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UNSW
THE UNIVERSITY OF NEW SOUTH WALES

Law Reform Commission
NSW Department of Attorney General and Justice
GPO Box 5199
SYDNEY NSW 2001
nsw_lrc@agd.nsw.gov.au

Submission to the NSW Law Reform Commission on the Parole Reference

The Australian Justice Reinvestment Project (AJR Project) welcomes the opportunity to make the following submissions in response to the call for submissions to inquiry, pursuant to section 10 of the *Law Reform Commission Act* 1967, aimed at improving the system of parole in NSW. This submission addresses some specific elements of question papers 4 and 5 as well as commenting on other issues relevant to parole.

1. The AJR Project

The AJR Project is an ARC-funded project (Discovery Project DP 1301011) which draws together senior researchers across the disciplines of law and criminology to examine justice reinvestment programs in other countries and analyse whether such programs can be developed in Australia. More information about the AJR Project can be found at www.justicereinvestment.unsw.edu.au

2. About Justice Reinvestment

Justice Reinvestment is a recent development in criminal justice enjoying a spectacular rise onto the political and policy agenda internationally. In Australia, the idea has gained traction among politicians and community advocates, with particular emphasis on its potential in the Indigenous context.[1]

[1] Aboriginal & Torres Strait Islander Social Justice Commissioner, 'Chapter 2: Justice reinvestment – a new solution to the problem of Indigenous over-representation in the criminal justice system' in *Social Justice Report 2009* (2010) http://www.humanrights.gov.au/publications/social-justice-report-2009;. Gooda, Mick, 'The necessity of Justice Reinvestment' (Presented at Koori Prison Transition Forum, Department of Justice, Preston, 29 June 2012) http://www.humanrights.gov.au/news/speeches/necessity-justice-reinvestment-2012; Senate Legal and Constitutional Affairs References Committee, Commonwealth of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (June 2013); Justice Reinvestment Campaign for Aboriginal Young People at *Just Reinvest NSW*

THE UNIVERSITY OF NEW SOUTH WALES
UNSW SYDNEY NSW 2052 AUSTRALIA
Telephone: +61(2) 9385 9630
Facsimile: +61(2) 9385 1175
ABN 57 195 873 179
CRICOS Provider No. 00098G

Justice Reinvestment involves the redirection of resources from Corrections budgets to various forms of community provision such as education, housing, drug and alcohol, employment, healthcare and other resources in high crime communities from which many prisoners come and to which many prisoners will return. Its growing popularity stems from a range of factors, including recognition across the political spectrum that increasing imprisonment rates and populist law and order strategies have failed to prevent crime and ensure public safety. Indeed the criminogenic, or crime producing nature of imprisonment is being recognised as recidivism rates have become a political issue.[2]

There is a specific process that characterises a JR approach. The first step is 'justice mapping' — an analysis of data and trends affecting incarceration rates, including identification of the areas producing high numbers of prisoners and the factors driving the growth in prison population. In the next phase, policy options are developed and implemented to reverse the rates of incarceration and to increase the effectiveness of spending in the criminal justice arena. Savings are quantified and reinvested back into communities that produce high numbers of imprisoned offenders.[3]

3. Relevance to Parole

A focus on parole and community corrections has been a very significant component of the implementation of Justice Reinvestment in the US and UK. This is because parole has been identified as a stage in the corrections process where there are unnecessary levels of return to custody, and therefore also a site where significant fiscal savings can be realised. Indeed, Cadora has emphasised the link between increasing prison populations and 'a failure in probation and parole supervision' noting the high level of incarceration for breaches, many of which are 'technical'.[4]

In the US, one in every 100 adults is incarcerated, and two-thirds of released prisoners return to jail. The implementation of the Justice Reinvestment Initiative (JRI) across 28 states in the US is supported by The PEW Charitable Trusts and the US Department of Justice, Bureau of Justice Assistance. The approach to modification of the mechanisms and processes for considering and determining parole has varied widely in implementation of justice reinvestment. PEW provides a snap shot of the type of parole

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http://www.justicereinevstmentnow.net.au; Schwartz, M, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14 *Australian Indigenous Law Review* 1.

[2] Brown, David , 'Justice Reinvestment: the circuit breaker?' (2013) 8 *Insight* 36, 36.

