Dear Sir/Madam

Institute of Public Affairs submission to inquiry into imprisonment and recidivism

Thank you for the opportunity to make a submission in response to the Queensland Productivity Commission’s inquiry into imprisonment and incarceration.

The Institute of Public Affairs (IPA) is Australia’s oldest free market think tank. Our criminal justice project was begun in 2016 with the intention of examining the growth of incarceration and related costs in Australia, the expansion of the criminal law, and other aspects of criminal justice from policing to corrections. In researching these areas, the IPA has developed a view that is broadly supportive of efforts to reduce the growth of incarceration but with the conviction that this need not entail a radical departure from our traditional values of fair punishment for offenders and personal responsibility. Criminal justice reform does not require a wholesale rethink of our concept of justice; instead, it requires improved administration and greater dedication to rigorous cost-benefit analysis. Criminal justice is one of the basic functions of government but this is not a licence to be profligate. On the contrary, it is all the more reason to ensure that taxpayers are receiving value for their money, and that the programs of the correctional system provide the largest possible dividend in terms of community safety.

However, cost-benefit analysis, while vital to reform efforts, is not the foundation of criminal justice reform. The discussion paper identifies three main purposes of the criminal justice system: community safety; the rehabilitation of offenders; and exacting retribution against offenders for their wrongdoing. The paper asks what is the appropriate balance between these interests. The answer to this question resides in the moral basis of the criminal law. A crime is a wrongdoing so severe that it harms not only the victim but society itself. Retribution is the only way to make sense of this harm: punishment follows wrongdoing naturally. So retribution can be understood as the most basic of the aims of the criminal justice system, and inextricable from the concept of community safety in the sense that retribution is exacted by the community in order to protect itself. The question of which punishments best fit which purposes takes place within this framework.

Having reasserted the importance of retribution, we can consider the notion of corrections. The role of the state in correcting an offender’s behaviour is justified by the prior acceptance of the moral component of the criminal law. Corrections is a normative activity: it implies that there is a proper way to behave in our society, which we are entitled to defend through the coercion of others. Corrections is consistent with the retributive system of justice. In a sense, the imposition of moral norms on offenders is part of the very meaning of retribution. The choice between retribution and rehabilitation is a false one. Our efforts to rehabilitate offenders will come at a cost to their liberty, and in a society predicated on individual rights, this is inherently punitive. The governing principle then is that punishments should be proportional to the harm caused by the offending. Reforms that aim to reduce incarceration and strengthen corrections need to replace incarceration with an equivalent level of retribution. Punishments like community service, fines, restitution orders, along with conditions like home detention, curfews, and movement restrictions can be imposed in various combinations, which, taken together have a retributive effect appropriate for many kinds of offending.

In this context, prison needs to be understood as a particularly severe form of punishment suited to the most serious offending. There is however one more consideration, which is that prison also possesses a unique function: the incapacitation of offenders. As we suggest in our research, this
implies that alternatives to prison are best-suited to nonviolent offenders. Prison ideally is to be used for violent offenders because their offending requires greater punishment and because of the risk they pose to the community. But for this same reason, prison may be an appropriate punishment for recidivists, since their repeated offending indicates that they are a greater risk to the community. The high level of recidivism across the country poses the biggest challenge to reformers looking to slow the growth of incarceration because it frustrates the sensible argument for reserving incarceration for violent offenders. Over the past two years, the Institute of Public Affairs Criminal Justice Project has published a number of reports analysing the performance of Australia’s criminal justice systems and recommending that the growth of incarceration be slowed through a combination of punishment reform for nonviolent, non-recidivist offenders, improvements to non-prison punishments like community service, and changes to the administration of justice. I have attached extracts from some of our reports and enclosed other reports in full for the information of the inquiry.

In what follows, I provide short summaries of our reports, note whether they are excerpted and attached or enclosed in full, and direct the inquiry to their most relevant parts. In addition, Attachment A to this letter includes a table listing these parts against the sections of the discussion paper.

The use of prisons in Australia: reform directions (December 2016) provides an overview of incarceration trends across Australia, including incarceration rates, reoffending rates, and direct and indirect costs of incarceration. The paper outlines a number of reform principles the follow from taking proportionality in sentencing seriously, as well as how best to direct criminal justice spending. Of particular relevance to the inquiry are pages 3-10 regarding the costs of incarceration, Chapter 3 regarding the causes of the rise of incarceration, and pages 56-64 in which suggestions for reducing imprisonment are discussed. [ENCLOSED]

Criminal justice reform: lessons from the United States (April 2017) summarises the key lessons that the IPA has taken from criminal justice reform efforts in conservative American states like Texas and Georgia. The American experience shows not only what sorts of reforms are available, but also speaks to their political viability. Of particular relevance are pages 5-7 which provide an overview of the American case for reform, relevant to the background questions in the discussion paper, and pages 8-17 which outline steps taken to reduce incarceration in the United States and how they might apply in Australia. Pages 13-15 are specifically relevant to the question of preventing recidivism. [Extracts at Attachment B]

Indigenous Australians and the criminal justice system (September 2017) includes an overview of corrections and socioeconomic statistics related to the very high level of incarceration of Indigenous Australians, and provides a first principles argument for addressing this problem with universal reforms to the criminal justice system and by improving access to justice and non-prison punishments. Pages 7-24 are relevant to the questions listed under Trends and Causes, while pages 25-39 are relevant to preventing recidivism. [ENCLOSED]

Australia’s criminal justice costs: an international comparison (December 2017) compares Australia’s spending on prisons on a per prisoner per year basis to other OECD countries. It finds that on this measure Australia’s spending is the fifth highest in the OECD. It also finds that between 2010 and 2015, Australia had the 7th highest growth in prison spending among OECD countries. These findings are at pages 4-9. [Extracts at Attachment C]
From the desk of Andrew Bushnell, Research Fellow
abushnell@ipa.org.au

Making community corrections work (May 2018) recommends that for-profit businesses be allowed to participate in community service schemes on the premise that access to meaningful work and skills-acquisition opportunities are essential to correcting offenders’ behaviour. Pages 19-23 and 27-31 are relevant to preventing recidivism. [Extracts at Attachment D]

Victim appeal: how to address manifestly inadequate sentences (October 2018) proposes that victims of serious offences be given the right to direct public prosecutors to appeal unjustly lenient sentences. The purpose of this reform is to increase community confidence in the courts by increasing the sensitivity of the judiciary to victims’ interests and community standards of justice. The parts of this argument that are relevant to this inquiry are pages 14-35, and especially pages 17-28 (especially Figures 5, 6, 7, and 8) which outline trends in sentencing and the number of guilty findings that lead to incarceration by court types across Australian jurisdictions. The report finds that by this measure Queensland’s judiciary and magistracy are more likely to sentence those convicted of assault and sexual assault to prison than their equivalents in other mainland states. [ENCLOSED]

Thank you again for the opportunity to submit this research. I would also like to acknowledge the conversation that I had with Mr Sid Shanks in which I was able to canvass a number of the IPA’s views regarding criminal justice reform.

Please do not hesitate to contact me for any further information regarding our criminal justice research. I am available at abushnell@ipa.org.au or by phone at 03 9600 4744.

Yours faithfully

Andrew Bushnell
Research Fellow, Institute of Public Affairs
## Table of relevant sections against topics from discussion paper

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Extract from *Criminal justice reform: lessons from the United States*


The pages are submitted in reference to the background questions regarding the purposes of the criminal justice system, questions related to reducing imprisonment, and questions related to preventing recidivism.
1. The American case for criminal justice reform

For decades, the United States has had an incarceration rate much higher than other developed countries. This divergence began in the 1970s and continued to grow until the national incarceration rate peaked in 2007. It has subsequently fallen but is still very high in world terms at 698 per 100,000 people. The comparable figure for Australia is 1511.

In a 2014 report, the National Academy of Sciences attributed the growth in the US prison population to an increase in the use of incarceration to punish convicted criminals and to longer prison sentences. This was a result of various laws passed by legislatures. Mandatory minimum sentences limited the discretion of judges. Three strikes laws imposed automatic prison sentences on offenders upon their third conviction. Truth-in-sentencing laws reduced or eliminated parole, meaning that convicted criminals could not be released from prison early. Drug crimes, violent crimes, and recidivism became much more harshly punished.2

Together, these changes constitute the punishment component of the “tough on crime” trend in criminal justice policy. This trend was necessitated by an historic crime wave that washed over the United States in the 1960s and 70s. In those decades, crime, especially violent crime, rose sharply. In subsequent decades, crime alternately rose and fell, and it has fallen consistently since the mid-90s. However, the link between the fall in crime and the rise in incarceration is unclear, and heavily contested.3

Not contested, however, is the truth that this dramatic expansion in incarceration came at a high financial cost to taxpayers, especially at the state level. From 1985 to 2012, spending on corrections grew from 1.9 percent to 3.3 percent of state budgets. At the federal level, growth has been even faster but from a much smaller base, and corrections spending is still only a fraction of total federal government expenditure. The increase in expenditure has been driven almost entirely by an increase in the number of prisoners (as opposed to capital costs, for example).4

It was in this context that reformers became interested in the rise in incarceration.

When Republican Jerry Madden was appointed chairman of the House Criminal Justice Committee in Texas in 2005, he was given a specific instruction from the speaker: “Don’t build new prisons. They cost too much.”5 Although Madden was a conservative, it became his belief that with some tweaking, a number of reforms that had been developed by centre-left researchers were compatible with his values.

At the heart of these reforms was the idea of “justice reinvestment”. The originators of this idea conceived it as a long-term shift of government resources from prison and punishment to

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1 Andrew Bushnell and Daniel Wild (2016), The use of prisons in Australia: reform directions p.12
Note that this is the figure per 100,000 total population, not just adults.
3 Ibid
4 Ibid p. 315
5 David Dagan and Steven Teles (2016), Prison Break: Why conservatives turned against mass incarceration p.85
increased spending on in health and education in areas known to produce criminals. But as Republican reformers began to consider the issue of prison spending, this idea became narrower: a redirection of spending on prisons to other parts of the criminal justice system, like alternative punishments, rehabilitation programs, and parole and probation.

Over time, a powerful argument for criminal justice reform was developed, and it eventually gained widespread acceptance.

The central contention of this argument was that criminal justice reform could make the community safer by reducing recidivism and other negative consequences of incarceration. This argument ties together economic and moral principles by positing that rationalising expenditure leads to better results for the community, victims, and offenders.

The economic case was straightforward. With high rates of crime and recidivism despite growing expenditure, it was clear that there was a significant amount of waste in the criminal justice system. Fiscally conservative politicians were receptive to the message that there is no good reason to exempt the criminal justice system from the scrutiny that they would normally give to government spending.

Crucially, the economic case was supported by a moral argument based on traditional themes of redemption, the importance of the family, and just deserts. Crucially, embracing these arguments did not mean capitulating to the radical critique of retribution. Instead, these themes were connected to the traditional view of crime and punishment through the notion of desert. The reforms focused on extending greater consideration to those offenders who deserve it, namely nonviolent first-time offenders.

Texas: the test case

Criminal justice reform in Texas has become a widely-celebrated success story.

Reforms in Texas have attracted attention not only for their success but for being led by conservative Republicans.

Under Republican leadership, Texas has:

- Avoided more than $3 billion in projected prison costs
- Amended parole laws to reduce unnecessary revocations
- Expanded community-based supervision and rehabilitation
- Seen serious property, violent, and sex crimes decline 12.8 percent since 2003

By taking on criminal justice reform, Texas gave the idea new credibility. Since then, a number of reliably conservative states have followed Texas's lead, including Georgia, South Carolina, Kentucky, and Mississippi, among others.

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6 Ibid p. 130
8 David Avella, "GOP governors push for criminal justice reform", Real Clear Politics 18 July 2016
The success of this argument for criminal justice reform has led reformers in other countries, including Australia\(^9\) and the United Kingdom\(^{10}\), to take notice. While the circumstances of the United States are in many ways unique, if nothing else criminal justice reform efforts in that country open up new policy directions for reformers in other countries by articulating a clear vision of what a well-ordered, principled criminal justice system should look like.

The next section outlines some of the specific policies adopted by reformers in the United States and their potential application in Australia.

Two broad problems with the criminal justice system were identified by reformers:

- Over-incarceration: rapid growth in the prison population places strain on budgets while failing to produce the expected public safety dividends.
- Over-criminalisation: the application of the criminal law to harms that would be better addressed through the civil law or left unregulated.

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9 John Silvester, “Lock ‘em up lunacy; how we turn small fry crooks into dangerous sharks”, The Age 2 September 2016
2. Over-incarceration

Criminal justice reform in the United States began with a reconsideration of sentencing and the use of prisons. As we have seen, incarceration rates across the United States are consistently much higher than in comparable jurisdictions. While a number of states had previously attempted to address this issue, and its attendant financial and social costs, reform efforts were given new momentum by the reforms of Texas, which subsequently inspired other states to also take on this challenge. This section outlines the common elements of these reforms and considers their possible application to the Australian context.

2.1 Alternatives to incarceration for nonviolent offenders

- Justice reinvestment: diverting nonviolent offenders from prison and redirecting the money saved into supervision and treatment of offenders in the community.
- Major conservative states Texas and Georgia have heavily committed to this approach.
- There is scope for pursuing a similar idea in Australia, but the specific programs into which savings are reinvested may differ.

The idea

Many states have adopted a justice reinvestment model. This entails reducing incarceration, or slowing its growth, by diverting nonviolent offenders from prison, and redirecting money slated for new prison expenditures to supervision and treatment of offenders in the community. This does not necessarily entail a broader approach of taking money from criminal justice and using it for general welfare programs or education.

The US experience

Texas began by reforming the punishments given to nonviolent offenders. This recognises that a high incarceration rate is not a problem in and of itself. Instead, the question of over-incarceration is whether prison in any given case is the punishment that best fits the crime committed. As Madden notes, incarceration reforms should distinguish between those criminals we are “afraid of”, and those who we are merely “mad at”.

In 2007, the Texas congress adopted a justice reinvestment approach, passing laws to reorganise community corrections in the state, with money being redirected from planned new prison places to parole and probation for nonviolent, low-risk offenders. The state legislature spent $241 million on additional treatment and diversion programs. This money was redirected from projected expenditure on new prison construction and maintenance of more than $2.5 billion over the next five years.

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What is justice reinvestment?

Justice reinvestment is the policy of redirecting money budgeted for incarceration towards crime and recidivism prevention measures.

Savings are created through punishment reform: nonviolent, non-recidivist offenders are punished with measures like home detention and community service and given access to community-based rehabilitation services.

The money that was otherwise to be used to pay for their incarceration is then dedicated to increasing the number of bail and parole officers and specialists in rehabilitation. There is also good reason to believe that investing in the police is effective for reducing the crime rate.

Importantly, justice reinvestment does not involve increasing the overall amount of resources for the criminal justice system. It is a system rationalisation.

