

## **INVESTMENT IN PRISONS: AN INVESTMENT IN SOCIAL EXCLUSION?**

### **LINKING THE THEORIES OF JUSTICE REINVESTMENT AND SOCIAL INCLUSION TO EXAMINE AUSTRALIA'S PROPENSITY TO INCARCERATE**

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*Much of the conceptual space occupied by Justice Reinvestment theory suggests clear links with the theoretical framework of Social Inclusion and therein understandings of the social determinants of health. This article seeks to explore this mutually interested and unified relationship, and furthermore examine how their combined adoption in Australia would provide benefits for the general population as well as those in contact with the criminal justice system. Despite the existence of consistently strong links between social disadvantage and imprisonment, it is apparent the social determinants of health have yet to adequately address their implications for incarceration. Forming these links, this article will introduce and explore the notion of the social determinants of incarceration. Moreover, the importance of the social and economic imperatives to be realised through the adoption of Justice Reinvestment ideals will be argued, in turn providing explanation for why the coalescing of Justice Reinvestment and Social Inclusion is fundamentally important to consider. Therefore, we hope to prompt insightful questioning of our current institutional processes such as: Is investment in new prisons really investment in social exclusion?*

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I INTRODUCTION

This article explores the relationship between the separate, but intrinsically linked and unified theories of Justice Reinvestment and Social Inclusion. We examine how a combination of these two theories might result in gains for the general population but specifically that part of the population in contact with the criminal justice system. Much of the theoretical framework of Justice Reinvestment has clear links to the theoretical framework of Social Inclusion. Moreover, the notion of Social Inclusion builds upon understandings of the social determinants of health. Despite epidemiological prisoner health studies consistently demonstrating the strong link between social disadvantage and imprisonment, literature developed understandings of the social determinants of health have been unable to adequately address their implications for incarceration. Illustrating these links, this article introduces and explores the notion of the *social determinants of incarceration*. We argue the importance of the social and economic

imperatives to be realised through the adoption of Justice Reinvestment ideals. Indigenous Australians comprise 26 per cent of the prison population from a 2.5 per cent national population base.<sup>1</sup> For this reason alone, the benefits of understanding how the theories of Justice Reinvestment and Social Inclusion might coalesce are important to consider.

## II THE POLITICAL EXUBERANCE FOR PRISON CONSTRUCTION

In recent months, Australian governments of all political persuasions have heralded new or expanded prisons in their jurisdictions.

In a Victorian Parliament Hansard report, Minister for Corrections the Hon E J O'Donoghue, stated:

[T]he government is investing \$52.9 million to build and operate a new high-security unit at Barwon Prison. ... In addition, \$78.6 million will be spent to build and operate an additional 357 beds across the prison system. In total the 2013-14 budget invests \$131.5 million across a number of projects. This budget's investment in the correctional system will create an additional approximately 65 construction jobs and 40 ongoing jobs at Barwon and across other regions. This funding is on top of the \$670 million announced in last year's budget to build a new 500-bed men's prison at Ravenhall, and to add 395 beds elsewhere across the system, which is estimated to create approximately 800 construction jobs and 580 ongoing jobs.<sup>2</sup>

Western Australian Minister for Training and Workforce Development and Corrective Services, the Hon Murray Cowper, also recently disclosed how \$665 million, provided under the Liberal-National Government, would add more than 2 600 beds to WA's prison system. This would include three new prisons and four new work camps, marking a 900 per cent increase compared with the previous government.<sup>3</sup> In a separate press release the Western Australian Department of Corrective Services stated, in reference to a new prison opened in West Kimberley, that a feature of 'this unique and innovative facility' would be the 'use of semi-transparent materials for the maximum-

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<sup>1</sup> Paul Simpson and Michael Doyle, *Indigenous prison rates are a national shame* (28 May 2013) The Drum Opinion (Australian Broadcasting Corporation) <<http://www.abc.net.au/unleashed/4717444.html>>.

<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Council, 8 May 2013, 32 (E J O'Donoghue).

<sup>3</sup> Government of Western Australia, 'Young adult facility opens' (Media Statement, 21 November 2012) <<http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatementId=6812>>.

security perimeter fence and in some of the building materials for the accommodation units, to reduce the feeling of confinement and enhance connection to country'.<sup>4</sup>

Northern Territory Treasurer, the Hon Delia Lawrie also acknowledged that, '[T]he plan to spend nearly half-a-billion dollars on a prison near Palmerston [was] a "very good result"'. The news article detailed further, '[t]he new prison plan was announced as a \$300 million project in 2007 ... it will now cost \$495 million dollars and have room for up to 1000 prisoners'. According to Delia Lawrie, 'more facilities will be built than was originally planned' and the implementation of the plans would provide 'for an increase in the number of beds in the prison, a whole new 48-bed supported accommodation facility that was not in the original costing [and] an increased site to provide better education and training options'.<sup>5</sup>

A New South Wales Government news release was issued on the 12 November 2010, stating:

*Premier Kristina Keneally today officially opened the \$155 million, 600-bed South Coast Correctional Centre near Nowra - the State's 36th correctional facility. ... The NSW Government's decision to locate the correctional centre at Nowra has delivered a massive jobs boost to the south coast. 'This \$155 million centre will continue to deliver strong, positive economic benefits for the south coast, bringing new jobs and investment to the area,' Ms Keneally said. ... Ms Keneally was joined ... by Minister for Corrective Services, Phil Costa, and Labor Member for Kiama, Matt Brown. ... Mr Brown said the centre will deliver a welcome jobs boost and encouraged local families to attend the formal opening ceremony and open days later this month. 'This new facility will create around 120 local jobs and pump an estimated \$10 million into the local community each year.'*<sup>6</sup>

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<sup>4</sup> Government of Western Australia Department of Corrective Services, 'West Kimberley prison opens' (Media Release, 1 November 2012)

<[http://www.correctiveservices.wa.gov.au/\\_news/details.aspx?uid=3396-6604-2538-1881&ID=960](http://www.correctiveservices.wa.gov.au/_news/details.aspx?uid=3396-6604-2538-1881&ID=960)>.