[3] Brown, David, Schwartz, Melanie & Boseley, Laura, 'The promise of Justice Reinvestment', (2012) 37 *Alternative Law Journal* 96.

[4] Cadora, Eric, Justice Reinvestment in the US *in Justice Reinvestment – A New Approach to Crime and Justice* Edited by Rob Allen and Vivien Stern, 10.

and community corrections reforms which have been pursued over the period 2007-2013 as part of the JRI. [5]

Policy Reform	No of states that have implemented reform
Revise parole hearing/decision/eligibility standards	10
Expand good/earned time prison credits	10
Establish/expand geriatric or medical parole	4
Establish earned discharge (probation/parole)	9
Authorize performance incentive funding	7
Authorize administrative jail sanctions	9
Authorize graduated responses for violations	13
Cap revocation time	7
Establish/improve electronic monitoring	6
Establish mandatory re-entry supervision	8
Require/improve risk-needs assessment	14
Require evidence-based practices	11
Reform/pilot specialty courts (HOPE, drug courts etc)	7
Reduce probation terms	2
Improve interventions such as substance abuse/mental health/CBT	13

These types of specific policy reforms merit consideration. However, they are likely to hold most promise when undertaken within the context of a more overarching approach to reform, such as that associated with justice reinvestment, which is data-driven, strategic and focused on driving down incarceration rates.

4. Alternative approaches

4.1. US

In some US states a scarcity of places in community based treatment programs has been identified as causing a substantial backlog in release to parole, at significant cost to the state. For instance, in Texas strategies introduced as part of a Justice Reinvestment program included *inter alia* improving supervision within the community, increasing the capacity of treatment facilities for substance abuse and those with mental health conditions and introducing graduated sanctions for breaches. These changes are said to have contributed to an increase in release to parole while revocation rates declined.[6]

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[5] Adapted from Pew, *Sentencing and Corrections Reforms in Justice Reinvestment States* (May 2013) <http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_Sentencing_and_Corrections_Reform_Matrix.pdf>.

[6] Fabelo, Tony 'Be more like Texas' 2010 *Justice Research and Policy*, 12(1) 113 at 123.

A recent analysis of parole data in one US state by PEW confirmed that "supervision can make a decisive difference in controlling criminal behaviour among released offenders".[7] However, such supervision must be targeted to be effective.

Reduction of technical violations of parole leading to an offender being returned to custody is essential to ensure that the benefits of parole in terms of recidivism rates and cost savings are not lost. Policies include the use of graduated sanctions and limiting prison stays. For example, North Carolina has a 90 day cap on the period an offender can be returned to custody following a technical violation of parole.[8]

Seven states have implemented mandatory re-entry supervision programs.[9] For example, in Kentucky, as part of the Public Safety and Offender Accountability Act (H.B. 463), a mandatory re-entry supervision policy was developed which requires offenders to be released to parole no less than six months before the end of their sentence, if they have not yet been granted "discretionary parole".[10]

4.2. United Kingdom

UK data indicates that the substantial growth in the prison population has been driven in part by lower rates of release to parole and higher breach rates, which in turn have arisen from harsher sentencing regimes, legislative changes that increase the likelihood of imprisonment for a breach and changes to enforcement.[11]

Several pilot studies of Justice Reinvestment are underway in the UK which differ in some ways but which have in common the intent to drive down demand on prisons and other parts of the criminal justice system and to reduce the costs of the criminal justice system.

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[7] Pew, *The impact of parole in New Jersey* (November 2013) <http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf> 1.

[8] Justice Reinvestment Act 2011, Pew, *The impact of parole in New Jersey* (November 2013) <http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf> 4. For further information on the Kentucky approach to parole within Justice Reinvestment see PEW, *2011 Kentucky Reforms Cut Recidivism, Costs* (July 2011) http://www.pewstates.org/uploadedFiles/2011_Kentucky_Reforms_Cut_Recidivism.pdf; UNC, *Criminal Law in North Carolina,* <http://www.sog.unc.edu/node/2044>.

[9] Kentucky, Kansas, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, West Virginia.

[10] Pew, *The impact of parole in New Jersey* (November 2013) <http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf> 3.

[11] Ministry of Justice (2009a) *Story of the Prison Population 1995–2009* England and Wales. London: Ministry of Justice. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf

4.2.1 **Throughcare**

We note that Corrective Services NSW indicates it is committed to a throughcare approach to managing offenders in custody and in the community. [12] We support this principle. However, the difficulties in implementation in custody, in transition and in community as highlighted in Parole Question paper 4, must be addressed. [13] If a throughcare model is to successfully drive offender reintegration in the community it is essential that the theory match the practice.