This initiative included considerable funding of substance abuse treatment for those on probation, with 800 new beds in a residential program and 3000 new places for outpatient substance abuse treatment. It also included 1400 new beds in “intermediate sanctions facilities” for offenders on probation and parole making technical breaches of their release conditions, and 300 new halfway house places for parolees.\(^\text{12}\)

By 2015, violent offenders made up 5.6 percent more of the Texas prison population, illustrating the shift in emphasis.\(^\text{13}\) The bolstered services included new staff for monitoring criminals in the community and for residential and non-residential drug treatment programs.\(^\text{14}\) This built on a 2001 reform introducing specialist drug courts to diverts suitable drug offenders from prison and to supervise them in the community.\(^\text{15}\)

Similar changes were implemented in Georgia, after a 2009 study by Pew Charitable Trusts found that 1 in 13 people in Georgia were in the corrections system, the highest rate for any state.\(^\text{16}\)

Like Texas, Georgia started its reform process by reducing the incarceration of nonviolent offenders. This included redirecting money slated for prison operations towards new specialist courts for drug offenders and the mentally ill, new residential treatment for offenders with substance abuse problems, and enhancements for community supervision.\(^\text{17}\)

Another idea that has found favour with reformers in the United States is changing the way that breach of parole and supervision orders are policed. Historically, any violation of the conditions of release into the community was punishable by losing the privilege of release and being incarcerated. Because the severity of this punishment was often disproportionate to the violation committed, supervisors would often allow violations to go unpunished, rendering the system arbitrary. First pioneered in Hawaii,\(^\text{18}\) an alternative approach has emerged that punishes

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14 Right on Crime website (as above)
15 Texas Department of Criminal Justice (2003), Texas Drug Courts fact sheet
16 Pew Center on the States (2009), One in 31: The long reach of American corrections
18 Amy Walters (2014), “Could this be the solution to America’s probation problem?” Al Jazeera America, 17 June 2014
violations with a range of measures, escalating in seriousness, from loss of privileges to weekend detention. This approach has come to be known as "swift, certain, and fair": punishments for violations are meted out quickly, consistently, and proportionately, reducing incarceration and giving offenders greater opportunity to prove they are ready to live in the community.

Many states have adopted similar ideas to those outlined above. The table below is a non-exhaustive snapshot of how US states are attempting to reduce incarceration.

**Table 1: Savings and reinvestment in selected American states**

<table>
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<th>Other incarceration reforms</th>
<th>Prison savings</th>
<th>Year</th>
<th>State</th>
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<tr>
<td>Portion of savings reinvested in supervision for parolees and released prisoners.</td>
<td>Aims to cut prison population by 1000 over 5 years. $300 million in future corrections costs avoided.</td>
<td>2015</td>
<td>Nebraska</td>
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<tr>
<td>Truth-in-sentencing laws rolled back. Amended punishment for parole violations. Reduced sentences for theft and drug crimes.</td>
<td>Reduces growth in number of prison beds by 3460 over 10 years.</td>
<td>2014</td>
<td>Mississippi</td>
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<tr>
<td>Some savings redirected to supervision for parolees and released prisoners. Amended punishments for supervision violations. Some savings have been invested in law enforcement grants, targeting violent offending.</td>
<td>Reduces growth in prison population by 1759 prisoners to save up to $120 million, both over ten years.</td>
<td>2012</td>
<td>Oklahoma</td>
</tr>
<tr>
<td>Increased chance for prisoners to earn credit towards early release.</td>
<td>Savings of $46 million over 4 years.</td>
<td>2011</td>
<td>Ohio</td>
</tr>
<tr>
<td>Increase supervision for released prisoners. Amended punishments for supervision violations. Expanded drug diversion.</td>
<td>Reduction of 3100 prison beds and savings of up to $70 million over 4 years.</td>
<td>2011</td>
<td>North Carolina</td>
</tr>
<tr>
<td>Requires risk assessments for parolees. Increased violent crime penalties while reducing penalties for other offences.</td>
<td>Reduction of 1786 prison beds and savings of $400 million over 5 years.</td>
<td>2010</td>
<td>South Carolina</td>
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The United States also provides an example of how to address the growth of the remand population. In New Jersey, Republican governor Chris Christie signed a bill providing for non-monetary alternatives to bail for those without the means to pay. These alternatives included bailing people into the custody of designated guardians and imposing conditions like staying in employment, curfews, and GPS monitoring. At the same time, his administration championed a referendum strengthening judges options for remanding those accused of violent crimes.20

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19 Dagan and Teles (2016) (as above) p. 133 NB: figures for Mississippi, Ohio, North Carolina, South Carolina taken from Table 1 on this page

Council of State Governments Justice Center (2015), Nebraska’s justice reinvestment approach: Reducing prison overcrowding and expanding probation and parole supervision

Council of State Governments Justice Center (2012), Justice reinvestment in Oklahoma: Analysis and policy framework

20 Inimai Chettiar and Michael Waldman (2015), Solutions: American leaders speak out on criminal justice, p. 21
How it might work in Australia

In Australia, there is significant scope for reducing the incarceration of nonviolent offenders. Government statistics indicate that up to the most serious offence of up to 46 percent of Australian prisoners was a nonviolent offence. This figure includes those on remand, who have yet to be convicted. The incarceration of these offenders costs taxpayers up to $1.8 billion per year, including the contribution this policy choice makes to the need for more prison space.21 As the American experience demonstrates, reducing the incarceration of this class of offender is the best place to start when reforming sentencing policy.

Regarding the remand population, it has been proposed that the Commonwealth government can use the tax and transfer system to enable contingent loans for accused people without the means to post bail.22 With increased monitoring and other release conditions, this can provide a safe option for reducing the growth of the nonviolent remand population, direct resources to those most dangerous to the community, and reduce the burden that excessive remand places on the presumption of innocence.

Dr Steven Teles, co-author of Prison Break: Why Conservatives Turned Against Mass Incarceration, notes that the question of sentencing reform is how best to fill in the spectrum between the maximally-coercive punishment of imprisonment and the minimally-coercive options of probation and parole.23

Some states have begun down this path already. The previous Liberal government in Victoria abolished suspended sentences and replaced them with Community Corrections Orders that give judges more ability to coerce and restrict sentenced criminals in the community. While there has been some subsequent controversy about how these orders are being applied, in principle this is a positive development. Similarly, the current Labor government of South Australia is conducting a lengthy review of its sentencing practices and has recently expanded the courts’ discretion to impose home detention on certain convicted criminals.

Australia’s average annual per prisoner cost of incarceration is $110,000.24 This is much higher than, for example, Texas, where the figure was around US$30,000 in 2010 (A$39,000).25 So while it is true that the scope for reducing incarceration in Texas was much greater than Australia, because of its high incarceration rate (704 per 100,000 residents in 2004, when the first reforms came into effect),26 the potential saving to the budget of avoiding or ending the incarceration of a single prisoner is much greater in Australia.

Part of the reason for examining the reforms in the US is to avoid making the mistakes that precipitated the massive increase in incarceration in that country. One major difference between our country and theirs is the widespread use in the US of precise sentencing scales. Implemented in the wake of the 1960s crime wave and subsequent perceived leniency by judges, sentencing scales limit judicial discretion by stipulating strict requirements for how crimes are to be punished.

In Australia, the states’ Crimes Acts typically rank crimes by seriousness and then stipulate the upper limit of punishment for each rank. By contrast, in the United States, sentencing scales

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21 Bushnell and Wild (2016) (as above)
23 Stephen Teles in private conversation, July 2016
24 Bushnell and Wild (2016) (as above) p. 5
26 Ibid p. 2
often stipulate a narrow range of sentences for each type of crime, with specific guidelines on sentencing enhancement and mitigation.

As we have seen, some US states that have pursued criminal justice reform have included changes to their sentencing scales in their reforms. And at the federal level, a bipartisan coalition including Texas Republican Senator Ted Cruz have worked to remove mandatory minimum sentences for drug offences through the Smarter Sentencing Act.\(^\text{27}\)

In Australia, we need to resist calls to impose new limits on judicial sentencing discretion for nonviolent crimes, such as mandatory minimum sentences and baseline sentences. Based on the US experience, attempts by legislatures, however well-intentioned, to dictate sentencing will lead to perverse consequences and unnecessary incarceration, and sentencing guidelines will again need to be relaxed.

Reducing the cost of incarceration generates savings within the criminal justice system. This money can be reinvested towards reducing crime. As Table 1 shows, the upstream interventions that have proved most successful, and have been implemented most widely, are increased access to drug rehabilitation and mental health services. Additionally, releasing more offenders into the community requires an increase in supervision.

A broader justice reinvestment approach is theoretically possible. This would redirect savings from punishment reform towards other areas of government expenditure and attempt to address crime upstream, through education and community services. However, as the Australian Senate noted in its inquiry into justice reinvestment, such an approach has uncertain benefits.

The Law Council of Australia also noted that commentators have adopted a more cautious approach to justice reinvestment as “true correctional savings have been difficult to document and even more problematic to capture” and that the “impact on offending or recidivism from the reinvestment of these savings into community-based crime prevention strategies will take a lot longer to emerge”. [The Centre for Independent Studies] was of a similar view, commenting that “the impact on offending or recidivism from the reinvestment of these savings into community-based crime prevention strategies will take a lot longer to emerge, and it is too early to evaluate their effects, if any”.\(^\text{28}\)

Given the uncertain benefits of redirecting funds from the criminal justice system to the welfare state, a narrower approach should be preferred. Justice reinvestment should focus on rationalising the criminal justice system by redirecting money from inefficient imprisonment towards improving those parts of the system that better contribute to public safety, including supervision, treatment for known problems, and policing.

A 2016 justice reinvestment trial in Cowra, New South Wales found that the cost of incarcerating people from that town had been $42 million over 10 years. Researchers and community leaders came up with a list of mostly nonviolent offences to be treated with non-carceral punishments. These crimes constituted around half of the crimes committed in the town. In terms of incarceration costs, this amounted to a potential saving of $23 million over 10 years. This amount has been slated for reinvestment in service mapping, youth education engagement, employment and skills development, housing security, and community transport.\(^\text{29}\) A similar project has been undertaken

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\(^{27}\) S. 502 - Smarter Sentencing Act of 2015

\(^{28}\) Senate Legal and Constitutional Affairs References Committee (2013), *Value of a justice reinvestment approach to criminal justice in Australia*, 5.63


The offences selected for punishment reform were traffic offences, public order offences, justice procedure offences, property damage, drug offences, fraud and deception, theft, and unlawful entry with intent, burglary, and breaking and entering.
Criminal Justice Reform - Lessons from the United States

in Bourke, New South Wales. Both projects are seeking greater upfront investment by the state government. It is too early to measure the success of these ventures in reducing crime in these communities.

As the experience of states like Oklahoma and South Carolina demonstrate, a justice reinvestment approach is compatible with increasing penalties for violent crimes and with increased funding for the police. New Jersey Democrat, Senator Cory Booker has said, “It costs hundreds of thousands of dollars to incarcerate a nonviolent offender for a few years, money that could be used to hire more police officers, secure our nation from terrorist threats, or solve more serious crimes”. The effectiveness of policing was also endorsed by the White House review of incarceration.

In Australia, the share of criminal justice resources being directed to the police has gone down over the last ten years as more money has been used for incarceration. Punishment reform for nonviolent offenders is a high-potential method for reversing this trend and enabling ‘needs-based policing’, in which the police direct their resources to where they will do the most good.

2.2 Reduce recidivism and emphasise employability

- Recidivism is one of the main drivers of increasing incarceration and indicates that rehabilitation services are failing. In Australia, 59 percent of prisoners have been imprisoned before.
- Texas, Georgia, and other US states have tackled this problem by focusing on reentry services, boosting funding for education programs that will assist released prisoners to return to the workforce.
- Barriers to the workforce like occupational licensing and access to state identification have also been addressed.
- In Australia, the high minimum wage is another barrier that should be reconsidered.

The idea

One of the biggest criminal justice costs to the community is recidivism. A wide range of states have undertaken measures to reduce recidivism, prompted by a 2008 Federal law, known as the Second Chance Act, that provided grants for state and local reentry programs. In particular, states have recognised the importance of increasing the employment prospects of those released from prison.

The US experience

Reducing recidivism has been a focus of criminal justice reform in Texas. In 2009, the Texas legislature built on its earlier initiatives by instituting a Reentry Task Force in Office of the Governor. The task force comprised representatives from various relevant government [accessed 29 March 2017]

31 Chetliar and Waldman (2015) (as above) p. 8  
32 Council of Economic Advisers (2016), Economic perspectives on incarceration and the criminal justice system, p. 5  
34 Senate Research Center (2009), Bill analysis: H.B. 1711
departments, the judiciary, law enforcement, and civil society. The legislature also funded 64 reentry coordinators and other evidence-based measures to reduce recidivism, including individualised case management and the provision of classes for essential life skills like money management and nutrition. The legislature also amended occupational licensing requirements to make it easier for nonviolent offenders to obtain a license in fields not related to their crimes.  

In its 2012 Reentry Update, the Texas Department of Criminal Justice recommended that future reform concentrate on improving employment through further reform of occupational licensing and tax incentives and bonding programs to incentivise businesses to hire ex-convicts.  

Similarly, criminal justice reform in Georgia has emphasised returning released prisoners to productive society. In his second inaugural address, Governor Nathan Deal said:

I am here to tell you, an ex-con with no hope of gainful employment is a danger to us all. This is why we must work to get these individuals into a job. Our prisons have always been schools. In the past, the inmates have learned how to become better criminals. Now they are taking steps to earn diplomas and gain job skills that will lead to employment after they serve their sentences.

In recent years, savings from reduced incarceration have been redirected to, along with rehabilitation programs, job training for inmates. Two prisons now host charter schools so that inmates can achieve their high school diplomas. Governor Deal also took executive action to “ban the box”, eliminating the requirement for applicants for state jobs that they reveal any previous convictions.

Reentry services and reducing recidivism have become key parts of the criminal justice reform movement in the United States. The Council of State Governments’ Justice Center emphasises occupational licensing, access to state identification, and reporting of convictions in job applications as crucial parts of a strategy for returning ex-prisoners to the workforce.

