Value of a justice reinvestment approach to criminal justice in Australia
Senate Inquiry

Submission by the Aboriginal Legal Service (NSW/ACT) Limited

General

The object and strategy of Justice Reinvestment

The Aboriginal Legal Service of New South Wales and the Australian Capital Territory (ALS (NSW/ACT)) supports a program of Justice Reinvestment in its objective of developing and resourcing a range of community-based programs, services and initiatives to address the underlying causes of crime: programs that could, in appropriate cases, enable and support the diversion of young adult offenders from a sentence of imprisonment.

The ALS (NSW/ACT) further endorses a principal strategy of Justice Reinvestment: the proposal that each of these programs should be developed in consultation and collaboration with specific communities.

Support programs necessary for the diversion from custody of Aboriginal and Torres Strait Islander people

The ALS (NSW/ACT) has consistently maintained that the diversion of Aboriginal and Torres Strait Islander offenders from incarceration will only be effective if supported by programs and services relevant to their specific needs and culturally appropriate to their community. These initiatives must be developed in response to, in partnership with and trusted by the community in which they would operate.

Submission by the ALS (NSW/ACT)

The ALS (NSW/ACT) has already contributed to the submissions made to this Inquiry by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and the Justice Reinvestment Campaign for Aboriginal young people (Justice Reinvestment Campaign). While it endorses each of these submissions, the ALS (NSW/ACT) offers the following additional comments and recommendations (on pp 5-6).

The purpose of Justice Reinvestment

The idea of Justice Reinvestment proposes that the escalating costs – both social and economic – of imprisoning many offenders can be effectively reduced by reallocating a portion of the expenditure on programs and services to support the diversion of an offender, in appropriate cases, from imprisonment and to address the causes of their offending.

Justice Reinvestment does not propose the abolition of all prisons nor the diversion from imprisonment of all offenders. It acknowledges the necessary role of incarceration for some categories of offenders and as a sentencing response to certain offences. (The ALS (NSW/ACT) is, however, strongly of the view that even in those cases where imprisonment is an appropriate response, there is required an improvement in correctional procedures and provision of services – particularly those relating to assessment and treatment of prisoner health – and acknowledges that this would necessitate additional financial expenditure. The issue of such improvements is, though, not a part of this Inquiry.)

Justice Reinvestment proposes a reconsideration of the prevention of crime – particularly in the context of offending by young people and young adults. It is, in effect, an investment in the future of the community and an investment in the lives of young people who are now or who may be in the future caught – unnecessarily – in the juvenile and criminal justice systems.

A dual commitment

It is to be stressed, though, that this investment requires both a commitment of funds and a commitment of policy and practice to genuinely pursue these goals and the strategy of individual – 'placed-based' – solutions on which the potential success of the program relies.

The purposes of sentencing

An agenda of Justice Reinvestment further invites, if impliedly, a critical reconsideration of the purposes of sentencing and an acknowledgement that these objects are not achieved by current practice.

In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* recognises the goals of sentencing as being punishment, deterrence, protection of the community, rehabilitation of the offender, accountability of the offender,

denunciation of their conduct and recognition of the harm by that conduct.[1] In identifying these goals, the then Attorney-General stressed that:

> A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders to prevent them from offending in the future. The imposition of a just sentence in the individual case requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise.[2]

That complexity cannot be reduced to a straightforward 'Tough on Crime' approach that demands a continued and unquestioned incarceration of offenders as a priority.

<u>The practice of imprisonment</u>

While a 'Tough on Crime' approach incorrectly focuses on punishment out of its legislative context, it is also mistaken in its assumptions of achieving deterrence or satisfying community notions of punishment.

Increasing rates for commission of offences and recidivism demonstrate that a response of imprisonment is ineffective both as a general deterrent against the commission of many offences as well as a specific deterrent to many offenders who reoffend. (Submissions by the Justice Reinvestment Campaign and the NATSILS include statistical information that the rate of imprisonment over the decade 2000 to 2010 has risen by more than 51%, while more than 55% of prisoners have prior convictions for similar offences.)

Given that a large number of prisoners have been sentenced for relatively minor offences – such as driving and traffic offences – or perhaps a breach of orders, it should also be questioned how effective imprisonment is in addressing demands for punishment of crime and protection of the community.

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[1] *Crimes (Sentencing Procedure) Act 1999* (NSW) s3A a) – g). The provision was inserted into the Act by *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002,* Schedule I.

