



Senator Penny Wright

Chair

Legal & Constitutional Affairs Committee

Parliament House

Canberra A.C.T.

Dear Senator

Please find enclosed a paper recently given to solicitors & others interested in Indigenous & Children's issues so far as sentencing & the criminal law are concerned.

It seeks to stress the importance of a formal as distinct from an ad hoc approach to Justice Reinvestment and in particular the importance of the final step namely measurement & evaluation of the impact of Justice Reinvestment. It is through measurement & evaluation that better targeting of resources will be achieved and/or improvement in programs or delivery of programs.

I also sought to emphasize a view that Justice Reinvestment should not consider or be driven

by racial imperatives however tempting that  
might be.

I hope the paper will add to the wealth of  
submissions received by your Committee

Yours sincerely

# Justice Reinvestment – A Path Towards Healing

John Nicholson SC<sup>1</sup>

*The Aboriginal Community must come to terms with the reality of our contemporary situation and deal with it. Whatever the causes of our alcohol and substance abuse issues, whatever the denial that has resulted in our dispossession, whatever the outcomes of poor Government policies on our communities, the results are ours to confront.*

*Like the victims of a hit and run accident, there is no point in bemoaning our fate. We must contribute to our own healing and rehabilitation – Patrick Dodson<sup>2</sup>*

## WHAT IS JUSTICE REINVESTMENT ?

Justice reinvestment is a localized criminal justice policy approach that diverts a portion of the funds designated for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services in deprived and depressed communities where these issues are most acute in order to address the underlying causes of crime in those communities. It still recognises the need for prison as the appropriate measure for dangerous and serious offenders but actively shifts the culture away from imprisonment and starts providing community wide services that prevent offending by persons in those communities.<sup>3</sup>

Tom Calma asks rhetorically “Is imprisonment good value for money? He answers his own question with the obvious answer – “The simple answer is that it is not.”<sup>4</sup> The pity is that this question would seem to present as the most important driver of change. Moral, social justice, health and welfare imperatives should all have been in the forefront of any debate about the efficacy of incarceration as a social engineering tool to bring about beneficial changes in, what the researchers are showing us is a small and already disadvantaged proportion of our society.

## WHY DO WE NEED JUSTICE REINVESTMENT?

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<sup>1</sup> Acting Judge of the District Court of New South Wales. The opinions expressed herein are those of the author and do not purport to reflect the views of the District Court of New South Wales, or any judge of that Court.

<sup>2</sup> Sydney Peace Prize acceptance speech; 8<sup>th</sup> November 2008.

<sup>3</sup> T. Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner; Social Justice Report 2009; Report of the Aboriginal and Torres Strait Islander Social Justice Commission to the Attorney-General; Australian Human Rights Commission. I should note at the outset Mr Calma’s Report has been the major primary source document for this paper. Not only has the author quoted extensively from it, but also has followed much the same structure in presenting the topic.

<sup>4</sup> See fn. 3

Juvenile incarceration rates, particularly Aboriginal juvenile incarceration rates have spiked upward since the Royal Commission Into Aboriginal Deaths in Custody, in alarming numbers. There are many well-known causes finding their origin in the displacement and dispossession of Aborigines since the arrival of Europeans and others to this land. One such cause, the normalisation of custody for Indigenous persons has a particular poignancy in this example:

So many people in custody or on community based orders are following the footsteps of their parents or grandparents. When I was going to Muluwa prison a women came up to me and introduced me to her mother and her grandmother. They had all been in custody and they are all in Muluwa together in the women's jail. It was not remarkable to them. I t was just what happens... (My emphasis)<sup>5</sup>

It may be, with the clash of cultures and the dispossession as a consequence of European settlement, Aboriginal youngsters were more significantly exposed to conflict with the law than children of other races. It is worth pausing a moment to understand particularly how Aboriginal culture, insofar as it related to children, was unable to defend itself against the boiling pot of social, economic, and political pressures arriving with surging influx of non-Indigenous peoples from all nations, wanting a slice of the action and the land.

In a recent paper Geoffrey Eames recalled the some of the findings of the Commission, arguing many of those findings were still relevant to today's social environment. Of particular significance, for the purposes of this paper was his recounting of findings relating to "Juvenile justice issues".

As Commissioner Johnston noted ... high regard is placed by Aboriginal people on autonomy. For example, ... drinking (and I would add domestic violence) is regarded as someone's own business, even if that behaviour may adversely affect other people, including the drinker. The importance of autonomy and independence is emphasised from childhood.

