Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia

March, 2013

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

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1. About NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following Aboriginal and Torres Strait Islander Legal Services (ATSILS):

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

The NATSILS make this submission to the Senate Legal and Constitutional Affairs Committee to highlight the value that justice reinvestment approaches could have in addressing the steadily rising imprisonment rate across Australia, and in particular the over-representation of Aboriginal and Torres Strait Islander peoples in custody. Imprisonment is expensive and at the rate that imprisonment is rising in Australia, the cost is becoming unsustainable. Imprisonment is also often ineffective in its ultimate goal of rehabilitating offenders and making communities safer. Justice Reinvestment is an alternative approach that not only has fiscal rationality at its core but also works to address the causes of offending so as to prevent crime in the first place while also more effectively rehabilitating those who do offend. These arguments will be further outlined below.

3. Recommendations

1) *That the Commonwealth Government work with opposition parties to secure bipartisan support at the federal level for justice reinvestment.*

2) *That the Commonwealth Government work with the Standing Council on Law and Justice to secure agreement with State and Territory governments to commit to jointly establishing an independent central coordinating agency for justice reinvestment.*

3) *In securing agreement with State and Territory governments, that the Commonwealth Government consider the potential for attaching relevant conditions to the funding it provides to State and Territory governments.*

4) *In the event that agreement is not secured, that the Commonwealth Government itself establish an independent central coordinating agency for justice reinvestment.*

5) *That the central coordinating agency focus on building the evidence base that will inform justice reinvestment initiatives. Such will not only assist in identifying locations for justice reinvestment initiatives but will also provide the necessary data to inform modelling as to the fiscal benefits that could be achieved which could serve to convince any State and Territory governments which have not yet signed on.*

6) *Given the over-representation of Aboriginal and Torres Strait Islander peoples in Australia's prisons, the central coordinating agency and any subsequent justice reinvestment initiatives in Aboriginal and Torres Strait Islander communities must have, and insist on, cultural expertise at all stages of project design and implementation. Such would also be in recognition of the principles of community control, free, prior and informed consent and self-determination. Local and peak Aboriginal and Torres Strait Islander organisations could assist here.*

7) *That Commonwealth, State and Territory governments progress their previous commitment to introduce justice targets under the Safe Communities Building Block of the Closing the Gap policy initiative. Such targets should be included in a National Partnership Agreement relevant to the Safe Communities Building Block that also makes references to the implementation of justice reinvestment initiatives for Aboriginal and Torres Strait Islander communities.*

8) *That robust evaluation of initial justice reinvestment trials be completed in order to assess outcomes and provide evidence as to its effectiveness. Such could then be used to secure further buy in from non-participant jurisdictions.*

4. The drivers behind the past 30 years growth in the Australian imprisonment rate

4.1 'Tough on Crime' and 'Law and Order' politics

Over the last thirty years Australia's prison population has tripled, growing four times faster than total population growth. Crime rates have not been the driving force behind the growth of Australia's imprisonment rate. There has been no spike in the crime rate to which we can attribute such a significant increase in incarceration. Nor have increased incarceration rates led to any drop in the crime rate. Rather, the steady increase in imprisonment rates has

been the result of legislative and policy changes implemented under the catch cry of being 'tough on crime'.

State and Territory governments regularly espouse they are 'tough on crime' and champion harsh 'law and order' policies. These approaches are designed to respond to a perceived community need for harsher punishment and retribution in order to 'make communities safer' despite the lack of evidence that such policies have any positive impact on crime rates or community safety. The NATSILS strongly believe that the community does have a legitimate interest in increased safety and reduced crime rates, and that there is a real need to protect vulnerable members of the community and tackle offending behaviour. However, the evidence does not support any link between this objective and 'tough on crime' approaches. By contrast, there is a strong correlation between 'tough on crime' approaches and increasing incarceration rates, which place a significant cost burden on the community.

Tough on crime policies are most visible at pre-election time in the States and Territories. While such strategies tend to galvanise public support for proponents of law and order approaches, they also misinform the public and fail to draw on the significant evidence base about what actually works. In striving to win votes, politicians and their parties ultimately fail the public by relying on tactics that are ineffective in preventing crime and making communities safer.

Accordingly, the growth in incarceration rates can be viewed as a symptom of a political response to the perceived desires of voters, which is ultimately politically led, as opposed to the result of an approach that is informed and evidence based in relation to what actually prevents crime and increases public safety.

Research and experience both demonstrate that imprisonment is not an effective deterrent to offending. This is evidenced by the fact that 55 per cent of Australian prisoners have been in prison before.[1] Tough on crime campaigns that advocate for increased sentences as the way to protect the community rely on the myth that harsher sentences provides an effective deterrent to offending and an effective means of punishment and rehabilitation to those who have offended. However, all the evidence shows that prison actually fails to deter, rehabilitate, meet public concerns and make communities safer.[2] For example, NSW imprisons people at almost twice the rate of Victoria yet the crime rate in NSW isn't lower.[3] The Victorian Sentencing Advisory Council recently concluded that "the research suggests imprisonment has a negative but generally insignificant effect upon the crime rate, representing a small positive deterrent effect …" however, "increases in the severity of punishment … have no corresponding increased deterrent effect upon offending".[4] In other words, the general threat of imprisonment has a very small deterrent effect but increasing prison terms has no deterrent value.

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[1] Australian Bureau of Statistics, *Prisoners in Australia 2012* (2012).

[2] T Matthiesen, *Prison on Trial* (2006); A Coyle, 'Community Prisons' (2006) 64 *Criminal Justice Matters* pp 32-33.

[3] Weatherburn, Grech & Holmes *Why does NSW have a higher imprisonment rate than Victoria?* NSW Bureau of Crime Statistics and Research (2010) 1, Australian Bureau of Statistics, *Recorded Crime Victims, Australia 4510.0 2010*, (2011) 43, and *Crime Victimisation, Australia 4530.0 2009-10* (2011), 11 and 13.

[4] Sentencing Advisory Council *Does Imprisonment Deter? A Review of the Evidence* (2011) 17.

4.2 Bail and Remand

Changes to bail legislation have been central to the tough on crime approach. Across Australia, changes to bail legislation have restricted the rate at which bail is granted and those who are granted bail have been placed under increasingly strict, and often unrealistic, conditions. This has particularly been the case in relation to juveniles. Increasing the onerous nature of bail conditions has elevated the risk of young people either being denied bail because they cannot meet the requirements, or being remanded in detention for conditional or technical breaches of bail that do not constitute further offending or a risk to the public. The proportion of juveniles in detention on remand has increased substantially over the past 30 years. Since 1981 to 2008 the percent of juveniles in detention on remand has increased from 21 percent to 59.6 percent.[5]

The intersection between changes to bail laws and the broader social and economic disadvantages faced by Aboriginal and Torres Strait Islander peoples, can be seen as a specific area of concern in relation to increasing remand rates. For example, it is the NATSILS' experience that Aboriginal and Torres Strait Islander young people are often denied bail because they lack access to appropriate accommodation or, due to family dysfunction, lack a responsible adult to whom they can be bailed. As a result, it is also the NATSILS' experience that many young people will choose to enter a plea of guilty simply to finalise their court matters quickly and avoid lengthy periods of detention on remand.

For example, in Western Australia there is an urgent need for an expansion in the numbers and capacity of bail hostels in regional and remote areas to enable children to be released on bail in their local communities. In the absence of bail hostels, or in the event a hostel is full, children are denied bail and remanded in custody to a juvenile detention facility in Perth. This raises issues of the separation of children from their families, dislocation from country and the severing of ties to kinship and culture. In addition, punitive bail conditions sometimes require Aboriginal and Torres Strait Islander people to leave their local communities, resulting in overcrowding in housing in other areas, or homelessness.

In terms of remand, in jurisdictions around Australia there is no legislated limit placed on the maximum period that an adult can be placed on remand. Due to increasingly congested court lists the NATSILS have witnessed numerous cases in which a person spends a longer period on remand than the sentence they receive upon conviction, or would have received if convicted. This combined with the increased number of people being placed on remand as bail conditions have become more rigid, is contributing to the growth in Australia's imprisonment rate.

4.3 Mandatory Sentencing

Perhaps the most damaging component of the tough on crime approach has been the spread of mandatory sentencing. The Northern Territory and Western Australia have had mandatory sentencing laws for some years. Furthermore, the Northern Territory has just passed a suite of amendments to further extend mandatory and minimum sentencing provisions for violent offences. This will include a mandatory minimum 3 month jail sentence for a first offence (where harm is caused and a weapon used), and a minimum 12 month sentence for repeat violent offending). Victoria has recently removed suspended sentences

[5] Kelly Richards, 'Trends in Juvenile Detention in Australia' (2011) 416, *Trends and Issues in Crime and Criminal Justice*, 4.

for serious offences in addition to announcing plans to introduce statutory minimum sentencing laws for adults and young people aged 16-17 and adults who commit the yet to be defined offence of "gross violence".

The recently elected Liberal Government in Western Australia has promised to expand mandatory sentencing for home burglaries and, for some offences, minimum mandatory terms of 15 years will be imposed. The minimum mandatory term for three strikes home burglary laws (which currently attract minimum mandatory terms of 12 months) will be increased to 2 years for all offenders over the age of 16 years. NATSILS is concerned that these laws will inevitably lead to an increase in incarceration rates in Western Australia.

Mandatory sentencing laws are arbitrary, often disproportionate to the crime and do not allow regard for the circumstances of the particular offence or offender.[6] Furthermore, mandatory sentencing has been shown to be costly, ineffective in deterring criminal activity,[7] and in breach of Australia's human rights obligations. Critically, mandatory sentencing laws may actually increase the likelihood of reoffending, given that periods of incarceration diminish employment prospects, positive social links, and other protective factors that help prevent recidivism.

The NATSILS consider judicial discretion to be essential to an effective criminal justice system. A decision maker must be allowed to take into account an offender's unique circumstances, and have the full range of sentencing options available when applying sentencing principles of general and specific deterrence and rehabilitation, and subsequently, when making a decision as to sentence. This is especially the case with disadvantaged groups, such as Aboriginal and Torres Strait Islander peoples. By removing discretion, mandatory sentencing has resulted in inappropriate sentences of imprisonment, disproportionately high imprisonment rates in those jurisdictions in which it exists,[8] and has contributed to the overwhelming overrepresentation of Aboriginal and Torres Strait Islander peoples in the prison population of those jurisdictions.

