



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

Faculty of law

15 March 2013

Dear Secretary,

## **Value of a justice reinvestment approach to criminal justice in Australia**

The Australian Justice Reinvestment Project (AJR Project) welcomes the opportunity to make the following submissions in response to the call for submissions to the inquiry into the value of a justice reinvestment approach to criminal justice in Australia.

The AJR Project is an ARC-funded project which aims to examine the characteristics of justice reinvestment in other jurisdictions, and analyse whether such programs can be developed in the Australian context.

In order to address the terms of reference, this submission:

1. refers the committee to previously published material authored by the members which deal with terms of reference (a) to (d);
2. makes substantive submissions in relation to (e) to (j).

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

Yours sincerely,

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## **Submission to the Senate inquiry into the value of a justice reinvestment approach to criminal justice in Australia.**

### **Part 1**

1. The first four terms of reference (ToRs) concern issues for which there already exists a significant body of Australian literature. Some of that literature is referred to below and attached to this submission.

#### **A) The drivers behind the past 30 years of growth in the Australian imprisonment rate**

2. In response to the first ToR, the AJR Project refers the committee to the forthcoming text:
  - Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M. and A. Steel (forthcoming) *Penal Culture and Hyperincarceration. The Revival of the Prison*, Ashgate, Farnham. (see Attachment 1)

It is relatively easy to point to the more immediate political/legal drivers which have led to increased imprisonment rates. The key immediate drivers of increased imprisonment rates are: longer sentence lengths brought about predominantly by a range of legislative measures restricting judicial discretion; parole changes making it harder to get and easier to lose; and constant punitive amendments to restrict access to bail for a widening category of offences. Much of this legislative activity followed media-driven law and order campaigns around individual cases or as part of election campaigns seeking to demonstrate 'tough on crime' credentials and sympathy towards victims of crime. Research evidence generally played little part and the influence of 'expertise' diminished with the rise of the 'public voice', as mediated through tabloids and talk back radio.

3. It is more difficult to tease out some of the deeper economic, social and cultural drivers which have led to the reinvigoration, normalisation and reproduction of the prison. These drivers include the emergence of risk in correctional paradigms, the emergence of new categories of offender such as terrorists and sex offenders detained beyond the expiration of their sentence and the notion of the prison as therapeutic and a community economic

asset. These are the subject of the forthcoming book. In order to assist the committee relevant excerpts of this text are attached. (*see Attachment 1*)

4. The AJR Project also refers the committee to the following sources which consider this ToR:

- Cunneen, Chris (2011) 'Punishment: two decades of penal expansionism and its effects on Indigenous imprisonment' *Australian Indigenous Law Review*, Vol 15(1), pp. 8-17. (*see Attachment 3*)
- Brown, David (2010) 'The Limited Benefit of Prison in Controlling Crime' *Current Issues in Criminal Justice* Vol 22(1), pp. 137-148. (*see Attachment 4*)

#### **B) The economic and social costs of imprisonment**

5. The AJR Project refers the committee to following sources which address this ToR:

- Cunneen, Chris (2010) 'Fear: Crime and Punishment' *Dialogue*, Vol 29(2), pp. 44-54. (*see Attachment 5*)
- Baldry, Eileen, Brown, David, Brown, Mark, Cunneen, C, Schwartz, Melanie & Steel, Alex (2001) 'Imprisoning rationalities' *Australian & New Zealand Journal of Criminology*, Vol 44, pp.24-40. (*see Attachment 2*)
- Brown, David (2010) 'The Limited Benefit of Prison in Controlling Crime' *Current Issues in Criminal Justice*, Vol 22(1), pp.137-148. (*see Attachment 4*)

#### **C) The over-representation of disadvantaged groups within Australian prisons, including Aboriginal and Torres Strait Islander peoples and people experiencing mental ill-health, cognitive disability and hearing loss**

6. The AJR Project refers the committee to the forthcoming text *Penal Culture and Hyperincarceration. The Revival of the Prison* which specifically addresses the over-representation of Indigenous prisoners, mentally ill prisoners and women prisoners.
7. The contemporary burden of rising imprisonment rates falls squarely on the shoulders of particular social groups increasingly defined as suitable penal subjects. We do not argue

that these targets of a new penalty have simply emerged *de novo*. Rather they have been subjects of varying institutional practices over long periods of time. What is new is the current weight they carry in an intensified penal punitiveness. They have become the ballast in expanding penal practices. Of particular note are three social groups within penal regimes: those with mental and cognitive impairment; women; and first nations, Indigenous and racialised peoples.

8. The evidence suggests that at least in the Anglophone world these social groups have been subject to an intensification in the use of penal strategies over the last several decades. We recognise the continuity in the use of asylums, mental hospitals, reserves, missions and prisons as places of confinement for women, racialised minorities and people with mental and cognitive impairment. However, we emphasise the significant cultural change, which has seen the apparent increased acceptability of the prison itself as an institutional response to these social groups. Thus while the presence of people with mental and cognitive impairment in criminal justice systems internationally and specifically within Australia is not a new phenomenon, their rate appears to have increased over recent years. There has been a growing 'feminization' of prison populations evident in many countries, as the rates of women's imprisonment have increased more quickly than men. The evidence also shows disproportionate increases in imprisonment rates among racialised groups over recent decades.
9. Many of the current changes in penalty in relation to women, people with mental and cognitive impairment and Indigenous and other racialised peoples have occurred at a time when there is apparently greater administrative emphasis on developing public policy for the benefit of particular groups: women-centred prisons, Indigenous-focused prisons, the introduction of drug courts and other therapeutic courts, the recognition of healing, circle sentencing and other Indigenous processes in sentencing and within prison regimes. Yet for all this apparent change, the rate of imprisonment for these social groups has continued to grow.
10. The risk of imprisonment is not spread evenly within these social groups. Not *all* those with mental and cognitive impairments are vulnerable to being drawn into the criminal justice system, it is only those who are seriously socially disadvantaged (homeless mentally ill persons in particular) and from racialised communities who are likely to be imprisoned, that is, those deemed riskier and more dangerous and who are excluded from

mainstream support and advocacy. It is not all women who bear the brunt of increases in imprisonment. Racialised minority women have shown the greatest increases in imprisonment (which in the Australian context are primarily Indigenous women).

11. The prison, at least in part, has been reconstituted as a 'therapeutic institution' providing a solution not only to serious criminal behavior but also to behavior seen as too difficult to manage in the community. The reconstitution of the prison as therapeutic is part of an 'imaginary penalty'.<sup>1</sup> The imaginary world of the therapeutic prison may re-cast incarceration as more acceptable but belies the hyper-incarceration of socially marginal groups and the high return rate of ex-prisoners. We see this exemplified in the concept of 'complex needs' where people with multiple issues such as mental impairment and substance abuse disorders are deemed too high risk to be in the community and the prison is seen as a therapeutic place of healing and support. The reconstitution of the prison as therapeutic can also be seen in relation to women. The critical thrust of the 1980s which called for the decarceration of women has been reframed into a 'women-centred' penalty with the development of women-specific prisons and programs. These changes have coincided with an increase in women's imprisonment and re-incarceration rates.
12. We also see the expression of the prison as a therapeutic institution in relation to Indigenous people. Specific racialised modalities of punishment are seen as appropriate and we see this materialised in a number of forms including the creation of Indigenous sentencing courts and prisons. We argue that these approaches appear to value Indigenous culture while at the same time they further cement the centrality of criminal justice responses to a social group deemed as high risk. The rise of risk thinking and the influence of a criminogenic needs model, which commonly uses risk assessment tools derived from population groups to predict how risky a person might be, re-casts risk as a failing of the *individual* rather than arising from the profound collective economic and social disadvantage which itself has been the outcome of colonial policies. The coupling of risk within a neo-liberal emphasis on the values of retribution and deterrence has seen increases in imprisonment rates for Indigenous people which have outstripped other social groups. Whether standardised risk assessment tools are relevant or appropriate for use with Indigenous peoples is subject to dispute.

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<sup>1</sup> Carlen P (2008) 'Imaginary penalties and risk-crazed governance', ch 1, in P Carlen (ed) *Imaginary penalties*, Cullumpton, Willan 2008.

13. There is insufficient attention paid to the ‘penal/colonial complex’, colonialism, post colonialism and race in the construction of imprisonment rates. Our suggestion is that while the present moment looks promising in terms of rolling back nearly three decades of increasing imprisonment rates and their drivers, unless reform movements confront the highly selective nature of penalty and the way it bears so disproportionately on marginalised groups, then any gains to be made through political and popular attitudinal shifts towards widespread adoption of policies such as justice reinvestment or penal reductionism, are likely to be limited in practice.
14. For hyperincarcerated communities such as Indigenous communities in Australia, the stigmatisation of imprisonment may give way to the prison as a contested site of political/social power, for example some prisons become spaces for reclaiming an Aboriginal domain. Here, the experience of imprisonment as a meaningful life event merges with the reality of the destabilising impact of mass incarceration on whole communities. This multi-faceted, sometimes internally contradictory role of the prison is illustrated through the phenomenon of ‘community prisons’ like Balund-a at Tabulum in NSW, a new carceral space disguised as a voluntary place for *avoiding* the penal gaze and gaining cultural knowledge.
15. The place where prison ends and community begins is further blurred through transcarceral regulation, that is, the dissolving of the prison wall and the two-way merging of the prison into the community. This process is assisted by the expanded reach of corrections into ‘community prisons’, and COSPS in NSW, by hyper-active probation and parole regimes, ‘tough’ sentencing laws and popular punitiveness.
16. The AJR Project refers the committee to following sources which address this ToR:
  - Cunneen, Chris (2011) ‘Punishment: two decades of penal expansionism and its effects on Indigenous imprisonment’ Australian Indigenous Law Review, Vol 15(1), pp.8-17 (*see Attachment 3*)
  - Stubbs, Julie (2011) ‘Indigenous women in Australian criminal justice: Over represented but rarely acknowledged’ Australian Indigenous Law Review Vol 15(1), pp.47-63. (*see Attachment 6*)

**D) The cost, availability and effectiveness of alternatives to imprisonment, including prevention, early intervention, diversionary and rehabilitation measures**

17. The AJR Project refers the committee to following source which addresses this ToR:

- National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment*, August 2012.

## Part 2

18. The AJR Project submits that the issues raised in ToRs (e) – (i) should be the primary focus of the inquiry, as resolution of the issues raised therein is a necessary precursor to the successful implementation of Justice Reinvestment (JR) in the unique context of Australia.

### E) The methodology and objectives of justice reinvestment

19. JR involves advancing “fiscally sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer”.<sup>2</sup>
20. JR has been described as a form of “preventative financing, through which policy makers shift funds away from dealing with problems ‘downstream’ (policing, prisons) and towards tackling them ‘upstream’ (family breakdown, poverty, mental illness, drug and alcohol dependency)”.<sup>3</sup>
21. The key strategy is the quantification of savings in the corrections realm and reinvestment of those funds in high-stakes neighbourhoods to which the majority of people released from custody return, for example, in redeveloping “abandoned housing and better coordinat[ing] such services as substance abuse and mental health treatment, job training, and education”.<sup>4</sup>
22. JR schemes typically involve a form of budgetary devolution: in the UK devolution is from central to local government and in the US federal or state jurisdictions, devolution is to county administrations. There is a strong strand of localism in much of the JR literature, encompassing local community organisations, NGOs, church and welfare agencies, and the private sector.

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

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

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



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

- Brown, David, Schwartz, Melanie & Boseley, Laura (2012) 'The promise of Justice Reinvestment' *Alternative Law Journal*, Vol 37(2), pp. 96-102. (see Attachment 7)
- Schwartz, Melanie (2010) 'Building communities, not prisons : justice reinvestment and Indigenous over-imprisonment" *Australian Indigenous Law Review*, Vol 14(1), pp. 2-17. (see Attachment 8)

**F) The benefits of, and challenges to, implementing a justice reinvestment approach in Australia**

24. Since 2006, JR strategies have realised millions of dollars of savings in corrections budgets through reduced levels of imprisonment in a number of participating US states. Some of these savings have been reinvested in capacity building and crime prevention projects in communities that produce high numbers of offenders. On an early assessment, JR in the US is therefore addressing two major concerns common to that jurisdiction and Australia: high imprisonment rates and the huge budgetary commitment that flows from it.
25. The uptake of JR in the US and UK, and the potential benefit of it in Australia, comes in part as a response to the fact that ever increasing imprisonment rates are hugely expensive at a time of fiscal stringency, yet provide very little return in addressing high recidivism rates, and indeed may be counter – productive and criminogenic, contributing to social breakdown and crime.<sup>5</sup>
26. Any reduction in crime rates, in recidivism rates, and in imprisonment rates have clear and quantifiable national economic and social benefits. The establishment of a sound conceptual basis for the diversion of a portion of the \$3.1 billion p.a. of public

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

expenditure currently spent on corrections, to effective social crime prevention programs engaging with local agencies, will contribute to a safer, healthier and more cohesive community.<sup>6</sup>

27. It is also important not to overlook the fact that the \$3.1 billion national corrections figure only represents net operating expenditure and does not represent the substantial outlays incurred for prison refurbishment and new prison building. For example, in Queensland, the refurbishment of Lotus Glen prison is costing \$445 million.<sup>7</sup> In Victoria, the planned new prison is estimated to cost \$500 million<sup>8</sup> and similarly in the Northern territory, the cost of the new prison nearing completion is estimated at \$800 million.<sup>9</sup>
28. Consequently, the impact of a successful translation of JR into the Australian context would provide welcome benefits to the high stakes communities which it targets.
29. JR is ultimately concerned with increasing functionality and capacity in disadvantaged communities, through the rationalisation and reinvestment of corrections spending, and thus understanding the potential for the adoption of JR strategies will assist directly with strengthening both the social *and* economic fabric in Australia.
30. Effectively implemented, JR may improve prospects for young people through early intervention, (a healthy start to life) and help families and individuals live healthy, productive and fulfilling lives particularly in the disadvantaged, high crime focus communities on which JR focuses.
31. While acknowledging the evident promise of JR, the AJR Project is concerned that the groundswell of commitment to JR in Australia is arising without a clear understanding of
  - a. the defining features of JR;
  - b. its conceptual and theoretical components;

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<sup>6</sup> Report on Government Services 2013, p.8.4

<sup>7</sup> Queensland Corrective Services. (2009). *Growth in Prisoner Numbers*  
<[http://www.correctiveservices.qld.gov.au/About\\_Us/The\\_Department/Key\\_Initiatives/Lotus\\_Glen\\_Correctional\\_Centre\\_Expansion/refurbishment\\_and\\_expansion.shtml](http://www.correctiveservices.qld.gov.au/About_Us/The_Department/Key_Initiatives/Lotus_Glen_Correctional_Centre_Expansion/refurbishment_and_expansion.shtml)> at 5 October 5 2009.

<sup>8</sup>De Kretser, '\$500m prison not safer or smarter in a tight Budget' Media Release, 1 May 2012 *Smart Justice*  
<[http://www.smartjustice.org.au/resources/Budget\\_Prisons\\_Final](http://www.smartjustice.org.au/resources/Budget_Prisons_Final)> at 12 March 2013.

<sup>9</sup> Henderson, A 'Opposition claims new prison cost blowout' *ABC News Online* 24 November 2011  
<<http://www.abc.net.au/news/2011-11-24/20111124-prison-cost/3691368>> at 12 March 2013.

- c. how it relates to other concepts in current criminal justice policy such as ‘social impact bonds’; and
  - d. the likely effects of its introduction in the Australian context.
32. One of the main criticisms of JR is that it is conceptually vague and means different things to different people, so that apparent bi-partisan support is built on unstable ground.<sup>10</sup> The sparse academic analysis of JR in the US emphasises that “justice reinvestment is tailored to fit the dynamics of each participating jurisdiction, [such that] the range of strategies is appropriately varied”.<sup>11</sup>
33. In looking to the US model of JR, it must be recognised that the 3 tiered system of incarceration in the US, and the different county/state/federal responsibilities in relation to criminal justice means any simple translation of JR from the US to Australia is likely to be artificial. It is also important to acknowledge that generally higher imprisonment rates in the US (although they vary significantly from state to state, as they do in Australia), may mean that achieving substantial reductions in US imprisonment may be achieved more simply than in Australia. Research is needed to clarify these issues.
34. Furthermore, the lack of analysis of JR means that its imminent translation into the Australian context may involve major gaps in understanding about its fundamental precepts and potential pitfalls.
35. Consequently, prior to the adoption of JR in Australia, analysis of the theoretical footings and socio-historical context of the emergence and popularity of JR is required. The outcomes of the AJR Project will provide a platform to consider the relationship between theory and political programs in the criminal justice field. It may be that the groundswell of support for JR can be seen as a 'populist' response to diverse and widespread disillusionment with contemporary criminal justice. It might be that its lack of a clear

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

<sup>11</sup> Clear T (2011) ‘A private-sector, incentives-based model for justice reinvestment’ *Criminology & Public Policy* Vol 10(3), p.591.

meaning and established theoretical base are strengths rather than weaknesses, enabling it to operate as a 'floating signifier' in the political field.<sup>12</sup>

36. Another potential challenge arises because JR is allied with both 'evidence led' approaches to criminal justice policy and the increasing concern with fiscal imperatives or 'value for public money' in criminal justice policy and incarceration in particular. A major limitation of JR is that it avoids facing up to a long history of scholarship on the moral underpinnings of punishment, for example the Durkheimian view that punishment is not aimed primarily at affecting offenders but at defining and promoting community cohesion and a collective morality, or retributivist theory that punishment is deserved. It will be important to investigate the extent to which JR approaches can overcome a reliance on economic rationalities and cost benefit analyses and be connected to a range of ideas about the functions of punishment – retribution, rehabilitation, reparation etc, particularly in the Indigenous context.<sup>13</sup>
37. A further issue of note concerns the focus of JR on locations that produce high numbers of prisoners. It follows that some of these locations will be home to high numbers of Indigenous people. The JR process calls for a consciously democratic consensus-based approach to decision making in relation to the needs of high-stakes communities.<sup>14</sup> At first blush, this fits well with the observation of former Social Justice Commissioner Tom Calma that the only way that Indigenous service delivery and policy can succeed is through working in partnership with communities'.<sup>15</sup> However, it has also been noted that the "rhetoric about 'partnering' with communities, too often ... is not translated into communities having genuine involvement in decision-making about the solutions to their problems".<sup>16</sup> There is great need to explore whether the metropolitan bias of JR programs overseas can be rethought to allow it to deliver results to remote Australia, and to

<sup>12</sup> Tonry, M(2011) 'Making peace, not a desert: Penal reform should be about values not justice' *Criminology & Public Policy*, Vol 10(3), p.637; Clear T (2011) 'A private-sector, incentives-based model for justice reinvestment', *Criminology & Public Policy*, Vol 10(3), p.585.

<sup>13</sup> Willis M (2010) 'Indicators used internationally to measure Indigenous justice outcomes', *Indigenous Justice Clearinghouse Brief 8*, NSW Dept of Justice & Attorney General.

<sup>14</sup> Council of State Governments Justice Center, (2010) 'The strategy: How justice reinvestment works – Step 3: Quantify savings and reinvest in select high stakes communities.' *Justice Reinvestment*, <<http://www.justicereinvestment.org/strategy/quantify>> at 7 February 2013.

<sup>15</sup> Aboriginal & Torres Strait Islander Social Justice Commissioner, (2010) *Social Justice Report 2009* Australian Human Rights Commission, 2.

<sup>16</sup> NSW Ombudsman, *Addressing Aboriginal Disadvantage: the need to do things differently* (Oct 2011) 2.2.

consider what the structural assumptions or practices in JR are that might inhibit its usefulness in the Australian geographical context.

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

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

- Detailed thinking must be done about the political and geographical differences between the USA, where JR has had most traction, and Australia. For example, while JR involves a devolution of funding to local authorities, what does this mean in the Australian context? The levels of government that exist in Australia are not equivalent to those in the USA. What will devolution of funding and authority mean in the Australian context? Is there a metropolitan bias to JR programs overseas, which do not totally cohere with the realities of distribution of offending in the Australian geographical context? Can JR be rethought to allow it to deliver results to remote and rural Australian communities? The current limited availability of non-custodial options in remote and rural areas impact negatively on Indigenous imprisonment rates. How will the usual problems in remote service delivery be overcome in the roll out of JR?
- There is a pressing need to develop appropriate measures for the Australian context, and for over-represented groups, especially for Indigenous peoples. In the planning phase US programs are encouraged to use standardised risk-assessment tools<sup>17</sup> to guide decision making about how to reduce the use of incarceration while keeping communities safe. These tools continue to be controversial especially for use with women, and for Indigenous people.<sup>18</sup> US programs also draw on a ‘what works’ framework derived from empirical research; care needs to be taken in assessing whether the findings of such studies are generalisable to Australia. We also need to ensure that the measures used in evaluating outcomes are meaningful to the local community context and for target groups, especially Indigenous peoples.<sup>19</sup>

39. Once again, the AJR Project refers the committee to following sources which deal directly with this ToR:

- Brown, David, Schwartz, Melanie & Boseley, Laura (2012) ‘The promise of Justice Reinvestment’ *Alternative Law Journal*, Vol 37(2), pp.96-102

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<sup>17</sup> Clement, M Schwarzfeld M & Thompson M (2011) *The National Summit on Justice Reinvestment and Public Safety Addressing Recidivism, Crime, and Corrections Spending* Council of State Governments Justice Centre, New York, ch.2

<sup>18</sup> Hannah-Moffat, K (2009) ‘Gridlock or mutability: Reconsidering “gender” and risk assessment’ *Criminology & Public Policy* 8(1): 209–219.

<sup>19</sup> Willis M (2010) ‘Indicators used internationally to measure Indigenous justice outcomes’, *Indigenous Justice Clearinghouse Brief 8*, NSW Dept of Justice & Attorney General.

- Schwartz, Melanie (2010) 'Building communities, not prisons : justice reinvestment and Indigenous over-imprisonment" *Australian Indigenous Law Review*, Vol 14(1), pp.2-17

**G) The collection, availability and sharing of data necessary to implement a justice reinvestment approach**

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

41. The US Bureau of Justice Assistance requires that sites seeking grants for local JR projects can produce the following data:<sup>20</sup>

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

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<sup>20</sup> Adapted from 'Guidance for Submitting Phase 1 Letters of Interest for Local Jurisdictions' *BJA* <<https://www.bja.gov/Programs/JRILocalGuidance.pdf>> at 12 March 2013.

42. The data available within Australia varies between jurisdictions, and there is limited data in the public domain; data on the reception (admission) of inmates is crucial but is particularly poor and prison numbers are more commonly reported on the basis of census data which is too crude for the purposes of JR.
43. The AJR Project considers that the federal inquiry has the potential to make significant contributions to the advancement of data collection in Australia through:
  - a. the identification of the type of data that is currently collected by state and federal agencies,
  - b. the identification of any gaps in the collection of relevant data and statistics,
  - c. the direction for the appropriate agencies to begin collecting the required data and statistics, and
  - d. the determination of an appropriate mechanism for collating and making the data and statistics available.
44. One example of the type of data that would be useful to collect is the total number of prison receptions broken down by state and territory, gender, and by Indigenous and Non-Indigenous status. The census based 'one day' snapshots which are currently collected tend to over emphasise long term offenders and more serious offenders, whereas reception based statistics would provide a better impression of the number of offenders flowing through Australian prisons and more accurately reflect high remand populations and short term sentences.

#### **H) The implementation and effectiveness of justice reinvestment in other countries, including the United States of America**

45. Arguably in a range of jurisdictions conditions are favourable for a substantial reconsideration of criminal justice policy and a shift away from the popular punitiveness dominant since the mid 1980s.<sup>21</sup> The significance of the JR concept in this context is

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<sup>21</sup> Brown D (2010) 'The Limited Benefit of Prison in Controlling Crime' *Current Issues in Criminal Justice*, Vol 22(1), p.141.



evident from the impact it has had in the USA. With 1 in 100 adults incarcerated, and two-thirds of released prisoners returning to custody, America has the highest imprisonment rate in the world, and the national corrections budget is more than US\$60 billion per year. In the last 20 years spending on US prisons increased by more than 300 %, compared with an increase in spending on higher education of 125 %.<sup>22</sup>

46. The combination of skyrocketing costs and the global financial downturn has resulted in unusual levels of bipartisan support for more effective spending in the corrections context, including JR.
47. Seventeen US states have signed up with the Council of State Governments Justice Center to investigate or apply the JR model; others are pursuing JR through different avenues. The results have been striking: the initial JR pilot in Connecticut has resulted in the cancelation of a contract to build a new prison, realising savings of US\$30 million, of which US\$13 million has so far been reinvested into community based crime prevention initiatives.<sup>23</sup>
48. In the UK, commitment to JR has been expressed in Parliamentary Reports, although implementation is still in its infancy. The 2010 House of Commons Justice Committee (HCJC) Report, *Cutting Crime: The case for justice reinvestment*, argued that the criminal justice system “is facing a crisis of sustainability” and noted that “[t]he overall system seems to treat prison as a ‘free commodity’”.<sup>24</sup> The Justice Committee recommended capping the prison population at current levels, followed by phased reductions to two-thirds of the current population and a devolution of custodial budgets so that there is ‘a direct financial incentive for local agencies to spend money in ways which will reduce prison numbers’.<sup>25</sup> In 2011 the Institute for Public Policy Research released a report,

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<sup>22</sup> Council of State Governments, ‘The National Summit on Justice Reinvestment and Public Safety’, January 2011.

<sup>23</sup> Council of State Governments Justice Center (2010) ‘Connecticut: Overview’ *Justice Reinvestment* <<http://justicereinvestment.org/states/connecticut>> at 17 Dec. 2011

<sup>24</sup> House of Commons Justice Committee, (2010) *Cutting Crime: the case for justice reinvestment*, Committee Paper No 1, Session 2009-10 (2010) 6; Ministry of Justice (UK) (Dec 2010) *Breaking the Cycle: Effective punishment, rehabilitation and sentencing of offenders*.

<sup>25</sup> House of Commons Justice Committee (2010) *Cutting Crime: the case for justice reinvestment*, Committee Paper No 1, Session 2009-10, 143.

*Redesigning Justice*, which used the London Borough of Lewisham as a case study for how JR strategies might work.<sup>26</sup>

49. Nevertheless, caution is warranted as there has been very little academic or critical treatment of Justice Reinvestment.
50. Todd Clear has noted that the success of Justice Reinvestment strategies in the USA have been achieved despite the fact that it is an “an idea in progress rather than a full-fledged strategy”.<sup>27</sup> Shadd Maruna argues that the concept has been only “sort of” defined, is not based on a “strong empirical foundation” and does not really qualify being a proper “theory”.<sup>28</sup>
51. Therefore, while application of Justice Reinvestment strategies has led to significant savings in corrections costs in numerous states, Clear observes that “the implementation of these strategies has sometimes been problematic” and at this stage is largely unexamined.<sup>29</sup> The AJR Project will be visiting key JR actors in the US to obtain some insight into the implementation of JR and lessons to be gained for the Australian context.

**D) The scope for federal government action which would encourage the adoption of justice reinvestment policies by state and territory governments**

52. Though criminal justice systems in Australia are predominately state and territory based there is significant scope for the Federal government to take action. This includes:
  - a. the creation of an auspicing/oversight body including setting out its areas of responsibility;
  - b. advancing the early stages of JR in Australia by taking a lead role in the identification and collection of relevant data for provision to the auspicing body;

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<sup>26</sup> Institute for Public Policy Research (2011) ‘Redesigning Justice: Reducing Crime Through Justice Reinvestment’.

<sup>27</sup> Clear T, (2011) ‘A private-sector, incentives-based model for justice reinvestment’ (2011) *Criminology & Public Policy* Vol 10(3) p.587.

<sup>28</sup> Maruna S (2011) ‘Lessons for justice reinvestment from restorative justice and the justice model experience’ *Criminology & Public Policy* Vol 10(3) p.661.

<sup>29</sup> Clear T. (2011) ‘A private-sector, incentives-based model for justice reinvestment’ (2011) *Criminology & Public Policy* , Vol 10, p.590.

- c. coordination of research into the effectiveness of current community based programs;
- d. taking a leading role in encouraging states to embrace multi-partisan support for JR;
- e. provision of grants for relevant exploratory exercises such as mapping of community assets, exploring remote community models, investigating local authority options and developing relevant and meaningful measures of key concepts and for the purposes of evaluation.

**J) Any other related matters.**

53. Clearly, JR captures the deep disillusionment with nearly three decades of popular punitive approaches to law and order across the political spectrum and gives expression to the desire for more social and cost effective strategies to rebuild local communities blighted by crime.
54. However, in the absence of a robust conceptual unpacking of JR, it risks becoming an all-purpose slogan encompassing any vaguely rehabilitative program or concern, eliding its broader focus on building social cohesion in high crime neighbourhoods, or worse, operating as a cover for a strategy of disinvestment in state provision of prison and post release services.
55. The danger is that without a robust and critical consideration of the conceptual foundations of JR, Australia risks committing to a policy trajectory without a clear understanding of whether it fits the particular conditions that attend the high rates of imprisonment in Australian jurisdictions.
56. Ultimately, it will be very important for Australia to grapple with laying the conceptual foundations of JR and undertake an analysis of the uniqueness of the Australian penal context which will inevitably prove invaluable to considerations of whether the spectacular savings to corrections budgets and reinvestment in the high stakes communities achieved in the US, can be reproduced here.

***Signed by the Australian Justice Reinvestment Project***

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### Summary of attachments and corresponding terms of reference

Attachment	Reference	TOR
1	Cunneen, C., Baldry, E., Brown, D., Brown, M., Schwartz, M. and A. Steel (forthcoming) <i>Penal Culture and Hyperincarceration. The Revival of the Prison</i> , Ashgate, Farnham.	(a-d generally)
2	Baldry, Eileen, Brown, David, Brown, Mark, Cunneen, C, Schwartz, Melanie & Steel, Alex (2001) 'Imprisoning rationalities' <i>Australian &amp; New Zealand Journal of Criminology</i> Vol 44 pp.24-40.	(a-d generally)
3	Cunneen, Chris (2011) 'Punishment : two decades of penal expansionism and its effects on Indigenous imprisonment' <i>Australian Indigenous Law Review</i> , Vol 15(1), pp.8-17	(a), (c)
4	Brown, David (2010) 'The Limited Benefit of Prison in Controlling Crime' <i>Current Issues in Criminal Justice</i> Vol 22(1), pp.137-148.	(b)
5	Cunneen, Chris (2010) 'Fear: Crime and Punishment' <i>Dialogue</i> , Vol 29(2), pp.44-54	(b)
6	Stubbs, Julie (2011) 'Indigenous women in Australian criminal justice: Over represented but rarely acknowledged' <i>Australian Indigenous Law Review</i> Vol 15(1), pp.47-63.	(c)
7	Brown, David, Schwartz, Melanie & Boseley, Laura (2012) 'The promise of Justice Reinvestment' <i>Alternative Law Journal</i> , Vol 37(2), pp.96-102.	(e) & (f)
8	Schwartz, Melanie (2010) 'Building communities, not prisons : justice reinvestment and Indigenous over-imprisonment" <i>Australian Indigenous Law Review</i> , Vol 14(1), pp.2-17	(e) & (f)

# Australian & New Zealand Journal of Criminology

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## **Imprisoning rationalities**

Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz and Alex Steel  
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What is This?

## Imprisoning rationalities

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### Abstract

Imprisonment is a growth industry in Australia. Over the past 30–40 years all state and territory jurisdictions have registered massive rises in both the absolute numbers of those imprisoned and the per capita use of imprisonment as a tool of punishment and control. Yet over this period there has been surprisingly little criminological attention to the national picture of imprisonment in Australia and to understanding jurisdictional variation, change and continuity in broader theoretical terms. This article reports initial findings from the Australian Prisons Project, a multi-investigator Australian Research Council funded project intended to trace penal developments in Australia since about 1970. The article begins by outlining the notion of penal culture that provides the analytic lens for the project. It outlines various intersecting areas of study being undertaken before focusing on just three features of the contemporary penal field – restrictions upon presumptions of bail, the rise of post-sentence indefinite detention and the role of supermax confinement. Each in their own way exemplifies an aspect of and contributes to what we conclude to be the revalorization of the prison in Australian culture and society.

### Keywords

Australian prisons, imprisonment rates, penal culture, risk, sentencing

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## Introduction

Penological theory and research within criminology has been reinvigorated in recent years by the seemingly inexorable rise of prison populations in most Western nations. The terrain of this work has been marked out by important new ideas, such as the 'new penology' (Feeley and Simon, 1992), 'culture of control' (Garland, 2001) and 'new punitiveness' (Pratt et al., 2005), and more recently by claims about an emergent 'carceral state' (Gottschalk, 2008; *Social Research*, 2007). Underpinning this work has been a veritable drum roll of statistics, first signalled in the US by the arrival at a prison population of 1 million, but then in June 2002 it was recorded that 2 million (mainly young, mostly male, increasingly Black and Latino) bodies were behind bars, and so the counting continued. In Australia prison populations have been subject to many of the same upward pressures and, like the United States, this has involved significant over-representation of particular communities: in Australia most notably Indigenous people. Moreover, jurisdictional variations have also mirrored US patterns, with some places, such as the Northern Territory, imprisoning at rates amongst the highest in the world, while others, such as Victoria, seem almost models of Scandinavian-style restraint. Imprisonment in Australia thus exhibits many of the hallmarks of what has made the US such a crucible for recent work in penology.