<sup>5</sup> Jane Bardon and Jano Gibson, *Cost of new prison blows out to \$495 million* (7 October 2011) Australian Broadcasting Corporation News <<http://www.abc.net.au/news/2011-10-07/20111007-new-prison-costs-deal/3340908>>.

<sup>6</sup> New South Wales Government, '\$155 million South Coast Correctional Centre completed' (News Release, 12 November 2010)

<[http://www.correctiveservices.nsw.gov.au/\\_data/assets/pdf\\_file/0009/238509/101112-south-coast-correctional-centre.pdf](http://www.correctiveservices.nsw.gov.au/_data/assets/pdf_file/0009/238509/101112-south-coast-correctional-centre.pdf)>.

Queensland, the Minister for Police and Community Safety, the Hon Jack Dempsey, released the following:

*Community Safety Minister Jack Dempsey officially opened the \$445 million redevelopment of the Lotus Glen Correctional Centre this morning. Mr Dempsey said the extensive refurbishment had greatly enhanced the centre's facilities. This project has increased the centre's cell capacity to more than 690, a dramatic increase from the 496 cells previously available. ... The upgrade has also resulted in the creation of an additional 40 jobs boosting staff numbers at the correctional centre from approximately 290 to 330.<sup>7</sup>*

In the Australian Capital Territory, a newspaper article reported:

\$3 million would be spent on designs for an expanded ACT jail, and a further \$6 million would be spent to help the prison increase 'service demand' and train new guards. The Alexander Maconochie Centre which opened in 2009 holds maximum capacity for 300 and currently houses a daily average of 265 inmates.<sup>8</sup>

A recurring theme in many of these announcements is the fanfare alluding to fiscal responsibility and claims that prison construction brings benefits to the local economy. The language is characterised by enthusiasm and opportunity, rather than regret about the expanding prison population and attendant social and economic consequences, or shame about the continued failure to reduce criminal behaviours or secure greater community safety. Such exuberance for prison building in Australia reflects the continuing dominant perspective that incarceration is an acceptable response, at least politically, to criminal justice and community safety issues. Explicit in these announcements is the preparedness to 'grow' prisons according to projected growth in prisoner numbers, as well as a need to acknowledge the cultural sensitivities of Indigenous inmates (implicitly assuming that incarceration is somehow culturally appropriate), such as that conveyed on the Hon Murray Cowper's website.<sup>9</sup>

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<sup>7</sup> The Queensland Cabinet and Ministerial Directory, '\$445 million Lotus Glen redevelopment opened' (Media Statement, 4 April 2013) <<http://statements.qld.gov.au/Statement/2013/4/4/445-million-lotus-glen-redevelopment-opened>>.

<sup>8</sup> Christopher Knaus, '\$3m earmarked for ACT jail expansion' *The Canberra Times* (online), 5 June 2013 <<http://www.canberratimes.com.au/act-news/3m-earmarked-for-act-jail-expansion-20130604-2nno9.html>>.

<sup>9</sup> Liberal Party of Australia, Western Australian Division, *Murray Cowper MLA Member for Murray-Wellington* <<http://www.wa.liberal.org.au/representative-intro/30>>.

Consideration rather should be afforded to the view that any discernible need to increase the prison estate purely exemplifies the existence of a failed current model. We argue that socio-environmental factors such as unemployment, poor housing and/or homelessness, poor mental and physical health, substance abuse, and low educational attainment — inextricably linked to contact with the criminal justice system — should be a legitimate priority, both conceptually and fiscally, for policymakers in the criminal justice sector. By applying the conceptual approach of the social determinants of health — a familiar space for public health professionals and epidemiologists — to develop an understanding of the *social determinants of incarceration*, we hope to show how the concept of Justice Reinvestment ‘joins up’ the current policy vacuum between social inclusion and incarceration, and its social determinants.

### III JUSTICE REINVESTMENT

Australian politicians often invoke the concept of Justice Reinvestment, it has yet to be adopted as a policy option by governments at any level. In its application in the United States it has been described as ‘part philosophy and part strategy’ and also a broad strategic plan of action and system-wide process that enables local leaders to rethink how they allocate resources through the criminal justice and social service systems.<sup>10</sup> The Urban Institute Justice Policy Centre in Washington provides the organising framework for the Justice Reinvestment program and policy context in the USA, setting out five methodological steps (See Figure 1).<sup>11</sup>

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<sup>10</sup> Todd Clear, ‘A private-sector, incentives-based model for justice reinvestment’ (2011) 10(3) *Criminology & Public Policy* 583.

<sup>11</sup> Alison M Dwyer, S Rebecca Neusteter and Pamela Lachman, ‘Data-Driven Decisionmaking for Strategic Justice Reinvestment’ (Policy Brief, Urban Institute Justice Policy Centre, 31 May 2012) 2 <<http://www.urban.org/UploadedPDF/412543-Data-Driven-Decisionmaking-for-Strategic-Justice-Reinvestment.pdf>>.



It is important to note that Justice Reinvestment is both a place-based initiative and a systems approach. As a *place-based initiative*, it actively shifts the criminal justice paradigm from one of community depletion resulting from the removal of community-members through incarceration, to that of community empowerment through the funding of resources to assist development of community safety and amenity together with the restoration of (otherwise incarcerated) individuals to their communities. Justice Reinvestment focuses on low-level criminal activity and its critical elements include the types of crimes committed, offenders' home communities, and the devolution of decision-making regarding reinvestment of funds from centralised governments to local communities and local governments.<sup>12</sup> The idea of Justice Reinvestment springs from a realisation that mass incarceration impacts neighbourhoods in ways that perpetuate cycles of crime. Its theoretical grounding is in research findings that show how a policy of mass incarceration is itself a generator of crime problems. This occurs when certain neighbourhoods, already stressed by poverty and disadvantage of its young people, reaches a point where crime rates spiral

<sup>12</sup> Rob Allen and Vivien Stern (eds), 'Justice Reinvestment - A New Approach to Crime and Justice' (Report, International Centre for Prison Studies, June 2007).

upwards.<sup>13</sup> As a *systems-approach*, Justice Reinvestment is based on a holistic philosophy encompassing a variety of service provision areas including housing, employment, legal, family support, mental health, and alcohol and other drug use services.

