Law Council
OF AUSTRALIA

Value of a justice reinvestment approach to criminal justice in Australia

Senate Legal and Constitutional Affairs References Committee

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Table of Contents

Acknowledgement **2**
Introduction **3**
What is justice reinvestment? **5**
Implementation and effectiveness of justice reinvestment in other countries **6**
United States 6
Justice reinvestment in Michigan 7
Justice Reinvestment in Texas 8
United Kingdom (UK) 9
Economic and social costs of imprisonment in Australia **11**
Cost, availability and effectiveness of alternatives to imprisonment 11
Economic and social costs 11
Alternatives to imprisonment in Australia 13
Over-representation of disadvantaged groups within Australian prisons 14
Indigenous Australians 14
Individuals with cognitive disability and other mental illnesses 16
Implementing a justice reinvestment approach in Australia **17**
Conclusion **17**
Attachment A: Profile of the Law Council of Australia **19**

Acknowledgement

The Law Council acknowledges the assistance of the Law Society of Western Australia (LSWA), the Law Society of New South Wales (LSNSW), the Queensland Law Society (QLS), the Law Society Northern Territory and the NSW Bar Association (NSW Bar)in the preparation of this submission.

The Law Council notes that throughout this submission, reference is made to Aboriginal and Torres Strait Islander people and Indigenous Australians. The Law Council understands that Aboriginal peoples and Torres Strait Islanders constitute many nations, language groups and cultures, each with separate and distinct identities. The Law Council recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples.

Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Legal and Constitutional Affairs References Committee (the Committee) as part of its inquiry into the value of a justice reinvestment approach to criminal justice in Australia (the inquiry).

2. Justice reinvestment has been mentioned in a number of reports in recent years as a potential model that Australia could adopt as an alternative means of delivering justice. Indeed, in its report on its inquiry into Access to Justice in 2009, this Committee approved justice reinvestment as a "concept to divert funds from incarceration to community-based programs and services that address the underlying causes of crime",[1] and 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."[2]

3. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs expressed a similar view in its report on its inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system in 2011, where it noted its support for the principles of justice reinvestment and recommended that "governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate the justice reinvestment approach in Australia." [3]

4. In addition to this, justice reinvestment was also discussed by the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma AO, in his 2009 Social Justice Report. In that report, Mr Calma observed that justice reinvestment could become a "very powerful tool for ensuring that Indigenous Australians are socially included",[4] and suggested that justice reinvestment may provide a framework to address the over-representation of Indigenous juveniles and adults in the criminal justice system.[5]

5. The Law Council recognises that Indigenous Australians are significantly and unacceptably over-represented in Australian prisons and the criminal justice system, and is committed to working in partnership with Indigenous Australians to:

    - promote, as a matter of the highest priority, methods for reducing this over-representation;[6] and

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[1] Senate Legal and Constitutional Affairs References Committee, *Report of Inquiry into Access to Justice*, 8 December 2009, p. xviii. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/access_to_justice/report/index.htm

[2] Ibid., Recommendation 21, p.xxiii.

[3] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*,' 20 June 2011, Recommendation 40. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm

[4] T. Calma, Australian Human Rights Commission, (2009). *2009 Social Justice Report – Aboriginal and Torres Strait Islander Social Justice Commissioner*, p.5. Available from http://humanrights.gov.au/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf (2009 Social Justice Report)

[5] Ibid., p.41.

[6] See Law Council of Australia, *Policy Statement – Indigenous Australians and the Legal Profession*, February 2010, p.2, available from

- promote the development of alternative justice models involving greater participation of the Indigenous community, such as restorative justice models, Indigenous courts and community justice groups.[7]

6. The Law Council has expressed concern about the over-representation of Indigenous Australians in the criminal justice system on a number of occasions in the past, including in the following submissions:

   - Submission to the Standing Committee on Aboriginal and Torres Strait Islander Affairs in response to its Inquiry into high levels of involvement of Indigenous juveniles and young adults in the criminal justice system in January 2010;[8]
   - Submission to the Attorney-General's Department on Australia's National Human Rights Action Plan 2012 in February 2012;[9] and
   - Submission to the Attorney-General's Department in response to its consultation on the Fifth Periodic Report by Australia on the Convention against Torture, and Other Cruel Inhuman or Degrading Treatment and Punishment in November 2012.[10]

7. In addition to this, a number of the Law Council's Constituent Bodies - namely, the Queensland Law Society (QLS), the Law Society of Western Australia (LSWA), and the NSW Bar Association (NSW Bar) and the Law Society Northern Territory- have expressed support for justice reinvestment as an approach that should be considered to potentially address the over-representation of Indigenous Australians in the criminal justice system.

8. The Law Council notes that the Committee is interested in a broad range of issues as part of this inquiry. Given the broad nature of the inquiry, the Law Council's submission does not address all of the Committee's Terms of Reference. Rather, it focuses on the following:

   - The objectives of justice reinvestment;
   - The implementation and effectiveness of justice reinvestment in other countries including the United States and United Kingdom;
   - The economic and social costs of imprisonment in Australia, including the cost, availability and effectiveness of alternatives to imprisonment, and the over-representation of disadvantaged groups within Australian prisons; and
   - The benefits of and challenges to, a justice reinvestment approach in Australia.

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http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=B621BAA0-1E4F-17FA-D251-0175930EAF8D&siteName=lca

[7] Ibid., p.2.