Yet for reasons that are not wholly clear, Australian criminology has on the whole elided consideration of the place of growing prison use in penal politics and in social trends more broadly (but cf. Brown and Wilkie, 2002; Zdenkowski and Brown, 1982). One factor that seems to have impeded thinking about the Australian prison in national terms and surveying its influence at the national level is the fact that, unlike either New Zealand or England and Wales, the Australian prison stands atop eight different state or territory systems of criminal law and criminal justice. While the services of the Australian Bureau of Statistics and the Productivity Commission (through its annual Report on Government Services) have enabled Australian criminologists to look at correctional data in state-wise and national terms, it has been far more difficult to reconcile the apparently different social, political and cultural contexts within which the Australian prison is embedded and operates. It is in this context that the Australian Prisons Project was conceived. It is a multi-investigator, Australian Research Council funded, collaborative project designed as a way of bringing the Australian experience of prison development and reform together with broader penological theory, while at the same time breaking down the balkanized view of prisons in Australia by framing the project at a national, rather than state or territory-based, level. We aim in this article to indicate some of the key dimensions of penal change explored in the project. The remainder of the article is divided into two parts. We set out in Part I the idea of penal culture as the unifying theoretical frame through which we explore Australian developments in penalty since the start of the 1970s. We follow this in Part II with an analysis of some of the key changes across different areas of penal change including bail, preventive detention and the use of secondary punishment. Each of these, we believe, is key to understanding not only the shape of recent Australian imprisonment *practices* but also the way prisons in Australia have come to operate as important *cultural* institutions and signifiers of wider social forces and trends.



## I. Penal culture

An understanding of penal culture allows us to explore the public sensibilities that underpin the penal values of a particular society. We use the notion of 'penal' in the context of a wider concept of penalty which refers to the broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment. It is a view that sees punishment as far more than a calculative task by sentencers or a technical apparatus administered by experts. Similarly penalty implies a study of punishment that extends beyond the effects on a discrete offender to the social meaning and cultural significance of punishment.

The phenomenon of punishment is not a singular object of study. There is a variety of often contradictory and competing discourses on punishment including judicial decisions, parliamentary reports, commissions of inquiry, media and popular culture depictions, government policy, academic research and prisoner activist voices. The concept of penalty allows us to approach this broader, complex and multidimensional realm of punishment, and understand the connections to legal, social, political and economic policy, while seeing the influence they have on punishment and the social field more generally. In this respect we can refer to representations of imprisonment in films like *Stir* (1980), *Ghosts of the Civil Dead* (1988) and *Chopper* (2000) to locate prison imaginings in their historical and social context and to look at them in light of Michelle Brown's (2009) notion of 'penal spectatorship'. The three films spread across three decades show different understanding of penalty: the emergence of prisoners as political subjects in the 1960s and 1970s; the more general shift in penal culture from a rehabilitative ideal prior to the containment and 'nothing works' emphasis of the 1980s; and, finally, a key transformation in late modernity – the rise of celebrity to replace notions of class or traditional conceptions of authority.

The concept of culture is more difficult to define than penalty. It is more widely used in both everyday language and in academic discourse. It is used as an analytical concept or tool (referring to meaning through symbols, language and other signifiers), and as a description (referring for example to prison culture, youth culture, or a national culture). Garland (1991, 2001, 2006) has provided the most systematic use of the concept of culture in relation to punishment. For Garland, punishment is a cultural artefact which embodies and expresses society's cultural forms (1991: 193). Culture includes both 'mentalities' (intellectual systems and forms of consciousness) and 'sensibilities' (structures of affect and emotion). Socially constructed sensibilities and mentalities form the cultural patterns that influence how and why we punish and structure the way we 'feel' about offenders and their punishment. Mentalities provide an intellectual framework which explain and justify why and how we do and do not do certain things as punishment (assess, classify, segregate, train, etc.). Cultural sensibilities rule in some forms of punishment as 'appropriate' and rule out others as 'unthinkable' (for example, as cruel, barbaric, repugnant).

Garland argues that our approach to cultural analysis should not be limited to textual or discourse analysis – although documents and rituals are the most obvious – and perhaps the easiest sites for understanding culture. He suggests extending analyses into areas that are less convenient methodologically such as technologies, spatial arrangements and bodily postures. He makes the point that the cultural domain is not

exclusively discursive in so far as it can be exemplified in ritual practices, and modes of behaviour. In this context Norbert Elias's (1984) work on the civilizing process is also of interest to our project. In Elias's detailed examination of changing norms, expectations and behaviour, he characterizes the trends he identifies over several centuries as a 'civilizing process'. There is no moral prescriptiveness in Elias's work – by the term 'civilizing' he seeks to thematize changing patterns of behaviour and cultural values over time. These patterns include 'a tightening and differentiation of the controls imposed by society upon individuals, a refinement of conduct, and an increased level of psychological inhibition as the standards of proper conduct become ever more demanding' (Garland, 1991: 217–218; see also Pratt, 2002).

We emphasize the point, however, that seeing punishment as a cultural artefact, as a cultural expression should not be divorced from: 'the fact that punishment is also, and simultaneously, a network of material social practices in which symbolic forms are sanctioned by brute force as well as by chains of reference and cultural agreement' (Garland, 1991: 199). In other words, seeing punishment in terms of cultural expression does not exclude analysis of power, material interest and social control. Indeed we argue the necessity of combining these differing levels and modes of analysis. Lacey (2008) for example insists on the need to combine cultural analysis and political economy. She argues that the rise of penal populism does not characterize all late modern democracies. 'Rather certain features of social, political and economic organisation favour or inhibit the maintenance of penal tolerance and humanity in punishment' (Lacey, 2008: xvi). She maintains that an analysis of the political-economic system as well as the cultural climate is necessary for understanding the institutional processes which frame criminal justice policy.

We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penalty defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations. How we understand appropriate or acceptable punishment is contextualized within broader social and cultural norms. The way we punish offenders is understood within particular cultural boundaries which define gender, age, race, ethnicity and class. These boundaries are not static. They are constantly being drawn and redrawn, and penalty itself plays a part in constituting these relations. We highlight this issue with respect to Indigenous people, women and people with mental illness.

Our cultural understandings of 'Aboriginality' have permeated the development of penalty in Australia with formal and informal differences in punishment existing from the 19th century through to the present. Some historical examples include the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the 20th century. The segregation of penal institutions along racialized lines has also been commonplace. Historically these different modes of punishment were justified by (and reproduced) racialized understandings of Aboriginal difference (Cunneen, 1993).

Today we understand both sentencing and punishment through concepts of race and culture: witness for example the consideration of the Aboriginality of an offender in sentencing (instantiated in the *Fernando* principles: *R v Fernando* [1992]) or the growth in

Koori, Nunga and Murri courts, circle sentencing courts (Marchetti and Daly, 2007) and Indigenous prisons such as Balund-a and Yetta Dhinikal in New South Wales. Yet within this context of cultural definitions and understandings of 'Aboriginality', we have also seen Indigenous Australians' imprisonment rates rising rapidly. In the 20 years to 2008 Indigenous imprisonment rates rose from 1234 to 2492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at almost half the rate, from 100 to 169 per 100,000 of population (Australian Bureau of Statistics, 2008; Carcach and Grant, 1999; Carcach et al., 1999).

The increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time (Fitzgerald, 2009), something the noted increases in cultural expressions and recognitions of Aboriginality have done little to ameliorate. Indeed discourses speaking to the implied primitiveness of Aboriginality have re-emerged. Witness the Howard Government's Crimes Amendments (Bail and Sentencing) Act in 2006. Presented as a response to family violence in Indigenous communities, it actually restricts courts taking customary law into consideration in bail applications and when sentencing.

The extraordinary growth in women's imprisonment clearly reflects a changed environment in our cultural understanding of the appropriateness of gaol for women. While debates in the 1980s were still focused on drastically reducing the number of incarcerated women and emphasized the importance of alternatives to custody, contemporary penal discourse on women no longer seems to identify any *particular* barriers to imprisonment based on gender, and while it may identify specific criminogenic needs for women, prison itself is seen as no less appropriate punishment for women than it is for men. In this climate women's imprisonment rates have increased rapidly. In 1983 women formed 3.9 per cent of the Australian prisoner population, in 1993 the proportion was 4.8 per cent, in 2003, 6.8 per cent and in 2009 it was 7 per cent (Australian Bureau of Statistics, 2010; Biles, 1984; Walker, 1982–1990). Incarceration rates for Indigenous women have been far greater than for non-Indigenous women. The most recent longitudinal comparison was made in 2006 when the proportion of Indigenous women prisoners had increased from 21 per cent of all women prisoners in 1996 to 30 per cent in 2006 (Australian Bureau of Statistics, 2006). The rate of Indigenous women's imprisonment in 2009 was 359 per 100,000 of adult Indigenous females compared with 16 for non-Indigenous females (Australian Bureau of Statistics, 2010). Changing sensibilities about both race and gender have clearly impacted on the propensity to incarcerate Indigenous women.

Similarly the available data would suggest that warehousing large numbers of people with mental health issues has become normalized. Internationally, the evidence shows that the rate of prisoners with mental health disorders has been increasing. Although there are no longitudinal Australian data on this, the perception amongst correctional authorities and service providers is that numbers and proportions have increased over the past two decades (White and Whiteford, 2006). In recently gathered data, people with these disabilities are significantly over-represented amongst prisoners when compared with the general population, with rates three to six times higher (Butler et al., 2006). Persons with complex needs are even more likely than those with a single diagnosis to be caught in the imprisonment cycle (Dowse et al., 2009) and women with mental health disorders are more highly over-represented amongst the prison population than men (Butler et al., 2006).

Even if we accept Harcourt's (2006: 1752) argument of 'the remarkable continuity of confinement and social exclusion' which has characterized the use of asylums, mental hospitals and prisons over the 20th century, a significant cultural change has occurred from the 1960s and 1970s with the reduction in mental hospital admissions (Doessel, 2009), the closure of mental institutions and the effective transfer of large numbers of the mentally ill to prison. Although the problem in official discourse is often defined as one of providing appropriate treatment for the mentally ill in prison, there is far less questioning of the role of prison itself as an institutional response to mental illness.

Much criminological work has attempted to explain the changing penal responses to Indigenous people, women and people with mental illness, including: the role of substance abuse, disadvantage and poor health (Wundersitz, 2010); racism, discrimination and the impact of colonization (Cunneen, 2009); psychiatric and intellectual disability deinstitutionalization (Aderibigbe, 1996), leaving the poor and disadvantaged with complex needs to become homeless and offend (Rose et al., 1993); and the large number of negative policy and legislative changes over the past 20 years (Baldry et al., 2008; NSW Legislative Council Inquiry into the Increase in Prisoner Population, 2001). Yet we believe a focus on penal culture will encourage a broader and more historically sensitive approach to the relationship of vulnerable groups to mechanisms of punishment and control. We are inclined to see current arrangements not simply as the result of changing 'policy settings' but also as the genealogical descendents of major cultural forces shaping Australian society.

There are various dimensions of penal culture that are of particular interest to us in the Australian context. We do not attempt to cover all the potential sites of penal culture in this article. Rather we focus on a number of key areas including the rise of risk-thinking through specific rationalities and practices such as the legitimization of pre-trial detention; definitions of dangerousness; and the acceptance of incapacitation for particular types of offenders.

## **II. Rationalities and practices of risk and danger**

The cultural meanings, which imbue and are conveyed by penalty also reproduce ideas about the psychology and ontology of individuals, those defined as criminal, as terrorist, as justifying preventive detention or an unacceptable risk, as well as those defined as 'normal'. These cultural meanings address us as moral agents, as rational and responsible individuals, or perhaps as those without moral agency, as beyond redemption. We might consider in this context three influences in redefining penalty and revalorizing the prison in contemporary Australia: the removal of presumptions in favour of bail, the use of preventive detention and the influence of the war on terror.

### ***Restricting bail and increasing imprisonment***

The use of remand has grown significantly in all Australian jurisdictions since the 1970s with an increase in the use of remand as a percentage of imprisoned people rising from 7.8 per cent in 1978 to 23 per cent in 2008 nationally, and to 35 per cent in the Northern Territory (ABS, 2008; Biles, 1990). This dramatic increase has had a significant impact on overall prison numbers. For example, the NSW Bureau of Crime Statistics and

Research found that 25 per cent of the increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by more Indigenous people being remanded in custody and for longer periods of time (Fitzgerald, 2009).

But beyond the impact on prison numbers, remand is a useful prism through which to view penal culture for a number of reasons. First, it is a fundamental principle of criminal law that a person cannot be legally punished unless they have been found guilty of a crime. This means that in order to keep a person in custody on remand, a court must rely on reasons other than those associated with punishment. Historically, the primary justification for remand was a fear that the accused would flee the jurisdiction. The extent to which modern bail legislation provides additional reasons to refuse bail illuminates the further uses to which non-punishing imprisonment is currently put.

Secondly, remand and bail was historically a discretion exercised by courts and the extent to which that discretion has been constrained or re-directed by government provides an insight into the ways in which a changing penal culture has seen increased attempts to directly influence the operation of the courts. Thirdly, a comparison between the degree of government intervention through bail legislation and the prevailing remand rates in specific jurisdictions provides some measure of the extent to which attempts to control or influence judicial decision-making are accepted or resisted by individual judicial officers. This provides some insight into the dynamics of penal culture as it is played between government and the judiciary. Fourthly, the combination of these factors permits a reflection on whether national trends and a national penal culture can be ascertained, at least as it is reflected in approaches to bail, or whether there is instead an atomistic jurisdiction by jurisdiction approach to imprisonment.

We have approached bail and remand through a focus on the nature and scale of legislative intervention since the 1970s to compare this with existing research on remand numbers and jurisdictional cultures. The method used has been to analyse the number of discrete Acts of Parliament that amend the existing Bail Acts and which contain provisions that either change presumptions in relation to bail or create additional conditions to be considered before granting bail: in other words, amending legislation that can be seen to be punitive in nature.

From the late 1970s the law on bail was codified, with most jurisdictions introducing a presumption in favour of bail of varying strength. Legislative amendment since the time of introduction has overwhelmingly seen a retreat from that position, with jurisdictions increasingly limiting the discretion of courts to grant bail. As legislatures retreat from the presumption in favour of bail, they have done so by focusing either on a particular characteristic of the accused, or the type of offence with which they have been charged. While the codification of bail laws were done as a result of a thorough reflection on the role of remand in the justice system and its broader social impacts, many of the amendments since the 1970s have been political responses to horrific crimes, and have lacked any stated reference to broader impacts.

Restrictions on the availability of bail by requiring judicial examination of particular characteristics of individuals – such as flight risk, propensity for violence, lack of community ties – will inevitably be applied on a case-by-case analysis and provides for politicians little *a priori* definiteness of effect in a law and order climate. Consequently, most restrictions on bail have concentrated on more simplistic restrictions

based on the type of offence charged. Initial exceptions to the presumption concentrated around the most violent of offences – armed robbery – and burglary.

Restrictions on bail eligibility can be seen to mirror broader penal concerns about danger and risk associated with particular types of offenders and crimes. Beyond armed offences, one of the first categories of crime to have presumptions against bail were drug offences, and since the 1980s the availability of bail for those accused of these crimes has been increasingly tightened – on five separate occasions in NSW. A similar progressive tightening of bail for those accused of domestic violence offences has occurred since the later 1980s. Western Australia and NSW have also been at the forefront of removing bail eligibility for those accused of being repeat offenders. These restrictions on bail provide for simple, strong political statements about ‘locking up’ ‘offenders’ but have the potential to incarcerate large groups of accused without proper analysis of whether such deprivation of liberty achieves any justifiable social ends.

As noted, across Australia the degree of legislative intervention into judicial discretion has varied markedly. New South Wales has been the most interventionist jurisdiction. In the period 1992–2008, NSW passed no less than 23 amending pieces of legislation containing punitive elements. This was completely out of step with other Australian jurisdictions: the ACT (9); Western Australia and Northern Territory (7); Victoria (6); South Australia (4); Queensland (3); and Tasmania (1). This raw statistic alone suggests that NSW may well be an example of penal exceptionalism within Australia.

One might therefore expect NSW to have the highest rate of remand per 100,000 adult population, and South Australia one of the lowest. However the figures show that while all remand rates show a strong trend upward since the 1970s, South Australia’s rate remains consistently higher (43.5 in 2004) than the national average (20 in 2004), while Victoria has consistently the lowest rate (15.9 in 2004) (Sarre et al., 2006, citing ABS, 2005). There are differences in the basis on which eligibility for bail is determined between these jurisdictions, but not differences that would produce this widely divergent result.

Research by Bamford, King and Sarre (1999) has demonstrated that the key to the higher remand rate in South Australia lies in the less transparent procedures and more punitive attitudes of police and bail granting authorities in South Australia. This suggests that parliamentary intervention is relatively ineffective in reducing imprisonment rates, if the courts do not share that goal.

On the other hand the degree of intervention by NSW appears to parallel significant rises in the NSW remand population (Lulham and Fitzgerald, 2008). This is perhaps unsurprising in that as parliaments remove a court’s discretion to release an accused on bail, remand rates would be expected to rise. Such an outcome does however require a predisposition to oppose discretionary bail by law enforcement, and suggests that police in NSW are supportive of the parliamentary intention to restrict bail eligibility. It also suggests that while parliaments might well be able to directly increase rates of incarceration, their overall ability to influence the practices of police and courts may be more limited.

**Indefinite detention and the expansion of post-sentence supervision and detention**  
Provisions for the indefinite detention of serious offenders are a longstanding feature of Australian criminal justice systems, most notably evidenced in the sentence of life imprisonment. The idea of imprisoning people indefinitely by means other than a life sentence,

however, has risen and fallen in favour over time. At the turn of the 20th century all Australian states adopted indeterminate sentencing laws modelled upon the Habitual Criminals Act 1905 (NSW). Around mid-century anxieties about the psychopathic offender became prominent and were reflected in the emergence of defective offender statutes and revisions to habitual offender legislation, traces of which remain today, such as in Queensland's *Criminal Law Amendment Act* 1945 and NSW's Habitual Criminals Act 1957. Yet by the 1980s most of these had fallen into disuse or irrelevance. As early as 1968 Victoria's Director of Prisons was able to describe the state's indefinite detention provisions as a dead letter, with only one offender having been sentenced under s. 537 of the Crimes Act 1958 (Vic) in the whole preceding decade (Daunton-Fear, 1969).

Yet within quite a short time the idea of indefinite detention reappeared. This began in the context of concerns about the threat posed by violent offenders (mirroring contemporaneous debates in the UK; Floud and Young, 1981; Gunn and Farrington, 1982). It took form in ad hominem legislation directed at specific violent individuals in Victoria (Garry David in 1990) and NSW (Gregory Kable in 1994), with each case reflecting the politically charged status of violent offenders at that time (for a discussion see Gerull and Lucas, 1993). This period also saw a progressive re-introduction and shoring up of indefinite sentencing options across Australian states and territories. Nevertheless, it was still possible in 2000 for Arie Freiberg, a long-time observer on sentencing matters, to remark that the history of indefinite detention laws in Australia showed them to be 'almost completely irrelevant to the control of criminal individuals or populations' (Freiberg, 2000: 58). Such was Freiberg's faith in judicial distaste for such laws he felt able to proffer the view that despite the recognized 'failures' and 'inadequacies' of the criminal justice system, Australian 'judges... were not prepared to countenance legislative alternatives which were regarded by them as being more dangerous than the dangerous they sought to govern' (2000: 58). One question we have asked in the Australian Prisons Project is whether or not that conclusion is still valid. To answer this question we need to break it into two parts. First, has indefinite detention continued to be a minor feature of the Australian penal landscape, albeit in ways that mirror established state and territory jurisdictional differences in approach to punishment (such as those reflected in remand practices)? And second, has the judicial resistance to preventive and predictive confinement, so noted by Freiberg and instantiated in the High Court's decision in the case of *Kable*, been maintained? The answer to the first question in fact is relatively straightforward. The use of indefinite sentences does indeed mirror existing jurisdictional differences in punishment. New South Wales, Queensland and Western Australia, for example, all embrace in a comparatively strong way forms of preventive confinement achieved through the sentencing process, while Victoria, despite being a large state with indefinite sentencing provisions on its books since 1993, makes very little use of this tool. Overall, rates of sentenced preventive detention fell during the 1990s and have remained stable since then. So it is to the second question that we now turn.

### *Post-sentence preventive confinement*

It is in the area of post-sentence preventive confinement that the greatest change and expansion in prison use for indefinite, preventive purposes has occurred. The development of Australian post-sentence supervision and detention schemes is now fairly well

documented and critiqued (e.g. Doyle and Ogloff, 2009; McSherry and Keyzer, 2009). These schemes provide for the continued detention, or intensive community supervision, of sex offenders who would otherwise be released at completion of a finite sentence of imprisonment. Five Australian states now have such provisions, beginning with Queensland in 2003, then South Australia in 2005, NSW and Western Australia in 2006 and finally Victoria, which since 2005 had had an extended supervision regime, in 2010. While supervision under these schemes might appear *prima facie* a lighter penalty, the Victorian experience indicates otherwise. Supervision in the community often proves impossible, leading to individuals being housed within a prison, or in prison-like circumstances, in a manner that the Victorian Supreme Court described as making citizens 'a prisoner in all but name' (*TSL v Secretary to the Department of Justice*, 2006). Data on the uptake of this new penal option has also been rather more difficult to obtain than might be expected, given the overtly populist impulse that appears to lie behind the new measures. Table 1 shows the number of Australian citizens held under preventive, post-sentence, detention or supervision arrangements in the five states where such measures are available.

The expansion of this new form of penal confinement has been quite rapid. For instance, between 1992 and 2009 the Queensland courts handed down 36 indefinite sentences, or roughly two per year. Yet between 2003 and 2009, as Table 1 indicates, those courts granted 81 post-sentence supervision or detention orders. In October 2009 31 sex offenders were under an order of post-sentence indefinite detention, either directly or through breach of supervision conditions, equating to roughly four and a half indefinite detention orders per year: more than double the rate at which similar sentences were handed down for all types of offending. It must also be noted that Table 1 provides raw figures, not accounting for total eligible population. Thus, while NSW and WA are almost equivalent in the number of applications granted, NSW has a general population three and a half times greater than WA.

**Table 1.** Post-sentence detention and supervision in Australia

	NSW <sup>1</sup>	Vic <sup>2</sup>	Qld <sup>3</sup>	SA <sup>4</sup>	WA <sup>5</sup>	Aust
Applications made to date	44	—	94	38	29	165
Applications granted	28	45	81	10	27	191
Supervision: no. currently serving	27	26	46	n/a	10	109
Detention: no. currently serving	2	n/a	31	10	14	57

Source: Individual jurisdictions

Notes: <sup>1</sup> At September 2009. <sup>2</sup> At mid-year 2009. Detention not available until January 2010. Application data not released. Detention facilities are provided at Ararat Prison for up to 40 people on supervision orders who cannot be placed in the community. <sup>3</sup> At October 2009. Number serving detention orders comprises 19 ordered to indefinite detention plus 12 detained following breach of community supervision conditions. <sup>4</sup> At September 2010. A further three applications are pending. <sup>5</sup> At June 2010. Number serving is reduced by two individuals deceased. Two further applications, pending resolution have resulted in one interim continuing detention order and one no-order, so true total is 31 applications. Three applications were dismissed, but one dismissal overturned on appeal. One supervision order expired with no application for renewal.



We are thus left with a complex picture of indefinite detention in modern Australian imprisonment. While the use of indefinite sentences declined during the 1990s and has remained fairly stable since, new post-sentence detention schemes offer a potentially more expansive role for penal confinement. How such schemes alter imprisonment practices is something we are only just beginning to discern. But the growth of these measures does point to one more feature in a changing cultural landscape of imprisonment, wherein the prison is increasingly imagined as a viable solution to unsavoury and disagreeable characters as well as to criminal offending itself.

### *Effect of terrorism: 'Supermax', 'radicalization' and 'policy transfer'*

One significant development in the international political landscape over the last decade, heightened by the September 11 2001 terrorist attacks in the USA, has been the way the spectre of terrorism and the technologies of risk and the politics of fear they engender, have generated an increasing emphasis on issues of 'national security'. Fear of terrorism has been the justification for a range of security based measures, practices and discourses, including a raft of anti-terrorist legislation creating new criminal offences, extensions of police powers, and the use of preventive detention. Domestic criminal justice processes have been subject to a politicization, manifest in overreaching claims of executive sovereignty, lack of respect for the separation of powers, political trumping of judicial decisions and the use of the criminal process, the courts and the correctional system as 'a form of political theatre' (Brown, 2009: 63). In the penal sphere the terrorism debate and the imprisonment of a number of people charged with, and in some cases convicted of terrorist related offences, has generated three key developments.

First it has given prominence and legitimacy to the relatively new figure of the 'supermax' prison. 'Supermax' refers most commonly to a high security unit within an existing prison to which those both remanded for trial and convicted of terrorist related offences, along with a diverse range of other high security classification prisoners, are sent, such as Goulburn High Risk Management Unit (HRMU) in NSW and Melaleuca and Acacia units at Barwon prison in Victoria. Second it has generated concerns about 'radicalization', fears that prisons may become terrorist incubators as terrorist sympathizers in prison recruit other prisoners to the cause. Third it is seen as a stimulus for a globalizing tendency in penal regimes through which a range of security measures and regime developments are 'imported' in the process of an (often US inspired) policy transfer.

Investigation of these issues as part of the Australian Prison Project has thrown up a number of difficulties and highlighted the central role of culture and the pertinence of local history in determining the way these developments unfold in the Australian context. In relation to 'supermax' for example, there is a real question as to whether this is simply a vague, catchy, cultural, media and political label for an institution in Australia that has a history going back to colonization, when places and regimes of 'secondary punishment' were a key component of convict society; 'secondary' because most of those suffering these regimes were 'doubly convicted', transported for an offence in Britain and then convicted of another offence in the colony. Then, as now in 'supermax', the consequences of prolonged isolation were frequently mental disintegration, self harm, suicide and violence (Davis, 1996; Haney and Lynch, 1997).

Post-colonization, most State and Territory penal systems contained specific prison units, wings, or whole prisons, designated as high security, punishment and 'trac' regimes, frequently exhibiting an historical 'progression' from overt physical brutality, such as is well documented in relation to Grafton in NSW (Nagle, 1978; Zdenkowski and Brown, 1982) and Pentridge H Block in Victoria (Jenkinson, 1973–1974; Edney, 2006), through to isolation based sensory deprivation regimes such as those at Katingal and the Goulburn HRMU in NSW (Funnell, 2006) and Jika Jika and Barwon in Victoria (Carlton, 2008). These units were sites of state terror, exercised largely in secret, no longer aimed at shoring up either convict labour or wider class relations, but justified as necessary to keep a minority of 'intractables' or the 'worst of the worst' under control, and to provide a deterrent to resistance in the wider prison system. To what extent then is 'supermax' something 'new', an example of US policy transfer, and to what extent is it merely a 'rebadging' of long established secondary punishment traditions and institutions?

#### Regime change by policy transfer?

It has proved difficult to obtain information detailing specific technological, design, hardware, practices, programmes or regimes which can be shown to be recent imports into Australian high security units directly from the US by way of policy transfer, apart from the label supermax itself. The use of orange jump suits for certain high security prisoners, the adoption of particular shackles, new classifications of prisoners, increased electronic and other surveillance, may have been influenced by US developments, although some of these may have happened anyway; some, such as the shackles, have long local pedigrees (Derkley, 1995).

Risks associated with terrorism may be influencing the design of new prisons, even in relation to local prisons conceived and marketed as medium security 'community prisons' (Kempsey in NSW for example). Such prisons are strengthened against *external* attack as well as internal revolts, hostage taking and escapes, and the capacity to seal off sections of prisons is enhanced. New classifications have been introduced in several States; in NSW for example an AA (men) and Category 5 (women) classification was introduced in the Crimes (Administration of Sentences) Regulation 2001.

Longstanding techniques such as strip searching have become more frequent and intrusive, but not just in high security sections (McCulloch and George, 2008) and urine testing has been stepped up. DNA samples may be taken by force if prisoners are not compliant. There has been a significant upgrading of high tech security devices across Australian prisons, including forms of biometric identification of visitors. Tighter restrictions are evident on access to communications, visitors, reading matter, and there is increased concern about mobile phones and religious practices.

Further research is necessary to discover the extent to which there are links between these developments and US 'supermax' practices or the new 'war prisons' (Butler, 2004) such as Guantanamo Bay. Probably the clearest example of 'national security' and 'terrorism' concerns impacting on high security prison regimes in Australia is the strengthening of liaison between prison management and police, military, security and intelligence agencies, especially in relation to concerns over 'radicalization' in prison. There has been some sensationalist media coverage of the issue of 'conversions' of prisoners to Islam and potentially to terrorist sympathies (Australian Federal Police, 2006),

reflected in stories like 'Hard men turn to Islam to cope with jail, Goulburn's super mosque' (*Sydney Morning Herald*, 19 November 2005).

While the numbers of prisoners charged with or convicted of terrorism related offences in Australia is currently small, the significance of the terrorism and national security debate on penal practices and cultures is potentially greater. The vaguely defined but highly politicized and media hyped figure of the supermax, despite its links with colonial histories of secondary punishment and 20th century high security units, which were much more widespread, provides an apparently 'new' justification for a range of 'security' practices. The figure of the 'terrorist' as an alien radicalizer and enemy can serve to reconfigure older classifications such as the 'intractable' and 'worst of the worst', to obscure increasingly restrictive and isolating practices in high security regimes, and to hinder the opening up of such regimes to democratic scrutiny, accountability and the treatment of their inhabitants as political subjects exercising discursive citizenship (Brown, 2008).

## Conclusion

The Australian penal landscape has changed significantly over the last three or four decades, the period that forms the focus of the Australian Prisons Project. Much of what has changed we have been unable to touch upon here, such as the nature, location and quality of prison buildings, the daily regimes of prison time or the provision of work, rehabilitation or post-release programmes for prisoners. What we have attempted to set out in this article has been a broader picture, mainly the relentless expansion, over these decades of the penal estate, the penal complex, the imprisonment machine. More people are in prison, both in number and per capita, than might have been imaginable in 1970. When in 1968 the Victorian Director of Prisons declared the state's indefinite sentencing legislation a dead letter, he possibly could not have imagined the vigour with which post-sentence, predictively based, continuing detention schemes would be taken up just over 30 years later. Yet as our discussion of the ever expanding rates of penal confinement of Indigenous Australians and the development of 'supermax' style secondary-punishment units have indicated, many current developments in Australian punishment have complex origins. The sources of such policies might be found at one level in contemporaneous debates on public protection, security, or the intransigence of certain types of crime. But much of what we find in contemporary Australian penal practice also has distinct lineages and connections with earlier attitudes and practices. We have been working with the idea of penal culture as a way of capturing the polyvalent quality described here, where new developments are at once immediately contemporary yet, upon closer reflection, also clearly continuous with earlier patterns of thought and forms of social organization and practice.

But the Australian Prisons Project has also found evidence of changing rationalities of imprisonment in Australia. At least in some sectors of public life, over-imprisonment is increasingly being defined as a problem that needs to be addressed. The ideas of 'justice re-investment' and 'penal moderation' are two rationalities that argue for a reduction in the use of imprisonment. Much of this argument is based on an economic model of increased *efficiency* in the use of public resources. Justice reinvestment is an emerging approach to over-imprisonment that calculates public expenditure on

imprisonment in localities with a high concentration of offenders and diverts a proportion of the expenditure back into those communities to fund initiatives to reduce rates of offending (Pew Centre, 2007). The idea is that under justice reinvestment the channelling of funds away from communities into prisons is reversed; money that would have been spent on housing prisoners is diverted into programmes and services that can address the underlying causes of crime in these communities. In January 2010, the UK House of Commons Justice Committee (2010) recommended that prison numbers be cut by a third through the utilization of justice reinvestment. In Australia recent federal government inquiry reports (Legal and Constitutional Affairs Committee, 2009), human rights reports (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010) and political party policies (Australian Greens, 2010) have called for an introduction of justice reinvestment strategies. We have yet to see whether a changing rationality of punishment based partly in economic efficiency and partly in appeals to community development will change the cultural place of the prison in the Australia.

Finally, it has been a central aim of this project to view and think about imprisonment in Australia at a national level. Given the sorts of findings reported here, to what extent has this been a productive approach? Can we usefully talk about an Australian penal culture in the face of significant variations in prison rates and practices amongst the states and territories? And as we utilize the analytic concept of culture across the penal field in Australia – perhaps thinking, for example, of bail legislation and trends in custodial remand – can we legitimately say the culture analytic amounts to more than a hold-all category through which distinct state-wise variations of approach and practice are re-described? On the other hand can some of the directions we discuss, such as Indigenous imprisonment, be best understood using a national lens. Certainly these questions of analytic scope and power are not unique to penal culture itself. As the reviews of Loic Wacquant's (2009) *Punishing the Poor* by David Brown and by John Pratt elsewhere in this issue illustrate, it remains unclear whether the idea of a neoliberal penalty can contain the many variations in discourse and practice to be found across Western polities. One important outcome of the Australian Prisons Project will be a better sense of the extent to which both the modernist notion of the nation state – of a coherent and integrated Australia – and the analytic device of penal culture together provide useful insights into the trends and crosscurrents of penalty in our society.

