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# Submission to the Senate Legal and Constitutional Affairs Committee on the value of a justice reinvestment approach to criminal justice in Australia

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This submission has been prepared by The Centre for Independent Studies (CIS) for the Senate Legal and Constitutional Affairs Committee on the value of a justice reinvestment approach to criminal justice in Australia.

The CIS recently released a research paper *Panacea to Prison? Justice Reinvestment in Indigenous Communities* (attached) which questions implementing policy frameworks from overseas without any comprehensive empirical evidence to show whether they work or what their unintended consequences are. The aim to reduce the number of people going to jail, particularly juveniles is worthwhile but do we need to adopt Justice Reinvestment approaches to achieve this? Many programs in Australia are already operating along Justice Reinvestment lines, so do we need to reinvent the wheel or should we look at what is currently being done and improve on that.

The paper makes the following four key points:

## 1. Australian criminal justice system is different from criminal justice systems overseas

Advocates of Justice Reinvestment in Australia have been quick to highlight the success stories from overseas but a number of important differences exist between the criminal justice systems in the United States, the United Kingdom, and Australia. <sup>1</sup> These disparities suggest that the application of Justice Reinvestment strategies in Australia could be difficult, and that Australia needs to exercise caution and not embrace Justice Reinvestment strategies just because everyone else is.

In the United States, three-quarters of offenders are given custodial (prison) sentences, whereas only one-fifth of the sentences imposed in Australia are custodial, which means, the United States has more room to 'manoeuvre' because it has more offenders to keep out of prison compared to Australia. <sup>2</sup> Although the percentage of Indigenous offenders in many locations is high, the number of offenders is not nearly as high as in the United States. Consequently a more dramatic reduction in the percentage of offenders and re-offenders would be needed to realise any savings in the corrections budget and for prisons to be closed.

In the United States, it might make sense to divert the flow of funds spent locking up offenders in rural prisons to invest in urban areas with a higher concentration of offenders. However, that flow is reversed for many Indigenous offenders in Australia. Indigenous offenders mainly live in rural and remote areas and are sent to prisons in larger towns or cities. Many sentencing options are not available in rural areas in Australia, in particular, supervised bonds, community service orders, periodic detention, and home detention. <sup>3</sup> Advocates for Justice Reinvestment have suggested the program could act as a catalyst to make these services available.<sup>4</sup> However, practical difficulties make diversion programs hard to implement in such locations. Juvenile offenders from Brewarrina and Wilcannia inevitably end up in juvenile detention in Dubbo because there is no suitable place to return them to in their home town. Sending them back to their families is not an option as their home environment is often the cause of their offending. <sup>5</sup> Moreover, although diversion and other non-custodial sentences may be appropriate for some offenders, for many crimes prison should remain the only option. Reducing the number of people going to prison is an admirable goal but its

feasibility will depend on the type of offence committed. A large proportion of Aboriginal people in jail (50 per cent) are in there for serious crimes (homicide, assault and sex offences), and should not be eligible for non-custodial sentences.<sup>6</sup>

A key feature of Justice Reinvestment in the United States is the devolution of power from federal and state governments to local authorities.<sup>7</sup> But Australia does not have as much scope for the devolution of funding and responsibility between different governments as the United States—it is highly unlikely that responsibility will be devolved from state and territory governments to local government authorities.

## 2. Justice Reinvestment claims to save money but does it?

A purported benefit of Justice Reinvestment is that it saves money—instead of channelling funds away from communities into prisons, money that would have been spent on housing prisoners is diverted into programs and services to address the underlying causes of crime in those communities. Susan Tucker and Eric Cadora describe prisons and parole systems in the United States as business failures, arguing that from an investment perspective, prisons fail to provide many returns.<sup>8</sup> It is true that there are many economic and social costs to imprisonment. Prisoners are exposed to other offenders and criminal networks, and the time spent in prison can fracture family and community ties. Post-release offenders often find it hard to reintegrate into society as the labelling effect of prison diminishes their employment opportunities. Justice Reinvestment attempts to reduce the burden of imprisonment on society by reducing the number of people entering the criminal justice system in the first place, as well as lowering the numbers returning to custody via breaches of parole or reoffending.<sup>9</sup> Yet it is equally true that crime has high social and economic costs. The assumption underpinning Justice Reinvestment—the prison system is a failure—ignores the fact that prisons serve a purpose: they protect society by taking out of circulation violent and repeat offenders.