[8] Law Council of Australia, Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into high levels of involvement of Indigenous juveniles and young adults in the criminal justice system*, 27 January 2010. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8667662C-1E4F-17FA-D20F-0ED118993E97&siteName=lca

[9] Law Council of Australia, Submission to Attorney-General's Department, *Australia's National Human Rights Action Plan 2012*, 29 February 2012, pp.38-39. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=BDB13CF4-F2A8-71BA-85F6-D1620B4F542C&siteName=lca

[10] Law Council of Australia, Submission to Attorney-General's Department in response to consultation on the *Fifth Periodic Report by Australia on the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment and Punishment*, 19 November 2012, p.34. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2A5188B3-1999-B243-6EA1-DF73BB56494C&siteName=lca

What is justice reinvestment?

9. Justice reinvestment is a relatively new concept which was first outlined in a policy paper published by the Open Society Institute in the United States in 2003.[11] That paper questioned whether the significant expenditure by states on imprisonment was the most effective use of such large sums of money - particularly when it appeared that the majority of offenders came from only a small number of communities which were often plagued by deeper social problems such as substance abuse, high levels of unemployment and poverty.

10. A large number of offenders in the communities mentioned in the Open Society Institute paper were caught in a cycle of imprisonment. That is, once they had completed their term of imprisonment, they would be released back into the problematic communities where they would get caught in a pattern of offending behaviour and eventually end up in prison again. Accordingly, one of the critical aspects of justice reinvestment involves devising strategies and implementing programs and services to end this pattern of cyclical imprisonment.[12]

11. There does not yet appear to be a single accepted definition of justice reinvestment.[13] Indeed, the ambiguity that surrounds this concept has been noted by some commentators who have observed that justice reinvestment can "mean many things to many people,"[14] and that it is "an idea in progress rather than a full-fledged strategy".[15] Notwithstanding this, justice reinvestment has been the subject of a significant number of articles and reports which enable the central aspects of the concept to be articulated, despite the fact that questions still remain in relation to the finer details of how it actually operates in practice.

12. Justice reinvestment essentially refers to the diversion of funds that would ordinarily be spent on keeping individuals in prison, and instead, investing this money in the development of programs and services that aim to address the underlying causes of crime in communities that have high levels of incarceration.[16] It has been described as a "data-driven"[17] and comprehensive approach which "makes us think more broadly and holistically about what really leads to crime and how we can prevent it."[18]

13. As noted by one of the Law Council's Constituent Bodies, the Law Society of Western Australia (LSWA), the justice reinvestment methodology can be broken down into a series of steps. The first step involves collecting crime data from relevant state and/or local agencies and analysing this data to identify the communities that have the

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[11] S. Tucker and E. Cadora, (2003). 'Ideas for an Open Society: Justice Reinvestment,' *Open Society Institute*, 3(3). Available from http://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf
[12] Ibid., p.3.
[13] T. Clear, (2011). 'A private-sector, incentives-based model for justice reinvestment,' *Criminology & Public Policy*, 10(3), p.586. DOI: 10.1111/j.1745-9133.2011.00729.x.
[14] R. Allen, (2011). 'Justice reinvestment and the use of imprisonment – Policy reflections from England and Wales,' *Criminology & Public Policy*, 10(3), p.617. DOI: 10.1111/j.1745-9133.2011.00745.x.
[15] Op.cit., T. Clear, 'A private-sector, incentives-based model for justice reinvestment,' p.587.
[16] Ibid., p.585.
[17] A. Dwyer, S. Neusteter & P. Lachman, (2012), *Data-Driven Decisionmaking for Strategic Justice Reinvestment*, Urban Institute Justice Policy Centre, Brief 2. Available from http://www.urban.org/UploadedPDF/412543-Data-Driven-Decisionmaking-for-Strategic-Justice-Reinvestment.pdf
[18] Op.cit., T. Calma, 2009 Social Justice Report, p.12.

highest imprisonment rates and spend the most amount of money on imprisonment. This involves the use of justice mapping.[19]

14. Once this data has been obtained, the data is examined to determine the reasons why the 'targeted' communities have such high rates of imprisonment. A set of options are then developed to assist these communities to reduce the amount of money they spend on incarceration.

15. The third step in the process involves calculating the savings that are likely to be made as a result of implementing the options identified above, and reinvesting this money in programs and services that address the underlying causes of crime in the 'targeted' communities.

16. The final step in the justice reinvestment process involves evaluating the effectiveness of the programs and services in reducing recidivism and imprisonment. The overall impact on the 'targeted' communities is also evaluated.

17. Justice reinvestment relies heavily on interactions between agencies at both the state and local level. It also has a significant community-focus, seeking "community- level solutions to community-level problems".[20] It is these aspects of justice reinvestment, along with its evidence-based approach and focus on addressing and preventing the underlying causes of crime such as unemployment and drug and alcohol abuse, that have given rise to the growing support for justice reinvestment in recent years throughout the world.

Implementation and effectiveness of justice reinvestment in other countries

18. A number of countries have implemented, or are considering implementing, justice reinvestment approaches to criminal justice. Whilst much of the empirical evidence in support of justice reinvestment has come from studies carried out in the United States (US), some studies in relation to this approach have also been carried out in recent years in the United Kingdom (UK).

