



Redressing Indigenous **OVER-REPRESENTATION** in the criminal justice system with **JUSTICE REINVESTMENT**

By Melanie Schwartz

'Australia is locking up more people than ever before... Less than 3 per cent of Australians identify as Aboriginal or Torres Strait Islander, but Indigenous Australians make up more than a quarter of the nation's prison population. They are among the most imprisoned people groups in the world. In fact, an Indigenous person is more likely to be returned to prison than they are to stay in high school or university. This is a national disgrace.'

Senator Penny Wright¹

Senator Wright is among the growing number of advocates for justice reinvestment (JR), a new approach to reducing the number of people in prison while building capacity – ranging from infrastructure and program delivery to social capital and resilience – in those places that produce the highest numbers of prisoners. In Australia, consideration of a JR approach necessarily means examination of how it might reduce the contact of Aboriginal and Torres Strait Islander (ATSI) people with the criminal justice system. This article will first consider the nature of Indigenous over-representation, and then discuss the potential of JR to add a new and hopeful chapter to the long history of ATSI mass-imprisonment in Australia.

THE REALITIES OF INDIGENOUS OVER-REPRESENTATION

ATSI over-representation in the criminal justice system is not only an issue of imprisonment. The problem of over-representation begins much earlier, in the areas of police discretion in regard to diversion, cautioning, arresting and charging, through to bail decisions and available sentencing options. At each stage in the criminal justice process, Indigenous people are less likely to benefit from the exercise of discretionary decision-making, and are more likely to incur the more punitive end of the range of available options.

Concerns around Indigenous interaction with the police have littered the text of judicial decisions and commissions of inquiry for many years. Deaths in custody are the most extreme end of such concerns, but there are also widespread everyday effects of a range of low-level actions, including the use of discretion in street policing in ways that are detrimental to Indigenous citizens. In Queensland, for example, Indigenous people were 20 times more likely than non-Indigenous people to be given a direction to 'move-on' (and almost 10 times more likely to appear on a charge of failing to comply with such a direction).²

The over-policing of Indigenous people creates a net-widening effect: it means that low-level offending that would remain undetected in non-Indigenous communities not subject to the same degree of police attention is identified and leads to charges against Indigenous people. Furthermore, the increased amount of interaction with police increases the risk of escalation to the commission of offences like resisting arrest and assaulting police. The NSW case of *Dunn*³ provides the textbook example of a young Aboriginal man approached by police in a remote community, ostensibly on suspicion of having stolen the pushbike he was riding. On being told that the bicycle was being taken into police custody, Dunn swore at police, beginning an altercation which resulted in an infamous trifecta of charges: resisting arrest, assaulting police, intimidating police (as well as using offensive language). By the time the case reached court, the goods in custody charge had disappeared, leaving only the trifecta – a set of offences only committed because of the original misuse of police discretion.

MASS-INCARCERATION

More punitive uses of discretion earlier in the criminal justice process can contribute to more serious outcomes down the line. While Indigenous people comprise only 2 per cent of the Australian population, in March 2013, 28 per cent of adult full-time prisoners in Australia were ATSI. This was an increase of 4 per cent from the same time the year before overall, and an increase of 12 per cent for ATSI female prisoners.⁴ This gives some sense of why the rate of imprisonment of Indigenous people has been termed mass-incarceration. The figures are even more shocking for Indigenous young people, who are 25 times more likely to be in detention than their non-Indigenous counterparts.⁵

It is not only the degree of imprisonment which is notable, but also the fact that Indigenous people are more likely to be in an in-and-out cycle from community to prison to community to prison and so on. The median sentence length for ATSI prisoners is 24 months, while for non-Indigenous prisoners it is 47 months.⁶ In the Northern Territory, where mandatory sentencing is in place, 60 per cent of all Indigenous prisoners are jailed for less than six months, and 38 per cent for less than three months. This is costly in social terms for prisoners and their families, and also in financial terms for the government footing the bill.