In practice, Justice Reinvestment involves all three levels of government (Commonwealth, State and local), non-government organisations, service providers, and the education, health, commercial and justice sectors in reaching agreement of how one might re-think the criminal justice system. At a broad level it requires a shift in policy and social outlook from that of *incarceration* to that of *non-incarceration* with the investment of savings otherwise spent in the criminal justice system, instead be re-directed back into the community. Socio-environmental factors are inextricably linked to individuals' contact with the criminal justice system. For this reason such factors are of legitimate concern to policymakers not only in the social policy sector but, importantly, to those in the criminal justice sector.

#### *A What Justice Reinvestment is Not*

To understand Justice Reinvestment it is important to equally understand what it is *not*. It is not just a program or a collection of programs, it is not just restorative justice (although the philosophy and theory of restorative justice may be relevant) and it is not about creating more diversionary programs (although evaluations of those programs also can provide evidence towards a Justice Reinvestment operating framework). Nor is Justice Reinvestment short-term – it is a long-term approach therefore requiring a collaborative systems approach and research to provide evidence. Justice Reinvestment does *not* (as has been suggested by some) merely concern itself with diverting funds away from health, education, employment and training budgets.<sup>14</sup> Rather, it facilitates a policy and fiscal framework to enable funds budgeted within the criminal justice system forecasted and intended to be spent on future prison expansion to instead be invested in community safety and amenity. In this way — i.e., properly conceptualised as belonging

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<sup>13</sup> Judith A Greene, 'Testimony on Justice Reinvestment' (Report, Colorado House and Senate Judiciary Committee, 27 April 2009).

<sup>14</sup> Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (Speech delivered at the Centre for Independent Studies, St Leonards, Sydney, 3 October 2012) <<http://www.cis.org.au/publications/policy-monographs/article/4684-panacea-to-prison-justice-reinvestment-in-indigenous-communities>>.



within broader ecological, social and political systems — criminal justice policy together with the criminal justice system invests in social inclusion thereby reducing incarceration, rather than in social exclusion to increase incarceration.

*B Investment in the Justice System (“Justice Investment”) is Not Justice Reinvestment*

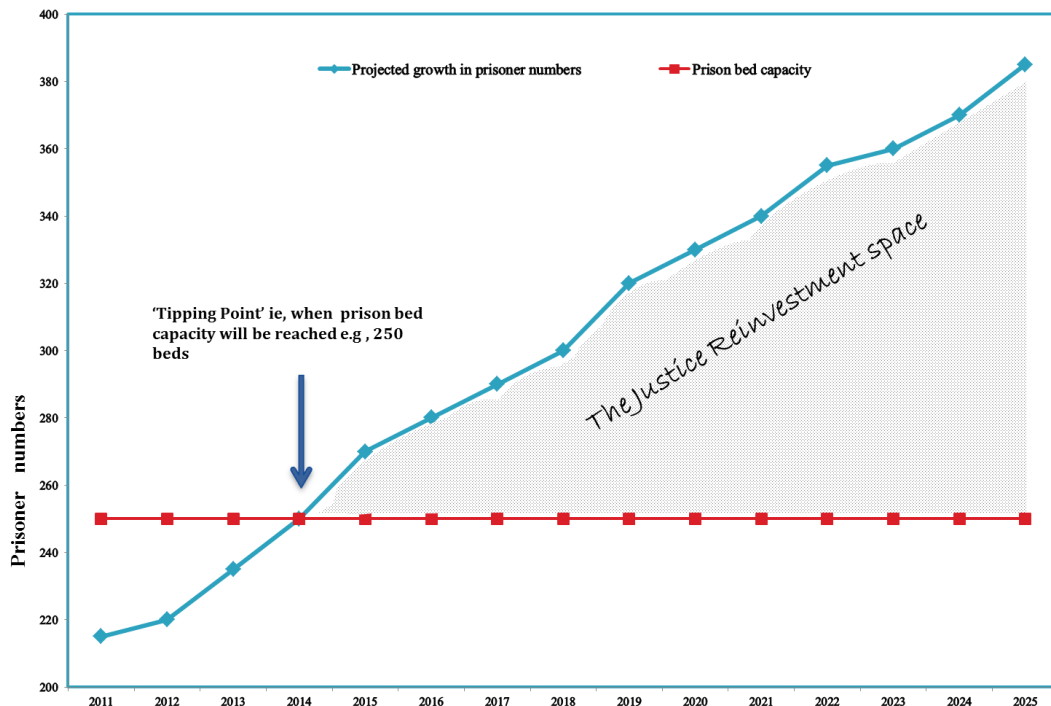
Justice Reinvestment is not about closing or downgrading prisons or about releasing all prisoners. We acknowledge the human rights imperative to allocate and spend money in the justice system so people who are deemed rightly incarcerated are treated humanely. An issue for policymakers is to invest in and implement prison health and rehabilitation programs without being seen to take resources away from those perceived as more deserving. For this reason, it is important that governments allocate funding into the justice system, particularly where some of Australia’s ageing prisons have run down. However, investment in the justice system — justice *investment* — should not be confused with Justice Reinvestment. An explanation of the conceptual space occupied by Justice Reinvestment illustrates that demarcation (see Figure 2).