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# PUNISHMENT: TWO DECADES OF PENAL EXPANSIONISM AND ITS EFFECTS ON INDIGENOUS IMPRISONMENT

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## I Introduction

There was optimism at the time of the Royal Commission into Aboriginal Deaths in Custody ('RCADIC') that Indigenous imprisonment rates would be reduced. Indeed a core finding of the Commission had been the need to reduce Indigenous custody and imprisonment, and the consequent over-representation of Indigenous people, as a way of addressing the large number of Indigenous deaths in custody. However, over the last two decades Indigenous imprisonment rates have grown significantly rather than declined.

In 2001, I reviewed the first decade after the RCADIC and noted that there was ample evidence to demonstrate that the results of the Royal Commission were not as we might have expected.<sup>1</sup> The first decade post-RCADIC highlighted at least four areas where there was failure to achieve the desired outcomes of the Royal Commission. These included:

- the continued over-representation of Indigenous people in the criminal justice system;
- that Indigenous deaths in custody remained at high levels;
- that the recommendations of the Royal Commission were often ignored; and
- that there had been a drift into a more punitive 'law and order' society.<sup>2</sup>

The failure to solve the problematic relationship between the criminal justice system and Indigenous people was most graphically illustrated in the climbing imprisonment rates throughout the 1990s. In summarising these changes, the Australian Institute of Criminology concluded that in the decade from 1991 the number of Indigenous and non-Indigenous prisoners increased at an average annual rate of

eight per cent and three per cent respectively, and the level of Indigenous over-representation within the total prisoner population had steadily increased.<sup>3</sup> Imprisonment levels had risen for everyone in Australia during the 1990s, but for Indigenous people the increase was on top of an already high rate, and had occurred at a time when the major policy thrust of the Royal Commission was to *reduce* imprisonment levels.

During the first decade after the RCADIC, there were three independent national evaluations of government responses to the Royal Commission recommendations. All three reports were critical of implementation processes by government. The *Justice Under Scrutiny* report prepared by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs<sup>4</sup> addressed the issue of diversion from custody and was critical of government implementation of recommendations in this area. It noted a failure to remedy institutional racism in some police forces. The *Indigenous Deaths in Custody 1989–1996* report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner<sup>5</sup> examined 96 Indigenous deaths in custody during the period 1989–1996 and found that on average there were between eight and nine Royal Commission recommendations breached with each death in custody. The most frequent breaches occurred in Queensland and Western Australia.<sup>6</sup> Finally, the *Keeping Aboriginal and Torres Strait Islander People Out of Custody*<sup>7</sup> report focused on those recommendations of the Royal Commission directly designed to reduce custody levels through changes to criminal justice policy. It found a failure on the part of governments to adequately implement specific recommendations and that this failure represented a *massive lost opportunity* to resolve critical issues which lead to the unnecessary incarceration of Indigenous people.<sup>8</sup>



By the end of the first decade post-RCADIC it was apparent there were weaknesses and limitations in the Royal Commission process and its recommendations. Many of these problems had been highlighted in the reports noted above. Some issues were not dealt with very well, such as the relationship between Indigenous women and the criminal justice system – ironically enough given, as I discuss further below, the way the recent increase in Indigenous women's imprisonment has outstripped the increase for Indigenous men. Some recommendations could have been better drafted: recommendation 92 (that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort)<sup>9</sup> became destined to be breached systematically. The principle of imprisonment as a sanction of last resort has been legislated in most Australian jurisdictions, but has not been seen as inconsistent with the introduction of mandatory sentences of imprisonment and increased restrictions on judicial discretion. Finally it became increasingly clear after the first decade that the process of implementation relied too much on government and not enough on Indigenous people and their organisations, and there was largely an absence of independent monitoring of government implementation processes. Too much had been left to the goodwill and good faith of governments to bring about effective change.

The evaporation of political goodwill around criminal justice reform in the decade following the RCADIC reflected changed political conditions. The political conditions of neoliberalism which had grown during the 1980s, but accelerated in the 1990s were no longer conducive in Australia to effective reform of the criminal justice system nor to the recognition of Indigenous rights. The nation has steadily moved into a more punitive period in relation to criminal justice responses, and whatever impetus there was to reform in the early 1990s evaporated during the ensuing decade. Australian states and territories saw the drift into 'law and order' responses manifested in increased police powers, 'zero tolerance' style laws which increased the use of arrest for minor offences, mandatory sentences of imprisonment for minor offences, increasing controls over judicial discretion and demands for longer terms of imprisonment for a range of offences. More generally there was a significant shift away from the recognition of Indigenous rights, including the right to self-determination.<sup>10</sup>

Since these reflections on the RCADIC at the turn of the century, another decade has now passed, and we have

the passage of 20 years since the Royal Commission first tabled its findings and 339 recommendations. The purpose of this article is to revisit Indigenous imprisonment and punishment, and to do so through the prism of the Australian Prisons Project ('APP'). The APP was established in 2008 as a result of an Australian Research Council grant, with a view to understanding developments in penality since the 1970s through to the present, particularly with a focus on the seemingly inexorable rise in imprisonment rates from the mid 1980s. One component of our work has been the consideration of the over-representation of Indigenous people in prison.<sup>11</sup> In the discussion below I use the example of the Northern Territory to highlight some of the more general trends and issues.

## II Sentencing, Punishment and Race

The APP has stressed the importance of understanding the multidimensional nature of punishment: punishment is more than a calculative task by sentencers or a technical apparatus administered by experts. The study of punishment extends beyond the effects on a discrete offender to the social meaning and cultural significance of punishment. We see punishment as a communicative and didactic institution. It communicates meaning about power, authority, legitimacy, normality. Penality defines and depicts social, political and legal authority, it defines and constitutes individual subjects and it depicts a range of social relations. How we understand appropriate or acceptable punishment is contextualised within broader social and cultural norms. The way we punish offenders is understood within particular cultural boundaries which define gender, age, race, ethnicity and class. These boundaries are not static. They are constantly being drawn and redrawn, and punishment itself plays a part in constituting these relations.

Our cultural understandings of 'Aboriginality' have permeated the development of penality in Australia with formal and informal differences in punishment existing from the 19<sup>th</sup> century through to the present. Some historical examples include the continuance of public executions of Aboriginal offenders after their cessation for non-Aboriginal offenders, and similarly the extended use of physical punishments (lashings, floggings) for Aboriginal offenders well into the twentieth century. The segregation of penal institutions along racialised lines has also been commonplace. Historically these different modes of

punishment were justified by (and reproduced) racialised understandings of Aboriginal difference.<sup>12</sup>

Today we understand both sentencing and punishment through concepts of race and culture: witness for example the consideration of the Aboriginality of an offender in sentencing (instantiated in the *Fernando* principles<sup>13</sup>) or the growth in Koori, Nunga, Murri and circle sentencing courts<sup>14</sup> and Indigenous prisons such as Balund-a and Yetta Dhinikal in New South Wales ('NSW'). Contemporary cultural understandings of Indigeneity are not always positive. Discourses speaking to the implied primitiveness of Aboriginality have re-emerged. Witness the Howard Government's *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth). Presented as a response to family violence in Indigenous communities it actually restricts courts taking customary law into consideration in bail applications and when sentencing. In summary, cultural assumptions about Aboriginality within sentencing may be positive (such as in the Koori courts), they may be negative (such as in the Howard government's approach to customary law), or they may reinforce particular boundaries as to who is really Aboriginal (such as in case law which differentiates between traditional and urban Indigenous peoples and applies particular criteria to one group).

Despite the occurrence of positive initiatives like the Koori and other Indigenous courts, we have also seen Indigenous Australians' imprisonment rates rising rapidly. In the 20 years to 2008 Indigenous imprisonment rates have more than doubled from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at a slower rate from 100 to 169 per 100,000 of population during the same period.<sup>15</sup> By 2010, the Indigenous imprisonment had settled at 2,303 per 100,000.<sup>16</sup>

There has also been a very marked increase in women's imprisonment, and this has particularly impacted on Indigenous women. The proportion of women in the total prison population has doubled over the last two decades<sup>17</sup> and the proportion of Indigenous women in the female prison population increased from 21 per cent of all women prisoners in 1996 to 30 per cent in 2006 and steadied at around that percentage (29.3 per cent in 2010).<sup>18</sup> The rate of Indigenous women's imprisonment in 2010 was 374 per 100,000 of adult Indigenous females compared with 18 per 100,000 for non-Indigenous females.<sup>19</sup> Thus the Indigenous women's rate of imprisonment was 21 times higher than the

non-Indigenous women's rate. The Indigenous women's rate of imprisonment is now more than 50 per cent higher than of the non-Indigenous *male* rate.<sup>20</sup>

Despite the RCADIC findings and its recommendations, despite apparent government commitments in the early 1990s to implement the recommendations, despite some positive initiatives such as Indigenous sentencing courts<sup>21</sup> and some comprehensive Indigenous Justice Agreements,<sup>22</sup> Indigenous imprisonment rates are far higher now than they were in 1991.

### III Governing through Crime and Punishment

In understanding the use of imprisonment one of the most important points to grasp is that a rising imprisonment rate is not directly or simply related to an increase in crime. The use of prison is a function of government: it reflects government policy and legislation, as well as judicial decision-making. Governments make choices that either directly impact on the use of imprisonment (for example, legislation covering such matters as standard non-parole periods, mandatory sentencing and maximum penalties for particular offences) or less indirectly (for example, availability of non-custodial sentencing options, presumptions in favour of bail and the availability of parole).

In summarising the international literature, Wilkinson and Pickett note that only 12 per cent of the growth in the state prison population in the United States ('US') during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment.<sup>23</sup> Similarly a comparison between the United Kingdom ('UK') and the Netherlands showed that two thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates.<sup>24</sup> Imprisonment rates in Australia also do not appear to be a function of increased levels of crime, since increases in imprisonment rates have continued, while crime rates have levelled or fallen, in many categories of crime from 2000.<sup>25</sup>

More specifically the increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather more frequent use of imprisonment for longer periods of time.<sup>26</sup> The NSW Bureau of Crime Statistics and Research studied the 48 per cent increase in Indigenous imprisonment

rates in NSW between 2001 and 2008 (which, incidentally, was a greater increase than occurred with the non-Indigenous imprisonment rate). It found that 25 per cent of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime. In other words, the 48 per cent increase was not caused by increased crime levels.

More generally however, the overall environment within which sentencing and punishment occurs has been one of constantly changing criminal law. Roth found that between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories,<sup>27</sup> while Steel<sup>28</sup> has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident. More broadly, and particularly impacting on Indigenous people, a number of factors appear to have contributed to the increased use of imprisonment including:

- changes in sentencing law and practice;
- restrictions on judicial discretion;
- changes to bail eligibility;
- changes in administrative procedures and practices;
- changes in parole and post-release surveillance;
- the limited availability of non-custodial sentencing options;
- the limited availability of rehabilitative programs; and
- a judicial and political perception of the need for 'tougher' penalties.<sup>29</sup>

While these administrative, legal and technical changes contribute to increased penal severity, they are themselves reflective of less tolerant and more punitive approaches to crime and punishment.

In reflecting on the US growth in imprisonment, Simon argues that criminalisation and imprisonment has become increasingly used as a tool of social policy which has resulted in a process of 'governing through crime'.<sup>30</sup> Increased punishment has been targeted at those defined as high risk, dangerous and marginalised. Furthermore, governance through crime has also focused on reducing the risk of crime

and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms.<sup>31</sup>

Simon's notion of governing through crime is useful for understanding the rise of penal severity and its link to particular political configurations in many western democracies. One aspect of the governing through crime thesis particularly applicable to the Australian context is that weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. This focus has led to populist political responses to perceived 'popular' opinion about crime: hence a view that the most politically expedient response to crime is the promotion and implementation of the 'toughest' response to crime. While conservative political parties may have traditionally appeared to be 'tougher' on crime and punishment, it is clear that in jurisdictions like NSW and the Northern Territory the most sustained and largest increases in imprisonment rates have occurred under Labour governments. For example the recent decade of the Labour government in the Northern Territory under Claire Martin and later leaders saw imprisonment rates (and particularly Indigenous imprisonment rates) increase at a much faster rate than in the previous decade under the National Liberal Party.<sup>32</sup>

Not all modern democracies have followed the path of countries like Australia, New Zealand, the US or the UK which have relied on exclusionary and punitive approaches to penal policy. According to Lacey,<sup>33</sup> some European jurisdictions have opted instead for criminal justice systems that are relatively moderate and inclusionary. Lacey argues that more social democratic and corporatist forms of government have sustained more moderate criminal justice policies. The governing through crime thesis also needs to be able to account for the profound racialisation of punishment, both in Australia and other liberal democracies like the US. Perhaps in nations like Australia the concept of 'colonising and racialising through crime' is as apt as the more general notion of 'governing through crime'.

#### IV Colonising Punishment

While the development of crime control as a key form of governance may go some way to explaining the punitiveness which has underpinned developments in penal policy, it is also clear that punishment is highly racialised. The two jurisdictions in Australia, which have the highest imprisonment rates (the Northern Territory and Western Australia), are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are well beyond any meaningful comparison to other rates in Australia: whilst the non-Indigenous imprisonment rate in Western Australia in 2010 was 170 per 100,000, the rate of Indigenous imprisonment was 4,309.6.<sup>34</sup>

I want to consider how the increased focus on risk and danger has been targeted at Indigenous people. In other words, how is it that governing through crime comes to identify specific populations such as Indigenous people as high risk and dangerous. Bail and the use of remand is fundamentally about risk and it provides a useful way of considering how changes in understandings of risk have negatively impacted on Indigenous people. The use of remand has grown significantly in all Australian jurisdictions since the 1970s with an increase in the use of remand as a percentage of imprisoned people rising from 11 per cent in 1978 to 23 per cent in 2008 nationally.<sup>35</sup> This dramatic increase has had a significant impact on overall prison numbers, and has specifically impacted on Indigenous people. As noted previously, 25 per cent of the increase in Indigenous imprisonment rates in NSW between 2001 and 2008 was caused by more Indigenous people being remanded in custody and for longer periods of time.<sup>36</sup>

As we have noted elsewhere<sup>37</sup> remand is a useful prism through which to view penal culture for a number of reasons. First, it is a fundamental principle of criminal law that a person cannot be legally punished unless they have been found guilty of a crime. This means that in order to keep a person in custody on remand, a court must rely on reasons other than those associated with punishment. Historically, the primary justification for remand was a fear that the accused would flee the jurisdiction. The extent to which modern bail legislation provides additional reasons to refuse bail illuminates changes and developments in ideas around risk. Secondly, remand and bail was historically a discretion exercised by courts and the extent to which that discretion has

been constrained or re-directed by government provides an insight into the ways in which a changing penal culture has seen increased attempts to directly influence the operation of the courts.

From the late 1970s the law on bail was codified, with most jurisdictions introducing a presumption in favour of bail. Legislative amendment since then has overwhelmingly seen a retreat from that position, with jurisdictions increasingly limiting the discretion of courts to grant bail. Much of the initial focus on restricting bail concentrated on particular offences such as armed robbery, burglary, drug offences and domestic violence. However during the 1990s and more recently restrictions on bail eligibility have particularly focused on types of offenders: specifically repeat offenders. As we noted previously, 'these restrictions on bail provide for simple, strong political statements about "locking up" "offenders" but have the potential to incarcerate large groups of accused without proper analysis of whether such deprivation of liberty achieves any justifiable social ends'.<sup>38</sup> Given the higher recidivism rates of Indigenous people (see below), any focus on repeat offenders is likely to negatively impact on Indigenous offenders.

Theorists such as Ulrich Beck<sup>39</sup> have argued that the politics of insecurity in late modern societies like Australia, Canada, the US and New Zealand has led to a preoccupation with and aversion to risk, uncertainty and dangerousness. One reaction to the 'ontological insecurity' generated by risk aversion is a decline in tolerance and a greater insistence on the policing of moral boundaries.<sup>40</sup> As I have argued elsewhere,<sup>41</sup> criminalisation plays a significant role in creating moral boundaries and constructing Indigenous peoples as a threat to the social order because of their presumed criminality. The criminal justice system constitutes social groups as threats and reproduces a society built on racialised boundaries. Indeed it has been argued that the process of criminalisation itself now constitutes a significant racialising discourse – that is we understand race through discourses about crime and punishment, and we understand crime and punishment through images of race.<sup>42</sup> The Northern Territory Intervention provides a particularly graphic example of the construction of Indigenous men in particular as sexual and physical abusers of women and children. Such abuse was also linked to traditional Aboriginal culture. An increased criminal justice response was seen as appropriate to dealing with the perceived problem and Indigenous imprisonment rates in the Northern Territory have continued to increase dramatically.

There are at least two ways the rise of 'risk' paradigms negatively impact on the assertion of Indigenous authority specifically within the criminal justice area. Firstly, the developments of risk in criminal justice policy has seen a shift in focus towards the utilisation of various risk assessment processes: the development of 'techniques for identifying, classifying and managing groups assorted by dangerousness'.<sup>43</sup> Criminal justice classification, program interventions, supervision and indeed detention itself is increasingly defined through the management of risk. The assessment of risk involves the identification of aggregate populations based on statistically generated characteristics. One result of this is that an understanding of crime and victimisation in Indigenous communities is removed from specific historical and political contexts. Within the risk paradigm any rights of Indigenous peoples (such as self-determination or self-government) are seen as secondary to the membership of a risk-defined group. In other words the group's primary definition is centred on the risk characteristics they are said to possess, and risk is measured through factors such as the incidence of child abuse, domestic homicide, drug and alcohol problems, school absenteeism, juvenile offending and so on.

Secondly, the post-9/11 concerns with security and the war on terror have led to what some commentators have referred to as a 'paranoid' nationalism which emphasises order and conformity over difference.<sup>44</sup> Within this context Indigenous claims to self-determination, the recognition of Indigenous law and greater control over criminal justice, including punishment, can be easily portrayed as a threat to the national fabric. As Megan Davis notes in discussing sovereignty claims, 'it is difficult to comprehend how the patriotic, warlike, race-divided Australia of today can even begin to think in earnest about what principles underpin a liberal democracy or to seriously consider reform of our public institutions'.<sup>45</sup> Indigenous claims to sovereignty and self-government are presented as at best irrelevant to solving the problems of social disorder which are increasingly defined as a threat of criminality from risk-prone populations, or at worst the claims are seen as a threat to national unity and security.

Returning to the Northern Territory for the moment, we can see the changing discourses on punishment which occurred during the period from the 1970s through to the end of the first decade of the twenty first century. In a review of the Northern Territory prison system in 1973, Hawkins and

Misner described the functions of existing prisons as being to 'warehouse bodies, prevent escapes and to keep the prison as neat and clean as possible'.<sup>46</sup> The Hawkins and Misner report was the first of a number aimed at improving correctional services.<sup>47</sup> From the 1970s through to the early 1990s there was a period of reform which was clearly focused on lowering prison numbers and in particular reducing Indigenous imprisonment. There was also an approach to decriminalise certain offences and to increase the range of non-custodial sentencing options. The Hawkins and Misner report recommended wide-ranging changes to punishment and imprisonment in the Northern Territory, and set the agenda for correctional services reform in the Territory for the next decade.<sup>48</sup> Their recommendation to decriminalise public drunkenness was quickly enacted by the Territory government. Other key recommendations included a reduction in prison numbers through a wider range of alternatives to imprisonment and the development of mental health services including reform of the Mental Defectives Ordinance. Changes introduced during the later part of the 1970s and 1980s included the decriminalisation of public drunkenness, the introduction of the fine default diversionary program, the introduction of home detention and the establishment of Aboriginal Community Corrections officers.

Yet by the early to mid 1990s the focus of reform in the Northern Territory had shifted from reducing Indigenous imprisonment and over-representation to a retributive rhetoric aimed at making conditions more harsh for offenders. This shift to a more punitive penalty occurred at almost the same time that governments were responding to the recommendations of the RCADIC which was advocating for reform which centred around reducing prison numbers. Over the next decade and a half changes in the Northern Territory were to include punitive amendments to juvenile justice legislation, the introduction of mandatory sentencing, the introduction of punitive work orders, changes to parole, changes to public order legislation, government endorsement of zero tolerance policing approaches, and calls by politicians for the judiciary to impose harsher sentences. The increase in the prison population has been particularly marked over the last decade: rising from 469 per 100,000 in 2000 to 663 per 100,000 in 2010,<sup>49</sup> while the specific Indigenous imprisonment rate in the Northern Territory rose by 74 per cent from 1,206 per 100,000 in 2000 to 2,103 per 100,000 in 2010.<sup>50</sup>

## V Waste Management

Harsh criminal justice policies and ever increasing prison numbers may be popular among politicians and some voters. Punitive measures can be introduced by government in response to apparent populist demands with relative ease. Governments can be seen to be doing 'something' without much consideration of the longer term impacts. Indeed, increased criminalisation does not require complex bureaucracies or systems of government, although it does require increased budgetary allocations.<sup>51</sup> A result has been what some have called the 'waste management' prison which 'promises no transformation of the prisoner ... [i]nstead, it promises to promote security in the community simply by creating a space physically separated from the community'.<sup>52</sup> It functions to hold people who are defined as presenting an unacceptable risk for society.

It is difficult to conceive of anything more removed from the vision of the RCADIC than the idea that prisons have become human warehouses for marginalised peoples. Yet the metaphor of the waste management prison is useful in capturing some of the changes which have occurred as a result of penal expansionism. The size of the prison system has grown to deal with expanding prison numbers, and a significant focus on risk and custody has developed, alongside the physical expansion of the penal estate. How we think about the physical size of prisons has also changed over the last two decades. A medium sized prison in the 1990s was about 300 inmates, and large prison was around 500. Across Australia today new prisons are being built or old prisons expanded to hold around 1,000-plus prisoners. Staffing ratios have fallen, there are more prisoners per prison officer and there is far greater reliance on various technical forms of surveillance and security in the new prisons. Economies of scale are being used to try and push down the average cost per prisoner.

Further, we know the significant limitations of prison as a rehabilitative institution and crime control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will bring about reductions in re-offending.<sup>53</sup> Yet we see the opposite occurring when it comes to Indigenous

people. The Indigenous re-imprisonment rate (58 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for Indigenous students (which is below 50 per cent).<sup>54</sup> As a society we do better at keeping Indigenous people in gaol than in school or university.

Meanwhile, Indigenous participation in university and TAFE decreased across all age groups between 2001 and 2006. For example, Indigenous participation at university for 25- to 34-year-olds fell by 18 per cent between 2001 and 2006.<sup>55</sup> On the basis of the 2006 Census data Indigenous men are 2.4 times more likely to be in gaol than in a tertiary institution at any one time. This estimate is also consistent with the results from the 2002 National Aboriginal and Torres Strait Islander Social Survey which showed that Indigenous people are far more likely to report contact with the criminal justice system, including incarceration, than a tertiary qualification. In the 2002 Survey, some three per cent of Indigenous people reported having a Bachelor degree or above, while seven per cent reported being incarcerated in the previous five years.<sup>56</sup> Given the trends of *decreasing* Indigenous tertiary participation levels and *increasing* Indigenous imprisonment rates it may be that these odds have increased further since 2006.

## VI Conclusion: The Politics of Neoliberalism

The central finding of the Royal Commission was Aboriginal people die in custody at a rate relative to their custodial population. However, 'the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often'.<sup>57</sup> The Royal Commission found that there were two ways of tackling the problem of the disproportionate number of Aboriginal people in custody. The first was to reform the criminal justice system; the second approach was to address the problem of the more fundamental social and economic factors which bring Indigenous people into contact with the criminal justice system – the underlying issues relating to over-representation. The Commission argued that the principle of Indigenous self-determination must underlie both areas of reform. In particular the resolution of Aboriginal disadvantage could only be achieved through empowerment and self-determination.

We have done far too little in any of these three areas: reforming the criminal justice system, addressing the

underlying issues, or recognising self-determination. I noted at the beginning of this article that political conditions from the early 1990s were no longer conducive to the type of reforms envisaged by the RCADIC. These changed political conditions were reflective of the growing ascendancy of neoliberalism. In conclusion it is worthwhile exploring why neoliberalism has proved so hostile to the reform of criminal justice systems and recognition of Indigenous rights. Firstly, and as noted previously, among western style democracies it is those who have most strongly adopted neoliberalism which have the highest imprisonment rates (particularly the US, Australia, New Zealand, the UK and South Africa), while social democracies with coordinated market economies have the lowest (Sweden, Norway, Finland and Denmark).<sup>58</sup> The development of neo-liberal state has coincided with a decline in welfarism. The realignment of values and approaches primarily within Anglophone justice systems emphasised deeds over needs. The focus shifted from a welfare-aligned rehabilitative approach to a justice-oriented approach with an emphasis on deterrence and retribution. Individual responsibility and accountability increasingly became the focus of the way justice systems approached offenders. The privatisation of institutions and services, widening social and economic inequality, and new or renewed insecurities around fear of crime, terrorism, 'illegal' immigrants and racial, religious and ethnic minorities have all impacted on the way criminal justice systems operate. All of which have fuelled demands for authoritarian law and order strategies, a focus on pre-crime and risk as much as actual crime,<sup>59</sup> and a push for 'what works' responses to crime and disorder.<sup>60</sup> Within this context Indigenous claims to self-determination increasingly appeared to have no relevance to criminal justice administration and reform.<sup>61</sup>

In his discussion of international criminal justice, Findlay<sup>62</sup> has succinctly summarised the values and principles of neoliberalism to include individualisation of rights and responsibilities; the valorisation of individual autonomy; a belief in free and rational choice which underpins criminal liability and penalty; a denial of welfare as central state policy; the valorisation of a free market model and profit motivation as a core social value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations. The values of neoliberalism promote individualism and individual responsibility and downplay the need for social and structural responses to crime such as reducing unemployment rates, improving educational outcomes, increasing wages, ensuring proper

welfare support, improving housing and urban conditions.<sup>63</sup> Promoting individual responsibility largely became identified with retributivism, incapacitation and just deserts – all of which translated into more frequent use of prison and with longer gaol terms. The requirement for social and structural changes – which formed the basis of the RCADIC's approach to addressing underlying issues – was seen as less relevant to justice systems focused on ensuring individual accountability. And in a social and political milieu which defined individual accountability in terms of imprisonment, the focus of the RCADIC on diminishing the use of imprisonment appeared increasingly insignificant. Certainly from the mid 1990s it was difficult to find a politician in either of the major parties who would publicly advocate for reducing prison numbers. Governments continued to say they were implementing the RCADIC but they conveniently forgot the core values and outcomes the Commission had advocated for: reduce custody levels, address social and economic disadvantage and respect Indigenous self-determination.

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# Contemporary Comments

## *The Limited Benefit of Prison in Controlling Crime\**

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### Introduction

A number of recent developments in the United State (US), United Kingdom (UK) and Australia suggest that conditions may be ripe for a political shift in the reliance on escalating rates of imprisonment as a default criminal justice strategy for responding to crime. The default position is illustrated by the Yabsleyite response of former New South Wales (NSW) Premier Nathan Rees's to questioning over the cost of prison building and NSW's high recidivism rate: '[t]he advice to me is we have still got 500 cells empty, I don't mind if we fill them up, and if we fill them up and have to build another jail, we'll build another jail' (Knox and Tadros 2008).

After three decades of rapidly increasing imprisonment rates across a number of countries and jurisdictions, albeit with considerable variations, there are signs that some politicians, and sections of the media and public, are tiring of the endless political bidding wars (Hogg and Brown 1998) over who is tougher on crime and the consequent 'arms race' involving ever-increasing public expenditure on prison building, at the expense of other forms of public investment such as schools, hospitals, public transport, welfare and rehabilitative services. The global financial crisis has sharpened the need to scrutinise all forms of public expenditure, especially in those countries embarking on cuts to public services. Feeding into this incipient mood change is increasing information and research on:

- the economic and social costs of imprisonment;
- the relationship between incarceration rates and crime rates; and
- the comparable benefits offered in terms of cost, crime prevention, public safety and reduction in recidivism through public investment in services and programs other than increasing rates of incarceration.

This brief comment is an attempt to summarise in an accessible, albeit truncated way, research on the second of these issues: the relationship between incarceration rates and crime rates. It also seeks to insert this discussion briefly into the wider context of the growing movement for a rethinking of the place of imprisonment in current criminal justice policy.

### Signs of a shift: selected US imprisonment rate reductions

In the US, where the national imprisonment rate is the highest in the world at 756 per 100,000 population and the rate has increased fivefold since 1975 when it was 110, there is evidence in certain US states of reductions in imprisonment rates, spurred largely by fiscal

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concerns over the spiralling costs of penal expansion or by movements such as 'justice reinvestment'. A recent Sentencing Project report, *Downscaling Prisons: Lessons from Four States* (Greene and Mauer 2010), noted that while there had been a 12% increase in the number of people incarcerated in state prisons in the US over the period 2000–08, four states had reduced their numbers. New York showed a 20% reduction between 1999–2009; Michigan a 12% reduction from 2006–09; New Jersey a 19% reduction from 1999–2009; and Kansas a 5% reduction from 2003–09. According to Greene and Mauer (2010:2): '[i]n 2008, the national total remained steady, and 20 states experienced a modest reduction in their populations that year'. The authors noted that 'what is clear in each of these cases is that the reduction only came through conscious efforts to change policies and practices' (Greene and Mauer 2010:2), before going on to discuss the factors contributing to reduced rates of incarceration in these states, including specific sentencing reforms, development of alternatives, reductions in the length of sentences, increasing parole release rates, and reductions in parole revocations.

Support for imprisonment reduction is coming from non-traditional sources such as business leaders. A Pew report, *Right Sizing Prisons: Business Leaders Make the Case for Corrections Reform*, quotes a number of US business leaders across various states 'adding their voices to calls for more cost-effective ways to protect public safety and hold offenders accountable, while also providing the education and infrastructure they need for a thriving economy' (Pew Center on the States 2010:1). The National Conference of State Legislators (NCSL) has been arguing for an extension of 'earned time', otherwise known as 'remissions', noting that 'earned time provisions have seen recidivism rates remain unchanged or actually drop' as a result of participation in prison programs (Lawrence 2009).

In another development, legislation in the form of a National Criminal Justice Act establishing a National Criminal Justice Commission is currently before the US House of Representatives and Senate. Its sponsor, Senator Jim Webb, has stated that:

We are wasting billions of dollars and diminishing millions of lives. We need to fix the system. Doing so will require a major nationwide recalculation of who goes to prison and for how long and how we address the long-term consequences of incarceration (Fisher 2010:1).

### **'Justice reinvestment'**

The 'justice reinvestment' movement is gaining traction in the US, UK and Australia. Justice reinvestment involves advancing 'fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer' (Council of State Governments Justice Center 2010a). US state expenditure on corrections has risen from US\$12 billion to US\$52 billion over the 20-year period from 1988 to 2008 and it is estimated that half of those released from state prisons will be reincarcerated within three years (Council of State Governments Justice Center 2010b:1). The key strategy is the quantification of savings and subsequent reinvestment in high-stakes neighbourhoods to which 'the majority of people released from prisons and jails return', by, for example, redeveloping 'abandoned housing and better coordinat[ing] such services as substance abuse and mental health treatment, job training, and education' (Council of State Governments Justice Center 2010c).

The 'justice reinvestment' approach is an outgrowth of the 'evidence-based public policy' strategy. An example in the penal realm is the Washington State Legislature decision in 2005 that, in the light of the costs of a typical new prison of around US\$250 million per year plus annual operating costs of US\$5 million, it was important to identify 'alternative "evidence-based" options that can: (a) reduce the future need for prison beds, (b) save money for state and local taxpayers, and (c) contribute to lower crime rates' (Aos et al 2006:1). The Legislature directed the Washington State Institute for Public Policy (WSIPP) to examine possible options. The ensuing WSIPP Report based on detailed analysis of correctional programs showed reductions in recidivism up to 20% resulted from a range of programs less costly than prison (Aos et al 2006).<sup>1</sup> The Report argued that the adoption of particular 'portfolios' of such evidence-based options would avoid a 'significant level of future prison construction' saving taxpayers 'about two billion [US] dollars' and reducing crime rates (Aos et al 2006:1).

In the UK, the House of Commons Justice Committee released a report, *Cutting crime: the case for justice reinvestment*, which defined justice reinvestment as 'approaches which channel resources on a geographically-targeted basis to reduce crimes which bring people into the criminal justice system and into prison in particular' (House of Commons Justice Committee 2010:5). The Report argues that the criminal justice system 'is facing a crisis of sustainability' (House of Commons Justice Committee 2010:5), noting that '[t]he overall system seems to treat prison as a "free commodity" ... while other interventions, for example by local authorities and health trusts with their obligations to deal with problem communities, families and individuals, are subject to budgetary constraints and may not be available as an option for the courts to deploy' (House of Commons Justice Committee 2010:6). The Justice Committee recommended capping the prison population at current levels, followed by phased reductions to two-thirds of the current population (House of Commons Justice Committee 2010:[321]) and a devolution of custodial budgets so that there is 'a direct financial incentive for local agencies to spend money in ways which will reduce prison numbers' (House of Commons Justice Committee 2010:[338]).