4.4 Parole, strict compliance and 'street time'

Tough on crime approaches have also had a significant impact on the delivery of community corrections, which has moved towards a 'strict compliance' approach to supervision and monitoring. In several jurisdictions, probation and parole officers are subject to internal guidelines which remove any element of discretion, and require all breaches to be reported, however minor. The underlying purpose of parole conditions is to minimise risk factors and ensure an effective period of community supervision.

In the Northern Territory, for example, the strict compliance model has resulted in strikingly high rates of parole revocations even where there are no issues of high risk behaviour or offending. In 2011, 46 parolees had their parole revoked. Of those, only 5 revocations followed from offending and 41 revocations, or approximately 89%, were the result of

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[6] Australian Human Rights Commission, *Mandatory Detention Laws in Australia* (2009) *at* http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html.

[7] Donald Ritchie, *Does Imprisonment Deter? A review of the Evidence* (2011).

[8] The imprisonment rate in the Northern Territory is the highest in Australia at 826 people per 100,000 adult population – an increase of 72 per cent between 2002 and 2012. See http://www.abs.gov.au/ausstats/abs@.nsf/Products/35E0B43474FA232FCA257ACB00131595?opendocument .

breached conditions.[9] Such breaches often involved single instances of failing to report at the required time, being exited from a residential rehabilitation program, or travelling without permission.

In NAAJA's experience, these conditional breaches were frequently the result of explicable circumstances, such as a failure to report when out of range of mobile reception, or travelling to attend a funeral. Perversely, some conditional breaches are also the result of attempts by parolees to *minimise* risk, for example, by leaving a place of residence to avoid drinking or fighting. Such breaches are in no way linked to any threat to community safety.

The impact of such a rigid approach to technical parole breaches is multiplied when it is combined with parole law that requires 'street time' to be served out in the event that parole is revoked. In many jurisdictions, a prisoner whose parole has been revoked must serve the total number of days that were outstanding against his or her sentence at the date they were first released on parole. In some cases, this has resulted in individuals serving total periods of supervision that exceed the original full term date of their sentence by months or years.

The combination of strict compliance requirements and street time provisions has also produced a situation in which probation and parole officers are increasingly reluctant to recommend parole for individuals who face perceived barriers to successful completion of parole. Given that prisoners often have limited capacity to identify suitable accommodation options and support networks outside prison, the barriers to achieving parole in the first place are often insurmountable. This is particularly so for prisoners serving long sentences, who face other barriers such as mental health issues, and where linguistic or cultural factors create barriers to effective engagement with a parole officer. Indeed, those prisoners who would most benefit from a period of supervised release are those most likely to simply serve their full terms.

Such policies impact disproportionately on vulnerable parolees with unstable living arrangements, limited financial means, and support networks that lack understanding of the parole process. Aboriginal and Torres Strait Islander parolees face additional barriers to achieving or successfully completing parole, especially in cases where an individual does not speak English or seeks to reside in a remote or regional community.

The removal of discretion in supervision has resulted in a small but significant number of individuals being returned to prison as a result of conditional breaches of orders. Combined with 'street time' laws and reluctance within community corrections to recommend parole for individuals with identified vulnerabilities, these policies contribute to Australia's imprisonment rate by increasing the numbers of prisoners who serve their full time, whose sentences are effectively extended by significant periods, and who spend time in prison as a result of mere conditional breaches.

4.5 Availability of alternative sentencing options in regional and remote areas

A lack of alternative community based sentencing options in regional and remote areas has resulted in people being sentenced to a term of imprisonment which they would not have

[9] Parole Board of the Northern Territory, 2011 Annual Report, online at http://www.nt.gov.au/justice/documents/depart/annualreports/paroleboard_annualreport_2011.pdf

received had they lived in a metropolitan area where such alternatives are routinely available. Not having alternative sentencing options means that imprisonment is often the only choice the court can make regardless of whether the circumstances warrant such. This is a significant contributing factor to the growth of imprisonment rates. The availability, cost and effectiveness of alternative sentencing options is discussed in more detail below under section 6.

In addition, many Aboriginal and Torres Strait Islander offenders who are released on parole or who are subject to community based dispositions administered by Corrections authorities, are not able to access services designed to address the core reasons for their offending behaviour. For example, in the Central Desert area of Western Australia, which includes a number of remote Aboriginal communities, there are no counselling or mental health services made available to parolees or offenders undergoing community based orders.

4.6 Sustained increase in Aboriginal and Torres Strait Islander over-representation

The sustained increase in imprisonment rates of Aboriginal and Torres Strait Islander peoples is a unique contributing factor to the overall growth in imprisonment rates in Australia. This will be discussed separately below.

5. The over-representation of disadvantaged groups within Australian prisons, including Aboriginal and Torres Strait Islander peoples and people experiencing mental ill-health, cognitive disability and hearing loss

5.1 Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander peoples are chronically over-represented in the criminal justice system. Aboriginal and Torres Strait Islander peoples are incarcerated at a rate 14 times higher than non-Aboriginal and Torres Strait Islander peoples, a rate which has increased from 2000 – 2010 by almost 59 per cent for Aboriginal and Torres Strait Islander women and 35 per cent for Aboriginal and Torres Strait Islander men.[10]Aboriginal and Torres Strait Islander children are 22 times more likely to be in detention than non-Aboriginal and Torres Strait Islander children,[11] a situation which has been deemed a 'national crisis' by the Australian House of Representatives inquiry into Aboriginal and Torres Strait Islander youth and the criminal justice system.[12]

The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system has been linked to the broader issues of social and economic disadvantage

[10] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2011*(2011) 4.12.1.
[11] Australian Institute of Criminology, *Australian Crime: Facts and figures* (2009), 113.
[12] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011), 2.4.

which Aboriginal and Torres Strait Islander peoples experience at a disproportionate rate.[13] These include:

- High levels of poverty;
- poor education outcomes;
- high rates of unemployment;
- high levels of drug and alcohol abuse;
- over-crowded housing and high rates of homelessness;
- over-representation in the child protection system;[14]
- high levels of family dysfunction; and
- a loss of connection to community and culture.[15]

A recent study examined the substantial rise in the Aboriginal imprisonment rate between 2001 and 2008[16] and noted that there had not been a corresponding rise in the conviction rate for Aboriginal and Torres Strait Islander peoples over this period.[17] As a result, it concluded that "the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system's response to offending rather than changes in offending itself."[18] While the above factors relate to the underlying causes of offending, when it comes to imprisonment, Aboriginal and Torres Strait Islander peoples are imprisoned more often than non-Aboriginal and Torres Strait Islander people because they are disproportionately affected by the increasingly rigid approach to offending as described above. This approach includes:

- failure of police to appropriately use their discretion in relation to minor offending by Aboriginal and Torres Strait Islander young people;

- inflexible and heavily restrictive bail conditions which, in particular, has had a discriminatory effect on Aboriginal and Torres Strait Islander young people and caused an increase in the number of Aboriginal and Torres Strait Islander young people on remand;

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[13] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 12.

[14] Stewart, A, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) at <www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf>. Stewart found that in Queensland 54 per cent of Aboriginal and Torres Strait Islander males, and 29 per cent of Aboriginal and Torres Strait Islander females, involved in the child protection system go on to criminally offend.

[15] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 12, 12-13.

[16] Between 2000 and 2008, the imprisonment rate for Aboriginal and Torres Strait Islander peoples increased by 34.5 percent, an increase almost seven times that of non-Aboriginal and Torres Strait Islander people in the same period. See Australian Bureau of Statistics (ABS) 2008. *Prisoners in Australia*. ABS cat. no. 4517.0. Canberra: ABS.

[17] Fitzgerald, J, 'Why are Indigenous Imprisonment Rates Rising?' (2009) *NSW Bureau of Crime Statistics and Research Crime and Justice Statistics Issue Paper no. 41*, 6.

[18] Ibid.

- the spread of mandatory sentencing and other punitive laws which have disproportionately affected Aboriginal and Torres Strait Islander peoples in the Northern Territory and Western Australia;

- compliance based approaches to community supervision, particularly of parole orders, combined with the effect of 'street time' provisions; and

- significant numbers of Aboriginal and Torres Strait Islander peoples in regional and remote areas being sentenced to imprisonment unnecessarily due to a lack of access to non-custodial sentencing options in these areas.

Through our experience on the ground the NATSILS have also identified that conflicting practices under customary law and Australian law, as well as, discriminatory legislative requirements in the Northern Territory that issues of Aboriginal cultural significance and customary law cannot be considered by criminal courts in sentencing[19] are also factors which critically contribute to the over-representation of Aboriginal and Torres Strait Islander people in Australia's prisons.

While bail, mandatory sentencing, parole and alternative sentencing options have been discussed above, NATSILS would like to provide further information as to the use of police discretion in response to minor offending by Aboriginal and Torres Strait Islander young people. Around Australia, Aboriginal and Torres Strait Islander young people are increasingly being brought into the criminal justice system for minor offending in circumstances where police should be exercising their discretion. NATSILS have seen numerous cases where young Aboriginal and Torres Strait Islander people, some as young as 10 years old, are being arrested and charged for crimes such as stealing a single chocolate bar worth less than $2. ALSWA has advised that currently there is a concerning number of Aboriginal and Torres Strait Islander children between the age of 10 and 13 years of age who are in juvenile detention in WA. In January this year, The Australian ran a series of articles on similar cases in NSW which included one where an Aboriginal and Torres Strait Islander boy with a previously clean record was arrested, charged and sentenced to 12 months imprisonment for stealing hamburger buns.[20] NATSILS propose that if these were non-Aboriginal and Torres Strait Islander children this would be unacceptable to the wider community. Given the well recognised link between involvement in the juvenile justice system and subsequent involvement in the adult criminal justice system, the disastrous consequences for young Aboriginal and Torres Strait Islander peoples of such an approach to police discretion is clear.

