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Editorial communications should be addressed to:

The Editor
Australian Indigenous Law Review
Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia
phone 61 2 9385 1496
fax 61 2 9385 1266
email ailr@unsw.edu.au

phone 61 2 9385 2252
fax 61 2 9385 1266
email ilbsubscriptions@unsw.edu.au
web www.ilc.unsw.edu.au

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Indigenous Law Centre
Faculty of Law
University of New South Wales
Sydney NSW 2052 Australia

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INDIGENOUS LAW BULLETIN

Since 1981 the Indigenous Law Bulletin has led the way with accessible, accurate and timely information about Australia's Indigenous peoples and the law. We write for legal practitioners, advocates, policy makers, researchers and students. We cover legislation and government policy, case law, parliamentary proceedings, international developments, local activism and the work of Indigenous communities and organisations.

We report on crime, family law, native title, custody issues, legal services, international and comparative law, land and water rights, intellectual property and copyright law.

CONTACT DETAILS

*Indigenous Law Bulletin, Faculty of Law, UNSW, Sydney 2052, Australia
phone 61 2 9385 2256 fax 61 2 9385 1266 email editor ilb@unsw.edu.au
email subscriptions ilbsubscriptions@unsw.edu.au
web www.ilb.unsw.edu.au*

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EDITORIAL NOTE

The *Australian Indigenous Law Review* ('AILR') is a DEST-approved publication unique for its currency, expert commentary and international perspectives. It draws together legal developments from all areas affecting Indigenous peoples in Australia and around the world.

The AILR publishes detailed, peer-reviewed commentary from leading Australian and international experts. It also includes recent and relevant case law, publishing the most prominent cases alongside those which would otherwise go unreported.

From 2009 onwards, the AILR is to be published bi-annually rather than quarterly, so as to streamline production processes. This is not to come at the expense of content – the same amount of material will be published per volume, but in two rather than four editions.

Included in the last volume of each edition is a cumulative index.

The AILR is designed to complement the Indigenous Law Centre's long-established publication, the *Indigenous Law Bulletin*.

Previous editions of the AILR are available online at <<http://www.austlii.edu.au/au/journals/AILR/>> and <<http://www.informit.com.au/>>.

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The editors wish to express their gratitude to the following people, who generously and expertly prepared headnotes for this edition: Emily Burke, for *Chippewas of Mnjikaning First Nation v Chiefs of Ontario*; David Buxton-Forman, for *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury*; Lauris de Clifford, for *Attorney-General v Mair and others*; Chantel Cotterell, for *Santo v David*; Jacqueline Fetchet, for *Anderson v Minister for the Environment, Heritage and the Arts*; Jess Harvie, for *C Incorporated v Australian Crime Commission*; Angela MacDonald, for *State of South Australia v Lampard-Trevorror*; Rhiannon Partington, for *Dates v Minister for Environment, Heritage and the Arts (No 2)* and *Worimi (aka Gary Dates) v Worimi Local Aboriginal Land Council*; and Karenna Williams, for *Tsuu T'ina Nation v Alberta (Environment)*. The other headnotes were prepared by Michelle Bradley, Suzannne Mortimer, Keiran Hardy and Daniel Threlfall. Headnote reviews were conducted by Michelle Bradley, Keiran Hardy, Daniel Threlfall and Lucienne Cassidy.

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Artist's Note

In 2006, Helen McCarthy Tyalmuty had her first solo exhibition in Melbourne. Further solo and group exhibitions, in Sydney and Perth, quickly followed. In August 2007, Helen was honoured to receive the People's Choice Award at the 24th Telstra National Aboriginal & Torres Strait Islander Art Awards for her painting Tyemeny Liman's Wutinggi (Grandpa Harry's Canoe). Helen was also a finalist at the 2008 Telstra Awards. Helen now devotes herself to painting full time. She spends her time in her community at Bulgul, on the coast between Daly River and Darwin, and with her family in Darwin.

The artist explains the cover artwork entitled Wangi – the start of the wet:

'This work was painted in Alice Springs and it was one of a series I did exploring a completely new artistic direction for me. Until this series, all my works had explored traditional topics from a bush point of view. In this series, I looked at traditional subjects from both a bush and a city perspective, and as a result, some of the iconography I have used clearly shows urban landscapes. I guess it recognises my heritage which is part Indigenous and part non-Indigenous. The painting itself talks about the start of the wet. Across the lighter part of the painting, we see the wind that has swung around from the desert and now comes from the north bringing the monsoons with it. It is at this time that the bush turns green and the edible plants start to spring up. But not only is the bush green, so is Darwin, my other home.'