In Australia 'justice reinvestment' arguments are starting to gain some political traction through the work of pressure groups such as the Sydney-based Crime and Justice Reform Committee (CJRC) established by Hal Sperling QC, a retired NSW Supreme Court judge.<sup>2</sup> The Australian prison population has doubled since 1980 to a national imprisonment rate of 165.6 per 100,000 adults in 2008–09. NSW has nearly double the rate of imprisonment (184.8) of Victoria (103.6), with 57 custodial facilities compared with 14 in Victoria. In 2008–09 costs per prisoner per day were A\$205.94, and national operating expenditure and capital costs on prisons were A\$2.79 billion — A\$1 billion of it in NSW (CJRC 2010:1). The NSW Opposition's Shadow Attorney-General, Greg Smith, has offered to declare a truce in the law and order 'arms race' in the lead-up to the next state election (West 2009; Merritt 2010; Steketee 2010), although the offer was not taken up by the Labor Attorney-General, who preferred to run on the Government's 'tough-on-crime' credentials

<sup>1</sup> A net value (the long-term benefit after deducting up-front costs of the program) ranging between US\$13,738 and US\$3,258 (in ascending order of value) was returned by: vocational education in prison; intensive supervision and treatment-oriented programs; basic education or post-secondary; cognitive behavioural therapy; drug treatment in the community; correctional industries in prison; drug treatment in prison; adult drug courts; employment and job training in the community; and sex offender treatment in prison with aftercare programs (Aos et al 2006:9).

<sup>2</sup> For the Charter of the CJRC and fact sheets see: <<http://www.crimeandjustice.org.au>>.

— a stance dating back to the mid-1980s. The NSW State Plan sets a specific target for the prison system: to ‘reduce the proportion of all offenders who re-offend within 24 months [of being convicted] by 10% by 2016’ (NSW Government 2010:55).

What such developments suggest is that the time may be right to achieve a significant shift in political approaches to the use of imprisonment. One component of such a shift is a research-based reconsideration of the taken-for-granted link between imprisonment rates and crime rates. The received wisdom on the link is exemplified by the claim of current NSW Attorney-General John Hatzistergos that NSW’s falling crime rates across many categories of crime are a result of the Labor Government’s ‘tough on crime policies’, including significantly increased imprisonment rates — ‘[w]e are taking more serious offenders off the street for longer and that means fewer criminals are posing a threat to the community and there are fewer opportunities to commit crimes’ (Steketee 2010). In short, if imprisonment rates go up, crime rates go down because ‘criminals’ are out of circulation. Interestingly, when crime rates were increasing during the 1980s and 1990s, governments, including the NSW Labor Government, generally sought to emphasise the complex relationship between imprisonment rates and crime rates, and the role of non criminal justice economic and social factors in producing crime rates. This latter analysis is closer to the mark, as we shall see.

### **Does incarceration of offenders increase or decrease crime?**

The first thing to note is that research studies on the relationship between incarceration and crime are relatively few in number, especially in the Australian context, and that both the relationship itself (King et al 2005) and the methodology of research into it, are complex. A detailed comment on the methodological issues can be found in Spelman (2000; see also Weatherburn et al 2006a). Spelman (2000) categorises the main methodological difficulties as:

- ‘simultaneity’ (at the same time as prison is affecting crime, crime is affecting prison);
- left out variables;
- the difficulty of comparisons across jurisdictions as prisons may be being used differently (for example, by imprisoning wildly differing proportions of drug offenders); and
- measurement errors.

The two main measures that emerge from the studies are those of ‘elasticity’, that is the percentage change in crime rates associated with a 1% change in the prison population; and ‘marginal effectiveness’, which is the number of crimes prevented by putting one more offender in prison.

Spelman’s study involving a detailed review of all major previous studies, and including an examination of their methodologies, concluded that a 10% increase in imprisonment rates will produce at most a 2–4% decrease in crime rates (Spelman 2006:484). This estimate is now the most cited and tends to be accepted as a benchmark. In a 2006 report, the NSW Bureau of Crime Statistics and Research (NSW BOCSAR) calculated how much burglary might be prevented by the incarceration of offenders convicted of that crime (Weatherburn et al 2006a). The basic findings were that to get a 10% reduction in burglary rates through

imprisonment, we would need to increase the number of burglars imprisoned by 34% at a cost of A\$26 million per year (Weatherburn et al 2006a:2). The authors qualified their findings in a number of ways, including, significantly, that it did not take into account the potential effect of imprisonment as a factor that might itself result in an increase in criminal behaviour after the offender was released (Weatherburn et al 2006a:8–9). This is a significant omission that some of the more sophisticated US research is starting to examine further (for example, Pritikin 2008; Rose and Clear 1998; Mauer and Chesney-Lind 2002).

The potentially criminogenic effects of incarceration highlighted by researchers fall into three categories: the effects of incarceration itself; post-incarceration consequences; and third-party effects. The experience of incarceration includes: prisons as ‘schools of crime’ effects; the fracturing of family and community ties; hardening and brutalisation; and the deleterious effects of imprisonment on mental health. Post-incarceration crime-producing effects include: labeling; deskilling; reliance on criminal networks built up in prison; reduced employment opportunities; and reduced access to benefits and social programs. Third-party effects include crime-producing effects on families of offenders and their communities (Pritikin 2008; Daoust 2008).

Rose and Clear (1998:457) found that there may be a ‘tipping point’ in certain communities so that crime increased once incarceration reached a certain level. They argue that:

high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of managing social order through family or social groups, crime rates go up (Stemen 2007:6).

The Sentencing Project calculates that 60% of the US prison population is racial and ethnic minorities — with one-in-eight African-American males aged 20–29 years in prison at any one time (Sentencing Project 2010).

It seems likely that such effects apply in the Australian context, particularly amongst vulnerable populations and communities, such as Aboriginal communities and certain geographical or ‘postcode’ areas, where we may already have reached that ‘tipping point’ where excessive imprisonment rates are actually causing crime.

Indigenous Australians comprise one-in-four of the Australian prison population. Between 2000 and 2008 the imprisonment rate for Indigenous Australians increased by 34% — from a rate of 1,653 prisoners per 100,000 Indigenous adults to 2,223 per 100,000, seven times the increase of non-Indigenous adults (from 123 to 129 per 100,000 adult population). In 2000, Indigenous people were 13.5 times more likely to be incarcerated than non-Indigenous people and this rose to 17.2 times more likely in 2008 (Australian Institute of Criminology 2009). Fitzgerald (2009:1) found that the increase was even greater in NSW — at 48% — most of which was ‘due to increased severity by the criminal justice system’ and not to increased offending. Once age cohorts are taken into account, it is likely that one-in-five young Indigenous males are under some form of criminal justice supervision. A NSW BOCSAR study revealed the one-in-four young Indigenous men are being processed through the criminal justice system every year (Weatherburn et al 2003).

Such findings provide support for those who argue that the concept of ‘mass imprisonment’ (Garland 2001) applies to Indigenous Australians. Mass imprisonment refers

to a situation where imprisonment rates are far higher than the comparative and historical norm, and fall disproportionately on particular (often racial) groups, so that the effects cease to be explicable in terms of individual offending and involve whole communities. In this situation, imprisonment:

becomes part of the socialisation process. Every family, every householder, every individual in these neighbourhoods has direct personal knowledge of the prison — through a spouse, a child, a parent, a neighbor, a friend. Imprisonment ceases to be a fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population (Garland 2001:5).

Michael Levy (2008) has noted that 20% of Aboriginal children have a parent or carer in prison. In these circumstances, imprisonment becomes 'normalised' and incarceration becomes one more contributor to social dysfunction, weakening communities and reducing the social capital and social solidarity that are the bedrock forces preventing crime.

An additional effect of such 'normalisation' is that the prospect of prison loses much of its supposed deterrent effect — becoming, instead, an inconvenient expectation, a 'fact of life' or even, on some accounts, a 'rite of passage'. Blagg (2008:131) argues that 'enclaves of domain' — domain meaning 'those spaces where the dominant languages, cultures, structures of sentiment and feeling are Aboriginal' — may be built within prison. In the 20 years that the NSW prison population has increased from less than 4,000 to more than 10,000, the proportion of inmates serving a second or subsequent term has increased from 52% to 69% (Knox and Tadros 2008). It bears noting at this point that deterrence research generally suggests that deterrence is, in any event, an overrated notion — largely assumed, rather than proven. The research suggests that the likelihood of getting caught is the primary deterrent; that there may be some deterrent effect of imprisonment in relation to instrumental property crimes, but little if any in expressive crimes such as assault and other violent crime; and that the severity of punishment has no deterrent effect. On this last point, a NSW BOCSAR study found no evidence that full time imprisonment exerts a greater deterrent effect than a suspended sentence (Lulham et al 2009:1).

One widely accepted finding is that any crime-reduction effects of imprisonment are subject to diminishing returns. This is because high-rate serious offenders are more likely to have been arrested and imprisoned earlier on, so that as we send more people to prison, we include more and more lower rate offenders for committing less serious offences (Donahue and Siegelman 1998). A major US study found that over a 25-year period (1978–2004), the rate that incarceration reduced crime dropped fourfold between the first half of that period and the second (Johnson and Raphael 2006).

It appears from this brief review of the leading research that incarceration has, at best, a modest effect in reducing crime; that this crime-reduction effect diminishes over time the higher incarceration rates climb; and that in relation to particular communities and groups, such as African Americans in the US and Aborigines in Australia, it is likely to have a negative or crime-producing effect in the long term.

### **What other factors affect crime rates?**

Crime rates have been dropping for many offences in Australia and NSW over the last decade. There are significant long-term downward trends in NSW in murder, robbery with a firearm, break and enter a dwelling and non-dwelling, and motor vehicle theft (Moffatt and



Goh 2010:1). Crime rates in the US are the lowest in 30 years, with total violent crime and property crime a half and a quarter, respectively, of 1973 levels (Bureau of Justice Statistics 2010). In the UK, household and violent crime rates are down by 46% and 43% respectively (House of Commons Justice Committee 2010:5).

Spelman calculated that only 25% of the US drop in crime rates could be explained through increased incarceration rates (Spelman 2006). The Vera Institute of Justice has examined criminological research into other factors contributing to the decrease in crime rates. Factors identified as contributing to decreased crime rates in the US included: fewer young people in the population; smaller urban populations; decreases in crack cocaine markets; lower unemployment rates; higher wages; more education and high school graduates; more police per capita; and more arrests for public order offences (Stemen 2007:9).

Some of these particular findings may be US-specific (for example, reductions in crack cocaine markets). However, it seems likely that some are more applicable to Australia, suggesting that politicians and policymakers have placed too much emphasis on prisons and that other forms of public investment may be both more effective and more cost effective in reducing crime.

A range of research from the NSW BOCSAR produced the following findings:

- a very strong positive relationship between criminal activity and the extent of long-term unemployment (Chapman et al 2002:1);
- a negative association between criminal activity and high school completions (Chapman et al 2002:1);
- dominant factors in reducing property crime rates appeared to be 'a reduction in heroin use, rising average weekly earnings and falling long term unemployment' (Weatherburn et al 2009:2); and
- Indigenous respondents to a National Aboriginal and Torres Strait Islander Social Survey (NATSISS) 'were far more likely to have been charged with, or imprisoned for an offences if they abused drugs or alcohol, failed to complete year 12 or were unemployed. Participating in the Commonwealth Development Employment Scheme (CDEP) appears to reduce the risk of being charged (compared with being unemployed). Other factors that increase the risk of being charged or imprisoned include: experiencing financial stress, living in a crowded household and being a member of the "stolen generation"' (Weatherburn et al 2006b:1).

## Reformulating the key question

While US research is not necessarily directly applicable in the Australian context (where commitment to welfare and social democratic policies are stronger), and while extensive Australian research is lacking, an emerging view is that the impact of imprisonment on crime is limited and diminishing. Expenditure on imprisonment, especially in a time of reduced public expenditure, is often at the cost of spending on other areas such as education, employment programs, wages policy, welfare, rehabilitation and post-release services, which are likely to have greater crime-reduction effects at lower cost.

In a 2006 report, the NSW BOCSAR argued that 'the relevant issue is not whether prison costs less money than it saves but whether it is the most cost effective way of bringing crime down' (Weatherburn et al 2006a:9). Other NSW BOCSAR research has found that 'modest reductions in the rate at which offenders are re-imprisoned would result in substantial savings in prisoner numbers and correctional outlays' (Weatherburn et al 2009) and that participants in the NSW Drug Court were less likely to be reconvicted than offenders imprisoned (Weatherburn et al 2008:1).

As Spelman puts it: '[i]t is no longer sufficient, if it ever was, to demonstrate that prisons are better than nothing. Instead, they must be better than the next-best use of money' (quoted in Stemen 2007:13). The Vera Institute of Justice puts it this way: 'the pivotal question for policymakers is not "Does incarceration increase public safety?" but rather, "Is incarceration the most effective way to increase public safety?"' (Stemen 2007:2).

### Confronting limitations

It is not only the limited benefit of prison in controlling crime that requires recognition. It is also important to recognise the limitations that may affect the nature and extent of the postulated shift, suggested above, in political approaches to the use and costs of imprisonment. For it is only if these limitations are openly acknowledged, addressed and combated, that the potentialities in the current conjuncture can be fully realised. Some of the difficulties or limitations include:

- various problematic assumptions underlying the whole 'evidence-based' approach (Freiberg and Carson 2009; Hogg 2009);
- fiscal 'rationality' arguments do not necessarily trump emotive law and order policies that are electorally popular;
- given that punishment involves deeply-held emotions and has a strong expressive and symbolic character, evidence of the limited or counter-productive effects of imprisonment on recidivism, rehabilitation and deterrence does not directly confront imprisonment as retributive (Overington 2010);
- the limits of rationality are shown in studies where large sections of the public believe that crime rates are higher than ever, although they have been decreasing; and that judges are too lenient when sentences are considerably longer (Jones et al 2008; Judicial Commission of NSW 2010);
- there are dangers that cost-saving imperatives may feed into cuts to prison services and programs;
- it is one thing to 'model' targets for prison reduction and quite another to commit to and invest in the programs and sentencing changes that will bring them about;
- while there is an emerging political consensus in NSW that recidivism rates need to be lowered in order to reduce imprisonment rates, crime rates and correctional costs, there is very little political will at present to confront and wind back some of the key drivers of escalating imprisonment rates, such as the constant undermining of the presumption in favour of bail, which has led to nearly one-in-four prisoners being on remand — that is, unconvicted (Lulham and Fitzgerald 2008; Gibson 2010; SMH Editorial 2010). In addition, sentences for selected serious crimes have

been driven up by up to 60% due to a raft of sentencing changes such as the 'truth in sentencing' changes in 1989; guideline judgments; and, in particular, the introduction of standard non-parole periods (Judicial Commission of NSW 2010);

- individual politicians, such as NSW Shadow Attorney-General Greg Smith, may be broadly supportive of justice reinvestment approaches, but whether he can carry the Shadow Cabinet and likely future NSW Government, is another matter, as he openly acknowledges — 'What I want to do and am allowed to do might be different questions' (Steketee 2010).

The challenge is to situate cost-based arguments and 'justice reinvestment' concerns within a moral and political vision, to couch them in a language that connects with cultural imaginings concerning punishment — for punishment is nothing if not about the imagination, emotion, culture, symbolism, representation and pain. As Michelle Brown argues: 'punishment constitutes one of the most precarious spaces of the human condition in its seductive invitation to rely upon the acts of others, both real and imagined, to justify our own infliction of pain rather than see our place in its problematic pursuit' (Brown 2009:11). The developments sketched out briefly above are illustrative of an attempt to shift debate from the partisan politics of law and order and its assumption that the 'toughest' policies are automatically the most politically advantageous, to the ground of 'the most effective use of scarce resources to reduce offending and re-offending' (House of Commons Justice Committee 2010:[42]). Such a potential shift is a political development of some significance that requires both critical analysis and a political and ethical engagement with its strategies, policies and constituencies in order to secure the most favourable conditions under which to reduce incarceration rates, recidivism and crime.

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## **Fear: Crime and Punishment**

**Chris Cunneen**

Australia, like many western nations, has seen an unprecedented rise in the levels of imprisonment over recent decades. Several factors have flowed from this over-reliance on criminalisation and imprisonment as a tool of social policy:

- governments have seen a significant growth in budgets allocated to criminal justice expenditure at the cost of providing community-based resources;
- criminal justice policy has become increasingly politicised with little difference between the policies of major parties except to the extent that they try to outdo each other in more punitive approaches to law and order; and
- perhaps most importantly, it has been the more marginalised and less powerful social groups which have experienced the brunt of growing prison numbers. In particular, people with mental illness, Aboriginal and Torres Strait Islander peoples and women have seen the most significant increases in their rates of imprisonment. One effect of these policies has been, at a considerable financial cost, to further entrench the social exclusion of the already marginalised.

### **Punishment: costs and numbers**

Governments make considerable outlays in their budgets every year to ensure that individuals who have been convicted of crimes are punished. The most recent report on the cost of government service provision noted that correctional services had national net operating expenditure and capital costs of \$2.79 billion in 2008-09.<sup>1</sup> These costs and the numbers of people incarcerated have been on a significant upward curve at least from the later part of the 1980s. After more than two decades of growth we are spending more money and depriving more people of their liberty, but are we spending money efficiently and effectively? Do we feel safer and less fearful of crime? And can we afford either financially, socially or in terms of public safety the current system, particularly when responsible governments elsewhere have been looking to reduce prison numbers?

Prison expenditure in 2009 increased by 5 per cent over the previous year, and in line with the longer term trend. Indeed if we go back to the first report on government service provision in 1995, the warning then was fairly clear. The report noted that 'over the past decade spending in this area [corrective services] has grown strongly in real terms, at an annual average rate of 5.4 per cent Australia wide'.<sup>2</sup> And, as later reports on government service provision attest, prison expenditure continued to grow in real terms at a similar pace. Imprisonment rates have also been increasing – at only a slightly slower tempo than spending. In 2008-09 the daily average for prisoners was 27,612 people. This was an increase of 4.4 percent over the reported daily average of the previous year.<sup>3</sup> The Australian Bureau of Statistics has estimated that in the decade between 1993 and 2003 the Australian rate of imprisonment increased by 22 per cent,<sup>4</sup> and between 1998 and 2008 the rate had increased by 20 per cent.<sup>5</sup>

The increase in imprisonment in Australia has been reflected in many other western states. Recent international literature and research pose a number of explanations for the growth in imprisonment over the last 25 years. It has been suggested that many western democracies are entering a period of 'mass imprisonment'.<sup>6</sup> This change represents a reversal of earlier trends where prison rates had been relatively stable or increasing only slowly during most of the twentieth century. According to many commentators, the rise of mass imprisonment is consistent with the broader political agenda of the neo-liberal



state,<sup>7</sup> a move away from rehabilitative aims towards a culture of control<sup>8</sup> and an increased reliance on risk assessment.<sup>9</sup>

### **Punishment as social policy**

Perhaps one of the most fundamental points to grasp is that rising imprisonment is not directly related to increases in crime. In the final analysis, the use of prison is a function of government policy and legislation and judicial decision-making. In summarising the international literature Wilkinson and Pickett note<sup>10</sup> that only 12 per cent of the growth in the state prison population in the USA during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment. Similarly a comparison between the UK and the Netherlands showed that two thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates. We have similar research in Australia: the NSW Bureau of Crime Statistics and Research studied the 48 per cent increase in Indigenous imprisonment rates in NSW between 2001 and 2008 (which, incidentally, was a greater increase than occurred with the non-Indigenous imprisonment rate). It found that 25 per cent of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime. In other words, the 48 per cent increase was not caused by increased crime levels.<sup>11</sup>

More generally, imprisonment rates in Australia do not appear to be a function of increased levels of crime, since increases in imprisonment rates have continued, while crime rates have levelled or fallen, in many categories of crime from 2000.<sup>12</sup> There have been contradictory movements in some states: Western Australia, for example, has maintained a 'three strikes' law relating to property offences while simultaneously abolishing short prison sentences of six months or less. However, the overall environment has been one of constantly changing criminal law. Roth<sup>13</sup> found that between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories, while Steel<sup>14</sup> has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident. More broadly, a number of factors appear to have contributed to the increased use of imprisonment, including changes in sentencing law and practice, restrictions on judicial discretion, changes to bail eligibility, changes in administrative procedures and practices, changes in parole and post-release surveillance and a judicial and political perception of the need for 'tougher' penalties. While these administrative, legal and technical changes contribute to increased penal severity, they are themselves reflective of less tolerant and more punitive approaches to crime and punishment.

In reflecting on the US growth in imprisonment, Simon argues that criminalisation and imprisonment has become increasingly used as a tool of social policy which has resulted in a process of 'governing through crime'.<sup>15</sup> Increased punishment has been targeted at those defined as high risk, dangerous and marginalised. Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order which is increasingly structured around 'the problem of crime'.

One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms.<sup>16</sup>

The advent of governing through crime, and the rise in penal severity, has been attributed to certain political configurations in some liberal democracies.<sup>17</sup> These include lower levels of public trust in politicians and a new populism which distrusts 'experts'. Further, there is public lack of credibility specifically in the expertise of criminal justice professionals and less virtue and public good associated with judicial autonomy: judicial independence is seen as a problem to be contained rather than a basic democratic safeguard. Weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. This focus has led to populist political responses to perceived 'popular' opinion about crime: hence a view that the most politically expedient response to crime is the promotion and implementation of the 'toughest' response to crime. A contradictory outcome of the focus on governing through crime and the promotion of populist responses to crime is that the result is a higher level of *insecurity*: the problem of crime and the criminal appears everywhere from child sex offenders in the local neighbourhood to asylum seekers arriving by boat, from the threat of terrorists to public drunkenness on the streets and increasing juvenile crime. Like the dilemma faced in Goethe's poem *The Sorcerer's Apprentice*, no matter how many people we incarcerate the problem seems destined to ever multiply more quickly.

However, not all modern democracies have followed the path of countries like Australia, New Zealand, the US or the UK which have relied on exclusionary and punitive approaches to penal policy. According to Lacey,<sup>18</sup> some European jurisdictions have opted instead for criminal justice systems that are relatively moderate and inclusionary. Lacey argues that more social democratic and corporatist forms of government have sustained more moderate criminal justice policies. Consistent with this argument is the view of Wilkinson and Pickett that modern democratic societies with higher levels of inequality also have more punitive approaches to punishment.<sup>19</sup> We can see significant differences in levels of imprisonment between states and territories within Australia. While the increases have occurred in all jurisdictions, the size of the increase has not been uniform across the country – NSW and Queensland in particular have had the highest increases – and the absolute levels of imprisonment vary widely around the country. The Northern Territory has the nation's highest imprisonment rate, with 646.7 prisoners per 100,000 adults, about five and six times the rates of Tasmania (136.6) and Victoria (103.6). Moreover, large and ostensibly similar jurisdictions, such as NSW and Victoria, also vary markedly. NSW has an imprisonment rate of 184.8 per 100,000 adults, almost double that of Victoria.<sup>20</sup>

### **Racialisation and punishment**

While distrust in government and experts, a fear of crime and a developing 'culture of control' may go some way to explaining the punitiveness which has underpinned developments in penal policy, it is also clear that punishment is highly racialised. The two jurisdictions in Australia which have the highest imprisonment rates (the Northern Territory and Western Australia) are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are way beyond any meaningful comparison to other rates in Australia: the Indigenous rate of imprisonment in Western Australia is 4309.6 per 100,000, while the Indigenous male rate is 7803.5.<sup>21</sup> By the first quarter of 2010 the number of Indigenous people imprisoned in Australia had reached 7613 and comprised

26 per cent of the total prison population. The Indigenous rate of imprisonment was 14 times higher than the non-Indigenous rate.<sup>22</sup>

US research suggests that racial resentment is inextricably connected to public punitiveness, that race and racism 'shape the contours' of how Americans think about crime and punishment.<sup>23</sup> According to Unnever and Cullen one of the most salient and consistent predictors of punitiveness is 'racial animus': mass imprisonment and the death penalty are acceptable in the US because they are disproportionately aimed at African Americans.<sup>24</sup> It has been well publicised in the US that the odds of an African American male going to gaol are higher than going to college, or getting married.<sup>25</sup> No similar comparative analysis has been conducted in Australia. So what does the data indicate?

First, it is worth considering that the Indigenous re-imprisonment rate (66 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for Indigenous students (which is below 50 per cent).<sup>26</sup> In other words, Indigenous people are returned to prison at a higher rate than they are retained in either high school or university. Secondly, imprisonment rates for Indigenous people have been increasing. Nationally the rate increased by 45.5 per cent for Indigenous females and 26.6 per cent for Indigenous males between 2000 and 2008.<sup>27</sup> Meanwhile, Indigenous participation in university and TAFE decreased across all age groups between 2001 and 2006. For example, Indigenous participation at university for 25 to 34 year olds fell by 18 per cent between 2001 and 2006.<sup>28</sup>

The 2006 Census showed 7057 Indigenous people enrolled in a university or tertiary institution. Of those, 2322 were males and 4735 were females.<sup>29</sup> At same time, there were 6091 Indigenous people imprisoned. Of these, 5549 were male and 542 were female.<sup>30</sup>

On the basis of the 2006 Census data Indigenous men are 2.4 times more likely to be in gaol than in a tertiary institution at any one time.<sup>31</sup> Given the trends of *decreasing* Indigenous tertiary participation levels and *increasing* Indigenous imprisonment rates it is likely that these odds have increased further since 2006. Furthermore, the situation is likely to be considerably worse than these static census figures would indicate, because Aboriginal and Torres Strait Islander people move in and out of the prison system relatively frequently. We know that Indigenous prisoners are more likely to be re-imprisoned on multiple occasions, and that many more Indigenous people will be imprisoned for short sentences over a twelve month period than the annual census figure would indicate.<sup>32</sup> This likelihood of multiple imprisonment experiences over a lifetime stands in stark contrast to lower participation rates in tertiary institutions and poor retention rates after enrolment.

The traditional goals or objectives of sentencing and punishment are deterrence, rehabilitation, denunciation, retribution and community protection. Given the mass imprisonment of Indigenous people it is worth asking whether these goals have much purchase or legitimacy in sentencing Indigenous offenders. The desired outcomes of specific deterrence of the offender and general deterrence in the community is undermined by high levels of re-offending, and the widespread familiarity within the community of incarceration and the criminal justice system more generally. Similarly it is difficult to argue that rehabilitation is achieved when re-offending levels are high and there is limited access to programs (either therapeutic or vocational) while in prison. Community protection may be achieved in the short term through incapacitation, but not in the longer term if there is a failure to change behaviour.

A goal of punishment is said to be the public denunciation of crime. Yet effective denunciation requires that the institutions of the criminal justice system are seen as legitimate by the offender and their community. The act of denunciation requires institutional legitimacy. However if the justice system is seen as an alien institution, an Anglo-Australian institution with only limited connectedness to Indigenous people, then denunciation is not likely to be effective. Similarly, retribution requires moral authority and political legitimacy. Retribution in sentencing requires the community, if not the offender, to recognise that the act was wrong. It is the wrongness of the act, and the authority of the justice system which justifies the infliction of pain on the offender. However, without that authority and legitimacy, retribution is likely to be experienced as oppression. As Blagg has noted, there can be radically incommensurate views between mainstream Australia and Aboriginal people about the meaning and experience of prison. Blagg suggests that the prison itself becomes a site for the maintenance of an Aboriginal domain.<sup>33</sup> While there has been some move to increase the legitimacy of the courts through the introduction of various Aboriginal sentencing courts (eg Murri Courts, Koori Courts, circle sentencing courts), these reforms are seriously undermined when most Indigenous offenders go through mainstream courts, and increasing numbers are being sentenced to gaol.<sup>34</sup>

#### **Waste management and the hidden costs of imprisonment**

Harsh criminal justice policies and ever increasing prison numbers may be popular among politicians and some voters. Punitive measures can be introduced by government in response to apparent populist demands with relative ease. Governments can be seen to be doing 'something' without much consideration of the longer term impacts. Indeed, increased criminalisation does not require complex bureaucracies or systems of government,<sup>35</sup> although it does require increased budgetary allocations. A result has been what some have called the 'waste management' prison which 'promises no transformation of the prisoner... Instead, it promises to promote security in the community simply by creating a space physically separated from the community'.<sup>36</sup> It functions to hold people who are defined as presenting an unacceptable risk for society.

The idea of the waste management prison is at least metaphorically useful in capturing some of the changes which have occurred as a result of penal expansionism. The size of the prison system has grown to deal with expanding prison numbers, and a significant focus on risk and custody has developed, alongside the physical expansion of the penal estate. How we *think* about the physical size of prisons has also changed over the last two decades. A medium sized prison in the 1990s was about 300 inmates, and large prison was around 500. Across Australia today new prisons are being built or old prisons expanded to hold around 1000-plus prisoners. Staffing ratios have fallen, there are more prisoners per prison officer and there is far greater reliance on various technical forms of surveillance and security in the new prisons. Economies of scale are being used to try and push down the average cost per prisoner. However, in the Australian context it would be too simplistic to see prisons as no longer aimed at, or interested in, reforming individuals. Certainly the public rhetoric of correctional services still prioritises rehabilitation as a core goal, alongside security. Typically, with a focus on measurable performance outcomes, correctional services identify a reduction in re-offending as a key corporate goal. Yet the achievement of this goal is increasingly illusory. Indeed, the expansion of prisons make it less likely that recidivism rates will decline.

The problem that penal expansionism poses, is that greater and greater resources have to be allocated to building and operating prisons, and proportionately less is available for

programs within prisons and for non-custodial sentencing options and other support services outside of prison. Mass imprisonment has become the policy solution to the political problem posed by law and order politics. A continuing string of political promises to be tougher on law and order inevitably demands an expansion of the incarceration end of the criminal justice system. It is clear that the more marginalised groups within society are those that have been impacted upon the most. We referred in the previous section to Indigenous people. There have also been significant increases in women's imprisonment: between 1993 and 2003 the female prison population increased by 110 per cent, with particularly large increases among Indigenous women prisoners.<sup>37</sup> The presence of people with mental health disorders and cognitive disability (MHDCD) in prison is not new, but the rate of people with MHDCD appears to have increased.<sup>38</sup> Women with mental health disorders are more highly over-represented amongst the prison population than men. People with MHDCD are convicted and imprisoned for lower level offences such as theft, road traffic/motor vehicle regulatory offences; justice offences, alcohol and drug related offences and public order offences.<sup>39</sup> Baldry paints a picture of people with MHDCD constantly recycling through the prison system, living chaotic lives on the outside without support, often homeless, until coming back to prison for a relatively short sentence and then being released back into the same highly marginalised situation, where they are re-arrested and re-imprisoned.<sup>40</sup>

The social costs of imprisonment are observable on a number of levels. There is an unequal distribution of imprisonment among the poor, among socially marginal groups and minority groups (particularly Indigenous people). In most cases, imprisonment does not resolve issues relating to alcohol and drug abuse; the effects from experiencing physical, sexual and emotional violence as a child and/or as an adult; or the prevalence of intellectual disabilities and mental health problems. In general 60 per cent of inmates are not functionally literate or numerate; 44 per cent are long-term unemployed; 60 per cent did not complete Year 10; 64 per cent have no stable family; a high proportion were state wards (that is, previously placed in state care as children); and most come from the most seriously disadvantaged communities.<sup>41</sup> Imprisonment can further exacerbate or cause loss of employment and income, loss of housing, and breakdown of families and relationships, including the children of imprisoned parents going into care and the beginning of a new cycle of poor educational outcomes and contact with the criminal justice system. The social costs of imprisonment can also be seen through the inability of the prison to reform or rehabilitate offenders and in its self-reproducing nature: in NSW some 67 per cent of current prisoners had previously been imprisoned.<sup>42</sup>

It is also important to consider the relationship between social costs and dollar costs. NSW spends the largest part of the national annual expenditure on prisons – over \$1 billion or 37 per cent of the \$2.8 billion annually, so it is useful to consider expenditure in this state. In NSW corrections expenditure per person in the population increased in real terms over the last five years by 11.5 per cent.<sup>43</sup> During a similar period, NSW state government recurrent expenditure on schools declined in real dollars by 0.51 per cent and expenditure per fulltime student declined in real terms by 0.64 per cent.<sup>44</sup> NSW real recurrent expenditure in the Vocational and Educational Training (VET) sector fell by 6.3 per cent over the same period.<sup>45</sup> NSW government expenditure per person on public hospitals rose in real terms by 9.8 percent during the same period.<sup>46</sup> In summary, the NSW state government increase in expenditure per person on prisons was greater than the increase per person on public hospitals, while real recurrent expenditure on school and adult education declined.

