

MINORITY REPORT BY COALITION SENATORS

Introduction

1.1 The promise inherent in a justice reinvestment ("JR") approach to our criminal justice system holds great appeal: that is, by diverting focus and resources away from a reactive approach to the incidence of crime and towards a preventative approach, we drive down rates of offending, rates of imprisonment and recidivism. The value of such an approach in social and economic terms, if successfully implemented, needs no debate.

1.2 At the heart of this argument is the failure of our system of sentencing and penal servitude to properly identify the causes of criminality and address them so as to reduce the rate at which offenders return to prison and perpetuate a criminal lifestyle. This problem is, arguably, as old as Australia's establishment as a penal colony of Britain in the 18th century.

1.3 Coalition senators warmly endorse the principle of justice reinvestment. However, we cannot endorse the approach taken in the majority report – particularly the recommendations – because it overlooks two critical problems in the Commonwealth implementing a new approach on JR:

- a. The dearth of evidence that any JR programs to date are sufficiently successful to allow reduced spending on the court and prison systems.
- b. The criminal justice system (for the most part) and the prison system (in its entirety) are the responsibility of the states and territories, not the Commonwealth.

1.4 Coalition senators are broadly supportive of further investment in exploring the potential of JR, but we see the approach emerging from the majority report as one of the Commonwealth assuming policy and funding leadership over JR across the nation, an approach which is potentially very costly and which intrudes into the fundamental responsibilities of the second-tier of Australian government.

Limitations on application of Justice Reinvestment

1.5 In *The Promise of Justice Reinvestment*, the authors list some of the risks with JR:¹

- Ambiguity
- Lack of a clear theoretical and normative base
- Potential to be used to justify 'disinvestment' strategies

1 D. Brown et al, *The Promise of Justice Reinvestment* AltLJ Vol 37:2, 96, 2012, pp 100–101.

- 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
- 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 funding and responsibility.

1.6 In relation to bipartisanship, the article states:

Justice Reinvestment 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.

1.7 In the absence of clear solutions to the problems Brown et al identify at the state and territory level, a wholesale takeover of national leadership in JR policy development by the Commonwealth would be ill-advised.

Role of the Commonwealth in Justice Reinvestment

1.8 These problems at the state and territory government level demonstrate the complexity in the field and the need to implement policy within context, particularly if the aim in the policy is to have a harmonised and uniform approach across the jurisdictions. It is already open to jurisdictions to pursue harmonisation at the national level through COAG (in particular the Standing Council on Law and Justice). This has often occurred when there is a will and a demonstrated need to have a national approach to a particular program.

1.9 However as the implementation involves the divestment of State monies into particular State areas identified to have high statistics of recidivism, the relevance and power of the Commonwealth (how to tell the States to spend their budgets) is highly problematic. Under section 96 of the Constitution, the Commonwealth can grant funds to States on any terms and conditions. However this is not a coercive power and does also not extend to local governments (see below).

1.10 The Promise of Justice Reinvestment also makes an important point about the issue of cross jurisdictional co-ordination:

A second precondition is that in the Australian context it is necessary to identify both an agency to take a coordination role...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 currently running local social services, together with financial transfers to these agencies and within and between government departments.

1.11 It would be difficult for the Commonwealth to have a role to redress these apparent problems, particularly in the aftermath of the Williams case in the High Court (the Chaplaincy case) where the chaplaincy scheme was not supported by legislative underpinning, and where the court said that the executive power (section 61) was insufficient to validate the scheme. In relation to local governments, without constitutional change, the Commonwealth cannot deal directly with local governments. It has to go through the states.

1.12 The fact is that the cockpit for implementation and reform on JR is the states and territories, not the Commonwealth. The inquiry heard encouraging evidence of initial signs of success from some JR programs being auspiced at this level. The conditions governing the success or failure of such programs may well vary from state to state, and even from region to region – particularly to the extent that they involve indigenous communities. The "fine touch" approach which State governments can engineer in these circumstances may be better suited than a nationwide approach. In any event, COAG provides mechanisms at Ministerial and bureaucratic levels to share best practice.

Diversion of Resources Not yet Warranted on the Evidence

1.13 The concept of diverging resources from the courts and prisons to JR programs relies on some clear evidence that spending on the former can be withdrawn as spending on the latter increases; unfortunately, no such evidence was available to this inquiry.

1.14 Several organisations appearing before the committee gave evidence of JR programs exhibiting signs of "success"; however, in no case did any program proved sufficiently successful in diverging offenders from the criminal justice system that some reduction of resourcing of that system would become possible.

1.15 This problem was highlighted when officers of the Attorney General's Department appeared before the committee in Canberra to discuss the national evaluation of JR programs:

Senator HUMPHRIES: From the evidence you have seen already, does it appear as though there are any outstanding programs that are being run anywhere in the country which, if applied on a more universal basis, could actually start to ratchet down significantly the cost of the criminal justice system—bearing in mind that the ultimate objective of the justice reinvestment movement is to stop building these prisons we are building and close some of the ones we already have?

Mr Walter: I think the answer is no: there are no stellar examples about which you would say, 'Wow, if we rolled this out across the country, this would be fantastic'—out of those evaluations. A number of them that were able to demonstrate outcomes were really around sentencing courts and those kinds of things. And the outcomes they were demonstrating were

more around the integrity and legitimacy of the justice process rather than having a big effect in terms of reducing recidivism or anything like that.²

1.16 To acknowledge the lack of such evidence at this time is not to deny that such programs can or will in the future deliver results sufficient to warrant a diversion of resources away from the criminal justice system. But it is a stark warning that the premature diversion of resources could weaken the protections afforded by our criminal justice system without in any way lessening the pressures on it.

1.17 Coalition senators warmly endorse the programs underway across Australia that seek to identify and deal with causes of criminal offending. We believe a much greater focus must ultimately be put on such endeavours if we are to ensure that the failings of our present system are addressed. But we do not believe it is sound public policy to use the partial indicators of success from such programs thus far as the basis for a major shift in jurisdictional responsibility for such programs or, more fundamentally, for transferring resources away from existing institutions on the basis of those partial indicators of success.

1.18 Coalition senators accordingly recommend a continued Commonwealth role in supporting programs at the state and territory level in pursuit of JR, and the sharing of information with other jurisdictions to that end. But we cannot support the approach of the committee majority that demands Commonwealth leadership in this area or the commencement of major new funding programs. We believe that this approach has the potential to cut across much good work going on in state, territory and local government without necessarily producing any better outcomes.

Senator Gary Humphries

Senator Michaelia Cash

Senator Sue Boyce

Senator Bridget McKenzie

2 Mr Andrew Walter, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 17 May 2013, p 17.