The Final Report noted that many young Aboriginal men have been denied the status and self-affirmation that once came with employment in the cattle industry. Working for the dole or on CDEP projects does not provide that status. Commissioner Johnston noted that there was evidence to suggest that for many young people their desire to affirm their adulthood and status was expressed through activities that brought them to police attention. ... There are some underlying cultural factors that the Commission identified as playing a role in that regard.

... It was the strength of Aboriginal culture and kinship that provided a powerful force for dealing with and overcoming racism, but the Commissioner also identified some aspects of Aboriginal culture that, in modern times, unwittingly contribute to the high rate of detention of Aboriginal children.

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<sup>5</sup> The New South Wales Corrective Services Women's Advisory Council submission to the 2880 Australian Parliamentary Inquiry referred to by then Attorney General The Hon. R, McClelland in his address on the occasion Lionel Murphy's Legacy Address, Canberra, 7 September 2011.

...[T]he Commissioner noted that ... in encouraging that independence, the behaviour of young children in Arnhem Land was characterized by “absolute indulgence” from adults; children were not subjected to training in social behaviour, or to punishment for misbehavior. They were expected to naturally learn to be co-operative and friendly, and to be responsible for themselves and for their peers. As children grew older and faced initiation there was pressure to conform, as a corrective to absolute autonomy. Thus embedded in the process of children growing up were very strong cultural values that promoted and encouraged early and continuing independence of children.

This cultural heritage was not confined to remote, tribal communities. In New South Wales, for example, it was said that although the context was different – with the central concern of that community being the affirmation of Aboriginal identity - the development of a cheeky assertiveness was rewarded by adults, who promoted the identification of a child as a “Cheeky black kid”. ....

Assuming these observations are true today, 20 years after the Royal Commission reported them, this historic cultural tolerance of conduct by children that non-Aboriginals might regard as misbehavior but many Aboriginal adults would regard as mere assertions of independence, may be one factor in the high rate of juvenile offending. When that tolerance is coupled with a reduction in the incidence (and, in many cases, cessation) of the steadying role of initiation, and where boredom and lack of opportunity are coupled with drug and alcohol misuse, or petrol sniffing, in some communities, and given the high visibility of Aboriginal children, then it is inevitable they will come under police attention to a significant degree. The high degree of police surveillance of Aboriginal children, in turns, fuels resentment and alienation and perceptions of racism. (references omitted)<sup>6</sup>

### **THE ‘WHITE FELLA’ SOLUTION THE PUNITIVE PARADIGM**

If arrested and charged (not an automatic consequence of arrest where children are concerned), the Children’s Court normally deals with an accused child’s criminal matters. In NSW there are a number of philosophical principles underpinning the exercise of Children’s Court jurisdiction. These include a recognition that:

- Children have rights and freedoms before the law equal to those of adults, including the right to be heard at and participate in hearings.
- Children who commit offences bear responsibility for their actions, but because of their dependency and immaturity require guidance and assistance;

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<sup>6</sup> The Royal Commission into Aboriginal Deaths in Custody: Twenty years After”; a paper delivered to the conference for Judicial Officers and Aboriginal Community members – Exchanging Ideas II – Conference sponsored by Ngara Yura Program and Judicial Commission of NSW; Sydney 10 September 2011. The Hon Geoffrey Eames AM QC had been counsel assisting Commissioner Hal Wotten.

- Wherever possible the child's employment or education should be allowed to proceed without interruption.
- Any penalty imposed upon a child should not be greater than that imposed upon an adult who commits the same offence;
- A Children's Court should aim for the child's reintegration into the community so as to sustain family and community ties.

A Children's Court magistrate has a number of sentencing options available at sentence. The ultimate sanction provided to magistrates is to make an order committing the young person to the control of the relevant Minister for a maximum period of 2 years in respect of an offence carrying a maximum penalty of two or more years imprisonment.

Magistrates like judges, read legislation through lens tinted by the social mores of our time. The fundamental principles underpinning the Children's Court jurisdiction, would on the surface, appear open to benign and beneficial interpretation. Those fundamental principles have not been amended in recent years, or indeed, at all.

Tom Calma makes the point that high imprisonment rates are not inevitable<sup>7</sup>. One only has to look at the varying levels of imprisonment rates world wide, or within Australia to understand that something other than the presence of offenders in court answering to their charges is informing the outcome of sentencing. True it is that politicians and to some extent the legislature are running a law and order campaign. But there is no need for judicial officers to jump on the law and order bandwagon. Courts are there to offer checks and balances against government over-reaching.