Further information about the artist and her work can be found at: <<http://www.aboriginalartworld.com.au/index.asp>> and <<http://www.kateowengallery.com/>>



CONTENTS

Volume 14, Number 1

Commentary

Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment <i>Melanie Schwartz</i>	1
Monetary Compensation and the Stolen Generations: A Critique of the Federal Labor Government's Position <i>Dylan Lino</i>	19
Local Government Rates Exemptions for Indigenous Organisations: The Complexities of a State-By-State System <i>Fiona Martin</i>	35
The NTER Redesign Consultation Process: Not Very Special <i>Alison Vivian</i>	46
'The Holy Grail' or 'The Good, The Bad and The Ugly'? A Qualitative Exploration of the ILUAs Agreement-Making Process and the Relationship Between ILUAs and Native Title <i>Dr Deirdre Howard-Wagner and Amy Maguire</i>	71
The New Representative Body for Aboriginal and Torres Strait Islander People: Just One Step <i>Sam Muir</i>	86

Court and Tribunal Decisions

Australia

<i>State of South Australia v Lampard-Trevorrow</i> , [2010] SASC 56	100
<i>C Incorporated v Australian Crime Commission</i> , [2010] FCAFC 4	104
<i>Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury</i> , [2010] QCA 37	106
<i>Anderson v Minister for the Environment, Heritage and the Arts</i> , [2010] FCA 57	110
<i>Santo v David</i> , [2010] FCA 42	112

<i>Dates v Minister for Environment, Heritage and the Arts (No 2)</i> , [2010] FCA 256	114
<i>Worimi (aka Gary Dates) v Worimi Local Aboriginal Land Council</i> , [2010] FCAFC 3	116
<i>Inquest in to the Death of Mulrunji</i> , (Unreported, Coroner’s Court, Palm Island & Townsville & Brisbane, Deputy Chief Magistrate Hine, 14 May 2010)	118
Canada	
<i>Tsuu T’ina Nation v Alberta (Minister of Environment)</i> , 2010 ABCA 137	120
<i>Lax Kw’alaams Indian Band v. Canada (Attorney General)</i> , 2009 BCCA 593	122
<i>Chippewas of Mnjikaning First Nation v. Chiefs of Ontario</i> , 2010 ONCA 47	124
New Zealand	
<i>Attorney-General v Mair and Others</i> , [2009] NZCA 625	126
African Commission on Human Rights	
<i>Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya</i> , Communication 276 / 2003	128



COMMENTARY



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

Melanie Schwartz*

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.¹ 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.²

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.³

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.'⁴ 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,⁵ where the 700 per cent increase in the prison population between 1970 and 2005⁶ has led to the description, 'mass imprisonment'.⁷ In the US, which incarcerates the highest number of people in the world, the corrections budget is US\$60 billion per year,⁸ and recidivism rates are such that two-thirds of released prisoners find their way back to jail.⁹

Over 12 American states are either investigating or applying the justice reinvestment model.¹⁰ 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';¹¹
- Implement the new policies; and
- Measure the impact of the enacted policies on rates of incarceration, recidivism and criminal behaviour.¹²

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.¹³

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.¹⁴ 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.¹⁵ 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[.]¹⁶

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.¹⁷ 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.¹⁸

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 1995.¹⁹ 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.'²⁰

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,²¹ 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.'²² It recognised that 'only small reductions in re-offending may be necessary for community interventions to "break even" in broad cost-benefit terms.'²³

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.²⁴ 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.²⁵ 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'.²⁶

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.²⁷

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)).²⁸

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)).²⁹

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'.³⁰ 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 Papunya³¹ (of a total population of 379, including 71 people under the age of 14 years).³² At \$164 per day per prisoner,³³ positing an average sentence of nine months of that year, this incarceration rate

represents a corrections cost of at least \$3 468 960 per year³⁴ 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.'³⁵ 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.³⁶ 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.³⁷ 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.³⁸