Also at the federal level, in 2015 Senators Rand Paul (Republican, Kentucky) and Cory Booker (Democrat, New Jersey) introduced the Record Expungement Designed to Enhance Employment (REDEEM) Act, which would expunge the records of nonviolent and juvenile offenders.
How it might work in Australia

Australia has a very high recidivism rate. Fifty-nine percent of prisoners in Australia have been incarcerated before. This figure has been stable for the past decade.\textsuperscript{43} There are no clear data for how many people are released from prison each year in Australia. A 2010 estimate, when the prison population was at 29,000 put the number of releases at around 60,000.\textsuperscript{44} A 2015 study also found that the exact figure is unknown.\textsuperscript{45}

Although each Australian jurisdiction has rehabilitative and educational programs for prisoners, as the data show they have not been effective. Resources could be better targeted to programs that will increase ex-convicts’ chances of employment. Research shows unemployment to be correlated with crime and recidivism.\textsuperscript{46} And Queensland research shows that vocational education and training reduces recidivism.\textsuperscript{47} For this reason, some jurisdictions are moving to eliminate programs that have no direct connection to employment. The NSW government, for example, announced in 2016 that it would be replacing arts and music classes with literacy and numeracy classes in a bid to focus the system on providing job skills.\textsuperscript{48}

One of the most serious barriers to entry into the workforce in Australia is the high minimum wage, which reduces workforce growth.\textsuperscript{49} This especially affects people who possess characteristics that make it difficult for them to compete for jobs, as is recognised by the legal exemptions from the minimum wage for people with disabilities and minors. Along with investing in job training and practical skills, state governments should lobby the Commonwealth for ex-prisoners to be exempted from the minimum wage, increasing their competitiveness in the labour market.\textsuperscript{50}

\textsuperscript{43} Bushnell and Wild (2016) (as above) p. 38
\textsuperscript{44} Mark Halsey (2010), “Imprisonment and prisoner re-entry in Australia”, Dialectical Anthropology Vol. 34, No. 4 December 2010 p. 547
\textsuperscript{45} University of Melbourne (2015), “Number of people released from prison unknown: new research finds”, Media Release, 26 February 2015
\textsuperscript{46} Bushnell and Wild (2016) (as above) p. 20
\textsuperscript{47} Robin Fitzgerald and Adrian Cherney (2015), “State of imprisonment: out one day, back the next in Queensland”, The Conversation, 15 April 2015
\textsuperscript{48} Lisa Visentin (2016), “Three quarters of teachers to be sacked from NSW prisons”, The Sydney Morning Herald, 10 May 2016
\textsuperscript{49} Aaron Lane and Mikayla Novak (2014), Submission to the Fair Work Commission: Annual Wage Review 2014, Institute of Public Affairs
\textsuperscript{50} Wild, Daniel (2016), “The minimum wage is holding prisoners back when they leave jail”, The Sydney Morning Herald, 27 May 2016
2.3 Data collection and performance tracking

- Punishment reform depends on evidence-based approaches to prisoner rehabilitation.
- Validating alternative punishments depends on the collection of reliable data, preferably across jurisdictions.
- There are currently a number of holes in Australia’s criminal justice data collection, including inconsistent reporting standards across jurisdictions.

The idea

To be worthwhile, the redirection of funds from incarceration to other parts of the criminal justice system must lower rates of crime and recidivism and consequently contribute to public safety. This depends on the careful verification of the results of programs into which funds are redirected, underpinned by the accurate collection of relevant data.

In the United States significant work has been done to map this data, showing how it interacts with other demographic data in particular locations. This enables resources to be targeted to the postcodes from which crimes arises and in which crime is committed. Justice mapping is one example of the efficiency made possible by careful data collection.

The US experience

In discussions with the IPA, reformers in Texas and Georgia acknowledged the vital role played in criminal justice reform by the Pew Charitable Trusts, which commissioned the research and analysis upon which justice reinvestment was based.\(^{51}\)

When the Right on Crime coalition first moves into a state, their first action is a top-to-bottom review of the criminal justice system’s performance conducted by Pew. This data gathering and analysis phase is vital to the design and tailoring of the reform program.

The importance of reliable and wide-ranging data was recognised by the Obama administration’s report on criminal justice reform. It also identified that current reporting requirements are insufficient and unreliable.

Designing effective criminal justice system reform requires research and evaluation of policy approaches, which in turn necessitates accessible and comprehensive data on criminal justice system indicators.\(^{52}\)

The Obama administration took steps to coordinate better national criminal justice system reporting.

One way that this data is put to use in the Unites States is with justice mapping. Criminal justice statistics can be mapped to provide an overview of the intersections between geography, crime, victimhood, and other data relevant to the welfare state. The maps are then used to help redirect criminal justice expenditures, especially when community services are being expanded as part of a broad justice reinvestment approach.

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\(^{51}\) Conversations (all July 2016) with:
- Chuck DeVore and Marc Levin, Texas Public Policy Foundation
- Benita Dodd, Georgia Public Policy Foundation
- Carey Miller, Office of the Governor of Georgia

\(^{52}\) Council of Economic Advisers (2016) (as above) p. 60
How it might work in Australia

There is no equivalent of Pew Charitable Trusts in Australia. As an alternative, a top to bottom review of the operation of the criminal justice system in each state could be initiated by the state ombudsman.

**Investigations by state ombudsmen**

The state ombudsmen are able to initiate investigation under their “own motion”. Investigations can consider all administrative actions taken by government authorities.

State ombudsmen have experience providing in-depth systemic reviews. Recent ombudsman’s investigations have considered, in NSW, the operation of the Freedom of Information Act and in Victoria, the transparency of local government decision making.

This would involve analysis of the performance of each part of the criminal justice system, from police to courts to prisons. Data gathered would yield insight into how successful are criminal law interventions in reducing crime, which punishments and rehabilitation programs get the best results for the community, and the main correlates of criminal offending. The data would provide the basis for designing criminal justice reforms that address the specific failing of each jurisdiction.

There is also a role for the Commonwealth government, which administers both the Australian Bureau of Statistics and the Productivity Commission, in refining the data that is recorded and tracked over time. A comparison of the state level results would likely show inconsistencies and gaps in reporting standards. The Commonwealth and states should work together to ensure that the statistics kept are comprehensive and enable policymakers to compare across jurisdictions.

The lack of uniform data collection standards across Australia was noted by the Senate inquiry into justice reinvestment. Many submissions to that inquiry noted gaps in national and state data, from prisoner health to family violence, referrals to diversionary courts, and access to parole, and even the basic question of how many unique receptions Australians have in any given year.\(^{53}\)

Lastly, data mapping is already done in Australia by the Law and Justice Foundation, whose work shows the way that improvements in data collection will assist civil society organisations to provide constructive policy advice to government.

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\(^{53}\) Senate Legal and Constitutional Affairs References Committee (2013) (as above) 7.50-7.56
Extract from *Australia’s criminal justice costs: an international comparison*

The following pages are taken from Andrew Bushnell (2017) *Australia’s criminal justice costs: an international comparison* Melbourne: Institute of Public Affairs.


These pages are submitted in reference to the rising costs of incarceration and the rate of growth of incarceration in Australia. Given that Queensland’s annual per prisoner incarceration cost is approximately $107,300 (as reported in the discussion paper), were the state its own country, it would have the fifth most expensive prisons in the developed world by this measure.
1. Australian prisons are expensive

Australian prisons are among the most expensive in the world. Among countries for which 2014 data is available, Australia had the fifth highest per prisoner annual prison cost. The cost of putting one person in prison for a year was $109,500.

Only Sweden, Norway, the Netherlands and Luxembourg had higher costs.

All three of these countries have been cited in recent years as examples for other countries, including Australia, to follow. It is rarely mentioned that doing so, absent a significant reduction in prisoner numbers, would result in a massive increase in prison spending. Even if the purportedly more rehabilitative approach to imprisonment taken by those countries led to longer-term reductions in recidivism and thus to the prison population, Australian taxpayers would still have to carry a substantially increased prison spending burden in the interval.

Australia already spends considerably more per prisoner than the other common law countries, and more than most European social democracies. Major countries like the United States, Japan, France, and Canada spend less than the OECD average.

Moreover, what this figure suggests is that Australia’s resourcing for prisoners is already generous. Put bluntly, differences in crime and recidivism levels are unlikely to be simply explained by per prisoner spending. To the extent that Australia’s prisons are less successful in reducing recidivism than those of comparably high-spending countries, this problem is likely to be a question of prison policy or socio-cultural factors rather than spending.

Explanatory notes

Because of the variety of sources used, this is an estimate only. Counting of both prisoners and expenditures may vary across countries.

European figures, including United Kingdom figures, are drawn from the Council of Europe Annual Prison Statistics 2015. The data is from 2014 and has been adjusted.

The United States figure is an average from 45 states in 2015, and does not include federal prisoners. The Japan figure is an estimate based on English-language reporting from Japan from 2015.

Where needed, figures have been adjusted for inflation. All figures have been converted to Australian dollars at the 2015 end-of-financial-year rate.

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1 See for example:
Ray Edgar, “Design the key to youth detention, and the Werribee option already has it wrong”, Sydney Morning Herald, 24 March 2017 [accessed 28 June 2017]
Erwin James, “Prison is not for punishment in Sweden. We get people into better shape”, The Guardian, 26 November 2014 [accessed 28 June 2017]
Christina Sterbenz, “Why Norway’s prison system is so successful”, Business Insider Australia, 12 December 2014 [accessed 28 June 2017]
Figure 1: Average annual per prisoner cost, available OECD countries 2015 (2015 A$)

2. Australian prison expenditure is growing rapidly

Not only are Australian prisons expensive, overall prison spending has grown at a rapid rate in the past several years.

Between 2010 and 2015, the growth of Australian prison spending far exceeded the OECD average, which was 12.5 percent. (Note that this figure is not population-weighted and is boosted by huge increases in spending in smaller countries like Hungary, Iceland, and Latvia.)

Over that period, Australian prison expenditure grew by **25.3 percent**, faster than all common law countries.

Big-spending Norway saw a 26.1 percent increase. The Netherlands by contrast reduced prison spending by 12.9 percent, largely by closing prisons.²

Prison spending increases can be caused by capital works, increased operational costs caused by workforce expansion, service improvements, increased remuneration for employees, and adding more prisoners. Unpicking the exact causes of each country’s change in prison spending would be a substantial undertaking and is beyond the scope of this paper. However, it should be noted that whether countries have a rehabilitative or retributive approach, both have failed to stem the need for increased prison resources in recent years.

**Explanatory notes**

The earlier Canada figure is from 2010-11.

The earlier Ireland figure is from 2011.

United States figures exclude the federal prison system (which houses up to 8 percent of American prisoners).³

The OECD average is not population-weighted.

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² Killalea (as above)

³ The Bureau of Justice Statistics estimated that in December 2015, there were 2,173,800 people in prisons across the United States - Bureau of Justice Statistics, Media release: US correctional population at lowest level since 2002, 29 December 2016

The Federal Bureau of Prisons counts 187,736 federal inmates as at 22 June 2017 -
Figure 2: Changes in prison spending 2010-15, available OECD countries

3. Australia’s prison population is also growing rapidly

As stated, one of the main drivers of increased prison costs is, naturally, an increase in the prison population.

Australia has seen a remarkable rise in its incarceration levels. As noted in the IPA report The use of prisons in Australia: Reform directions the incarceration rate per 100,000 Australians is now at its highest since Federation.\(^4\) The number of prisoners has grown 39 percent in the last 10 years.\(^5\)

Over the past five years, international figures show that Australia’s incarceration growth has outstripped that of many comparable countries. Fellow common law countries, the United States, the United Kingdom, Canada, Ireland, and New Zealand all reduced their incarceration levels over the period. Across the OECD, there was a slight decrease of 4.4 percent.

Among fellow high spending countries, Sweden and the Netherlands reduced incarceration. Norway saw a greater increase in incarceration than Australia. Again, no simple relationship between spending and incarceration is present.


Figure 3: Change in incarceration rate per 100,000 adults and prison population, available OECD countries 2009-2014

- Change in number of prisoners
- Change in incarceration rate per 100,000 adults

Extract from *Making community corrections work*


The pages are submitted in reference to the questions related to preventing recidivism. These sections provide analysis of the costs and benefits of community corrections and an argument for the importance of work as a component of corrections.
4-2: Community corrections and reoffending

KEY POINTS:

» There is some evidence to suggest that community corrections is more effective than prison in reducing reoffending, even when relevant differences between the two populations are controlled for.

» There is no correlation between expenditure, staffing levels, and completion rates, suggesting that community corrections does not require more funding.

» With such a large gap between the costs of prisons and community corrections, there is scope for increasing the cost of community corrections where doing so displaces prison spending.

Along with its lower cost, community corrections may be more effective in reducing reoffending than prison. However, the question of whether community corrections achieves better results than prison is hard to measure and the relationship is not straightforward. A simple comparison, as in Figure 10, does not capture the effectiveness of the different punishments in a nuanced way. Nonetheless, the figures are worth noting for the sake of completeness.

**Figure 10:** Percentage of offenders released from prison or community corrections in 2013-14 who returned to the corrections system within two years

This figure shows clearly that released prisoners are far more likely to return to the corrections system than are offenders discharged from community corrections. The problem with a simple comparison like this, however, is that the populations being compared have been sorted (through sentencing) by the seriousness of their offending. The community corrections population is made up of criminals whose offending was less serious than that of the prison population. In this respect then, it is not surprising that released prisoners should return to corrections at a higher rate: they are often hardened criminals.
To compare the effect on reoffending of community corrections and prison therefore requires a more sophisticated statistical analysis that accounts for the differences between the two populations. Based on studies that have controlled for demographic differences, there is emerging evidence that community corrections can be more effective than short prison sentences in correcting offenders’ behaviour.

4-2-1: Summary of reoffending studies

A 2017 study by the NSW Bureau of Crime Statistics and Research (BOCSAR) compared offenders who received Intensive Corrections Orders (ICOs) between 1 October 2010 and 30 September 2012 with those who, in the same period, received prison sentences of less than two years. The study tested for reoffending, defined as any proven offence committed after the end of the relevant period that lead to a finalised court appearance. It found that the ICO population was younger, more likely to come from major cities and less-disadvantaged areas, and less likely to have committed certain offences, such as justice procedure offences and indictable offences. Using two different models, the study concluded that those offenders who received ICOs were less likely to reoffend. The authors attributed this effect to the combination of supervision and rehabilitation offered by ICOs.  

Another important factor in the effectiveness of community corrections is access to community service work, for which there is some evidence of a correlation with reduced reoffending.

An earlier BOCSAR study that performed a similar analysis of matched populations found that community service (imposed at the time as a separate order) was more effective in reducing reoffending than good behaviour bonds, suggesting a connection between work and corrected behaviour. Similarly, there is some evidence that community service orders get better results in terms of reoffending than incarceration. A literature review conducted by Monash University for Corrections Victoria examined evidence from overseas, with one study from Scotland finding that “offenders on community service consistently have lower reconviction rates than would be predicted by their criminal history, age, and other relevant characteristics”. A Deakin University study of an employment assistance program that involved placing interested prisoners and offenders into paid work found that participants had low reoffending rates while in the program, consistent with the established correlation between unemployment and offending.

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8 This claim should not be confused with claims about compulsory work components providing a barrier to access to community corrections. This point is addressed in Section 6 of this report.


10 Shelley Turner and Chris Trotter (2013), Best practice principles for the operation of community service schemes p. 28

It should, however, be noted that an earlier 2008 American survey of different studies found evidence of a link between unpaid work (specifically) and reduced reoffending to be “sparse and dated”. That report did note though that offenders reported a positive effect from participation in unpaid work, including predicting that they were less likely to reoffend. Finally, a 2014 analysis by the Victorian Sentencing Advisory Council found only a non-significant lower rate of reoffending by those given community work as part of their community-based orders, stating that there was “no clear relationship” between the two. That report also noted that one of the limitations of its analysis was that it was unable to discriminate between the types of offending of participants or the nature of the programs in which they participated.

None of the above data mean that there are no other considerations to be taken into account in punishment. It is still reasonable to say that community safety in the immediate term trumps reoffending, and this means violent criminals should be imprisoned. But it does suggest that the growth of community corrections may contribute to a longer-term increase in community safety, as long as offenders are selected appropriately.

4-2-2: Other community corrections performance data

If we accept that there is at least some positive effect that community corrections might have on criminals who otherwise would have been imprisoned, the next question we need to consider is how well the programs are delivering that benefit.