United States

19. For several years now, the US has had the highest per capita incarceration rate in the world and the world's largest prisoner population.[21] There were a total of 2,334,381 inmates in federal, state and local prisons in the US at the end of 2011.[22] This equates to an incarceration rate of approximately 716 inmates per 100,000 population.[23]

20. Since 1980, the number of prisoners in US federal prisons has increased from 25,000 inmates to almost 219,000 in 2012. This is an increase of approximately 6,100

[19] See D. Brown, M. Schwartz & L. Boseley, (2012), 'The Promise of Justice Reinvestment,' *Alternative Law Journal*, 37(2), p.97.
[20] Op.cit., S. Tucker and E. Cadora, 'Ideas for an Open Society: Justice Reinvestment,' p.2.
[21] Human Rights Watch, *World Report 2013*, p.642. Available from http://www.hrw.org/sites/default/files/reports/wr2013.pdf
[22] See http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190
[23] Ibid.

prisoners every year.[24] The increase in federal prison numbers has been attributed to a number of criminal justice policy decisions, including increases in the number of federal offences subject to mandatory minimum sentences; changes to the federal criminal code that have increased the number of federal criminal offences; and the abolition of parole for federal offenders. [25]

21. Interestingly, whilst the number of individuals incarcerated in federal prisons has continued to increase, the numbers of inmates in US state prisons has actually decreased over the last couple of years. In fact, according to the US Bureau of Justice Statistics, the number of prisoners under the control of state corrections authorities decreased from 1,407, 369 to 1,404, 032 between 2009 – 2010, and from 1,404, 032 to 1,382,418 between 2010 -2011.[26]

22. Justice reinvestment approaches have been adopted by several American states in an effort to reduce the amount of money being spent on corrections and better address the underlying causes of crime in troubled communities. In fact, sixteen American states have now registered with the Council of State Governments' Justice Centre (CSGJC) to investigate or apply the justice reinvestment model,[27] with a number of other states also pursuing justice reinvestment through other methods.[28] Michigan and Texas are commonly cited as examples of the positive impact that justice reinvestment can have on reducing crime and associated expenditure in different communities.

Justice reinvestment in Michigan

23. Between 1998 and 2008, the state of Michigan increased its expenditure on corrections from $1.26 billion to $1.99 billion.[29] In March 2007, there were 51,554 prisoners in Michigan.[30] This was the highest prisoner population that Michigan had ever experienced. Faced with such increases, and under increasing pressure to rein in expenditure in light of a difficult economic climate, Michigan policy makers began to investigate a justice reinvestment approach to criminal justice.

24. To begin the justice reinvestment process, the Michigan Governor contacted the CSGJC to request its assistance in conducting detailed data analyses of the prison population. The CSGJC was also asked to generate a series of options that could be implemented to reduce recidivism within Michigan communities, and reduce spending on corrections in that state.[31] A bipartisan and inter-agency Justice Reinvestment Working Group was established to guide the CSGJC's work in this regard.

25. A series of policy measures were suggested in an effort to: deter criminal activity in Michigan's troubled communities; lower recidivism rates; and reduce the amount of money being spent on corrections. These included initiatives such as providing employment opportunities to juveniles who did not attend school or work and were at risk of engaging in criminal behaviour; responding to probation violations quickly and

[24] N. James, *The Federal Prison Population Buildup: Overview, Policy changes, Issues and Options*, Congressional Research Service, 22 January 2013, p.1. Available from http://www.fas.org/sgp/crs/misc/R42937.pdf
[25] Ibid.
[26] E. Carson & W. Sabol, US Bureau of Justice Statistics, *Prisoners in 2011*, 17 December 2012, p.21.Available from http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf
[27]Op. cit., D. Brown, M. Schwartz & L. Boseley, ' The Promise of Justice Reinvestment,' p. 98.
[28] Ibid.
[29] See http://justicereinvestment.org/states/michigan
[30] See Pew Center on the States, *Prison Count 2010*, Issues Brief, April 2010. A vailable from http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Pew_Prison_Count_2010.pdf
[31] See http://justicereinvestment.org/states/michigan/how-mi/

with certain and proportional sanctions; expanding employment services for high-risk probationers and parolees; and ensuring that everyone released from prison received a period of supervision in the community.[32]

26. By 2010, Michigan had reduced its prisoner population by more than 6,000 inmates to 45,478.[33] This significant reduction in prisoner numbers was attributed to a variety of measures, such as "decreasing parole revocation rates, and enhanced re-entry planning and supervision through the Michigan Prisoner Re-entry Initiative".[34] The reduced prisoner numbers meant that Michigan was able to close 21 prisons and reinvest the money saved by such closures in the development of community services and programs.[35]

Justice Reinvestment in Texas

27. Another US state that has experienced positive results following the introduction of a justice reinvestment approach is Texas. Between 1985 and 2005, the number of prisoners in Texas increased by 300 percent. In an effort to accommodate such a significant increase, Texan authorities spent $2.3 billion to create an additional 108,000 prison beds.[36] By 2007, Texas' prison population had exceeded the number of prison beds by 3,000 inmates. This number was expected to increase to 14,000 by 2012 if Texan authorities did not do something to address their imprisonment rates.[37]

28. In 2006, Texan authorities sought assistance from the CSGJC to analyse the Texan prison population and the amount of money being spent on the communities to which inmates were returning. It was found that five counties actually accounted for more than half of the people who were being sentenced to prison, and that the costs of imprisoning these people totalled approximately half a billion dollars.[38]

