

# COMBATTING OVER-REPRESENTATION OF INDIGENOUS YOUTH IN THE QUEENSLAND CRIMINAL JUSTICE SYSTEM THROUGH ‘JUSTICE REINVESTMENT’

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## ABSTRACT

In recent years, the Queensland Police Service (QPS) and Queensland courts have sought to rely on a range of ‘diversionary’ practices such as youth justice conferencing and cautioning as a response to the alarmingly high rates of over-representation of Indigenous youth in Queensland’s criminal justice system. The results of such practices have, on the whole, done little to curb the growing rates of Indigenous youth offending, particularly in remote and regional areas of the State. The problems with these practices is that often youth justice conferencing and cautioning are inaccessible and ineffective to Indigenous youth. This paper asserts that a further strategy that the Queensland Government and other relevant public institutional stakeholders should adopt is what is known as ‘justice reinvestment’ (JR). The growing JR movement in the US and Australia represents an opportunity for a fundamental shift in Governmental policy, whereby greater emphasis is given to formulating ‘front-end’ programs designed to alleviate the causes of youth offending. Under the broad definition of JR, public funds are directed into a diverse range of programs in the areas of education, health and community services for communities experiencing a high level of Indigenous juvenile offending. This paper looks at the current problem of over-representation of Indigenous youth offending in Queensland and puts forward various strategies associated with the JR initiative to combat this problem.

## I INTRODUCTION

The 1991 Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) acknowledged the over-representation of Indigenous Australians within the criminal justice system throughout most parts of Australia. As part of its findings, the Royal Commission, *inter alia*, called for action to reduce the number of Indigenous people coming into contact with the justice system.<sup>1</sup> Despite the collective optimism and high hopes that many had for the Royal Commission in addressing deaths in custody of Indigenous people specifically, and disparate rates of incarceration generally, nearly three decades later, the extent of Indigenous incarceration, and the level of over-representation in the criminal justice system is far from acceptable. During 2016 to 2017, only 5 per cent of people in Australia aged 10 to 17 years of age were from an Aboriginal or Torres Strait Islander background, yet this group accounted for over half (58 per cent)

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<sup>1</sup> Commonwealth Government of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) [1.3.3], [1.6.1] (‘RCIADIC report’).

of those in detention.<sup>2</sup> During that same period, Indigenous youth accounted for more than two out of three (71 per cent) youths in detention in Queensland.<sup>3</sup>

The causes of Indigenous over-representation in the criminal justice system are complex. Factors such as historical, social and economic disadvantage contributes immensely to such high rates of disparity between Indigenous and non-Indigenous rates of offending.<sup>4</sup> Remoteness, too, plays a large part in the difference.

In response to the inordinate rates of offending by Indigenous youth, the Queensland Government embarked on a program of ‘diversion’ as an alternative to the more traditional punitive measures including incarceration. With the introduction of certain diversionary practices, such as cautioning, conferencing and the controversial ‘boot camps’, the State government aimed to divert offenders from the justice system and consequently, reduce the level of recidivism.<sup>5</sup> While good in theory, the ‘one-size-fits-all’ approach was far from ideal and often merely highlighted the disconnect between policy and the real impact that such policies have on Indigenous communities.<sup>6</sup>

Further, the benefits of these diversionary programs often bypass young Aboriginal and Torres Strait Islander people because of several barriers to access, such as the misuse of police discretion and geographical isolation.<sup>7</sup> As a result, diversion has had a minimal impact on Indigenous youth offending rates in Queensland.<sup>8</sup>

The diversity of Indigenous communities throughout Queensland calls for tailored solutions to affect positive outcomes in reducing the disproportionate representation of Indigenous youth in the criminal justice system. One such initiative is broadly referred to as Justice Reinvestment (JR). Justice reinvestment can be defined as a group of tailored strategies, programs and policies that redirect a portion of public money away from the criminal justice system to ‘introduc[e] initiatives at a community level to reduce repeat offending, and to have whole-of-community benefits.’<sup>9</sup> Under JR, the government directs public money into specific locations experiencing a high level of Indigenous juvenile crime, to address the determinants of offending and develop strong communities.<sup>10</sup> With a focus on early intervention and prevention, examples of JR projects could include collective and ‘place-based’ approaches that focus on long term

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<sup>2</sup> Australian Institute of Health and Welfare, ‘Youth Justice in Australia 2016-2017’ (Report, Australian Institute of Welfare, 2018) 8.

<sup>3</sup> Children’s Court of Queensland, Annual Report 2016-2017 (2017) 37.

<sup>4</sup> Amnesty International, ‘A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia’ (Report, Amnesty International, May 2015) 3.

<sup>5</sup> Emily Scott, Bethany King, Saranya Saravanan and David De Witt, ‘Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria’ (Report, Liberty Victoria’s Rights Advocacy Project, 2018) 1.

<sup>6</sup> Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Final Report 2010*, September 2010, 8.

<sup>7</sup> The use of the word ‘misuse’ is not intended to imply that police are deliberately thwarting the use of their diversionary powers in relation to Indigenous youth. However, it is often the case that police inadvertently apply racist motives or personal judgement in deciding whether to divert an Indigenous youth offender. This is one of the explanations for the great disparity in the rates of police diversion for Indigenous and non-Indigenous youth.

<sup>8</sup> Troy Allard, Anna Stewart, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, ‘Police Diversion of Young Offenders and Indigenous Over-Representation’ (Report, Australian Institute of Criminology, 26 March 2010) 2.

<sup>9</sup> Fiona Allison and Chris Cunneen, ‘Justice Reinvestment in Northern Australia’, *The Cairns Institute Policy Paper Series*, James Cook University (2018) 3.

<sup>10</sup> PwC, ‘Indigenous incarceration: Unlock the facts’ (Report, PwC, May 2017) 44.

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goals and which are evidenced based.<sup>11</sup> One example of a JR project currently underway is the Maranguka Justice Reinvestment Project at Bourke in NSW that, *inter alia*, is looking to address issues with breaches of bail, outstanding warrants and unlicensed driving (through the introduction of a learner driver programme).<sup>12</sup>

The first part of this paper outlines the current circumstances of Indigenous youth crime in Queensland. In doing so, it highlights the urgent and pressing need for reform of policy and the law. The paper then turns to a discussion of Justice Reinvestment and how it might be applied as an adjunct to current diversionary programs and punitive measures in Queensland.

## II PROFILE OF INDIGENOUS YOUTH OFFENDING IN QUEENSLAND

### A *Age of Offenders*

Understanding the age profile of Australia’s Indigenous population is fundamental in implementing any response to their offending, as it is significantly different to the age profile of the Australian population generally.<sup>13</sup> In 2017, the Indigenous population had a median age of 21.8 years, compared to the non-Indigenous population where it was 37.6 years<sup>14</sup> – and one third of the Indigenous population were under 15.<sup>15</sup> Indigenous youth are also likely to be younger when committing their first offence,<sup>16</sup> accounting for over half (62 per cent) of the 10 to 12 year olds in detention in 2016.<sup>17</sup> This combination of a significantly higher proportion of Indigenous youth, with a greater propensity to offend at a young age, contributes greatly to their over-representation in Queensland’s criminal justice system. However, this much younger age structure presents a tremendous opportunity in terms of reducing their chances of offending, if timely interventions and adequate services/programs are made available.

The reference to ‘youth offenders’ in Queensland encompasses those between the age of 10 and 17.<sup>18</sup> In Queensland, as in all other States and Territories, children under the age of 10 cannot be held criminally responsible for any act or omission.<sup>19</sup> Further, children under the age of 14 years are considered incapable of committing a crime unless it is proved beyond reasonable doubt that they had the capacity to know they ought not do the act or make the omission.<sup>20</sup> Recent legislative changes have also

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<sup>11</sup> Allison and Cunneen, above n 9.

<sup>12</sup> See, Just Reinvest NSW, *Justice Reinvestment in Bourke* (2018)

<<http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>>. Another example of a JR-type program is currently being planned by Jamie Fellows and Dr Mark Chong of James Cook University which focuses on a joint JCU Law/ Criminology mentor program designed to increase participation of Indigenous school leavers in the study of law and/ or criminology.

<sup>13</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*, June 2011, 20 [2.53].

<sup>14</sup> Australian Institute of Health and Welfare, ‘Australia’s welfare 2017’ (In brief, Australian Institute of Welfare, Parliament of Australia, 2017) 32.

<sup>15</sup> *Ibid.*

<sup>16</sup> Jacqueline Joudo, ‘Responding to substance abuse and offending in Indigenous communities: review of diversion programs’ (Research Paper No. 88, Australian Institute of Criminology, 2008) 7.