It is worth considering prisons in the context of *opportunity* costs, by which I mean the cost of passing up the next best choice when making a decision. If government capital expenditure and recurrent funding is used for building and maintaining prisons the opportunity cost is the value of the next best purpose the funding could have been used for. For example, as an alternative to prisons, government funding could have gone into school or adult education, supported housing, mental health services, drug and alcohol rehabilitation or employment programs. The choice between various options would be an easier decision if we knew the end outcome. However, we know the significant limitations of prison as a rehabilitative institution and crime and control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will bring about reductions in re-offending.<sup>47</sup> And we do know that building prisons is a comparatively expensive option. For every prison bed we construct we could provide more than 30 school student places.<sup>48</sup>

Economist often refer to social costs as negative externalities, or the negative external costs involved in the production of goods or services. These external costs are seldom borne by the producer. The failure to properly account for external costs leads to an over-production of those goods that have a high social cost. For example, the logging of trees for timber can cause the loss of a recreation area, loss of soil quality and erosion, loss of air quality, etc, but this loss is usually not quantified and included in the price of the timber that is made from the trees. As a result, individual producers have no incentive to factor in these external social costs, and as a result more of this activity is performed than would be if its cost had a true accounting. As a result there is over-production because the real social costs are not being properly met.

There is an analogous argument with imprisonment. Governments do not acknowledge the real social cost of imprisonment – they pass that cost onto the racialised and working class communities from which the incarcerated are drawn. They do not acknowledge the costs on the individuals incarcerated, their families or their communities. Nor do they acknowledge the costs of reproducing crime and victimisation through the recidivism compounded by imprisonment. They also do not acknowledge the opportunity costs – that for every person imprisoned we have fewer programs, services, school places, etc – less of the very things we know might reduce crime and its consequent social harms. Because the true social costs of imprisonment are not acknowledged or accounted for, we have endemic over-production of the prison as a strategy of containment. Governments simply do not meet the real costs of imprisonment – and, in fact, they pass those costs back to the impoverished communities from which they draw prisoners through lower standards of health, education and housing.

### **Conclusion: fear and safety**

It was Durkheim who argued that punishment serves a particular symbolic function of drawing the moral limits around a society. The spectacle of punishment was not aimed at the offender: its target was the broader citizenry. Punishment of the offender had the outcome of increasing social solidarity. Yet punitive responses to crime do not make us feel safer. If there is any solidarity it is in the consensus forged around fear and, arguably, this fear drives a passion for punitive punishments. Indeed, it has been suggested in the US that governing through crime has fuelled a culture of fear and control, which

simultaneously lowers the threshold of fear while placing ever greater burdens on individuals.<sup>49</sup>

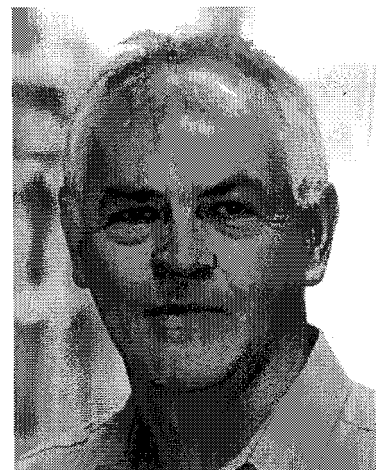
In the first section of this essay I referred to the significant difference between imprisonment in NSW and Victoria, with the imprisonment rate in Victoria only slightly more than half that of NSW. In many ways they are two comparable jurisdictions: both with the largest urban populations in Australia, both culturally diverse, both major economic centres. Yet the two states have different approaches to punishment. There is a greater use of custody in NSW than Victoria. NSW has a consistently higher proportion of offenders sentenced to fulltime imprisonment than Victoria,<sup>50</sup> recidivism rates are also higher in NSW<sup>51</sup> and NSW spends more than double the budget on corrections compared to Victoria.<sup>52</sup> Indeed NSW now faces the prospect of needing to build a 1000 bed prison every two years if prison numbers continue to grow at 5 per cent per annum.

We might expect, as a result of all this activity and expense, that the residents of NSW feel safer than their southern counterparts in Victoria. But reports from national surveys on perceptions of community safety show otherwise.<sup>53</sup> Consistently over a number of years Victorians are more likely to report feeling 'safe' or 'very safe' than people in NSW across a range of activities including being at home alone during the day, at home alone during the night, walking or jogging during the day, and walking or jogging during the night. The only area where Victorians reported feeling less safe than people in NSW is on public transport.

Outside of Australia responsible governments are responding to the problem of over-incarceration and developing policy to reduce imprisonment. Change is occurring in high imprisoning states in the US with the development of justice re-investment strategies<sup>54</sup> and other programs for release of prisoners. In the last 18 months in the UK there has been the UK Commission on English Prisons Today and a report by the UK House of Commons Justice Committee.<sup>55</sup> The House of Commons report called for a one third reduction in prison numbers, a justice re-investment strategy, a national debate on spending on criminal justice and increasing community understanding of the cost of imprisonment. In Australia, such a debate has yet to seriously begin.

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- <sup>29</sup> *Ibid*: Table 4A.7.1 and Table 4A.7.2
- <sup>30</sup> ABS (2006). *Prisoners in Australia ,30 June 2006*. Canberra: ABS: Catalogue No 4517.0.
- <sup>31</sup> This estimate is also consistent with the results from the 2002 National Aboriginal and Torres Strait Islander Social Survey which showed that Indigenous people are far more likely to report contact with the criminal justice system, including incarceration, than a tertiary qualification. In the 2002 Survey, some 3 per cent of Indigenous people reported having a Bachelor degree or above, while 7 per cent reported being incarcerated in the previous five years. See ABS



- (2004b). *National Aboriginal and Torres Strait Islander Social Survey, 2002*. Canberra: ABS: Catalogue No 4714.0: 14.
- <sup>32</sup> Lind, B and Eyland, S (2002). *The Impact of Abolishing Short Prison Sentences, Crime and Justice Bulletin No 73*. Sydney: New South Wales Bureau of Crime Statistics and Research.
- <sup>33</sup> Blagg, H (2007). *Crime, Aboriginality and the Decolonisation of Justice*. Leichhardt: Hawkins Press.
- <sup>34</sup> On Indigenous sentencing courts see, Marchetti E and Daly K (2007). 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model'. *Sydney Law Review* 29: 416-443.
- <sup>35</sup> Simon (2007) *op cit*.
- <sup>36</sup> Ibid: 143.
- <sup>37</sup> ABS (2004a) *op cit*.
- <sup>38</sup> Baldry, E, Dowse, L and Clarence, M (2010). 'Background Paper: Pathways to Prison for Mentally Ill and Cognitively Impaired Offenders'. NSW District Court Annual Conference: 1.
- <sup>39</sup> Baldry, E (2009). 'Prisons and Vulnerable Persons: Institutions and Patriarchy'. In Segrave, M (ed) *Australia & New Zealand Critical Criminology Conference 2009: Conference Proceedings*. Melbourne: Monash University and the Australia and New Zealand Critical Criminology Network: 20-21.
- <sup>40</sup> Ibid.
- <sup>41</sup> New South Wales Select Committee on the Increase in Prisoner Population (2001a) *op cit*: 20. New South Wales Select Committee on the Increase in Prisoner Population (2001b) *Interim Report: Issues Relating to Women*. Sydney: NSW Parliament: 21.
- <sup>42</sup> NSW Department of Corrective Services (2009). *New South Wales Inmate Census 2009*. Sydney: NSW Department of Corrective Services: 3.
- <sup>43</sup> SCRGSP (2010) *op cit*: Table 8A.13.
- <sup>44</sup> Ibid: Table 4A.7, Table 4A.10.
- <sup>45</sup> Ibid: Table 5A.1.
- <sup>46</sup> Ibid: Table 10A.3.
- <sup>47</sup> Brown, D (2010). 'The Limited Benefit of Prison in Controlling Crime' *Current Issues in Criminal Justice*, 22, 1: 461-472; Weatherburn, D, Foley, G, Moffatt, S and S. Corben (2009). 'Prison populations and correctional outlays: The effect of reducing re-imprisonment', *Crime and Justice Bulletin* No 138. Sydney: NSW Bureau of Crime Statistics and Research; Spelman, W (2000). 'What recent studies do (and don't) tell us about imprisonment and crime'. In Tonry, M (ed) *Crime and Justice: A Review of Research* vol 27. Chicago: University of Chicago Press: 419-494; and Aos, S, Miller, M and Drake, E (2007). *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates*. Olympia: Washington State Institute for Public Policy.
- <sup>48</sup> Quantity surveyor figures for the mid 2000s indicated that construction costs in Sydney were between \$222,000 - \$268,000 per bed medium security prison; \$180,000 per bed for a typical 250 bed hospital in Sydney; and \$8,000 per student place for a typical 2 level school in Sydney. J Paget, private correspondence.
- <sup>49</sup> Simon (2007). *op cit*: 6.
- <sup>50</sup> The NSW Judicial Commission found that across a range of offences NSW courts consistently sent proportionately more offenders to prison – for some offences at a rate 30 percentage points higher than Victoria. Inddyk, S and Donnelly, H (2007). 'Trends in the Use of Fulltime Imprisonment 2006-07', *Sentencing Trends and Issues* No 36. Sydney: NSW Judicial Commission.
- <sup>51</sup> ABS (2010b) *op cit*.
- <sup>52</sup> SCRGSP (2010) *op cit*.
- <sup>53</sup> Ibid: 6.22-6.23 and associated Tables.
- <sup>54</sup> Justice re-investment can be defined as an approach which calculates public expenditure on imprisonment in localities with a high concentration of offenders, and diverts a proportion of this expenditure back into those communities to fund initiatives that can have an impact on rates of offending. See Schwartz, M (2010). 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Representation' *Australian Indigenous Law Review* (forthcoming). In the

US see the Council of State Governments, *Justice Reinvestment: A project of the Council of State Governments Justice Center* <<http://justicereinvestment.org/states>> at 25 July 2010. In the Australian context it has been the former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma who has publically pushed the idea of justice re-investment. See Aboriginal and Torres Strait Islander Social Justice Commissioner (2010). *Social Justice Report 2009*. Sydney: Australian Human Rights Commission. See also Legal and Constitutional Affairs References Committee, Parliament of Australia (2009). *Access to Justice*. Canberra: Commonwealth of Australia.

- <sup>55</sup> Commission on English Prisons Today (2009). *Do Better Do Less: The Report of the Commission on English Prisons Today*. London: The Howard League for Penal Reform; and Justice Committee, House of Commons (2009). *Cutting Crime: The Case for Justice Reinvestment*. London: UK Parliament, House of Commons.



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# INDIGENOUS WOMEN IN AUSTRALIAN CRIMINAL JUSTICE: OVER-REPRESENTED BUT RARELY ACKNOWLEDGED

Julie Stubbs\*

## I Introduction

It is now two decades since the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') delivered its final report, which documented the substantial over-representation of Indigenous people in prisons and police custody, and provided detailed analysis of the underlying factors that contributed to that over-representation and to deaths in custody. That work was, of course, of enormous significance, and was intended to lay the groundwork for wholesale change, both within the criminal justice system and beyond it, to redress those factors. As we know, those aims have not been met, and in fact, as documented by numerous studies and reports, the situation of Indigenous over-representation in the criminal justice system and especially in prisons has been heightened. For instance, in its *Overcoming Indigenous Disadvantage* report the Productivity Commission noted that in relation to 'social indicators such as criminal justice, outcomes [for Indigenous people] have actually deteriorated.'<sup>1</sup>

It is well known too, that concerns have been raised about the limitations of RCIADIC in its consideration of Indigenous women.<sup>2</sup> As Marchetti stated, 'the official RCIADIC reports lacked a gender-specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women.'<sup>3</sup> The failure to attend sufficiently to the ways in which racialised and gendered social relations intersect with criminal justice means that the specific positioning and experiences of Indigenous women is overlooked or assumed within a universalising approach to Indigenous experience based largely, in fact, on the experiences of men.<sup>4</sup>

As examined in Part II of this paper, the failure to attend to

the criminalisation and incarceration of Indigenous women<sup>5</sup> continues today in policy, criminal justice practices, service delivery and research. I also document activist efforts to redress this neglect by challenging authorities on the basis of systemic discrimination experienced by women in prison and Indigenous women in particular.

In Part III, I provide some data on the current position of Indigenous women in the criminal justice system. This is not a straightforward task as standard sources rarely report data for Indigenous women. The paucity of data concerning Indigenous women continues notwithstanding the many reports that have criticised this failure, and specific recommendations that have been made to redress the problem.<sup>6</sup> However, while this picture is partial, it is clear that the level of over-representation has become worse since RCIADIC, that patterns are uneven across jurisdictions, and that the needs and interests of Indigenous women are too rarely recognised.

In Part IV, I turn to two examples of initiatives that have been taken in New South Wales ('NSW') intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. The first is the Magistrates Early Referral into Treatment Program ('MERIT'), which is a diversion program tied to bail for defendants with substance abuse problems. A similar program exists in Queensland. It draws in part on therapeutic jurisprudence, and its objectives include providing access to treatment at an early stage as a condition of bail in order to prevent reoffending and to improve health and other outcomes. The second is the adoption of sentencing principles that are to be considered in relevant circumstances involving Indigenous offenders; the so-called *Fernando* principles.<sup>7</sup> In considering these, I review the available evidence to consider the implications of these

developments for Indigenous women and the limitations inherent in their use.

I have chosen these examples because they operate at two different stages of the criminal justice process: pre-trial diversion and sentencing. MERIT is not an Indigenous-specific program, but given its focus on local courts and its wide availability across NSW, it has been seen as having great promise in responding to Indigenous offenders.<sup>8</sup> Reforms to sentencing are commonly considered to have a key contribution to make in reducing over-representation. The *Fernando* principles are specific to Indigenous offenders, but contrast significantly from the approach to sentencing Indigenous people adopted in Canada. I draw on Canadian experience to examine the extent to which Indigenous women have benefited from such sentencing developments.

## **II Failing to Attend to the Needs of Indigenous Women: A Recurring Theme**

While belated attention has begun to be paid to research and programs directed towards the victimisation of Indigenous women – some of which recognise the overlap between victimisation and offending – there has been little attention given to the criminalisation of Indigenous women and their needs and interests within criminal justice. For instance, a recent review of diversion programs for Indigenous women notes a dearth of specific programs for Indigenous women and little data on women's participation in Indigenous programs, or in generic ones. Of the few specific programs that had been developed, some were short-term and lacked ongoing funding, and few had been evaluated.<sup>9</sup> An examination of effective treatment programs for Indigenous people charged with violent offences concludes that there is insufficient published research to allow conclusions to be drawn about programs for Indigenous women.<sup>10</sup> A positive review of the Boronia Pre-release Centre for Women in Western Australia ('WA'), designed to be 'women-centred', notes that 'areas for improvement include the needs of Aboriginal women', and expresses 'regrets that good women-centred practices have not spread into the rest of the custodial system, particularly for Aboriginal women, whose conditions and services are of a particularly low standard'.<sup>11</sup> The development of post release programs has also failed to recognise the needs of Indigenous women.<sup>12</sup>

The observations by successive Social Justice Commissioners Dr William Jonas and Tom Calma, in their reports of 2002 and

2004, remain apposite: there is an 'apparent invisibility of Indigenous women to policy makers and program designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances'.<sup>13</sup>

### **A Intersectional and Systemic Discrimination**

Indigenous women are vulnerable to intersectional discrimination; that is, a compounding of discrimination in specific ways brought about by race and gender (and other social categories), within the criminal justice system. Social Justice Commissioners Jonas and Calma have noted that Indigenous women are not served by programs designed for Indigenous men, or for women generally.<sup>14</sup>

Concerns about the treatment of Indigenous women within the criminal justice system and the failure to recognise their needs and circumstances have not been confined to Australia. In Canada, in 2001, a complaint was lodged to the Canadian Human Rights Commission ('CHRC') by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada, in coalition with other activists, on the basis of discrimination against women prisoners. The grounds for the complaint included, inter alia, the inadequacy of community based release options, including those for Aboriginal women, the inappropriate classification system used, and inadequate and inappropriate placements of women with cognitive and mental disabilities.<sup>15</sup> The CHRC undertook a systemic review with reference to federally sentenced women<sup>16</sup> and found that 'the Canadian government is breaching the human rights of women prisoners by discrimination on the basis of sex, race and disability'.<sup>17</sup> Nineteen recommendations were made, which were directed towards bringing Correctional Services Canada into compliance with the *Canadian Human Rights Act*.<sup>18</sup>

Australian activist group Sisters Inside followed the Canadian lead and lodged a formal complaint with the Anti-Discrimination Commission Queensland ('ADCQ'), seeking a review on the basis 'that "women prisoners experience direct and indirect discrimination on the grounds of sex, race, religion and impairment"'.<sup>19</sup> The ADCQ reported in 2006 with 68 recommendations and noted both 'a strong possibility of systemic discrimination occurring in the classification of female prisoners, particularly, those who are Indigenous'<sup>20</sup> and that the 'absence of a community custody facility in North Queensland ... is a *prima facie* instance of

direct discrimination'.<sup>21</sup> Among other concerns, the report questioned the validity of a risk assessment tool in use, and found that Indigenous women were among those likely to be assessed as high-risk using such measures.<sup>22</sup> Indigenous women were commonly in prison for shorter sentences, but they were over-represented in secure custody, and were less likely to receive release-to-work, home detention or parole, and had higher recidivism rates.<sup>23</sup>

A similar complaint lodged in the Northern Territory ('NT') resulted in a report by the NT Ombudsman, who also raised concerns about systemic discrimination and made 67 recommendations. Notwithstanding the requirement in the *Standard Guidelines for Corrections in Australia* that '[t]he management and placement of female prisoners should reflect their generally lower security needs but their higher needs for health and welfare services and for contact with their children',<sup>24</sup> the Ombudsman found

a lack of resources, poor planning, outdated and inappropriate procedures and a failure to consider women as a distinct group with specific needs. This had resulted in a profound lack of services, discriminatory practices, inadequate safeguards against abuse and very little in the way of opportunities to assist women to escape cycles of crime, poverty, substance abuse and family violence.<sup>25</sup>

Both reports emphasise the need to attend to *substantive* equality, rather than formal equality:

Preventing discrimination requires addressing differences rather than treating all people the same. Indigenous women need equal opportunities to benefit from safe and secure custody, rehabilitation and reintegration back to their community. This requires the provision of correctional services that address their unique needs. A proactive approach is required by correctional services to look at new models and programs. Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and try to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners.<sup>26</sup>

Anti-discrimination actions have been lodged in other Australian jurisdictions,<sup>27</sup> but Kilroy and Pate report that there have been few outcomes for criminalised women.<sup>28</sup> Recent reports to United Nations ('UN') bodies have also taken up concerns about women in the Australian criminal

justice system, especially Indigenous women. The non-governmental organisation submission to the UN Committee on the Elimination of Racial Discrimination noted the substantial growth in the Indigenous women's prison population and expressed concerns about the inadequacy of health and other services for women in prison.<sup>29</sup> It also highlighted unsafe prisoner transport practices, and the damaging effects of mandatory sentencing in the NT and WA. The Australian Human Rights Commission ('AHRC') submission to the Universal Periodic Review at the UN Human Rights Council also noted the growth in the number of Indigenous people in custody,<sup>30</sup> and the distinct human rights issues affecting women in prison, who are subject to strip-searching.<sup>31</sup> The report's recommendations include that Australia 'expedite ratification of the Optional Protocol to [the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*]<sup>32</sup> and the establishment of a National Preventive Mechanism for places of detention'.<sup>33</sup>

In 2010, the UN Special Rapporteur on the Rights of Indigenous Peoples advised that the government fully implement the recommendations of RCIADIC,<sup>34</sup> and, importantly, also made a separate recommendation that '[t]he Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and women in custody'.<sup>35</sup> The separate recognition of Indigenous women is important, because while RCIADIC continues to provide a significant, unrealised, foundation for reform, it does not provide an adequate basis for addressing the criminalisation of Indigenous women.

### III The Criminalisation and Incarceration of Indigenous Women

Data on the involvement of Indigenous women in the criminal justice system is limited, since criminal justice sources typically report with respect to women *or* Indigenous people, but not Indigenous women *per se*. Data is particularly poor concerning police and prosecutorial practices, which underpin criminalisation.

#### A Policing and Indigenous Women

##### (i) Arrest

The most recent National Aboriginal and Torres Strait Islander Social Survey data (2008) indicate that more than

one-third of Indigenous women (35.2 per cent) and men (40.7 per cent) reported having been arrested in the past five years. While percentages fell in 2008 in almost every jurisdiction compared to earlier surveys in 1994 and 2004, they continue to be substantial.<sup>36</sup> The figures were similar for NSW (30.6 per cent of women, 37 per cent of men) and Queensland (30.1 per cent women, 40 per cent men) but higher in WA (45.6 per cent of women, 44.1 per cent of men).

There is scant data on incidents recorded by police that involve offending by Indigenous women, but the evidence indicates that patterns differ markedly for Indigenous women as compared to non-Indigenous women. Bartels presents data from three jurisdictions comparing offence rates per 100,000 for Indigenous and non-Indigenous women; rates for Indigenous women in NSW, South Australia ('SA') and the NT were 9.3, 16.3 and 11.2 times higher respectively. In each state the disparity between Indigenous and non-Indigenous rates was greater for women than for men.<sup>37</sup>

In WA, police arrests of Indigenous women over the period 1996 to 2006 *increased*, while the arrests of non-Indigenous women *declined*.<sup>38</sup> Among women arrested, 'the Indigenous proportion increased from 29.4 per cent in 1996 to 44.5 per cent in 2006'; the proportion of Indigenous men among those arrested increased to a lesser extent over that period from 18 per cent in 1996 to 26 per cent in 2006. The Indigenous proportions for all female arrestees were 'consistently and significantly higher than for all male arrestees'.<sup>39</sup> Increases in Indigenous arrests were attributed to 'increases in offences against the person and justice and good order offences, especially since 1999'.<sup>40</sup> Indigenous women were most likely to be arrested for disorderly conduct (19 per cent), breach of a justice order (14 per cent) or assault (19 per cent).

Court data available from two jurisdictions confirms that Indigenous women are commonly charged with offences of disorderly conduct, assault and, in WA, breach of a justice order. Bartels cites court data for NSW (from 2001) and WA (from 2008), and in both jurisdictions, Indigenous women were particularly over-represented for the categories 'acts intended to cause injury' and 'public order', and in WA were also over-represented for 'offences against justice procedures'.<sup>41</sup> Recent NSW research intended to identify ways of reducing Indigenous contact with the court does not report separately for women. However, findings indicated that road traffic and motor vehicle regulatory offences accounted for a quarter of all Indigenous appearances in the

NSW Local Courts, and that 11 per cent were for breaches of justice orders such as bail, apprehended violence orders, or parole. The study noted the need for further examination of the rates of breach of orders, and for assistance to be provided to aid compliance with orders.<sup>42</sup>

Changing police practices can have a substantial impact on the custodial system; one of the first studies to quantify this effect was recently undertaken in NSW. Researchers found that a 10 per cent increase in police arrests results in an estimated 4.57 per cent increase in the full-time prison numbers for women one month later, with ongoing effects at a cost of \$2.2 million.<sup>43</sup> And of course, this does not begin to account for the human costs to the individuals involved, or to their families and communities.

#### (ii) Police Custody

Data reported by RCIADIC demonstrated that Aboriginal women were 'massively disproportionately detained by police compared to non-Aboriginal women'.<sup>44</sup> However, there is little recent data to consider current levels of police custody. The last police custody survey was in 2002; it indicated that levels of Indigenous over-representation in police custody had declined somewhat, but remained high. The authors noted that 'strategies to reduce Indigenous incidents of police custody are meeting with varying degrees of success in each jurisdiction'.<sup>45</sup> It is thus significant to note that in NSW, a reduction in over-representation rates resulted from the increased use of custody for non-Indigenous people and was *not* the result of fewer Indigenous people in custody, since Indigenous custody levels had remained stable.<sup>46</sup>

Nationally, Indigenous women accounted for 23 per cent of Indigenous people in police custody in 2002, but the report provided no further detail.<sup>47</sup> For Indigenous people, public drunkenness accounted for one-in-five custody incidents, either on the basis of an arrest, or in jurisdictions where public drunkenness has been decriminalised on the basis of 'protective custody'.<sup>48</sup> The most common offence categories for Indigenous people in custody were assault, and public order (which includes public drunkenness and other offences). A report by the Social Justice Commissioner in 2002 had raised particular concern that Indigenous women comprised nearly 80 per cent of all cases where women were detained in police custody for public drunkenness, but it is not possible to determine whether this pattern has continued.

## B Patterns in Women's Incarceration

The limited data available differs in the way in which trends in Indigenous women's imprisonment are measured and described, for instance, by reference to the number, percentages and population rates over differing time frames. However, whatever measure is used, it is clear that the level of over-representation of Indigenous women in prison is markedly greater now than in 1991 at the time of the RCIADIC final report.

In 1991, there were 104 Indigenous women incarcerated in Australia,<sup>49</sup> but by 2010 the average daily number had risen to 643.<sup>50</sup> The Productivity Commission notes that the Indigenous women's imprisonment rate has increased at a greater rate than other groups; from 2000–2010 there was a 58.6 per cent increase in Indigenous women's imprisonment as compared to 35.2 per cent for Indigenous men,<sup>51</sup> 3.6 per cent for non-Indigenous men and 22.4 per cent for non-Indigenous women.<sup>52</sup> The growth since 2000 builds on a substantial increase in Indigenous women's imprisonment throughout the 1990s.<sup>53</sup> Based on national figures, at June 2010 Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men.<sup>54</sup>

Table 1 demonstrates that growth in the number of Indigenous women imprisoned has continued over the past five years in most jurisdictions, with marked variations

across jurisdictions. The three states with the highest number of Indigenous women in custody are NSW, Queensland and WA. Together they account for approximately 83 per cent of Indigenous women in custody in Australia. The proportion of women in prison constituted by Indigenous women ranges from a low of 6.3 per cent in Victoria to a high of 82 per cent in the NT; for NSW it is 28.8 per cent, Queensland 27.1 per cent, and WA 51.5 per cent.<sup>55</sup>

The very marked differences in rates of imprisonment between Indigenous and non-Indigenous women in each jurisdiction are evident from Figure 1 (as at 2010) (see over), with WA demonstrating the greatest disparity.

As evident from Table 2 (see over), there has been some fluctuation in rates over the past five years, but the overall national pattern is one of increase. NSW and WA are notable for having imprisonment rates for Indigenous women that are consistently above the national rate, and while the most recent NSW data departs from the trend in showing a decline from 2009 to 2010, the NSW rate remains substantially above the national level. Tables 1 and 2 also demonstrate substantial increases in the numbers and rates of Indigenous women incarcerated in recent times in Queensland, SA and the NT.

The substantial variations in incarceration rates and penal practices across Australia indicate the need for specific attention to jurisdictional differences and localised practices.<sup>56</sup> The available data are considered in more detail with specific reference to NSW.

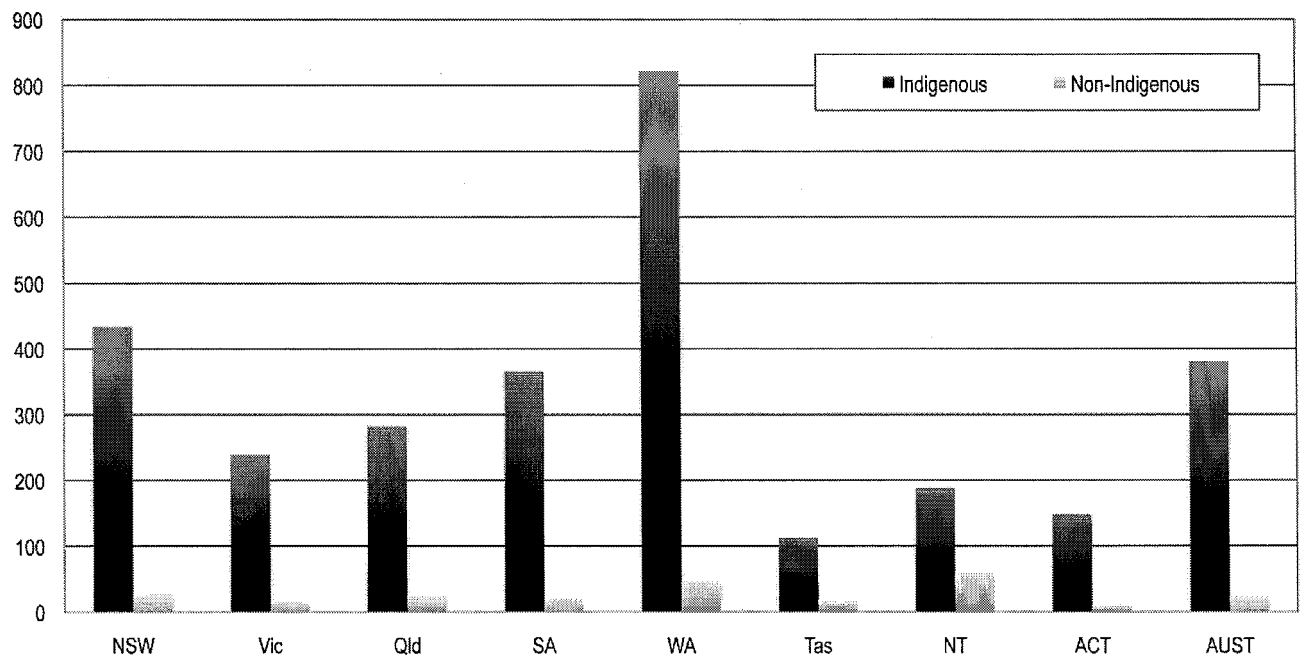
TABLE 1: AVERAGE DAILY NUMBER OF INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	194	13	114	24	134	8	23	1	512
2007	209	15	115	29	175	7	32	1	584
2008	213	17	115	28	143	8	36	3	561
2009	226	19	123	31	165	7	39	2	612
2010	210	26	136	34	187	7	41	2	643
Per cent change 2006–2010	8.2	100.0	19.3	41.7	39.6	-12.5	78.3	100.0	25.6

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).



FIGURE 1: FULL-TIME CUTSODY RATES 2010:  
INDIGENOUS AND NON-INDIGENOUS WOMEN (RATES PER 100,000)



Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).

TABLE 2: INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010 (RATE PER 100,000 ADULT INDIGENOUS POPULATION)

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	463.9	145.0	270.8	291.3	628.1	149.4	124.9	78.3	346.2
2007	473.2	150.1	265.9	343.9	836.9	137.9	159.1	71.4	380.1
2008	466.9	163.1	254.6	316.1	666.7	137.1	177.8	235.4	354.8
2009	492.1	186.9	266.2	343.5	731.4	121.2	189.4	198.2	379.2
2010	434.1	239.4	281.9	366.0	821.7	112.8	191.1	148.8	381.6
Non-Indigenous rate 2010	27.0	14.5	24.7	19.2	45.4	61.1	62.4	10.5	24.4

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011); data for 2007 and 2008 were updated by the ABS in this publication to take the 2006 census into account.

### C Characteristics of Indigenous Women in Custody

Women prisoners in general have been described as 'victims as well as offenders', who 'pose little risk to public safety'.<sup>57</sup> Compared with other women inmates, Indigenous women are more likely to be victims of violent crime<sup>58</sup>, and they 'almost universally have been subjected to social and economic hardship'.<sup>59</sup> The majority are mothers.<sup>60</sup> They commonly have poorer physical and mental health than other inmates and are over-represented among those considered 'at risk'.<sup>61</sup>

In most Australian jurisdictions Indigenous women serve much *shorter* sentences than non-Indigenous women. For instance, as measured by median sentences, Indigenous women's sentences nationally were around half as long as those for non-Indigenous women; they were around one-third in NSW, SA and the NT.<sup>62</sup> Bartels suggests this may indicate that they are being incarcerated for 'more trivial' offences.<sup>63</sup> Evidence indicates that the profile of offences for which Aboriginal women are incarcerated differs from that of non-Aboriginal women. For instance, a WA study of women in prison also indicates that Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women, and were more than twice as likely to be serving a sentence of 12 months or less; by contrast, non-Aboriginal women were over-represented in the more serious offence categories.<sup>64</sup>

Based on national data for 2007–08 and as measured by their 'most serious offence', of all women imprisoned Indigenous women constituted:

- \* 55 per cent for acts intended to cause injury;
- \* 40.3 per cent for road traffic and motor vehicle regulatory offences;
- \* 37.9 per cent for break and enter;
- \* 36 per cent for robbery and extortion;
- \* 33.5 per cent for offences against justice and good order;
- \* 28.2 per cent for theft; and
- \* 27.3 per cent for public order (although the overall numbers were small).<sup>65</sup>

The substantial over-representation of Indigenous women for offences related to 'acts intended to cause injury' has been noted in several reports, and deserves greater attention. Links with alcohol have been identified,<sup>66</sup> and concerns have been raised that some of these offences are committed

in response to domestic violence.<sup>67</sup> A recent WA report found that approximately 60 per cent of assaults for which Aboriginal women were in custody involved partners, family, friends or acquaintances as victims, and that most were committed while intoxicated.<sup>68</sup> Given evidence suggesting that increasing Indigenous imprisonment levels in part reflect greater law enforcement activity,<sup>69</sup> it is possible that some of these remaining matters relate to charges of assault police.<sup>70</sup> It is also notable that Bartel's study indicates that 67 women (20 of whom were Indigenous) were incarcerated for 'road traffic and motor vehicle regulatory offences'; the use of imprisonment for these offences is troubling and needs further investigation.