Imprisonment and juvenile detention are very deliberate policy choices, not only by government, but also by judicial officers. There is no doubt many thousands of adults and children are being sent to prison or detention each year not for the safety of the community, but in pursuit of a policy of punitive justice. If proof of this was needed the second most senior gaoler in Corrective Services said as much:

... [W]e still maintain that high risk sex offenders should be managed in custody as should high risk violent offenders. However there aren't very many of those people in a population of 10,000 [prisoners in NSW]. *Tomorrow I could safely let several thousand people out of gaol onto the streets of New South Wales [and] have no impact on crime. It would save us a lot of money and could put money into things that would actually produce much better outcomes for the people of New South Wales.*"<sup>8</sup> (My emphasis)

Tom Calma points to several examples of decarceration, including two periods in England and Wales between 1908 and 1939 and again in 1979 to 1992. He also

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<sup>7</sup> See fn.3

<sup>8</sup> Luke Grant, Assistant Commissioner, Offender Services and Programs, Corrective Services NSW. 11 Sept 2011, Exchanging Ideas II, Sydney. Note the perhaps unintended plug for justice reinvestment in the final sentence.

notes the decarceration consequences of the use of justice reinvestment in Texas, Kansas and other States in the United States.<sup>9</sup>

In the administration of justice, judicial officers all too frequently fail to recognise the fact that sentencing is not normally an end point in the path of an offender, but a mid-point. If sentencing is a mid-point then the refusal of bail represents a period even earlier in the administration of criminal justice process. Rarely sentencing may become an end point (dismissal or s.10A conviction<sup>10</sup>) but usually it initiates a final process of accountability (e.g. good behaviour bond, term of imprisonment/detention, fine, intensive corrections, community service). Even more rarely is the refusal of bail an end point (successful no-bill application; prosecutorial discretion not to prosecute).

Judges and advocates should take a longitudinal approach to sentencing by understanding, and framing sentences that recognise sentencing is just a mid-point along the pathway that is the administration of criminal justice: – offending, investigation and arrest; charging and commencement of court proceedings; acquittal (end point for those found “Not Guilty”) or sentencing; the administration/serving of the sentence (Custody, supervision, etc.); release from sentence obligations/parole and completion of the sentence. Once it is recognised that sentencing is a mid-point, it becomes easier to turn the judicial mind to and understand the sentencing to incarceration process itself, more frequently than not, is having unintended and counter productive effects upon the sentenced prisoner/juvenile.

The end-point outcome is far more important than the sentencing outcome. True the sentencing outcome plays a vital role in the end-point outcome. Mention has already been made of the counter productive consequences of incarceration on adults and children alike.

Yet either, children are committing more criminal offences, or Children Court’s Magistrates are becoming, and/or are being forced to be, tougher on penalty or the grant of bail. Yes, it is being suggested that some Magistrates are choosing bail/sentencing options in circumstances where the law does not require incarceration. Put another way the underpinning principles are now being unnecessarily read through lens focused upon a punishment paradigm. That is not to ignore the fact that the legislature is also requiring, unnecessarily, an approach that sees more children incarcerated than the safety of the community requires.

The Charts below tell a story of the years 2004 – 2009. Of particular interest is the growth in the percentage of detained children on remand:

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<sup>9</sup> See fn.3

<sup>10</sup> Crimes (Sentencing Procedure) Act 1999 (NSW)

**Table 1 – Average daily number of juveniles in custody.<sup>11</sup>**

2004-2005	2005-6	2006-7	2007-8	2008-9	2009-10	2010-11
283	309	331	390	427	434	391

**Table 2 – Total admissions of juveniles in custody and custody status<sup>12</sup>.**

2004-2005	2005-6	2006-7	2007-8	2008-9
C.O* 412	468	514	623	711
R** 3444	3625	4263	5018	4634

\* Control Order

\*\* Remands

**Table 3 – Proportion of those on Remand who do/do not receive a control order within 12 months<sup>13</sup>.**

2004-2005	2005-6	2006-7	2007-8	2008-9
Do 22.9%	17.7%	17.8%	18.3%	21.7%
D.N.* 77.1%	82.3%	82.2%	81.7%	78.3%

\*Do Not

**Table 4 – Proportion of Detention/Remand Prisoners who are Aborigines<sup>14</sup>**

Year	Detention	Remand
<b>2006-2007</b>	50.3%	38.6%
<b>2007-2008</b>	51.6%	40.1%
<b>2008-2009</b>	49.9%	48.8%
<b>2009-2010</b>	49.8%	38.8%
<b>2010-2011</b>	51.7%	38.5%

Tom Calma's Commission<sup>15</sup> noted the 2009 Productivity Commission Overcoming Indigenous Disadvantage report is unequivocal about how significant the disparity of representation of Indigenous persons in the criminal justice system is:

- The imprisonment rate increased by 46% for Indigenous women and by 27% for Indigenous men between 2000 and 2008.
- Indigenous adults were 13 times as likely as non-Indigenous adults to be imprisoned in 2008, compared to 10 times in 2000.