*C The Justice Reinvestment Conceptual Space*

To understand Justice Reinvestment conceptually and fiscally, it needs to be juxtaposed against justice investment. This is best illustrated by thinking of a ‘tipping point’ that occurs when a prison reaches near capacity (say 250 beds, as shown in Figure 2). When such a point is reached, policymakers are required to consider how prison population growth will be accommodated. For example, committing significant funding to building a new prison, prison wing, or ‘double bunking’ prisoners into a single prison cell, also warrants the concomitant health and social consequences of that decision be considered. In contrast, a Justice Reinvestment operating framework would consider the projected prison population growth *well in advance* of such a ‘tipping point’, with politicians and policymakers making a commitment *not* to build a new prison, instead using the funding intended for future prison expansion to support community programs proven to minimise prison population growth. Thus, funds intended to be spent in the justice system to build new prisons are *reinvested* well before any ‘tipping points’ can be reached, and reinvested into community development initiatives that foster reduced crime and enhance community safety and amenity. Conceptually and fiscally, the Justice

Reinvestment space lies in the area between the bed capacity of the existing prison estate and projected prison growth in any jurisdiction (see Figure 2). That fiscal space can be subjected to cost benefit analyses to calculate the projected amount of funding that can be ‘saved’ and used instead, *well in advance*, on non-incarceration alternatives, particularly in localised settings. In comparison, the Justice Investment space comprises all the costs associated with the *current* prison estate as well as the criminal justice system supporting that estate.

Figure 2: Conceptualising the Justice Reinvestment space (using hypothetical numbers)



#### IV THE AUSTRALIAN PRISONER POPULATION

In Australia, as elsewhere, prisoners are among the most stigmatised and socially excluded citizens in the community, characterised by extreme socio-economic and psychological disadvantage. Typically, those exposed to the criminal justice system are poorly educated, unemployed, socially isolated and financially dependent with high levels of physical ill health,<sup>15</sup> psychiatric illness,<sup>16</sup> violence,<sup>17</sup> and engagement in risky

<sup>15</sup> Tony Butler and Lucas Milner, ‘The 2001 New South Wales Inmate Health Survey’ (State Health Publication No (CHS) 030148, NSW Corrections Health Service, September 2003) <[http://www.nobars.org.au/downloads/Inmate\\_Health\\_Survey\\_2001.pdf](http://www.nobars.org.au/downloads/Inmate_Health_Survey_2001.pdf)>; Devon Indig et al, ‘2009 NSW Inmate Health Survey: Key Findings Report’ (Report, Justice Health NSW, 2010) <<http://www.justicehealth.nsw.gov.au/about-us/publications/2009-ihs-report.pdf>>.

<sup>16</sup> Tony Butler et al, ‘Mental disorders in Australian prisoners: a comparison with a community sample’ (2006) 40(3) *Australian and New Zealand Journal of Psychiatry* 272.

behaviours such as alcohol, tobacco and other drug use.<sup>18</sup> Inmate Health Surveys in New South Wales,<sup>19</sup> Victoria,<sup>20</sup> Queensland,<sup>21</sup> the Australian Capital Territory<sup>22</sup> and New Zealand<sup>23</sup> consistently demonstrate the link between alcohol and other drug use and incarceration. Housing is also a key social determinant of incarceration. Living in a crowded household increases the likelihood of imprisonment.<sup>24</sup> Lack of access to appropriate accommodation has been identified as one of the factors driving high youth remand, with indications that some young people who otherwise would not be on remand are spending time in detention due to lack of suitable accommodation. There is also strong evidence of a dynamic relationship between homelessness and involvement in the justice system. People who have spent time in prison are overrepresented in the homeless population and homelessness in turn increases the likelihood of re-offending.<sup>25</sup>

Mental illness is another key social determinant of incarceration, with research consistently illustrating high correlations of the affliction within prisoner populations.<sup>26</sup> A meta-analysis of over 60 prison mental health surveys covering 23 000 prisoners internationally found they were more than likely than the general population to have a

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<sup>17</sup> Tony Butler and Azar Kariminia, 'Prison violence: perspectives and epidemiology' (2006) 17(2) *New South Wales Public Health Bulletin* 17.

<sup>18</sup> Josephine M Belcher et al, 'Smoking and its correlates in an Australian prisoner population' (2006) 25(4) *Drug and Alcohol Review* 343; Tony Butler et al, 'Drug use and its Correlates in an Australian Prisoner Population' (2003) 11(2) *Addiction Research and Theory* 89.

<sup>19</sup> Hudson, above n 15.

<sup>20</sup> Deloitte Consulting, 'Victorian Prisoner Health Survey' (Report, Department of Justice – Corrections Victoria, February 2003)  
<<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/victorian+prisoner+health+study>>.

<sup>21</sup> Barbara Hockings et al, 'Queensland Women Prisoners' Health Survey' (Report, Queensland Government Department of Corrective Services, 2002)  
<[http://toolbox.flexiblelearning.net.au/demosites/series7/701/shared/content/resources/health\\_women2.pdf](http://toolbox.flexiblelearning.net.au/demosites/series7/701/shared/content/resources/health_women2.pdf)>.

<sup>22</sup> Epidemiology Branch, ACT Government Health Directorate '2010 ACT Inmate Health Survey Summary results' (Health Series Report No 55, ACT Government Health Directorate, July 2011).

<sup>23</sup> Kirstin Lindberg and Ken Huang, 'Results from the Prisoner Health Survey 2005' (Public Health Occasional Bulletin No 37, Wellington Ministry of Health, December 2006).

<sup>24</sup> Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey' (Crime and Justice Bulletin, Contemporary Issues in Crime and Justice No 10, NSW Bureau of Crime Statistics and Research, October 2006)

<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/cjb104.pdf/\\$file/cjb104.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb104.pdf/$file/cjb104.pdf)>.

<sup>25</sup> Jason Payne, 'Recidivism in Australia: findings and future research' (Research and Public Policy Series No 80, Australian Institute of Criminology, October 2007).