Data also indicate that Indigenous women are much more likely than other women in prison to have been imprisoned previously. National figures indicate that 65 per cent of Indigenous women had prior adult imprisonment as compared with 35 per cent for non-Indigenous women.<sup>71</sup> A WA study found that a staggering 91 per cent of all Aboriginal women in prison had served a prior sentence and that 48 per cent of Aboriginal women in custody in WA had served more than five previous terms of imprisonment.<sup>72</sup> This WA study also sheds some light on the offence of breach of order; over two-thirds of Aboriginal women had as a current offence a breach of an order, most commonly bail, and the breaches were typically due to re-offending rather than non-compliance.<sup>73</sup> NSW research on Indigenous recidivism does not address gender, but recommends investing in drug and alcohol treatment programs and vocational training, and investigating further the circumstances in which orders are breached as strategies towards reducing recidivism.<sup>74</sup>

Researchers have also begun analysing sentencing patterns in order to determine whether the increasing over-representation of Indigenous women within prison is attributable to harsher sentencing. In a study of sentencing in the *higher* courts of WA, Bond and Jeffries found that Indigenous women were *less* likely to be sentenced to imprisonment than non-Indigenous women.<sup>75</sup> However, their recent research in Queensland, which analyses results for Indigenous people and not women specifically, found differences between sentencing in the higher and lower courts. Once other relevant sentencing factors were controlled, there were no differences in the likelihood of a prison sentence for Indigenous and non-Indigenous people in the higher courts; however, in the lower courts Indigenous people were *more* likely to be sentenced to imprisonment.<sup>76</sup>

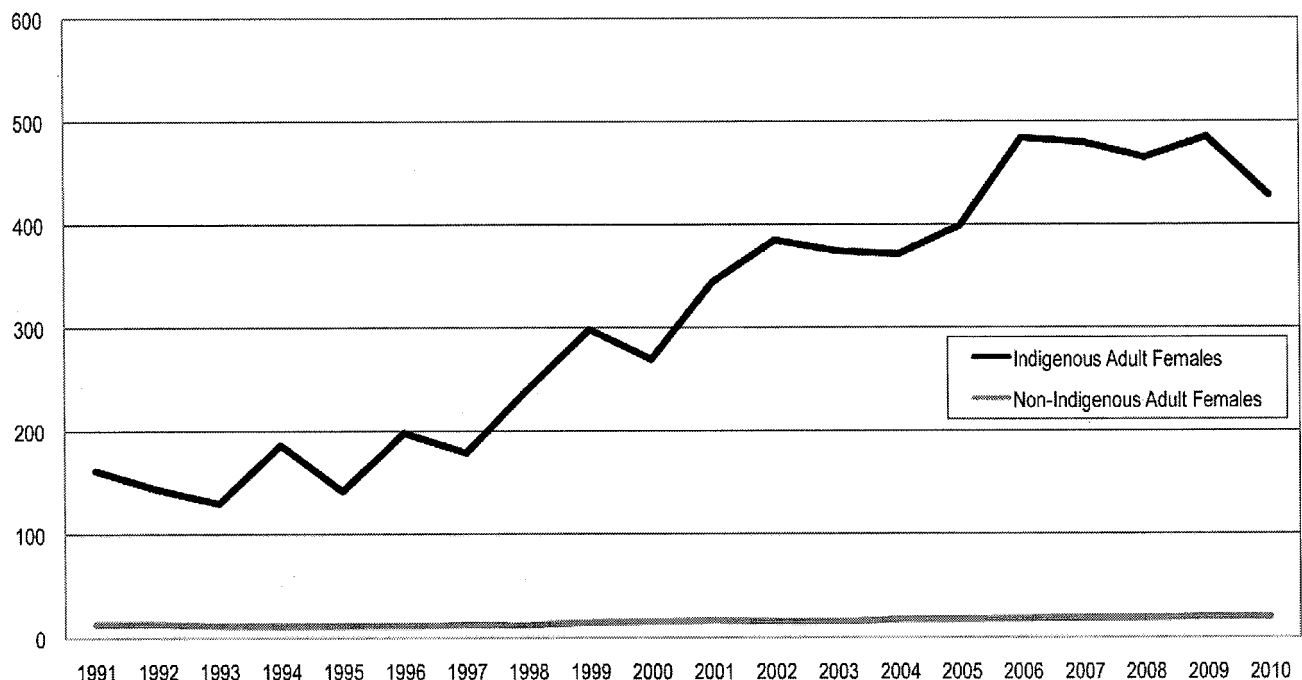
The authors suggest that one interpretation of their findings is that because time-poor magistrates in the lower courts are 'required to make sentencing decisions quickly with minimal information about defendants ... there may be greater judicial reliance on stereotypical attributions about offenders.'<sup>77</sup> In both higher and lower courts being on remand and having a prior record increased the likelihood of imprisonment.

More work is needed to understand the sentencing of Indigenous women, especially in the lower courts, which incarcerate the majority of people, particularly those given lesser sentences. However, these findings, together with the different offence profiles of Aboriginal and non-Aboriginal women, suggest that in addition to sentencing we also need to understand better police practices and bail decision-making that bring Indigenous women before the courts and into custody.

#### D Bail and Remand for Indigenous Women

The data presented above do not distinguish between sentenced and unsentenced inmates, and again there is little data specific to unsentenced Indigenous women. The Australian Bureau of Statistics ('ABS') reports that at 30 June 2010, 22 per cent of Indigenous offenders were unsentenced compared with 21 per cent for non-Indigenous offenders, but does not provide data for Indigenous women.<sup>78</sup> However, several sources have noted that increases in the remand population have been significant in driving the increase in prison populations generally. The NSW Select Committee into the Increase in Prison Population found in 2001 that the increase in the remand population was 'the most significant contributing factor'.<sup>79</sup> A more recent study by Fitzgerald notes that the growth in the number of Indigenous women remanded in custody in NSW has been greater than that of

FIGURE 2: NSW WOMEN'S CRUDE FULL-TIME CUSTODY RATES: 1991–2010, (PER 100,000 ADULTS)



Source: Corrective Services NSW, data provided to the author.

those who are sentenced.<sup>80</sup> Since 2002, Indigenous women have constituted between 20 and 30 per cent of the women's remand population in NSW.<sup>81</sup>

### E Indigenous Women in Custody in NSW

At the time of the final RCIADIC report, there were 47 Aboriginal women in full-time custody in NSW; by June 2010 that number had risen to 209.<sup>82</sup> Figure 2 shows the growth in the NSW Indigenous women's imprisonment rate per 100,000 from 161.6 in 1991 to 428.3 in 2010, as compared to that for non-Indigenous women (13.1 in 1991 to 19.8 in 2010).<sup>83</sup> In 1998, the Indigenous women's imprisonment rate surpassed the rate for non-Indigenous men for the first time; by 2010, the Indigenous women's imprisonment rate had grown to more than one-and-a-half times that for non-Indigenous men (276.0 per 100 000).

At June 2009 the rate of remand in NSW was:

- \* 111 per 100,000 for Aboriginal women; and
- \* six per 100,000 for non-Aboriginal women.

For sentenced inmates the NSW imprisonment rate was:

- \* 379 per 100,000 for Aboriginal women; and
- \* 14 per 100,000 for non-Aboriginal women.

While Aboriginal men's remand and custodial rates were 16.5 times those on non-Aboriginal men, the remand rates for Aboriginal women were 19.5 times, and sentenced rates 27.2 times, those of non-Aboriginal women.<sup>84</sup>

In 1991, the number of Aboriginal women on remand in NSW prisons was eight; by 2007, this had increased to 61, although it declined somewhat to 43 by 2010. The number of non-Aboriginal women on remand also grew over the same period, although to a lesser degree.<sup>85</sup>

Fitzgerald examined the growth in the number of Indigenous prisoners over the period 2001 to 2008, which was greater for remandees than for sentenced prisoners (72 per cent compared to 56 per cent); no details were provided by gender.<sup>86</sup> She found that the increase in the remand population was due to *an increase in the proportion of people remanded in custody overall* (from 12.3 per cent in 2001 to 15.4 per cent in 2007), and for each of the offence categories that were most common for remandees; that is, the increase did not reflect a change in the

offence profile to more serious offences, but rather *harsher bail decisions*. The mean time in custody also increased from 3.3 months in 2001 to 4.2 months in 2008.<sup>87</sup>

Steel's research has demonstrated that NSW has tightened bail laws substantially over the last two decades, and that the NSW Parliament has introduced many more punitive amendments to the *Bail Act* than have been put in place in any other jurisdiction.<sup>88</sup> Such approaches are clearly at odds with the recommendations of RCIADIC and other strategies intended to reduce Indigenous incarceration, since they not only contribute to higher numbers on remand, but also may make conviction and incarceration more likely.<sup>89</sup>

In considering the increasing rate of Indigenous women's incarceration over time depicted in Figure 2, it is striking to note that in fact *fewer* Indigenous people appeared in NSW courts in 2007 than in 2001. However, the percentage found guilty was higher, especially for those charged with offences against justice procedures which increased by 33 per cent. The percentage of those convicted who received a custodial sentence also increased, especially for offences against justice procedures (from 17.7 per cent to 27.6 per cent). However, while the mean length of sentence increased for some offences, for offences against justice procedures it actually went down,<sup>90</sup> which suggests perhaps that more offences of lesser seriousness were resulting in incarceration. Fitzgerald found that 'the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself.'<sup>91</sup>

### F Deaths in Custody

The last comprehensive analysis of the deaths in custody of women was undertaken by Collins and Mouzos, who examined the period of 1980–2000.<sup>92</sup> They found that the deaths of Indigenous women were distinctive in several respects. Deaths of Indigenous women accounted for 32 per cent of all female deaths in custody as compared with Indigenous men, who accounted for 18 per cent male deaths in custody.<sup>93</sup> Half of Indigenous women were found to have died of natural causes as compared with 20 per cent of non-Indigenous women and 38 per cent of Indigenous men, and the most common cause of death for both of the latter groups was self inflicted.<sup>94</sup> Indigenous women were much more likely to be in custody for good order offences as their most serious offence (54 per cent); this was almost double

the percentage for non-Indigenous women (28 per cent) and much higher than the percentage for Indigenous men (19 per cent).<sup>95</sup> Most Indigenous women died in police custody (79 per cent); this was not the case for non-Indigenous women (37 per cent) or Indigenous men (42 per cent) the majority of whose deaths occurred in prisons. They note that the final report of the RCIADIC also found that the Indigenous women whose deaths they had investigated had a 'high incidence of good-order offences in [their] criminal histories'.<sup>96</sup>

Indigenous deaths in custody have decreased over time, and despite increases recorded in the last five years, remain lower than they were in the mid-1990s.<sup>97</sup> However, a recent series of articles written by Inga Ting for *Crikey* has documented increases of 'nearly 50%' in deaths in prisons in NSW and Queensland over the past decade.<sup>98</sup> Ting also documents ongoing concerns about failures by correctional authorities to implement recommendations from the RCIADIC and from subsequent coronial inquiries. According to Ting, in the nine years to 2009 'NSW Coroners documented more than 60 cases in which bureaucratic bungling, a failure or absence of policy, breaches of procedure or lack of communication between government agencies contributed to the death' and that 'deaths could have been avoided had custodial and health authorities exercised proper duty of care and adhered to policies implemented as a result of Royal Commission recommendations.' Numerous breaches of RCIADIC recommendations were identified.<sup>99</sup>

Due to the lack of available data, it is difficult to track trends in the deaths of Indigenous women. However, Ting has identified three deaths of Aboriginal women in recent years in NSW prisons (in 2004, 2005 and 2009), one of whom was an Aboriginal transgender (male-to-female) inmate.<sup>100</sup> All three were on remand and two were known to have made previous suicide attempts.<sup>101</sup> The remand period is known to be a time of risk: the RCIADIC found that 30 per cent of deaths were of people who were unsentenced.<sup>102</sup> As Cunneen has noted, '[t]he current tragedy is that so many of the circumstances leading to deaths in custody identified by the RCIADIC are still routine occurrences'.<sup>103</sup>

#### IV Redressing Over-representation?

The data reviewed above indicate that there are notable differences in trends in the criminalisation and incarceration of Indigenous women between jurisdictions, and point to the

role of harsher laws, policies and practices as exacerbating the levels of over-representation of Indigenous women in custody. Fitzgerald's research indicates that in NSW harsher bail decisions, higher conviction rates and longer sentences have been driving trends. In this part of the paper I examine two recent developments in NSW. The first, MERIT, is a mainstream program operating in local courts, designed to divert offenders into treatment programs with the reduction of re-offending as one of its objectives. The second, the *Fernando* principles, are an Indigenous specific set of sentencing principles intended to assist judges in relevant cases.

##### A Bail-based Diversion: The MERIT Program

The Magistrates Early Referral into Treatment program operates in more than 60 courts across NSW and offers eligible adults charged with an offence who have a substance abuse problem access to drug treatment prior to entering a plea and while on bail. A small number of courts also offer treatment for alcohol abuse. Magistrates are provided with a report on the defendant's participation, which may be taken into account at sentencing. It is 'the largest mainstream program that diverts adult defendants into treatment' and has been described as a 'highly appropriate intervention program for Aboriginal defendants'.<sup>104</sup> It has been found to be associated with 'improvements in dependence and psychological distress as well as general and mental health'.<sup>105</sup>

MERIT was reviewed by the NSW Auditor-General in a report which considered whether eligible Aboriginal people were getting access to the program, and whether the program was meeting their needs (although the review did not specifically deal with the needs of Aboriginal women). While referrals of Aboriginal people to the program have increased somewhat over time, they remain low: in 2007–08 only 427 of an estimated 19,000 Aboriginal defendants were referred, and only 273 participated.<sup>106</sup> An evaluation of the program found that over time the rate of Aboriginal people being *accepted* into the program decreased, while the rate for non-Aboriginal people remained the same. This decrease was found to coincide with a change to the *Bail Act*, which made it more difficult for repeat offenders or those who had previously breached bail to be released to bail. It was also said that some Aboriginal people were not accepted into the program because they were charged with assault, as the program excludes those who have committed serious violent offences.<sup>107</sup>

Other barriers to Aboriginal defendants gaining access to the program identified by the Auditor-General were: the paucity of alcohol-specific programs;<sup>108</sup> the fact that while solicitors were a key point of referral, many defendants did not have legal representation;<sup>109</sup> the 'disproportionate impact' of eligibility criteria and the location of courts on Aboriginal defendants;<sup>110</sup> and 'the generally poor level of engagement and communication with Aboriginal defendants'.<sup>111</sup> For instance, '[a] standard, case plan approach is used by MERIT teams to develop the treatment program for clients.' However, it was found that 'this approach did not recognise any special needs Aboriginal participants may have or recognise alternative treatment models that may be more suitable for Aboriginal clients'.<sup>112</sup> These issues may also underlie the finding that one-in-three Aboriginal people referred to the program do not accept.<sup>113</sup>

The evaluation found that completion rates for Aboriginal people (50 per cent) were less than for non-Aboriginal people (60 per cent), and that the most common reason for non-completion for both groups was being breached by the staff for non-compliance.<sup>114</sup> Outcome data was not reported by gender.<sup>115</sup> One hopeful finding reported by the Auditor-General was that after an 'Aboriginal Practice Checklist' was trialled at several locations, completion rates for Aboriginal clients had increased to approximately 64 per cent.<sup>116</sup>

A further evaluation of MERIT focused on women, and found that at entry to and exit from the program, 'women had significantly poorer general and mental health scores than men'.<sup>117</sup> A higher proportion of women (22 per cent) than men (13 per cent) in the program were Aboriginal, but the findings did not otherwise distinguish between Aboriginal and other women.<sup>118</sup> However, women were reported to be less willing than men to participate in the program due to family responsibilities and concerns about 'the mandatory child protection obligations' of staff, and were less likely to complete the program than men often due to a failure to attend. They were reported to have more complex commitments and higher rates of 'co-morbid chronic mental health disorders and trauma' than men, which constituted 'a significant barrier to female participation'.<sup>119</sup> The authors noted the need for such programs to be more responsive women's needs.

These reports demonstrate that the potential benefits of the programs are diminished or unavailable to Aboriginal women because standardised, mainstream programs

have not anticipated their needs. The development of the Aboriginal Practice Checklist for MERIT seems to offer promise, but it too may prove to be inadequate if it does not explicitly consider the additional barriers that Aboriginal women face in accessing and completing the program.<sup>120</sup> The high levels of victimisation among Aboriginal women are likely to affect some women's capacity to participate and will require attention to their safety. The competing demands of child care and other familial responsibilities also mean that location and transport are very significant considerations and make regular attendance difficult. Together with the fear of mandatory child protection reporting, these are formidable obstacles to Aboriginal women's participation. Further, a checklist is not an adequate substitute for the involvement of Aboriginal people in developing and delivering appropriate programs and services.

## **B Sentencing: The *Fernando* Principles**

Several reports in NSW have recommended the trial of the abolition of short-term sentences, especially for Indigenous women, in recognition of the damaging effects of imprisonment, the evidence reviewed above that Indigenous women commonly serve shorter sentences, lack of access to programs for short-term inmates and the likelihood that short sentences serve little rehabilitative purpose, and the need to overcome Indigenous over-representation.<sup>121</sup> However, these recommendations have not been acted on. The sole Indigenous-specific sentencing initiative has been the development of common law principles guiding the sentencing of Indigenous offenders.<sup>122</sup>

The so-called *Fernando* principles were articulated by Wood J in *R v Fernando*. The decision sets out sentencing principles that may be relevant to Aboriginal offenders in certain circumstances, with particular reference to alcohol abuse and violence, while not establishing Aboriginality as a mitigating factor per se. A thorough review was undertaken by Janet Manuell SC for the NSW Sentencing Council, but did not address gender specifically.

Manuell found that the principles were not always applied and were seen as applicable in only a very narrow range of circumstances.<sup>123</sup> The potential ambit of the principles has been read down in subsequent appellate decisions. For instance, other commentary points to decisions that seem to turn narrowly on questions of whether a person is 'Aboriginal enough', and whether the principles might

apply to Aboriginal people in urban settings.<sup>124</sup> Research undertaken for this paper identified six cases in which the *Fernando* principles had been considered or applied to women defendants, and no real elaboration of how the principles might relate to women.<sup>125</sup> In two of these cases the *Fernando* principles were found not to apply.<sup>126</sup>

An interesting point of contrast has been the Canadian statutory provision, *Criminal Code* Part XXIII section 718.2, which provides that in sentencing 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.' This was considered in *R v Gladue*,<sup>127</sup> in which the Supreme Court of Canada described the over-representation of Indigenous people in Canada as a crisis, and recognised systemic discrimination in the criminal justice system. The Court found that

[t]he remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.<sup>128</sup>

The provision 'amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders.'<sup>129</sup> Canadian governments have subsequently developed a system of community-based justice programs including the Aboriginal Justice Strategy.

The Canadian approach to sentencing demonstrates a focus on substantive equality,<sup>130</sup> which is not limited to redressing any evidence of discriminatory sentencing. Indeed, in a manner consistent with the approach adopted in the RCIADIC, Aboriginal over-representation in the Canadian criminal justice system is understood to have complex roots arising from the legacy of colonisation, factors that are seen as relevant in sentencing.<sup>131</sup> However, the Canadian developments have been somewhat controversial. For instance, Stenning and Roberts criticise the approach on several grounds, including that they find no evidence of discrimination in sentencing, and, they argue, because it 'violates a cardinal principle of sentencing (equity) relevant to all'.<sup>132</sup> In reply, Rudin and Roach argue, inter alia, that the intent of the provision is to reduce over-representation in

prison and is not limited to redressing any discrimination in sentencing, that Aboriginal defendants are distinguishable from other disadvantaged defendants by reference to the impact of colonisation, and that Stenning and Roberts mistakenly adhere to formal equality when Canadian law instead favours substantive equality.<sup>133</sup>

An approach founded on substantive equality has not been endorsed in the NSW context, where the clear preference lies with formal equality.<sup>134</sup> For instance, the NSW Law Reform Commission (NSWLRC) specifically rejected 'legislative prescription' of sentencing principles on the basis that it 'would add nothing to the existing common law'. By contrast with the recognition by the Canadian Supreme Court of systemic discrimination in the criminal justice system, the NSWLRC commission noted only that 'the potential for discrimination against Aboriginal offenders still exists,' but at the same time rejected 'the notion that this would be overcome by a legislative statement of sentencing principles.'<sup>135</sup> The Sentencing Council also dismissed the Canadian approach, stating a preference for the present Australian position which 'does not offend the basic principle that the same sentencing principle apply irrespective of the offender's identity or membership of an ethnic or racial group'.<sup>136</sup>

The rejection of an approach founded on substantive equality by two eminent NSW bodies is regrettable, since, as in Canada, there are clear policy reasons for endorsing such an approach.<sup>137</sup> However, as in Canada, it may require legislative action to bring it about, perhaps an unlikely outcome in an era of punitive populism.

The explicit adoption of a substantive equality approach offers a way forward for Indigenous women since it has the potential to bring a more contextual understanding to their experiences as both Indigenous people *and* as women. In 1994, the Australian Law Reform Commission ('ALRC') promoted reforms based on substantive equality, recognising the need to '[place] inequality in the context of disadvantage'. However their recommendations, which included an Equality Act, were not adopted.<sup>138</sup>

While there remain compelling reasons why questions of justice need to be approached through a concern for substantive equality, Canadian experience indicates that this is unlikely to be a sufficient means of redressing Indigenous women's over-representation within the criminal justice

system. Ten years on from *Gladue* the capacity of courts to reduce over-representation of Aboriginal people in the prison system in Canada has been described as 'dismal'.<sup>139</sup> The growth in the percentage of Aboriginal women in the prison system from 2004/2005 to 2008/2009 outstripped that for men, and in '2008/2009, Aboriginal women represented 28 per cent of all women remanded and 37 per cent of women admitted to sentenced custody'.<sup>140</sup>

Toni Williams has argued with respect to the Canadian situation that although the legal principles require that offences by Aboriginal people be considered in context, this contextualisation does not necessarily produce lesser sentences, since those factors can be interpreted differentially, including as indicating that the offender is risky or dangerous.<sup>141</sup> As she goes on to say, 'the *Gladue* decision essentially requires judges to consider the social context of an Aboriginal defendant when passing sentence and assumes that such consideration makes it less likely that an Aboriginal defendant will receive a prison sentence'.<sup>142</sup> There is a tension in that these factors can be seen as reasons for lesser punishment and as markers of risk; 'an individual's experience of hardship or needs may be subordinated to the perceived demands of social protection if that hardship or need is constituted as a risk, as in effect situating the individual among the "dangerous classes"'.<sup>143</sup> For Aboriginal women, she sees a danger that a contextual analysis may see them portrayed 'as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality that render the stereotyped group more vulnerable to criminalization'.<sup>144</sup>

One possible implication of William's research is that justice practices that have Indigenous legal actors, including circle sentencing and specialist Indigenous courts, may be better placed to undertake such contextual analysis and sentencing. Indigenous justice practices are now well established in some settings in Australia. Several such initiatives have been endorsed by the Productivity Commission as examples of 'things that work'; these include Aboriginal sentencing within the South Australian magistrates courts, the South Australian Aboriginal conferencing initiative in Port Lincoln, and Aboriginal courts such as the Murri court in Queensland and the Koori court in Victoria.<sup>145</sup> However, here too, the need for explicit attention to the intersection of race and gender will arise if Indigenous women's needs are to be met.

## V Conclusion

This paper has documented enduring and repeated failures to pay sufficient regard to Aboriginal women. An intersectional analysis that recognises the specific circumstances that contribute to Aboriginal women's criminalisation and incarceration, coupled with an approach to the provision of services and support that focuses on substantive equality is crucial. But it is also not enough. As William's work suggests, an intersectional analysis provides a vital first step in bringing recognition to Indigenous women but does not determine how that recognition is given expression within criminal justice practices. Indigenous women need to be fully involved in shaping the meanings that emerge.

Several recent reports and initiatives have given emphasis to the need to return to RCIADIC as guiding future developments.<sup>146</sup> It is vital that Indigenous women have a voice in determining how best the blueprint provided by RCIADIC can be reconfigured so as to adequately represent their interests.

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- \* Professor of Law, University of New South Wales. I would like to acknowledge the research assistance of Chantelle Porter and Yvette Theodorou.
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- Between 1993 and 2003 the general female prison population increased by 110%, as compared with a 45% increase in the general male prison population. However, over the same time period the Indigenous female prison population increased from 111 women in 1993 to 381 women in 2003. This represents an increase of 343% over the decade': above n 12, 15.
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The Sentencing Council acknowledges the approach in Canada of special consideration of alternatives to imprisonment for Aboriginal offenders ... The Sentencing Council prefers the present common law position in Australia ... The common law position in NSW acknowledges the relevance of Aboriginality in sentencing, but does not offend the basic principle that the same sentencing principle apply irrespective of the offenders identity or membership of an ethnic or racial group: 'Abolishing Prison Sentences of 6 Months or Less', above n 121, 16 n 49.
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# THE PROMISE OF JUSTICE REINVESTMENT

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This article examines the notion and practice of Justice Reinvestment ('JR'), an emerging approach addressing the high social and economic costs of soaring incarceration rates. JR invests in public safety by reallocating dollars from corrections budgets to finance education, housing, healthcare, and jobs in high-crime communities. Key distinguishing features of JR (including justice and asset mapping, budgetary devolution and localism, and the desirability of bipartisanship) are briefly outlined, followed by discussion of its recent emergence and application in the United States, and to a lesser extent in the United Kingdom. The prospects for the adoption of JR approaches in Australia are then considered, with particular reference to the high imprisonment rates of Indigenous people. If JR is to be promoted in the Australian context it is important that it be subject to critical scrutiny and therefore some of the key problems are briefly outlined, before a conclusion which emphasises the potential benefits of JR.

Justice Reinvestment is a very recent concept enjoying a spectacular rise onto the political and criminal justice policy agenda in the US and UK. Its recent origins are evident from the fact that the term was first coined in 2003 by Tucker and Cadora in a paper written for George Soros' Open Society Foundation.<sup>1</sup> It was picked up by the Council of State Governments Justice Center ('CSG') — a national non-government organisation ('NGO') providing advice to government policymakers — which has become the main body for JR implementation in the US since the first pilot began in 2006.

The promise of JR lies in providing an appealing framework, attractive to both progressives and conservatives, from which to challenge law and order populism as a default political position. Depending on how it is framed, JR appeals to a broad constituency, including fiscal conservatives worried about ever increasing state expenditures on imprisonment. It is in part a response to the 'evidence based' turn in criminal justice which is revealing that ever increasing imprisonment rates are not only hugely expensive at a time of fiscal stringency and global financial crisis, but also are providing very little return in terms of high recidivism rates. Indeed high imprisonment rates may in fact be counter-productive and criminogenic, contributing to social breakdown, crime and insecurity.<sup>2</sup>

However, behind this promise lies a conceptual ambiguity which may result in JR becoming an all

program or concern thus eliding its broader focus on building social cohesion in high crime neighbourhoods. Even worse, it may operate as a cover for a strategy of disinvestment in state provision of prison and post release services. This article aims to clear the ground a little by providing a basic guide to the emergence, distinguishing features, potential promise and pitfalls of JR, its prospects in the Australian context and its application to Indigenous communities.

Thinking critically about JR involves confronting its ambiguity and lack of a clear theoretical and normative base; recognising the potential for it to be used to cover neo-liberal strategies of disinvestment; acknowledging the limits of fiscal rationality and evidence based strategies in the criminal justice area; and resolving the difficulties in securing some key political conditions in the Australian context, such as a lack of bipartisanship in criminal justice politics and finding appropriate structures for political and financial devolution. However, it is also possible that some of these issues can be reconceptualised so that perceived weaknesses might be seen as strengths. For example its ambiguity and lack of a clear theoretical and normative base might enable a bipartisan approach to criminal justice policy. Indeed JR might become part of a wider challenge to re-examine the taken-for-granted nature of 'popular punitiveness' in the Australian context, by uncoupling the two terms and taking the notion of populism more seriously.

## What is Justice Reinvestment?

JR involves advancing 'fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer'.<sup>3</sup> The key strategy is the quantification of savings and subsequent reinvestment in high-stakes neighbourhoods to which 'the majority of people released from prisons and jails return', by, for example, redeveloping 'abandoned housing and better coordinat[ing] such services as substance abuse and mental health treatment, job training, and education'.<sup>4</sup> The JR approach is an outgrowth of the 'evidence-based public policy' strategy which seeks to promote social policy based on research outcomes rather than on the politics of legitimisation crises and media and popular punitiveness. It is, at least in part, cost driven in recognition that law and order has traditionally been cloistered from the calculations of economic rationality; expensive institutions such as prisons are

## Justice reinvestment funding is used to bolster existing organisations by supporting various local community building projects.

lies behind decisions on investment in other forms of social infrastructure such as schools, hospitals and public transport. Todd Clear argues the need to 'realign the incentives of the justice system so that it becomes in the business (and residential) community interest to reduce prison populations'.<sup>5</sup> In the attempt to encourage the use of economic incentives to change public policy, JR is compatible with various tenets of neo-liberalism, while the emphasis on social cohesion and community building draws heavily on traditional social democratic concerns.

### Key distinguishing features

#### *Justice and asset mapping*

There is a specific process that characterises a JR approach. The first step is 'justice mapping' — an analysis of data and trends affecting incarceration rates, including identification of the areas producing high numbers of prisoners and the factors driving the growth in prison population. In the next phase, policy options are developed and implemented to reverse the rates of incarceration and to increase the effectiveness of spending in the criminal justice arena. Finally, the impact of the changes is evaluated. Savings are quantified and reinvested back into those communities producing high numbers of offenders.

The 'mapping' process is two-fold: to identify high risk-high crime neighbourhoods, and to map the community 'assets' in those communities (the various government, non-government, civic, community, business, educational, familial, religious, sporting, cultural and community organisations and agencies that are a source of strength and social cohesion). Justice reinvestment funding is used to bolster existing organisations by supporting various local community building projects.

JR is then a 'place based' approach, whereby resources spent on incarceration can be redirected into the local communities from which offenders come, and to which they will return. It has been described as a form of:

preventative financing, through which policymakers shift funds away from dealing with problems 'downstream' (policing, prisons) and towards tackling them 'upstream' (family breakdown, poverty, mental illness, drug and alcohol dependency).<sup>6</sup>

#### *Budgetary devolution and localism*

Key characteristics of JR noted so far are that it is evidence based, is partly cost driven, is place based, targets high stakes-high crime communities and identifies the existing

neighbourhoods. Depending on their national and geographical location, JR schemes typically involve a form of budgetary devolution. In the UK context, devolution is from central to local government; in the US federal or state jurisdictions, devolution is to county administrations. Those budgetary devolutions can take the form of block grants; fiscal incentives; the use of social bonds by trusts, local businesses or social entrepreneurs (as in the English Peterborough prison scheme involving post release mentoring and advice provided by charitable trusts and foundations using social impact bonds); or the use of various voucher systems. There is a strong strand of localism in much of the JR literature, encompassing existing local community organisations, NGOs, church and welfare agencies, and the private sector.

#### *Bipartisanship in criminal justice politics*

Another key feature of the appeal of JR is its potential to attract bipartisan support from both left and right. Bipartisanship in criminal justice policy is arguably a key pre-condition for the adoption of 'evidence-based' policies.<sup>7</sup> However, it has been in short supply across the political spectrum as political parties have jostled to portray themselves as 'tough on crime', with little evidence of action on the Blairite corollary, 'tough on the causes of crime'. On the right, a number of international conservative convergences over the need to reduce imprisonment rates have emerged. In New Zealand, under a National Party (Conservative) Coalition, the Deputy Prime Minister and Finance Minister, Bill English, recently described prisons as a 'fiscal and moral failure'<sup>8</sup> and signalled an end to prison building. In the UK, Justice Secretary Kenneth Clarke has argued for significantly reduced imprisonment rates and, in the US, right-wing Republicans have promoted JR approaches. At the same time a re-evaluation of the criminal justice and law and order record of Blairite 'New Labour' policies is charting the damaging effects of Labour policies and comparing them unfavourably with aspects of the criminal justice record (as against the belligerent rhetoric) of Thatcherism.<sup>9</sup> It remains for Australian scholars to adequately document the criminal justice record of Labor State governments.<sup>10</sup>

#### *JR in the United States*

In the US, one in every 100 adults is incarcerated, and two-thirds of released prisoners return to jail. This is the highest imprisonment rate in the world. Behind it lies gross race-specific disproportions that Garland

5. Todd R. Clear, 'A Private-Sector Incentives-based Model for Justice Reinvestment', (2011) 10(3) *Criminology and Public Policy*, 606.

6. Tess Lanning, Ian Loader and Rick Muir, *Redesigning Justice: Reducing Crime through Justice Reinvestment* (Institute for Public Policy Research, 2011) 4.

7. See, eg. Nicola Lacey, 'The Prisoners' Dilemma' (Cambridge University Press, 2008) 190–96; Ian Loader, 'Fail of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46(4) *British Journal of Criminology*.