5.2 Mental health and cognitive/intellectual disability

When addressing mental illness in the community, the unique position of Aboriginal and Torres Strait Islander peoples and the trauma inflicted on Aboriginal and Torres Strait Islander peoples since British settlement cannot be ignored. One of the legacies of this

[19] See s104A of the *Sentencing Act* (NT) which places limitations on when and how customary law and views expressed by members of an Aboriginal community can be taken into account in the sentencing process. Significantly, s16AA of the *Crimes Act 1914* (Cth) precludes the court from taking into account customary law or cultural practice as a mitigating factor, amongst other things.
[20] Natasha Robinson, 'Black Justice: bun theft worth a year's jail' *The Australian,* 7th January 2013.

trauma is the high rates of mental illness amongst Aboriginal and Torres Strait Islander peoples. This has significant consequences for Aboriginal and Torres Strait Islander peoples' contact with the justice system. Recent research in Queensland conducted by Heffernan, Andersen, Dev and Kinner[21] found that 73% of male and 86% of female Aboriginal and Torres Strait islander inmates of a sample of 396 Queensland inmates in high security prisons suffered a mental disorder.[22] It was also found that mental health disorders were more common among those in the remanded sample (84.4%) compared to those in the sentenced sample (70.4%). Post-traumatic stress disorder and major depression were the most common disorders suffered. [23]

The impact of Foetal Alcohol Spectrum Disorder (FASD) is an issue that is of particular importance. The prevalence of FASD amongst Aboriginal and Torres Strait Islander peoples is yet to be accurately determined, however, estimates have warned that it could be at chronically high levels. Given the lack of a recognised diagnostic tool, the justice system to date has no effective way of addressing the needs of people with FASD. The recent Commonwealth Inquiry into FASD found that:

- Individuals with FASD who come into contact with the criminal justice system may not have their disabilities taken into account by judicial officers. Due to the broad spectrum of FASD, some people with FASD may fit within current definitions of disability for the purpose of sentencing that takes into account reduced culpability. Others, however, may not, despite having significant impairments that should be considered mitigating factors;[24]
- Although people with FASD are more likely to come into contact with the criminal justice system, the system is not designed for people with the type of impairments associated with FASD. Individuals with FASD may confess or agree to any statement due to high suggestibility and eagerness to please. Moreover, they may have little understanding of the various legal processes and the gravity of their situation;[25]
- There are few diversionary programs available for people with FASD, as it a non-recognised and under-diagnosed disability;[26]
- The lack of diversionary options limits the sentencing options for people diagnosed with, or suspected of having, FASD;[27]
- Without a formal medical diagnosis of FASD, it is difficult for magistrates to rely upon impaired functioning as a mitigating factor in sentencing. Moreover, the dearth of specific management services or a centre to coordinate access to community services that may assist

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[21] Heffernan, E.B., Andersen, K.C., Dev, A., and Kinner, S., *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland Prisons*, Medical Journal Australia 2012; 197(1) 37-41.
[22] Ibid, 37.
[23] Ibid, 39.
[24] House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012), 5.91.
[25] Ibid, 5.100; H Douglas et al, 'Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland's Criminal Justice System', *Journal of Judicial Administration*, vol. 21, no. 3, February 2012, p. 180; Western Australia Department of the Attorney-General, *Equality Before the Law Bench Book*, 2009, p. 4.2.7 <www.supremecourt.wa.gov.au/_files/equality_before_the_law_bench book.pdf> viewed 5 November 2012.
[26] Ibid, 5.112.
[27] Ibid.

> an individual with FASD, provide few options for magistrates to effectively and creatively sentence offenders with FASD before the courts. Consequently, sentencing dispositions are rarely able to reflect the difficulties experienced by FASD affected individuals and instead offenders with FASD are subject to the same sentences and punishments, such as imprisonment, as fully functioning offenders, despite this being inappropriate;[28]

The relationship between mental illness and incarceration is complex. Due to a chronic lack of support and treatment centres in the community, police are increasingly being relied upon to respond to issues arising out of a person's mental health status or cognitive/intellectual disability. The NATSILS are concerned that this is not appropriate given that police are not sufficiently trained to consistently identify signs that a person may be suffering from a mental health issue or cognitive/intellectual disability, and that cultural and linguistic barriers compound the likelihood that police will overlook relevant issues.

As a result, the NATSILS often see the failure of police to deal with the mental illness and cognitive/intellectual disabilities of a person who has come into contact with the criminal justice system, for relatively minor offending, without resorting to judicial proceedings and detention. Even when such issues are identified by the police, the lack of community based support and treatment options, can mean that detention in custody is the only available response. These same issues have also meant that remand is increasingly used to manage people with mental illness and/or cognitive disability. The NATSILS are of the view that in situations like these, a person's health concerns should be addressed as a priority over detention in the criminal justice system.

The NATSILS hold similar concerns in relation to people declared unfit to plead or mentally/cognitively impaired at the time of offending. Around Australia these people can either be placed on remand until a psychiatrist's report is completed or placed on supervision orders. The concern is that despite legislative requirements for psychiatrist's reports to be completed within 21 days, as is the case in Queensland, this is not often enforced in practice and it is not unusual for people to spend up to 3 months on remand and in some cases, up to 12 months on remand waiting for these reports. This has resulted in people spending significant periods detained on remand yet when it comes to being sentenced they are either not sentenced to a period of imprisonment at all or are sentenced to a term of imprisonment that is shorter than the period they have already spent on remand.

In relation to supervision orders, in many cases in the Northern Territory supervision orders involve custodial supervision. That is, incarceration in the same correctional centres as all other prisoners. Supervision orders in the Northern Territory have no expiry date. The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer at serious risk of harm to the community or themselves. The result is that once people are put on supervision orders, there is a real risk of them being held indefinitely. CAALAS and NAAJA both have clients who have been detained on supervision orders for years beyond the likely length of sentence they would have received if they were fit or not mentally impaired at the time of offending. In Western Australia, where a similar regime exists, a man has been detained under fitness to plead legislation for ten years despite the fact that the maximum sentence he would have received if convicted would have only been two years.

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[28] House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 24, 5.112; Aboriginal Peak Organisations Northern Territory, *Submission 38*, p. 20.

5.3 Hearing loss

Aboriginal and Torres Strait Islander peoples suffer ear disease and hearing loss at ten times the rate of non-Aboriginal and Torres Strait Islander people and arguably at the highest rate of any people in the world.[29] High rates of hearing impairment are another factor which interplays with the already significant over-representation of Aboriginal and Torres Strait Islander peoples in Australia's prisons. An investigation among inmates in Northern Territory correctional facilities found more than 90 per cent of Aboriginal and Torres Strait Islander inmates had a significant hearing loss.[30] Despite its high prevalence, hearing loss often goes undetected.

A recent parliamentary inquiry found that there is a causal relationship between hearing impairment and a person's engagement with the criminal justice system. The Senate Community Affairs References Committee in its Inquiry into Hearing Health in Australia found that "for Indigenous people with hearing loss, whose first language - if they have one - is not English, this relationship can be disastrous".[31] For example, the Committee noted that "engagement between Indigenous people with a hearing loss and police can spiral into confrontation, as police mistake deafness for insolence".[32] The confusing nature of such engagement can also lead to increased aggression.

For example, during the parliamentary inquiry mentioned above one witness testified about the potential consequences of poor communication caused by hearing loss:

> One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, 'Good' and 'Yes'—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's [sic] participation in the criminal justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on.[33]

Where people participate in court proceedings but do not fully understand them, the prospects of them complying with any order of the court are substantially impaired. A more common example witnessed by the NATSILS than the one given above would be where a client, who has an undetected hearing impairment, indicates that they understand what has transpired and that they understand the conditions of a bail or parole order when in fact they haven't actually been able to hear a thing. Consequently, not being aware of their bail conditions, the client is then released only to unknowingly breach the order and be remanded in custody.

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[29] Senate Community Affairs References Committee, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) xv.
[30] Troy Vanderpoll and Dr Damien Howard, *Investigation into hearing impairment among Indigenous prisoners within the Northern Territory Correctional Services* (2011), 3.
[31] Senate Community Affairs References Committee, above n 29, xvi.
[32] Senate Community Affairs References Committee, above n 29, xvi.
[33] Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray]

6. The economic and social costs of imprisonment

Housing someone in prison is extremely expensive. Council of Australian Government figures show that the average real net operating expenditure per prisoner per day in 2009-2010 was $240.66, or close to $90,000 per year. In 2012-2013 this is estimated to increase to $315 and almost $115,000 respectively.[34] In contrast, the average real net operating expenditure per community corrections offender per day is $18.50 or less than $7,000 per year.[35]

Total net expenditure on corrective services in Australia was approximately $3.4b in 2009 – 10 with 85 per cent of this, or $2.9b, being spent on prisons. This corresponded to $154 for every person in Australia, or $199 for every adult.[36]

Such levels of spending are unsustainable, especially in light of the fact that the current approach to imprisonment does not have any appreciable impact on the rate of offending. Tax payers are not getting value for money in terms of current prison expenditure and it is time that the economic rationality tests that are applied to all other areas of government spending are applied to justice expenditure. The ever increasing expenditure on prisons is diverting resources away from investment in more (cost) effective ways of reducing crime as well as away from other priority areas of benefit to taxpayers such as education, health and infrastructure.

In addition to being economically costly, incarceration is associated with a number of significant social costs. For example, periods of imprisonment typically lead to loss of family connection, poor employment outcomes and poor health outcomes for prisoners including an increased risk of mortality post-release.[37] Research suggests that outcomes of incarceration are worse for Aboriginal and Torres Strait Islander peoples than for non-Aboriginal and Torres Strait Islander people.[38] Social costs also extend well beyond the actual individual incarcerated. Around 40,000 children in Australia have a parent incarcerated.[39] Research has found that it is likely that disruption associated with parental imprisonment, and the values, attitudes and behaviours that are promoted in the child throughout this experience, have a negative impact on the child and can be associated with family breakdown, disruption in living and care arrangements, mental health issues, poorer educational outcomes and increased probability of the child him/herself offending later in life.[40] Intergenerational offending in particular needs to be recognised, and treated as a

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[34] Australian National Council on Drugs, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (2012) viii.

[35] Corrections Statistics FAQs on www.justice.vic.gov.au.

[36] Australian crime: Facts & figures 2011Australian Institute of Criminology; Steering Committee for the Review of Commonwealth/State Service Provision 2011. Report on government services, volume 1: education, justice emergency management. Melbourne: Productivity Commission; Australian Bureau of Statistics (ABS) 2002–10. *Population by age and sex, Australian states and territories* (various issues). ABS cat. no. 3201.0. Canberra: ABS.

[37] Australian National Council on Drugs, above n 34.

[38] Ibid.

[39] Quilty, S., The magnitude of experience of parental incarceration in Australia (2005) Letter to the Editor. *Psychiatry*, *Psychology and Law*, *12*(1), 256-257.

[40] Reed, D.F. & Reed, E.L., "Children of incarcerated parents" (1997) *Social* Justice, vol. 24, no. 3, pp. 152-169, 59; Gabel, K. & Johnston, D., *Children of Incarcerated Parents* (1995) 83.

social condition which becomes more entrenched with every expansion of the criminal justice system.[41]

Intergenerational offending combined with the over-representation of Aboriginal and Torres Strait Islander peoples in Australian prisons is destroying the social fabric of Aboriginal and Torres Strait Islander families and communities. Incarceration is so widespread that in some communities it has come to be seen as a virtual rite of passage that young men will go through on the path to adulthood.