29. The CSGJC identified a number of options to generate savings and increase public safety in Texas. These new policies and initiatives included: expanding treatment and diversion programs; reducing probation terms for drug and property offenders from a maximum of 10 years to a maximum of five years so as to minimise the potential for incarceration for breaches; establishing incentives for counties that created progressive sanctioning models for probation officers to respond effectively to violations of supervision; and expanding drug courts and other specialty courts to place offenders who committed minor crimes in treatment programs that would reduce their likelihood of re-offending.[39]

30. As a result of the implementation of the new policy initiatives, Texan authorities were able to reinvest $241 million to expand the capacity of prison and community-based treatment and diversion programs.[40] Additional savings were also reinvested in

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[32] See http://justicereinvestment.org/states/michigan/how-mi/provide-mi
[33] Op.cit., Pew Center on the States, *Prison Count 2010*, p.3.
[34] Ibid.
[35] Op.cit., T. Clear, 'A private-sector, incentives-based model for justice reinvestment,' p.587. See also S. Hudson, (2013), *Panacea to Prison? Justice Reinvestment in Indigenous Communities,* Centre for Independent Studies, Policy Monograph, p.14. Available from http://www.cis.org.au/publications/policy-monographs/article/4684-panacea-to-prison-justice-reinvestment-in-indigenous-communities
[36] See http://justicereinvestment.org/states/texas
[37] Ibid.
[38] See http://justicereinvestment.org/states/texas/how-tx/provide-tx
[39] Ibid.
[40] See http://justicereinvestment.org/states/texas/how-tx/quantify-tx

programs and initiatives to improve outcomes for disadvantaged children and families.[41]

31. Whilst the reductions in Michigan's and Texas' prisoner population have been described by some commentators as evidence in support of justice reinvestment, other commentators have adopted a more cautious approach, noting that "true correctional savings have been difficult to document and even more problematic to capture,"[42] and that the "impact on offending or recidivism from the reinvestment of these savings into community-based crime prevention strategies will take a lot longer to emerge."[43]

United Kingdom (UK)

32. There are a number of differences between the criminal justice systems in the US and UK. Central to these is the size of the prison populations in each of these countries. The prisoner population in the UK is significantly smaller than the incarcerated population in the US, with England and Wales having a prison population of 85,697 as at 22 June 2012. This equates to155 prisoners per 100,000 population[44] compared to 716 per 100,000 population in the US.

33. The prison systems in the US and UK also differ in the way that they are governed. For example, Her Majesty's Prison Service is responsible for the operation of public prisons in England and Wales, as opposed to the local, state and federal authorities who are responsible for prisons in the US.[45] Notwithstanding these differences, several justice reinvestment studies have been carried out in the UK.

34. In 2010, the House of Commons Justice Committee released a report titled 'Cutting Crime: The case for justice reinvestment.' The purpose of this report was to evaluate the UK's existing policies and expenditure on the criminal justice system, and to examine whether the significant amounts of money being spent by the British Government on imprisonment could be used more effectively.[46] The report focussed on the value of a justice reinvestment approach to the criminal justice system in England and Wales and how agencies and programs in the UK could be organised if it was decided that justice reinvestment was a good approach to adopt.[47]

35. The Justice Committee made a number of recommendations as result of their inquiry, including that the Government put in place appropriate community-based services to prevent potential offenders from entering the criminal justice system.[48] It also recommended that the Government commit to a significant reduction in the prison population by 2015, with a particular focus on women and those whose criminality is driven by mental illness and/or addictions to drugs or alcohol.[49]

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[41] Ibid.
[42] Op.cit., S. Hudson, *Panacea to Prison? Justice Reinvestment in Indigenous Communities,* p.14.
[43] Ibid., p.14.
[44] Prison Reform Trust, *Bromley Briefings Prison Factfile ,* June 2012, p.4. Available from http://www.prisonreformtrust.org.uk/Portals/0/Documents/FactfileJune2012.pdf
[45] House of Commons Justice Committee, (2010), *Cutting crime: the case for justice reinvestment*, p.27. Available from http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/94/94i.pdf
[46] Ibid., p.23.
[47] Ibid., p.27.
[48] Ibid., p.8.
[49] Ibid.

36. In 2011, the Institute for Public Policy Research (IPPR) released a report on its findings following a pilot program of justice reinvestment strategies in Lewisham.[50] The IPPR's study found that 518 adult offenders were released in Lewisham between 2009 and 2010. Each of these offenders had been imprisoned for less than 1 year, at a total cost to the UK Government of £2.8 million. The majority of these offenders had not committed violent or sexual offences. Accordingly, it was suggested that considerable savings could have been made if these offenders had been diverted from the criminal justice system, rather than being sentenced to prison.

37. The IPPR study also examined rehabilitation services in Lewisham and whether they would have the capacity to absorb an increase in offenders. The study found that many of these rehabilitation service providers considered that they could manage a temporary increase in their caseloads, but that funding cuts to a number of agencies could have implications for their ability to handle such increases on an ongoing basis. The study found that it was considerably cheaper for these local rehabilitation service providers to deal with offenders, compared to the costs incurred as a result of sending them to prison.[51]

38. As a result of the study's findings, the IPPR's report made a number of recommendations, including that: options should be included in the criminal justice system to divert low-risk offenders into more effective rehabilitative programmes; short-term prison sentences of less than six months should be replaced with community-based penalties; local authorities should be made responsible for reducing reoffending in their local areas; and the probation service should be decentralised and fully integrated into local crime-reduction work by placing it under the control of local authorities.[52]

39. The British Government is currently in the process of looking at ways that it could comprehensively reform its criminal justice system. Indeed, as recently as October 2012, British Prime Minister, David Cameron stated that the British government must think hard about dealing with the causes of crime and focus on the implementation of initiatives that focus on preventing crime in the first place.[53] Whilst a justice reinvestment approach to criminal justice does not appear to have been explicitly endorsed by Mr Cameron to date, it may be that aspects of this approach will be adopted by the British Government at some point in the future.