8. Mike Steketee, 'Breaking the Prison Cycle', *The Australian* (Sydney), 15 October 2011.

9. Michael Tonry, 'The Costly Consequences of Populist Posturing: ASBOs, victims, 'rebalancing' and diminution in support for civil liberties' (2010) 12(4) *Punishment and Society* 387; Emma Bell, 'Criminal Justice and Neoliberalism' (Palgrave Macmillan, 2011); Steven Farrall and Colin Hay, 'Not So Tough on Crime?' (2010) 50(3) *British Journal of Criminology* 550–69; Steven Farrall, 'Rolling Back the State' (2006) 34(4) *International Journal of the Sociology of Law* 256–277; Tim Newburn, 'Tough on Crime' (2007) 36 *Crime and Justice* 425–70.

10. On Australian law and order politics generally see: Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998); Donald Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (Federation Press, 2004).

whereby the effects of imprisonment cease to be explicable in terms of individual offending and involve whole communities becoming part of the socialisation process.<sup>11</sup> To keep up with the numbers of prisoners, the US corrections budget is more than US\$60 billion per year. In the last 20 years, spending on prisons has increased by more than 300 per cent compared with an increase in spending on higher education of 125 per cent in the same period.<sup>12</sup>

The combination of skyrocketing costs and the global financial downturn has resulted in unusual levels of bipartisan support in the US for more effective spending of tax dollars in the corrections context, including JR. The outcomes achieved through JR have thus been couched firmly in the language of fiscal responsibility and increasing public safety, rather than suggesting that it is otherwise desirable (morally or ideologically) to avoid sending people from particular (racial) communities to prison in their masses. As explained by Kansas State Senator John Vratil (Republican), 'If we do not address the problem today, we are effectively deciding to spend hundreds of millions of dollars on future construction and operation of more prisons.' This is echoed by Democrats such as Michigan Governor Jennifer Granholm,

It is not good public policy to take all of these taxpayer dollars at a very tough time, and invest it in the prison system when we ought to be investing it in things that are going to transform the economy.<sup>13</sup>

The framing of the problem of hyper-incarceration as largely an issue of economic sustainability has been adopted by the JR movement itself. The opening remarks of the report of the 2011 National Summit on Justice Reinvestment and Public Safety were:

Americans have made it clear they want a correctional system that holds offenders accountable and keeps communities safe. But they also want and deserve a system that makes the most of their tax dollars — especially in perilous economic times, when public funds are scarce and there are compelling, competing needs such as education and health care that must be addressed.<sup>14</sup>

It is clear, then, that the elements of JR which speak to the imperatives of the current economic climate are important in helping it find political traction and bipartisan support.

Since the term 'justice reinvestment' was coined, sixteen American states have signed up with the CSG Justice Center to investigate or apply the JR model. Another handful of states are pursuing JR through other avenues. The results have been striking. The 2004 JR pilot in Connecticut has resulted in the cancellation of a contract to build a new prison, realising savings of US\$30 million. So far, US\$13 million of these savings have been reinvested into community-based crime prevention initiatives, including funding the Department of Mental Health and Addiction Services to support community-based programming and resourcing community-led planning processes to develop neighbourhood programs to improve outcomes for residents. Reinvested funds have also been channelled

reducing technical violations and increasing transitional support for probation violators who would otherwise have been re-incarcerated. Almost 100 new probation officers were hired to cap maximum caseloads at approximately 100 per officer, rather than 160 cases per officer as it had previously been.<sup>15</sup>

Similar savings were realised in Kansas and Texas. It should be noted that these savings are largely the result of legislative and policy reform (for example, to probation and parole regimes) which give rise to fast, sometimes dramatic, reductions in prison numbers. The impact on offending or recidivism of the reinvestment of these savings into communities is a much longer-term proposition that is too early to evaluate.

A number of states have introduced legislation to support JR initiatives in their jurisdictions. A federal bill, the *Criminal Justice Reinvestment Act*, was introduced in the US Senate in November 2009, approved by bipartisan vote of the Senate Judiciary Committee in 2010, but lapsed with the conclusion of the 111th congressional session. It remains to be seen whether it will be reintroduced.

## JR in the United Kingdom

In the UK, the 2010 House of Commons Justice Committee Report, *Cutting Crime: The case for justice reinvestment*, argued that the criminal justice system 'is facing a crisis of sustainability' and noted that:

The overall system seems to treat prison as a 'free commodity' ... while other interventions, for example by local authorities and health trusts with their obligations to deal with problem communities, families and individuals, are subject to budgetary constraints and may not be available as an option for the courts to deploy.<sup>16</sup>

The Justice Committee recommended capping the prison population at current levels, followed by phased reductions to two-thirds of the current population and a devolution of custodial budgets so that there is 'a direct financial incentive for local agencies to spend money in ways which will reduce prison numbers'.<sup>17</sup>

Following the May 2010 election, the Justice Secretary in the new Conservative/Liberal Democrat coalition government denounced the 'bang 'em up culture' and pledged to cut the record 85 000 daily prison population in England and Wales by 3000 within four years through sentencing reforms and a 'rehabilitation revolution'.<sup>18</sup> In December 2010, a Green Paper, *Breaking the Cycle: Effective punishment, rehabilitation and sentencing of offenders*<sup>19</sup> was released, seeking community consultation on a variety of proposals, including increasing diversion of less serious offenders with mental illness and drug dependency into treatment rather than prison; and decentralising rehabilitative services to 'open up the market to new providers from the private, voluntary and community sectors'.<sup>20</sup>

In June 2011 the Institute for Public Policy Research released a report, *Redesigning Justice*, which used the London Borough of Lewisham as a case study for how JR strategies might work. Mapping of both offenders and

11. David Garland (ed), *Mass Imprisonment: Social causes and consequences* (Sage, 2001) 5.

12. Marshall Clement, Matthew Schwartzfeld and Michael Thompson, *The National Summit on Justice Reinvestment and Public Safety* (CSG, 2011) 2-3.

13. See 'Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2009' (Aust Human Rights Commission) 18.

14. Clement et al, above n 12, 1.

15. See CSG Justice Center, 'Connecticut: Overview', [www.justicereinvestment.org/states/connecticut](http://www.justicereinvestment.org/states/connecticut).

16. UK House of Commons Justice Committee, *Cutting Crime: The case for justice reinvestment* (2010) 6.

17. Ibid para 338.

18. Alan Travis and Afua Hirsch, 'Kenneth Clarke Pledges to Cut Daily Prison Population', *The Guardian* (UK) 20 October 2010.

19. UK Ministry of Justice Green Paper, *Breaking the Cycle: Effective punishment, rehabilitation and sentencing of offenders* (2010).

20. Ibid para 11.



... it is arguable that at least in some jurisdictions, conditions are favourable for a substantial reconsideration of criminal justice policy and a shift away from the popular punitiveness dominant since the mid 1980s

518 adult offenders were released into Lewisham over the course of 2009/10 having served sentences of less than 12 months, at a cost to the state of £2.8 million (an average of £5386 per sentence). The majority of the offences committed by the offenders were non-violent. Existing local social services were capable of absorbing these offenders into local programs of a reparative and rehabilitative nature, at much lower costs. The report recommended that short term sentences of less than six months should be replaced with community based sentences; local authorities should be made responsible for reducing offending in their areas; and local custody budgets for short term adult offenders should be devolved to local councils; and that the probation service should be decentralised and integrated into crime reduction work locally.<sup>21</sup>

### The Australian context

In the last few years there has been a groundswell of interest in JR in Australia, in both government and community sectors. The call has been led by the current and immediate past Aboriginal and Torres Strait Islander Social Justice Commissioner, beginning with the 2009 *Social Justice Report*. Also in 2009, the Legal and Constitutional Affairs Committee (in its inquiry on *Access to Justice*) recommended the commencement of a pilot of JR strategies and for exploration of the potential for JR in regional and remote Indigenous communities.

In 2010, the Australian Greens formally adopted JR as part of their justice policy platform. In the same year, a review of the New South Wales Juvenile Justice system proposed the implementation of justice reinvestment strategies in the juvenile context.<sup>22</sup> The failure of the Labor government to embrace this recommendation was a factor in the resignation of Graham West, the Minister for Juvenile Justice who commissioned the report.<sup>23</sup> This event highlights some of the political difficulties in promoting JR policies. On one approach, a precondition for the broader take up of JR policies is a reduction in imprisonment rates and a reinvestment of the monies saved, at least notionally, in various targeted high-risk communities to build up crime reducing social infrastructure and enhance social cohesion. On another, such community investment can be made first, with the prospect that down the track it will reduce crime and recidivism and promote community safety thereby reducing future expenditures on costly imprisonment. Ideally a strategy of JR would involve both approaches in tandem, depen-

If the first approach is adopted, JR is postponed pending a political program of reducing incarceration rates, by for example reducing recidivism rates, bail reform to reduce high remand rates (24 per cent nationally), sentencing and parole reform and a reduction in short term sentences.<sup>24</sup> The political question being: is there the commitment to such an approach? The second approach places less emphasis on waiting for savings to be achieved before acting and advocates the positive social, political and moral value of community-building programs in strengthening social cohesion as a desirable outcome in and of itself, as well as for the fiscal savings it may deliver in the longer term.

Without seeking to minimise the difficulties or the considerable state by state variation in Australia, it is arguable that at least in some jurisdictions, conditions are favourable for a substantial reconsideration of criminal justice policy and a shift away from the popular punitiveness dominant since the mid 1980s.<sup>25</sup> To take New South Wales as an example, imprisonment rates are dropping; Greg Smith, Attorney General in the new conservative Coalition government, has described the previous government's trumpeting that NSW had reached 10 000 prisoners 'a disgrace'. He has given the NSW Law Reform Commission references on both bail and sentencing reform and has indicated a strong desire to reduce remand populations, especially of juveniles, and to boost post release, drug and rehabilitative services. The High Court has recently undermined the New South Wales standard non-parole scheme in *Muldrock*<sup>26</sup>. Further, the weak state of the NSW Labor Party opposition allows 'the government to focus more on policy than populism'.<sup>27</sup>

Ironically Victoria, under the Baillieu government (egged on by the Murdoch *Herald Sun*) seems to be bucking this international trend and adopting policies which other jurisdictions are in the process of abandoning as a failure. 'Ironically', because historically it has been Victoria which other Australian jurisdictions have looked to as the 'Australian Scandinavia' — the 'best practice' leader in much criminal justice policy, manifest in imprisonment rates well below the national average and nearly half that of New South Wales, and in far better welfare and post release service provision in areas such as housing. Sadly, the Victorian government, in contrast to its conservative counterparts in NSW, seems to be attempting to redefine such achievements as 'lagging behind' other states. A state by state assessment is beyond the scope of this article; developments are

21. CSG Justice Center, above n 4, see Executive Summary, 2–3.

22. Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister*, April 2010.

23. Thalia Anthony, 'MP's Resignation a Selfless Act', *The Age* (Melbourne), 10 June 2010.

24. For a range of suggested criminal justice reforms to reduce imprisonment rates, see Crime and Justice Reform Committee factsheets, [www.crimeandjustice.org.au](http://www.crimeandjustice.org.au), eg Julie Stubbs, 'Bail for Children and Young People' (2010), David Brown and Melanie Schwartz 'Justice Reinvestment' (2011).

25. See David Brown, 'The Limited Benefit of Prison in Controlling Crime: On the threshold of a political shift', in Gabrielle Maxwell (ed), *The Costs of Crime: Towards Fiscal Responsibility* (Institute of Policy Studies, 2011).

26. *Muldrock v The Queen* [2011] HCA 39 (5 October 2011).

27. Steketee, above n 8.

at a discursive level, little has emerged by way of concrete programs.

### JR and the over-imprisonment of Indigenous people

In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs lent its support to JR in its report on the over-incarceration of Indigenous young people, *Doing Time – Time for Doing*. The report's recommendation that further research be conducted to investigate the potential for JR in Australia (recommendation 40) was accepted by the government in its response to *Doing Time*. The response notes that the National Justice CEOs have established a working group to consider JR and to develop options for the next steps in working towards JR in Australia. It also reiterates that the primary responsibility to implement JR approaches will fall to states and territories, rather than to the Commonwealth.<sup>28</sup>

There has been particular focus on the potential for JR to address the over-representation of Aboriginal and Torres Strait Islander people in Australian prisons. It is well-documented that Indigenous people are imprisoned at 14 times the rate of non-Indigenous people. In 2008, 73 per cent of Indigenous prisoners had a history of prior imprisonment; indicating a very high rate of recidivism in the Indigenous population.<sup>29</sup> It has been estimated that a 10 per cent reduction in the Indigenous re-imprisonment rate would result in savings of more than \$10 million each year.<sup>30</sup>

Since JR focuses on locations that produce high numbers of prisoners, the sheer extent of Indigenous over-representation in the criminal justice system means that some of these locations will be home to high numbers of Indigenous people. This reasoning is reflected in the American experience of JR; initiatives in the United States have not specifically targeted racial groups; however, in practice they have been largely directed towards African-American populations as a result of the disproportionate representation of that demographic in custody.

There are a number of characteristics more likely to be found in Indigenous communities that make them suitable for JR policies. While in some cases these characteristics contribute to high levels of imprisonment, they also present opportunities because they are the types of issues that reinvestment strategies can attempt to address. These characteristics include the high level of disadvantage in many Indigenous communities, the higher numbers of Indigenous people living in remote locations and the high level of victims' needs in the Indigenous population.<sup>31</sup>

In addition, the processes which characterise JR align well with what is acknowledged to be 'best-practice' in program implementation in Indigenous communities. These processes include the necessity for bipartisanship and consensus-driven solutions, the devolution of decision-making to the local level, the

from the high-stakes communities about what might address criminogenic factors in that particular place. The democratic nature of decision-making in the JR methodology is a significant departure from the way that government has traditionally approached policy making for Indigenous communities, but it coheres with what Indigenous advocates have always said about how to give programs implemented in Indigenous communities the best chance of success: by letting communities lead the direction of those strategies.

In his October 2011 report, *Addressing Aboriginal Disadvantage: the need to do things differently*, the New South Wales Ombudsman highlights the aspects of current Indigenous affairs programming and policy-production which are obstructing positive outcomes. Many features identified as contributing to ineffective approaches are consciously avoided or addressed in a JR approach. For example, the Ombudsman identifies the following as critical: the failure to achieve a whole-of-government approach to program management in Indigenous communities; poor communication and coordination between relevant agencies; weak accountability mechanisms; and lack of formal mechanisms to engage Aboriginal people.<sup>32</sup> The report concludes that:

government needs to adopt a very different way of doing business with Aboriginal communities. While for many years there has been rhetoric about 'partnering' with communities, too often this is not translated into communities having genuine involvement in decision-making about the solutions to their problems.<sup>33</sup>

The report goes on to recommend that formal mechanisms be established to engage with Aboriginal people, including providing community leaders with the authority to facilitate outcomes. Its recommendations have met with high levels of support from Indigenous groups.

It is striking that the core principles that the Ombudsman report puts forward are also core principles of the JR approach. Although JR was not conceived with Indigenous people in mind, there is a strong argument to be made that the JR methodology closely follows 'best-practice' principles in working with Indigenous communities; in the criminal justice sphere and beyond.

### Thinking critically about the JR concept

Having given an overview of the potential benefits of JR, there are also a number of difficulties both with the JR concept itself and in applying it in the Australian context. These include ambiguity; lack of a clear theoretical and normative base; potential to be used to justify 'disinvestment' strategies; the extent to which the 'rationality' of 'evidence-based' and cost arguments fail to address the emotive and retributive sentiments central to criminal justice politics; and the difficulty in securing key pre-conditions in the Australian context, including bipartisan approaches to law and order and the appropriate political structure for the devolution of

28. Commonwealth of Australia, Attorney-General's Dept., *Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Report: Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (November 2011).

29. Matthew Willis, 'Reintegration of Indigenous Prisoners: Key findings' (2008) 364 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology 2.

30. Don Weatherburn et al., 'Prison Populations and Correctional Outlays: The effect of reducing re-imprisonment' (2009) 138 *Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research 1.

31. For more on the interaction between these factors and justice reinvestment, see Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Representation' (2010) 14(1) *Australian Indigenous Law Review* 2–17.

32. NSW Ombudsman, *Addressing Aboriginal Disadvantage: The need to do things differently* (October 2011) 2.1, 2.2, 3.1.

33. *Ibid.* 2.2.

## There has been particular focus on the potential for JR to address the over-representation of Aboriginal and Torres Strait Islander people in Australian prisons.

### Ambiguity

The lack of a clear definition and a clear differentiation with other concepts such as 'social investment bonds', the tendency of JR to mean different things to different people, and its appeal to different political constituencies, may conceivably affect its prospects of adoption. On this view JR could become a vague 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.

### Lack of clear theoretical and normative base

Some critics have argued that justice reinvestment should be about values and that the emphasis on cost savings and program effectiveness is disingenuous, impractical and instrumental rather than normative.<sup>34</sup> Others argue that JR has no clear theoretical base and has 'moved from beautiful idea into real-world practice without a stopover first in academic theory development'.<sup>35</sup> For some, such as Michael Tonry, JR must be connected to fundamental progressivist ideas and traditions of economic and political equality, democracy and redistributive justice; to others such as Todd Clear, gains can be made within existing frameworks by stimulating neo-liberal incentives to create a community and business interest and market in crime reduction programs, for example in employing ex-offenders.<sup>36</sup>

### A cover for disinvestment?

There are dangers that cost-saving imperatives may feed into cuts to prison services and programmes and that generalised statements advocating the need for 'justice reinvestment' may become a cover for strategies of *disinvestment*, especially in a cost cutting environment. This objection is based on seeing neo-liberal economic and social policies as inherently criminogenic, weakening traditional forms of social solidarity. The fear is then that cost cutting and 'austerity' policies will create more crime, while in-prison and post-release programs and services are cut.

### The limits of fiscal rationality arguments

Fiscal 'rationality' arguments do not necessarily trump emotive law and order policies that are electorally popular. The limits of rationality are shown in studies where large sections of the public believe that crime rates are higher than ever (although they have been decreasing), and

sentences have actually become considerably longer).<sup>37</sup> Retributive sentiments are central to long established justifications for punishment as 'deserved' and are deeply culturally embedded, such that they cannot (and arguably should not) just be 'wished away' or ignored. Similarly, the Durkheimian view that punishment is not aimed primarily at affecting offenders but at defining and promoting community cohesion and a collective morality, is not sufficiently addressed in the calculus of fiscal rationality. A key issue then is the extent to which JR approaches can overcome a reliance on economic rationalities and be theoretically articulated with various moral and social approaches to penalty.

### Bipartisanship and structures for devolution

JR approaches require changes to sentencing, parole and bail, and subsequent reinvestment in post release and community programs — all of which may be difficult to implement where opposition political parties continue to run a popular punitive 'tough on law and order' line, seeking to exploit fear and division for perceived electoral advantage. Bipartisan or multi-partisan approaches would significantly improve the prospects for implementation of JR policies. It is precisely here that the ambiguity of JR, and its potential appeal across diverse political constituencies, may play a significant role in creating more favourable political conditions. Indeed JR might be a vehicle through which to challenge the 'taken for granted' character of the notion of 'popular punitiveness' and its invariably negative connotations.<sup>38</sup> As Russell Hogg suggests, following Laclau, it may be timely to attempt to take 'populism more seriously both conceptually and politically' by detaching it from its 'punitive' and heavily pathologised companion and examining it 'as both a normal and necessary dimension of politics and one with no essential ideological or social belonging'.<sup>39</sup>

A second precondition is that in the Australian context it is necessary to identify both an agency to take a coordination role (compare the United States' CSG) and the political structure for devolution of funding and responsibility. Local government authorities favoured in the UK are unlikely candidates in Australia. Given that criminal justice is primarily a state function, it would seem that state governments would need to take the lead (except perhaps in the Indigenous area). Devolution of funding and responsibility might involve an expanded role for NGOs, church, welfare and charitable organisations

34. See, eg, Michael Tonry, 'Making Peace, Not a Desert: Penal reform should be about values not justice' (2011) 10(3) *Criminology and Public Policy*, 637–649.

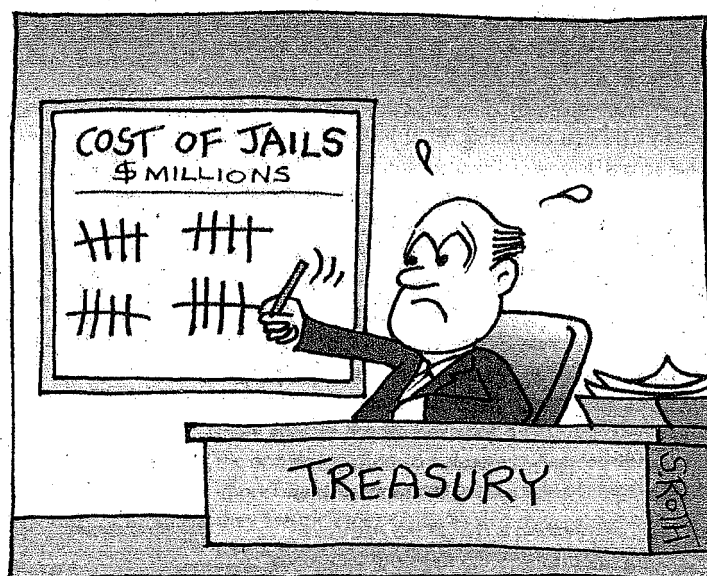
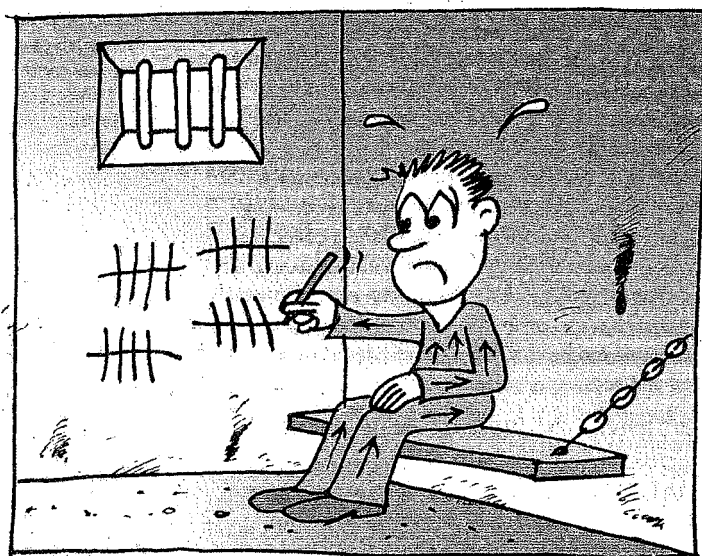
35. See, eg, Shadd Maruna, 'Lessons for Justice Reinvestment from Restorative Justice and the Justice Model Experience' (2011) 10(3) *Criminology and Public Policy* 661–669, at 662.

36. Clear, above n.5.

37. See, eg, Craig Jones, Don Weatherburn and Katherine McFarlane 'Public Confidence in the NSW Criminal Justice System' (2008) 118 *Crime and Justice Bulletin*, NSW BoCSAR; See also Judicial Commission of NSW, 'The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in NSW' (May 2010) Research monograph 33.

38. On 'popular' or 'new' punitiveness more generally see: John Pratt, *Penal Populism* (Routledge, 2007); John Pratt et al, *The New Punitiveness* (Taylor & Francis, 2005).

39. Russell Hogg, 'Punishment and "The People": Rethinking penal populism', forthcoming in Kerry Carrington et al (ed), *Crime, Justice and Social Democracy* (Palgrave Macmillan, 2012); see also Ernesto Laclau, *On Populist Reason* (Verso, 2007).



financial transfers to these agencies and within and between government departments.

## Conclusion

It might turn out to be the case that JR is looked back on as a passing fad, a catchy slogan that appealed to many but foundered on its tendency to mean all things to all people, and on the difficulty of fashioning the appropriate political structures through which financial resources and social responsibilities might be devolved to at a local level. But, alternatively, it might be the case that it is a notion that captures the deep disillusionment with nearly three decades of popular punitive approaches to law and order across the political spectrum and gives expression to the desire for more social and cost effective strategies to rebuild local communities blighted by crime and other forms of social dysfunction. While its potentially broad constituency of appeal can be seen as a weakness, it might be re-constituted as a strength — a circuit breaker out of the partisan politics of regressive 'tougher than thou' posturing over criminal justice policy. As a floating signifier, cut adrift from any fixed or essential ideological or social moorings, it might just be a notion for the times and a way of socialising criminal justice out of the moral and legal stranglehold of individual wrongdoing and culpability and on to the plane of social policy. The key point is that neither of these possibilities is already given or determined in theory or in politics. Outcomes depend on the way that discourses constituting JR are articulated to a variety of popular democratic constituencies. That is the project of a politics in which cost and 'evidence based' arguments need to be situated within a moral and political vision that connects with popular cultural imaginings concerning crime and punishment.

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# BUILDING COMMUNITIES, NOT PRISONS: JUSTICE REINVESTMENT AND INDIGENOUS OVER-IMPRISONMENT

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Melanie Schwartz\*

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## I Introduction

The Australian prison estate has failed to reduce offending or to make people feel safer, despite the nearly \$3 billion spent on the prison system in Australia every year.<sup>1</sup> Justice reinvestment is an emerging approach to over-imprisonment that diverts a proportion of corrections budgets to communities within the jurisdiction that have high rates of offending, giving those communities the capacity to invest in programs that will reduce criminal behaviour and the rate of recidivism. This article examines the take-up of the justice reinvestment approach in the United States ('US') and United Kingdom ('UK'), and analyses the potential of the approach to be used effectively in the Indigenous context in Australia. In doing so, it discusses the aspects of justice reinvestment that distinguish it from other 'decarceration' initiatives and identifies the ways in which the approach is suited both to articulated policy aims in relation to Indigenous people, and to the particular circumstances of Indigenous communities. It argues that justice reinvestment principles cohere well with the needs of Indigenous communities and with the current financial climate – and that the combination of these factors make it an approach worth pursuing in Australia, particularly in the Indigenous context.

## II The Story So Far: Justice Reinvestment on the International Stage

Justice reinvestment is an emerging approach to addressing expanding prison populations. It calculates public expenditure on imprisonment in localities with a high concentration of offenders, and diverts a proportion of this expenditure back into those communities to fund initiatives that can have an impact on rates of offending. In locations that produce high numbers of offenders, prison can be said

to be the primary – and sometimes best-funded – governing institution. Yet, unlike roads, hospitals and schools, the money spent on incarcerating residents takes place outside of the communities:

[r]ather than directing resources toward the neighborhoods, prisons act more like urban exostructures, displacing investments to prison towns outside of the communities to which prisoners will return.<sup>2</sup>

It is important to note that imprisonment itself has only a limited effect in reducing crime in the community; that its effect

diminishes over time the higher incarceration rates climb; and that in relation to particular communities and groups, such as African Americans in the US and Aborigines in Australia, it is likely to have a negative or crime producing effect in the long term.<sup>3</sup>

Through justice reinvestment, the channelling of funds away from communities into prisons is reversed; money that would have been spent on housing prisoners is diverted into programs and services that can address the underlying causes of crime in these communities.

In addition to addressing already existing criminal behaviour, justice reinvestment focuses on reducing the number of people entering the criminal justice system in the first place. Effectively then, justice reinvestment can, and should, be employed at all critical points along the criminal justice path: in prevention of offending; diversion from custody at the point of remand or conviction; and in lowering the numbers returning to custody via breaches of parole or reoffending.

It may be that justice reinvestment is a strategy that has found its time. In December 2009, the Senate Legal and Constitutional Affairs References Committee presented its report *Access to Justice*, in which it recommended 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.'<sup>4</sup> For governments concerned with reducing spending, justice reinvestment promises to reuse existing funds rather than increase the burden on state or federal budgets. Its localised, community focus also gives it particular potential as an Indigenous crime prevention strategy, as it meets the need for tailored, grassroots, multipronged solutions to addressing disadvantage, and promotes opportunity and capacity building in communities.

The term 'justice reinvestment' was coined in the US,<sup>5</sup> where the 700 per cent increase in the prison population between 1970 and 2005<sup>6</sup> has led to the description, 'mass imprisonment'.<sup>7</sup> In the US, which incarcerates the highest number of people in the world, the corrections budget is US\$60 billion per year,<sup>8</sup> and recidivism rates are such that two-thirds of released prisoners find their way back to jail.<sup>9</sup>

Over 12 American states are either investigating or applying the justice reinvestment model.<sup>10</sup> These initiatives are largely auspiced by the Council of State Governments Justice Centre, which assists states in applying the three-step justice reinvestment process:

- Analyse data provided by state and local agencies relating to crime, arrest, conviction, jail, prison, and probation and parole; map specific neighbourhoods that are home to large numbers of people under criminal justice supervision; collect information about the need for relevant services that address unemployment, substance abuse or housing issues; develop 'practical, data-driven, and consensus-based policies that reduce spending on corrections to reinvest in strategies that can improve public safety';<sup>11</sup>
- Implement the new policies; and
- Measure the impact of the enacted policies on rates of incarceration, recidivism and criminal behaviour.<sup>12</sup>

A March 2010 report on the American prison population by The Pew Centre on the States identifies a reduction in the number of state prisoners for the first time in nearly 40 years.<sup>13</sup>

Of the five states nominated as having the greatest decrease in incarceration rates between 2008 and 2009, the top three have actively engaged justice reinvestment strategies.<sup>14</sup> In addition, Texas, a state that joined the justice reinvestment program in 2006, showed a decline in prison numbers of 1257 prisoners in the same year.<sup>15</sup> In discussing the reason for the drop in prison population in some American states, the report remarks that:

an important contributor is that states began to realize they could effectively reduce their prison populations, and save public funds, without sacrificing public safety. In the past few years, several states, including those with the largest population declines, have enacted reforms designed to get taxpayers a better return on their public safety dollars[.]<sup>16</sup>

Although the extent of the link between justice reinvestment and reduction in incarceration in the subject states is not clear, the report does go on to specifically discuss initiatives associated with justice reinvestment as factors driving the reduction in prison numbers in Michigan and Texas.

Due to its local focus, justice reinvestment is an inherently flexible strategy. Accepting that the causes of crime are complex and are also location specific, programs falling within justice reinvestment can be as diverse as investments in education, job training, health, parole support, housing or rehabilitation. They can also include schemes like micro-loans to support job creation and 'family development loans' for education, debt consolidation or home ownership.<sup>17</sup> In 'asset mapping' – identifying existing entities in post-Katrina New Orleans through which justice reinvestment strategies could be implemented – the Spatial Information Design Lab nominated schools, homeless clinics, police stations, child development centres, health clinics, cultural and recreational centres and local businesses, as organisations that could support change through a justice reinvestment network.<sup>18</sup>

The model has recently found traction in the UK, where the prison population has more than doubled since 1992, despite a 42 per cent decline in reported crime since 1995.<sup>19</sup> In 2007, the Howard League for Penal Reform set up 'The Commission on English Prisons Today' to investigate this rise in prison population. Its report, *Do Better Do Less*, introduces justice reinvestment as 'a radical new way of delivering a modified and ultimately "moderate" form of criminal justice ... [through a] devolved approach that focuses on communities or localities.'<sup>20</sup>

In January 2010, the House of Commons Justice Committee released *Cutting Crime: The Case for Justice Reinvestment*. The report identified a 'crisis of sustainability' facing the criminal justice system,<sup>21</sup> and recommended that prison numbers in the UK be cut by a third through the utilisation of justice reinvestment. The response to the report from the UK Government commits to a consideration of justice reinvestment approaches 'through early intervention and by targeted, intensive, partnership-based activity in specific areas.'<sup>22</sup> It recognised that 'only small reductions in re-offending may be necessary for community interventions to "break even" in broad cost-benefit terms.'<sup>23</sup>

However, the UK Government also reiterated its commitment to delivering 96 000 prison places by 2014. *Do Better Do Less* noted that initiatives said by the UK government to be justice reinvestment pilots did not have sufficient focus on community building, but rather sought to address the needs of offenders as individuals. In addition, the pilots did not devolve budget to local authorities or implement programs *outside* of the criminal justice arena.<sup>24</sup> Thus, the take-up of justice reinvestment in the UK is nascent at best, and it remains to be seen how these tensions will play out.

### III Novelty in the Justice Reinvestment approach

There is extensive existing literature detailing the failure of the prison estate and recommending alternative approaches that might better address rates of offending.<sup>25</sup> In some respects – in advocating the addressing of criminal offending by focusing on underlying causes of crime, and in its focus on the potential of in-community initiatives – justice reinvestment is really a new framing of accepted wisdom. However, there are aspects of justice reinvestment, particularly in the combination of economic methodologies, place-based approaches and the use of data mapping, which do represent an emerging approach to dealing with over-incarceration.