While Papunya presents a particularly stark example, Indigenous offenders are more likely to come from communities suffering from disadvantage across any indicator.³⁹ 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.⁴⁰

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'⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴

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.⁴⁵ 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.⁴⁶

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));⁴⁷ 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 2008.⁴⁸ National expenditure on prisons and periodic detention centres in Australia totaled \$2.8 billion in 2008-09.⁴⁹ In the same year, keeping someone in jail cost \$210 per day, or \$76 650 per prisoner per year.⁵⁰ 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.⁵¹ 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.⁵² Children of prisoners are more likely than children in the general community to be imprisoned themselves.⁵³ The NSW Standing Committee on Social Issues reported that Indigenous incarceration is often intergenerational.⁵⁴

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.⁵⁵

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.⁵⁶ 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.⁵⁷

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',⁵⁸ 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'.⁵⁹ 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.⁶⁰ 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'.⁶¹

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.⁶²

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'.⁶³

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.⁶⁴ 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.⁶⁵ 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).⁶⁶ 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'⁶⁷ 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.⁶⁸

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.⁶⁹

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.⁷⁰

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',⁷¹ commits to an expansion of diversionary programs and other interventions for Indigenous people (Strategy 2.2.1).⁷² 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'.⁷³ Goal 3.2, to '[r]ecognise and strengthen Indigenous community responses to justice issues to support community ownership of safety and crime prevention',⁷⁴ 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'.⁷⁵ 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'.⁷⁶ 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.⁷⁷ 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).⁷⁸

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.⁷⁹

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*.⁸⁰

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',⁸¹ 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',⁸² 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.⁸³ 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'⁸⁴ initiatives that address mental illness, substance abuse, community leadership development and healthy living are named.⁸⁵ 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.⁸⁶

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 Wales⁸⁷ 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.⁸⁸

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.⁸⁹ 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 2011.⁹⁰ 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).⁹¹ All IJAs acknowledge that a justice-related approach to over-representation is not sufficient by itself to address structural disadvantage in Indigenous communities.⁹²

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.'⁹³

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.⁹⁴ In 11 (39 per cent) of those locations, more than 50 per cent of the population are Indigenous.⁹⁵ 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;⁹⁶
- 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;⁹⁷
- Indigenous people are 4.8 times more likely than non-Indigenous people to live in overcrowded housing;⁹⁸
- approximately 30 per cent of NSW children in out of home care are Indigenous, despite Indigenous children comprising just 4 percent of the child population;⁹⁹ and
- Indigenous people are almost twice as likely as non-Indigenous people to report their health as only fair or poor.¹⁰⁰

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.¹⁰¹

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.'¹⁰² 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.¹⁰³

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 indentified '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.'¹⁰⁴

B Remoteness

There is a clear correlation between remoteness and disadvantage.¹⁰⁵ 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.'¹⁰⁶ 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.¹⁰⁷

A 2006 NSW parliamentary report found that many sentencing options were not available in rural areas.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

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.¹¹¹

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 aunts.'¹¹² 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.¹¹³

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.'¹¹⁴

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.'¹¹⁵ 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.¹¹⁶

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.¹¹⁷ The widely publicised strict restitution and community service requirements for the juvenile offenders also won public support throughout the community.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹ 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.¹²²

More generally, Indigenous women are 35.1 times more likely to be hospitalised after a domestic assault than their non-Indigenous counterparts.¹²³ 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.¹²⁴ 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.'¹²⁵

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".¹²⁶

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;¹²⁷
- 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,¹²⁸ and the increasing number of Indigenous defendants who are refused bail;¹²⁹
- working with existing community resources, such as community justice groups or restorative justice healing circles, to engage communities in creating justice reinvestment strategies¹³⁰ 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; and¹³¹

- 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.¹³² 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,¹³³ the unequal impact of 'equal' laws,¹³⁴ 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.¹³⁵