One relevant consideration here is the rate at which offenders in community corrections complete the programs to which they have been sentenced. As Figure 11 shows, completion rates across the country have mostly been steady over the past 10 years, and vary quite substantially between jurisdictions.

**Figure 11: Completion rates of all community corrections orders by state 2007-08 to 2016-17 (%)**

Source: Productivity Commission, Report on Government Services 2018 Table 8A.19

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12 Robert Davis et al (2008), A synthesis of literature on the effectiveness of community orders, pp. 20-21
13 Sentencing Advisory Council (2014), Exploring the relationship between Community-Based Order conditions pp. 21-2
Completion rates have risen in Queensland and, in recent years, in the Northern Territory. In Victoria, Western Australia, South Australia, and Tasmania completion rates have been steady. In New South Wales and the Australian Capital Territory they have fallen.

Completion rates do not necessarily reflect the success of the programs. The rate may fall if supervision improves, such that breaches are more readily detected. Changes to policy may also mean that some breaches may now lead to termination of an offender’s community corrections order where previously they did not, or vice versa.

Perhaps in part for this reason, completion rates do not track community corrections spending or staff levels. There is no correlation between completion rates, staffing levels, and spending. This strongly suggests that the effectiveness or otherwise of community corrections in Australia is not being determined by resourcing. However, the large gap in cost between community corrections and prison does mean that there is significant scope for increasing community corrections costs if those costs displace prison spending.

Figure 12: Community corrections per offender per day cost versus order completion rate by state 2016-17

Figure 12 shows that if there is a correlation between community corrections completion rates and spending, it actually runs the opposite way from what might be expected. The jurisdictions with lower per offender per day costs tend to have higher completion rates.

There is also no correlation between completion rates and staffing levels.
Figure 13 suggests that the number of offenders per staff member is a poor predictor for how likely an offender is to complete a community corrections order. This is worth noting, as it might be suspected that a higher ratio would mean that breaches are less likely to be detected or, conversely, that it is more difficult for offenders to complete their orders without more extensive support. However, it is possible that these two effects cancel each other out in the statistics.
5 What do offenders do when being punished in the community?

KEY POINTS:

» Offenders only perform about half of the community service hours to which they are sentenced.
» This is in part caused by a shortage of suitable work opportunities.
» Unlike prisoners, offenders in the community do not have access to paid employment opportunities.

Community corrections is increasingly replacing both prison sentences and monetary orders. Community corrections is cheaper than incarceration and there is some evidence suggesting that it is more effective in correcting offenders' behaviour. However, these benefits depend on how community corrections is structured. In particular, community corrections is designed to achieve two purposes: the punishment of wrongs and the correction of wrongful behaviour.

For this reason, offenders in community corrections are usually involved in both rehabilitation programs and community service work.

For example, in NSW in 2015-16, 3,775 offenders in community corrections participated in rehabilitation programs, with most of them in programs for violence and addiction. The NSW Department of Justice also states that Community Service Orders supervise approximately 9,635 offenders. This compares to the average daily community corrections population in that state in that year being 17,450 – the total of everyone in community corrections regardless of order.

In Victoria, of the 10,508 offenders who received CCOs in 2015, 74.3 percent included work orders, and 76.6 included an assessment or treatment order.

Community service is widely regarded as a unique form of corrections, able to satisfy retributive and rehabilitative ends simultaneously. It achieves this by imposing a mix of the deprivation of liberty (through coerced participation), restoration of damage to the community (through participation in programs improving community amenity), and providing offenders an opportunity to learn skills and reintegrate into the community (by working with selected organisations).

The ability of community service programs to satisfy these aims is limited by the availability of suitable community work. Across Australia, offenders usually serve around half of the community sentence hours to which they have been sentenced.

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14 NSW Department of Justice (2016), “Fact Sheet 6: Offender programs”
15 NSW Department of Justice (2016), “Fact Sheet 3: Community Service Orders”
16 Sentencing Advisory Council (2016), Community Corrections Orders: third monitoring report p. 17
17 Turner and Trotter (2013), as above, p. 14
18 In most jurisdictions, community service sentences are between 40 and 240 hours, though in some jurisdictions the limit is 400 hours.
Table 4: Offender community work by jurisdiction 2015-16

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
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<th>TAS</th>
<th>ACT</th>
<th>NT</th>
<th>Aus</th>
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<tbody>
<tr>
<td>Average hours ordered per offender</td>
<td>na</td>
<td>102</td>
<td>64</td>
<td>62</td>
<td>142</td>
<td>na</td>
<td>122</td>
<td>85</td>
<td>78</td>
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<tr>
<td>Average hours worked per offender</td>
<td>90</td>
<td>30</td>
<td>30</td>
<td>36</td>
<td>41</td>
<td>na</td>
<td>63</td>
<td>43</td>
<td>41</td>
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</tbody>
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Source: Productivity Commission, Report on Government Services 2017 Table 8A.13

What this says is that even though community service is recognised as a useful form of punishment, getting full value for the community from its use is constrained by its unreliable availability, and arguably, enforcement. Offenders are not only avoiding the full measure of their punishments, they are missing out on the benefits of being engaged in work. As the Sentencing Advisory Council has written:

Unpaid community work often represents the first time that offenders have experienced structure, routine, and responsibility in their chaotic lives. It also allows offenders to develop skills that might otherwise be unattainable with potential relevance to future job opportunities.

This would be equally true if we deleted the first word in that quote – “unpaid”. Prisoners have access to paid labour. New South Wales, for example, has a prison industries program that has annual revenue of more than $100 million. In the Northern Territory there is an innovative work release program, Sentenced to a Job, in which prisoners are given the opportunity to work in commercial businesses in the community. Participants are able to work in, for example, a commercial bakery.

Participant businesses are chosen based on a number of considerations, which include minimising the disruption caused to the economy. Selected industries have a need for additional labour. The program has enjoyed strong growth and good results: reoffending has been reduced for first-time offenders and offenders who have committed less than five offences; property offending may have been reduced because of access to legitimate earnings; offenders have earned hundreds of thousands of dollars towards their board and lodging and victims’ compensation; and both participants and staff have reported that the program is beneficial.

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19 For example, in its 2013 review of sentencing, the NSW Law Reform Commission noted that the number of hours of community service per offender would have to be limited “due to the difficulties [Corrective Services NSW] sometimes experiences in arranging sufficient community service work”. New South Wales Law Reform Commission, Report 139: Sentencing, p. 254

20 One possible contributor to the ratio of hours ordered to hours worked is compliance by offenders. However, a comparison of Table 4 with Figure 8 reveals no clear correlation between this ratio and completion rates by state.

21 Sentencing Advisory Council (2014), as above, p. 4

22 NSW Department of Justice (2016), “Fact Sheet 7: Corrective Service Industries”

23 Jo Wodak and Andrew Day (2017), Sentenced to a job: A case study
In both programs, offenders are paid the minimum wage. The goal is both to provide skills training and to normalise work in the lives of offenders. There is a growing body of work that associates employment with lower reoffending.\(^{24}\)

If the challenge of community corrections is a lack of supply of meaningful work, and the benefits of paid work for prisoners are well understood, then the conclusion we should draw is that limiting community corrections to unpaid work is counterproductive.

The final section of this report discusses this proposition.

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\(^{24}\) Bushnell and Wild (2016), as above, p. 20

A recent study in United States showed that prisoners who were laced into work at the end of their sentences had lower reoffending rates. Peter Cove and Lee Bowes (2015), “Immediate access to employment reduces recidivism” realclearpolitics.com 11 June 2015

A 2012 study from Indiana found that employment was the main predictor of reoffending, with employment stability also “decisive”. John M. Nally et al, The post-release employment and recidivism among different types of offenders with a different level of education: a 5-year follow-up study in Indiana pp. 23-4
Making community corrections work

**KEY POINTS:**

» Opening up community service programs to bids from businesses would increase the quantity and quality of work opportunities for offenders.

» Paying offenders in community service for their labour is consistent with prison industries and work release programs, and with enabling fine-defaulters to work off their debts.

» The maximum number of community service hours to which an offender can be sentenced may have to increase to take advantage of these opportunities.

» This will also help to maintain a balance between the rehabilitative and retributive goals of community service.

Australia’s rapidly rising rate of incarceration has rightly attracted the attention of governments and the judiciary. One response has been to increase the use of community corrections, in order to fill in the spectrum of punishment between incarceration and release into the community. Community corrections has two main advantages: first, it is much cheaper than incarceration; second, there is emerging evidence that community corrections is more effective than incarceration in reducing reoffending.

An important part of community corrections is community service. Forced participation in work serves as a punishment for offenders, enables them to give back to the communities they have harmed, and provides access to training and experience that can assist offenders to stay on the straight and narrow. Unemployment is correlated with offending, so part of correcting offenders’ behaviour is instilling in them the discipline and skills required to hold down employment.

Unfortunately, the viability of community service as an alternative to prison (whether in place of a prison sentence or together with a shorter prison sentence) is threatened by an under-supply of meaningful work. Studies have shown that community service is more effective where offenders regard the work as meaningful. But community service work in Australia is usually made up of simple tasks like cleaning up public spaces, in contrast to prison-based programs that enable participation in industry and skills training. Moreover, offenders in community service complete only half of the hours to which they are sentenced.

Community service programs are operated by community organisations that bid for access to offender labour. To be selected, organisations have to show that they are able to supervise offenders in their charge. The work is explicitly required to be unpaid. For example, Corrections Victoria’s *Guidelines for Community Work Partner Agencies* states that partner agencies are to:

> Ensure that, as community work offenders are performing unpaid community work, they are not given money or other material rewards for their services.25

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25 Department of Justice – Corrections Victoria (2013), *Guidelines for Community Work Partner Agencies: Community Correctional Service*
This free labour contributes tens of millions of dollars to the economy each year. In New South Wales, community service contributes $10 million worth of free labour.\footnote{Department of Justice (NSW) (2016), “Community Service Orders”} In Queensland, the figure is $8.4 million.\footnote{Department of Justice and Attorney-General (Queensland) (2016), Annual Report 2015-16 p. 57}

It is clear the labour of offenders in community corrections has value. It is also clear that the capacity of this workforce is underused. And the underuse of this workforce undermines the retributive and rehabilitative advantages of community corrections. For these reasons, this report proposes the following reform.

**Recommendation 1: Businesses should be permitted to bid for offender labour.**

The following sections outline how this would work in practice, and discuss some of the advantages and disadvantages of this reform.

**6-1: Offender labour in commercial enterprise: how it would work**

Businesses would be able to bid, along with community groups, for offender labour. Unlike community groups, businesses would be expected to pay a flat rate to corrections departments, based on the expected value of the work to be done. This income could then be put towards the cost of the departments paying the offenders. Governments would have to set the wages of participant offenders based on political and legal considerations, like the minimum wage and labour law, from which participant businesses and offenders would likely have to be exempt. The model would be analogous to that of a labour hire firm: suitable offenders would constitute a pool of labour available at a price to suitable businesses. Offenders would keep their earnings, subject to government decisions about the contributions they need to make to program costs, victims’ compensation, and fine payments.

**Recommendation 2: Corrections departments should provide offender workers to suitable businesses on a labour hire model. Participant offenders should be able to keep their earnings subject to program costs, victims’ compensation, and fine payments.**

Commercial enterprises could be selected based on their ability and willingness to impart useful skills to offenders. However, even where the work is of a similar nature to existing programs, giving offenders a material reward for their work can operate as positive reinforcement.\footnote{Some of the benefits of work placement programs are outlined in Chapter 3 of Arthur Brooks’ The Conservative Heart. Brooks discusses the success of reintegration programs focused on providing work, and the program providers’ “entrepreneurial” view of offenders not as liabilities but as “under-utilized assets”. Arthur C. Brooks (2015), The Conservative Heart, pp. 81-105} Participant businesses could also be incentivised, with costs reduced for businesses that show results in reducing reoffending among their participant offenders. Some American states have performance incentives for agencies supervising offenders on probation and parole.\footnote{Vera Institute of Justice (2013), The potential of community corrections to improve communities and reduce incarceration p. 28}

Another option would be for the state to run commercial industries to employ community-based offenders, similar to prison industries. This is an inferior policy option, however, as it would likely cost more, offer offenders less opportunity to integrate into the community, and be more distortive of the local economy.
6-2: Advantages of this reform

Opening up community service to bids from commercial enterprise would increase the supply of hours available for community work. This would go at least some of the way to ensuring that offenders in community corrections complete the number of hours to which they have been sentenced. That is, it would increase the retribution being meted out to offenders.

This reform would also potentially give offenders access to more meaningful work and skills training, both of which are correlated with reduced reoffending risk. The overall goal of the rehabilitative aspects of corrections is to change offenders’ perceived incentives for committing crime.

6-3: Responses to possible problems

Community corrections sentences are too short to enable successful training

One of the differences between prisoners and offenders being involved in commercial enterprise is that prison sentences are longer and provide more time for appropriate offenders to be selected for work programs and more time for skills to be imparted to them. Community service orders usually only span from 40 to 240 hours in most jurisdictions, although this rises to 400 hours in Victoria. To mitigate this concern, and to reflect the increasing use of community corrections in place of prison, the maximum number of hours of community service to which offenders can be sentenced should be increased.

Recommendation 3: Increase the maximum number of hours of community service to which offenders can be sentenced.

Paid community service is insufficiently retributive

This change should also help to offset any concern that allowing community service to be in paid work will decrease its retributive impact.

That it is a softer punishment than prison is a frequent criticism aimed at community service. The key is to make sure that punishments are proportional, and this requires judges to operate according to community standards. It also requires that those in community service programs are supervised properly, with little tolerance for absences or misbehaviour.  

A related concern is that allowing offenders to be paid for their work is of itself in derogation of the criminal justice system’s commitment to punishing wrongdoing. At the margin, payment of offenders for their labour might be seen as a perverse incentive encouraging crime. This concern can be mitigated in practice by the selection process for access to paid programs. But in principle, it is probably a misunderstanding of how criminals think. Criminals are characterised by short-term thinking. It is unlikely that a criminal would plan to be caught in the hope of some distant payoff in the form of access to paid employment after sentencing.

30 See for example the discussion of the United Kingdom’s attempts to expand community corrections here: Andrew McFarlane (2010), “Can community sentences replace jail?” BBC New Magazine 16 August 2010

The reform proposed in this section could be combined with the adoption of swift and certain administrative sanctions for offenders in community service programs. See http://www.swiftcertainfair.com/ and https://scfcenter.org/ for examples.
Lastly on this point, across the country prisoners are given access to a range of paid work programs. And some jurisdictions allow impecunious offenders to work off their unpaid fines through community service at rates higher than the minimum wage. That is, there are clear precedents for paying offenders for their labour.

The reform would increase the cost of community corrections

The combination of longer hours and potential subsidies for offenders would undoubtedly increase the per offender per day cost of community corrections. This would diminish one of community corrections’ advantages, as discussed above. The overall per offender per day cost of community corrections would likely still be much lower than that of prison. And this increase would be offset at least in part by increasing the viability of community corrections as a replacement for prison.