<sup>26</sup> Seena Fazel and John Danesh, 'Serious mental disorder in 23,000 prisoners: A systematic review of 62 surveys' (2002) 359(9306) *The Lancet* 545.

psychotic illness, major depression, or a personality disorder.<sup>27</sup> In Australia, the largest prison mental health survey found that 43 per cent of prisoners displayed symptoms of psychosis, anxiety disorder, and/or affective disorder in the previous 12 months, and 61 per cent of women had a psychiatric illness compared with 39 per cent of men.<sup>28</sup> In 2001, an estimated 15 000 people with a major mental illness were held in institutions of whom one-third were imprisoned,<sup>29</sup> and the 2007 Australian National Mental Health Survey estimated that 41 per cent of people who had ever been in prison had a mental disorder in the previous year compared with 19 per cent of those not incarcerated. However, these evident disparities between prison and community become far more striking where substance abuse is concerned, with 23 per cent of ex-prisoners diagnosed with a substance use disorder compared with 5 per cent of those non-incarcerated.<sup>30</sup> Explanations for these high burdens of psychiatric illness include de-institutionalisation of the mentally ill, few diversionary options for mentally ill offenders, high levels of substance use among the mentally ill, and poor psychiatric and forensic services in the community.<sup>31</sup> Concurrent mental health problems and substance use are common amongst offender populations.<sup>32</sup> Moreover, individuals suffering from mental illness are often incarcerated rather than treated as a result of inadequacies in the availability of appropriate mental health and other services.<sup>33</sup>

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<sup>27</sup> Butler, above n 17.

<sup>28</sup> Tony Butler and Stephen Allnutt, 'Mental Illness Among New South Wales Prisoners' (State Health Publication No (CHS) 030147, NSW Corrections Health Services, August 2003) <<http://www.justicehealth.nsw.gov.au/about-us/publications/mental-illness-among-nsw-prisoners-2003.pdf>>.

<sup>29</sup> James R P Ogloff, 'Identifying and Accommodating the Needs of Mentally Ill People in Gaols and Prisons' (2002) 9(1) *Psychiatry, Psychology and Law* 1.

<sup>30</sup> Australian Bureau of Statistics, '2007 National Survey of Mental Health and Wellbeing: Summary of Results' (Catalogue No 4326.0, Australian Bureau of Statistics, 23 October 2008) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6AE6DA447F985FC2CA2574EA00122BD6/\\$File/43260\\_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6AE6DA447F985FC2CA2574EA00122BD6/$File/43260_2007.pdf)>.

<sup>31</sup> Phillip Brinded et al, 'Prevalence of psychiatric disorders in New Zealand prisons: a national study' (2001) 35(2) *Australian and New Zealand Journal of Psychiatry* 166.

<sup>32</sup> Tony Butler et al, 'Co-occurring mental illness and substance use disorder among Australian prisoners' (2011) 30(2) *Drug and Alcohol Review* 188.

<sup>33</sup> Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Report No 3, Australian Human Rights Commission, March 2008) <[http://www.humanrights.gov.au/sites/default/files/content/social\\_justice/publications/preventing\\_crime/cog\\_disr.pdf](http://www.humanrights.gov.au/sites/default/files/content/social_justice/publications/preventing_crime/cog_disr.pdf)>; Lindy L Moffatt, 'Mental illness or spiritual illness: what should we call it?' (2011) 194(10) *Medical Journal of Australia* 541.

*A Indigenous Australians in the criminal justice system*

Indigenous Australians' experience must be understood in the context of a history strewn with dispossession and colonialism, with the understanding that these events gave way to high rates of Indigenous poverty as well as exclusion from many types of health care. It should also be noted that Australia's Indigenous peoples are not a homogenous group, as there are many languages, groups and a wide diversity of cultural, social, economic and geographical settings within and between Indigenous communities. These multiple factors have had widespread impact on Indigenous communities and individuals, therefore presenting vast challenges for strategy developers endeavouring to address their effects. The impact of Australia's colonial history as a social determinant of health for Indigenous Australian populations is recognised.<sup>34</sup> An emerging body of research demonstrating the link between good health care and positive health outcomes for Indigenous Australians highlights four underpinning strategies related to communicable diseases, chronic diseases, maternal and child health outcomes, and social and environmental health.<sup>35</sup> More recently the social determinants discourse has sought to include as social determinants specific issues such as racism and marginalisation, poverty, social class, education, control over ones own health, powerlessness, employment, income, housing and infrastructure, family separation, land and reconciliation, and importantly incarceration and the justice system.<sup>36</sup>

For Indigenous Australians disadvantage is further compounded by higher rates of ill-health, lower life expectancy, lower levels of educational attainment and income, high rates of unemployment and poorer housing conditions.<sup>37</sup> Furthermore, substance misuse and co-existing mental illness are closely linked with high levels of offending,

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<sup>34</sup> Ian Anderson and John Wakerman, 'Aboriginal and Torres Strait Islander primary health care and general practice' in Robert Pegram (ed) *General Practice in Australia: 2004* (Commonwealth of Australia, 2005) 303.

<sup>35</sup> Ian Anderson, 'Aboriginal Wellbeing' in *Health in Australia: Sociological Concepts and Issues* (Prentice Hall, 1999).

<sup>36</sup> Ian Anderson, Fran Baum and Michael Bentley (eds), 'Beyond Band-aids: Exploring the Underlying Social Determinants of Aboriginal Health' (Cooperative Research Centre for Aboriginal Health, 2007).

<sup>37</sup> Australian Bureau of Statistics and Australian Institute of Health and Welfare, 'The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008' (Catalogue No 4704.0, Australian Bureau of Statistics, 29 April 2008) <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442458618>>.

particularly violent offending,<sup>38</sup> that all too regularly result in long periods of incarceration as violent offenders are often not permitted entry into treatment and diversion programs.<sup>39</sup> Alcohol abuse and illicit drug use, however, are seen as the most powerful correlates of Indigenous Australians' arrestment, while also exerting strong effects are issues such as welfare dependence, unemployment, financial stress, being a member of the Stolen Generations<sup>40</sup> and being a member of a one-parent family.<sup>41</sup> Strongly associated with later-life incarceration, particularly for Indigenous Australians, is involvement in out-of-home care as a child. The 2009 NSW Inmate Health Survey found that 46 per cent of Indigenous Australian male respondents had been placed in care as children, compared with 22 per cent of non-Indigenous Australian male inmates. Furthermore, 45 per cent of Indigenous Australian women had been in care compared with 27 per cent of non-Indigenous Australian women.<sup>42</sup>

Given that youth itself embodies a criminogenic risk-factor, Australia faces a challenging predicament. In 2011, children under the age of 15 years made up 36 per cent of the Indigenous population compared with 19 per cent of the non-Indigenous population (see Figure 3).<sup>43</sup> It is imperative that young Indigenous Australians are afforded equal opportunity with their non-Indigenous Australian counterparts to engage meaningfully with the education and employment systems in alignment with their individual aspirations. However, the emerging reality inferred from the current trajectory of Australian Indigenous incarceration rates is that not all will benefit equally from these human social resources, unless there is the political will to address the challenge.

