

BRIEFING PAPER

JUSTICE REINVESTMENT

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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JUSTICE REINVESTMENT

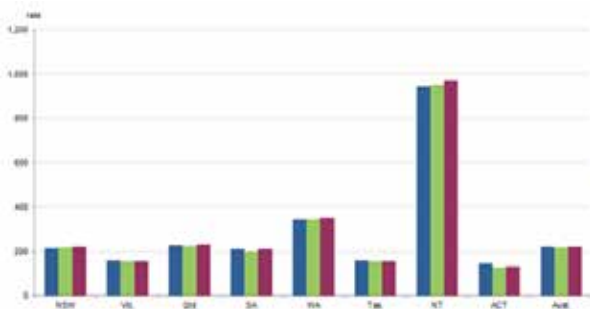
Why is a different approach needed?

Imprisonment rates – states and territories

Analysing national imprisonment rates and looking at where Western Australia (WA) sits compared to other states and territories provides an integral context to adopting a justice reinvestment strategy. In particular, the comparatively high rates of imprisonment in WA highlight the State’s opportunity to become a leader in embracing this approach.

As at March 2020, the national average daily imprisonment rate was 213 prisoners per 100,000 of the adult population. The Northern Territory (NT) has the highest average daily imprisonment rate (971 prisoners per 100,000 of the adult population). The second highest average daily imprisonment rate was in WA (351 prisoners per 100,000 of the adult population): see Figure 1.¹

Figure 1
Average daily imprisonment rate(a), By states and territories, Mar 2019, Dec 2019 and Mar 2020



Footnote(s): (a) Rate is the number of prisoners per 100,000 adult population. Based on average daily number.

There has been a significant increase in the use of imprisonment as a response to crime in the last twenty years. As at June 2000, the national average daily imprisonment rate was 144 prisoners per 100,000 of the adult imprisonment population.

Again, WA sat relatively higher than other states and territories with the average daily imprisonment rate at 218 per 100,000 of the adult population.²

Imprisonment rates – Indigenous people

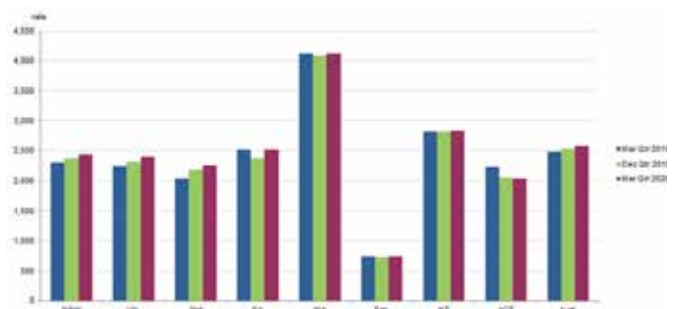
As at June 2019, Indigenous people represented 28% of the total prisoner population nationally,³ while only accounting for approximately 3% of the population nationally.⁴ This is an increase from 21% of the total prisoner population in 2003.⁵

In WA, the proportion of Indigenous prisoners is much higher: as at 30 June 2019, Indigenous people constituted 39% of the total prisoner population.⁶

The imprisonment rate of Indigenous people per 100,000 of the adult Indigenous population in WA is significantly higher than other states and territories.

For example, in March 2020, WA had 4,118 persons per 100,000 adult Aboriginal and Torres Strait Islander population whereas the NT had 2,840: see Figure 2.⁷ In WA, this represents a significant increase from 2,472 Indigenous prisoners per 100,000 of the adult Indigenous population in 2000.⁸

Figure 2
Aboriginal and Torres Strait Islander imprisonment rate(a), By states and territories, Mar 2019, Dec 2019 and Mar 2020



Footnote(s): (a) Rate is the number of prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. Based on average daily number.

