group discusses progress of JR in each jurisdiction and policy and other matters related to JR, as well as sharing ideas and resources underpinning effective implementation of JR. The Network is unfunded and relies on support from individuals and some assistance from staff at UNSW.

Conclusion

JR work presently being conducted in communities will benefit from and indeed requires greater collaboration with government at Commonwealth and State/Territory levels through establishment and effective implementation of policies, agreements and/or frameworks. The creation of legislation to underpin this collaboration is also necessary, including as it may offer some stability to JR projects (protecting them from changes in approach, for instance, that often accompany changes in government). Moreover, successful implementation of JR as a policy option in Australia will require a similar allocation of resources as has occurred in the US [1] to assist local communities with JR design and implementation and to allow for measurement of the impact of JR initiatives.

A national reform agenda is essential to move from the mere 'concept' of JR to a tangible and measurable policy. For change to occur, health, housing, employment, education, social and justice services must work collaboratively with improved information sharing and shared management plans. Providing responsive, community-based services attuned to the needs of those who are vulnerable to imprisonment represents a highly preferable allocation of resources. Achieving successful outcomes depends largely on increased interdisciplinary collaboration and greater availability of safe, well-designed and resourced community-based options within areas such as health and education in urban, regional and remote settings. The 'art and science' of its implementation, either large or small scale, requires a high level of skill related to, and knowledge and understanding of community development, and of issues surrounding Australia's socio-political history, particularly the experiences of Indigenous Australians in the criminal justice system. It will also require cross sector collaboration and alignment between sentencing and JR.

Our recommendations for reform

To achieve this national reform agenda, we propose **three** reforms which we see as essential to moving from a mere concept of JR to a tangible and measurable national reform agenda. To achieve reform, genuine partnerships between *community*, in all its forms, and governments at all levels must be established and maintained.

We respectfully suggest that Australian Law Reform Commission recommends that the Australian Government:

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

Rationale: Good intentions and ‘in-principle agreements’ are vulnerable to change, which limits their capacity to affect lasting impact. We propose that an adequately funded body is required to progress a national JR reform agenda in Australia. A similar model has been successfully implemented in the US through the Council of State Governments for state-level initiatives, and the Center for Effective Public Policy for local level Justice Reinvestment [1]. The statutory Authority should be overseen by a governing Board that includes community members; incorporating, importantly, Indigenous and consumer representation. This Authority might be drawn from or be constituted by the national network of JR experts and those working with JR, described above. Its functions could include data collection and analysis; economic cost-benefit analysis; justice mapping; testing JR methodological approaches, including where those approaches are informed by local community partnerships; and the formulation of options for JR initiatives to address the particular underlying causes of crime identified in focus sites.

Furthermore, as JR touches on human rights issues with greatest potential benefit for Indigenous Australians, the Commonwealth should consider whether it may enact legislation relying on the race power or the external affairs power, which permits the Commonwealth to implement treaties such as the *International Convention on the Elimination of All Forms of Racial Discrimination*.

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

Rationale: We propose that a national JR reform program be funded in line with similar initiatives and that adequate ‘start-up’ funding is allocated to establish and stabilise the Authority. An indicative period of three years could see results emanating from the aforementioned suggested activities for the Authority.

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

Rationale: Programs of significant national reform requiring a partnership between the Commonwealth and the States are implemented through the Council of Australian Governments (COAG), Australia’s peak intergovernmental forum. Because successful JR implementation will be contingent on States and Territories, COAG will need to take an active part in a national JR reform program. Furthermore, in order to move beyond in-principle agreements and mere consideration of recommendations, the Commonwealth Government must lead the national reform agenda. Precedents reflecting such Commonwealth action which have subsequently resulted in successful implementation occur in other sectors such as health, namely the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008* [10] and the *National Health and Hospitals Network Act 2011* [11].

The National Congress of Australia First Peoples [12] and the Social Justice Commissioner [6] have publicly called for justice targets to be integrated into the Indigenous Reform Agenda. We also hold this view, and suggest that achieving targets in each jurisdiction should be monitored through the proposed National JR Authority.

Ultimately, national incarceration rates should reflect - at the very most - no more than the 2.5% Indigenous population rate. Accordingly, an indicative incarceration rate target for Australia should be set by the aforementioned Authority. The National Indigenous Reform Agenda sets targets in six areas - Indigenous life expectancy, mortality, access to early childhood education, literacy, school attainment and employment. An example of a JR target is provided by the State of Oklahoma, where a target of a 10% reduction in violent crime by 2016 has been set [13]. Without an equivalent measure in Australia there will be little imperative for change.

The Authority should work with all jurisdictions to determine an agreed level by which incarceration in each State/Territory will be reduced and the commensurate savings to be diverted from the corrections sector for reinvestment to JR initiatives in those jurisdictions.

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