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.¹³⁶

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 Zealand¹³⁷ and Scotland¹³⁸ 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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- * Melanie Schwartz is a Lecturer in the Faculty of Law, University of New South Wales, and Research Associate to the Australian Prisons Project that is funded by the Australian Research Council. The author would like to acknowledge the helpful comments of the peer reviewers, the research assistance of Alisa Wicks and Emily Burke, and the chief investigators of the Australian Prisons Project.
- 1 Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Report on Government Services* (2010) 8.3.
 - 2 Spatial Information Design Lab, 'Justice Reinvestment New Orleans' (Report, Columbia University Graduate School of Architecture, Planning and Preservation, 2009) 7.
 - 3 David Brown, 'Contemporary Comments: The Limited Benefit of Prison in Controlling Crime' (2010) 22(1) *Current Issues in Criminal Justice* 461.
 - 4 Legal and Constitutional Affairs Committee, Parliament of Australia, *Access to Justice* (2009) Recommendation 21.
 - 5 Susan Tucker and Eric Cadora, 'Ideas for an Open Society: Justice Reinvestment' (2003) 3(3) *Open Society Institute Occasional Papers* 2.
 - 6 JFA Institute, *Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011* (Report, JFA Institute, 2007) ii.
 - 7 See David Garland, *Mass Imprisonment: Social Causes and Consequences* (Sage Publications, 2001).
 - 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.
 - 11 The Council of State Governments, *Justice Reinvestment Overview* <<http://justicereinvestment.org/resources/summit>> at 24 March 2010.

- 12 A four-step process is outlined at The Council of State Governments, *Justice Reinvestment: A project of the Council of State Governments Justice Center* <http://justicereinvestment.org/facts_and_trends> at 24 March 2010. However, a more recent and better refined version can be found at The Council of State Governments, *Justice Reinvestment Overview* <<http://justicereinvestment.org/resources/summit>> at 24 March 2010.
- 13 The Pew Center on the States, *Prison Count 2010: State Population Declines for the First Time in 38 Years* (Report, The Pew Centre on the States, 2010) 2.
- 14 Rhode Island (9.2 percent reduction); Michigan (6.7 percent reduction); and New Hampshire (6 percent reduction). However, it should be noted that New Hampshire only commenced investigation of Justice Reinvestment strategies in 2009.
- 15 A reduction in prison population of 0.6 per cent: The Pew Center on the States, above n 13, 2.
- 16 Ibid 3.
- 17 Tucker and Cadora, above n 5, 5.
- 18 Spatial Information Design Lab, 'Justice Reinvestment Central City: Rebuilding Community in Post-Katrina New Orleans' (Meeting Report, City Council of New Orleans Criminal Justice Committee, 12 July 2007) slides 65-8 <<http://www.scribd.com/doc/28986876/SIDL-No-La-City-Council-Crime>> at 27 March 2010.
- 19 Commission on English Prisons Today, *Do Better Do Less: The Report of the Commission on English Prisons Today* (Report, Commission on English Prisons Today, 2009) 6.
- 20 Ibid 49.
- 21 House of Commons Justice Committee, *Cutting Crime: The Case for Justice Reinvestment*, House of Commons Justice Committee Paper No 1, Session 2009-10 (2010) 5.
- 22 Ministry of Justice, 'Government Response to the Justice Committee's Report: *Cutting Crime: The Case for Justice Reinvestment*' (2010) 4.
- 23 Ibid 37.
- 24 Commission on English Prisons Today, above n 19, 51.
- 25 In the Australian context, see the following section for an outline of this literature.
- 26 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) 10.
- 27 Tucker and Cadora, above n 5, 3.
- 28 As quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, 18.
- 29 Ibid.
- 30 Spatial Information Design Lab, above n 18, slide 38.
- 31 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, 179.
- 32 Australian Bureau of Statistics, *Census Data* (2006) <<http://www.censusdata.abs.gov.au/ABSNavigation/prenav/ViewData?&action=404&documentproductno=ILOCC3300503&documenttype=Details&tabname=Details&areacode=ILOCC3300503&issue=2006&producttype=Community%20Profiles&producttype=Community%20Profiles&javascript=true&textversion=false&navmapdisplayed=true&breadcrumb=PLD&collection=Census&period=2006&producttype=Community%20Profiles&#Indigenous%20Profile>> at 3 April 2010.
- 33 Australian Institute of Criminology, *Australian Crime: facts and figures* (2009) <<http://www.aic.gov.au/en/publications/current%20series/facts/1-20/2009/7%20criminal%20justice%20resources.aspx>> at 3 April 2010.
- 34 The actual cost is likely to be higher due to transport and other costs associated with remoteness.
- 35 Rob Allen, 'From Restorative Prisons to Justice Reinvestment' in Rob Allen and Vivien Stern (eds), *Justice Reinvestment – A New Approach to Crime and Justice* (International Centre for Prison Studies, 2007) 5.
- 36 Failures in local service delivery are, in remote areas, obviously bound up with larger issues of educational and economic development and extent of existing infrastructure.
- 37 Allen, above n 35, 6.
- 38 Tucker and Cadora, above n 5, 2.
- 39 See Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access' (2008) 32(1) *Criminal Law Journal* 38, 38.
- 40 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, 12.
- 41 Spatial Information Design Lab, above n 18, slide 19.
- 42 Spatial Information Design Lab, above n 2, 5.
- 43 Spatial Information Design Lab, above n 18.
- 44 Spatial Information Design Lab, above n 18, slide 37.
- 45 Spatial Information Design Lab, above n 2, 7.
- 46 See Spatial Information Design Lab, above n 18, slide 68.
- 47 See Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, Appendix 2.
- 48 Australian Bureau of Statistics, *Prisoners in Australia* (2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/F11545CBE350E058CA257687001CC54A?opendocument>> at 26 March 2010. It is worth noting that the UK – which is looking seriously towards justice reinvestment – has an imprisonment rate of 153 per 100,000 adults: Commission on English Prisons Today, above n 19, 16.
- 49 Productivity Commission, 'Report on Government Services' (Report, Productivity Commission, January 2010) 8.3.
- 50 Ibid, 8.24.
- 51 See Eileen Baldry et al, 'Ex-Prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration for Ex-Prisoners? Final Report'(Final Report No 46,