<sup>11</sup> Figures obtained from NSW Juvenile Justice Annual Report 2009, and the NSW Attorney General and Justice Annual Report 2010-2011. An interesting feature of the daily averages is to note the variation between mid-October – mid-December, and the numbers incarcerated during the Christmas week – which fall 10% below those for Mid-October to mid-December. That variation, based presumably upon judicial sentimentality, suggests not all children detained in the lead-up to Christmas absolutely needed to be detained.

<sup>12</sup> See fn. 5.

<sup>13</sup> See fn.4.

<sup>14</sup> Attorney General and Justice Report 2010-2011. Available on the Corrective Services Website.

<sup>15</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner; Social Justice Report 2009 p. 31.



- The indigenous juvenile detention rate increased by 27% between 2001 and 2007, making juveniles 28 times more likely to be detained than non-Indigenous juveniles.<sup>16</sup>

Judge Norrish Q.C. noted a number of factors contributing to increased rates of incarceration, including the incarceration of Aboriginal juveniles<sup>17</sup>. His Honour noted:

- Greater restrictions on the grant of bail;
- Increased complexity in sentencing principles;
- Increased codification of the criminal law with resultant increases in statutory maximum penalties;
- Inhibition of sentencing discretion by legislative amendments;
- Guideline judgments structuring sentencing discretion;
- Restricting sentencing outcomes by abolition of some sentencing options.

It may be a comfort to some that he has not noted the use of punitive paradigm lenses by some judicial officers that I have referred. However, to his list I would add the absence of some sentencing options in regional and remote communities – for example sentencing access to compulsory drug treatment programs. I would also add there is an absence of suitable non-custodial accommodation options for juveniles whose family circumstances are unsuitable for a juvenile on remand. Another factor may well be a consequence of the fact that one in five Aboriginal Children has a parent or carer in prison, according to a 2008 study<sup>18</sup>.

### **But it gets Worse**

There is a perception most juveniles who have a brush with the law are usually of a view that “*One brush with the law is one too many!*” The truth appears to be very much to the contrary. As Chart 5 below illustrates there is a linkage between childhood court appearances and subsequent adult court appearance and custody periods. The linkage is particularly strong in the case of Indigenous childhood offenders.

The adult custodial percentages may well have varied upwards in the seven years since 2005. Imprisonment rates may have plateaued or declined slightly in 2011 – but during the whole of this seven-year period they have generally increased.

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<sup>16</sup> SGRGSP (Steering Committee for the Review of Government Service Provision), *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission (2009) At [http://www.pc.gov.au/gsp/reports/indigenous/key\\_indicators2009](http://www.pc.gov.au/gsp/reports/indigenous/key_indicators2009) (view 24 July 2009 – by Social Justice Commission)

<sup>17</sup> A judge of the District Court of NSW; “*Equal Justice in Sentencing for Aboriginal People*”; a paper for the “National Indigenous Legal Conference; 13<sup>th</sup> August 2011.

<sup>18</sup> Study unidentified, but referred to by the then Attorney General The Hon. R. McClelland in his address on the occasion Lionel Murphy’s Legacy Address, Canberra, 7 September 2011. This paper noted earlier the normalisation of incarceration for Indigenous persons, the custodial rates of parents, carers and close relatives is another powerful factor in that normalisation process.

**Table 5 Persons who first appeared in NSW Children’s Courts in 1995 with subsequent adult court and custodial experience in the decade to 2005<sup>19</sup>**

Juvenile Characteristics	No.	% with at least one adult court appearance	% with at least one custodial appearance
Age at first Court appearance			
10-13	1241	58.1	17.8
15-16	2371	57.2	13.1
17-18	1864	57.1	9.8
Indigenous Status			
Non Indigenous	4783	52.6	9.7
Indigenous	693	90.5	36.1

One particular horror of custody is that custody itself contributes to and compounds the disadvantage:

For Indigenous and non-Indigenous prisoners, time spent in prison is fraught with many risks to their health and wellbeing. Offenders have disproportionately higher rates of serious mental illness and substance use. While in prison, they are at increased risk of blood-borne virus transmission, physical violence, sexual assault and isolation. Even upon their release, numerous challenges remain as they sometimes face stigmatization, social and cultural exclusion and frequently inadequate access to support network and to health and social services. Evidence also indicates that prisoner have higher mortality rates upon their release relative to the general populations.<sup>20</sup>

There is every reason to accept what is true for adults is also true, and likely to a greater degree, for an immature young person.