There is also a very significant over-representation of Indigenous people on remand. In NSW, where people who are refused bail make up more than a quarter of the total prison population, Indigenous people are held on remand at a rate of 583 per 100,000 population, compared with the overall NSW rate of 49 per 100,000.⁷ One quarter of the increase in Indigenous imprisonment in NSW between 2001 and 2008 is said to be because of greater incidence of bail refusal and longer time spent on remand.⁸ Overly onerous bail conditions and lack of access to adequate housing, particularly in non-urban settings, is a particular problem resulting in bail refusal or revocation.

The effects of these levels of incarceration cannot be overstated. It is estimated that more than one in five Indigenous children will have a parent in jail over their lifetime.⁹ The loss of significant numbers of people from a community creates social and economic stress, decreasing capacity in that place in every respect, and increasing the likelihood of further offending. In some communities, levels of imprisonment are so high that at all times, nearly every family is missing at least one member. This is hugely destabilising not only for families but for communities as a whole. And the picture is getting worse rather than better: if the rates of Indigenous imprisonment continue to grow along current trends, it is estimated that the number of ATSI adults in jail will double within 12 years.¹⁰

WHAT IS JUSTICE REINVESTMENT?

Justice reinvestment (JR) has emerged as a strategy with some prospect of reversing the ever-deepening crisis of Indigenous mass-incarceration. Initiated in the USA in 2004, its central idea is to make savings in the corrections budget, and then reinvest those funds in locations that produce high numbers of offenders. Reinvestment might be in such things

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as redeveloping abandoned housing, providing job training and education, treatment for substance abuse and mental health services. Examples of ways to realise savings in the corrections budget include removing bail and probation/parole revocations for technical breaches, or ensuring that, where appropriate, prisoners are paroled at an early opportunity. JR is not about abolishing imprisonment, but rather works on the assumption that many more people are incarcerated than is necessary for public safety.

The JR approach is often articulated in four steps. They are:

1. Analyse data relating to crime, arrest, conviction, jail, prison, and probation and parole. Identify specific neighbourhoods that are home to large numbers of people under criminal justice supervision. Collect information about the need for relevant services in those locations, such as for addressing unemployment, substance abuse or housing issues, in order to address the underlying causes of criminal offending that are specific to that place.
2. Develop policies that will reduce corrections spending and use those savings to invest in strategies that can improve public safety and build human capital and physical infrastructure in focus communities.
3. Implement the new policies.
4. Measure their impact on rates of incarceration, recidivism and criminal behaviour.

JR is a 'place-based' approach in which resources that would be spent on incarcerating offenders are redirected to the local communities from which offenders come and to which they will return. It has been described as a form of 'preventative financing, through which policymakers shift funds away from dealing with problems "downstream" (policing, prisons) and towards tackling them "upstream" (family breakdown, poverty, mental illness, drug and alcohol dependency)'.¹¹

In the USA, justice reinvestment has met with a warm reception from liberals and conservatives alike. There, the political rhetoric focuses on possibilities for increased public safety through lowered crime and recidivism rates, and the potential – in the pressing fiscal realities of a global economic downturn – to save taxpayer dollars. Since it began in 2004, 27 US states have participated in JR, and approximately 18 have enacted JR legislation to stabilise corrections populations and budgets.¹² In Texas alone, JR is reported to be responsible for \$1.5 billion in construction savings and \$340 million in annual averted operations costs.¹³

CAN JUSTICE REINVESTMENT MAKE INROADS INTO INDIGENOUS MASS-INCARCERATION?

The Senate Legal and Constitutional Affairs Committee handed down a report in June 2013 in which it recommended a trial of JR in Australia, including in at least one remote Indigenous community (recommendation 6).¹⁴ Indigenous organisations across Australia have also identified the potential of JR for ATSI communities experiencing high levels of incarceration.