<sup>17</sup> Amnesty International, ‘Heads Held High’ (Report, Amnesty International, August 2016) 13.

<sup>18</sup> Australian Institute of Family Studies, *The intersection between the child protection and youth justice systems* (July 2018) <<https://aifs.gov.au/cfca/publications/intersection-between-child-protection-and-youth-justice-systems/youth-justice>>.

<sup>19</sup> Criminal Code 1899 (Qld) s 29(1).

<sup>20</sup> *Ibid* s 29(2). A person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission the person had capacity to

mandated that a 17 year old can no longer be charged as an adult and will instead be dealt with in the youth justice system, bringing Queensland into line with all other Australian jurisdictions.<sup>21</sup>

### B Indigenous Communities

Queensland has the second highest population of Aboriginal and Torres Strait Islanders, possessing three of the top 10 most populated Indigenous Regions in Australia.<sup>22</sup> In 2016, the Brisbane Region had the highest proportion of Aboriginal and Torres Strait peoples of all Indigenous Regions throughout Australia.<sup>23</sup> Townsville to Cairns, and Cairns to Atherton also featured in the top 10 most populated Indigenous Regions during this period.<sup>24</sup> The data clearly shows, therefore, that the majority of Aboriginal and Torres Strait Islanders actually live in metropolitan areas.<sup>25</sup> A significant number of Aboriginal and Torres Strait people do, however, reside in remote and regional areas and it is these communities that often experience a higher level of disadvantage and generate a substantial number of youth offenders.<sup>26</sup>

In 2016 the majority of Queensland's highly disadvantaged communities were located in the remote areas of Far North Queensland.<sup>27</sup> Only three out of 11 of those communities were located in more urbanised areas.<sup>28</sup> The Queensland Crime and Misconduct Commission at the time stated, '[i]t is important ... to draw a distinction between the problems and approaches needed in urban and regional areas, and those of more remote Indigenous communities.'<sup>29</sup> There are common indicators of social and economic disadvantage evident among Indigenous populated communities.<sup>30</sup> However, these issues can present themselves in diverse ways, or may be more prevalent in one community as opposed to another. For example, Flamsteed and Golding noted with specific reference to education and employment within Indigenous communities, that 'urban, regional and remote contexts are qualitatively different learning and working

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know that the person ought not to do the act or make the omission. This is derived from the common law *doli incapax* presumption: *R v F; ex parte Attorney-General* [1998] QCA 97, 104.

<sup>21</sup> *Youth Justice and Other Legislation (Inclusion of 17-year-old persons) Amendment Act 2016* (Qld); *Criminal Law Amendment Act 1945* (Qld).

<sup>22</sup> Queensland Government Statisticians Office, 3. 'Indigenous Regions' are large geographical units loosely based on the former Aboriginal and Torres Strait Islander Commission boundaries. They are created by combining together one or more Indigenous Areas.

<sup>23</sup> *Ibid* 9. Brisbane had 70,734 of the national Indigenous population, which equates to 10.9%.

<sup>24</sup> *Ibid*.

<sup>25</sup> Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians' (Report, Australian Bureau of Statistics, June 2011). An estimated 35 per cent of Aboriginal and Torres Strait Islander Australians lived in major cities in 2011. In comparison, almost 90 per cent of non-Indigenous Australians lived in major cities or inner regional areas.

<sup>26</sup> Queensland Government, *Draft Indigenous Justice Strategy 2011-2014* (May 2011) 24.

<sup>27</sup> Tony Vinson, Margot Rawthorne, Adrian Beavis and Matthew Ericson, 'Dropping Off The Edge 2015: Persistent communal disadvantage in Australia' (Report, Jesuit Social Services and Catholic Social Services Australia, July 2015) 75.

<sup>28</sup> *Ibid* 84.

<sup>29</sup> Crime and Conduct Commission Queensland, 'Restoring Order: Crime prevention, policing and local justice in Queensland's indigenous communities' (Report, Crime and Conduct Commission Queensland, November 2009) xix.

<sup>30</sup> Vinson, Rawthorne, Beavis and Ericson, above n 27, 77.

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environments.<sup>31</sup> Further, there may be shortcomings within a community that are unique to it.

As will be discussed later in this paper, JR programs allow communities and relevant stakeholders to tailor programs that are unique to their specific issues and problems. Issues that are relevant to them are therefore one of the integral components and advantages of JR.

The types of issues that tend to arise in remote and regional areas in Queensland are illustrated by referring to the examples of Doomadgee and Mornington Island.<sup>32</sup>

*C Features and Characteristics of Two Remote Indigenous Communities Experiencing High Rates of Indigenous Youth Crime*

1 *Mornington Island*

Mornington Island is situated in the Gulf of Carpentaria, 125km from the nearest town, Burketown.<sup>33</sup> Approximately 88 per cent of the island's population consists of Aboriginal or Torres Strait Islander people,<sup>34</sup> and it was identified in 2015 as one of Queensland's most disadvantaged communities.<sup>35</sup> Basic supplies can often be unavailable for extended periods of time, due to torrential rain causing isolation from the mainland.<sup>36</sup> Further, although 19 other Indigenous communities in Queensland have also implemented zero tolerance policies for alcohol,<sup>37</sup> the island's policy has produced a harmful homebrew epidemic<sup>38</sup> which has resulted in significant health impacts<sup>39</sup> and an increase in domestic violence, whereby admissions to hospital for assault-related injuries are at a rate thirty-eight times higher than other Australians.<sup>40</sup>

2 *Doomadgee*

Doomadgee is located in the Gulf of Carpentaria, approximately 500 km from Mount Isa.<sup>41</sup> It has a population of approximately 1405 people,<sup>42</sup> and of these, 1185 identify as Aboriginal and/or Torres Strait Islander.<sup>43</sup> Disadvantage within Doomadgee

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<sup>31</sup> Kate Flamsteed and Barry Golding, 'Learning through Indigenous business: The role of vocational education and training in Indigenous enterprise and community development' (Research Report, National Centre for Vocational Education Research) 22.

<sup>32</sup> It is important to note that these two communities are both classed as 'Aboriginal communities', though both Aboriginal and Torres Strait Islander peoples populate them.

<sup>33</sup> Queensland Government, *08. Mornington Island*, Department of Housing and Public Works <<http://www.hp.w.qld.gov.au/SiteCollectionDocuments/WorkingInMorningtonIslandFactSheet.pdf>>.

<sup>34</sup> Associate Professor Glenn Dawes, 'Keeping on Country: Doomadgee and Mornington Island Recidivism Research Report' (Research Report, James Cook University, 2016) 3.

<sup>35</sup> Vinson, Rawthorne, Beavis and Ericson, above n 27, 75.

<sup>36</sup> Queensland Government, *08. Mornington Island*, above n 33. Flights are often cancelled, and roads closed during the wet season, resulting in isolation of the community.

<sup>37</sup> *Ibid.* These are called Alcohol Management Plans (AMP).

<sup>38</sup> Dawes, above n 34, 4.

<sup>39</sup> Mornington Shire Council, 'Alcohol Management Plan' (Strategic Review, Mornington Shire Council, September 2017) 50. Dangerous levels of alcohol and toxic substances were uncovered from laboratory tests of homebrew found within the community.

<sup>40</sup> Dawes, above n 34, 4.

<sup>41</sup> Australian Government, *Doomadgee*, 2018, [indigenous.gov.au](http://indigenous.gov.au) <<https://www.indigenous.gov.au/community/doomadgee>>.

<sup>42</sup> Queensland Government Statisticians Office, above n 22, 2.

<sup>43</sup> Dawes, above n 34, 4.

substantially increased between 2007 and 2014<sup>44</sup> especially in relation to long term unemployment and young persons not being engaged in work or study.<sup>45</sup> Between 2015 to 2017, the overall attendance rate for students at Doomadgee State School was 58 per cent, with approximately 97 per cent of students being classified as Indigenous.<sup>46</sup>

#### D *Common Offences in Queensland Committed by Indigenous Youth*

During 2016 to 2017, the most common offences committed by Indigenous juvenile offenders in Queensland were those against property, particularly unlawful entry and theft.<sup>47</sup> Unlawful use of a motor vehicle was the next most common offence.<sup>48</sup> A total of 6502 property-related offences were committed during this period, as opposed to 592 offences against the person.<sup>49</sup> It is also evident that such offences are often committed as a form of entertainment for Aboriginal and Torres Strait Islander youth in their relevant communities.<sup>50</sup> This paper also suggests that the high level of property offences may be due to a correlation between the opportunistic nature of property offences and the socio-economic disadvantage of many Indigenous families.