There is also a clear link between the over-representation of Aboriginal and Torres Strait Islander adults in prisons and the over-representation of Aboriginal and Torres Strait Islander children in the child protection system. Children are typically taken into care when their primary carer is taken into custody. Even where the other parent or family member is able to provide care to the child, issues stemming from imprisonment of a family member contribute to circumstances of dysfunction that also increase the risk that a child will ultimately be removed by the state. The disruption of attachment when a parent or significant family member is imprisoned also has a long term impact on the well being of a child, and increases the risk that the child will eventually enter the criminal justice system themselves.

7. The cost, availability and effectiveness of alternatives to imprisonment, including prevention, early intervention, diversionary and rehabilitation measures

Prevention, early intervention, diversionary and rehabilitation programs/services are all approaches to offending that can offer an alternative to traditional criminal justice approaches. They focus on effectively addressing the underlying causes of offending and preventing recidivism rather than punishment. Such programs/services can include:

- Early childhood intervention/family support and school attendance programs;
- Improved public housing and transport programs, especially in regional and remote areas;
- Services for youth in crisis, and their families;
- Provision of civilian 'sobering up centres';[42]
- Alcohol and drug counselling, including both residential and community based rehabilitation options, psychological and psychiatric counselling, anger management and family violence counselling services. Ensuring that such are linguistically accessible and culturally appropriate is essential for Aboriginal and Torres Strait Islander peoples;

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[41] Ann Cunningham, 'Forgotten Families – the impacts of imprisonment' (2001) *Australian Institute of Family Studies – Family Matters*, No.59, pp 35-38, 38.

[42] See C S Reynolds, *Review of South Australia's Public Intoxication Act 1984* (2012). The review found that Sobering Up Centres are a key part of 'public order controls' that also provide a decriminalised way of responding to persons whose behaviour and state may threaten others as much as it poses a risk to themselves.

- Diversion/cautioning by police and courts;
- Police and Court referred Restorative Justice/Conferencing Programs;
- Initiatives like community courts that engage Aboriginal and Torres Strait Islander elders and community leaders in the justice process;
- 'Problem solving' courts like mental health and drug courts;
- Community work programs as an alternative to jail e.g. working on maintenance of community facilities, working for community organisations providing essential social services, working in community service roles like ranger programs and community work parties (subject to security clearance);
- Increasing resources for prison support and throughcare projects which provide intensive pre and post release case management. This could also include community driven initiatives like Strong Bala men's program in Katherine to support offenders once they leave prison; and
- Reducing caseload and shifting focus of community corrections officers so that they can work with people who are released on parole and under supervision to support their re-integration rather than having only a policing/compliance role.

In order for diversion and rehabilitation programs to be available and effective, it is essential that they are allocated sufficient funding to retain qualified staff and provide a high level of service. Government funding for these important services should be long term to ensure their sustainability and long term viability. The NATSILS consider that funding insecurity and funding cuts to essential diversion and rehabilitation programs, is significantly undermining the important work that these services carry out around the country.

For example, the Balanu Foundation in the Northern Territory has recently been advised that the Northern Territory Government will not be renewing its funding for 2013 and has had to close its doors. The Balanu healing program is a justice reinvestment program that in its own small way worked to close the gap and build stronger futures for young people, particularly young Aboriginal people in the Northern Territory. One of the many strengths of the program lay in the fact that it was Aboriginal and Torres-Strait Islander owned and operated. It was a grass-roots charity that has grown out of a real need to work with at-risk young people to build their self-esteem, resilience and re-connect to their culture.

The Coordinator- General for Remote Services in the Northern Territory recently observed that funding for youth services in particular, is "often piecemeal, short term, uncoordinated and with little promise of sustainable long term benefits" and that "only 8% of the 7,000 grants made by FaHCSIA were to Indigenous organisations."[43] This is a concerning trend that requires ongoing attention from Commonwealth and State and Territory governments.

[43] Office of the Northern Territory Coordinator General for Remote Services (2011-2012) 168 and 171 at http://www.drdia.nt.gov.au/__data/assets/pdf_file/0004/144886/NTCGRS_fullreport_2012.pdf

7.1 Cost

The cost savings generated by prevention, early intervention, diversion and rehabilitation programs/services represents an opportunity for long term fiscal savings for the community. There is also the opportunity to produce immediate reductions in prison numbers and thus relatively rapid cost savings through certain specific reforms, such as removing 'street time' provisions from parole law and shifting towards a model of community corrections supervision that is based on risk assessment rather than strict compliance.

Although the longer term benefits of preventative measures may take some time to produce appreciable cost savings, the NATSILS believe this investment can be considered analogous to a public health approach that values investment in the front end of the system, emphasising the importance of addressing issues early on so that they don't develop into more serious problems that are harder and more difficult to treat. For example, it makes fiscal sense to try and address health problems early on when they can be treated relatively simply and cheaply by a local GP rather than allowing the problem to escalate to the point that costly, complicated treatment is required from the emergency department.

The same arguments can be made for prevention, early intervention, diversion and rehabilitation programs/services. While some programs/services may be more resource intensive than others, and some (such as increasing rehabilitation options and reintegration support within corrections) may increase costs in the short term, the money that they save 'down the line' should be more than enough to justify such expenditure. Further, it has been shown that even relatively costly services such as residential rehabilitation programs are significantly less costly than imprisonment. By effectively addressing the underlying causes of offending such programs/services also have great potential to save further dollars through preventing reoffending.

The NATSILS do not have the capacity to conduct an in depth cost analysis of the entire spectrum of prevention, early intervention, diversionary and rehabilitative programs/services. However, we would like to provide the following case study as evidence of the kinds of savings that can be made.

Recent research from Deloitte Access Economics undertaken on behalf of the Australian National Council on Drugs found that:

> In 2009–10, there were 30 facilities providing residential drug and alcohol treatment to Indigenous people…Estimated expenditure per residential treatment client (including both operating and capital costs) ranged from $8608 to $33 822, with a mean of $18 385 and median of $15 556. The total average cost per client per day (including both operating and capital costs) is between $204.5 and $284.9.[44]
>
> The analysis in this report highlights the considerable benefits associated with the diversion of Indigenous offenders into community residential drug and alcohol rehabilitation services instead of incarceration. Diversion is associated with financial savings as well as improvements in health and mortality.
>
> - The total financial savings associated with diversion to community residential rehabilitation compared with prison are $111 458 per offender.

[44] Australian National Council on Drugs, above n 34, ix.

- The costs of treatment in community residential rehabilitation services are substantially cheaper than prison. Diversion would lead to substantial savings per offender of $96 446, based on a cost of community residential rehabilitation treatment of $18 385 per offender). Even if the high side estimate of the cost per offender for residential rehabilitation treatment was used ($33 822), the saving would still be substantial at around $81 000.[45]

- Community residential treatment is also associated with better outcomes compared with prison — lower recidivism rates and better health outcomes, and thus savings in health system costs. The savings associated with these additional benefits of community residential treatment are approximately $15 012 per offender.

- In addition, treatment of Indigenous offenders in the community rather than in prison is also associated with lower mortality and better health-related quality of life. In monetary terms, these non-financial benefits have been estimated at $92 759 per offender.[46]

As the residential treatment scenario is lower cost and is associated with better outcomes than incarceration, it is clearly the more advantageous investment.

7.2 Availability

There are numerous issues impacting upon the availability of prevention, early intervention, diversionary and rehabilitation programs/services. There are two issues in particular which affect Aboriginal and Torres Strait Islander peoples' access to such programs/services. Firstly, such programs/services are largely not available in regional and remote areas and where they do exist, they are usually full. For example, in 2009–10, nearly three-quarters of residential treatment and rehabilitation services providing services to Aboriginal and Torres Strait Islander clients had a waiting list.[47] In addition, there is also a lack of specifically culturally competent programs/services and a shortage of medical practitioners, counsellors and other specialised staff".[48]

And secondly, the eligibility criteria for such programs/services often pose a barrier to entry for Aboriginal and Torres Strait Islander peoples.[49] As a result, Aboriginal and Torres Strait Islander peoples are under-represented in diversion statistics. For example, in 2009–10, out of a total 17, 589 referrals from court diversion, 13.7 per cent were for Aboriginal and Torres Strait Islander peoples which is far lower than the proportion of Aboriginal and Torres Strait Islander peoples incarcerated.[50] Language and literacy concerns are also frequently cited as barriers to engagement with Aboriginal and Torres Strait Islander people, and the lack of culturally and linguistically adapted rehabilitation programs is a significant gap in service provision.

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[45] Australian National Council on Drugs, above n 34, ix.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.

7.3 Effectiveness

NATSILS does not have the capacity to provide an across the board analysis of every type of prevention, early intervention, diversionary or rehabilitative program/service. We would however, like to provide the following information on the proven effectiveness of a select range of programs/services.

An international review of restorative justice/conferencing programs compared to conventional criminal justice processes found that:

- restorative justice reduces repeat offending more consistently with violent crimes compared to less serious crimes;
- victims and offenders are more satisfied with restorative justice than with justice delivered through courts;
- victims who participate in restorative justice do better, on average, than victims who do not, including a reduction in post-traumatic stress; [51] and
- restorative justice reduces crime victims' desire for violent revenge against their offender.[52]

Other Australian research[53] has also found that:

- Indigenous young people were more likely to reoffend post court than those who attended a conference; and
- the reduction in reoffending rates of Indigenous young people mirrored the reductions for non-Indigenous young people post-conference compared to post-court.

The Queensland Youth Justice Conferencing Program has consistently delivered successful conference outcomes and participant satisfaction since first being piloted in 1997. The successes over the first 11 years have included:

- over 14,500 referrals being made to conference;
- over 11,500 referrals being conferenced;
- 97% of victims and 97% of young people who offended advising that they thought the conference was fair;

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[51] Angel, C (2005). *Crime victims meet their offenders: Testing the impact of restorative justice conferences on victims' post-traumatic stress symptoms*. PhD dissertation (University of Pennsylvania) in Sherman, L.

[52] Sherman, L & Strang H (2007). *Restorative Justice: The Evidence*. Esmée Fairbairn Foundation & The Smith Institute, London.

[53] Cunningham, T (2007). *Pre-court diversion in the Northern Territory: impact on juvenile reoffending.* Trends and issues in crime and criminal justice, no. 339. Australian Institute of Criminology, Australian Government.