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[50] T. Lanning, I. Loader & R. Muir, (2011), *Redesigning Justice: Reducing Crime through Justice Reinvestment*, Institute for Public Policy Research. Available from http://www.ippr.org/images/media/files/publication/2011/12/redesigning-justice-reinvestment_2ed_Dec2011_7786.pdf

[51] Ibid., p.19.

[52] Ibid., p.3.

[53] David Cameron, *Transcript of the Prime Minister's speech to the Centre for Social Justice*, 22 October 2012, available from http://www.number10.gov.uk/news/crime-and-justice-speech/

Economic and social costs of imprisonment in Australia

Cost, availability and effectiveness of alternatives to imprisonment

40. The costs of imprisonment are diverse. Whilst there are significant economic costs, there are also significant and long-lasting social costs associated with the incarceration of offenders.

Economic and social costs

41. Whilst Australia does not spend as much as other countries on prisons and incarcerating offenders, it still spent over $2.4 billion[54] nationally on prisons and periodic detention centres in 2011-2012,[55] and an additional $500 million on community corrections.[56] It currently costs more than $300 per day to keep a person in prison in Australia.[57]

42. According to the Australian Bureau of Statistics (ABS), Australia's total prisoner population increased by 1 percent between 2011 and 2012, growing from 29,106 on 30 June 2011 to 29,383 on 30 June 2012.[58] The national imprisonment rate for all prisoners also increased between 2011 and 2012, rising from167 prisoners per 100,000 adult population in 2011 to 168 prisoners per 100,000 adult population in 2012.[59]

43. Approximately one quarter of the total prison population in Australia in 2012 identified themselves as being Indigenous (7,979). In fact, Aboriginal and Torres Strait Islander prisoner numbers increased by 4% between 2011 and 2012.[60]

44. Imprisonment rates in all states and territories, except New South Wales and Queensland, have also significantly increased over the last 10 years.[61] The largest increases in imprisonment occurred in the Northern Territory and Western Australia, with the Northern Territory having 826 prisoners per 100,000 adult population in 2012 (compared to 480 prisoners per 100,000 adult population in 2002), and Western Australia having 267 prisoners per 100,000 adults (compared to 195 per 100,000 adult

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[54] Net of operating revenues and excluding payroll tax and expenditure on transport/escort services.
[55] Productivity Commission, *Report on Government Services 2013*, p.8.5. Available from http://www.pc.gov.au/__data/assets/pdf_file/0008/121769/11-government-services-2013-chapter8.pdf
[56] Ibid.
[57] Deloitte Access Economics, ANCD Research Paper, *An Economic Analysis for Aboriginal and Torres Strait Islander Offenders*: *Prison v Residential Treatment*, August 2012, p.viii. Available from https://www.deloitteaccesseconomics.com.au/uploads/File/NIDAC_Deloitte%20Access%20Economics%20Report%281%29.pdf
[58] See Australian Bureau of Statistics, *Prisoners in Australia 2012*, available from http://www.abs.gov.au/ausstats/abs@.nsf/Products/E40B7439DF76487BCA257ACB00130EDC?opendocument
[59] See Australian Bureau of Statistics, *Prisoners in Australia 2012*, available from http://www.abs.gov.au/ausstats/abs@.nsf/Products/EFDDD2B9A1206FC8CA257ACB00130EF0?opendocument
[60] See Australian Bureau of Statistics, *Prisoners in Australia 2012*, available from http://www.abs.gov.au/ausstats/abs@.nsf/Products/F1D32866F5634F83CA257ACB001316BA?opendocument
[61] See Australian Bureau of Statistics, *Prisoners in Australia 2012*, available from http://www.abs.gov.au/ausstats/abs@.nsf/Products/35E0B43474FA232FCA257ACB00131595?opendocument

population in 2002).[62] Imprisonment rates in Queensland and New South Wales actually decreased by 6 percent and 1 percent respectively between 2002 and 2012.[63]

45. Two of the Law Council's Constituent Bodies, the NSW Bar and the LSWA, have suggested that increases in imprisonment rates in some states and territories in recent years could be attributed to legislative changes that create new offences, or policies that favour imprisonment for offences that could otherwise be sanctioned with less severe forms of punishment. These factors may be attributed to a perception by State Governments that a "tough on crime" stance to legislative reform is politically expedient. A similar observation was made by Tom Calma in his 2009 Social Justice Report, where he noted that evidence that prisons do not effectively rehabilitate or deter offenders, nor increase community safety, has "largely fallen on deaf ears in the 'tough on crime' climate that has predominated in most Western countries for the last 50 years."[64]

46. In addition to the economic costs, there are many social costs that accompany imprisonment. As noted by the LSWA, imprisonment does not just affect the individual who is being confined but also has an impact on that person's family, their associates, and also on their local community.

47. For some individuals, imprisonment can have a detrimental impact on their ability to turn their life around once they are released. Indeed, one of the significant difficulties encountered by individuals after they have been released from prison is re-integrating into society. Many people experience difficulties in overcoming the stigma associated with being imprisoned once they are released. This is particularly the case when it comes to finding employment. Indeed, as noted by the LSWA, difficulties in obtaining legitimate employment can increase the pressure on former offenders to earn income through illegitimate means which can then lead to re-offending.