### III THE REASONS FOR INDIGENOUS OVER-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

#### A *Main Reasons*

Understanding the rationale behind Indigenous over-representation in the criminal justice system will enhance the Commonwealth and State Governments' ability to implement responses to Indigenous youth offending, particularly if either level of government implements JR programs that target specific causes of Indigenous offending. The rationale behind Indigenous over-representation is very much 'contested terrain',<sup>51</sup> as the roots of over-representation are complex and interrelated. Research has found that the various risk factors behind offending, such as socio-economic disadvantage, lack of education, and substance abuse are consistent with those of the non-Indigenous population.<sup>52</sup> However, these factors are often more prevalent, and experienced more gravely, within Indigenous communities.<sup>53</sup> Often the causes of Indigenous offending are intensified in remote communities, where services and infrastructure are lacking.<sup>54</sup> The following attributes have been identified as

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<sup>44</sup> Vinson, Rawsthorne, Beavis and Ericson, above n 27, 80.

<sup>45</sup> Ibid. Doomadgee rankings deteriorated on the following indicators: post school qualifications (ranked 114<sup>th</sup> in 2007 and 2<sup>nd</sup> in 2014); young adults not engaged in work or study (ranked 40<sup>th</sup> in 2007 and 4<sup>th</sup> in 2014); long term unemployment (ranked 405<sup>th</sup> in 2007 and 7<sup>th</sup> in 2014).

<sup>46</sup> Queensland Government, *Doomadgee State School*, 2017 <<https://doomadgeess.eq.edu.au/Supportandresources/Formsanddocuments/Annual%20reports/annual-report-2017.pdf>>.

<sup>47</sup> Queensland Police Service, 'Annual Statistical Review 2016-17' (2017) 112.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Emma Ogilvie and Allan Van Zyl, 'Young indigenous males, custody and the rites of passage' (Report No 204, Australian Institute of Criminology, April 2001) 3.

<sup>51</sup> Miriam Kelly and Hilde Tubex, 'Stemming the Tide of Aboriginal Incarceration' (2015) 17 *The University of Notre Dame Australia Law Review* 1, 2.

<sup>52</sup> Don Weatherburn, 'What Causes Crime?' (2001) (Bulletin No 54, NSW Bureau of Crime Statistics and Research, February 2001) 58.

<sup>53</sup> Kelly and Tubex, above n 52, 7.

<sup>54</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2017) 45; Australian Institute of

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specific causes for, or having a connection with, the high levels of Indigenous representation in the criminal justice system.

1 *Socio-Economic Disadvantage*

The Royal Commission into Aboriginal Deaths in Custody established that 'the most significant contributing factor [to Indigenous over-representation] is the disadvantaged and unequal position in which Aboriginal people find themselves in society – socially, economically and culturally.'<sup>55</sup> This socio-economic disadvantage is evident in various manners including employment, housing, and educational issues.<sup>56</sup>

(a) *Lack of Employment Opportunity and Income Inequality*

During 2014 to 2015, only 48.4 per cent of Australian Aboriginal and Torres Strait Islander people were employed, as opposed to 74.8 per cent of the non-Indigenous population.<sup>57</sup> In 2016, the median weekly income of Indigenous households was \$190 lower than other households in Queensland,<sup>58</sup> and 21 per cent of Indigenous households earned incomes of less than \$400 per week.<sup>59</sup>

(b) *Lack of Adequate Housing*

During 2014 to 2015, 28 per cent of remote Indigenous Australians lived in houses that did not possess basic household facilities, such as a shower, bedding, food storage or cooking facilities.<sup>60</sup> During this same period, 27 per cent of Indigenous prison entrants had been homeless prior to being imprisoned.<sup>61</sup> During 2017, approximately 19.5 per cent of all Indigenous families rented their home through a social housing provider,<sup>62</sup> and were three times more likely than non-Indigenous people to live in an overcrowded home.<sup>63</sup> The Standing Committee on Aboriginal and Torres Strait Affairs has noted that the lack of safe, stable and supportive accommodation for Indigenous youth often heightens their likelihood of offending, or reoffending.<sup>64</sup>

(c) *Failure to Attend School and Complete Secondary Education*

Indigenous people who complete their secondary education are 14 times less likely to be imprisoned than those who do not.<sup>65</sup> However, the 2016 Census revealed that a mere

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Health and Welfare, 'Australia's welfare 2017' (In brief, Australian Institute of Welfare, Parliament of Australia, 2017) 38.

<sup>55</sup> Commonwealth Government of Australia, above n 1, vol 1 [1.7.1].

<sup>56</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011, page 2 as cited in Thomas Crofts and Tanya Mitchell, 'Prohibited Behaviour Orders and Indigenous Overrepresentation in the Criminal Justice System' (2011) 23(2) *Current Issues in Criminal Justice* 277, 278.

<sup>57</sup> Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2016 (Report, Productivity Commission Canberra, 2016) [4.51].

<sup>58</sup> Queensland Government Statisticians Office, above n 22, 5.

<sup>59</sup> *Ibid* 6.

<sup>60</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2014-15* (28 April 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>. (The most recent 'Social Survey on ATSI People'. Other surveys were conducted in 2002 and 2008).

<sup>61</sup> PwC, above n 10, 23.

<sup>62</sup> *Ibid*. This is compared to only 3% of other households.

<sup>63</sup> Australian Institute of Health and Welfare, 'Australia's welfare 2017', above n 14, 37.

<sup>64</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 13, 44 [3.123] – [3.125].

<sup>65</sup> PwC, above n 10, 23.

10.3 per cent of Indigenous youth aged 15 years or older had completed year 12 or equivalent education.<sup>66</sup> There was an 18.5 per cent gap between the number of Indigenous and non-Indigenous children who had attained this level of education during this period.<sup>67</sup> Further, only 73.4 per cent of Indigenous children aged four and five were attending pre-school.<sup>68</sup> An Australian Institute of Criminology study associated offending with educational disadvantage, and suggested that offending is so problematic in Indigenous communities because of the lack of these opportunities.<sup>69</sup>

## 2 Drug and Alcohol Abuse

The RCIADIC report recognised the prevalence of alcohol use among Aboriginal communities, and its significant influence on the offending behaviour of Aboriginal people.<sup>70</sup> In Australia, Indigenous people are 1.5 to 3.8 times more likely to be under the influence of drugs or alcohol at the time of committing an offence when compared with non-Indigenous people.<sup>71</sup> A total of 90 per cent of Indigenous prison entrants have attributed their offending to substance abuse.<sup>72</sup> There is a high correlation between violence and the consumption of drugs or alcohol, as these substances tend to fuel aggression.<sup>73</sup> Research has also found illicit drug use to be strongly associated with property crime – the most commonly committed offences by Indigenous youth in Queensland.<sup>74</sup> Overall, Indigenous youth, especially those in remote communities, also consume drugs and alcohol at a considerably younger age than non-Indigenous youth.<sup>75</sup>

## 3 Impacts of Colonisation

The legal, political and social structures in Australia were founded on the legal fiction that Australia was *terra nullius*, or ‘uninhabited’.<sup>76</sup> There is some merit in the argument that lingering impacts of colonisation continue to affect Indigenous Australians, and have acted as a source of tension between Indigenous and non-Indigenous society.<sup>77</sup> The RCIADIC report asserted that it is important to recognise the ‘deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society’.<sup>78</sup>

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<sup>66</sup> Queensland Government Statisticians Office, above n 22, 7.

<sup>67</sup> *Ibid.*

<sup>68</sup> Steering Committee for the Review of Government Service Provision, above n 58, [4.21].

<sup>69</sup> John Walker and David McDonald, ‘The Over-Representation of Indigenous People in Custody in Australia’ (Report No 47, Australian Institute of Criminology, August 1995) 6.

<sup>70</sup> Commonwealth Government of Australia, above n 1, vol 2 [15.2.23].

<sup>71</sup> PwC, above n 10, 46.

<sup>72</sup> *Ibid* 23.

<sup>73</sup> Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia* (2013) 36.

<sup>74</sup> Australian Institute of Criminology, Submission No 77 to Legal Affairs and Community Safety Committee, *Inquiry on strategies to prevent and reduce criminal activity in Queensland*, 2014, 301; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia* (2013) 36.

<sup>75</sup> Joudo, above n 16, 9.

<sup>76</sup> Deen Potter, ‘Indigenous youth and restorative justice in Western Australia’ (2010) 20 *Journal of Judicial Administration* 92, 93; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 8.

<sup>77</sup> Monica La Macchia, ‘An introduction to over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system’ (Discussion Paper, Australian Policy Online, 17 October 2016) 2; Thomas Crofts and Tanya Mitchell, ‘Prohibited Behaviour Orders and Indigenous Overrepresentation in the Criminal Justice System’ (2011) 23(2) *Current Issues in Criminal Justice* 277, 278.