- 97% of victims and 98% of young people who offended indicating satisfaction with the agreement;
- 98% of conferences reaching an agreement; and
- Only 9% of conference agreements being returned due to non-completion.[54]

In light of this Inquiry and at a time where governments should be looking for evidence based policy, it is troubling that the Queensland Government announced that the Queensland Youth Justice Conferencing Program would cease at the end of 2012.

Evaluations of diversion treatment programs for offenders with drug and alcohol problems are also favourable. In addition to results discussed above at 6.1, a separate study of outcomes for Drug Court participants[55] compared participants who successfully completed the treatment program, participants who did not complete the program, and a comparator group who were eligible for the Drug Court program but were excluded for various reasons, and who mostly ended up incarcerated. Outcomes for Drug Court participants (whether they completed the program successfully or not) were better than for the comparator group. Participants were less likely to be reconvicted of an offence, including offences against the person as well as drug offences. Furthermore, an evaluation of the Magistrates Early Referral into Treatment program in New South Wales also found a significant reduction in the re-offending rates.[56] The findings of these two studies are supported by findings of other research in Australia.[57]

Better still, early intervention through court programs, such as the Neighbourhood Justice Centre, the Victorian Court Integrated Services Program and the NSW Drug Court, have been shown to be cost effective ways of reducing crime.[58] Participants in the NSW Drug Court Completion Program were found to be 37% less likely to be reconvicted during the follow up period.[59] Offenders processed at the Neighbourhood Justice Centre were 14% less likely to reoffend than those processed at other courts[60] and the Court Integrated Services Program evaluation showed it generated a 20% reduction in reoffending rates for participants.[61]

ATSILS provide intensive pre and post release rehabilitation and reintegration services for Aboriginal and Torres Strait Islander prisoners from correctional centres and juvenile detention centres. These programs provide strength based case management and referral services to individual prisoners to assist them in accessing opportunities when they are

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[54] Queensland Government Department of Communities, *Youth Justice Conferencing Queensland: Restorative Justice in Practice* (2010) 64-65.

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

[56] Lulham, R, 'The Magistrates Early Referral Into Treatment Program: impact of program participation on re-offending by defendants with a drug use problem' (2009) *Contemporary Issues in Crime and Justice*, no. 131.

[57] Australian National Council on Drugs, above n 34, x.

[58] Smart Justice, *More prisons are not the answer to reducing crime (2011).*

[59] Weatherburn, Jones, Snowball & Hua *The NSW Drug Court: A re-evaluation of its effectiveness* (2008) Crime and Justice Bulletin 121; NSW Bureau of Crime and Justice Statistics.

[60] *Evaluating the Neighbourhood Justice Centre In Yarra 2007–2009* (2010) Neighbourhood Justice Centre, p ii. www.neighbourhoodjustice.vic.gov.au

[61] Department of Justice, *Court Integrated Services Program: Executive Summary Evaluation Report*, (2010).

released from prison or juvenile detention. This addresses an individual's diverse transitional needs including rehabilitation, accommodation, employment, education, training, health, life skills, reconnection to family and community and social connectedness.

NATSILS member organisation, the North Australian Aboriginal Justice Agency (NAAJA), runs an Indigenous Throughcare Project which promotes community safety by tackling re-offending. It seeks to do this by supporting Aboriginal and Torres Strait Islander prisoners and juvenile detainees from the time they are taken into custody, to help them plan their reintegration back into the community. A similar program is now being rolled out at CAALAS in Central Australia.

The NAAJA Throughcare program provides case management and referral services for individual prisoners to help them access opportunities during their time in custody, and upon release. This includes helping them address a diverse range of transitional needs including rehabilitation, accommodation, employment, education, training, health, life skills, reconnection to family and community and social connectedness. It is based on voluntary engagement, in that the clients must want NAAJA's help to make changes in their lives. NAAJA's clients design their case management plan. And importantly, it is an Aboriginal-owned response rather than a one-size-fits-all solution.

Since the Throughcare program commenced in February 2010, the team has case managed 218 clients. Only 30, or approximately 13.7% of Throughcare clients, have returned to prison whilst under the supervision of Throughcare workers. This compares favorably to the recidivism rate for Territory prisoners which is 47%, the highest in the country. Since rolling out post-release support services for some clients, the Central Australian Aboriginal Legal Aid Service (CAALAS), another NATSILS member organisation, has also seen a similar success rate.

8. The methodology and objectives of justice reinvestment

8.1 Objective

Justice reinvestment is a much needed, evidence based alternative to the current law and order approaches we see around Australia. Prisons will always be needed to protect society from serious and repeat violent offenders. However, a large proportion of offenders who fill up Australia's prions have committed relatively minor offences, such as traffic offences, or have simply committed conditional breaches of supervised orders. For these prisoners, detention represents an expensive and ineffective form of rehabilitation. Justice reinvestment targets these offenders and seeks to treat the underlying causes of offending to prevent crime before it happens and applies evidence-based treatment and economic rationality to dealing with those who continue to offend.

Justice reinvestment has the potential to appeal to a wide range of political constituents as its objective is to apply a data-driven, place-based and fiscally sound approach to the criminal justice system which aims to reduce offending and imprisonment, and thereby increase public safety, especially in those communities which need it most, and ensure that government spending is value for money. 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).[62]

This is achieved by identifying the areas where significant numbers of offenders come from or return to, identifying savings that can be made in the criminal justice system and then reinvesting these back into those communities to address underlying causes of offending and prevent further crime and then monitoring and evaluating the effect of such reinvestment. Each of these phases is discussed in further detail below.

8.2 Methodology

Justice reinvestment typically involves the following four phases:

8.2.1 Analysis and Mapping

Justice reinvestment in based on evidence that a large proportion of offenders often come from a relatively small number of disadvantaged communities. This first stage of justice reinvestment looks at analysing data to identifying where high numbers of offenders are coming from (and returning to) as well as factors which are driving high rates of offending and imprisonment. It also involves mapping the 'community assets' in those communities such as various government, non-government, civic, community, business, educational, familial, religious, sporting and cultural organisations and agencies that are a source of strength and social cohesion.[63]

8.2.2 Generating Savings

This stage focuses on developing and adopting policies that manage existing resources and generate savings without compromising public safety.[64] It is important to emphasise that this process involves identifying savings that can then be reinvested and as such is a diversion or shift of spending rather than an *increase* in spending. Identifying savings involves looking at why there is such a high rate of imprisonment and particularly, return to custody, and then identifying changes that will address these and produce savings in the cost of imprisonment.

Measures to generate savings could include changes in how technical matters like bail and parole are dealt with, providing community based alternatives for non-violent offenders and reducing the length of prison sentences.[65] For example, some significant research has been produced showing the effect that reducing time spent in prison, eliminating the use of prison for parole or probation technical violators, reducing the length of parole and probation supervision periods, and decriminalising 'victimless' crimes (particularly those related to drug use and abuse) could have on reducing imprisonment rates, and generating associated savings, while posing no risk public safety.[66] A recent report by Deloitte Access

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[62] Tess Lanning, Ian Loader and Rick Muir, *Redesigning Justice: Reducing Crime Through Justice Reinvestment* (2011) 4.
[63] D Brown, M Schwartz and Laura Boseley, 'The Promise of Justice Reinvestment' (2012) *AltLJ* 37, pp 96-102, 97.
[64] See http://www.ncsl.org/issues-research/justice/justicereinvestment.aspx
[65] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), 20.
[66] James Austin et al, *Unlocking America: Why and How to Reduce America's Prison Population* (2007), 23-24.

Economics for the Australian National Council on Drugs, as discussed above, also recommended that non-violent offenders be treated outside the prison system at a saving of $110,000 per year, per offender.[67] A recommendation which they found would not only generate significant savings but also produce better outcomes in terms of community safety.

8.2.3 Reinvestment

Once savings have been identified, these funds can then be reinvested into community and justice programs which address the identified underlying causes of offending (as per stage 1 Analysis and Mapping). The important part of this stage is to recognise that one size will not fit all and that it is essential for government to partner with community in identifying the needs of that community as well as the solutions. A justice reinvestment plan will need to be developed for each community identified in the Analysis and Mapping stage that is based on the specific drivers of crime and the 'community assets' of that community. For example, while one community may need investment in drug and alcohol rehabilitation services, another might already have these but alternatively needs investment in mental health services. As identified above, investment in prevention, early intervention, diversionary and rehabilitative programs/services will also be a central part of justice reinvestment plans. By developing these plans in partnership with the local community, the Government will ensure that justice reinvestment activities will not only be addressing the right areas, but will also be building community capacity and cohesion at the same time.

8.2.4 Monitoring and Evaluation

Given importance that justice reinvestment places on being evidenced based, it is critical that the fiscal and criminal justice effects of reforms and reinvestments is effectively and regularly monitored and evaluated to ensure that projected results and benefits are being achieved.[68] Monitoring and evaluation must ensure that the projected savings are being realised and that the reinvestment of these funds is having the desired effect on offending and incarceration rates. While sufficient time will need to be given before results can be determined, if over time a lack of progress is found, then government and community may need to revisit the previous stages of justice reinvestment and check their analysis of the drivers of crime and the policies needed to address these.

9. The implementation and effectiveness of justice reinvestment in other countries, including the United States of America

At least 27 states in the United States of America (USA) have implemented some form of justice reinvestment initiative.[69] While justice reinvestment initiatives have existed in the USA since 2006, Congress formalised justice reinvestment in 2010 under the Justice Reinvestment Initiative (JRI) which sits within the Bureau of Justice Assistance (BJA) as part of the Department of Justice, in coordination with a number of national partners.[70] The JRI provides technical assistance and competitive financial support to states, counties, cities, and tribal authorities that are either currently engaged in justice reinvestment or are well

[67] Australian National Council on Drugs, above n 34.
[68] See http://www.ncsl.org/issues-research/justice/justicereinvestment.aspx
[69] Ibid.
[70] See http://www.ncsl.org/issues-research/justice/ncsl-criminal-justice-program-partners.aspx

positioned to undertake such work.[71] Any state, county, city or tribal authority interested in developing and implementing a justice reinvestment initiative in their jurisdiction makes contact with the JRI through the BJA who then guides and assists them through the process.