There are a number of features of JR that make it an attractive strategy in the Australian Indigenous context. These include:

- JR has a core commitment to addressing disadvantage as a way of tackling the underlying causes of offending;
- the localised approach of JR, which includes devolution of authority to community, coheres well with the necessity for Indigenous community buy-in for Indigenous community programs;
- the potential to improve service delivery in remote areas; and
- the capacity to fund victims' services, given the high numbers of Indigenous victims, who would benefit from the healthier communities that JR strategies aim to build.¹⁵

CHALLENGES TO IMPLEMENTING JR IN INDIGENOUS COMMUNITIES

However, despite the strong support for JR in the Indigenous context, there are a number of things to think about before rushing in. For example, it has been noted that JR, at its core, calls for a democratic, consensus-based approach to decision-making about the needs of focus communities. This fits well with the observation of former Social Justice Commissioner Tom Calma that the only way that Indigenous service delivery and policy can succeed is through working in partnership with communities.¹⁶ However, the NSW Ombudsman, talking about programming in ATSI communities, has noted that rhetoric about partnering too often is 'not translated into communities having genuine involvement in decision-making about the solutions to their problems'.¹⁷ JR requires government to commit to genuinely doing things differently and this is no easy ask, particularly considering the history of superficial consultation in place of true community control.

This reservation has particular resonance because of recent criticisms of the way that JR has been implemented in some places in the USA, where a *lack* of involvement of local individuals and organisations has, it is argued, compromised the integrity of the JR process.¹⁸ This outcome seems alarmingly close to the historical experience of government program implementation in Indigenous communities in Australia. Consideration must be given to how we might prevent JR in Australia from becoming a cover for the same failed policies of the past, and how JR can truly fit within the principles of Indigenous self-determination.

There is also a need to tread carefully with place-based models. Certainly there is the potential for JR to make inroads into geographic disadvantage by providing support for remote communities in developing initiatives in their cultural and geographic context. An injection of funds can also enable courts to have a greater variety of ways in which to deal with cases in regional or remote areas where alternatives to gaol have not previously seemed viable.

Yet there is a metropolitan bias to the way that JR has evolved in the USA, and the model may need rethinking

to make it cohere with the Australian geographical context. How will the usual problems in remote service delivery be overcome in the roll out of JR? Furthermore, while the idea of 'high incarceration' communities appears to be self-evident and relatively easily measured, there is considerable movement of Aboriginal people between communities – for example, between communities and town camps in Alice Springs and Cairns. There is some difficulty accommodating this movement or transience in a place-based community-focused approach.

Indeed, even the notion of 'community' is complex in the Indigenous context. Many remote and rural communities are the outcomes of colonial policies of concentration and segregation. This may give rise to significant intra-'community' conflict. The idea of place-based models of JR needs some critical thinking in the Indigenous context.

Finally, a note of caution about the identification of focus communities. In the USA, mapping of high-incarceration communities is advanced. (These are sometimes called 'million dollar blocks', because a million dollars each year is spent on imprisoning the inhabitants of areas sometimes no larger than a suburban block.) The identification of these localities is central to JR because savings are to be targeted at communities that contribute the most to the prison system. However, these 'hot-spot' suburbs are often named without sensitivity or explanation, which might cause residents to suffer shame. For example, the JR initiative in Arizona has produced publications including maps of the state's south that draw attention to a particular zipcode in Phoenix as home to 1 per cent of the state's total population but 6.5 per cent of the prison population, requiring \$70 million per year to incarcerate residents just from that neighbourhood.¹⁹

We need to avoid branding particular postcodes as undesirable or troubled. This concern is especially acute when considering the alleged failure of JR in the USA to meaningfully follow through on the community reinvestment limb of JR. Here, 'high stakes' communities are subject to all the stigma attached to their selection as JR sites, and none of the benefits.