<sup>78</sup> Commonwealth Government of Australia, above n 1, vol 2, ch 10.



#### IV THE POLICY SHIFT TO DIVERSION AND THE RATIONALE FOR ITS USE

##### A *The Negative Consequences of Incarceration*

Because the key drivers of Indigenous over-representation in the criminal justice system are socio-economic disadvantage, drug and alcohol misuse and the impacts of colonisation, incarceration (and other punitive measures) are unlikely to offer a long term solution to Indigenous youth offending.<sup>79</sup>

While necessary in some circumstances to ensure public safety, punitive measures may in fact result in further future offending' for a variety of reasons.<sup>80</sup> Given that a criminal record can hinder a child's future career options, incarceration (or other punitive measures) can lead to societal marginalisation and labelling, which can then negatively affect their prospects well into adulthood.<sup>81</sup>

Alarming, incarceration presents unfortunate opportunities for the development of relationships with deviant peers so that young offenders are, in effect, 'schooled' in further offending behaviour. The Townsville Community Legal Service stated that:

Research has shown that prisons often create institutionalisation or dependency, are a perfect training ground for criminal activity, as well as a network base for meeting criminals and leave children with no knowledge of basic life skills for reintegration into society.<sup>82</sup>

A further consequence of incarceration is that Indigenous youths who are placed in juvenile detention are excluded from family and other support networks that exist within their community.<sup>83</sup> Removal from one's family — irrespective of race — has an enormous impact on a person's psychological wellbeing. Some authors claim that removal of Indigenous youth is particularly detrimental due to the adverse consequences associated with the missed opportunity of learning about culture and community.<sup>84</sup>

Young people often 'grow out of crime' when exposed to positive responses,<sup>85</sup> and there is consistent evidence to the effect that a child who commits a minor offence may

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<sup>79</sup> Bronwyn Naylor and Adam Fletcher, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *A Justice Reinvestment Approach to Criminal Justice in Australia*, March 2013, 5.

<sup>80</sup> Children's Court of Queensland, Annual Report 2013-2014 (2014) 6; Commonwealth Government of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2 [14.4.32].

<sup>81</sup> Judge C J Harding and Judge A J Becroft, '10 Characteristics of a Good Youth Justice System' (Paper presented at The Pacific Judicial Development Programme Family Violence and Youth Justice Workshop, Port Vila, Vanuatu, 12-15 February, 2013) 3.

<sup>82</sup> Townsville Community Legal Service, IP Submission 181 to Australian Law Reform Commission, *Inquiry into Children and the Legal Process*, September 1995, as cited in Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [20.14].

<sup>83</sup> Australian Institute of Health and Welfare, Australian Government, *Diverting Indigenous offenders from the criminal justice system*, Resource sheet no. 24 (December 2013) 4. The point needs to be made, however, that removing youths from violent and dysfunctional family or social arrangements, could be a desirable outcome in certain circumstances.

<sup>84</sup> Wendy-Rea Young and Tammy Solonec, 'Epidemic Incarceration and Justice Reinvestment' (2011) *Indigenous Law Bulletin* 7(26) 15, 16.

<sup>85</sup> Shanna Satya and Ruth Bella Barson, 'A Contemporary Snapshot of Two Issues upon which the RCIADIC Report Commenced: Youth Justice and the Over-Incarceration of Aboriginal Young People, and Alcohol-Related Offences and Offending' (2011) 15(1) *Australian Indigenous Law Review* 87, 88.

often never re-offend.<sup>86</sup> Therefore, incarceration can entrench a young person in the justice system, who may have otherwise avoided involvement in further criminal activity.<sup>87</sup>

Quite apart from the fact that these punitive measures tend to have a questionable effect on recidivism, they are also amongst the most expensive means of addressing juvenile crime.<sup>88</sup> During 2016, the total costs in relation to the incarceration of Aboriginal and Torres Strait Islander offenders in Australia were estimated to be \$7.9 billion.<sup>89</sup>

Given their chronic over-representation in the justice system the negative consequences of incarceration have particular relevance for Aboriginal and Torres Strait Islander offenders and it is, therefore, understandable that that has already led to the implementation of diversionary measures to reduce their contact with the formal criminal justice system.<sup>90</sup>

## B *What is Diversion?*

Diversion refers to ‘changing the direction or course of a person away from the traditional justice system completely or minimising progression through the justice system.’<sup>91</sup> This process has the primary goal of providing offenders with the opportunity for rehabilitation, in the hope of preventing future reoffending.<sup>92</sup> The Queensland Police Service (‘QPS’) is generally the first point of contact for child offenders, and it is the only agency capable of diverting a child at this initial stage.<sup>93</sup> Police diversion may involve administering a caution,<sup>94</sup> referring the offender to a restorative justice process (i.e. conferencing),<sup>95</sup> or referring them to an alternative diversionary program.<sup>96</sup> The *Youth Justice Act 1992* (Qld) (‘*Youth Justice Act*’) expressly requires a police officer to consider these alternatives before proceeding against a child offender.<sup>97</sup>

Cautioning and conferencing are two of the most frequently used diversionary practices in Queensland. A caution is essentially a formal warning given to the offender by a police officer, which does not result in a conviction being recorded as the matter does not come before a court.<sup>98</sup> Instead, the likely consequences of further offending are explained to the child, in the hope they will not reoffend.<sup>99</sup> Conferencing consists of a meeting with the offender, victim, police, support persons and the convenor to discuss

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<sup>86</sup> Bob Atkinson, ‘Report on Youth Justice to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence’ (Report, Youth Justice Taskforce Queensland Government, 2018) 23.

<sup>87</sup> Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [18.38].

<sup>88</sup> Peter Murphy, Anthony McGinness and Tom McDermott, ‘Review of the Effective Practice in Juvenile Practice’ (Report for the Minister for Juvenile Justice, Noetic Solutions Pty Ltd, 2010) 4.

<sup>89</sup> PwC, above n 10, 27.

<sup>90</sup> Satya and Barson, above n 86, 88.

<sup>91</sup> Joudo, above n 16, 12.

<sup>92</sup> Scott, King, Saravanan and Witt, above n 5, 1.

<sup>93</sup> Atkinson, above n 87, 43.

<sup>94</sup> *Youth Justice Act 1992* (Qld) s 15.

<sup>95</sup> *Ibid* s 31(2).

<sup>96</sup> *Ibid* s 38.

<sup>97</sup> *Ibid* s 11.

<sup>98</sup> *Ibid* s 15. However, the juvenile is recorded on the police information system as having been cautioned for that particular offence.

<sup>99</sup> Ann Lewis and Clement O’Regan, ‘Police Cautioning – Effective Diversion or Expedience?’ (Paper presented at National Conference on Juvenile Justice, Adelaide, 22-24 September 1992) 246.

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the offence.<sup>100</sup> Overall, the conference looks to repair the damage caused to the victim and the community<sup>101</sup> and to assist the young offender to develop a sense of responsibility for his or her actions.<sup>102</sup> There are also diversionary programs available for referral by the police or the court, and these often involve treatment for drug and alcohol dependency.<sup>103</sup> Graffiti removal programs, adventure-based programs and educational/occupational training programs are also among the other specific options for the diversion of youth offenders.<sup>104</sup>

If the police decide not to divert a youth offender, the child is likely to appear before the Children's Court. There are number of avenues available to that Court in sentencing a child, short of a period of detention.<sup>105</sup> It may refer a child to conferencing as an alternative to sentencing only after a finding of guilt<sup>106</sup> but it does have the power to dismiss a charge against a child if it is satisfied the police should have cautioned<sup>107</sup> or referred the child to a restorative justice process.<sup>108</sup>

C      *Culturally Inappropriate and Homogenous Programs*

Cunneen recognises that diversionary schemes are often 'rigid in their structure and not designed in close consultation with Indigenous communities or adapted to local circumstances.'<sup>109</sup> Past programs in Queensland, such as the Newman Government's Sentenced Youth Boot Camp (SYBC), failed to recognise the realities in many Indigenous communities. Despite a majority of participants identifying as Aboriginal or Torres Strait Islander, the SYBC program entirely lacked consideration of Indigenous needs and failed to engage with their communities.<sup>110</sup> Those communities (and their elders) were not involved in the planning and implementation of the program, with the result that culturally specific needs were not addressed.<sup>111</sup>

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<sup>100</sup> *Youth Justice Act 1992* (Qld) s 34. The child can also request 1 or more members of their family to be present at the conference.