The BJA outlines the following key requirements for all jurisdictions interested in participating in the JRI:

- Leaders from all branches of government are committed to the goals of justice reinvestment and are willing to work through an intensive data-driven process;
- Officials commit to assisting the justice reinvestment team in setting up and coordinating focus groups, meetings, and interviews with criminal justice officials and stakeholders from across the system, as part of the assessment process before approval of the jurisdiction's selection;
- All relevant criminal justice agencies are willing to provide individual-level data for analysis; and
- The jurisdiction demonstrates a commitment to providing the staff support and data needed to assist the BJA in their delivery of intensive technical assistance, which includes qualitative and quantitative research, policy analysis, stakeholder engagement, communications support, and project management.[72]

Bipartisan support has been a central factor to the success of justice reinvestment in the USA with both Democrats and Republicans signing on to justice reinvestment principles.[73]

One of the central benefits of justice reinvestment is that it is not a one-size-fits-all approach but rather takes into account and addresses the specific needs of each location. Rather than analysing the specific measures and results in each of the 27 jurisdictions in the USA where justice reinvestment has been implemented, the NATSILS would like to provide information as to the effectiveness of justice reinvestment in Texas, which was one of the first states in the USA to implement justice reinvestment, by way of example. For information as to the effectiveness of justice reinvestment in other states in the USA the NATSILS suggest visiting the *Right on Crime* website at http://www.rightoncrime.com/reform-in-action/ .

Traditionally, Texas has been known for its tough on crime approach and high incarceration rate. In recent years however, in response to unsustainable spending, Texas has implemented a justice reinvestment campaign that has strengthened alternatives to incarceration for adults and juveniles, achieving significant reductions in crime whilst also saving significant amounts in government spending. Through justice reinvestment Texas has achieved:

- Avoiding more than $2 billion in taxpayer costs that would have been incurred had Texas simply constructed more than 17,000 prison beds that a 2007 projection indicated would be needed. Instead, the state legislature invested $241million in

[71] See https://www.bja.gov/ProgramDetails.aspx?Program_ID=92
[72] See https://www.bja.gov/ProgramDetails.aspx?Program_ID=92
[73] See http://www.rightoncrime.com/

residential and non-residential treatment-oriented programs for non-violent offenders, along with enhanced in-prison treatment programs.

- A marked decline in juvenile crime as well as a reduction of 52.9 percent in the number of youths in state institutions.
- A decline of 12.8 percent in serious property, violent, and sex crimes since 2003.[74]
- A 5 percent drop in murders over 12 months from 2007 to 2008
- A 4.3 percent drop in robberies
- A 6.8 percent decline in forcible rapes.[75]
- The lowest per capita crime rate in Dallas in 40 years in 2008, declining 10 percent from 2007.[x] It dropped another 10.7 percent over the next 12 months into 2009.[76]
- A decline in the incarceration rate of 4.5 percent while the average state incarceration rate increased by 0.8 percent.[77]
- A decline of 7.6 percent in the number of parolees convicted of a new crime from 2007 to 2008, despite an *increase* in the number of parolees.[78]
- A 27.4 percent decline in parole revocations from 2007 to 2008.[79]

10. The benefits of, and challenges to, implementing a justice reinvestment approach in Australia

10.1 Benefits

10.1.1 Community safety

By providing programs that address the underlying causes of offending, and which appropriately fit the punishment to the crime, justice reinvestment would ultimately result in reduced offending and safer communities. It would ensure that approaches to crime are evidenced based and regularly evaluated for results to make sure that they are delivering what has been promised.

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[74] Texas Law Enforcement Agency Uniform Crime Reports Crime Index Rates Per 100,000 Inhabitants, 11 Dec. 2009, 10 Jan. 2010, http://www.disastercenter.com/crime/txcrime.htm.
[75] Ibid..
[76] Robert Wilonsky, "A DPD Crime Report Clip-N-Save," 24 Sept. 2009, 10 Jan. 2010, http://blogs.dallasobserver.com/unfairpark/2009/09/a_dpd_crime_report_clip-n-save.php
[77] "Prisoners in 2008," U.S. Bureau of Justice Statistics, 8 Dec. 2009, 10 Jan. 2010, http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.
[78] Texas Board of Pardons and Paroles 2008 and 2007 Annual Reports, http://www.tdcj.state.tx.us/bpp/publications/publications.html.
[79] Legislative Budget Board, email, 16 Dec. 2009.

Justice reinvestment focuses on communities that produce significant amounts of offenders and then targets the circumstances in these communities that relate to such offending. This serves to both prevent offending in the first place as well as reoffending once an individual returns to the community from a period of imprisonment. In this way, justice reinvestment isn't just about individual offenders but is also about providing a benefit to the wider community that they come from.

10.1.2 Cost-effectiveness

Utilising a justice reinvestment approach would also ensure that tax payers receive a better 'bang for their buck' in regard to government spending on the justice system. It would ensure a cost-effective, fiscally sound approach to justice spending that prevents wastage on ineffective policies. With the current fiscal environment it is of critical importance to ensure that all government expenditure equates to value for money.

In light of the drivers of Australia's high imprisonment rates as identified above, there is great potential to generate savings as per the justice reinvestment model. By generating savings in spending before reinvestment occurs, justice reinvestment does not require a large injection of new funds and thus, the barrier of finding new additional money in tight government budgets is overcome. Savings generated by justice reinvestment approaches also has the potential to free up funding for investment in other areas of importance to taxpayers such as education, health and infrastructure.

By addressing underlying issues, preventing people from offending and more effectively rehabilitating those that do, justice reinvestment also has the potential to drastically improve people's lives and increase their productivity and contribution to society and the economy.

10.1.3 Healthier families and breaking the cycle

By reducing offending and imprisonment justice reinvestment would reduce the amount of children with an incarcerated parent and prevent the harm associated with such. It would create healthier families and children who have both parents around to care for them. This has potential to not only reduce the amount of children who end up the child protection system but also help break the cycle of intergenerational offending.

10.1.4 Aboriginal and Torres Strait Islander over-representation

Given the common underlying causes of Aboriginal and Torres Strait Islander offending and over-representation in prisons as outlined above, and the central aim of justice reinvestment to address such underlying causes, justice reinvestment has the potential to put a stop to this unacceptable over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Australian research has found that:

> Since JR focuses on locations that produce high numbers of prisoners, the sheer extent of Indigenous over-representation in the criminal justice system means that some of these locations will be home to high numbers of Indigenous people. This reasoning is reflected in the American experience of JR: initiatives in the United States have not specifically targeted racial groups; however, in practice they have been largely directed towards African American

> populations as a result of the disproportionate representation of that demographic in custody.[80]

The characteristics of justice reinvestment also align well with notions of self-determination and principles for working with Aboriginal and Torres Strait Islander peoples. For example,

> There are a number of characteristics more likely to be found in Indigenous communities that make them suitable for JR policies. While in some cases these characteristics contribute to high levels of imprisonment, they also present opportunities because they are the types of issues that reinvestment strategies can attempt to address. These characteristics include the high level of disadvantage in many Indigenous communities, the higher numbers of Indigenous people living in remote locations and the high level of victims' needs in the Indigenous population.
>
> In addition, the processes which characterise JR align well with what is acknowledged to be 'best-practice' in program implementation in Indigenous communities. These processes include the necessity for bipartisanship and consensus-driven solutions, the devolution of decision-making to the local level, the localisation of solutions, and the high level of input from the high-stakes communities about what might address criminogenic factors in that particular place. The democratic nature of decision-making in the JR methodology is a significant departure from the way that government has traditionally approached policy making for Indigenous communities, but it coheres with what Indigenous advocates have always said about how to give programs implemented in Indigenous communities the best chance of success: by letting communities lead the direction of those strategies.[81]

10.1.5 Mental illness and cognitive/intellectual disability

Justice reinvestment would also be an effective means of addressing the over-representation of people with a mental illness or cognitive/intellectual disability. By generating savings by treating people with a mental illness or cognitive/intellectual disability outside of the prison system, resources could be invested into community support and treatment facilities. This would mean that the police would no longer be the only option available in relation to dealing with behaviour that is the result of a mental illness or cognitive/intellectual disability and that courts would also have appropriate facilities that they could divert people to where necessary. Aside from a criminal justice issue, such investment should also be seen as a basic investment in the health system that would dramatically improve the quality of many people's lives.

10.1.6 Over-representation of people with a hearing impairment

Justice reinvestment could also be a useful tool in addressing the over-representation of people with a hearing impairment. For example, during the reinvestment phase, in relevant communities investment in early childhood health programs to help screen and treat inner ear infections that cause hearing impairments could form part of the community's reinvestment plan.

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[80] Schwartz, Melanie, Brown, David Bentley and Boseley, Laura, *The Promise of Justice Reinvestment* (2012) at SSRN: http://ssrn.com/abstract=2078715 .
[81] Schwartz, above n 80.

10.2 Challenges

10.2.1 Rationality v Emotion

Perhaps the most significant challenge to building momentum behind justice reinvestment in Australia in changing community perceptions about crime and educating the public as to what actually works to make them safer. If the general public could be made to understand that crime is not increasing, that tougher sentences will not actually make their communities safer, and that better outcomes could be achieved for less money, governments could then move away from 'tough on crime' campaigns without jeopardising their election chances. However, rationality, evidence based and cost effective arguments may not address the emotive and retributive sentiments central to criminal justice politics. For example:

> Fiscal 'rationality' arguments do not necessarily trump emotive law and order policies that are electorally popular. The limits of rationality are shown in studies where large sections of the public believe that crime rates are higher than ever (although they have been decreasing), and that judges are more lenient (when sentences have actually become considerably longer).[82] Retributive sentiments are central to long established justifications for punishment as 'deserved' and are deeply culturally embedded, such that they cannot (and arguably should not) just be 'wished away' or ignored. Similarly, the Durkheimian view that punishment is not aimed primarily at affecting offenders but at defining and promoting community cohesion and a collective morality, is not sufficiently addressed in the calculus of fiscal rationality. A key issue then is the extent to which JR approaches can overcome a reliance on economic rationalities and be theoretically articulated with various moral and social approaches to penality.[83]

For community perception and understanding to change, both politicians and the media will need to change the way they talk about the justice system. Government communications will need to move away from emotive language that that arouses and exploits people's fears. This will take political courage and leadership.

10.2.2 Bipartisanship

As outlined above, justice reinvestment requires significant changes to sentencing, parole and bail, and subsequent reinvestment in prevention, early intervention, diversionary, rehabilitative and post release programs. As seen in the experience of the USA, bipartisanship between both major parties is critical for justice reinvestment to be a reality. While bipartisanship between the current major parties in Australia is not very common, it can be argued that they are not as far apart on the political spectrum as Democrats and Republicans in the USA. In fact, the broad appeal of justice reinvestment across diverse political constituencies may be just the thing to bring political parties together.

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[82] See, eg, Craig Jones, Don Weatherburn and Katherine McFarlane 'Public Confidence in the NSW Criminal Justice System' (2008) 118 *Crime and Justice Bulletin*, NSW BoCSAR; See also Judicial Commission of NSW, 'The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in NSW' (May 2010) Research monograph 33.