The potentially criminogenic effects of incarceration highlighted by researchers fall into three categories: the effects of incarceration itself; post-incarceration consequences; and the 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. (references omitted).<sup>21</sup>

<sup>19</sup> S Chen, T Matruglio, D Weatherburn, J Hua; *The transition from juvenile to adult Criminal Careers*; May 2005; Criminal and Justice Bulletin No 86;Boscar; [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/cjb86.pdf/\\$file/cjb86.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb86.pdf/$file/cjb86.pdf) (viewed September 22, 2012)

<sup>20</sup> “Bridges and Barriers – Addressing Indigenous Incarceration and Health”. NIDAC 2010.

<sup>21</sup> “Contemporary Comments – The Limited Benefit of Prison in Controlling Crime”. Brown D. CICJ Vol 22 No. 1, July 2010

## JUSTICE REINVESTMENT – THE UNITED STATES MODEL<sup>22</sup>

*We are jammed up with this situation right now because we have fallen in love with one of the most undocumented beliefs: that somehow you get safer if you put more people in jail.* Don Perata (Democrat) California Senate President<sup>23</sup>.

Notwithstanding it has one of the highest imprisonment rates in the world, a more humane approach is being initiated in areas of the United States not known for being soft on crime. Although not of direct relevance to this paper, some amelioration of criminal harshness occurred with the historic United States Supreme Court decision of Brown v Plata<sup>24</sup>. Justice reinvestment is a public policy response to the out of control prison population in the United States from the 1990s. The concept came from the Open Society Institute, a New York think-tank led by George Soros<sup>25</sup>. “The innovation of justice reinvestment, according to the Commission on English Prisons is that it:

Is not about alternatives *within* the criminal justice process, it is about alternatives *outside* of it”.<sup>26</sup> (original emphasis, references omitted)

“Justice reinvestment makes us think more broadly and holistically about what really leads to crime and how we can prevent it. [It] is based on evidence that a large portion of offenders come from a relatively small number of disadvantaged communities. Demographic mapping and cost analysis ... identified ‘million dollar blocks’ where literally millions of dollars are being spent on imprisoning people from certain neighbourhoods.”<sup>27</sup> Calma gave an example of ‘The Hill’ in Connecticut where \$20 million was being spent housing 387 mostly low-income African Americans residents in prison.

The argument is that paying for prevention is better than paying for consequence. In our daily lives we are all familiar with the concept. A good example is found in the field of medicine. Few begrudge paying for a medical check up, even though that may require expenditure on blood and other testing. No one begrudges paying for blood pressure or cholesterol medication and diabetic injections on a regular basis, rather than living, or perhaps dying, with the consequences of refusing to participate in prevention. Prevention is not a novel concept in our societies. We paint our houses, service our cars and planes

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<sup>22</sup> So far as the author can determine, at least 19 of the American States have passed some form of justice reinvestment legislation. The 19 identified are Arizona, Connecticut, Delaware, Hawaii, Indiana, Kansas, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont, Wisconsin.

<sup>23</sup> See fn.3 p. 18

<sup>24</sup> 563 US \_ (2011); <http://www.supremecourt.gov/opinions/10pfd/09-1233pdf>; confirmed by majority a decision of a three man decision of the Federal Court to release 40,000 prisoners from the Californian prison system because of the effects of overcrowding in the system. The majority view was that there were various available methods of reducing prison numbers without endangering the safety of the community, including good-time credits, diversion of low-risk offenders to community based programs, and parole reform. The court noted the three man court had received expert evidence that prison populations had been lowered without adversely affecting public safety in certain counties in California, as well as Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, Florida and Canada.

<sup>25</sup> See fn.3

<sup>26</sup> See fn.3

<sup>27</sup> See fn.3

rather than accept the consequences that might flow from failing to do so. Many of the strategies of community policing are based upon prevention of crime rather than the detection of it.

A difference between the preventive medicine analogy and justice reinvestment, is the first is focused on an individual while the second is community focused. Justice reinvestment, unlike sentencing, focuses upon the community where the problem arose, rather than the individual who is the product of that community's dysfunction.