<sup>101</sup> Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* above n 88, [18.45].

<sup>102</sup> *Youth Justice Act 1992* (Qld) s 35(3). As per s 36, an agreement can be reached in order for the offender to remedy the harm caused. However, any agreement must not breach the sentencing principles within the Act or provide for a more severe punishment than would be imposed by the court.

<sup>103</sup> Legal Aid Queensland, *Diversion and referral options* <<http://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Diversion-and-referral-options>>. Such as Queensland Magistrates Early Referral into Treatment Program (QMERIT), Queensland Court Referral (QCR) and Drug Diversion Assessment Program (DDAP).

<sup>104</sup> Queensland Government, *Youth Justice community programs and services* <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-community-programs-and-services>>.

<sup>105</sup> *Youth Justice Act 1992* (Qld) ss 175-176. A child may be sentenced to a reprimand, good behaviour order, probation, community service order, conditional bail program, or graffiti removal order. The court may also impose a fine, or refer the child to a specialist court, such as the Queensland Murri Court.

<sup>106</sup> *Ibid* s 162.

<sup>107</sup> *Ibid* s 21.

<sup>108</sup> *Ibid* s 24A.

<sup>109</sup> Chris Cunneen, 'Community Conferencing and the fiction of Indigenous control' (1997) 30 *Australian and New Zealand Journal of Criminology* 292, 293.

<sup>110</sup> KMPG, 'Final Report for the evaluation of Queensland's Youth Boot Camps' (Report, KMPG, July 2015) 67.

<sup>111</sup> *Ibid* 65. For example, the traditional owners of the land at Lincoln Springs offered to provide free education to the participating youth, though this opportunity was refused by the service provider.

There has also been a tendency for diversion to have a homogenising effect, with programs being implemented consistently across the State, which assumes that all Indigenous communities encounter identical concerns. As a result, the specific problems within these communities, especially those in remote areas, are overlooked. The Select Committee on Regional and Remote Indigenous Communities asserts ‘...a one-size-fits-all policy and program approach will have inconsistent results given the differences between each community.’<sup>112</sup>

## V COMMON BARRIERS TO DIVERSION FOR INDIGENOUS YOUTH

### A Problems with Police Discretion

An impediment to the issuing of cautions to Indigenous youth offenders, or referring them to conferencing, is the level of discretion vested in the QPS. Cunneen argues that the discretion to apply diversionary powers may not lead to positive outcomes for Indigenous youth.<sup>113</sup> The problem is *not* that police have discretion; it relates to inconsistent application of the police powers. The lack of guidance in the *Youth Justice Act*, or in the QPS Operational Procedures Manual,<sup>114</sup> allows the police to ‘adopt idiosyncratic and inconsistent decision-making practices vulnerable to bias and prejudice.’<sup>115</sup> Some researchers argue that a common perception is that police will not wholeheartedly embrace diversion, due to the objectives of diversion not necessarily aligning with a police officer’s personal belief system regarding their duty to detect and punish crime.<sup>116</sup>

During 2016 to 2017, only 790 cautions out of a total of 3710 in Queensland were issued to Aboriginal and Torres Strait Islander offenders, which equates to a mere 21 per cent.<sup>117</sup> It therefore appears that the extent to which police use their diversionary powers is limited by their perception of their ‘gate-keeper’ role.<sup>118</sup> Further, since conferencing was included in the *Youth Justice Act* in 1996, there have been low rates of police referrals, which has arguably undermined its success with Indigenous youth. From all sources (including the Children’s Court), 47 per cent of all referrals to youth justice conferencing during 2016 to 2017 involved Aboriginal and Torres Strait Islanders.<sup>119</sup> However, during the same period, they were included in only 23 per cent of all police referrals.<sup>120</sup> It therefore appears that police may tend to choose harsher options, despite the availability of more lenient options which might be more appropriate for particular Indigenous youth offenders.<sup>121</sup>

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<sup>112</sup> Senate Select Committee on Regional and Remote Indigenous Communities, above n 6, 8.

<sup>113</sup> Cunneen, above n 110, 292.

<sup>114</sup> Queensland Police, *Operational Procedures Manual Issue 66* (28 September 2018) <<https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/opm.htm>>.

<sup>115</sup> Scott, King, Saravanan and Witt, above n 5, 1.

<sup>116</sup> Tamara Walsh, ‘Keeping Vulnerable Offenders Out of the Courts: Lessons from the United Kingdom’ (2018) 42 *Criminal Law Journal* 160, 175.

<sup>117</sup> Queensland Police Service, above n 48, 112.

<sup>118</sup> David Pheaney, ‘Understanding the Importance and Potential of the Youth Offenders Act 1997 (NSW) in Addressing the Over-representation of Aboriginal Juveniles in the Criminal Justice System’ (2013) 8(9) *Indigenous Law Bulletin* 27, 27.

<sup>119</sup> Children’s Court of Queensland, above n 3, 18.

<sup>120</sup> Queensland Police Service, above n 48, 112.

<sup>121</sup> A. Corbo Crehan, ‘Appropriate’ Police Discretion and Indigenous Over-Representation in the Criminal Justice System’ (2010) 11 *Australian Journal of Professional and Applied Ethics* 1, 5.

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B *Geographical Isolation*

The Australian Institute of Criminology suggests that one of the most significant barriers to diversion is the remoteness of many Indigenous communities.<sup>122</sup> Many remote Aboriginal and Torres Strait Islander communities experience high levels of youth crime and disadvantage<sup>123</sup> and their isolation presents a significant challenge in the delivery of diversionary options, particularly when governments take the view that it is 'not economically or practicably feasible to run programs in remote areas.'<sup>124</sup> This results in a lack of youth justice options for Indigenous youth, to exacerbate problems caused by the unavailability of other services including health, education, and employment services.<sup>125</sup>

Such barriers ultimately result in fewer Indigenous youth being diverted, which contributes to their over-representation in the criminal justice system generally, and their high levels of incarceration specifically.

C *It's not just Australia that experiences problems with diversion*

Parallels can be drawn between Australia, Canada and New Zealand since all three jurisdictions have historically been plagued with many of the same problems. The youth justice systems in both Canada and New Zealand have, however, applied a new model whereby the majority of youth offenders are 'diverted' from criminal behaviour. As will be shown, the results are mixed.

1 *The New Zealand Experience with Diversion*

Prior to enactment of the *Childrens and Young Peoples Well-being Act 1989* (NZ) ('CYPWA'), New Zealand had approximately 6,000 youth being processed formally through the court system.<sup>126</sup> One of the main principles under that Act is that criminal proceedings should not be instituted if there are alternative means of dealing with the matter.<sup>127</sup> Currently, over 75% of youth are handled through diversion, meaning only a quarter of youth offenders are ultimately charged.<sup>128</sup> In 2017, 1,884 juvenile defendants were disposed of in New Zealand courts, in comparison to a total of 6,479 in Queensland.<sup>129</sup>

New Zealand is considered the pioneer of youth justice conferencing, due to its creation of the Family Group Conference ('FCG') which has gained significant international recognition.<sup>130</sup> It was also the first country in the world to provide a legislative basis for conferencing.<sup>131</sup> Under the CYPWA, an FCG is compulsory for virtually all youth

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<sup>122</sup> Joudo, above n 16, 84.

<sup>123</sup> Queensland Government, *Draft Indigenous Justice Strategy 2011-2014*, above n 26, 24.

<sup>124</sup> Joudo, above n 16, 84.

<sup>125</sup> R White and J Wyn, *Youth and society: exploring the social dynamics of youth experience* (Oxford University Press Melbourne, 2<sup>nd</sup> ed, 2008) 86.

<sup>126</sup> Melissa Goemann, 'New Zealand's Youth Justice Transformation: Lessons for the United States' (Report, The National Juvenile Justice Network, 25 April 2018) 1.

<sup>127</sup> Children's and Young People's Well-being Act 1989 (NZ) s 208(a).

<sup>128</sup> Goemann, above n 127, 3.

<sup>129</sup> Ministry of Justice New Zealand, 'Youth Prosecution Statistics' (2017).

<sup>130</sup> Donald J Schmid, 'Restorative Justice: A New Paradigm for Criminal Policy' (2003) 34(1) *Victoria University of Wellington Law Review* 91, 92. Australia's conferencing model was adapted from New Zealand's FCG model.