- Australian Housing and Urban Research Institute, August 2003).
- 52 A F Lee, 'Children of Inmates: What Happens to These Unintended Victims?' (2005) *Corrections Today* 85.
- 53 NSW Department of Juvenile Justice, 'NSW Young People in Custody Health Survey: Key Findings Report' (Report, NSW Department of Juvenile Justice, 2003).
- 54 Standing Committee on Social Issues, Parliament of New South Wales, *A Report Into Children of Imprisoned Parents* (2003).
- 55 Chris Cunneen and Melanie Schwartz, 'More in jail as Australia tinkers with justice system', ABC News, 17 June 2009 <<http://www.abc.net.au/news/stories/2009/06/17/2600347.htm>> at 26 March 2010.
- 56 For NSW, see the findings of the Parliament of New South Wales, *NSW Women in Prison Task Force* (Report, NSW Women in Prison Task Force, 1985); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Inter Church Steering Committee on Prison Reform, *Prison - not yet the last resort; a review of the NSW penal system* (1994); NSW Legislative Council, Select Committee on the Increase in Prison Population, *Increase in Prison Population Final Report* (2001); NSW Legislative Council Select Committee on Mental Health 'Inquiry into mental health services in New South Wales' (Parliamentary Paper No 368, Parliamentary Library, Parliament of NSW, 2002).
- 57 Justice John Nagle, Commonwealth, Royal Commission into NSW Prisons, *Report* (1978) 25.
- 58 Shuling Chen et al, 'The Transition from Juvenile to Adult Criminal Careers'(2005) 86 *Crime and Justice Bulletin*.
- 59 Eileen Baldry, 'Recidivism and the Role of Social Factors Post-Release' (2007) 81 *Precedent* 5.
- 60 See Jason Payne, 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Report No 80, Australian Institute of Criminology, 2007); R Cannon and K Grogan, 'Incarceration : Unsustainable Costs and Diminishing Benefits' (Report, South Australian Council of Social Service, 2008); G Wardlaw and G O'Malley, 'Developing A National Crime Prevention And Community Safety Policy' (Report, Australian Institute of Criminology) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/~media/publications/proceedings/24/wardlaw-omalley.ashx>> at 4 April 2010.
- 61 Baldry, above n 59, 6; see also Eileen Baldry and Peter Maplestone, 'Prisoners' Post-Release Homelessness and Lack of Social Integration' (2003) 15(2) *Current Issues in Criminology* 155; S Sutherland, 'Throughcare: "Rhetoric or Reality"' (2005) *Social Science and Policy*.
- 62 Wardlaw and O'Malley, above n 60.
- 63 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, 56.
- 64 Australian Bureau of Statistics, above n 48.
- 65 M Willis, 'Reintegration of Indigenous Prisoners: Key Findings' (Report on Trends and Issues in Crime and Criminal Justice No 364, Australian Institute of Criminology, August 2008) 2.
- 66 Ibid 3.
- 67 Harry Blagg, 'Restorative Visions in Aboriginal Australia' (2001) 44(1) *Criminal Justice Matters* 15.
- 68 Donald Weatherburn et al, 'Prison Populations and Correctional Outlays: The Effect of Reducing Re-Imprisonment'(Report on Contemporary Issues in Crime and Justice No 138, NSW Bureau of Crime Statistics and Research, December 2009) 1.
- 69 Standing Committee of Attorneys-General Working Group on Indigenous Justice, 'National Indigenous Law and Justice Framework 2009-2015' (Report, Standing Committee of Attorneys-General, November 2009) 6.
- 70 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)*, 3.
- 71 Standing Committee of Attorneys-General Working Group on Indigenous Justice, above n 69, 10.
- 72 Ibid 17.
- 73 Ibid 21.
- 74 Ibid 22.
- 75 Ibid 29.
- 76 Ibid 29.
- 77 Ibid 30. See Actions 5.1.1a and 5.1.1b.
- 78 Ibid 28.
- 79 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, Recommendation 2.2.
- 80 Ibid Recommendation 2.3, 2.1.
- 81 Australian Government, *Social Inclusion Principles*, Australian Government Social Inclusion <<http://www.socialinclusion.gov.au/SlAgenda/Principles/Pages/default.aspx>> at 4 April 2010.
- 82 Ibid.
- 83 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)*, above n 70, 7.
- 84 Ibid A-38, A-41.
- 85 Ibid.
- 86 Ibid A-31.
- 87 Queensland's current IJA is in place between 2000-2011: the Victorian Agreement is in its second phase and was released in 2005; and the New South Wales and Western Australian IJAs were finalised in 2004.
- 88 While neither South Australia nor the Northern Territory have IJAs in place, both have signed off on agreements committing to reduce Indigenous disadvantage, including in the criminal justice system. See for example in the Northern Territory, *Closing the Gap of Indigenous Disadvantage – A Generational Plan of Action* (2007), which was largely a response to the findings of