Economic cost of imprisonment

In 2018-2019, reported recurrent expenditure on prisons (net of operating revenues and excluding capital costs, payroll tax and expenditure on transport/escort services and prisoner health) totalled \$3.64 billion nationally. For WA, reported recurrent expenditure on prisons was \$602 million.⁹

Nationally, in 2018-2019 the total net recurrent expenditure per prisoner per day was \$310 or \$113,150 per annum (comprising net operating expenditure, depreciation, debt servicing fees and user costs of capital).¹⁰ In WA, the recurrent expenditure per prisoner per day was \$301 or \$109,865 per annum.¹¹

Social cost of imprisonment

Imprisonment affects the individuals confined, their family and other close associates, and therefore the economic and social conditions in their local community. Incarceration can have a detrimental psychological effect on a person during and after the period of confinement. For example, for some individuals, isolation from familiar places, friends, and family members results in depression, anxiety, and emotional withdrawal. This is particularly so for Indigenous people who need a connection to community and culture for wellbeing, as indicated by a recent study from Yawru.¹²

Difficulties in obtaining legitimate employment increase the pressure and temptation for former offenders to earn income through illegitimate means. Inability to obtain steady, quality employment is one of the biggest risk factors for offender recidivism.

Former offenders contend with the time lost from their work or education. Released prisoners may lack the appropriate attire or knowledge of business norms needed to present in a manner reasonably likely to lead to employment, even with fair-minded employers. When employment is found it is generally at the lower end of the income scale.

Families of prisoners are collateral damage. If an otherwise responsible adult is removed from the home, the household loses economic resources, and social and emotional support. The effects on children may be particularly negative if a parent or other supportive adult is removed from their lives.

Attitudes that develop in childhood and adolescence influence choices individuals make as they transition into adulthood. For example, having a negative adult role model may hinder the children from developing positive attitudes about work and

responsibility.

And, if criminality is perceived as acceptable adult behaviour, some children may routinely become criminals themselves rather than engage in legitimate employment.¹³

What is justice reinvestment?

Orthodox principles of sentencing are focused on four key results: punishment, deterrence, rehabilitation and incapacitation. Their collective result and the ultimate purpose of our criminal justice system is to reduce the incidence of crime.¹⁴

However, there is little evidence that there is any relationship between high levels of imprisonment and low rates of crime.¹⁵ Such irrational crime control policies are based on 'popular punitiveness'— seeking to allay public concern about crime but failing to engage with research indicating its limited effectiveness.¹⁶

The concept of justice reinvestment has the same ultimate purpose of reducing incidence of crime, however, the underlying premise is to build communities rather than prisons. It is a comprehensive government (at all levels), nongovernment, business and community coordinated response funded through reversing prison population growth. Justice reinvestment directs resources and attention to communities that are disproportionately represented in our prison system and also addresses exacerbating factors that may be either systemic or based in policy. As former Chief Justice of Western Australia, the Hon Wayne Martin AC QC, has previously stated 'an ounce of prevention is worth a pound of cure'.¹⁷

Justice Reinvestment in Australia

The Justice Reinvestment Strategy is currently being trialled in the Australian Capital Territory, supporting the Ninth Parliamentary Agreement commitment to reducing recidivism by 25% by 2025.¹⁸ This strategy is the most comprehensive governmental engagement with justice reinvestment in Australia so far.¹⁹ It comprises a number of parts, in a three by three format – three steps and three pathways.²⁰

There are a number of other justice reinvestment initiatives underway in other states, including the Maranguka Justice Reinvestment Project in NSW, which is considered to be the most advanced engagement in place-based justice reinvestment in Australia so far.²¹

In Western Australia, there is an Aboriginal led coalition called Social Reinvestment WA (SRWA) that advocates for policies that are “prioritising healthy families, implementing smart justice and creating safe communities for all Western Australians; stopping the causes of crime before they’re committed, and ultimately closing the gap and ending the over-representation of Aboriginal people in custody in WA.”²²

SRWA outlined their strategic objectives for 2017-2019 as:

- a. Ensure that public policy decisions are based on a strong research and evidence base;
- b. Advocate and engage with political decision makers to influence policy outcomes;
- c. Develop community engagement and advocacy programs to inform and engage the public; and
- d. Ensure that the organisation can provide ongoing support for the social reinvestment campaign.²³

Justice Reinvestment Approach

Justice reinvestment dictates a scientific approach. Its four steps are:

1. Gathering data on offending and the criminal justice system;
2. Developing options to generate savings in the prison system and initiatives to reduce prison populations;
3. Redirecting funds from corrective services to implement programmes in ‘targeted’ locations to reduce offending; and
4. Evaluating the effectiveness of the programmes.