The reform would reduce community organisations access to free labour

As noted, offender labour contributes tens of millions of dollars to the economy each year. A significant part of the work that offenders do is on behalf of community organisations that cannot afford paid labour nor find sufficient numbers of volunteers.

While some offender labour might be displaced from community work to commercial enterprises, there is currently a surfeit of offender labour based on hours served. Opening up community service to commercial enterprises would supplement rather than replace existing supply of work opportunities.

Barriers to accessing community corrections

One of the challenges of community corrections is providing offenders with equal access to community-based punishments. Offenders in rural areas, for example, already have less opportunity to participate in community service work, and those areas may not have commercial enterprises that can take on the responsibility of supervising offender labour.

This is one reason that it is important to focus on commercial viability. Reducing labour costs for employers allows them to take on more staff. For small businesses, this reduction can be decisive.

Previous IPA research has recommended that the use of intermediate residential facilities be expanded, so that offenders in rural areas or with unstable housing can access community-based programs.31 Such facilities could include co-located rehabilitation services. They would need to be located in major population centres for staffing reasons, but this would still be better for offenders from remote areas than being sentenced to prison.

31 Andrew Bushnell [2017], Indigenous Australians and the criminal justice system, p. 36
Recommendation 4: Enable access to community service work with the expansion of residential facilities.

As previously discussed, a 2017 BOCSAR study that found that ICOs were more effective in reducing reoffending than short prison sentences. The authors of that study further suggested that the mandatory work component of ICOs was a barrier to extending ICOs to some higher-risk populations that they argued would benefit from their use. This conclusion arguably does not follow from their other findings, however, since removing that requirement would change the nature of ICOs and therefore would require a different study comparing the efficacy of the changed program, rather than the existing program, to prison sentences. More importantly, this observation elevates rehabilitation above retribution. The expansion of community corrections cannot be solely motivated by a desire for better rehabilitation outcomes; it must also deliver proportionate punishments to wrongdoers.

32 Wang and Poynton (2017), as above, p. 10
Conclusion

Australia’s community corrections population is growing rapidly. This growth has resulted from community corrections increasingly serving as an alternative to prison and as a replacement for monetary orders. And while community safety is best served by using prison for violent and recidivist criminals and community-based alternatives for nonviolent offenders, the growth of community corrections has not always followed this pattern.

The first step in reforming community corrections, then, is to rationalise the system in line with the demands of community safety. We need to distinguish between those offenders we are afraid of, and those we are merely mad at – and make sure that it is only the latter group who are in our communities.

The second step is to improve the viability of community corrections as an alternative to prison. It needs to be shown that it can deliver a proportionate punishment, hold offenders responsible for their wrongs, and deliver value for money to taxpayers.

Community corrections is less costly than prison, and there is some evidence that community corrections can reduce reoffending more effectively than can prison. It is incumbent upon reformers to make sure that these advantages are captured in a way that does not sacrifice the retributive element of corrections. It is submitted here that community service is the punishment best placed to achieve both the retributive and rehabilitative ends of criminal justice.

However, across Australia there is an under-supply of community service opportunities, and consequently offenders are not serving all of the hours to which they have been sentenced.

To rectify this problem, this report recommends that commercial enterprise be permitted to bid for offender labour. To take advantage of more meaningful and complex work opportunities, and to increase the retributive value of community corrections as an alternative to prison, jurisdictions should follow the lead of Victoria and increase the maximum number of hours of community service to which an offender can be sentenced. And to expand the range of offenders who can participate in community service work, the further development of intermediate housing arrangements for offenders is recommended.

The goal of the criminal justice system is to keep the community safe. It does this by isolating dangerous criminals and by correcting the behaviour of offenders, thereby reducing reoffending and crime. We know that work is the basic building block of a good life, and we know that its absence is a factor in a wide range of offending. As we look for safe, efficient alternatives to prison, we cannot ignore that employment is the best way for offenders to acquire the discipline and skills required in productive society. To make community corrections work, we should make community corrections work.
The use of prisons in Australia: Reform directions

Andrew Bushnell and Daniel Wild

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4. Reform directions

The principle of proportionality

The purpose of prison is to protect the community

Violent offenders should be jailed

Nonviolent offenders should have the chance to avoid jail

Justifying additional punishment for recidivism

The use of strict liability should be limited

Further implications of proportionality for nonviolent offenders

Deterrence is only a subsidiary consideration in punishment

White-collar crime should not be treated exceptionally

The criminal justice system should have incentives for restitution

Strengthening the police is the most effective justice reinvestment

Conclusion
Key Facts

To reduce unnecessary incarceration and keep the community safe, governments should:

- Extend the use of alternative punishments like fines and home detention for nonviolent, low-risk offenders.
- Restore the requirement of mens rea ("guilty mind"—the mental element of a crime, either intention or recklessness) for regulatory criminal offences. Where strict liability is imposed, alternative punishments to prison should be applied, provided the offender has not demonstrated a propensity for violence or anti-social behaviour.
- Not punish victimless crimes with incarceration.
- Allow offenders to make restitution to their victims and take this into account in sentencing.
- Broaden the applicability of fines and restitution by enabling alternative collection mechanisms, such as garnishing wages and reducing government benefits.
- Investigate amending bail and parole laws to impose certain but mild consequences on all breaches.
- Redirect resources saved from incarcerating fewer criminals to the police, strengthening their capacity to deter and detain criminals.
Incarceration is growing

- In 1975, there were 8,900 people in Australian prisons. In 2015, there were 36,000.
- The incarceration rate is now 196 per 100,000 of the adult population—the highest rate since just after federation.
- With the exception of the United States, Australia has a higher incarceration rate than other major common law countries (United Kingdom, Canada) and a much higher incarceration rate than continental European countries like France and Germany.
- The number of offenders and the offender rate has been fairly flat over recent years.
- However, the juvenile offender rate has decreased sharply and adult offender rate (which is what is relevant when analysing the incarceration rate) has increased sharply in line with the growth in the incarceration rate.
- About 46 percent of prisoners nationwide are incarcerated for nonviolent offences.
- A large part of the rise in the prison population is constituted by unsentenced prisoners.
- There is some evidence that parole has become more difficult to obtain and hold, which may affect the incarceration rate.

Incarceration has substantial fiscal and social costs

- Australian governments spend $3.8 billion on prisons each year. Net criminal justice system spending is $15.2 billion per year, with 24 percent of this spent on prisons.
- The average annual cost per prisoner is $110,000.
- For nonviolent offenders, the annual cost of incarceration is up to $1.8 billion nationwide.
- Incarceration is associated with lower lifetime economic performance, with good reason to expect that this relationship is partly causative.
- Incarceration has an overall negative impact on the children of prisoners, leading to worse lifetime outcomes for those children and additional costs to society.
Foreword

The Institute of Public Affairs' new criminal justice project aims to develop and promote ideas for the reform of Australia’s criminal justice system, including policing, the courts, and the criminal law. This report is the first in a series of research reports that will outline a reform agenda based on sound philosophy, the latest research, and the experiences of comparable jurisdictions.

The criminal justice project will extend the IPA’s sceptical scrutiny of government overreach and waste to an area from which it has been noticeably absent. Criminal justice is one of the most important functions of government but this does not mean that it should be exempt from public oversight. On the contrary, because criminal justice is so fundamental to public safety and order, it is vital that the criminal justice system be held to account—that individual rights are respected and spending is subjected to cost-benefit analysis. The IPA believes in limited, rules-based government, without exception.

A corollary of the defence of individual freedom is a belief in personal responsibility. The criminal justice system protects the community from those individuals who do not respect the rights of others. It is essential to civilised, ordered liberty that lawbreakers are forced to take responsibility for their actions. Criminal justice reform can never forget that crime is a choice and that the interests of victims must prevail.

Put another way, criminals are not victims; criminals are criminals and they should be punished for their crimes. The real victims are the members of the public who have been robbed, assaulted, deprived of liberty or belongings or who live in fear for themselves and their families.

The question of criminal justice reform, then, is not about how best to explain crime or about how to engineer a crime-free society. It is about how best to defend the safety of the community and the rights of the individual.

This report applies this perspective to Australia’s increasing use of incarceration, which is at an historical high point. A high level of incarceration is not a problem per se—if there are more criminals who deserve prison then a high incarceration rate is a positive. But it is a problem if there are people who are being incarcerated unnecessarily, where the interests of justice could be better served by the imposition of an alternative punishment.

It is often said that “the punishment must fit the crime”. The unique function of prison is the isolation of dangerous criminals from the public. But in Australia there are a great number of nonviolent, low-risk offenders in prison, people for whom prison may not be the punishment that fits best. And because prisons are not effective in rehabilitating criminals, incarceration may not always be the punishment that does the most to protect the community from future offending.

As this report details, incarceration is an expensive punishment, and applying it injudiciously carries high costs for the taxpayer. There are also opportunity costs: money spent on prison is money not spent on other parts of the criminal justice system that might achieve better results for community safety. For example, on average criminals are more likely to respond to immediate incentives than are others in the population. This means deterrence is better achieved through increasing the chances of being caught rather than increasing potential prison sentences. And this in turn implies that money saved by reducing incarceration could be profitably invested in policing.
In the United States, solidly conservative states like Texas and Georgia have achieved great results by being “smart on crime”: looking for efficiencies in the criminal justice system and focusing on reducing crime and reoffending. In Australia, the IPA proposes that this means being guided by community safety and proportionality in sentencing—putting violent offenders behind bars but looking for reasonable alternatives for the nonviolent.

This report makes a strong case for the need for rethinking incarceration as part of criminal justice reform in Australia. It provides a thorough overview of incarceration in Australia and lays out a powerful understanding of the role that individual choice and personal responsibility should play in the much-needed national conversation about criminal justice reform. I commend it to you, and trust that you will find it illuminating.

Simon Breheny

Director of Policy, Institute of Public Affairs
Introduction

One of the most important roles for government is the protection of people’s lives, liberty and possessions through a well-functioning criminal justice system. Keeping people safe from violence gives them confidence to live, work and raise a family.

And a key part of protecting the community is incarceration. Dangerous and antisocial criminals simply must be kept in isolation so that they cannot continue to harm others. This is the unique and defining function of prisons.

This is not to say, however, that public safety can only be secured through incarceration, or that it is better secured as incarceration rises. In some cases, where the offender is nonviolent and of little risk to the community, an alternative punishment may better serve the interests of justice.

Approximately 46 percent of the prison population are incarcerated for nonviolent offences. This may have been manageable in 1975 when there were only 8,900 people in jail. But now that number is over 36,000—an increase of more than 300 percent. Over this same period the total population grew by just 70 percent, resulting in the incarceration rate increasing to 196 per 100,000 adult population. This is higher than most other common law countries and the democracies of continental Europe (though much lower than the exceptional case of the United States).

For many of these nonviolent offenders, home detention, fines, restitution orders, and other such punishments might be preferable, either because they reduce the risk of recidivism or escalation of criminal behaviour or because they better realise the interests of victims. In these circumstances, changing the punishment mix can improve community safety.

Alternatives to prison also have the advantage of being less burdensome for the taxpayer.

The costs of criminal justice in Australia are rising sharply. In 2014-15 alone governments spent over $15 billion on criminal justice. The growth in prison numbers has seen an attendant explosion in prison costs. Australia spends nearly $4 billion each year on the construction and operation of prisons. This equates to $300 per prisoner per day, or $110,000 per year. This adds up to approximately $1.8 billion annually to incarcerate nonviolent offenders. It is vital that criminal justice spending is subject to the same scrutiny as all other major government programs. This means investigating and implementing more cost-effective approaches to criminal justice—and this implies a reconsideration of the role of prisons.
Unnecessary incarceration can also have downstream effects that lessen public safety and increase waste. Prisons have a poor record for rehabilitating criminals. Nationwide, 59 percent of prisoners have been previously incarcerated. Incarceration is associated with unemployment and worse lifetime economic outcomes. Imprisoning nonviolent, low-risk offenders can inadvertently turn them into hardened criminals who may never return to productive society. Criminal acts need to be punished. But where appropriate we should look to alternatives to prison that might better incentivise criminals to choose the right path in the future.

This paper presents the case for reform to Australia’s incarceration policies by describing the operation of criminal justice in Australia; investigating who is in the system; examining why those people are in the system in growing numbers; and suggesting directions toward an improved system.

A central finding of the paper is that prisons are being used for purposes broader than what is necessary. The objectives of criminal justice include punishment, deterrence, public safety through incapacitation and victim restitution. Only one of these objectives—public safety through incapacitation—can uniquely be achieved by prison. The other objectives of criminal justice can be met through alternative measures.

To this end the paper argues that prisons should be returned to their core and unique purpose of incapacitating violent offenders who pose a threat to public safety and antisocial recidivists who have failed to respond to alternative punishments.

In Chapter 1, we outline the costs of Australia’s criminal justice system. This section includes an overview of the system and specific data relating to prisons.

In Chapter 2, we describe the increase in the incarceration rate across Australia nationally and in each state, the most serious offences committed by prisoners, and the proportion of the population imprisoned for nonviolent offences. We also describe the demographics of the prison population based on known correlates of criminality.

Chapter 3 is an examination of the possible explanations for the rising incarceration rate. This chapter begins with an outline of how criminals think. This model of criminal behaviour provides context for the analysis that follows. The chapter makes several findings in relation to the underlying crime rate, the number of people on bail and remand, changes in sentencing practice, the granting and revoking of parole, and the rate at which convicted criminals reoffend.

Based on these findings, Chapter 4 outlines future reform directions based on the moral need to have punishments fit the crimes to which they are applied. Taking the principle of proportionality in sentencing seriously has a number of implications, including that we should focus prison resources on individuals who have demonstrated violent behaviour, and that deterrence is only a subsidiary concern in sentencing and can be better achieved by investing in the police.
1. The costs of criminal justice

Criminal justice constitutes a large and growing part of Australian government budgets. The costs of criminal justice comprise government expenditures on police, courts and prisons, and indirect costs resulting from criminal punishment. This chapter details these costs and illustrates why it is appropriate to place them under greater scrutiny.

Financial costs

Cost of crime to victims and the community

The most obvious financial cost of crime is the damage suffered by victims of crime. In a 2011 analysis, the Australian Institute of Criminology (AIC) estimated the cost of crime to the economy, based on a calculation of actual losses, intangible losses, loss of output caused by the crimes, and related costs like medical expenses.\(^1\)

This figure was more than $23 billion. This figure rose over the decade 2001-2011 by more than 21 percent.

Table 1 The direct costs of crime\(^2\)

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Estimated cost ($m)</th>
<th>Percentage change 2001-11</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homicide</td>
<td>1250</td>
<td>+34.4</td>
</tr>
<tr>
<td>Assault</td>
<td>3021</td>
<td>+109.8</td>
</tr>
<tr>
<td>Sexual assault</td>
<td>773</td>
<td>+237.0</td>
</tr>
<tr>
<td>Robbery</td>
<td>372</td>
<td>-38.0</td>
</tr>
<tr>
<td>Burglary</td>
<td>1645</td>
<td>-32.6</td>
</tr>
<tr>
<td>Thefts of vehicles</td>
<td>421</td>
<td>-52.2</td>
</tr>
<tr>
<td>Thefts from vehicle</td>
<td>677</td>
<td>+27.7</td>
</tr>
<tr>
<td>Shop theft</td>
<td>124</td>
<td>-84.7</td>
</tr>
<tr>
<td>Other theft</td>
<td>605</td>
<td>-5.5</td>
</tr>
<tr>
<td>Criminal damage</td>
<td>2725</td>
<td>+103.4</td>
</tr>
<tr>
<td>Arson</td>
<td>2269</td>
<td>+68.1</td>
</tr>
<tr>
<td>Fraud</td>
<td>6052</td>
<td>+2.9</td>
</tr>
<tr>
<td>Drug abuse</td>
<td>3161</td>
<td>+61.3</td>
</tr>
<tr>
<td>Total cost of crimes</td>
<td>23097</td>
<td>+21.4</td>
</tr>
</tbody>
</table>

Note that this figure does not include the costs of administering the criminal justice system. These costs are outlined in the following section.