- the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke mekarle – ‘Little Children are Sacred’ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); in South Australia, see the South Australian Government, *Strategic Plan – Creating Opportunity* (2007).
- 89 Chris Cunneen and Melanie Schwartz, ‘Indigenous Justice Agreements: The Current Policy Framework’ (2007) 82 *Precedent*, 26.
- 90 Ibid.
- 91 Justice-Related State Government Agencies and the Aboriginal and Torres Strait Islander Commission, *Western Australian Aboriginal Justice Agreement* (2004) Principle 4, 7.
- 92 Chris Cunneen and Fiona Allison, ‘Indigenous Justice Strategies: Analysis and Findings of Current Policy Framework’ (2008) (unpublished copy on file with the author) 27.
- 93 Chris Cunneen, ‘Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement’ (Report to the Justice Agencies CEOs, 2005) iv.
- 94 Data for the NT, ACT and TAS are not provided. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) fn 98.
- 95 Ibid table 2.1.
- 96 Steering Committee for the Review of Government Service Provision, ‘Overcoming Indigenous Disadvantage: Key Indicators’ (Report, Council of Australian Governments, 2009) 4.4– 4.5.
- 97 Ibid 6.32.
- 98 Ibid 9.3.
- 99 The number of children removed from their families by the NSW Department of Community Services increased by 15 per cent between 2008 and 2009. See J Manuell, ‘The Fernando Principles: The Sentencing of Indigenous Offenders in NSW’ (Discussion Paper, NSW Sentencing Council, December 2009) 15.
- 100 Steering Committee for the Review of Government Service Provision, above n 96, 7.7.
- 101 Interview with de-identified interviewee (Australian Prisons Project, 16 February 2010).
- 102 Council of State Government Justice Center, *Work in the States: Kansas* <<http://www.justicereinvestment.org/states/kansas/how-ks/quantify-ks>> at 5 April 2010.
- 103 Ibid.
- 104 Ibid.
- 105 See Aboriginal and Torres Strait Islander Social Justice Commissioner above n 26, Table 2.2, which lists the most advantaged and the most disadvantaged Indigenous communities. The most advantaged areas are overwhelmingly urban, while very remote communities comprise the bulk of the most disadvantaged locations.
- 106 Top End Women’s Legal Service. Submission No 7 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Legal Aid and Access to Justice*, 8 June 2004, 5.120.
- 107 Steering Committee for the Review of Government Service Provision, above n 96, Appendix 3.2.
- 108 Legislative Council Standing Committee, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xii.
- 109 Interview with de-identified interviewee (Australian Prisons Project, 16 February 2010).
- 110 Chris Cunneen, ‘Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement’ (Report, Institute of Criminology, University of Sydney, 2005) xxv.
- 111 Harry Blagg, ‘Restorative Visions in Aboriginal Australia’ (2001) 44(1) *Criminal Justice Matters* 16.
- 112 Tom Calma, ‘From Self-respect Comes Dignity, and from Dignity Comes Hope: Meeting the Challenge of Social Justice for Aboriginal and Torres Strait Islander Peoples’ (2009) *The Mabo Oration* <http://humanrights.gov.au/about/media/speeches/social_justice/2009/20090605_mabo.html> at 25 March 2010.
- 113 John Hagan, ‘The Next Generation: Children of Prisoners’ (1996) 3 *Journal of Oklahoma Criminal Justice Research Consortium*.
- 114 Aboriginal and Torres Strait Islander Social Justice Commissioner above n 26, 42.
- 115 Ibid 2.
- 116 Susan Tucker and Eric Cadora, ‘From Prisons to Parks in Oregon’ (2003) 3(3) *Open Society Institute Occasional Papers*, 6.
- 117 Allen, above n 35, 12.
- 118 Tucker and Cadora, above n 5, 7.
- 119 Allen, above n 35, 12.
- 120 Australian Bureau of Statistics, 4714.0 – *National Aboriginal and Torres Strait Islander Social Survey* (2002) 21.
- 121 G Gardiner and T Takagaki, ‘Indigenous Women and the Police in Victoria: Patterns of Offending and Victimization in the 1990s’ (2002) 13(3) *Current Issues in Criminal Justice* 319.
- 122 Ferrante *et al*, cited in Harry Blagg, ‘Restorative Visions in Aboriginal Australia’ *Criminal Justice Matters* 44(1)1, 16.
- 123 Manuell, above n 99, 19.
- 124 Ibid.
- 125 House of Commons Justice Committee, above n 21, [245].
- 126 Harry Blagg, ‘Crisis Intervention in Aboriginal Family Violence’ (Report, Office of the Status of Women, 2000) as cited in Blagg, above n 111, 16.
- 127 Willis, above n 65, 3.
- 128 Chris Cunneen, ‘Aboriginal Imprisonment During and Since the