In the UK, pilot studies are underway using a 'payment by results approach' to provide incentives to reduce reoffending rates by offenders released from prison. At Peterborough prison, the pilot focuses on providing 'through-the-gate' services including community supervision and support to short term inmates; this group has high reconviction rates but is not covered by statutory schemes for post release support. Results are not yet available. [14]

5. Concerns Regarding Risk Based Approach.

Risk based approaches have been promoted and taken up with enthusiasm by correctional administrators and service providers internationally. They are commonly used in conjunction with US justice reinvestment initiatives. We remain concerned about their use, especially by those not carefully trained in their application and aware of their limitations. We are especially concerned about their use for Indigenous people [15] and for women given that the assumptions underpinning the assessments seem to operate to their disadvantage and because the tools typically used have not been designed with them in mind.[16] The tools remain controversial in part because they have the capacity to treat structural disadvantage as individual risk.

6. The needs of specific groups

While we have identified promise in the application of justice reinvestment, we remain concerned that the needs of specific groups, and those with particular vulnerability, are

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[12] Parole Paper 4 [4.22]

[13] Parole Paper 4

[14] Disley, Emma et al., *Lessons learned from the planning and early implementation of the Social Impact Bond at HMP Peterborough* (RAND Europe 2011) 9.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217375/social-impact-bond-hmp-peterborough.pdf

[15] Cunneen et al., *Penal culture and hyperincarceration* Ashgate 2013, 110-111.

[16] Hannah-Moffat, Kelly 2009 'Gridlock or mutability: Reconsidering "gender" and risk assessment' *Criminology & Public Policy* Volume 8 Issue 1 209-219; Hannah-Moffat, Kelly Criminogenic needs and the transformative risk subject: Hybridizations of risk/need in penality *Punishment & Society* January 2005 7: 29-51.

not always give due attention in developing policy options or in measuring outcomes. Racialised groups, women, young people and those with incapacities related to mental health or cognitive functioning may miss out or be further disadvantaged when their needs are not kept in sight. An absence of appropriate community service for these groups may result in failure to attain parole and or breaches of conditions of release.

In the UK context it has been noted that placing increased emphasis on community corrections may backfire for women, given that 'our knowledge of 'what works for men' is imperfect, but for women, it is even more limited'. In the absence of well-targeted and adequate supports for women in the community, they may be at greater risk of failing to meet supervision requirements. [17]

7. Overview

Significant changes to parole across Australia, and a shift from parole as a form of release to parole as a form of control, have been documented by members of our research team in previous work.[18]

In the US context, Cadora has described community supervision as 'facing a crisis of purpose' and asks a series of questions that speak to our shared concerns: 'does its real mission lie with enforcement or support?. How would parole and probation officers function if they were squarely focused on successful resettlement? How could community supervision be redesigned to reflect 21st century realities? [19] However, he also notes the prospects for reform. Justice reinvestment offers a promising approach to guide reform.

8. Conclusion

Justice Reinvestment approaches require changes to sentencing, parole and bail, and subsequent reinvestment in post release and community programs – all of which may be difficult to implement where opposition political parties continue to run a popular punitive 'tough on law and order' line, seeking to exploit fear and division for perceived electoral advantage.[20]

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[17] Gelsthorpe, Loraine and Carol Hedderman (2012) Providing for women offenders- the risks of adopting a payment by results approach *Probation Journal December* 59(4): 374-390, 376.

[18] Cunneen et al., above note 15, 50-57,147-153.

[19] Cadora above note 4, 11.

[20] Brown, David, Schwartz, Melanie & Boseley, Laura (2012) 'The promise of Justice Reinvestment', *Alternative Law Journal,* vol. 37(2), pp. 100–101.

The members of the AJR Project welcome the opportunity to discuss the submission or any other issues relating to the review of parole and of the development of Justice Reinvestment in Australia

On behalf of the AJRP team.

Emeritus Professor David Brown
University of New South Wales

Professor Chris Cunneen
James Cook University

Melanie Schwartz
University of New South Wales

Professor Julie Stubbs
University of New South Wales

Courtney Young
University of New South Wales