Note also that these figures are for those crimes for which data was available. Later sections of this report will use the Australian Bureau of Statistics crime categories, which do not map exactly on to these categories.

Finally, while it is important to attempt to put a dollar figure on the cost of crime to victims and their families, it is very difficult to quantify the harm they suffer. Certainly this should not be read as an attempt to reduce human suffering to financial terms. Nonetheless, for criminal justice reform, the savings that can be made by reducing crime are relevant to considerations of alternative policy approaches.

The direct cost of crime was approximately 48 percent of the total cost of crime. Along with the criminal justice system, other costs include private spending to crime prevention measures, such as security systems. It also includes assistance provided to victims of crime.

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1 Smith, RG et al (2014), Counting the cost of crime in Australia: A 2011 estimate, Australian Institute of Criminology p.IX
2 Ibid p. XIII
All up, the AIC estimated that crime cost the Australian economy $47 billion, a 50 percent increase over the preceding decade.

**Overall cost of the criminal justice system**

In 2014-15 the state and commonwealth governments spent $15.2b on the criminal justice system, comprising police, civil and criminal courts, and corrective services. The vast majority of spending is on police and corrective services, accounting for 67 percent and 24 percent of all criminal justice spending respectively. By comparison, spending on the Australian Federal Police was about $1.1 billion in 2013-14 and spending on the High Court was about $18m in 2014.

Real expenditure has grown moderately in recent years at about 2.3 percent per year on average since 2010-11. The fastest-growing expenditure items have been corrective services, which includes prisons, up by 4.3 percent on average per year, and police services, up by 1.9 percent per year.

### Table 2 Other costs of crime

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Estimated cost ($m)</th>
<th>Percentage change 2001-11</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal justice system</td>
<td>16256</td>
<td>+154.0</td>
</tr>
<tr>
<td>Victim assistance</td>
<td>1877</td>
<td>+113.3</td>
</tr>
<tr>
<td>Security industry</td>
<td>3400</td>
<td>+8.3</td>
</tr>
<tr>
<td>Insurance administration</td>
<td>670</td>
<td>+34.0</td>
</tr>
<tr>
<td>Household precautions</td>
<td>2360</td>
<td>+29.0</td>
</tr>
<tr>
<td>Total other costs</td>
<td>24563</td>
<td>+92.7</td>
</tr>
<tr>
<td>Total overall</td>
<td>47660</td>
<td>+50.0</td>
</tr>
</tbody>
</table>


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3 Ibid
5 Ibid
6 Ibid
7 Ibid; Institute of Public Affairs Calculations
8 Ibid; Institute of Public Affairs Calculations
The Use of Prisons in Australia: Analysis and Reform Directions

Table 3 Real expenditure on the criminal justice system

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Police</th>
<th>Criminal Courts</th>
<th>Civil Courts</th>
<th>Corrective Services</th>
<th>Average Annual Growth Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010-11</td>
<td>$13948</td>
<td>$6740</td>
<td>$5121</td>
<td>$648</td>
<td>$3116</td>
<td>2.29%</td>
</tr>
<tr>
<td>2011-12</td>
<td>$14644</td>
<td>$6751</td>
<td>$5131</td>
<td>$648</td>
<td>$3269</td>
<td>2.31%</td>
</tr>
<tr>
<td>2012-13</td>
<td>$14538</td>
<td>$6765</td>
<td>$5130</td>
<td>$635</td>
<td>$3285</td>
<td>2.33%</td>
</tr>
<tr>
<td>2013-14</td>
<td>$15180</td>
<td>$6821</td>
<td>$5130</td>
<td>$620</td>
<td>$3422</td>
<td>2.35%</td>
</tr>
<tr>
<td>2014-15</td>
<td>$15269</td>
<td>$6850</td>
<td>$5127</td>
<td>$621</td>
<td>$3682</td>
<td>2.37%</td>
</tr>
</tbody>
</table>

The cost of prisons

Australian governments spent about $3.8 billion on prisons in 2014-15. This equates to about $300 to incarcerate one prisoner for one day on average or about $110,000 per year.

There are substantial cost differences across the jurisdictions—the Australian Capital Territory (ACT) has the highest operating costs at $421 per prisoner per day ($150,000 per year), over 75 percent higher than the lowest cost state, New South Wales (NSW) which houses its prisoners for $237 per day ($85,000 per year).

Nationwide the cost of incarceration per prisoner has grown by close to 20 percent from 2010-11 to 2014-15 in real terms, an average annual rate of about 4.5 percent. The decrease in costs in NSW of 8 percent have been more than offset by increases in the other jurisdictions.

Figure 2 The cost of prisons


Ibid

Ibid, Table 8A.6

Ibid, Table 8A.7

Ibid

Ibid, Table 8A.7

Ibid
The costs of prisons can be broken down into capital (fixed) and operating (ongoing) costs. On average across Australia 76 percent of total costs are ongoing. This includes expenditure on items such as staffing and maintenance. The marginal costs differ greatly across the country, ranging from $363 per prisoner per day in Tasmania to $180 in NSW.

It is worth noting that one extra prisoner will not increase costs to government by $110,000. Adding more prisoners will, to a point, reduce the average costs of incarceration because the fixed costs (such as a prison) would be averaged across a larger number of prisoners. It is the marginal costs, on average, that will increase: $224 prisoner per day, or about $81,000 per year.
Nonetheless, as prison numbers increase more prisons need to be built or existing prisons expanded. Utilisation is defined by the Productivity Commission as the annual daily average prisoner population as a percentage of the number of single occupancy cells and designated beds in shared occupancy cells provided for in the design capacity of the prisons.\textsuperscript{18} Currently prison utilisation rates are estimated to be quite high, from about 75 percent in Tasmania to 120 percent in the ACT.\textsuperscript{19} Being over capacity by the Productivity Commission’s definition does not necessarily imply prisons are not reasonable, efficient, cost effective and humane. Still, it raises the issue of further construction of prisons or expansion of existing prisons to house more inmates. If the incarceration trend continues this seems like a likely outcome.

\textbf{Figure 4 Prison utilisation rates}

![Graph showing prison utilisation rates across different states.](image)


The creation of new prisons and expansion of existing prisons can be expensive. The Melbourne Remand Centre and Marrigoneet prison at Barwon involved constructing 900 beds including 600 maximum security at a net present cost of $275 million. And the project to add 350 extra beds to the medium-security Hopkins Correctional Centre in Ararat is estimated to have cost $394 million in today’s dollars (about $1.1 billion over 25 years). Similarly, the Ravenhall prison located in Melbourne’s outer-west is expected to cost $2.5 billion over 25 years to build and run, and will hold 1,300 prisoners. This cost includes about $670 million in capital costs and $1.6 billion in total operating costs.

In New South Wales a 500-bed South Coast Correctional Centre which was opened in 2010 came at a cost of $155 million, and the state government committed in its 2016-17 budget to spend $3.8 billion over four years on 7000 new prison places (which will likely increase the state’s annual per prisoner cost).

\textbf{Key facts 1}

- Australian governments spend $3.8 billion on prisons each year.
- The average annual cost per prisoner is $110,000.
- This makes up 24 percent of total criminal justice expenditure, which is $15.2 billion per year.
**Indirect costs**

Aside from the large financial costs of incarceration, there are also a range of human costs. These costs include the economic and social consequences of incarceration, including forgone employment, loss of skills and attendant loss of economic output, and impacts on families of the incarcerated.

**Worse economic outcomes for prisoners**

A large body of research suggests that people who have been incarcerated perform poorly in the labour market after release, experience high unemployment rates and, consequently, lower expected lifetime earnings and stunted social mobility.

A 2014 study in the United States by the National Research Council provides an extensive overview of the effects incarceration has on employment prospects of former prisoners. They find that many studies of ex-prisoner populations estimate roughly half remain jobless up to a year after their release. For example, a 2010 study of US prisoners undertaken by Pew Charitable Trusts estimates that incarceration reduced hourly wages of men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent. And by age 48, the typical former inmate will have earned $179,000 less than if he had never been incarcerated.

The study further finds that of the former inmates who were in the lowest fifth of the male earnings distribution in 1986, two-thirds remained on the bottom rung in 2006, twice the number of those who were not incarcerated. And only 2 percent of previously incarcerated men who started in the bottom fifth of the earnings distribution made it to the top fifth 20 years later, compared to 15 percent of men who started at the bottom but were never incarcerated.

However, it is not entirely clear that these poor labour outcomes are caused by incarceration. Those who are incarcerated have characteristics that are associated with an elevated likelihood of both poor employment outcomes and incarceration. This includes, for example, low levels of schooling, higher incidence of drug and excessive alcohol use, mental illness, high discount rates and patchy work histories prior to incarceration. It is possible that these people would have had just as poor employment outcomes independent of the time in jail. Unemployment and low wages among the formerly incarcerated may therefore result not from incarceration but from preexisting low employability and productivity. In this sense, time in prison would send a negative signal of productivity and workplace suitability just as education is often a signal of the opposite.

However, there are a number of reasons why time in jail could be detrimental to job prospects upon release. This includes the potential stigma of a criminal record, loss of work-relevant skills, and the development of behaviours that may be useful while in prison but not well adapted to the workplace. Regardless of the causes, difficulty finding employment is highly problematic because it increases the pressure to gain income from illegal means which of course increases the chances of reoffending and returning to prison, which, in turn, further exacerbates the problem.

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22 Ibid
Observation 1

Evidence shows that incarceration is associated with lower lifetime economic performance, with good reason to expect that this relationship is partly causative.

Effects on the children of prisoners

A range of studies have found that children with incarcerated parents are at a heightened risk of developing behavioural problems, poor education, unemployment and imprisonment. There are a range of possible reasons for this. For example, insofar as children take on traits from their parents, or the environment in which they are raised, one could expect that they would possess some of the traits that led their parents to criminal behaviour. If this were the case it would imply that criminal (and other antisocial) behaviour wouldn’t be ‘caused’ by having parents incarcerated, but independently though traits inherited or received.

Alternatively, there are some who argue that the actual or perceived stigma of parental incarceration may be a source of child problems. This would occur where, for example, the stigma of incarceration that is attached to the person who is incarcerated is passed to the child of the incarcerated. Some contend that this could result in social and economic exclusion, in the same way as that can be observed amongst the incarcerated. More directly, though, the loss of a parent through incarceration would involve loss of income and associated education opportunities which would have substantial consequences for their children.

The incarceration of a parent could be beneficial for the spouse and children where the incarcerated parent is abusing their family and/or abusing drugs and alcohol. In this case incarceration could lead to a more stable and less hostile environment and even potentially reinforce law-abiding behaviour with the children by demonstrating a link between incarceration and criminal behaviour.

The preponderance of evidence, however, suggests incarceration of the parent has a substantially negative effect on their children. For example, one study found that 23 percent of children with a father who has served time in a jail have been expelled or suspended from school, compared with just 4 percent of children whose fathers have not been incarcerated.23 These results could be partly causative. As Rucker C. Johnson notes: ‘these results suggest that parental incarceration exposure leads children to develop greater behavioral problem trajectories … Imprisoning parents may cause greater deviant behavior and crime in the next generation, and thereby contribute to the intergenerational transmission of criminal involvement.’24

In a similar study also from the United States, Dr Holly Foster and Professor John Hagan found that independent of crime and incarceration ‘selection’ factors, such as low self-control, paternal imprisonment decreases the educational attainment of children in emerging adulthood.25 These results suggest that parental incarceration itself is a causal factor for the incarceration of their children.

24 Ibid
Further, according to a 2014 meta-analysis, The Growth of Incarceration in the United States, many studies document negative outcomes for children through open-ended interviews with fathers and their families. According to the book, mothers and fathers:

- believe their children perform more poorly or have more difficulties in school following their father’s incarceration;
- report negative behavioral changes in their children, including becoming more private or withdrawn, not listening to adults, becoming irritable, or showing signs of behavioral regression;
- report changes in children’s emotional or mental health, with children experiencing such feelings as shame or embarrassment about their father’s incarceration, emotional strain, including a belief that the father did not want to live at home, a loss of trust in the father, grief or depression, and guilt.26

Overall, the costs of incarceration go well beyond the direct financial costs to taxpayers. Potential forgone economic opportunities, earnings and attendant loss of economic output along with flow-on effects of incarceration on to prisoners’ families can be substantial.

Observation 2

» Incarceration has an overall negative impact on the children of prisoners, leading to worse lifetime outcomes for those children and additional costs to society.

26 National Research Council (2014), op. cit.
2. The incarceration rate and prisoner demographics

One of the main drivers of increased criminal justice costs across Australia is a rise in the number of people incarcerated. In this chapter, we outline the increase in incarceration and examine the characteristics of the prison population. The following chapter will then consider possible reasons for the increase.

The growing prison population

Over the past several decades the number of people incarcerated in Australia has increased rapidly. In 1975 there were 8,900 people in jail nation-wide. By 2015 that number had risen to over 36,000—an increase of more than 300 percent. Over this same period the total population grew by just 70 percent, resulting in an attendant rise in the incarceration rate to 196 per 100,000 adult population, or 151 per 100,000 of the total population. This is 145 percent higher than in 1975 and the highest rate since just after federation.

This puts Australia around the middle of the pack compared to other Western democratic countries—above the UK and Canada, for example, but below the US and New Zealand. Of course, a lower incarceration rate is not good in and of itself. One would need to analyse the costs

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27 Australian Bureau of Statistics (2015d), Prisoners in Australia 2015, Category 4517.0
28 Ibid
29 Australian Bureau of Statistics (2015a), Australian Demographic Statistics December 2015, Category 3101.0
30 Australian Bureau of Statistics (2001), Year Book Australia 2001, Table C8.11
of incarceration along with comparative crime rates, which are a function of the incarceration rate, to form a view on this.

**Table 5 Incarceration rate per 100,000 population**

<table>
<thead>
<tr>
<th>Country</th>
<th>Incarceration</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>698</td>
</tr>
<tr>
<td>NZ</td>
<td>194</td>
</tr>
<tr>
<td>Aus</td>
<td>131</td>
</tr>
<tr>
<td>UK</td>
<td>148</td>
</tr>
<tr>
<td>Canada</td>
<td>106</td>
</tr>
<tr>
<td>France</td>
<td>96</td>
</tr>
<tr>
<td>Germany</td>
<td>78</td>
</tr>
</tbody>
</table>

**Incarceration by state**

There is a substantial difference in the incarceration rate across the states. The Northern Territory has by far the highest rate at 885, while Tasmania has the lowest rate at 130. The main demographic reason for this is the relatively large proportion of Indigenous Australians in the NT, who are substantially overrepresented in prison (see below). Western Australia’s incarceration rate is elevated compared to the national average, while the Australian Capital Territory and Victoria join Tasmania with rates below the national average. Queensland, New South Wales and South Australia each have rates which are close to the national average.