<sup>131</sup> Sharon Hayes and Hennessy Hayes, 'Developing Ethical Identities in Young Offenders through Restorative Justice Practice in Australia' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 380, 382.

offenders,<sup>132</sup> as most proceedings cannot be instituted until an FCG is held.<sup>133</sup> Therefore, the outcome for a particular offender is generally decided by the conference participants, as opposed to by the court.<sup>134</sup>

## 2 Canada and Diversionary Strategies

Canada's youth incarceration rates were previously one of the highest among Western countries (even higher than the US) due to an over-reliance on custodial sentences.<sup>135</sup> Canada currently has one of the lowest rates of youth incarceration in the world, after a dramatic reduction in the previous two decades.<sup>136</sup> For example, there has been a 33 per cent decrease in the rate of youth incarcerated between 2012 and 2017 alone.<sup>137</sup>

The decline in youth custody rates has been credited to the introduction of the *Youth Criminal Justice Act 2003* (Can) ('YCJA'), which supports an increased use of diversion.<sup>138</sup> Diversion is highlighted in the form of extrajudicial measures contained within the Act, encompassing all measures outside the formal justice process.<sup>139</sup> The YCJA presumes extrajudicial measures to be the appropriate course of action for youth who have committed non-violent offences and who have no previous convictions.<sup>140</sup> However, these measures can still be utilised if a particular youth has previously been subjected to extrajudicial measures, or been found guilty of an offence.<sup>141</sup>

The YCJA also reserves incarceration for the most serious crimes. Thus, custody is only available as a potential sentence for a specific set of offences.<sup>142</sup> A judge must also consider all reasonable alternative options to custody before imposing any period of imprisonment, paying particular attention to the circumstances of Indigenous youth offenders.<sup>143</sup>

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<sup>132</sup> Cunneen, above n 110, 303.

<sup>133</sup> *Children's and Young People's Well-being Act 1989* (NZ) s 245. A Family Group Conference is only considered inappropriate where the offending is serious, such as murder or manslaughter.

<sup>134</sup> *Ibid* s 267. It is the duty of an enforcement agency to give effect to any decision, recommendation or plan within the conference, unless it is considered impracticable, unreasonable or clearly inconsistent with the principles set out in ss 5 and 208.

<sup>135</sup> JoAnn Miller-Reid, 'Transforming Ontario's youth justice system to improve outcomes for youth' (Paper presented at IPAC Annual Conference, 2015) 1.

<sup>136</sup> Brock Jones, 'Meaningful Consequences? Sentencing and the Youth Criminal Justice Act' (2009) 62 *Criminal Reports Articles* 233, 238.

<sup>137</sup> Jamil Malakieh, 'Adult and youth correctional statistics in Canada, 2016/2017 (Report, Canadian Centre for Justice Statistics, 19 June 2018) 5.

<sup>138</sup> *R v P* (2006) SCC 27, 38 C.R. (6th) [19] (Charron J); JoAnn Miller-Reid, 'Transforming Ontario's youth justice system to improve outcomes for youth' (Paper presented at IPAC Annual Conference, 2015) 2.

<sup>139</sup> *Youth Criminal Justice Act*, S.C. 2002, c 1, ss 6-8. Extrajudicial measures include warnings, cautions, crown cautions, or extrajudicial sanctions.

<sup>140</sup> *Ibid* s 4(c).

<sup>141</sup> *Ibid* s 4(d).

<sup>142</sup> *Ibid* s 39(1)(a)-(d). These include violent offences; indictable offences for which an adult would be liable to two or more years imprisonment and the child has a history of a pattern of findings of guilt; where the child has previously failed to comply with a non-custodial sentence; and exceptional cases where a non-custodial sentence would be inconsistent with the principles of the Act.

<sup>143</sup> *Youth Criminal Justice Act*, S.C. 2002, c 1, s 38(2)(d).

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D *Despite Diversionary strategies, over-representation of Indigenous youths in the Criminal Justice System in New Zealand and Canada, prevail*

Canada and New Zealand's history of colonisation, and its impact on their original inhabitants, mirrors the Australian experience in many ways.<sup>144</sup> As a result, it is not surprising that those countries also experience chronic over-representation of their native populations in their criminal justice systems.<sup>145</sup> Despite their increased use of diversion for youth offenders, this over-representation continues.

During 2017, Indigenous youth still accounted for 50 per cent of those admitted to custody in Canada, though they represented only 8 per cent of the total youth population.<sup>146</sup> Despite overall youth incarceration rates declining substantially, those for Indigenous youth decreased at a much lower rate.<sup>147</sup> In New Zealand, the proportion of Maori processed through court actually increased to 64 per cent (from 49 per cent in 2008), despite them representing only 14.9 per cent of the total population.<sup>148</sup>

In light of the above, the diversionary programs that have been put in place have not been particularly effective in reducing the over-representation of Indigenous youth in the criminal justice systems in New Zealand and Canada. What is required is a new model which embraces JR.

## VII TIME FOR A NEW MODEL? — JUSTICE REINVESTMENT

While diversionary strategies are an important adjunct to combatting Indigenous youth offending, other strategies may provide further benefits in reducing Indigenous youth crime. One such method that originated in the US, and which is gaining traction in parts of Australia, is referred to as Justice Reinvestment (JR). While not a panacea for the woes currently faced in Queensland, the development and application of JR-type programs might help address the root causes of Indigenous youth offending and lead to reductions in Indigenous youth offending and incarceration.

### A *What is Justice Reinvestment?*

There is no single project that is representative of JR. The creation of each project is a response to the need to rectify a problem or problems that exist within a particular area. JR-type projects are developed in communities experiencing high levels of crime.<sup>149</sup> The approaches adopted may include amending policy and legislation, introducing various treatment programs, and investing in neighbourhood necessities.<sup>150</sup> Within the US, the capacity to implement these approaches is derived from the redirection of funds

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<sup>144</sup> Raymond R Corrado, Sarah Kuehn and Irina Margaritescu, 'Policy Issues Regarding the Over-representation of Incarcerated Aboriginal Youth Offenders in a Canadian Context' (2014) 14(1) *Youth Justice* 40, 41.

<sup>145</sup> Naylor and Fletcher, above n 80, 10.

<sup>146</sup> Malakieh, above n 139, 6.

<sup>147</sup> Corrado, Kuegn and Margaritescu, above n 146, 45.

<sup>148</sup> Goemann, above n 127, 2.

<sup>149</sup> Matthew Willis and Madeleine Kapira, 'Justice reinvestment in Australia: a review of the literature' (Research Report No 09, Australian Institute of Criminology, 2018) vi.

<sup>150</sup> *Ibid.*

that were typically expended on incarceration.<sup>151</sup> Despite its economic benefits, JR can also serve a social justice purpose by addressing the prime causes of offending.<sup>152</sup>

While still relatively new, JR is attracting quite a lot of interest in the US. Most states have now introduced some form of JR-type strategies and have partnered with public and non-public institutions to develop projects designed to address the causes of offending behaviour and reduce the rates of recidivism amongst targeted groups.<sup>153</sup>

A review of the current literature, reveals that there are typically four stages that will occur as part of any JR project:

1. Collecting and analysing data to determine the communities experiencing the highest levels of crime, and the drivers of crime within each of those communities;
2. Developing policies to generate savings and improvements within each community;
3. Implementing the policies and reinvestments into each community; and
4. Evaluating and monitoring the impacts.<sup>154</sup>

Data is collected from communities to guide investment into programs and services that aim to target the unique risk factors present within that particular community.<sup>155</sup> As outlined by Schwartz, ‘...reinvestment might be in such things as redeveloping abandoned housing, providing job training and education, treatment for substance abuse and mental health services.’<sup>156</sup> Other developments may include improved healthcare, or increased family assistance.<sup>157</sup> However, there is also the capacity to invest in physical infrastructure and other resources within that community.<sup>158</sup>

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<sup>151</sup> Melanie Schwartz, ‘Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment’ (2010) 14(1) *Australian Indigenous Law Review* 2, 3.

<sup>152</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, above n 55, 127. These prime causes may include inadequate housing, low employment rates, lack of education and training opportunities, drug and alcohol abuse, mental illness and family concerns.

<sup>153</sup> For example, see, Justice Centre: Council of State Governments, *Justice Reinvestment* (2018) <<https://csgjusticecenter.org/jr/publications-library/>>. The Justice Centre outline details of a range of Justice Reinvestment projects that have either been completed or are currently underway throughout the United States. Examples of projects currently underway in the US, include: projects that examine probation, parole, and incarcerated population trends; length of time served in prison or jail and on supervision; statutory and administrative policies; availability of treatment and programs designed to reduce recidivism; behaviour health and so on. While targeting general members of the public, some projects have a specific Indigenous target, such as Wyoming.