[83] Schwartz above n 80, 100.

10.2.3 Coordination and Funding Arrangements

From experience it seems that the need to identify a central independent coordinating agency, like the BJA in the USA, with the necessary skills and expertise is of high importance to the success of justice reinvestment. A political structure for devolution of funding and responsibility for implementation will also need to be developed. For example, questions such as whether funding for initiatives would come through the central independent coordinating agency or directly from government need to be resolved.

Such a process will inevitably need to involve State and Territory governments as the administrators of criminal justice as well as the Commonwealth government given their involvement in services related to Aboriginal and Torres Strait Islander peoples.

A central independent coordinating body would:

- Provide non-partisan advice to both government, NGOs and communities on effective, evidenced based justice reinvestment initiatives;
- Collect data and identify communities for justice reinvestment initiatives;
- Assist in strategic development of justice reinvestment plans; and
- Assist with building community capacity, monitoring selected policy options and ongoing evaluation of social and economic outcomes.

11. The collection, availability and sharing of data necessary to implement a justice reinvestment approach

A very specific yet broad range of data is needed for the development and implementation of justice reinvestment. While some data may already be available, or deducible from other data systems, some data streams may need to be collected from scratch. Hence, there may need to be an initial data collection phase before justice reinvestment planning can take place. Appendix A provides a very detailed brief from the Urban Institute Justice Policy Centre, a non-partisan economic and social policy research centre in the USA, as to exactly what data is needed, how it can be collected and from where.

12. The scope for Federal Government action which would encourage the adoption of justice reinvestment policies by State and Territory governments

Given that criminal justice systems are the responsibility of State and Territory governments, for justice reinvestment to be implemented in Australia, State and Territory governments will need to be on board. While some jurisdictions, such as NSW, have recently shown some indication that they may be turning away from 'tough on crime' law and order approaches, others are still forging ahead along this path. There is potential here for the Commonwealth Government to play a significant leadership role in securing the necessary buy in from State and Territory governments for the implementation of justice reinvestment in Australia.

RECOMMENDATIONS

1) *That the Commonwealth Government work with opposition parties to secure bipartisan support at the federal level for justice reinvestment.*

2) *That the Commonwealth Government work with the Standing Council on Law and Justice to secure agreement with State and Territory governments to commit to jointly establishing an independent central coordinating agency for justice reinvestment.*

3) *In securing agreement with State and Territory governments, that the Commonwealth Government consider the potential for attaching relevant conditions to the funding it provides to State and Territory governments.*

4) *In the event that agreement is not secured, that the Commonwealth Government itself establish an independent central coordinating agency for justice reinvestment.*

5) *That the central coordinating agency focus on building the evidence base that will inform justice reinvestment initiatives. Such will not only assist in identifying locations for justice reinvestment initiatives but will also provide the necessary data to inform modelling as to the fiscal benefits that could be achieved which could serve to convince any State and Territory governments which have not yet signed on.*

6) *Given the over-representation of Aboriginal and Torres Strait Islander peoples in Australia's prisons, the central coordinating agency and any subsequent justice reinvestment initiatives in Aboriginal and Torres Strait Islander communities must have, and insist on, cultural expertise at all stages of project design and implementation. Such would also be in recognition of the principles of community control, free, prior and informed consent and self-determination. Local and peak Aboriginal and Torres Strait Islander organisations could assist here.*

7) *That Commonwealth, State and Territory governments progress their previous commitment to introduce justice targets under the Safe Communities Building Block of the Closing the Gap policy initiative. Such targets should be included in a National Partnership Agreement relevant to the Safe Communities Building Block that also makes references to the implementation of justice reinvestment initiatives for Aboriginal and Torres Strait Islander communities.*

8) *That robust evaluation of initial justice reinvestment trials be completed in order to assess outcomes and provide evidence as to its effectiveness. Such could then be used to secure further buy in from non-participant jurisdictions.*

13. Appendix A

URBAN INSTITUTE
JUSTICE POLICY CENTER

Data-Driven Decisionmaking for Strategic Justice Reinvestment

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JUSTICE REINVESTMENT AT THE LOCAL LEVEL

BRIEF 2

MAY 2012

Justice reinvestment aims to make more efficient use of criminal justice resources while maintaining public safety. The local justice reinvestment process involves identifying drivers of criminal justice system costs, targeting alternative allocations of resources to reduce those costs, and reinvesting the savings in areas that will contribute to increased public safety. Counties across the country are grappling with burgeoning criminal justice populations and dramatic increases in related costs. Implementing justice reinvestment enables local jurisdictions to generate better and more sustainable results from ever scarcer resources.

In the Justice Reinvestment at the Local Level (JRLL) model (depicted in figure 1), data from agencies throughout the county are analyzed to identify opportunities for increased criminal justice efficiencies and to measure the impact of reinvestment activities. Two distinct types of criminal justice data inform justice reinvestment: population data and cost data. Population data guide stakeholders where to target strategies to improve public safety while also yielding cost savings. Cost data enable jurisdictions to identify areas that consume disproportionate resources and help quantify anticipated savings for reinvestment. These data can also be used as ongoing performance measures to monitor progress and ensure that changes are sustained.

This policy brief addresses the value and use of data to

- identify population drivers,
- quantify cost drivers,
- guide reinvestment efforts, and
- ensure sustainability.

To illustrate the mechanics of applying data to justice reinvestment, this brief uses the fictional example of Doe County. While the experiences of Doe County are grounded in the

Figure 1. Local Justice Reinvestment Model

implementation experiences of real counties and provide realistic depictions of the process, all numbers and examples are fictional and should not be attributed to any specific site.

Locating and Accessing Data

As the central point on the justice reinvestment model indicates (see figure 1), the key to successful implementation is interagency strategic planning.[1] Once an active collaborative body is in place, the next step is to collect and analyze data to inform the development and implementation of more cost-beneficial interventions. Data used to inform a reinvestment strategy and measure its impact must come from agencies across the locality and criminal justice system. For example, it is nearly impossible to understand why the jail population fluctuates without examining data from the courts, arresting agencies, the jail, and other relevant local agencies. The necessary data may already be collected in the county or may be generated using existing data systems. It is possible, however, that desired data may not be accessible retrospectively and can only be collected moving forward.

Table 1 details the data various agencies may be able to provide in order to identify cost and population drivers in the county. Note, however, that these agencies may have limited experience coordinating data sharing and may have incompatible data management programs, different definitions of key elements, and disparate standards for sharing data.[2]

Identifying Population Drivers

The first two phases of the justice reinvestment model involve using data to identify areas where efficiencies can generate savings. While justice reinvestment requires stakeholders to examine costs across the system, the largest cost-efficiency improvements can often be identified by reviewing how populations flow through the local jail.

Although jails typically represent a major financial cost to the local criminal justice system, other agencies' decisions impact jail populations. Identifying how populations move through the local criminal justice system, with an eye toward targeting drivers of jail costs, can illustrate where improved efficiencies may be found.

To identify drivers, stakeholders might begin by asking the following questions of the criminal justice system (or refer to the Getting Started worksheet "Moving Data Collection Forward" at the end of this brief):

- Which individuals flow through the following system stages: jails, courts, alternatives/diversions, and probation/parole?
- What factors (such as charges) influence their movement through the system?
- For how long are these individuals in the system (what is their average length of stay at each point)?

Table 1. Potential Data for Intervention Points

Intervention point	Data information intervention point	Associated agency costs
System entry	■ Arrest/citation information ■ Booking information ■ Demographics ■ Charges ■ Risk/needs information	■ Arresting agency costs (including overtime) ■ Jail costs (including overtime) ■ Court costs (calendaring, bail hearings, court staffing) ■ Prosecutor costs ■ Defense attorney costs
Pretrial	■ Pretrial release method ■ Pretrial release information (employment, priors, etc.) ■ Indigency procedures ■ Release eligibility ■ Type of release ■ Pretrial diversion or alternative programs (drug court)	■ Pretrial diversion operating costs ■ Specialized docket costs ■ Community supervision costs ■ Release condition costs
Case processing	■ Length of stay in detention facility ■ Case processing disruptions (resets, continuances, failures to appear, etc.) ■ Case processing time (time from arrest or arraignment to case disposition)	■ Court administration costs ■ Prosecutor costs ■ Defense attorney costs ■ Jail costs
Sentencing	■ Use of alternatives to jail (e.g., community supervision, diversion programs, treatment programs etc.) ■ Sentence length ■ Sentence type ■ Postrelease supervision	■ Court administration costs ■ Alternative program costs ■ Jail costs
Reentry	■ Volume of repeat bookings, arrests, and convictions ■ Characteristics (type of charge, previous release, sentence, etc.) of recidivist population	■ Reentry service provider costs ■ Costs from agencies involved in incarceration and case processing ■ Costs associated with the recidivist population (disproportionate resources used across wide variety of agencies)

- How do they exit the criminal justice system?
- Who returns and why?

In answering these fundamental questions, stakeholders can identify opportunities for strategic changes that can both significantly reduce criminal justice costs and meaningfully enhance public safety. For example, a review of Doe County's data revealed that over 70 percent of jail detainees were being held on a pretrial status. This figure is nearly 10 percent higher than the average for U.S. jails (Minton 2011), which highlighted the pretrial population in Doe County as a potential population driver meriting further review. To determine why this population is high, stakeholders examined additional characteristics, including charges, demographics, and characteristics representing risk (e.g., criminal justice history) and needs (e.g., chronic homelessness), as well as the movement of their cases through the system.

The Doe County data analysis also demonstrated that although the bulk of the pretrial population was able to post bail, the process took an average of seven days from booking to release. This finding suggests that jail bed consumption for the population of pretrial detainees

is more likely caused by processing delays and challenges in posting bond, rather than court decisions to deny bail. Thus, there is likely an opportunity to expedite bail procedures, a change that could save money by reducing the jail space required for this population without altering existing release policies or court decisions. This population's imminent release also suggests that expediting bail procedures would have little impact on public safety. The next step was for Doe County to examine whether case processing or bail policies could be changed to expedite progression through the system and then to assess whether such changes would yield cost savings or affect public safety.

Indeed, public safety must be at the forefront when considering modifications to current criminal justice operations. The justice reinvestment model would enhance public safety by allocating resources more cost effectively, rather than cutting expenses to the detriment of public safety. Stakeholders should seek out data-supported interventions that both enhance safety and reduce costs.