[2] Second Reading Speech to *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*: *NSW Hansard*, Legislative Assembly, 23 October 2002, p 5813 . In his Speech, the then Attorney-General also referred to the decision of the High Court on this issue of the complexity of sentencing in *Veen v The Queen (No. 2)* (1988) 164 CLR 465.

The 'Tough on Crime' approach equates 'offending' with 'criminal' behaviour and assumes that rehabilitation is either unachievable or unnecessary as a function of the criminal justice system. (The irony is that after two periods of incarceration, the probability of an offender's sustained recidivism will be significantly increased while the likelihood of their rehabilitation drastically reduced.)

Yet examination of a typical offender – particularly a person not yet established in patterns of offending behaviour – suggests that rehabilitation may well be successful through diversion from imprisonment supported by an appropriate program of services.[3]

Many people who experience imprisonment are affected by not merely one, but a multiplicity of factors of disadvantage, such as social and family dysfunction, reduced opportunities of education and employment and physical and mental health disorders.[4] Such circumstances, relating to both the offender and the commission of the offence, need to be considered when formulating an appropriate sentencing response – that 'extremely complex and sophisticated judicial exercise.' However, the formulation of an appropriate response will often be dependent on relevant and appropriate services, but which are often unavailable – particularly for Aboriginal and Torres Strait Islander people.

Incarceration of Aboriginal and Torres Strait Islander people

Each of these factors of disadvantage is exacerbated in the case of Aboriginal and Torres Strait Islander people. The figures for the gross overrepresentation of Aboriginal and Torres Strait Islander people in rates for arrest and imprisonment (and underrepresentation in figures for diversion) are well known and have been cited in the submissions by both the Justice Reinvestment Campaign and the NATSILS.

Aboriginal and Torres Strait Islander people are 14 times more likely to be imprisoned than a non-Indigenous person; and Aboriginal and Torres Strait Islander young people are 24 times more likely to be placed in detention than a non-Indigenous young person. (Moreover, when an Aboriginal or Torres Strait Islander person is placed in custody, the place of imprisonment or

[3] As stressed above, Justice Reinvestment does not advocate diversion from imprisonment for all offences or offenders and acknowledges that in certain cases incarceration may be an appropriate response. However, even in these cases, that does not mean that rehabilitation should not be attempted and supported as part of a relevant sentencing regime.
[4] Again, this information is set out in detail in submissions by the Justice Reinvestment Campaign and the NATSILS.

detention may well be at a significant distance from their family and community, making the maintenance of connection with either more difficult and aggravating existing family, social and community dislocation.)

But the impact of incarceration on an Aboriginal or Torres Strait Islander person and their family is likely to be one that is qualitatively different, with a deeper and more lasting effect.

Aboriginal and Torres Strait Islander young people:
Intergenerational offending

What is frequently emerging in many Aboriginal and Torres Strait Islander families and communities is a pattern of intergenerational offending, a pattern that is strengthening while its underlying causes – as stated above, of often relatively minor offences – remain unaddressed.

Aboriginal and Torres Strait Islander young people:
The drift from Juvenile Justice and the criminalisation of care

A further disturbing feature in this pattern – and one that makes the argument of Justice Reinvestment even more urgent – is not only the 'drift' of young people from the juvenile justice system to the adult criminal justice system, but the acknowledged link between young people caught up in the child protection system and their increasing emergence into both other systems – 'cross-over' kids.

Aboriginal and Torres Strait Islander young people – and young adults as carers – are, again, grossly overrepresented in the child protection system.

The experience of the ALS (NSW/ACT) is now one that as a file is opened for an Aboriginal child alleged to be in need of care, there is a strong likelihood that a few years later that child may again be our client as a juvenile offender and, later, as an adult. By that point, it will be very likely that they will be our client on further occasions in our criminal law service and, possibly, our children's (care and protection) service – as will their children.

Recommendations

Given the above discussion, the ALS (NSW/ACT) recommends:

1. That any implementation of a program of Justice Reinvestment be committed to identify and develop services for Aboriginal and Torres Strait Islander men and women that are relevant to their specific needs

and culturally appropriate to their specific community (and a realisation that 'one size' of program will not 'fit' all situations, offenders or their communities).

2. That in the development of such services, there be a sustained commitment and practice to consult and collaborate with Aboriginal and Torres Strait Islander communities.

3. That in this process, the relevant Aboriginal and Torres Strait Islander Legal Service (ATSILS) be kept informed of its progress and be invited to participate.

4. That in exploring the needs of young Aboriginal and Torres Strait Islander people, especial consideration be given to the needs of young Aboriginal and Torres Strait Islander men and women caught up in the child protection system – whether as young people in need of care or as young adult carers.