48. Other individuals may suffer from serious psychological and physical health conditions post –release which may also negatively impact their ability to effectively function and re-integrate into society. As noted by the NSW Bar, similar observations have been made by Deloitte Access Economics in their economic analysis of prison versus residential treatment for Aboriginal and Torres Strait Islander offenders, where it was found that:

> *"[r]eoffending rates are high and incarceration is associated with poor health outcomes for prisoners, including a relatively higher risk of mortality post-release. Research suggests that outcomes of incarceration are worse for Indigenous Australians than for non-Indigenous Australians."*[65]

49. The impact of imprisonment on an offender's family can also be quite pronounced, particularly if the person who has been imprisoned was the family's main breadwinner, or has a young family that they need to support. Indigenous offenders often play important social, cultural and family roles in their communities.[66] When these individuals are removed from their communities as a result of imprisonment, other family and community members are often left to try and fill the void.

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[62] Ibid.
[63] Ibid.
[64] Op.cit., T. Calma, 2009 Social Justice Report, p.13.
[65] Op.cit., Deloitte Access Economics, *An economic analysis for Aboriginal and Torres Strait Islander offenders – prison vs residential treatment*, p.viii.
[66] Op.cit., T. Calma, 2009 Social Justice Report, p.42.

Alternatives to imprisonment in Australia

50. A number of the Law Council's Constituent Bodies have noted the savings that could be made in relation to the costs of imprisonment if alternative criminal justice measures associated with prevention, early intervention, diversionary and rehabilitation initiatives were implemented. Indeed, the NSW Bar, LSWA, and QLS consider that diverting people from incarceration, a form of punishment that is both expensive and of limited utility in promoting rehabilitation and reducing recidivism, makes sense both economically and socially.

51. Some states and territories have already adopted these types of initiatives in an effort to address the economic and social costs of traditional punishments like prison. One of the Law Council's Constituent Bodies, the QLS, notes the effectiveness of a number of diversionary court programs and rehabilitation measures that could provide an evidence base for future justice reinvestment strategies. These include programs such as youth justice conferencing; the Drug Court; and the Murri Court.

52. Youth justice conferencing has been established in a number of jurisdictions in Australia[67] and aims to "assist juveniles, their parents, victims and the community by facilitating their participation in a process that encourages juveniles to accept responsibility for their behaviour, allows victims to receive restitution, encourages family and community decision-making, reduces costs and prevents recidivism."[68]

53. Youth justice conferencing has been found to be an effective way of involving offenders in the process of determining how they should be punished for their behaviour. Indeed, the QLS notes that almost all of the youth justice conferences (95 percent) held in Queensland between 2010 and 2011 resulted in the parties reaching an agreement, and 98 percent of participants indicated that they considered the conference to be fair and were satisfied with the agreement that was reached.[69] Despite the success of this diversionary program, the Queensland Government took steps to remove the option of court-ordered youth justice conferencing in 2012. The QLS notes that conferencing remains available in Queensland through police referred conferencing, and suggests that it may benefit from further funding or inclusion in part of a broader justice reinvestment strategy.

54. Another diversionary initiative that currently operates in a number of jurisdictions in Australia is the Drug Court.[70] This court acts as a rehabilitative mechanism to address underlying causes of offending behaviour, and requires participants to: have abstained from using drugs for a substantial period; and either be employed or to have developed skills that would assist them to gain employment by the end of the intervention. Studies of outcomes for Drug Court participants have found that individuals who participated in the Drug Court programs were less likely to be reconvicted of an offence, including offences against the person as well as drug offences.[71]

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[67] K. Richards, (2010), *Police referred restorative justice for juveniles in Australia*, Trends and Issues in Crime and Criminal Justice, No.398, Australian Institute of Criminology. Available from http://www.aic.gov.au/documents/8/B/B/%7B8BB6EC00-2FDD-4CB9-A70F-DC451C3C22BD%7Dtandi398.pdf

[68] Ibid.

[69] Queensland Courts, *Children's Court of Queensland Annual Report 2010-2011,* p.20. Available from http://www.courts.qld.gov.au/__data/assets/pdf_file/0019/131608/cc-ar-2010-2011.pdf

[70] Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts*. Available from http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.html

[71] D. Weatherburn, C. Jones, L. Snowball & J. Hua (2008). *The NSW Drug Court: a re-evaluation of its effectiveness*, Contemporary Issues in Crime and Justice, No. 121.

55. The QLS notes that the Drug Court in Queensland has been an effective way of diverting offenders from prison and providing them with the treatment that they need to overcome their addictions. In fact, this initiative has resulted in 155 people being diverted from the criminal justice system in Queensland. The diversion of these individuals has been quantified as saving the Queensland community resource costs equivalent to 588 years of imprisonment.[72] However, despite these results, the Queensland Government has introduced legislation[73] that provides for the cessation of this court by 30 June 2013.

56. The Murri Court is another initiative that the QLS has identified as an alternative to traditional approaches to criminal justice that the Committee could consider. The Murri Court is similar to the Nunga and Koori Courts that exist in other jurisdictions in Australia which deal with the sentencing of Indigenous offenders. The Murri Court takes into account cultural issues and provides Aboriginal and Torres Strait Islander offenders with a forum in which they can provide input into the sentencing process. The Queensland Government wound up the Murri Court at the end of 2012 due to concerns that this court was not reducing the imprisonment or recidivism rates of Indigenous offenders.[74] The Queensland Attorney-General attributed this to the fact that many of these offenders returned to their communities and were exposed to the same levels of unemployment and substance abuse that got them into trouble in the first place. The QLS considers that a justice reinvestment approach, which could increase the capacity of communities to deal with these type of social issues, may be one way in which these types of concerns could be addressed.