There is also a substantial difference in changes to the incarceration rate across the states over the past decade. For instance, SA and the NT saw the largest increases, of 65 percent and 56 percent, respectively. While Tasmania’s rate dropped by close to 15 percent. Nationally, the incarceration rate increased by close to 20 percent.

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31 Roy Walmsley (2016), *World Prison Population List 11th Edition*, Institute of Criminal Policy Research. Note: Some countries report incarceration rates per 100,000 of the population, rather than 100,000 of the adult population. For comparison purposes per 100,000 of the population is used.


33 Ibid

34 Ibid
People are incarcerated for a wide range of crimes, from homicide and assault through to drug use and traffic offences. In 2015 the majority of people were in prison for relatively serious offences, such as acts intended to cause injury, sexual assault and unlawful entry with intent. A sizeable minority—about 13 percent—were incarcerated in relation to illicit drug offences, 70 percent of whom were charged with possessing and/or using drugs, as opposed to dealing, trafficking, manufacturing or importing or exporting drugs.

One should be aware of the limitations in interpreting prisoner data by offence type. This information is provided by most serious offence type. This means the actual number of incarcerated who have been convicted of a given crime is not publicly reported. For example, many offenders who have been incarcerated for assault might also be guilty of another offence, such as breaking and entering or drug use. But the only statistic recorded is their most serious offence. Thus this data provides an incomplete picture of the crimes committed by those in prison.

There has been a substantial change in the composition of the prison population by most serious offence since 2005. For example, the proportion of prisoners whose most serious offence was in relation to Dangerous or Negligent Acts Endangering a Person increased by 140 percent, while Traffic and Regulatory Offences decreased by 40 percent.

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36 Ibid
37 Ibid
Violent, nonviolent and property offences

In 2014-15, 53 percent of sentenced offenders were in jail for crimes against another person, including homicide, acts intended to cause injury and sexual assault. This has increased from about 50 percent in 2005.\(^{38}\)

In categorising the prison population by crime type we follow definitions provided by the ABS.\(^{39}\)

Violent offences committed against a person are defined as acts that:

- relate to culpable (i.e. intentional, negligent or reckless) acts that result in harm (i.e. physical injury/violation, or non-physical harm). These acts are not necessarily completed; they include attempts and conspiracies.

- must affect a specific person as opposed to the general public. That is, the victim(s) can only ever be a distinct person or persons. Thus, the acts cannot be committed against organisations, the state or the community.

\(^{38}\) Ibid

\(^{39}\) Australian Bureau of Statistics (2011), Australia and New Zealand Standard Offence Classification, Category 1234.0
Violent offences are categorised as homicide and related offences; acts intended to cause injury; sexual assault and related offences; dangerous or negligent acts endangering persons; abduction, harassment and other offences against the person; and robbery, extortion and related offences.

Nonviolent offences are generally classified as offences against organisations, government (local, state or federal) and the community in general, rather than against particular individual persons, such as illicit drug offences; prohibited and regulated weapons and explosives offences; public order offences; traffic and vehicle regulatory offences; offences against government procedures, government security and government operations; and miscellaneous offences.

Property offences are also included for our purposes in the nonviolent category as they do not generally involve an offence against another person. They include unlawful entry with intent/burglary, break and enter; theft and related offences; fraud, deception and related offences; property damage and environmental pollution.

There are two important caveats to this observation.

One is that these categories are not always cleanly separated into violent and nonviolent offenses. For example public order offences include both riot and affray together with nonviolent offences such as censorship crimes; and robbery, extortion and related offences which includes armed robbery (a violent offence) together with demands made via a letter (nonviolent). So there may be some people counted in the nonviolent category whose crimes involved some violence.

The other is that a nonviolent offence, like a weapon, drug, or traffic offence may still pose a danger to other people. While these offences do not involve harm, or the threat of harm, to another individual they may put others at risk, whether intentionally or unintentionally. Unlike with a violent offender, however, the risk to others entailed by these offences is not necessarily inherent in the offender, who is therefore less likely to need to be isolated from the community.

Based on these definitions, in 2015 about 54 percent of those in prison had committed a violent crime against a person; 18 percent had committed a property crime; and 28 percent a nonviolent crime.40

Table 6 Prison population, 2015, by most serious offence41

<table>
<thead>
<tr>
<th>Type of Offence</th>
<th>Number</th>
<th>Proportion of Total (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent (against person)</td>
<td>19,503</td>
<td>54</td>
</tr>
<tr>
<td>Nonviolent (victimless)</td>
<td>10,070</td>
<td>28</td>
</tr>
<tr>
<td>Nonviolent (property)</td>
<td>6,477</td>
<td>18</td>
</tr>
<tr>
<td>Nonviolent (total)</td>
<td>16,547</td>
<td>46</td>
</tr>
</tbody>
</table>

40 Australian Bureau of Statistics (2015d), op. cit; IPA calculations
41 Ibid
Calculating the cost of incarcerating nonviolent offenders

We can combine data on the incarceration of nonviolent offenders outlined above with our earlier data about the cost of incarceration to produce a rough figure for the amount spent annually nationwide and in each state on locking up nonviolent offenders.

Table 7 Annual cost of incarceration of nonviolent offenders

<table>
<thead>
<tr>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>WA</th>
<th>SA</th>
<th>TAS</th>
<th>ACT</th>
<th>NT</th>
<th>AUS</th>
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<td>$</td>
</tr>
</tbody>
</table>

By this measure, in 2015, Australian government spent more than $1.8 billion on the incarceration of offenders whose worst offence was a nonviolent offence.

This figure does come with some significant caveats, however.

42 Ibid and Productivity Commission (2016) op. cit. Tables 8A.6 and 8A.7
As previously stated, the number of nonviolent offenders is an estimate based on the most serious offence for which a prisoner is currently incarcerated. Some of these people may have committed violent offences in the past or concurrent with a more-heavily punished nonviolent offence. And given that 59 percent of prisoners have been incarcerated before, many of these nonviolent offenders will be recidivists, for whom alternatives to prison may be inappropriate and/or ineffective. (The incarceration of recidivists is discussed in greater detail in Chapter 4.)

A more accurate calculation would require a case-by-case analysis. Should public policy be based on the distinction between violent and nonviolent offenders, it will be necessary for the courts to closely enquire into the nature and circumstances of the offending before them.

This figure includes the capital costs of building and maintaining prisons. These costs would not necessarily go down were incarceration reduced, for the reasons discussed above. Moreover, it has been the experience of jurisdictions that have reduced their incarceration of nonviolent offenders that some savings are offset by the need to employ more parole officers, community corrections officers, and re-entry specialists, and that prison staff numbers do not go down in strict correspondence to the reduction of the prison population because violent prisoners require the most supervision.

Nonetheless, this figure indicates that there is a prima facie case for believing that there are significant savings to be made within the criminal justice system by emphasising the distinction between violent and nonviolent offenders. A number of the implications of this distinction are detailed in Chapter 4 of this report.
Prisoner characteristics

In the main crime tends to be committed by those of low socioeconomic status, including those with low education attainment, patchy work histories, lack of stable housing, broken families and substance abuse. This section examines the statistical correlation between these social phenomena and criminality. While none of these correlations should be read as causing crime, much less excusing it, they are important to understand in developing appropriate policy responses to the growing incarceration rate.

Educational attainment

Lower education attainment is correlated with higher crime and incarceration rates. For example, according to a 2015 report by the Australian Institute of Health and Welfare, only 16 percent of those entering prison had year 12 as their highest level of education attainment; while 72 percent had completed year 10 or lower. And over half had no formal education other than schooling, while one-third had completed a trade certificate. Further, few prison entrants were educated at tertiary level, with 4 percent completing a diploma, 2 percent a Bachelor’s degree and 1 percent a postgraduate qualification.43

Similarly, a 2008 report by the Griffith Institute of Social Research found about 20 percent of prisoners had year 12 as their highest level of education attainment, while 30 percent had only completed year 10.44 A 2015 academic piece published in the journal Health and Justice found that 31 percent had attained their high-school certificate, certificate or a degree while 34 percent had not completed year 10.45 And the NSW Inmate Health Survey found 52 percent of men and 45 percent of women in NSW prisons did not finish year 10.46

Evidence abroad is consistent with research in Australia. For example, a 2012 survey by the U.K Ministry of Justice reported 59 percent of prisoners stated they had regularly played truant from school, 63 percent had been suspended or temporarily excluded, and 42 percent stated that they had been permanently excluded or expelled. Prisoners with these issues were also more likely to be reconvicted on release than those without.47

Observation 3

» Lower educational attainment is strongly correlated with increased incidence of incarceration, with as many as 80 percent of Australian prisoners having left formal schooling before completing Year 12.

Similarly, a 2003 study of American crime and incarceration rates found that schooling significantly reduces the probability of incarceration. And this result is driven by a reduction in criminal behaviour rather than the probability of arrest or incarceration condition on crime. Further, the authors find differences in educational attainment between black and white men explain 23 percent of the black-white gap in male incarceration rates.48

43 Australian Institute of Health and Welfare (2015), The Health of Australian Prisoners
44 Griffith Institute for Social Research (2008), Literacy Unbarred: Investigating the Literacy and Numeracy Levels of Prisoners Entering Queensland Correctional Centres
45 Doyle et al. (2015), ‘Alcohol and other drug use among Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander men entering prison in New South Wales’
46 New South Wales Health Department (2009), New South Wales Inmate Health Survey
47 United Kingdom Ministry of Justice (2012b), Prisoners’ childhood and family backgrounds
Employment

Prison entrants are likely to have patchier work histories than the general population and are less likely to be working immediately prior to entering prison.

According to a 2015 study by the Australian Institute of Health and Welfare, almost one-half of prison entrants were unemployed immediately prior to prison, and a further 14 percent reported being unable to work due to disability, age, or health conditions. Slightly more than one-half of those who were unemployed were looking for work.49

A similar study conducted by Corrections Victoria estimated that about two-thirds of repeat offenders were unemployed at the time they re-offend (Victorian Department of Justice 2000-2001 cited in Graffam et al. 2004).50 And a 2015 study by the Victorian Ombudsman estimated that 63 percent of male prisoners and 45 percent of female prisoners were unemployed at the time they entered prison.51

Furthermore, according to the NSW Inmate Health Survey, 50 percent of men and 67 percent of women were unemployed in the six months before their incarceration. The report also found this unemployment tends to be quite entrenched, with about 30 percent of men and 44 percent of women being unemployed for five years or longer prior to incarceration.52

One needs be careful when interpreting these statistics as it seems likely the non-employment rate for criminals is a bit overstated. This is because some of the surveys interview people’s situations ‘immediately prior’ to prison. By this time many have been caught, convicted and sentenced and, as a consequence, have lost their job. Additionally, crime is disproportionately committed by younger people who are less likely to be employed than their older counterparts in the general population. For example, the employment rate for 18-24 year olds in July 2015 for the general population was 58.6 percent and 44.1 percent for 15-19 year olds, compared with the national average of 61 percent.53

Still, the preponderance of evidence suggests that the incarcerated have much worse employment outcomes and prospects than the general population.

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51 Victorian Ombudsman (2015), Investigation into Rehabilitation and Reintegration of Prisoners in Victoria, September 2015
52 New South Wales Health Department (2009), New South Wales Inmate Health Survey
Housing

Many studies have found that a large minority of former prisoners are without stable housing when released. For example, the Australian Institute of Health and Welfare found that approximately a quarter of those entering prison were homeless or in short-term or emergency accommodation. And the Melbourne Institute estimated about one in five lack stable housing.

There is also a well-documented relationship between unstable housing and recidivism. A 2006 study published in the Australian and New Zealand Journal of Criminology found of the ex-prisoners who did not move or moved housing just once about 22 percent had been reincarcerated within nine months of release, whereas of those who moved twice or more 59 percent were back in prison. Many of those involved in the trial indicated they moved because they had to, not because they chose to (although they may have had to move because of choices they made).

Some international evidence provides similar results. For example, a 2012 report by the UK Minister of Justice found 15 percent of prisoners in their sample reported being homeless before custody compared with 3.5 percent general population who reported having ever been homeless. In addition, close to 80 percent of prisoners who reported being homeless before custody were reconvicted in the first year after release, compared with 47 percent of those who did not report being homeless before custody.

Observation 5

- Homelessness is correlated with an increased rate of incarceration. Released prisoners without stable housing are also more likely to reoffend and return to prison.

Family

A large and growing body of research suggests that people who commit crime and are incarcerated are more likely to come from dysfunctional families and/or single parent households.

For example, a 1987 report from the US on youth in custody found that about 70 percent did not grow up with both natural parents. And a 1994 study of juveniles in Wisconsin found only 13 percent grew up with their married parents.

Similarly, 24 percent of prisoners stated they had been in care at some point during their childhood, according to the UK’s Ministry of Justice report. Those who had been in care were younger when they were first arrested, and were more likely to be reconvicted in the year after release from custody than those who had never been in care.

54 Australian Institute of Health and Welfare (2015), op. cit
57 United Kingdom Ministry of Justice (2012a), Accommodation, homelessness and reoffending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey
58 United States Department of Justice (1988), Survey of Youth in Custody 1987, September 1988
60 United Kingdom Ministry of Justice (2012b), op. cit.
According to the book, the Index of Leading Cultural Indicators, in the US children from single-parent families account for 63 percent of all youth suicides, 70 percent of all teenage pregnancies, 71 percent of all adolescent chemical/substance abuse, 80 percent of all prison inmates, and 90 percent of all homeless and runaway children.61

The Heritage Foundation found that a 10 percent increase in the proportion of children living in single-parent homes on average leads to a 17 percent increase in juvenile crime.62

As Kay Kymowitz wrote in The Atlantic:

The bottom line is that there is a large body of literature showing that children of single mothers are more likely to commit crimes than children who grow up with their married parents. This is true not just in the United States, but wherever the issue has been researched.63

Drug use

There is also evidence that prisoners are more likely to engage in illicit drug use than the general population. According to the Australian Institute of Health and Welfare, for example, prison entrants were typically 2-3 times as likely as the general community to report recent use. In particular, cannabis use was reported by more than one-half (53 percent) of 18 to 24-year-old entrants, compared with just under one-quarter (23 percent) of their general community counterparts.64

Similarly, the drug most likely to be used by prison entrants, methamphetamines, was also the drug type with the largest difference in use compared to the general community, being reported at least 10 times as often by prison entrants as by the general community. Among 18 to 44-year-olds, more than 50 percent of prison entrants reported using methamphetamines in the previous 12 months, compared with 5 percent or less in the general community.65

Further, another study by Corrections Services NSW found illegal drug use six months prior to imprisonment was reported by close to 75 percent of inmates. The use of ‘heavy-end’ drugs such as heroin, amphetamines or cocaine in the six months prior to imprisonment was reported by one in two inmates. Thirty-five percent reported they had injected drugs.66
Age and gender

Imprisonment is overwhelmingly a young male phenomenon. About 92 percent of those in prison in 2015 were male and over 50 percent were under 35 years old. The ratio of male/female imprisonment has been roughly constant over the past decade, although the representation of women has increased slightly over recent years.67

Figure 11 Imprisonment by gender

Source: Australian Bureau of Statistics Prisoners in Australia 2015

Observation 8

» Prisoners are overwhelming male. Criminality is most prevalent among young people, between the ages of 20 and 39.