<sup>154</sup> For example, see, Wendy-Rea Young and Tammy Solonec, ‘Epidemic Incarceration and Justice Reinvestment’ (2011) *Indigenous Law Bulletin* 7(26) 15, 17; Melanie Schwartz, ‘Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment’ (2010) 14(1) *Australian Indigenous Law Review* 2, 3; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia* (2013) 45. See, also, the various examples provided by the Justice Centre: Council of State Governments, *Justice Reinvestment* (2018) <<https://csgjusticecenter.org/jr/publications-library/>>.

<sup>155</sup> Amnesty International, ‘A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia’, above n 4, 27.

<sup>156</sup> Schwartz, ‘Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment’, above n 153, 40.

<sup>157</sup> Naylor and Fletcher, above n 80, 9.

<sup>158</sup> Melanie Schwartz, David Bentley Brown and Chris Cunneen, ‘Justice Reinvestment’ (2018) *University of New South Wales Law Research Series* 1, 2.



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B *The United States Experience*

Among lawyers, criminologists and those familiar with sentencing practices, the US is not generally considered a frontrunner when it comes to instituting an ideal criminal justice system because of its historically high incarceration rates and its use of the death penalty in some States. These criticisms notwithstanding, the nation-wide use of JR has attracted worldwide attention. The concept emerged in the early 2000s as a strategy for reducing costs in the US penal system in response to a 500% increase in prison numbers since the 1970s.<sup>159</sup> JR has been embraced in various places within the US, with 27 states having implemented it by 2013, and federal legislation having been enacted to give it full force.<sup>160</sup>

Demographic mapping in the US identified 'million dollar blocks' whereby millions of dollars were being spent on imprisoning people from particular neighbourhoods.<sup>161</sup> Common underlying issues identified in numerous states included unequal employment opportunities and a lack of access to health services, though other factors were identified in certain areas.<sup>162</sup>

1 *Texas*

Between 2008 and 2009, Texas decreased its prison population by approximately 9,000 people.<sup>163</sup> The majority of its JR initiatives involved criminal justice system reform regarding specialist courts, prison-based services and parole.<sup>164</sup> However, the recognition of a need for increased funding on substance abuse and mental health services resulted in \$241 million being redirected from prisons and expended on these programs.<sup>165</sup>

2 *City of New Orleans*

Despite JR usually being implemented from a costs-saving perspective in the US, the city of New Orleans in the state of Louisiana is a valuable example of JR being applied with a greater emphasis on community improvement. A particular neighbourhood within the city called 'Central City' was identified as experiencing limited access to health care, high unemployment rates, poor education, and poverty. These are factors present in many Australian Indigenous communities.<sup>166</sup> The establishment of JR in the city 'led to a range of pilot projects, focusing on health services, employment mentoring, corrections supervision and vocational training for young people.'<sup>167</sup>

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<sup>159</sup> *Ibid* 3.

<sup>160</sup> See, Legal and Constitutional Affairs References Committee, above n 73, 50 [5.27].

<sup>161</sup> Melanie Schwartz, 'Redressing Indigenous over-representation in the criminal justice system with justice reinvestment' (2013) 118 *Precedent* 38, 41.

<sup>162</sup> See, Legal and Constitutional Affairs References Committee, above n 73, 49 [5.24].

<sup>163</sup> Young and Solonec, above n 85, 15.

<sup>164</sup> Willis and Kapira, above n 151, 20.

<sup>165</sup> Legal and Constitutional Affairs References Committee, above n 74, 52 [5.32].

<sup>166</sup> Spatial Information Design Lab, 'Justice Reinvestment New Orleans' (Report, Columbia University Graduate School of Architecture, Planning and Preservation, 2009).

<sup>167</sup> Willis and Kapira, above n 151, 24.

C Justice Reinvestment in Australia

Justice reinvestment is not an unknown concept in Australia, particularly in Queensland. It was first identified in 2009 by the Social Justice Report,<sup>168</sup> and a number of reports and inquiries have considered its implementation since then. The majority recommended that JR be trialled in Australia on a national scale.<sup>169</sup> Additionally, two successive Aboriginal and Torres Strait Islander Social Justice Commissioners (Tom Calma and Mick Gooda) have strongly supported JR in Australia.<sup>170</sup> Queensland is one of the few states or territories in Australia that has individually considered JR, though as yet it has not been applied to any considerable extent. There are a number of JR initiatives at the consultation and planning stage throughout the State, but it is difficult at this stage of their implementation to make any true evaluation of their capacity to reduce offending.<sup>171</sup>

As Allison and Cunneen have noted, JR projects in Australia have varied in origination and funding.<sup>172</sup> The common goal, however, has been to focus on the reduction of incarceration of young Indigenous people.<sup>173</sup> Most states and territories throughout Australia have some form of JR projects which are characterised by a series of partnerships between public and non-public stakeholders relative to geographical location and tailored to the needs in those communities.<sup>174</sup> For instance, in communities where school non-attendance is a particular problem, projects could be designed with the inclusion of relevant stakeholders such as schools and community members to tackle issues surrounding truancy. Similarly, in communities experiencing a lack of adequate health outcomes, projects can be designed with improvements in this area as their focus.<sup>175</sup>

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<sup>168</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Report, Australian Human Rights Commission, 2009) 56.

<sup>169</sup> See, for eg, Senate Select Committee on Regional and Remote Indigenous Communities, *Final Report 2010*, September 2010, 21; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*, June 2011, 321; Queensland Government, *Draft Indigenous Justice Strategy 2011-2014* (May 2011) 24; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia* (2013) 124; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 14; Amnesty International, 'A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia' (Report, Amnesty International, May 2015) 8; Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 7.

<sup>170</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Report, Australian Human Rights Commission, 2009); Aboriginal and Torres Strait Islander Social Justice, *Social Justice and Native Title Report 2014* (Report, Australian Human Rights Commission, 2014); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Report, Australian Human Rights Commission, 2016).

<sup>171</sup> Schwartz, Brown and Cunneen, above n 160, 6.

<sup>172</sup> Allison and Cunneen, above n 9, 8.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.* 10-11. Examples of specific projects currently underway or in the developmental phase, include, but are not limited to: Yarrabah Safe Communities Working Group (QLD); Yirriman Project in the West Kimberleys, (WA); Doomadgee, on-country bush camp (QLD); Katherine-based governance group (NT); and Marangka project in Bourke, (NSW). In addition to those projects, Allison and Cunneen cite other locations where projects in varying stages of progress are underway. These include: Cherbourg (Qld); Cowra (NSW) Ceduna (South Australia).

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D Challenges

JR in Australia is not without its challenges. This section of the paper will discuss the main challenges that must be addressed if the viability of such programs is to be assured.

1 *Whole of Government and Multi-jurisdictional Support*

The primary challenge in implementing JR is gaining genuine commitment from all levels of government in Australia's federal structure.<sup>176</sup> While primary responsibility for the criminal justice system lies with the states and territories,<sup>177</sup> Amnesty International argues that the Australian Government, 'as a signatory to international human rights conventions, bears ultimate responsibility for fulfilling the rights of Indigenous young people in all states and territories.'<sup>178</sup>

A JR approach also requires multi-jurisdictional support, as demonstrated by the success of JR in the US.<sup>179</sup> For national success in Australia, there needs to be cooperation and commitment among all states and territories.<sup>180</sup> The Australian Law Reform Commission has recommended that a national body, preferably with Indigenous leadership, be established.<sup>181</sup> Similar to the 'US Council of State Governments Justice Center', this national body could play a supervisory role to ensure initiatives are implemented in line with the essence of JR.<sup>182</sup>

2 *Data Collection and Monitoring*

The UK House of Commons Justice Committee has stated that JR requires precise data for input into the mapping process (the first stage of JR)<sup>183</sup> so significant limitations to the implementation of JR in Australia are the lack of current data and the difficulty of collecting it in the future. The National Congress of Australia's First Peoples suggested that such data be conducted on a national basis, or alternatively, that there should be improvements in data collected on a nation-wide basis.<sup>184</sup> However, JR is not purely data driven. It is supplemented by years of 'research, countless conversations, and a network of local and national participants' dedicated to justice reinvestment.<sup>185</sup> Additionally, the experiences and needs of each community can be used to develop tailored programs for youth offending.<sup>186</sup>

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<sup>176</sup> Schwartz, 'Redressing Indigenous over-representation in the criminal justice system with justice reinvestment', above n 163, 40.

<sup>177</sup> Legal and Constitutional Affairs References Committee, above n 74, 127.

<sup>178</sup> Amnesty International, 'A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia', above n 4, 5.

<sup>179</sup> Legal and Constitutional Affairs References Committee, above n 74, 85.

<sup>180</sup> Just Reinvest NSW, Submission No 44 to Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia*, March 2013, 23.