Over-representation of disadvantaged groups within Australian prisons

Indigenous Australians

57. Indigenous Australians are significantly over-represented in the Australian criminal justice system.[75] In fact, according to the ABS, Aboriginal and Torres Strait Islander adults were imprisoned at a rate 15 times higher than that of non-Indigenous prisoners in 2012, despite comprising less than 3 percent of the total Australian adult population.[76] This equates to 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population, compared to 129 non-Indigenous prisoners per 100,000 adult non-Indigenous population in 2012.[77]

58. The incarceration rate of Indigenous juveniles also far outweighs that of their non-Indigenous counterparts, with Indigenous juveniles being 31 times more likely to be in

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New South Wales Bureau of Crime Statistics and Research. Available from http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/$file/CJB121.pdf

[72] Magistrate's Court of Queensland, *Magistrate's Court Annual Report 2010-2011*, p.31. Available from http://www.courts.qld.gov.au/__data/assets/pdf_file/0012/131610/mc-ar-2010-2011.pdf

[73] See *Criminal Law Amendment Bill (No.2) 2012*

[74] See http://www.healthinfonet.ecu.edu.au/about/news/1050

[75] See T. Allard, A. Stewart, A. Chrzanowski, D. Ogilvie, J. Birks & S. Little, (2010). 'Police diversion of young offenders and Indigenous over-representation,' *Trends and Issues in Crime and Criminal Justice*, No. 390, Australian Institute of Criminology. Available from http://www.aic.gov.au/documents/0/9/2/%7B092C048E-7721-4CD8-99A6-1BC89C47D329%7Dtandi390.pdf .

[76] Australian Bureau of Statistics, *Prisoners in Australia 2012*, 6 June 2012. Available from http://www.abs.gov.au/ausstats/abs@.nsf/Products/284EF4DA1F5BD6F5CA257ACB001316D3?opendocument

[77] Ibid.

detention compared to non-Indigenous juveniles.[78] The Law Council considers that there is an urgent need for the Government to address these high levels of incarceration in a practical way.

59. There are a number of factors that have been identified as increasing the risk of Indigenous Australians' involvement in crime. These include criminogenic needs such as substance abuse, overcrowded living environments, unemployment, and poverty.[79] A number of commentators have noted the impact that substance abuse and high levels of unemployment play in the over-representation of Indigenous Australians in prison. Indeed, it has been suggested that "alcohol is a factor in up to 90% of all Indigenous contact with the criminal justice system." [80] A lack of education, or poor school attendance, has also been identified as a factor that increases the risk of offending later in life.[81] High levels of mental illness and disadvantage within a number of Indigenous communities have also been found to increase the risk of Indigenous Australians becoming involved in crime.[82]

60. Despite having a greater understanding of the underlying causes of Indigenous involvement in the criminal justice system, governments at both the state and federal level continue to struggle with how best to address this serious social issue. Justice reinvestment has been suggested by some advocates as an approach that may provide a framework for addressing this issue.[83] In fact, several aspects of this approach have been described as being beneficial to Indigenous offenders and their communities. These include the ability of a justice reinvestment approach to focus on community building through crime prevention as opposed to the weakening of communities through imprisonment; and the ability of justice reinvestment to address the multiple underlying causes of offending.[84] Another benefit of justice reinvestment is its ability to provide sustainable sources of funding for culturally appropriate community programs such as Indigenous healing programs and residential drug and alcohol programs.[85]

61. The LSNSW suggests that there needs to be a shift in government policy away from populist law and order policies to more effective early intervention, diversionary and rehabilitative models, in order to work towards long-term reductions in the over-representation of Indigenous people in the criminal justice system. The NSW Bar, LSWA and QLS have expressed support for justice reinvestment as an approach that could be used to address this problem.

62. The QLS considers that a justice reinvestment approach could focus on building community support and provide rehabilitation. It is also of the view that justice reinvestment could potentially reduce recidivism and build community capacity to deal with offending behaviour. It is not alone in this regard. Indeed, the NSW Bar has also expressed the view that there is a need for the criminal justice system to change the way that it deals with Indigenous Australians and to that end, has expressed support

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[78] Australian Institute of Health and Welfare, *Juvenile detention population in Australia: 2012,* Juvenile justice series, No.11, Canberra: AIHW, p.vii. Available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542551

[79] D. Weatherburn, L. Snowball, & B. Hunter. (2006). 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey,' *Crime and Justice Bulletin*, No. 104, Sydney: Australia, NSW Bureau of Crime Statistics and Research. Available from http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb104.pdf/$file/cjb104.pdf

[80] Op.cit., T. Calma, 2009 Social Justice Report.

[81] Op.cit., S. Hudson, *Panacea to Prison? Justice Reinvestment in Indigenous Communities,*p.8

[82] See http://www.aihw.gov.au/mental-health-indigenous/

[83] Op.cit., T. Calma, 2009 Social Justice Report, p.41.

[84] Ibid., p.45.

[85] Op.cit., S. Hudson, *Panacea to Prison? Justice Reinvestment in Indigenous Communities,* p.12.

for a careful consideration of the benefits of actively pursuing the benefits of justice reinvestment.