Step 1 – Gathering data

The first step requires an analysis of data and trends affecting incarceration rates, including identifying the geographic areas producing the highest number of prisoners (and the greatest cost to the criminal justice system).²⁴ Analysing the data also seeks to understand the causal reasons for offending (eg drug and alcohol abuse, domestic violence, punitive laws).²⁵

This task should be undertaken by non-partisan independent authorities, such as the ABS or the Productivity Commission, that have been given access to necessary departmental databases and statistics. The federal government should adopt standardised data collection policies that are consistent nationally.²⁶

Step 2 – Development of options

In the second step savings are made by reducing the cost of expanding the prison system and by diverting funds to initiatives that reduce the prison population.²⁷ This involves looking at why there are such high rates of imprisonment and why people return to custody.²⁸ Often this involves looking at the way parole violations and bail matters are dealt with, as well as providing community based alternatives to imprisonment.²⁹ This step necessarily requires community consultation and engagement around the causes and solutions to crime in that particular area.³⁰

A pertinent example contributing to high rates of imprisonment in WA is the three strikes home burglary legislation. This provides that if an adult or juvenile is convicted of a home burglary three or more times, a mandatory 12-month minimum imprisonment sentence applies.³¹ This has a disproportionate impact on Indigenous children, thereby exacerbating systemic bias against Indigenous offenders generally.³² A way to circumvent this could be for police to give out more cautions and warnings rather than charging young offenders.³³

In 2016 the *Sentencing Legislation Amendment Act 2016 (WA)* (the Act) came into operation and amended the *Sentence Administration Act 2003*, the *Sentencing Act 1995* and *The Criminal Code* to provide the courts with alternative sentencing options for those persons convicted of lower level

offences. The Act also aims to stop the cycle of offending associated with entry into the fines enforcement system.³⁴

Step 3 – Implementing programmes

The third step is to quantify the savings and use them to reinvest in high-risk communities, based on the information gathered in the last two steps.³⁵ For example, if there is a particular problem with driving related offences (e.g. driving without a licence), then services providing free driving lessons could be introduced.³⁶

Step 4 – Evaluate the effectiveness of programmes

Finally, the effectiveness of all diversionary initiatives and programmes to reduce recidivism must be closely examined. Unless there are desired results after an initial review and feedback process allowing proper time for the programme to develop and an opportunity to overcome any perceived failures, initiatives should be abandoned.

Since 2013 Just Reinvest NSW has partnered with an Indigenous community group to develop the Maranguka Justice Reinvestment Project.

The implementation phase began in June 2016 and there are reports that indicate the justice reinvestment strategy is working.³⁷