<sup>181</sup> Australian Law Reform Commission, *Pathways to Justice*, above n 154, 138.

<sup>182</sup> Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' above n 153, 13.

<sup>183</sup> House of Commons Justice Committee, UK Parliament, *Cutting Crime: the case for justice reinvestment* (2010) 118.

<sup>184</sup> National Congress of Australia's First Peoples, Submission 53 to Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach in Australia*, March 2013, 13.

<sup>185</sup> Spatial Information Design Lab, above n 168, 7.

<sup>186</sup> Just Reinvest NSW, above n 182, 20.

JR initiatives would also need to be monitored and evaluated on a regular basis.<sup>187</sup> This would ensure that the anticipated savings and the desired effect on offending and incarceration rates is achieved.<sup>188</sup>

### 3 'Tough on Crime'

The need for a unique approach in dealing with child offenders, particularly Indigenous youth, is often contested by the powerful political preference for 'tough on crime' approaches in Queensland and elsewhere. Tension arises between the decision to hold youth accountable for their actions, or to provide them with protection and assistance as dependent individuals.<sup>189</sup>

## VIII JUSTICE REINVESTMENT IN QUEENSLAND: THE SOLUTION TO THE OVER-REPRESENTATION OF INDIGENOUS YOUTH?

Numerous policy approaches in Australia, and more specifically in Queensland, have endeavoured to counteract the over-representation of Indigenous youth in the criminal justice system.<sup>190</sup> Diversion in particular has been one of these responses, though it has provided minimal positive outcomes for Indigenous youth offending rates. Governments have tended to employ a 'one-size-fits-all' approach across the state, resulting in the complexities and disadvantages within Indigenous communities not being fully considered. Furthermore, several barriers can hinder access to diversion, such as the gatekeeping role of the police and the remoteness of many communities.

Diversionary programs tend to target individuals, though broader community transformation is required as reoffending behaviour is often closely associated with disadvantage.<sup>191</sup> The 2009 Social Justice Report observed, '...you can put an individual offender through the best resourced, most effective rehabilitation program, but if they are returning to a community with few opportunities, their chances of staying out of prison are limited.'<sup>192</sup> The need to implement community-based programs and initiatives is consistently raised throughout the literature,<sup>193</sup> and a JR strategy does precisely that.<sup>194</sup>

JR in the US has largely focused on reforming the criminal justice system with the objective of producing financial savings. Arguably, Australia should focus on JR programs that address localised disadvantage and provide social reform, though that could still be achieved by the re-allocation of funds. Data in relation to a particular community would be collected and analysed, instead of implementing a generic

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<sup>187</sup> Alexandra Bratanova and Jackie Robinson, 'Cost affective analysis of a justice reinvestment approach to Queensland's youth justice services' (Report, Pro Bono Centre School of Law University of Queensland, 2015) 20.

<sup>188</sup> Legal and Constitutional Affairs References Committee, above n 74, 47 [5.19].

<sup>189</sup> His Honour Judge Peter Johnstone, 'Emerging developments in juvenile justice: the use of intervention, diversion and rehabilitation to break the cycle and prevent juvenile offending' (2016) 12 *The Judicial Review* 455, 459.

<sup>190</sup> See, eg. Council of Australian Governments, National Indigenous Reform Agreement 2012 (Closing the Gap).

<sup>191</sup> Legal and Constitutional Affairs References Committee, above n 74, 14 [2.52].

<sup>192</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, above n 170, 12.

<sup>193</sup> His Honour Judge Peter Johnstone, above n 189, 459.

<sup>194</sup> Mick Gooda, 'Justice Reinvestment: A new Solution to the Problem of Indigenous Over-representation in the Criminal Justice System' (Speech delivered at ANTaR NSW Seminar – Juvenile Justice Strategy: A Better Way, Sydney Mechanics School of Arts NSW, 10 March 2010).

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approach for all Indigenous communities, to recognise that they may in fact experience dissimilar issues.<sup>195</sup> That would take into account the reality that Indigenous communities are diverse, and would allow specific programs and services to align with each particular community's needs.<sup>196</sup>

As stated, the majority of Aboriginal and Torres Strait Islander youth live in urbanised areas that could be likened to the 'million dollar blocks' identified within the US. However, there is also a substantial number of Indigenous youth who reside in remote communities where access to mainstream services is limited..<sup>197</sup> JR could act as a catalyst to make these services available where they could not previously be provided.<sup>198</sup> For example, JR within Mornington Island could focus on the unavailability of basic supplies in wet seasons and its harmful homebrew epidemic. On the other hand, JR within Doomadgee could focus on its long-term unemployment rates and lack of educational opportunities. JR is not a panacea for Indigenous youth offending, as the 'back-end' approaches of incarceration and diversion would still be required for those who do offend.

## IX CONCLUSION AND RECOMMENDATIONS

This paper recommends that the Australian government trial JR to address the complex needs and issues present within its deprived (and often remote) Indigenous communities. It acknowledges that JR is not an entirely new concept within Australia, though any implementation of JR has only been within particular states, rather than on a national-level. JR in Australia could address Indigenous youth crime before it eventuates, moving away from a focus on diversion and other back-end criminal justice responses.<sup>199</sup>

Like diversion, JR would attempt to reduce reoffending among Indigenous youth, though it would do so by ensuring they return to strong and supportive communities. As Judge Peter Johnstone stated, 'An enlightened society seeks to tackle crime at its very roots. Thus, the primary focus might be on the situations that will impact upon a young person's likelihood of committing crime, to prevent offending before it begins.'<sup>200</sup>

The rate at which Indigenous youth are over-represented in the criminal justice system has been described as 'one of the most urgent human rights issues facing Australia.'<sup>201</sup> An attempt to rationalise Indigenous over-representation requires an analysis of the complex historical issues, and consequent disadvantage experienced by Indigenous peoples. Socio-economic disadvantage, substance abuse and the impacts of colonisation are all recognised as significant sources of that over-representation.

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<sup>195</sup> Schwartz, 'Redressing Indigenous over-representation in the criminal justice system with justice reinvestment', above n 161, 39.

<sup>196</sup> Legal and Constitutional Affairs References Committee, above n 74, 71 [6.30].

<sup>197</sup> Susan Bandias, Don Fuller and Steven Larkin, 'Vocational education, Indigenous students and the choice of pathways' (Research Report, Department of Industry, Innovation Science, Research and Tertiary Education, April 2013) 11.

<sup>198</sup> Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment', above n 151, 10.

<sup>199</sup> Bratanova and Robinson, above n 187, 2.

<sup>200</sup> His Honour Judge Peter Johnstone, above n 189, 458.

<sup>201</sup> Mick Gooda, 'Social Justice and Native Title Report' (Report, Australian Human Rights Commission, 2014) 100.

It is also crucial to understand the geographical distribution, and considerably younger age structure, of the Indigenous population in Queensland when attempting to address Indigenous youth offending. Despite a majority of Indigenous youth living in urban areas, the high proportion who live in remote communities often experience the highest levels of disadvantage, which contributes significantly to their high rates of incarceration.<sup>202</sup>

Although implemented as a response to the negative consequences of incarceration, diversion is not producing the desired reduction in Indigenous youth offending rates in Queensland.<sup>203</sup> Diversionary schemes are often uniformly applied across the state, with little consideration of the Indigenous culture, or the diversity between communities. Further, Indigenous youth are often unable to access diversion due to the adverse use of police discretion and geographical isolation. New Zealand and Canada have illustrated that even a conscious effort to increase diversion is not sufficient to reduce the disproportionate representation rates of Indigenous youth in the criminal justice system. Whilst integral parts of the justice system, diversion and incarceration need to cease to be the government's focus.

'Front-end' programs that are designed to alleviate the underlying causes of offending in communities hold much greater potential to counteract the over-representation issue. JR, in particular, allows for the implementation of these 'front-end' programs by redirecting funds into specific communities that experience a high level of disadvantage and juvenile offending. It is accepted that JR may not be readily accepted by the Commonwealth and State governments, due to the 'tough on crime' rhetoric, the difficulty inherent in a whole of government and multi-jurisdictional approach, and the requirement for extensive data. However, JR has the capability to cause a significant overhaul of disadvantaged Indigenous communities so as to see a significant reduction in Indigenous youth incarceration rates.<sup>204</sup> It is only once this significant reduction occurs that there can be any hope of counteracting their disproportionate representation in the youth justice system.

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<sup>202</sup> Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment', above n 151, 41.

<sup>203</sup> Satya and Barson, above n 85, 88.

<sup>204</sup> Legal Affairs and Community Safety Committee, *Inquiry on strategies to prevent and reduce criminal activity in Queensland*, 2014, 91.