Individuals with cognitive disability and other mental illnesses

63. Individuals with cognitive disabilities and other mental illnesses are another disadvantaged group that are also over-represented in the criminal justice system. The LSNSW has expressed particular concern about high levels of young people in custody with cognitive and mental health impairments. Indeed, it has been found that "persons with cognitive impairment and other disability such as mental health and AOD disorders (Alcohol and Other Drugs) are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events"[86] compared to individuals who are not impaired in this way.

64. Numerous studies have found high incidences of mental health problems among incarcerated populations. For example, a study by the Australian Institute of Health and Welfare in 2010 found that 31percent of prison inmates reported that they had previously been told by a medical practitioner that they had a mental health disorder (including substance abuse disorders), [87] and that 16 percent of prison entrants were currently on medication for a mental health condition.[88]

65. The rate of cognitive disabilities and other mental illnesses amongst Indigenous inmates has been found to be even higher. A Queensland study published in the Medical Journal of Australia found 86 percent of Indigenous women and 73 percent of Indigenous men in Queensland prisons (out of a sample of 396) had been diagnosed with a mental health disorder in the preceding 12 months before their imprisonment. Out of these individuals, 66 percent suffered from a substance abuse disorder.[89] This study concluded that for mental health services to be effective, they must be culturally capable, and accessible both in custody and in the community, with a focus on enabling continuity of care between the two.

66. Cognitive disabilities in Indigenous Australians have also been linked to earlier, and increased, contact with the police than that experienced by those without this disability.[90]

67. The QLS has suggested that a justice reinvestment approach may benefit prisoners with mental disorders given its focus on building community support and providing rehabilitation, and its ability to divert individuals away from prisons where mental health issues may be exacerbated. The NSW Bar has also expressed support for exploring the benefits of such an approach.

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[86] E. Baldry, L. Dowse, M. Clarence (2012), (2012) *People with intellectual and other cognitive disability in the criminal justice system*, Sydney, University of New South Wales, p.4. Available from http://www.adhc.nsw.gov.au/__data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf

[87] Australian Institute of Health and Welfare, *The Mental Health of Prison Entrants in Australia- 2010*, Bulletin 104, June 2012, p.2. Available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198

[88] Ibid.

[89] E. Heffernan, K. Andersen, A. Dev & S. Kinner, (2012), 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons,' *Medical Journal of Australia*, 197(1). Available from https://www.mja.com.au/journal/2012/197/1/prevalence-mental-illness-among-aboriginal-and-torres-strait-islander-people

[90] Op.cit., E. Baldry, L. Dowse, M. Clarence , *People with intellectual and other cognitive disability in the criminal justice system*, p.4.

Implementing a justice reinvestment approach in Australia

68. Australia differs to the US and UK in a number of ways. One of the main differences is the remoteness of many Australian communities. Many of the US states that have implemented a justice reinvestment approach to date are located in urban areas. The implementation of a justice reinvestment approach in predominantly remote and regional areas in Australia may pose unique challenges which may have an impact on the success of justice reinvestment in Australia compared to the more urban US states.

69. It has been noted by a number of commentators that many of the locations with high rates of Indigenous offending that may benefit from a justice reinvestment approach are located in very remote areas.[91] This may have implications for the ease with which data can be mapped, and also on program and service delivery in these locations.[92] The QLS also notes that one of the challenges that would need to be met by a justice reinvestment approach is the poor access that many residents of remote and very remote communities have to criminal justice initiatives and services generally. The QLS notes that whilst remote and very remote communities are well-positioned for place-based intervention, the remoteness of these communities inhibits the participation of offenders in community-based programs. Particular programs such as conditional bail support programs, which successfully divert offenders away from court processes in other areas, may not be appropriate in remote areas. The Committee should consider ways in which such challenges might be addressed if a justice reinvestment approach is to be implemented in Australia.

70. Another difference between Australia and the US which may have some implications for the success of justice reinvestment in Australia is the significant difference between the number of prison sentences handed down by US courts compared to courts in Australia. It has been suggested that 75 percent of the sentences imposed on offenders in the US are custodial.[93] This is significantly higher than Australia, where only one-fifth of offenders receive custodial sentences.[94] Indeed, such a significant difference means that the US "has a lot more room to move in that regard – and a lot more offenders to keep out of prison than Australia."[95] Accordingly, the savings incurred as a result of reducing prisoner numbers in Australia are unlikely to be as dramatic as those experienced in other countries throughout the world.

Conclusion

71. The objectives of justice reinvestment resonate with many policy makers. Its ability to reduce expenditure and reinvest savings into programs and services that aim to address the underlying causes of crime and prevent future offending, has made it particularly appealing to policy makers seeking to reduce expenditure in a challenging fiscal environment, while maintaining public safety.

[91] Op.cit., S. Hudson, *Panacea to Prison? Justice Reinvestment in Indigenous Communities,* p.13.
[92] Ibid.
[93] Ibid., p.14.
[94] Ibid.
[95] Ibid.

72. Notwithstanding its benefits, the fact that justice reinvestment is such a new concept means that there is still some uncertainty surrounding the details of how such an approach would actually operate in practice in Australia. Despite these possible challenges, there are clearly also many benefits to this approach which have been highlighted throughout this submission, and which the Law Council submits the Committee should consider.

73. The Law Council thanks the Committee for the opportunity to make a submission to this inquiry.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.