A NEW WAY FOR A DIFFERENT FUTURE

There is every reason to be optimistic about the potential for JR to reduce the number of Indigenous people in the cycle between prison and the community, and to address a range of factors that can affect rates of offending. There is a clear and accepted link between levels of disadvantage in ATSI communities and levels of offending, and we have known for some time that community-owned programs have the best chance of success in addressing entrenched issues. We also know that the role of the prison in controlling or reducing crime is very limited²⁰ and, at the same time, that large-scale imprisonment has incredibly destructive effects. All these factors point towards the need for justice reinvestment.

We are lucky to have ten years of American experience with JR to draw on when critically considering potential potholes in the road to penal reduction. We should be careful to learn the lessons from the USA and to consider the

applicability of their experience to the Australian context. We should also be mindful that JR is not a silver bullet. It won't, for example, directly impact on criminal justice practices like discriminatory policing that contribute significantly to Indigenous over-representation. But what it can do – and what it has done in the USA – is to bring about a shift in the public and political mindset so that a serious reduction in incarceration rates is considered both possible and desirable. And, under the weight of the statistics we have considered here, that can only be a step in the right direction. ■

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- Notes:** **1** Penny Wright, 'Australia's culture of incarceration has gone too far', *The Guardian*, 11 July 2013, <www.guardian.co.uk/commentisfree/2013/jul/11/australia-rising-incarceration>. **2** Crime and Misconduct Commission Qld (December 2010): *Police Move-On Powers: A CMC review of their use – Data Report*, 23, 68. **3** *Police v Shannon Thomas Dunn* (1999) Unreported, Dubbo Local Court, reproduced in (1999) 24(5) *AltLJ* 238. **4** ABS, *Corrective Services Report 4512.0*, March Quarter 2013. **5** Australian Institute of Health and Welfare, *Youth Justice in Australia 2011-12: an overview*, Bulletin 115, April 2013, 10. **6** ABS, *Prisoners in Australia, 2012* (tables 4.6, 4.7). **7** NSW Law Reform Commission, *Bail*, Report 133 (2012) 59. **8** NSW BOCSAR, *Why are Indigenous Imprisonment Rates Rising?* Issue Paper No. 41 (August 2009) 1. **9** M Levy (2008) 'Children of prisoners: an issue for courts to consider in sentencing' Presentation to Federal Criminal Justice Forum, 29 September, Canberra. **10** Senate Legal and Constitutional Affairs References Committee, *Value of the Justice Reinvestment Approach to Criminal Justice in Australia* (June 2013) 4.21. **11** Institute for Public Policy Research (IPPR) *Redesigning Justice: Reducing Crime Through Justice Reinvestment*, June 2011, 4. **12** Austen et al, *Ending Mass Incarceration: Charting a New Justice Reinvestment*, April 17, 2013, 1. **13** Council of State Governments, *Lessons from the States: Reducing Recidivism and Curbing Corrections Costs Through Justice Reinvestment*, April 11, 2013, 1. **14** Senate Legal and Constitutional Affairs References Committee, *Value of the Justice Reinvestment Approach to Criminal Justice in Australia* (June 2013): Recommendation 6. **15** See M Schwartz (2010). 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Representation' 14(1) *Australian Indigenous Law Review* 2, 9-12. **16** Aboriginal & Torres Strait Islander Social Justice Commissioner, (2010) *Social Justice Report 2009*, Australian Human Rights Commission, 2. **17** NSW Ombudsman, *Addressing Aboriginal Disadvantage: the need to do things differently* (Oct 2011) 2.2. **18** J Austin, E Cadora, T Clear, K Dansky, J Greene, V Gupta, M Mauer, N Porter, S Tucker and M Young (2013), *Ending Mass Incarceration: Charting A New Justice Reinvestment*, <<http://sentencingproject.org/doc/Charting%20a%20New%20Justice%20Reinvestment%20FINAL.pdf>>. **19** Council of State Governments Justice Centre, 'Reducing crime and generating savings options for Arizona policy makers' (February 2008) 1. **20** D Brown, 2010, 'The limited benefit of prison in controlling crime', *Current Issues in Criminal Justice*, vol. 22, no. 1, pp137-48.

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