One of the most widely acclaimed success stories of Justice Reinvestment is in Michigan, where over the last 10 years (2002–12) the state has closed 21 prisons.<sup>10</sup> The 2004 Justice Reinvestment pilot in Connecticut also resulted in the cancellation of a contract to build a new prison, realising savings of US\$30 million.<sup>11</sup> It must be noted, however, that most of these savings were from legislative and policy reforms to probation and parole regimes, which can lead to fast, and sometimes dramatic, reductions in prison numbers because prisoners are given non-custodial sentences instead of custodial sentences.

The impact on offending or recidivism from the reinvestment of these savings into community-based crime prevention strategies will take a lot longer to emerge, and it is too early to evaluate their effects, if any. Another issue is that even though prisons have been closed down or not built in some states, the true correctional savings have been difficult to document and even more problematic to capture. US criminologist Todd Clear says in every one of 12 locations where Justice Reinvestment work has been carried out, the correctional budgets have continued to grow.<sup>12</sup> This means unless funds saved from reducing incarceration are genuinely redirected, Justice Reinvestment will become yet another ‘add-on’ program.

The United Kingdom has only recently adopted Justice Reinvestment strategies, so it is too soon to say whether it is working there. Yet already UK criminologists have noted that Justice Reinvestment is being used primarily to provide improved governance of rehabilitation programs, and that these programs are running in parallel with the continued growth of the prison system.<sup>13</sup>

The rhetoric that Justice Reinvestment simply involves a ‘redirection of resources’ comes across as a cynical ploy to get bipartisan support by appealing to the fiscally conservative. We would be better

off recognising that in Australia, Justice Reinvestment is unlikely to lead to real savings (at least in the short term).

### 3. A new theory or reinventing the wheel?

Despite Justice Reinvestment's growing popularity, it is still an idea in its infancy. Critics point to the lack of a 'strong empirical foundation' and question whether it qualifies as a 'proper' theory.<sup>14</sup> Many details of Justice Reinvestment are left unexplained. Who is diverted from prisons and how are they diverted? How are prison savings calculated and how are they reinvested? Justice Reinvestment sounds great in theory, but what happens if funds are redirected from corrections budgets to communities and offending does not go down? Are offenders not given a custodial sentence (even though their offence is worthy of imprisonment) to save funds, or will the government end up paying more money to achieve very little change in offending and reoffending outcomes?

The premise of Justice Reinvestment is that the most effective way to address offending behaviour lies not within the penal realm, but rather in addressing the underlying causes of crime in communities. This insight is not new. Since the 1978 Nagle Royal Commission into NSW Prisons, the failure of prisons in addressing reoffending has been well known.<sup>15</sup>

Justice Reinvestment's localised, community-focused approach has seen it touted as an appropriate 'place-based' strategy for Indigenous communities. The argument is that because Justice Reinvestment focuses on locations that produce high numbers of prisoners—and that many of these locations are home to high numbers of Indigenous people—it is particularly suited to Indigenous people and communities. Social Justice Commissioner Mick Gooda says he likes Justice Reinvestment because it 'provides opportunities for some communities to take back local control ... to not only take some ownership of the problem but also own the solution.' Yet for all the talk that Justice Reinvestment is a 'new way' of a tackling crime in Indigenous communities, there is nothing particularly novel about community-based programs.