#### A The Economic Argument

The presentation of justice reinvestment as an economic opportunity accords well with contemporary social and political fiscal concerns. The strong economic argument for penal reform has perhaps been under-utilised. As the outgoing Aboriginal and Torres Strait Islander Social Justice Commissioner comments in the 2009 *Social Justice Report*, '[f]raming the problem of Indigenous imprisonment as an

economic issue might be more strategic than our previous attempts to address it as a human rights or social justice issue'.<sup>26</sup>

In one of the early documents setting out the Justice Reinvestment framework, the Open Society argued in the following terms:

[f]rom an investment perspective, both our prison and parole/probation systems are business failures. These policies destabilize communities along with the individuals whom they fail to train, treat, or rehabilitate (and whose mental health and substance abuse are often exacerbated by the experience of imprisonment) ... The cumulative failure of three decades of prison fundamentalism stands out in sharp relief against the backdrop of today's huge deficits in state budgets.<sup>27</sup>

This argument was made in 2003. In the wake of the global downturn, these ideas are now finding purchase on the political stage in a number of countries. At a time when bipartisanship is low in the United States, reduction in spending on prisons is a direction supported by Republicans and Democrats alike. On both sides of the spectrum in America, the language of prudence is emerging on the subject of expenditure of 'taxpayer dollars' on corrections:

[i]t is not good public policy to take all of these taxpayer dollars at a very tough time, and invest it in the prison system ... (Michigan Governor Jennifer Granholm (Democrat)).<sup>28</sup>

We've got a broken correctional system. Recidivism rates are too high and create too much financial burden on states without protecting public safety. My state (Kansas) and others are reinventing how we do business by employing justice reinvestment strategies that can put our taxpayers' dollars to better use (US Senator Sam Brownback (Republican)).<sup>29</sup>

#### B A Place-Based Initiative

Currently, in places that produce high numbers of offenders, 'millions are being spent *on* the neighbourhood, but not *in* it'.<sup>30</sup> One example of this is Papunya in the Northern Territory. In 2007–08, there were 72 adults in Northern Territory jails who usually live in Papunya<sup>31</sup> (of a total population of 379, including 71 people under the age of 14 years).<sup>32</sup> At \$164 per day per prisoner,<sup>33</sup> positing an average sentence of nine months of that year, this incarceration rate



represents a corrections cost of at least \$3 468 960 per year<sup>34</sup> for a community of less than 400 people. It would be highly significant for that community if a proportion of the dollars lost to corrections each year were reinvested in building crime prevention (though not necessary criminal-justice focused) capacity inside the community.

The developers of the justice reinvestment concept state that one of its key elements is that it seeks to develop measures and policies to improve the 'prospects not just of individual cases but of particular places.'<sup>35</sup> This is in contrast to the reliance in the corrections realm on risk assessment tools that focus on the characteristics of the individual rather than seeing their community context as integral to the offending cycle.

The emphasis on community dictates that local rather than central government should decide how money should be spent to produce safer local communities. This devolvement of a budget to local authorities addresses a paradox in the operation of the penal system: that it is the failure of local authorities to adequately deliver localised social, welfare and development services that ultimately leads to an increase in the number of its residents entering the prison system, yet the direct costs of that imprisonment are not borne by local authorities, but by the state.<sup>36</sup> On the other hand, as local authorities have no control over how public money is spent on imprisonment, they cannot spend any savings that accrue from reductions in imprisonment of their residents. Justice reinvestment, thus, provides greater incentive for local communities to reduce imprisonment levels among their residents.<sup>37</sup> In this way,

[j]ustice reinvestment is ... more than simply rethinking and redirecting public funds. It is also about devolving accountability and responsibility to the local level. Justice reinvestment seeks community level solutions to community level problems.<sup>38</sup>

While Papunya presents a particularly stark example, Indigenous offenders are more likely to come from communities suffering from disadvantage across any indicator.<sup>39</sup> As the 2009 *Social Justice Report* observes,

[t]he bottom line is that you can put an individual offender through the best resourced, most effective rehabilitation program, but if they are returning to a community with few opportunities, their chances of staying out of prison are limited.<sup>40</sup>

Justice reinvestment aims to use diverted funds to make effective long-term shifts in communities to reduce offending and build capacity. As noted below, this concept of place-based initiatives is finding traction in more recent Australian policy initiatives.

### C A Data-Driven Model

Justice reinvestment is premised on the fact that it is possible to identify which communities produce large numbers of offenders, and to strategically use that information to guide investment in community programs to most effectively reduce imprisonment numbers. 'Justice mapping' or 'prison geographies'<sup>41</sup> allow policy makers to identify 'million dollar blocks' – literally, a block of housing that is home to people whose incarceration costs over \$1 million per year – where prison related expenditure is concentrated. Using data mining techniques to create detailed prisoner density maps in residential areas, decisions can be strategically made about how and where to allocate funds to most effectively bring about a reduction in crime.

It is, however, important to note that the justice reinvestment approach is not *purely* data driven. While mapping underpins the identification of focus communities and, to some extent, the assets available to build community capacity, this is supplemented by years of 'research, countless conversations, and a network of local and national participants' committed to the justice investment approach.<sup>42</sup> The experiences, perceived needs and capacities expressed by the community are instrumental in developing tailored programs to address offending and, at the same time, achieving social justice outcomes.

Incarceration-mapping can provide insight into the concentration of prison related expenditure. For example, incarceration maps produced by the Spatial Information Design Lab to illustrate the potential for the use of justice reinvestment principles in rebuilding New Orleans post-Hurricane Katrina, give a series of increasing magnifications of the B W Cooper Housing project and surrounds in Central City, New Orleans, which has 0.9 per cent of New Orleans' population and three per cent of its prison admissions.<sup>43</sup> The maps indicate that the costs of incarcerating residents of B W Cooper Housing in 2003 were \$1 123 380 – demarcating it as a million dollar neighbourhood.<sup>44</sup>

Incarceration maps are different from mapping of crime rates in particular locations. Crime mapping identifies crime 'hot-spots', which may become the focus of increased policing, but this can have the effect of displacing criminal behaviour into other locations rather than reducing the amount of overall offending.<sup>45</sup> The impact that this has on behavioural reform is limited. Incarceration maps, on the other hand, show concentrations of prison admissions in particular areas so that public investment can be targeted towards the places that most need reshaping in terms of local infrastructure, production of social capital and better governance. The step following the incarceration mapping of B W Cooper Housing in New Orleans, for example, is to map the potential justice reinvestment 'assets' in the same area, to be overlaid with the incarceration map to see how infrastructure can be most effectively harnessed locationally, and what gaps need filling.<sup>46</sup>

One practical difference between the operation of justice mapping in the US and its application to Australian Indigenous communities is that incarceration-mapping in America focuses on urban settings. In Australia, the localities yielding the highest numbers of Indigenous offenders are also largely cities/regional centres (in NSW for example, the top three locations are Inner Sydney, Blacktown and Central Macquarie (Dubbo));<sup>47</sup> but a number of smaller remote communities in some jurisdictions also make the top 10 prisoner-yielding locations, even with relatively small total populations. For example in Queensland, Palm Island and Aurukun are in that State's top 10 prison-yielding locations. As such, the building of intra-community organisational networks that are a feature of incarceration-mapping will have less relevance in some Indigenous contexts. For remote communities, the well documented problems of poor access to services and infrastructure will present the same challenges for the rollout of justice reinvestment strategies that have been present for other initiatives. However, the greater security of funding that justice reinvestment provides, as well as the degree of community ownership it requires, are two factors that will increase the likelihood of success in remote communities.

#### **IV The Failure of the Penal Estate in Australia**

##### **A The Need for Penal Reform**

At 30 June 2009, the Australian imprisonment rate was 175 prisoners per 100 000 adult population, an increase from 168

per 100 000 in 2008.<sup>48</sup> National expenditure on prisons and periodic detention centres in Australia totaled \$2.8 billion in 2008-09.<sup>49</sup> In the same year, keeping someone in jail cost \$210 per day, or \$76 650 per prisoner per year.<sup>50</sup> Of course, the true costs of imprisonment far exceed the per-day costs of housing an inmate in a correctional facility. Imprisonment often results in the loss of employment and income, can exacerbate debt issues, and result in the loss of housing, such that homelessness becomes an issue on release.<sup>51</sup> Imprisonment of a parent can lead to disruption and damage to the lives of every member of the family. Children of prisoners are at higher risk than the general population of developing behavioural problems, experiencing psychosocial dysfunction and suffering negative health outcomes.<sup>52</sup> Children of prisoners are more likely than children in the general community to be imprisoned themselves.<sup>53</sup> The NSW Standing Committee on Social Issues reported that Indigenous incarceration is often intergenerational.<sup>54</sup>

The corrections budget is on track to swell even further from year to year: in NSW, for example, if imprisonment continues to grow at the current rate, the state will have to build one medium-sized jail each year to accommodate the influx of prisoners.<sup>55</sup>

The premise underlying justice reinvestment – 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 – is by no means an innovation. Since the 1978 Nagle Royal Commission into NSW Prisons, recognition in Australia that imprisonment largely fails to address recidivism or to affect rehabilitation has been widespread.<sup>56</sup> The Nagle Royal Commission reported that

it can legitimately be hoped that the prison population will not necessarily continue to increase proportionately to any population increase because of, inter alia, the adoption of alternative modes of punishment and improvements in the organisation of society.<sup>57</sup>

The hopes of the Commission have not been borne out, and the steady increase in incarceration – without significant impact on crime rates or community safety – has led to extensive literature on the factors that do impact on rates of offending. While there is 'a clear need for more Australian research into which programs and interventions are effective in reducing the risk of involvement in crime',<sup>58</sup> the literature highlights the

fact that the majority of prisoners cycling repeatedly through the prison system are 'short-term prisoners from highly disadvantaged suburbs, with poor educational and social backgrounds'.<sup>59</sup> It speaks of the need to look for solutions to criminal offending outside the penal system by addressing the social and economic causes of crime.<sup>60</sup> It emphasises the need for throughcare via the 'co-operation and co-ordination of justice and social service agencies prior to release, during transition and for some period after release'.<sup>61</sup>

The need for community-based approaches to addressing recidivism is uncontroversial:

crime prevention is fundamentally a community responsibility ... best done by empowering institutions closer to the source of the problem in the community to play a more active part.<sup>62</sup>

Justice reinvestment coheres with this partnership approach, providing 'a real role for the community to have a say in what is causing offending in their communities and what needs to be done to fix it'.<sup>63</sup>

## B The Indigenous Corrections Context

Over-representation of Indigenous people in the criminal justice system is well documented. The national age-standardised Indigenous imprisonment rate at June 2009 was 1891 prisoners per 100 000 Indigenous adults, compared with 136 prisoners for every 100 000 non-Indigenous adults.<sup>64</sup> This means that Indigenous people are being imprisoned at more than 13 times the rate of non-Indigenous people.

Further, in 2008, 73 per cent of Indigenous prisoners had a history of prior imprisonment, indicating a very high rate of recidivism in the Indigenous population.<sup>65</sup> A 2008 Australian Institute of Criminology study showed that within six months of release from prison a quarter of Indigenous people had been readmitted to custody – twice the percentage of non-Indigenous released prisoners (12 per cent).<sup>66</sup> At one year from the date of leaving prison, 39 per cent of Indigenous released prisoners had been returned to custody, compared with 21 per cent of non-Indigenous released prisoners.

These figures on the over-representation of Indigenous people in the criminal justice system are not new. They represent an entrenched and deepening crisis in Australian corrections, for which no successful avenue of redress has yet been identified. Of course, being 'amongst the most

imprisoned people in the world'<sup>67</sup> comes with a hefty economic price tag. It has been estimated that a 10 per cent reduction in the Indigenous re-imprisonment rate would result in savings of more than \$10 million each year.<sup>68</sup>

## C The Current Indigenous Policy Context

There is widespread recognition in government policy of the need to address disadvantage in Indigenous communities, including in criminal justice contexts. The justice reinvestment approach broadly coheres with the aspirations of the major Australian policy vehicles that touch on Indigenous justice.

### (i) National policy

In November 2009, Australian and State and Territory governments endorsed the National Indigenous Law and Justice Framework 2009–2015 ('the Framework'), which seeks to build

a government and community partnership approach to law and justice issues to reduce the evident levels of disadvantage that are directly related to adverse contact with the justice systems.<sup>69</sup>

Also in 2009, the Federal Government set out its *Social Inclusion Agenda*, which counts among its initiatives *Closing the Gap*, the 2007 Council of Australian Governments (COAG) National Indigenous Reform Agreement aimed at addressing social inclusion by closing the gap in Indigenous disadvantage.<sup>70</sup>

The Framework sets out five core goals, three of which are equally central tenets of justice reinvestment. The goal to '[r]educ[e] over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system',<sup>71</sup> commits to an expansion of diversionary programs and other interventions for Indigenous people (Strategy 2.2.1).<sup>72</sup> Like justice reinvestment, the Framework recognises the centrality of community ownership and responsibility to the development of successful initiatives, calling for communities to be partners in the 'identification, development and implementation of solutions'.<sup>73</sup> Goal 3.2, to '[r]ecognise and strengthen Indigenous community responses to justice issues to support community ownership of safety and crime prevention',<sup>74</sup> is likewise consistent with the collaborative, community centred approach in justice reinvestment.

Goal 5 has particular resonance with the justice reinvestment approach, and could easily have been drawn from the justice reinvestment literature: it is to '[s]trengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvements in justice and community safety'.<sup>75</sup> This goal focuses on building community resilience and emphasises the fact that maintaining 'not simply functional but thriving communities, healthy families and individual wellbeing is crucial to improving justice outcomes'.<sup>76</sup> The strategies nominated for achieving these goals are, like in the justice reinvestment approach, not necessarily focused on criminal justice, but are geared at allowing communities to develop their own capacity and their own solutions. These include to '[c]ontribute to the provision of measures needed to sustain the social and cultural resilience of strong communities' (Strategy 5.1.1), by providing the support necessary to develop leadership, and to engage in community affairs, policy development and service delivery.<sup>77</sup> Community justice groups are singled out as vehicles to establish links between health, education, housing, employment and welfare services so that an integrated approach to crime prevention can be developed (Action 5.2.1b).<sup>78</sup>

The degree of overlap between the aims articulated in the Framework and those articulated by proponents of justice reinvestment is striking. There is abundant scope for the Framework, which will be in place until 2015, to adopt justice reinvestment as a vehicle for achieving the policy goals it sets out. The *Social Justice Report 2009* recommended that the Framework identify justice reinvestment as a priority issue with a view to conducting pilot programs in targeted communities.<sup>79</sup>

The *Social Inclusion Agenda* and *Closing the Gap* initiative contain no in-depth consideration of interplay between social exclusion and the criminal justice system. However, there is a clear relationship between imprisonment and disadvantage, and incarceration is literally a circumstance of social exclusion. There is no path more likely than repeated contact with the criminal justice system to lead to entrenched exclusion. The *Social Justice Report 2009* recommended that criminal justice targets be added to *Closing the Gap*, and that justice reinvestment be added as a key strategy in the *Social Inclusion Agenda*.<sup>80</sup>

Despite the absence of focus on criminal justice issues in these policies, there are nevertheless strong resonances

with justice reinvestment principles. The *Social Inclusion Agenda*, for example, is to be carried out using eight 'approaches',<sup>81</sup> each of which are equally fundamental to the justice investment approach. They include: building on individual and community strengths through partnerships with key stakeholders; developing tailored services using locational approaches; and building joined-up services and whole of government solutions. The need for 'strengthening service provision in parts of the community sector, or jointly investing in new social innovations',<sup>82</sup> is also specified. Clearly, each of these approaches coheres with the justice reinvestment principles outlined above.

The foundation principles of justice reinvestment are also echoed in these *Social Inclusion Agenda* 'approaches': the use of 'evidence and integrated data to inform policy' – a hallmark of the justice reinvestment strategy – and 'planning for sustainability'. Integral to the justice investment approach is its sustainability. Sustainability in the sense of economic sustainability, as it involves a reshuffle of budgets (from corrections to local community) rather than the creation of new ones, and social sustainability, as the initiatives are locally developed and implemented.

Finally, in the *Closing the Gap* initiative, 'Safe Communities' are identified as a 'building block' contributing to improved outcomes for Indigenous communities.<sup>83</sup> Here, however, the discussion focuses on criminal justice system responses – effective policing and access to the justice system – rather than strategies lying outside that system. This is a structural limitation in the agreement; however, it should be noted that in discussing examples of programs that relate to the Safe Communities building block, 'prevention, diversion and treatment'<sup>84</sup> initiatives that address mental illness, substance abuse, community leadership development and healthy living are named.<sup>85</sup> Thus, there may be scope for a broader approach to addressing criminal justice issues than first appears.

COAG has recognised that

it will take more than increased expenditure ... to achieve better standards of health, education and life opportunities for Indigenous people. It will take a new way of working in partnership and doing business with Indigenous people.<sup>86</sup>

It may be that justice reinvestment can offer the kind of framework that COAG has in mind.

(ii) State and Territory Policy

Queensland, Western Australia, Victoria and New South Wales<sup>87</sup> have developed Indigenous Justice Agreements (IJAs), negotiated between government and peak Indigenous bodies. IJAs are broad in scope, covering the whole of the state or territory's criminal justice system.<sup>88</sup>

The details of the agreements vary between jurisdictions but they have some elements in common. The *NSW Aboriginal Justice Plan*, for example, looks to effect structural change aimed at reducing Aboriginal contact with the criminal justice system.<sup>89</sup> Similarly, the *Queensland Justice Agreement* has the long-term aim of reducing the rate of Indigenous contact with the criminal justice system (ultimately, in relation to the non-Indigenous rate). A specific goal is to reduce by 50 per cent the rate of Aboriginal and Torres Strait Islander peoples incarcerated in the Queensland criminal justice system by 2011.<sup>90</sup> Each IJA contains an 'action plan' for achieving this end, and each, in some form, acknowledges the need to ensure community engagement in, or community control and ownership of, solutions to Indigenous justice issues. In the Western Australian agreement, for example, this includes full partnership between government at all levels and Aboriginal people at all stages of planning, service delivery and monitoring to enable negotiated outcomes (WA IJA Principle 4).<sup>91</sup> All IJAs acknowledge that a justice-related approach to over-representation is not sufficient by itself to address structural disadvantage in Indigenous communities.<sup>92</sup>

A 2005 evaluation of the Queensland IJA commented on the apparent lack of urgency in meeting the goals relating to over-imprisonment, stating that, 'the failure to resource justice initiatives means that it is unlikely that the target of reducing Indigenous incarceration rates will be met by 2011.'<sup>93</sup>

There are several observations to be made about IJAs in relation to justice reinvestment. The first is that their overarching goals and principles – reduction in prison numbers, deep involvement of communities, and an approach that extends outside of the criminal justice framework – are common to justice investment strategies, such that justice reinvestment could easily be a vehicle for achieving IJA aims. Secondly, the under-resourcing of at least some IJA action plans, which limits the outcomes possible from IJAs, can be addressed by the diversion of

funds proposed by the justice reinvestment model. Indeed, adopting justice reinvestment would be both coherent with the aims of state IJAs, and has the potential to increase the degree of success in output that they can achieve.

## V Justice Reinvestment and Indigenous Communities

There are a number of characteristics more likely to be found in Indigenous communities that make those communities particularly suited to justice reinvestment. While in some cases these characteristics can be understood as contributing to Indigenous over-representation in the prison system, they also present strong opportunities in the justice reinvestment context.

### A Disadvantage

Indigenous people in Australia face well documented disadvantage across a broad number of areas. The 2009 *Social Justice Report* compiles a table of the 28 most disadvantaged locations in five states.<sup>94</sup> In 11 (39 per cent) of those locations, more than 50 per cent of the population are Indigenous.<sup>95</sup> Indigenous disadvantage in health, education, housing, employment and income is set out in *Overcoming Indigenous Disadvantage* 2009 and elsewhere. They include that:

- Indigenous people are only half as likely to finish year 12 as the non-Indigenous population, and have substantially lower literary rates than non-Indigenous children in all year levels;<sup>96</sup>
- Indigenous people aged 15-24 years are three times more likely than non-Indigenous people in their age group to be neither studying nor working;<sup>97</sup>
- Indigenous people are 4.8 times more likely than non-Indigenous people to live in overcrowded housing;<sup>98</sup>
- approximately 30 per cent of NSW children in out of home care are Indigenous, despite Indigenous children comprising just 4 per cent of the child population;<sup>99</sup> and
- Indigenous people are almost twice as likely as non-Indigenous people to report their health as only fair or poor.<sup>100</sup>

These issues – though not strictly criminal justice issues – are directly relevant to a justice reinvestment approach to reducing offending. It is precisely these sorts of issues that can be addressed in a coordinated attempt to alleviate

the hardships and disadvantage that are associated with criminal offending. Strengthening communities can not only reduce anti-social behaviour, but can also have an effect on the use of alternatives to imprisonment by courts when sentencing offenders resident in those locations. This dynamic is recognised by a senior legal practitioner:

[f]ix the social issues and you've got a good chance of addressing the law breaking; and if [members of those communities] do break the law you've got a better chance of sending people back to a supportive community rather than into a prison. I think that's part of the problem now: alternative dispositions for people from deprived backgrounds are probably not going to be as attractive to the bench, because they're probably not going to work as well.<sup>101</sup>

In the US, justice reinvestment has been used to address disadvantage associated with criminal offending. In Kansas, for example, incarceration mapping of Wichita revealed that in 2004, \$11.4 million was spent imprisoning people from a single neighborhood, 'as well as an additional \$8.7 million on food stamps, unemployment insurance, and Temporary Assistance to Families.'<sup>102</sup> Local authorities have designed strategies to address issues involving: children and youth; behavioural and physical health; adult education and economic vitality; and safe communities. Special attention was given to housing, which was identified as a key issue given the high incidence of dangerous and neglected accommodation.<sup>103</sup>

In Texas, the legislature appropriated \$4.3 million from the 2008–2009 corrections budget in order to make available a proven violence prevention program, the Nurse–Family Partnerships, to 2000 families in identified 'high stakes' communities. This pairs nurses with first-time, low-income mothers during their child's first two years. The model looks 'to increase self-sufficiency, improve the health and well-being of low-income families, and prevent violence.'<sup>104</sup>

### **B Remoteness**

There is a clear correlation between remoteness and disadvantage.<sup>105</sup> It has been argued that in remote communities, access to justice is 'so inadequate that remote Indigenous people cannot be said to have full civil rights.'<sup>106</sup> Of the total Indigenous population in Australia, 24.6 per cent live in remote or very remote communities, compared to just 1.8 per cent of non-Indigenous people.<sup>107</sup>

A 2006 NSW parliamentary report found that many sentencing options were not available in rural areas.<sup>108</sup> In particular, supervised bonds, community service orders, periodic detention and home detention were not available in many parts of the State. As confirmed by an interviewee for the Australian Prisons Project:

It's uneven across the state; there are not sufficient resources to enable [non-custodial options] to be applied equally for offenders so you get unfair treatment of some people in some places where the resources are not available for a disposition that would be suitable, which is not imprisonment.<sup>109</sup>

What justice reinvestment can do is act as a catalyst to *make* these resources available, creating the potential for a break in this geographic disadvantage by providing an injection of funds to create capacity for alternative dispositions where they have not previously existed. This accords with the recommendations of the evaluation of the Queensland *Aboriginal and Torres Strait Islander Justice Agreement*, which identified the need for increased capacity for community supervision in remote localities to facilitate an increase in the number of Indigenous offenders on community-based orders, and at the same time, a reduction in imprisonment rates.<sup>110</sup>

As discussed above, the bulk of justice investment initiatives in the US have been aimed at urban environments, and so are not directly transferrable to the remote Indigenous context. However, a well-resourced, well-coordinated, and holistic approach to addressing issues specific to remote communities has a great deal of potential. As Harry Blagg has written:

There are signs that, albeit in a fragmented and embryonic form, specifically identifiable Indigenous justice processes are developing in the post-RCIADC era ... Although poorly funded, capacity building initiatives such as Aboriginal Night Patrols and community wardens schemes, sobering-up shelters and family healing centres continue to gain the support and backing of Indigenous communities.<sup>111</sup>

Justice reinvestment can provide support for remote communities in the development and growth of initiatives that are most relevant to crime reduction in their cultural and geographic context.

### C Community Buy-In

The impact of high rates of incarceration on communities cannot be underestimated: '[e]very time an Indigenous person goes to prison and leaves their community, there are children that are losing parents, sisters, brothers and uncles and aunties.'<sup>112</sup> The withdrawal or loss of a family member to prison results in the loss

not only of economic capital, but also of social capital involving relationships among family members and the organization of family life toward the maintenance and improvement of life chances of children.<sup>113</sup>

Justice reinvestment presents an opportunity to interrupt the cycle of migration from communities to prison and back again, and to arrest the ripple effects of imprisonments that are felt throughout a community. The process of decarceration through community capacity building 'becomes mutually reinforcing; crime prevention decreases imprisonment; and community engagement strengthens the community so the preconditions for crime are reduced.'<sup>114</sup>

Due to its focus on local ownership, all justice reinvestment initiatives depend on the commitment, participation and support of the communities in which they are implemented. The success of programs – in fact any program – in Indigenous communities has always depended on the buy-in of those communities. As Tom Calma has observed, 'the only way ... the entire spectrum of Indigenous service delivery and policy would succeed was if we worked in partnership with communities.'<sup>115</sup> Thus the justice reinvestment methodology is well matched to the requirements of Indigenous communities.

One example of a high degree of community buy-in and control of reinvested funds can be found in the proto-justice reinvestment model adopted by Oregon in 1998 to address high levels of juvenile incarceration. State legislation awarded a grant to Deschutes County equal to the amount that the state was spending to incarcerate juveniles from that county each year. The county was free to spend the grant in whatever way they thought best, on condition that they pick up the tab for each local young person who found their way back to state prisons. This incentive-based system resulted in a focus on community supervision in the form of community service orders, and gave participants the opportunity to acquire skills at the same time. Programs

included the landscaping of local parks, constructing bunk beds for families in need, and joining Habitat for Humanity efforts to build homes.<sup>116</sup>

As a result of the new arrangement, the Department of Juvenile Justice reported a 72 per cent drop in incarceration of juvenile residents of the county.<sup>117</sup> The widely publicised strict restitution and community service requirements for the juvenile offenders also won public support throughout the community.<sup>118</sup> This incentive-based model was emulated in Michigan and Ohio, where substantial drops in institutionalisation of juveniles also followed, coupled with a strengthening of local infrastructure.<sup>119</sup>

### D Victims' Issues

It is important to take into consideration the high number of Indigenous victims, in addition to offenders, who would benefit from the healthier communities that justice investment strategies strive to build. In 2002, nearly one in four (24.3 per cent) Indigenous people reported being a victim of actual or threatened violence in the previous 12 months.<sup>120</sup> This was double the rate reported in the earlier 1994 National Aboriginal and Torres Strait Islander Social Survey. In Victoria, Indigenous women are four times more likely to be the victim of indictable assaults, three times more likely to be the victims of summary assaults, and twice as likely to be the victims of rape and sex offences than non-Indigenous women.<sup>121</sup> An Indigenous woman in Western Australia is about 45 times more likely to be the victim of serious domestic violence than a non-Indigenous woman.<sup>122</sup>

More generally, Indigenous women are 35.1 times more likely to be hospitalised after a domestic assault than their non-Indigenous counterparts.<sup>123</sup> Apart from the impact that such violence has on families and communities, there are high costs associated with having to provide hospital and other health services, emergency refuge accommodation, police services and care facilities in the wake of this kind of crime.<sup>124</sup> These hidden costs of Indigenous offending can be taken into account in the costs mapping stage of the justice reinvestment process. Funding can also be diverted into culturally appropriate victim support services: as *Cutting Crime: The Case for Justice Reinvestment* states, '[j]ustice reinvestment would enable the most victimised communities, as well as offenders and their families, to benefit from additional targeted support.'<sup>125</sup>

It is also important to note that many victims do not want to see offenders imprisoned:

Indigenous communities see prison as part of the cycle of violence - stripping communities of their young men and returning them more damaged than when they left. They want intervention strategies that stop violence but leave families intact and promote family and community "healing".<sup>126</sup>

These outcomes can be supported through justice reinvestment strategies.

## VI Conclusion: Time Ripe for Change

The need to address the rate of over-incarceration of Indigenous people has been well understood since the Royal Commission into Aboriginal Deaths in Custody. The economic imperative of reducing the rates of incarceration more generally is now finding footing internationally. It appears that justice reinvestment could offer strong prospects for reducing entry and re-entry to prison. Specifically, rates of incarceration and recidivism among Indigenous people might be addressed community by community through the justice reinvestment mechanism. The freeing up of corrections budgets will allow initiatives like the following to be implemented:

- \* strengthening parole options so that Indigenous offenders do not decline offers of parole due to difficulties meeting reporting requirements and other conditions;<sup>127</sup>
- \* increasing capacity in communities for providing more options for community corrections. This may address such longstanding issues as the overuse of imprisonment of Indigenous people for public order offences,<sup>128</sup> and the increasing number of Indigenous defendants who are refused bail;<sup>129</sup>
- \* working with existing community resources, such as community justice groups or restorative justice healing circles, to engage communities in creating justice reinvestment strategies<sup>130</sup> and to promote the community networks needed to underpin community renewal;
- \* providing sustainable sources of funding for culturally appropriate, community owned programs, rather than the limited-lifespan pilot programs that communities so often receive. These may include Indigenous

healing programs, residential drug and alcohol or anger management programs, mentoring, men's and women's groups and bush camps; and<sup>131</sup>

- \* exploring a range of in-community initiatives that lie outside the criminal justice system and that respond to factors at play in the community that contribute to wider socio-economic drivers of criminality. These may include programs aimed at developing economic or infrastructure related activities, bolstering housing, health or education programs, supporting new mothers or families in other respects.

If adopted, justice reinvestment could be part of a justice renewal strategy for Indigenous people.<sup>132</sup> There are, of course, many other aspects of the criminal justice system that need to be addressed if national Indigenous over-representation is to be reversed, which will remain largely untouched by justice reinvestment. Policing practices,<sup>133</sup> the unequal impact of 'equal' laws,<sup>134</sup> and the unsatisfactory experiences of Indigenous people in the criminal courts, are but some of the other spheres that will need to be addressed to ultimately achieve better criminal justice outcomes for Indigenous people.

The capacity of justice reinvestment to contribute to justice renewal for Indigenous people will inevitably face some challenges. Social Justice Commissioner Mick Gooda has said, in discussing the use of this strategy in addressing family violence:

[w]hat I like about Justice Reinvestment is that it provides opportunities for communities to take back local control ... to not only take some ownership of the problem but also to own the solutions.<sup>135</sup>

While this statement is true to the fundamental structures of justice reinvestment, it must be noted that there have been countless initiatives aimed at assisting Indigenous communities that have ended up being controlled not by those communities but by government or other non-Indigenous organisations – with correspondingly poor outcomes. While justice reinvestment dictates that both authority and funding be devolved to local community, it is easy to see how this could be sidelined in application, as it has been so many times in the past. The localised focus in justice reinvestment will require safeguards to ensure that practical self-determination is realised, to avoid bureaucratic or 'metrocentric' solutions being foisted upon communities,



and to ensure that money earmarked for reinvestment does not end up being funnelled into non-Indigenous agencies.

One way to safeguard against such outcomes is through the establishment of a structure similar to the Council of State Governments Justice Center in the United States. The Justice Center not only assists with the mapping and strategic decision-making associated with the establishment of justice reinvestment schemes, but can also play a supervisory role in ensuring that initiatives are implemented in a way consistent with the justice reinvestment ethos. Properly done, this would ensure truly community-led processes and outcomes. The existence of a body of this type would also be crucial in securing bipartisan support for reinvestment initiatives, while standing apart from the vicissitudes of changing governments or government policies.

However, perhaps the first hurdle for advocates of justice reinvestment will be convincing state and federal governments to redirect resources from the corrections budgets into communities. On 21 October 2009, the NSW Minister for Corrective Services was asked what the government intended to do about rising prison rates. His response was:

[t]he Government is on track to meet the demands of an increasing inmate population ... [C]onstruction plans are well underway for the new 600-bed facility at Nowra on the South Coast, and an additional 250 beds are due to be completed at Cessnock Correctional Centre by the end of 2011. Those projects form part of the Government's plans to provide an additional 1,000 beds across New South Wales. The New South Wales Department of Corrective Services is well equipped to handle any increase in inmate numbers.<sup>136</sup>

Justice reinvestment looks to shift penal culture away from the use of prisons as the front-line criminal justice strategy. However, it does require bipartisan support and an agreement to desist from law and order campaigning, which has traditionally focused on tougher rather than more effective responses to crime. There are signs that other countries are moving towards justice reinvestment: New Zealand<sup>137</sup> and Scotland<sup>138</sup> have both recently raised the approach as a possible future strategy. It is no longer just advocacy or specific interest groups that are agitating for this kind of penal reform. Internationally, responsible governments are responding to the crisis of over-incarceration by looking

seriously at ways to reduce prison numbers. If Australia does not do the same – particularly in relation to its most imprisoned group – it is in danger of being left behind.

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  - 3 David Brown, 'Contemporary Comments: The Limited Benefit of Prison in Controlling Crime' (2010) 22(1) *Current Issues in Criminal Justice* 461.
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  - 6 JFA Institute, *Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011* (Report, JFA Institute, 2007) ii.
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  - 8 JFA Associates, *Unlocking America: Why and How to Reduce America's Prison Population* (Report, JFA Associates, November 2007) 1.
  - 9 Tucker and Cadora, above n 5, 2.
  - 10 States that have sought support from the Council of State Governments Justice Center are: Arizona, Connecticut, Kansas, Michigan, Nevada, New Hampshire, Ohio, Pennsylvania, Rhode Island, Texas, Vermont and Wisconsin. States that have acted by themselves include Oregon. See The Council of State Governments, *Justice Reinvestment: A Project of the Council of State Governments Justice Center* <<http://justicereinvestment.org/states>> at 12 October 2009.
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