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<sup>38</sup> Jacqueline Joudo, 'Responding to substance abuse and offending in Indigenous communities: review of diversion programs' (Research and Public Policy Series No 88, Australian Institute of Criminology, January 2008) <<http://www.aic.gov.au/documents/1/8/0/%7b1807C117-551B-4D5A-B30C-CF07EF532F7D%7drpp88.pdf>>.

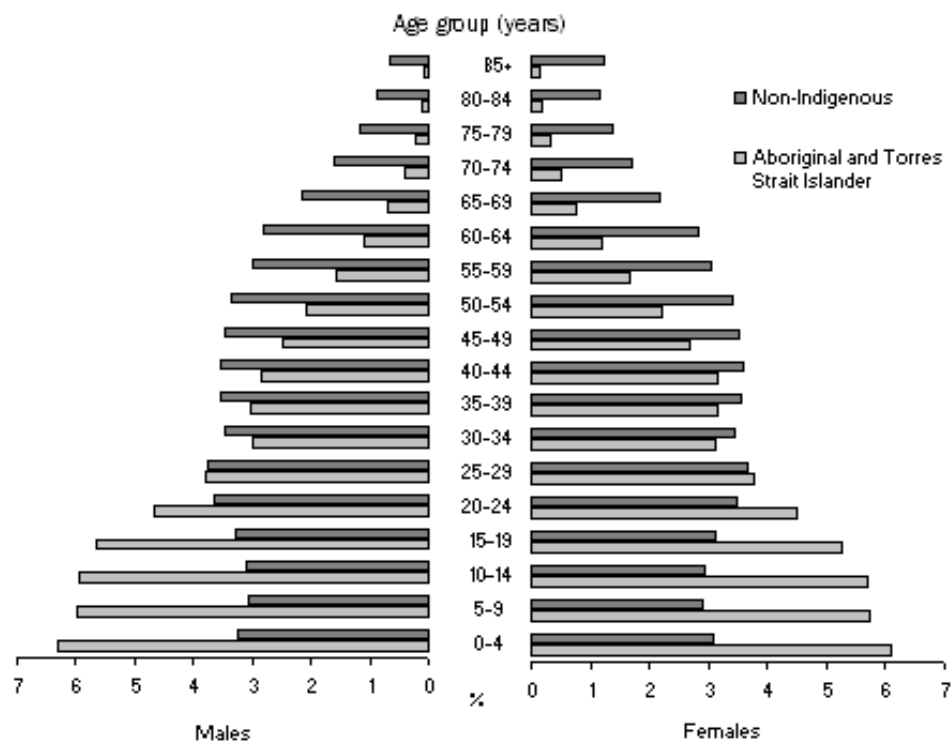
<sup>39</sup> National Indigenous Drug and Alcohol Committee, 'Bridges and barriers: addressing Indigenous incarceration and health' (Report, Australian National Council on Drugs, 25 June 2009).

<sup>40</sup> The Stolen Generation were children of Australian Aboriginal and Torres Strait Islander descent who were removed from their families by Australian government agencies and church missions under Acts of their respective parliaments in the period between approximately 1909 and 1969. Although in some areas children were still being taken until the 1970s.

<sup>41</sup> Don Weatherburn, Lucy Snowball and Boyd Hunter, 'Predictors of Indigenous Arrest: An Explanatory Study' (2008) 41(2) *The Australian and New Zealand Journal of Criminology* 307.

<sup>42</sup> Devon Indig et al, '2009 NSW Inmate Health Survey: Key Findings Report' (Report, Justice Health NSW, 2010) <<http://www.justicehealth.nsw.gov.au/about-us/publications/2009-ihs-report.pdf>>.

<sup>43</sup> Australian Bureau of Statistics, 'Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011' (ABS Catalogue No 2076.0, Australian Bureau of Statistics, 27 November 2012).

**Figure 3: Aboriginal and Torres Strait Islander & non-Indigenous populations, 2011**

#### V SOCIAL EXCLUSION AND SOCIAL INCLUSION

A focus on Social Exclusion as a primary *determinant of incarceration* adds insight. Social exclusion has various manifestations. For some, it is synonymous with poverty; while for others, it emphasises a lack of social participation and integration, and lack of power.<sup>44</sup> Social Exclusion is defined as consisting of dynamic, multidimensional processes driven by unequal power relationships interacting across four main dimensions – economic, political, social and cultural – and at different levels including individual, household, group, community, country and global. Wilkinson and Marmot note that social exclusion results from ‘racism, discrimination, stigmatization, hostility and unemployment’ and ‘these processes prevent people from participation in education and training, and gaining access to services and citizenship activities’.<sup>45</sup> It results in a continuum of

<sup>44</sup> Hilary Silver, ‘Understanding Social Inclusion and Its Meaning for Australia’ (2010) 45(2) *The Australian Journal of Social Issues* 183.