NOTES

1. Australian Bureau of Statistics (2020) 4512.0 – Corrective Services, Australia, March Quarter 2020.
2. Australian Bureau of statistics (2000) 4512.0 – Corrective Services, Australia, June Quarter 2000, 3.
3. Australian Bureau of Statistics (2019) 4517.0 – Prisoners in Australia, 2019.
4. Australian Bureau of Statistics (2016) 3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2016.
5. Australian institute of criminology, Australian Crime: Facts & Figures 2014 (2016) 75.
6. Australian Bureau of Statistics (2019) 4517.0 – Prisoners in Australia, 2019.
7. Australian Bureau of Statistics (2020) 4512.0 – Corrective Services, Australia, March Quarter 2020.
8. Australian Bureau of statistics (2000) 4512.0 – CorrectiveServices, Australia, June Quarter 2000, 25.
9. Productivity Commission, Report on Government Services – Corrective Services (2020) table 8A.1 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services>>.
10. Productivity Commission, Report on Government Services – Corrective Services (2020) table 8A.18 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services>>.
11. Productivity Commission, Report on Government Services – Corrective Services (2020) table 8A.18 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services>>.
12. Available at: <http://www.sbs.com.au/topics/life/health/article/2016/10/10/community-wellbeing-best-measured-groundyawuru-example>
13. Adding it up: the economic impact of incarceration on individuals, Families and communities by Harold Watts. Columbia university and the urban institute and Demetra smith nightingale, the urban institute www.doc.state.ok.us/offenders/ocjrc/96/Adding%20it%20up.pdf.
14. <http://www.judcom.nse.gov.au/publications/researchmonographs-1monograph26/mono26.pdf> sentencing serves a utilitarian purpose (the Kantian view of punishment as punishment for its own sake has not achieved legitimacy within the recent history of the common law)
15. Don Weatherburn, Law and Order in Australia – Rhetoric and Reality (Federation Press, 2004) 29.
16. Ibid.
17. http://www.supremecourt.wa.gov.au/_files/curtin_university_Annual_ethics_Lecture_martin_cj_30_Aug_2012.pdf
18. ACT Government, ‘Justice Reinvestment in the ACT’, Justice and Community Safety Directorate (Web page) <<http://justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy>>
19. Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report Number 133, 28 March 2018) 4 [4.48] <<https://www.alrc.gov.au/publications/justice-reinvestment-action>>
20. ACT Government, ‘Justice Reinvestment in the ACT’, Justice and Community Safety Directorate (Web page) <<http://justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy>>
21. Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report Number 133, 28 March 2018) 4 [4.43] <<https://www.alrc.gov.au/publications/justice-reinvestment-action>>
22. Social Reinvestment WA (Web page) <<https://www.socialreinvestmentwa.org.au/home>>
23. Social Reinvestment WA, ‘Social Reinvestment WA Brief’ (Web page) <<https://static1.squarespace.com/static/59c61e6dbefafb0293c04a54/t/59daf42937c581e591d4152f/1507521612698/srwa+lotterywest+brief+%281%29.pdf>>
24. David Brown, Melanie Schwartz and Laura Boseley, ‘The Promise of Justice Reinvestment’ (2012) 37(2) Alternative Law Journal 96,97.
25. Tammy Solonec, ‘Justice Reinvestment – What difference could it make in WA?’, Sir Ronald Wilson Lecture 2014, published in Brief (October 2014) 20.
26. Tammy Solonec, ‘Justice Reinvestment – What difference could it make in WA?’, Sir Ronald Wilson Lecture 2014, published in Brief (October 2014) 21.
27. David Brown, Melanie Schwartz and Laura Boseley, ‘The Promise of Justice Reinvestment’ (2012) 37(2) Alternative Law Journal 96, 97.
28. Aboriginal and Torres Strait Islander Commissioner, Social Justice Report (2009) 2.2.
29. Aboriginal and Torres Strait Islander Commissioner, Social Justice Report (2009) 2.2.
30. Aboriginal and Torres Strait Islander Commissioner, Social Justice Report (2009) 2.2.
31. Criminal Code (WA) s 401(4). Although for juveniles the court has the choice whether to impose a term of detention instead.
32. Neil Morgan, Victoria Williams and Harry Blagg, ‘Mandatory sentencing in Western Australia and the impact on Aboriginal Youth’ (2001) University of Western Australia, Crime Research Centre, 41, 46.
33. Tammy Solonec, ‘Justice Reinvestment – What difference could it make in WA?’, Sir Ronald Wilson Lecture 2014, published in Brief (October 2014) 20.
34. Second reading speech, sentencing Legislation Amendment Bill 2016 (WA).
35. Tammy Solonec, ‘Justice Reinvestment – What difference could it make in WA?’, Sir Ronald Wilson Lecture 2014, published in Brief (October 2014) 20.
36. Stuart Clark, ‘justice reinvestment Offers chance to cut number of indigenous inmates’ (23 September 2016) <<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/512-justice-reinvestment-offers-chance-to-cut-number-ofindigenous-inmates>>
37. See <http://www.justreinvest.org.au/abc-four-corners/>; KPMG, Maranguka Justice Reinvestment Project: Impact Assessment (2018) <<http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>>.

Policy Position

The Law Society of Western Australia recommends that the State Government adopts a justice reinvestment strategy and advocates for a nationally consistent approach. This requires:

1. The establishment of an independent body which has access to government department databases and statistics so that high-risk communities can be identified;
2. Advocating for the adoption of standardised data collection nationally and the contribution to such data by the Government of Western Australia;
3. The identification of savings within the justice system;
4. The re-investment of the justice system savings in community-led and indigenous-led diversionary and early intervention programmes and initiatives to reduce recidivism;
5. Additional Federal and State funding to support the diversionary approach; and
6. The development of a pilot programme in WA in consultation with key Aboriginal people and organisations, particularly Social Reinvestment WA.



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