A second argument made by the supporters of justice reinvestment focuses upon the counter-productive effects of gaol. Simply put, gaol is far from a financial success. Indeed it is a financial drain hole through which an endless stream of dollars is poured with little community benefit. Full time custody has very limited value for the community. The benefits appear to be three in number. Its prime purpose is to provide an acceptable vehicle for isolating dangerous criminals from the community. It may also have a purpose as a means of punishing abhorrent criminal conduct. Finally, it is an employer of several thousand people engaged in relatively non-productive labour.

Recidivism rates are unacceptably high. Parole breaches are also high, many being of a technical nature (fail to report, unauthorized change of address) rather than breaches of the criminal law. There is a substantial body of evidence that prison fails to rehabilitate, and the consensus of research is that those who do benefit from rehabilitation programs in custody, would be ten times more successful doing the same programs in the community<sup>28</sup>.

Champions of justice reinvestment mount a third argument. Incarceration has community consequences.

One of the assumptions of incarceration is that removing offenders from the community (incapacitation) makes the community a safer, better place. This might be true if removing a small number of serious offenders from a community. But if large numbers of offenders are being removed from a single community this disrupts social networks and weakens the community. ...

Offenders contribute financially; have family and cultural obligations and other social contributions. ... (references omitted)

In particular, many offenders are also parents. Some of the initial negative consequences of imprisonment on children of prisoners include:

- Loss of attachment bond with the parent.
- Mental health problems, including depression, withdrawal and anxiety;
- Physical health problems, hostile and aggressive behaviours;
- Poor school performance and truancy.<sup>29</sup>

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<sup>28</sup> See fn.8

<sup>29</sup> See fn.3

To that list can be added loss of social experiences with the parent, and loss of a role model upon which to base his/her own parenting values on when the role of parenting passes to the child.

### **Four Foundational Pillars of Justice Reinvestment**

The American experience has identified four underpinning strategies as providing the foundational framework for successful implementation of Justice Reinvestment programs:

- ❖ Analysis and mapping.
- ❖ Development of options to generate savings and improve local communities.
- ❖ Quantify saving and invest in high needs communities<sup>30</sup>
- ❖ Measure and evaluate impact.<sup>31</sup>

### **Analysis and Mapping**

To date no dedicated attempt has been made for justice reinvestment purposes to identify the community source of offenders in the various Australian jurisdictions. But identification of the community source is only part of the first step. What money is being spent on incarceration in the communities supplying incarcerated offenders? What, if any, is the under-spending on health, education, housing and other social services, by comparison to the over spending on imprisonment?<sup>32</sup>

In the American model a holistic analysis of the criminal justice system is a key feature of the justice reinvestment methodology. Consideration is given to policing, judicial systems, probation and parole, prevention programs, community supervision and diversion options as well as the geographic mapping.<sup>33</sup>

### **APPLYING THE AMERICAN ANALYSIS APPROACH TO NSW**

A useful first step was taken by Tom Calma's in his 2009 Social Justice Report to identify the most disadvantaged locations of Indigenous populations throughout Australia<sup>34</sup>. Table 6 identifies the seven most disadvantaged locations in NSW and the Indigenous component of those areas<sup>35</sup>.

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<sup>30</sup> This strategy could be more effectively enunciated as "*Identify savings and reinvest in high needs communities*" to correlate to the concept of justice reinvestment.

<sup>31</sup> See fn.3 at p.15-16

<sup>32</sup> See fn. 3 p.15

<sup>33</sup> See fn.3 at p.1.

<sup>34</sup> See fn. 3 Table 2.1 p. 35

<sup>35</sup> See fn.3. The centres were identified initially by Professor Tony Vinson in a 2007 Study "*Dropping of the edge: the distribution of disadvantage in Australia*" (reference to be found in Tom Calma's report.)

**Table 6 NSW Disadvantaged Locations and Indigenous Populations**

<b>Location</b>	<b>Indigenous % of population</b>
Western Plains – area between Bourke and Cobar	34.2%
Boggabilla	55.8%
Brewarrina	58.2%
Lightening Ridge	21.3%
Menindee	27.9%
Tingha	25%
Wilcannia	54%

The Centre for Aboriginal and Economic Policy and Research has identified 531 areas of population, which have been analysed and graded into areas of advantage and disadvantage for the purpose of comparing Indigenous and non-Indigenous populations. The areas of disadvantaged Indigenous communities tend to be in remote areas whereas areas of most advantaged Indigenous areas tend to be in upmarket city locations. The twenty most disadvantaged areas were outside NSW. Eighteen of the twenty were located in the Northern Territory, and two in Western Australia. However, also in the highly disadvantaged category were a number of urban communities including Campbelltown/Airds (rank 434); Blakett/Emerton (rank 428); and Blacktown/Bidwill Park (rank 425)<sup>36</sup>.