<sup>45</sup> Richard Wilkinson and Michael Marmot (eds), ‘Social determinants of health: the solid facts’ (Publication, 2nd Edition, The Regional Office of Europe for the World Health Organisation, 1 January 2003) <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0005/98438/e81384.pdf](http://www.euro.who.int/_data/assets/pdf_file/0005/98438/e81384.pdf)>.

inclusion/exclusion characterised by unequal access to resources, capabilities and rights, which in turn leads to health inequalities.<sup>46</sup>

There is increasing evidence that many are imprisoned as a direct consequence of shortfalls in appropriate community-based health and social services, most notably in the areas of housing, mental health and wellbeing, substance use, disability, and family violence.<sup>47</sup> The link between health and social determinants was documented in 2008 by Wilkinson and Marmot through meta-analyses over decades, leading them to identify ten social determinants of health: social gradient, stress, early life, social exclusion, work, unemployment, social support, addiction, food and transport. Investment in early years of life has great potential to reduce health inequities within a generation. Studies show the importance of early childhood development on physical, cognitive and linguistic development as well as subsequent life chances through skills development, education and occupational opportunities confers commensurate effects on many risks including criminality in later life.<sup>48</sup> However it was not until 2010, following a series of community consultations where the link between incarceration and problematic drug and alcohol use was highlighted, that the social determinants of health framework was extended to include incarceration. Marmot cited interventions such as a study of the impact of drugs in four English communities where nearly all had been in contact with the criminal justice system and over two-thirds had served a prison sentence, as the means for reaching the conclusion that drug prevention and treatment are essential mechanisms for reducing social exclusion. He argued that by conceptualising problematic drug use as a medical issue, and by investing in collaborative partnerships between police, schools, health and social care professionals to fund resources and evidence-based treatment programmes supporting long term behaviour change, a reduction in the impact of drugs on most deprived communities would result.<sup>49</sup>

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<sup>46</sup> Jenny Popay et al, 'Understanding and Tackling Social Exclusion' (Final Report to the WHO Commission on Social Determinants of Health, Social Exclusion Knowledge Network, February 2008) 207 <[http://www.who.int/social\\_determinants/knowledge\\_networks/final\\_reports/sekn\\_final%20report\\_042008.pdf](http://www.who.int/social_determinants/knowledge_networks/final_reports/sekn_final%20report_042008.pdf)>.

<sup>47</sup> Anthea S Kreig, 'Aboriginal incarceration: health and social impacts' (2006) 184(10) *Medical Journal of Australia* 534.

<sup>48</sup> Michael Marmot et al, 'Closing the gap in a generation: health equity through action on the social determinants of health' (2008) 372(9650) *The Lancet* 1661.

<sup>49</sup> Michael Marmot, 'Fair Society, Healthy Lives: A Strategic Review of Health Inequalities in England Post-2010' (Final Report, The Marmot Review, February 2010) <<http://www.instituteofhealthequity.org/Content/FileManager/pdf/fairsocietyhealthy lives.pdf>>.



Understanding of social exclusion grew throughout Europe and the United Kingdom during the 1980s, resulting in notions of social inclusion being increasingly adopted within official policy frameworks in these countries. In the USA however, the notion of the 'underclass' along with an interest in compensatory interventions for those with significant disadvantage — including members of minority groups — instead carries. In Australia, while it could be argued there has been a longstanding interest in assisting disadvantaged groups and the 2000 McClure Report identified the need to minimise social exclusion, it did not, however, identify an explicit social inclusion policy in any way remotely similar to anything introduced in the United Kingdom or European Union. It was not until 2008 that the Australian government finally adopted a social inclusion approach, through the establishment of an Australian Social Inclusion Board and a Social Inclusion Unit in the Department of Prime Minister and Cabinet.<sup>50</sup>

#### VI THE SOCIAL DETERMINANTS OF INCARCERATION

The social determinants of health – often referred to as 'the causes of the causes' of ill health – are seen to be particularly relevant for the prisoner population, highlighted by the general nature of epidemiological profiles of prisoners often illustrating close associations with education, employment, housing, physical and mental health, and financial independence.<sup>51</sup> Thus, they can be usefully conceptualised and understood as the *social determinants of incarceration*.

Social exclusion, in particular, forms a key determinant of incarceration and fundamental tenet of an incarceration philosophy. The causal element of social exclusion in the incarceration of Indigenous Australians was emphasised in a paper from Winnunga Nimmityjah Aboriginal Health Service in the Australian Capital Territory. The paper argued that the 'causes of the causes' of ill health for Aboriginal Australians' incarceration were manifold and highly repercussive upon one another. Colonisation, dispossession, the Stolen Generations and stolen wages were considered impetuses for Aboriginal Australians' disempowerment, loss of self-determination, loss of culture and identity, marginalisation and racism, further resulting in trauma and anger, mental

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<sup>50</sup> Alan Hayes, Matthew Gray and Ben Edwards, 'Social inclusion: Origins, concepts and key themes' (Briefing Paper, Australian Institute of Family Studies, May 2008).

<sup>51</sup> See Section IV.

health problems, drug and alcohol misuse and domestic violence.<sup>52</sup> It follows that initiatives to reduce incarceration may benefit greatly from the Social Inclusion approach.

## VII THE POLITICAL WILL TO REFORM PENAL POLICY

The political will to accept the argument that incarceration is a circumstance of social exclusion is yet to transpire, evidenced by the fact that neither the Social Inclusion Agenda,<sup>53</sup> nor the Closing the Gap,<sup>54</sup> initiative contain any consideration of the interplay between social exclusion and the criminal justice system. Moreover, calls for the Australian government to include justice targets,<sup>55</sup> in the Council of Australian Government's National Indigenous Reform Agenda,<sup>56</sup> are yet to be realised. As well, although the term is often invoked by politicians or policy makers, Justice Reinvestment has not yet been adopted as a policy option by governments at any level. This may be for several reasons, not only factors such as pressure on politicians to be 'tough on crime' and jurisdictional legislative complexities, but also, significantly, because of a lack in shared understandings of Justice Reinvestment and the necessary shift in approach to incarceration that it requires. Rather, with engagement and improved understanding of the social determinants of health including epidemiological studies of prisoner populations, the health discipline is seen to provide an informative basis for understanding its benefits. Therefore, its acceptance as a public policy faces a variety of challenges, not least of which is political acceptance. Penal policy reforms in Finland

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<sup>52</sup> Winnunga Nimmityjah Aboriginal Health Service, 'The Social Determinants of Aboriginal Prison Health and the Cycle of Incarceration and their Implications for Policy: an Australian Capital Territory case study' (Conference Presentation Paper, Commission on Social Determinants of Health: International Symposium on Indigenous Health, 29-30 April 2007) <<http://som.flinders.edu.au/FUSA/SACHRU/Symposium/Symposium%20Case%20Studies%20Combined%20with%20toc.pdf>>.