The localised, community-focused approach characteristic of Justice Reinvestment is one of the goals of the National Indigenous Law and Justice Framework 2009–15 (the framework). Goal 5 is to 'strengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvements in justice and community safety.' Under Action 5.2.1b of the framework, community justice groups are identified as a conduit for establishing links between health, education, housing, employment and welfare services so that an integrated approach to crime prevention can be developed. According to a government fact sheet:

Aboriginal Community Justice Groups are based on the idea that local Aboriginal people know their own communities and problems. Therefore, the groups can solve local community problems better by developing local community solutions.

The description of Aboriginal Community Justice Groups sounds strikingly like what Gooda says Justice Reinvestment will do. The question for Justice Reinvestment supporters is to explain how it will be any different to and an improvement on existing community-based justice programs.

The belief that Justice Reinvestment's localised community focus approach will reduce offending in Indigenous communities ignores the fact that for more than 30 years, governments have been running community-based programs. Except for a few exceptions, such initiatives have not led to real social change. The focus on community involvement as a precursor to improving remote Indigenous people's lives disregards the fact that most Indigenous communities exist only because of passive service delivery by outside suppliers.

Barriers to self-management in Indigenous communities have been documented in many government reviews and reports—and relate to low levels of literacy, numeracy and work readiness. All these factors contribute to high imprisonment rates in Indigenous communities, and it is likely that those communities with the highest number of offenders and the greatest need for alternative solutions will also find implementing Justice Reinvestment strategies the most challenging. A police strategy to get members of remote South Australian Aboriginal communities to become community constables is failing, with 9 out of 12 community constable positions vacant. Civil society relies on the effective functioning of civil institutions. If these civil institutions are weakened (or do not exist, as is the case for remote Indigenous communities such as Yuendumu), then the normative foundation for a shared commitment to the rule of law is undermined (or does not exist).

#### 4. Important lessons from past ‘panaceas’

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Lessons can also be learned from past panaceas such as Restorative Justice. When Restorative Justice was all the rage in the 1990s, one of its promises was that it would provide ‘healing’ to victims.<sup>16</sup> There was widespread adoption of restorative justice practices across Australia and around the world. Yet many of these involved token programs focusing on low-level juvenile offending. A number of these programs also ended up becoming net-widening exercises—actually increasing the number of people coming into contact with the criminal justice system rather than reducing it.<sup>17</sup> Arguably, the reason why Restorative Justice type initiatives such as Circle Sentencing in NSW have had no effect on levels of reoffending or the seriousness of offences is they focus on treating the symptoms, not the causes of offending.<sup>18</sup> By involving local Aboriginal people in the process of sentencing offenders, Circle Sentencing may have had some benefit, but crime rates will not go down unless the underlying reasons why people offend are addressed.

The report of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) contained 339 recommendations, with many recommending ‘imprisonment as a last resort’ and for a greater focus on ‘culturally appropriate’ strategies to reduce Indigenous incarceration.<sup>19</sup> Many of the initiatives introduced following the RCIADIC report have aimed to prevent Indigenous offending but have focused on changing the operation of the criminal justice system rather than crime prevention. For example, an initiative that allows community members to visit police watch-houses to provide comfort and support to Indigenous detainees is described by the Queensland government as one of a few key initiatives that ‘aim to reduce Aboriginal and Torres Strait Islander over-representation,’ although its effect on crime is likely to be negligible.<sup>20</sup> Crime prevention is quite an amorphous concept, and it seems almost anything that provides a ‘social good’ can be labelled as ‘crime prevention.’ For instance, in Queensland crime prevention funds were used to support the Hope Vale Indigenous Knowledge and Technology Centre.<sup>21</sup> The difficulty in defining Justice Reinvestment suggests that it too could become a ‘catch all’ phrase used to describe any number of ‘feel good’ type programs. Already supporters of Justice Reinvestment in Australia are calling for vague, ‘culturally appropriate’ initiatives such as ‘healing centres’ to be established.<sup>22</sup> These types of initiatives may help alleviate some of the ‘symptoms’ of disadvantage but will not address the causes.