Quantifying Cost Drivers

Not all drivers have equal costs, and collecting data can help jurisdictions quantify the costs of current criminal justice practices objectively and responsibly; doing so enables the identification of changes to policies and practices that will yield the greatest possible savings. To begin quantifying costs, it is important to start with a common language that ensures the concerns of stakeholders are adequately addressed. As the jail is often a large cost, it is valuable to quantify how expensive, on average, it is for the county to keep an individual in jail. The most basic calculation of this figure is called a jail bed day (JBD) and can be determined by using the equation below.

average length of stay × *number of admissions* = *jail bed days consumed*

Jail bed days are valuable for demonstrating the relationships among admissions, length of stay, and the relative costs to the system of different populations within the jail.[3] This calculation cannot be used, however, to quantify savings reliably due to the marginal costs associated with operating a detention facility. The formula is best used to compare the resource consumption of different populations, such as unsentenced misdemeanants and unsentenced felons, and is valuable in demonstrating how changes in jail bed day consumption impact the average daily population (ADP). Through this comparison, policymakers can target groups that consume the largest share of resources rather than relying solely on the number of admissions. As the formula suggests, a few individuals who stay in the jail for a long period of time can, and often do, consume more resources (in the form of jail bed days) than a large number of individuals who remain in the jail for a short period of time.

However, actual costs of the jail facility are based primarily on unit costs rather than per capita costs. For example, a facility may need a reduction of 30 jail bed days, sustained over a year, before costs can be reduced by closing a dormitory or reducing a food contract. While closing a jail facility is unrealistic for many counties, unit reductions such as closing a housing unit or eliminating a duty post can significantly alleviate costs. Such a shift can also mitigate the need to build a new facility, an option that should be viewed as the last possible strategy for reducing pressures on existing jail capacity. The example of Doe County below aims to illuminate how calculations and data can inform JRLL efforts.

Examining budget data and operating costs can help stakeholders determine the most cost effective options while maintaining public safety. To quantify these options, data should be collected on populations served, costs per person and per unit, capacity, and enrollment for each potential outcome (jail,

Strategizing with Data

Example 1

Assume that over the period examined, the Doe County jail has an ADP of 1,000 people; they have noted that over 70 percent of their population had not been adjudicated. County stakeholders decide to examine how to process this pretrial population more efficiently. In a representative month, the jail reports that 400 people with felony charges were released on bail, posting in an average of 10 days, and 500 people with misdemeanor charges were released on bail, posting in an average 7 days. The JBD formula indicates that people who eventually posted bail consumed 7,500 jail bed days in one month (4,000 from felony charges, 3,500 from misdemeanor charges). If the time taken for this group to post bond could be reduced to felonies posting in 5 days and misdemeanors posting in 3 days, the group would consume just 3,500 JBDs monthly, a net reduction of 4,000 JBDs per month. Speeding up the bail process for those who will eventually post bail, an option that requires neither releasing more nor booking fewer individuals, is the equivalent of reducing the ADP for this population by 11 people per month, or just under half of a 30-bed dormitory. Doe County previously only allowed bail to be posted in person at the jail from 7:00 a.m. through 9:00 p.m. Monday through Friday. Enacting a simple change in how bail is accepted, by allowing people to post bail by telephone or online, accomplished this goal by decreasing the average amount of time to post bail. Used in conjunction with other interventions, this approach could enable Doe County Jail to close a dormitory.

Example 2

Data from Doe County also indicated that about 35 percent of the population had been booked into the county jail multiple times within one year. However, in examining the number of individuals and the aggregate length of time they spent in the jail facility, stakeholders discovered that this 35 percent of the population was consuming nearly 70 percent of the facility's JBD resources. Stakeholders then focused data collection on that 35 percent, who were returning detainees, to determine the population's characteristics and reasons for jail return. The answers helped leaders determine which strategies could maximize cost savings and enhance public safety. In Doe County, this "frequent user" population was determined to be largely homeless; therefore, stakeholders developed interventions to provide supportive housing with the help of local community agencies. If the population were composed largely of chronic inebriates or those with mental illnesses, alternatives such as expanded inpatient care might prove beneficial.

probation, alternatives/diversion programs, bail types, etc.) and on recidivism rates (ideally by population type).

Directing Reinvestment Efforts

Once population and cost drivers have been identified, data can inform the best approach to addressing each driver. Anticipated cost savings, reinvestment strategies, and sustainability plans can be projected to enable stakeholders to make informed decisions. Such projections should include

- real estimates of how much the population must decline to achieve significant cost savings,
- projected cost reductions based on county experiences and studies of similar programs, and
- the timeline for reinvestment implementation.

Engaging in such data-driven planning enables stakeholders to assemble formal or informal agreements about how generated savings will be reinvested (see worksheet). Savings frequently come in averted spending (e.g., reduced population precludes the need to construct additional space or hire additional staff), rather than a reduction in the current operating budget. More significant savings may be realized over several years. Therefore, modeling the system impacts and grounding

these projections in data is crucial to developing a successful reinvestment strategy and achieving collaboration at the reinvestment stage.

Ensuring Sustainability

Data are integral to sustaining the iterative process of justice reinvestment by facilitating collaboration, providing feedback on intervention strategies, and informing future efforts. Performance indicators can be used to monitor progress throughout the JRLL process, to identify potential shifts early enough to implement interventions, and to continue to justify and target reinvestment spending. Performance measures are generally divided into two categories: internal and external. Internal measures, such as evaluating the size of the jail population or program enrollment, are typically objective quantitative data and enable stakeholders to monitor changes within the system and measure successes over time. External measures, such as the degree of interagency collaboration, provide stakeholders with information to assess the context of information related to the local criminal justice system policies and fiscal impact (Allen 2010). Table 2 shows some internal and external performance measures relevant to monitoring the jail population.

By monitoring these measures, the jurisdiction can accurately quantify and assess the state of the criminal justice system, identify significant deviations from expected norms, and plan activities accordingly (CCAP and Temple University 2005). For example, if a rapid spike in violent crime is experienced, an increase in the jail population can be anticipated. With this information, law enforcement and jail staff can prepare to accommodate fluctuations in the jail population as cost effectively as possible without compromising public safety. If internal and external factors are not consistently monitored, they may turn foreseeable challenges into unforeseen crises.

Additional Resources

Justice Reinvestment at the Local Level Brief Series: Tracking Costs and Savings through Justice Reinvestment, http://www.urban.org/url.cfm?ID=412541.

Justice Reinvestment at the Local Level Brief Series: Improving Strategic Planning through Collaborative Bodies. http://www.urban.org/url.cfm?ID=412543.

Justice Reinvestment at the Local Level Planning and Implementation Guide. http://www.urban.org/url.cfm?ID=412233.

Table 2. Performance Measures

Internal performance measures	External performance measures
■ Number and type of arrests	■ Fear of crime
■ Number of bookings into jail	■ Perceptions of community quality of life
■ Size of the jail detainee population	■ Speed of case processing
■ Number of detainees eligible and released on bond by offense type	■ Use of bail policies
■ Number of detainees eligible and released on recognizance (personal bond) by offense type	■ Perceptions of personnel efficiency
■ Number of dispositions	■ Confidence in the use of criminal justice fiscal resources
■ Time between case processing events	
■ Enrollment in and completions of programs	
■ Number of individuals on parole/probation	
■ Number and type of technical violations	

Notes

1. For more information, see the companion brief by Archer, Neusteter, and Lachman (2012).
2. More information on overcoming data challenges is available in La Vigne et al. (2010).
3. For a detailed explanation of the relationship between length of stay, number of bookings, and jail population fluctuations, see Cushman (2002).
4. More detailed information on developing a reinvestment strategy is available in the companion brief by Lachman and Neusteter (2012).

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Getting Started Worksheet: Moving Data Collection Forward

To use data to inform local justice reinvestment efforts, the first step is to convene stakeholders[a] to discuss what information is available. The following set of questions can help jurisdictions develop individual data approaches:

1. What agencies are involved in the criminal justice system and how do they approach data now?

What agencies are involved in the criminal justice system?	Are data compatible with other agencies?		Do memorandums of agreement exist to enable data sharing?		Is there a common identifier to link data files?	
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No
	Yes	No	Yes	No	Yes	No

What data are collected on the jail population?	What data could be collected in the future?	Which agency has these data?

2. What alternatives/programs have been implemented already, and what is currently working?

What alternatives/programs have been implemented already?	Is there enough capacity for demand?		Has this program been evaluated?		What impact has this program had on crime or recidivism?
	Yes	No	Yes	No	
	Yes	No	Yes	No	
	Yes	No	Yes	No	
	Yes	No	Yes	No	
	Yes	No	Yes	No	
	Yes	No	Yes	No	
	Yes	No	Yes	No	

3. What costs are associated with different criminal justice outcomes?

a. Read more about stakeholder engagement in the companion brief "Improving Strategic Planning through Collaborative Bodies" (Justin Archer, S. Rebecca Neusteter, and Pamela Lachman, Justice Reinvestment at the Local Level brief 3. Washington, DC: The Urban Institute, 2012. http://www.urban.org/url.cfm?ID=412543.)

CJ outcome	Annual costs	Costs per person	Agency/ies involved	Populations served	Are any populations particularly costly?
Incarceration	$	$			
Probation	$	$			
Substance abuse diversion	$	$			
Mental health diversion	$	$			
Other	$	$			
Other	$	$			

4. What is driving the jail population?
   Consider unsentenced population (court processing, bail issues), sentenced population (transfers to prison, length of sentence), frequent users (those who are homeless, chronically inebriant, and/or have mental health conditions or co-occurring disorders).

5. What data would convince stakeholders to commit to reinvestment strategies?

Where would savings accrue?	What agency budgets would be impacted?

6. How are data being used to measure success and ensure the long-term sustainability of effective programs/ initiatives?

The Justice Reinvestment Initiative

In October 2010, the Bureau of Justice Assistance formalized the Justice Reinvestment Initiative (JRI) to expand prior state and local justice reinvestment work. JRI provides technical assistance and competitive financial support to states, counties, cities, and tribal authorities either currently engaged in justice reinvestment or well positioned to undertake such work. The initiative is structured in two phases: in Phase I sites receive intensive onsite technical assistance to start the justice reinvestment process and in Phase II sites receive targeted technical assistance and are eligible for seed funding to support the implementation of justice reinvestment strategies. For more information about JRI, visit http://www.bja.gov/JRI. Justice Reinvestment at the Local Level (JRLL) was a partnership between the Urban Institute and three local jurisdictions: Alachua County, Florida; Allegheny County, Pennsylvania; and Travis County, Texas. For more information on JRLL, e-mail jrll@urban.org or visit us online at http://justicereinvestment.urban.org.

This project was supported by Grant No. 2009-DD-BX-K040 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.