Contrary to popular perception, Australia wide, and particularly in NSW, a majority of Indigenous Australians live in major cities (31%) or regional areas (45%) and not remote areas (24%).<sup>37</sup>

Tom Calma was also able to identify the five locations contributing the highest number of adult prisoners to the gaol population. These are set out in Table 7.<sup>38</sup>

**Table 7. Top 5 Indigenous adult prison location – NSW**

<b>Rank</b>	<b>Location</b>	<b>Description</b>
1	Inner Sydney ABS	Inner suburbs of Sydney

<sup>36</sup> See fn. 3 pp. 36-38

<sup>37</sup> See fn.3 p. 41.

<sup>38</sup> See fn. 3 Table 2.3 pp38-39.

	Statistical Subdivision	- Redfern, Darlington, Waterloo, Marrickville, Leichhardt to Botany
2	Blacktown ABS Statistical Subdivision	Blacktown and Surrounding western suburbs
3	Central Macquarie – ABS Statistical Subdivision	Area around Dubbo
4	Hastings – ABS Statistical Subdivision	Mid north coast including Kempsey and Taree.
5	Newcastle –ABS Statistical Subdivision	Newcastle

Tom Calma also ranked the top five Indigenous juvenile detainee locations in NSW.<sup>39</sup> They are set out in Table 8 below. The top three have echoes in the adult distribution in Table 7, while the fourth ranked reflects one of the disadvantage communities highlighted in Table 6.

**Table 8 – Top 5 Indigenous juvenile detainee locations - NSW**

<b>Rank</b>	<b>Area Description</b>
1	Mt Druitt
2	Dubbo
3	Kempsey
4	Bourke
5	Wagga Wagga

There may be a debate that needs to be had – namely whether justice reinvestment should be racially based as some affirmative action to redress the appalling over representation of Indigenous persons in the prison system, or whether it should be racially neutral, seeking to redress the consequence of economic and social disadvantage that results in incarceration. Tom Calma appears to argue for the former.

The communities with high Indigenous prisoner concentrations do not come as a surprise. They are the same communities that have been identified as disadvantaged for sometime now. ... [I]t is now time for a new holistic approach like justice reinvestment to try and tackle these entrenched issues.

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<sup>39</sup> See fn. 3 p. 40

Based on this data I think we can tentatively suggest that any of these locations would be ideal for justice reinvestment pilot projects.

Dear as Aboriginal issues are to my heart, I have some reservations as to the principles justifying targeting funds related to reforming justice issues just to redress this racial imbalance found among the prison population. For example who is to advocate for those with non-Indigenous persons with mental disabilities who also make up a very substantial proportion of the prison population. Regrettably, in the absence of precise information about the “Analysis and Mapping” that is called for, the dimension of the differentiation is probably unknown, and may not ultimately present as a major issue.

### **Development of options to generate saving and improve local communities**

The second pillar involves investigating the various custodial-contributing communities to assess what programs could be instituted within a high needs community that would most effectively create a by-pass from the prison gate. Tom Calma notes that given community involvement is such a key component of justice reinvestment, community consultation and engagement around the causes and solutions to crime is a vital strategy.<sup>40</sup> Anyone who knows anything about Aboriginal reconciliation would also understand the importance of having Aboriginal involvement and participation in over sighting the implementation of programs to the extent that they bear upon Aboriginal communities. It is especially important that local Indigenous persons be part of the solution where Indigenous communities are involved. This may require some skilling-up of available local Indigenous talent required to staff the programs.

### **Identify savings and reinvest in high needs communities.**

The third pillar involves drawing from an overview of the first and second pillar realistic calculations of the saving possible from a proper implementation of them. Principal among the savings will be the costs of housing prisoner/detainees and saving of capital expenditure dedicated to building new prisons. There are also capital maintenance costs required for occupied and unoccupied prisons. Substantial reduction in prison numbers should also result in some reduction of correction centre staffing and bureaucrats in head-office.