To address the underlying causes of Indigenous offending, we need to focus on education and employment—not be waylaid into thinking the answer lies with yet more ‘culturally appropriate’ or ‘Indigenous distinct’ programs. Education and employment may not sound as novel or exciting as Justice Reinvestment, but evidence shows both play a critical role in the high Indigenous incarceration rate.<sup>23</sup> Improving educational outcomes should not rely on diverting funds from prison services but a basic right that states and territories should be covering in their education budgets.

# The Centre for Independent Studies (CIS)

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- an economy based on free markets
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- we are politically non-partisan
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<sup>1</sup> As above; Melanie Schwartz, ‘Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment,’ *Australian Indigenous Law Review* 14:1 (2010), 2–17.

<sup>2</sup> Todd R. Clear, ‘[Reducing Violent Offending and Reoffending: A Justice Reinvestment Approach](#),’ keynote presentation (Canberra: National Justice CEOs Indigenous Justice Forum, July 2012).’

<sup>3</sup> Melanie Schwartz, ‘Building Communities, Not Prisons,’ as above.

<sup>4</sup> As above.

<sup>5</sup> From personal interview as part of field trip to remote NSW.

<sup>6</sup> ABS (Australian Bureau of Statistics), [Prisoners in Australia, 2011](#), Cat. No. 4517.0 (Canberra: ABS, December 2011).

<sup>7</sup> Susan Tucker and Eric Cadora, ‘Justice Reinvestment,’ as above.

<sup>8</sup> Susan Tucker and Eric Cadora, ‘Justice Reinvestment: To invest in public safety by reallocating justice dollars to refinance education, housing, healthcare and jobs,’ *Ideas for an Open Society*, Occasional Papers 3:3 (New York: Open Society Institute, 2003).

<sup>9</sup> Melanie Schwartz, ‘Building Communities, Not Prisons,’ as above.

<sup>10</sup> Todd R. Clear, ‘A Private-sector, Incentives-based Model for Justice Reinvestment,’ as above. See also Nicole Porter, [On the Chopping Block: State Prison Closings](#) (Washington, DC: The Sentencing Project, September 2011).

<sup>11</sup> Todd R. Clear, ‘Reducing Violent Offending and Reoffending: A Justice Reinvestment Approach,’ as above.

<sup>12</sup> Todd R. Clear, ‘A Private-sector, Incentives-based Model for Justice Reinvestment,’ as above.

<sup>13</sup> Chris Fox, Kevin Albertson, and Frank Warburton, ‘Justice Reinvestment: Can It Deliver More for Less?’ as above.

<sup>14</sup> Todd R. Clear, ‘A Private-sector, Incentives-based Model for Justice Reinvestment,’ as above, 587.

<sup>15</sup> Justice John Nagle, *Royal Commission into NSW Prisons, Report* (Canberra: Commonwealth of Australia, 1978), 25.

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<sup>16</sup> Shadd Maruna, 'Lesson for justice reinvestment from restorative justice and the justice model: Some tips for an 8-year-old prodigy,' *Criminology & Public Policy* 10:3 (August 2011), 661–669.

<sup>17</sup> As above.

<sup>18</sup> Jacqueline Fitzgerald, '[Does Circle Sentencing Reduce Aboriginal Offending?](#)' *Crime and Justice Bulletin* 115 (Sydney: NSW Bureau of Crime Statistics and Research, May 2008).

<sup>19</sup> AustLII, Indigenous Law Resources, '[Royal Commission into Aboriginal Deaths in Custody](#),' See Vol. 5 of report for recommendations.

<sup>20</sup> Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (Brisbane: Queensland Crime and Misconduct Commission, 2009), 18.

<sup>21</sup> As above.

<sup>22</sup> Melanie Schwartz, 'Building Communities, Not Prisons,' as above.

<sup>23</sup> John Walker and David McDonald, 'The Over-representation of Indigenous People in Custody in Australia,' *Trends & Issues in Crime and Criminal Justice* 47 (Canberra: Australian Institute of Criminology, August 1995).