- Royal Commission into Aboriginal Deaths in Custody' (1992) 2 (55) *Aboriginal Law Bulletin* 14.
- 129 Jacqueline Fitzgerald, 'Why are Indigenous Imprisonment Rates Rising?' (Issue Paper No 41, Crime and Justice Statistics Bureau Brief, NSW Bureau of Crime Statistics and Research, August 2009) 4.
- 130 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 26, 51.
- 131 Ibid 47.
- 132 For example, the Social Justice Commissioner has flagged its potential application in communities dealing with high levels of family violence: see Mick Gooda, 'Justice Reinvestment: A New Strategy to Address Family Violence' (Paper presented at The National Family Violence Prevention Forum, Mackay QLD, 19 May 2010).
- 133 See Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001).
- 134 See the operation of mandatory detention regimes in WA, and its defunct counterpart in the Northern Territory. See also N Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to 2002' (2002) 26 *Criminal Law Journal* 293; and for aspects of the bail regime in New South Wales, see Melanie Schwartz, 'The NSW Bail Act and Aboriginal Defendants' (2005) 6(9) *Indigenous Law Bulletin*.
- 135 Gooda, above n 132.
- 136 New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2009, 18364 (Minister for Corrective Services).
- 137 Rahui Katene, 'Imprisonment in the 21st Century' (Speech delivered at the Mini Symposium on Imprisonment in the 21st Century, Hunter Council Chamber, The University of Wellington, 17 March 2010).
- 138 See Hillary Ross, 'Justice reinvestment: what it is and why it may be an idea to consider in Scotland' (2008) *CjScotland*.