The recurrent cost of housing adult prisoners is something in the order of \$80,000+ per prisoner. The cost of housing juveniles can range from \$165,000 to \$240,00+ for high needs juveniles. Wikipedia identifies 73 “prison” establishments in NSW, of which 38 are closed (3 or them are museums) and 10 are juvenile detention centres<sup>41</sup> – although Kariong Youth Corrections Centre is managed and staffed by Corrective Services.

### **Measure and Evaluation of Impact**

The key component of the fourth pillar is an evidence based measurement of performance outcomes, such as the amount of imprisonment money saved,

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<sup>40</sup> See fn. 3 p. 16.

<sup>41</sup> Acmena JJC (Albury); Broken Hill JJC (Broken Hill); Cobham JJC (St Marys); Frank Baxter JJC (Kariong); Juniperina JJC (Lidcombe); Kariong Youth CC (Kariong); Keelong JJC (Unanderra); Orana JJC (Dubbo); Reiby JJC (Airds); Riverina JJC (Wagga Wagga).



reduction in imprisonment numbers, reduction in recidivism and indicators of community well-being and capacity as a consequence of the reinvestment in community based programs.<sup>42</sup> This is a crucial quality control mechanism through the feedback that results from evaluating impact.

An example given of the American experience by Tome Calma illustrated reinvestment in the State of Oregon. In Oregon money was reinvested in well-resourced restorative justice and community service programs for juvenile offenders. The approach resulted in a 72% drop in juvenile incarceration. Strong connections were made with local communities, resulting in increased social cohesion as well as tangible projects like parks and neighbourhood revitalization.<sup>43</sup> This example illustrates the prospects of a community gaining important infrastructure or assets available to all in lieu of detention centres for the wayward child.

### **Potential impacts available from Justice Reinvestment<sup>44</sup>**

The potential impacts upon the NSW fabric of society will very much depend upon the form and focus of any Justice Reinvestment program. One can only glean from the schemes already in operation what can be described as a range of potential outcomes – all of them beneficial:

- Reduction in rates of crime;
- Reduction in recidivist crime;
- Reduction in prisoner/detainee numbers, including Indigenous numbers;
- Improvement in probation and parole services; setting maximum case loads for probation and parole workers; creating a gradation of probation and parole sanctions so that only re-offenders or seriously recalcitrant parolees referred to Parole Board for parole revocation hearing;
- Establishment of an earned remissions credit scheme for education programs completed in prison; prison-based employment and employment skills learning. (Kansas);
- Staged release of long-term prisoners as preparation for parole period. Prisoners with relevant classifications are initially permitted to leave custody unescorted, returning at designated time the same day. This progresses to an overnight stay in suitable accommodation, which in turn progresses to weekend stay; and then weekly, and then three weekly and finally parole when all stays have been successfully completed.
- Provision of greater support for post released former prisoners through probation and parole or other services;
- Strengthening of local communities;
- Greater social inclusion in communities.
- Strengthening or creating community based resources to address criminogenic drivers (new beds in, or newly established substance abuse centres; increase in capacity for out-patients in substance abuse treatment programs; creating of, or new beds in established half-way housing for released prisoners/bailed persons);

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<sup>42</sup> See fn.3 at pp 16-17.

<sup>43</sup> See fn.3 p. 17.

<sup>44</sup> The overwhelming bulk of these examples are sourced from the Social Justice Report set out in fn. 3

- Provision of support programs for low-income families in high stake communities. A Texas example was “The Nurse Family Partnerships Program” which helped first time, low-income mothers during the first two years of their child’s life”;
- Programs targeting adult education; economic development; universal housing; physical, mental and behavioural health; safe and secure neighbourhoods. Providing summer learning programs for children from targeted neighbourhoods; establishment of Summer Youth Program, employing local adolescents to landscape and revitalize the neighbourhoods. (Central Northeast Wichita, Kansas);
- Reduction in family tensions, improvement in family well being; “For every pound invested into community-based diversions a further 14pounds of social value was generated to benefit the women, their children, victims and the community over a ten-year period” (Glasgow and Worchester)<sup>45</sup>;

## **CONCLUSION**

I cannot do better than to conclude with Tom Calma’s final words in his outline of “Justice Reinvestment – a new solution”:

Albert Einstein famously defined insanity as ‘continuing to do the same things and expecting a different result’. This is exactly the sort of madness that we see in the Indigenous interactions with the criminal justice system. We need to try something fundamentally different to solve this problem.

I believe that justice reinvestment might just be the approach we are looking for. It has a strong methodology and evidence base. It has succeeded in some of the toughest, most unlikely places in the United States... I am hopeful that Australia can also take up the challenge.”

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<sup>45</sup> See fn.3 p. 13.