<sup>53</sup> Australian Government, *The Social Inclusion Agenda*, Social Inclusion <<http://www.socialinclusion.gov.au>>.

<sup>54</sup> Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap* (5 August 2013) <<http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap>>.

<sup>55</sup> National Congress of Australia's First Peoples, 'Congress calls for Federal Politicians to get smart on justice' (Press Release, 30 October 2012) <<http://nationalcongress.com.au/congress-calls-for-federal-politicians-to-get-smart-on-justice/>>; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report 2012' (Report, Australian Human Rights Commission, 26 October 2012) <[http://www.humanrights.gov.au/sites/default/files/document/publication/social\\_justice\\_report\\_2012.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_report_2012.pdf)>.

<sup>56</sup> Council of Australian Governments, *Council of Australian Government's Reform Agenda*, <<http://www.coag.gov.au>>.

over the past half-century demonstrate that such transformational reforms are in fact possible, albeit at length. Beginning in the latter half of the 1960's, Finland began developing a series of legislative and criminal policy reforms, which have now resulted in a radical decline of incarceration rates whilst maintaining community safety and confidence. In Finland, the political will and consensus necessary for implementation of this 'decarceration' policy was formed by a coalition of stakeholders that included the judiciary, the media, politicians, academics, and police. It was their political decision to invest in high levels of universal social provision supported by high levels of taxation, which is believed to have brought about such social solidarity. Therefore this meant that criminal justice in practice would engender a fairly subordinate role in penal policy as contrasted to social and situational prevention strategies.<sup>57</sup> In a similar vein, we acknowledge that acceptance of Justice Reinvestment in Australia will require deep consideration and political commitment.

A Senate Inquiry into the value of Justice Reinvestment in Australia was announced in November 2012 and then reported in June 2013. With its recommendation that the Federal Government take leadership in this area of public social policy, the Inquiry can be construed as the beginnings of a national conversation about penal reform.<sup>58</sup> Such leadership in Australia, however, would require the political will, attitudinal and ideological readiness to actually reduce the number of prisoners, that is, to define *prison overcrowding* on a political level as a problem that should and can be solved, and not by simply building new prisons. A minority report appended to the review report makes the point that while political will has been previously demonstrated through the Council of Australian Governments (COAG), in Australian implementation of Justice Reinvestment 'involves the divestment of States monies into particular State areas... [and] is highly problematic.'<sup>59</sup> This interpretation, as does the previously mentioned one,<sup>60</sup> underscores a common misunderstanding of the conceptual and fiscal space occupied by Justice Reinvestment. To reiterate, in combination with the political will to

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<sup>57</sup> Tapio Lappi-Seppala, 'Imprisonment and Penal Policy in Finland' (2009) 54 *Scandinavian Studies in Law* 333.

<sup>58</sup> Parliament of Australia, Senate Committees, *Value of a Justice Reinvestment approach to criminal justice in Australia* (26 November 2012) Parliament of Australia <[http://www.aph.gov.au/parliamentary\\_business/committees/senate\\_committees?url=legcon\\_ctte/completed\\_inquiries/2010-13/justice\\_reinvestment/info.htm](http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/info.htm)>.

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

<sup>60</sup> Hudson, above n 15.

curb prison population growth, Justice Reinvestment draws upon social policy planning so that forecast monies which might otherwise be spent on building new prisons can instead be spent more appropriately on Social Inclusion measures. Again, this will require participation from all levels of government in social policy planning as well as non-government organisations, service providers, and the education, health, commercial and justice sectors.

#### VIII LINKING JUSTICE REINVESTMENT AND SOCIAL INCLUSION

In summation, the foremost aim of Justice Reinvestment is to improve public safety through a more cost-effective process by redirecting portions of funds intended to be spent in the criminal justice system into the direction of strengthening communities instead. For example, monies could be invested into schools, creating jobs, affordable housing and/or health care to meet these aims.<sup>61</sup> Although rarely communicated within its framework, Justice Reinvestment shares key commonalities with Social Inclusion, demonstrated by how Justice Reinvestment principles reflect those of the Australian Social Inclusion Board. Namely, building on individual and community strengths, building partnerships with key stakeholders, developing tailored services, giving high priority to early intervention and prevention, building joint services and whole-government solutions, using evidence and integrated data to inform policy, using locational approaches and planning for sustainability.<sup>62</sup> Of particular importance, the Australian government's response to the Senate Inquiry recommendations provides an opportunity for the Social Inclusion Board to envision and commence the measures required to begin reversing the effects of the social determinants of incarceration in Australia.

#### IX CONCLUSION

Justice Reinvestment requires the long-term planning and commitment of policymakers to invest in strategies that appropriately address the social determinants of incarceration while simultaneously committing to incarceration alternatives. Socio-

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<sup>61</sup> Susan B Tucker and Eric Cadora, 'Ideas for an Open Society: Justice Reinvestment' (Report No 3(3), The Open Society Institute, November 2003)

<[http://www.opensocietyfoundations.org/sites/default/files/ideas\\_reinvestment.pdf](http://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf)>.

<sup>62</sup> Australian Government, *Australian Social Inclusion Board Priorities*, Social Inclusion <<http://www.socialinclusion.gov.au/australian-social-inclusion-board/priorities>>.

environmental factors such as unemployment, poor housing and/or homelessness, poor mental and physical health, substance abuse, and low educational attainment – inextricably linked to contact with the criminal justice system – are of legitimate concern, both conceptually and fiscally, for policymakers in the criminal justice sector *and* social policy sectors. It is essential that more attention be given to forming these connections between sectors than there has been to date, especially as the Justice Reinvestment organising framework provides such a facilitating mechanism for policymakers to effectively accomplish Social Inclusion ideals. While we must admit Justice Reinvestment may not solve all the problems of excessive imprisonment use in Australia, the concept does embody the potential to achieve improved outcomes. Linking the notions of Social Inclusion and Justice Reinvestment within the social policy discourse in Australia, we hope, may encourage insightful questions such as ‘is investment in new prisons really investment in social exclusion?’ that may in turn lead to alternative, socially-inclusive policy decision-making.

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