Figure 12 Imprisonment by age 2015

Source: Australian Bureau of Statistics Prisoners in Australia 2015

Indigeneity

Indigenous Australians are far more likely to be imprisoned than the non-Indigenous population. For example, Indigenous Australians represent about 2.5 percent of the general population, but about 27 percent of the prison population. And the incarceration rate of Indigenous Australians stands at 2,253 compared with non-Indigenous of 146.68 This equates to an incarceration rate ratio of 16.

Some of this difference is because the Indigenous population has, on average, a younger age profile than the non-Indigenous population (given younger people have higher incarceration rates than older). When we take into account this difference, by calculating the incarceration if the Indigenous and non-Indigenous population had the same age profile, the incarceration rate for the Indigenous drops to 1731, compared with 146 for non-Indigenous.69 This represents a ratio of 12, compared with 16 for the crude imprisonment rate.

The growth of Indigenous Australians in prison has also far outstripped the growth of the non-Indigenous. There was an increase of 75 percent of Indigenous Australians in prisons over the last decade compared to 33 percent increase for the non-Indigenous.70

There is a substantial difference between Indigenous Australians and the non-Indigenous in terms of the most serious offence for which they are incarcerated. The Indigenous are far more likely have their most serious offence as acts intended to cause injury, unlawful entry, offence against justice procedures and robbery. Non-Indigenous people are far more likely to be incarcerated for illicit drug offences—17 percent compared to 3 percent. Higher rates of non-Indigenous incarceration can also be seen for sexual assault and homicide.71

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68 Ibid
69 Ibid
70 Ibid
71 Ibid
The high number of Indigenous Australians in prison also may help to explain why, as saw in Key Facts 2, above, that the Northern Territory has the highest incarceration rate. Indigenous Australians constitute about 30 percent of the population of the Northern Territory.

Some suggest high Indigenous Australian incarceration rates are the result of institutional bias or racism. However, Indigenous Australians generally serve shorter sentence lengths than non-Indigenous. For example, the mean and median sentence lengths for Indigenous Australian prisoners is 2.6 and 1.2 years, respectively, compared with a mean years and median of 2.1 for non-Indigenous. There are also substantial differences in some categories of crime. For example, in the case of homicide the median sentence length for the Indigenous is 9.9 years compared with 14.6 years for non-Indigenous. If there were institutional bias one would expect this to be reversed.

Further, the evidence suggests that unemployment and low education attainment are the two greatest ‘risk’ factors for Indigenous incarceration, as opposed to factors relating to race or socio-economic status. For example, unemployed Indigenous Australians are 20 times more likely to be imprisoned than employed Indigenous Australians. Indeed, the incarceration rate for Indigenous people who were employed at the time of their offending was 332 per 100,000, compared with 6,495 for unemployed Indigenous people. Similarly, the imprisonment rate was 164 for Indigenous people who had completed school compared with 2,217 for those who had not.

According to the ABS, about 58 percent of Indigenous Australians who are imprisoned returned to prison within ten years of release, compared to 35 percent for the non-Indigenous. Similarly, according to the Centre for Independent Studies, Indigenous offenders are more likely to exhibit factors that lead to custodial rather than non-custodial sentences, such as a lengthy criminal

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**Figure 14 Percentage of crime by Indigenous status 2015**

Source: Australian Bureau of Statistics Prisoners in Australia 2015

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72 Ibid
73 Sara Hudson [2013], Panacea to Prison? Justice Reinvestment in Indigenous Communities The Centre for Independent Studies, p. 8
74 Ibid p. 9.
75 Australian Bureau of Statistics [2010], Australian Social Trends Category 4102.0 March 2010.
Further, there are also likely to be a range of cultural factors that influence the rate of incarceration of Indigenous Australians. For example, in his book on Indigenous incarceration Dr Don Weatherburn notes that “arrest, prosecution and imprisonment may have become a rite of passage for young Aboriginal offenders rather than a source of shame or embarrassment”.

Weatherburn goes on to note that “for older offenders the attraction of free accommodation and food, good health care, relative safety from violence and regular social contact with relatives and friends sometimes far outweigh the negative aspects of incarceration.” In other words, the relative conditions outside of jail are so bad that some would rather a life in jail. This could be a reflection of the poor quality of conditions outside of jail, or the quality of conditions inside jail.

The Centre for Independent Studies quotes a police officer’s observation about Indigenous crime and incarceration:

_Crime occurs more in low socio-economic areas. These are places where parents do not know and usually don’t care where their children are; where a lot of people do not work and do not want to work; and where there is little respect for the police or for other people. The crime is committed by both Indigenous and non-Indigenous people but it is unfortunately a fact that many Aboriginal people live in low socio-economic areas._

Another factor contributing to the high rate is more people are identifying as being Indigenous. If the number of people who identify as Indigenous increases, then the observed number of Indigenous Australians being incarcerated will increase, all else being equal.

**Observation 9**

Indigenous Australians commit crime and are incarcerated at a far higher rates than the non-Indigenous. This may partly be explained by the strong correlation between indigeneity and the other factors correlated with criminality, but may also depend in part on cultural developments within some Indigenous Australian communities.

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76 Hudson (2013), op. cit. p. 7
78 Ibid
79 Ibid
80 Weatherburn (2014), op. cit. p. 3
3. Explaining the rise in the incarceration rate

In this chapter, we will discuss the possible explanations for why the people described in Chapter 2 are in Australian prisons. This includes a description of why criminals choose to commit crimes, an analysis of how public policy responds to their choices, and the effects of that response on the incarceration rate.

Individual choice and crime

All work on criminal justice is based on assumptions of how criminals behave. There are two broad ways to view the issues: socio-cultural causation and personal choice.

Criminology and explanations from the social sciences see crime as a function of the social environment and cultural conditioning. In this sense crime is not viewed as a conscious choice but the inevitable result of social and cultural circumstances, such as poverty, race or drug addiction.

Researchers who adopt this approach often talk of certain people as being ‘predisposed’ to crime and analyse the correlates or personal characteristics which determine the ‘risk level’ or probability of committing crime. The implication is that society is primarily responsible for crime because it creates and sustains the conditions in which crime takes place. On this view, policing and punishment cannot deter crime; crime is reduced most effectively by social policy aimed at eliminating the factors which are held to cause crime.

An alternative perspective brought from economics sees criminals not as a special category of people for whom particular and unique theories of behaviour are needed, but as regular people who base their decisions to commit crime on analysis of the costs, benefits and risks of those crimes. This approach suggests there is no fundamental difference between someone who chooses to steal for a living rather than work and someone who works instead of steals. Both are making a decision that they see as being in their own interests. As Gary Becker notes, “Some persons become criminals not because their basic motivation differs from that of other persons, but because their benefits and costs
differ.\textsuperscript{81} This approach ultimately assumes that people have free will and exercise that will when committing crime.

The benefit of the economic approach is that it accommodates the standard criminology and social sciences view: that one’s social environment, upbringing and culture affect individuals’ attitudes toward crime, through influencing their preferences to crime relative to other options. As an example, someone living in a neighborhood with a high prevalence of crime may be more likely to internalise crime as something normal and legitimate (because, in this situation it effectively is) and therefore develop different preferences with respect to crime than someone living in a low crime neighbourhood. At the same time there also many who are brought up in these environments and do not commit crime. The choice to commit crime—as with all other choices—is ultimately made by the individual.

Similarly, crime could also be normalised where someone’s family member has a history of crime and incarceration. This is borne out by the documented effect that parental incarceration has on children’s life outcomes. Similarly, where time in jail is seen as a rite of passage for acceptance into a group or gang, crime might seem more preferable.

In the economics view, the key to understanding why crime is committed is to analyse the costs and benefits of crime from the perpetrators’ perspective. There are two main costs of crime: direct costs which involve punishment including incarceration and fines, and opportunity costs which comprise that which perpetrators of crime give up in order to commit crime, such as forgone earnings from engaging in legal work, now and in the future. There are a range of offsetting benefits perpetrators receive from crime, from financial gain through to the satisfaction of revenge and gratification from assault or homicide.

Importantly, the economics framework can also help us make sense of the widely documented economic and social correlates of crime, detailed in Chapter 2. For example, there is a large and growing body of research which suggests that criminals, in the main, have lower education attainment than the general population. This means they are likely to be less skilled, less productive and have lower expected lifetime earnings from legitimate work than the general population. Additionally, incarceration also means lost wages resulting from time out of the labour market as well as flow-on consequences for finding future work, resulting from one having a criminal record and loss of work-relevant skills whilst in jail.

These factors mean that criminals, and in particular those who have been incarcerated, have lower expected wages than their counterparts in the general population, which in turn means they have a lower opportunity cost of committing crime. It therefore makes sense that people who commit crime are more likely to have lower education attainment, as relatively poorer workplace prospects reduce the cost of crime.

Similarly, a central element of the economic approach to understanding how people behave is analysing how they allocate their time and money in the present relative to the future (intertemporal substitution). Generally speaking, people who are more patient and are willing to defer gratification discount the future less than those who are impatient and seek immediate gratification. Crime itself is typically an example of this behaviour: the payoffs are, in the main, immediate and certain, while the costs in terms of detection, arrest and conviction are distant and uncertain. As noted in Chapter 2 of this report, criminals and the incarcerated are more likely to engage in a range of other behaviours that have upfront and certain benefits with distant and

uncertain costs, such as heavily consuming alcohol, drugs and tobacco. The inverse can also be observed: criminals are more likely to avoid behaviour where the costs are immediate and certain but the benefits are uncertain and distant, such as education.

This has obvious implications for how to reduce crime—increase both the direct and opportunity costs of committing crime. Increasing direct costs can be achieved through increasing the probability of detection (more police on the streets) and/or increasing the severity of punishment (such as sentence length). Increasing the opportunity costs involves increasing the return to non-criminal activities. This would occur, for example, through higher expected wages (either higher absolute wages or more aggregate opportunities at a lower wage) which is closely related to more economic opportunity and better education outcomes.

As James Q Wilson noted:

\[
\text{Deterrence and job-creation are not different anti-crime strategies; they are two sides of the same strategy. The former increases the costs of crime; the latter enhances the benefits of alternatives to criminal behavior.}^{82}
\]

With this model in mind, we will now consider the possible reasons for the increase in the incarceration rate.

**The crime rate**

The most obvious possible explanation for the increasing incarceration rate is that more people are choosing to commit crimes.

It is difficult to be certain about whether this is true or not. However, a fair reading of the data suggests that the crime rate has been increasing over recent years.

It is important to remember that data is limited, and sometimes patchy and inconsistent across jurisdictions. And even in a world of perfect data the actual crime rate would never be known because many crimes are unreported.\(^83\) The ABS has summarised some of the data issues:

\[
\text{When examining our statistics it must be remembered that not every crime is reported to the police, not every crime that is reported is recorded, not every crime that is recorded is investigated, not every crime that is investigated is cleared (‘solved’), not every crime that is investigated yields a suspect, not every suspect is apprehended, not every apprehended person is charged, not every charged person is brought before the courts, not every person brought before the courts is convicted, and not every convicted person is imprisoned.}
\]

So then, taking a snapshot at any time, or taking a series of data over time on any activity (e.g. court appearances, prisoner numbers, etc.) does not tell us about crime in Australia, but rather about that particular activity or segment.\(^84\)

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83 Although this would only affect the absolute numbers of crime reported. Provided errors in reporting (such as underreporting or misreporting) were similar across time, analysis of growth rates or relative changes to crime rates would not be affected.

No matter which way the data is analysed, an objective understanding of the crime rate is difficult to obtain. For example, the public data available includes:

- The number of offenders; but this does not provide information on the number of crimes committed per offender.
- The number of proceedings made by police per offender; but this doesn’t include the number of alleged crimes per proceeding.
- The number of victims; but this doesn’t include victimless crimes or the number of crimes committed against a given victim.

Additionally, the majority of data is not available over long time periods, so it can be difficult to draw strong conclusions about longer run trajectory of the crime rate.

With these limitations in mind it appears that:

- the overall offender rate has been relatively flat
- the adult offender rate has increased
- the juvenile offender rate has decreased
- the number of proceedings per offender has increased, and
- the victimisation rate has decreased.

The combination of a rise in the adult offender rate and the number of proceedings made by police per offender suggests the adult crime rate has increased, which explains some of the rise to the incarceration rate. The fact that the victimisation rate has decreased suggests the rise in the adult crime rate is mostly from victimless crimes (or there has been a reduction in the number of crimes per offender and per proceeding.)

**Number of Offenders**

In 2014-15 there were an estimated 411,000 offenders nation-wide. About 80 percent, or 326,000, were adults (18+) and about 20 percent, or 85,000, were juveniles.85 On an average annual basis the number of offenders has grown roughly in line with overall population growth at about 1.7 percent.86 This leaves the aggregate offender rate relatively unchanged since 2008-9.

Breaking down by youth and adult shows that the steadiness in the overall offender rate is the result of the adult rate increasing and the youth rate decreasing. The youth offender rate has decreased from 4898 per 100,000 youths in 2008-09 to 3739 in 2014-15—a 30 percent decrease. While the adult offender rate has increased by 15 percent from 1429 per 100,000 of the adult population to 1639 over the same time period.87

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85 Australian Bureau of Statistics (2015a), Recorded Crime—Offenders, 2014-15, Category 4519.0
87 Australian Bureau of Statistics (2015a, 2015e); IPA calculations
Table 8 Offender rates

<table>
<thead>
<tr>
<th>Year</th>
<th>No. offenders (total)</th>
<th>No. offenders (adult)</th>
<th>No. offenders (Youth)</th>
<th>Offender rate</th>
<th>Adult offender rate</th>
<th>Youth offender rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008–09</td>
<td>375593</td>
<td>265746</td>
<td>109847</td>
<td>2005</td>
<td>1429</td>
<td>4898</td>
</tr>
<tr>
<td>2009–10</td>
<td>391248</td>
<td>277549</td>
<td>113699</td>
<td>2051</td>
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<tr>
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<td>383147</td>
<td>275902</td>
<td>107245</td>
<td>1980</td>
<td>1456</td>
<td>4768</td>
</tr>
<tr>
<td>2011–12</td>
<td>376449</td>
<td>279085</td>
<td>97364</td>
<td>1916</td>
<td>1452</td>
<td>4316</td>
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<tr>
<td>2012–13</td>
<td>391184</td>
<td>299180</td>
<td>92004</td>
<td>1958</td>
<td>1534</td>
<td>4071</td>
</tr>
<tr>
<td>2013–14</td>
<td>404701</td>
<td>317036</td>
<td>87655</td>
<td>1994</td>
<td>1606</td>
<td>3861</td>
</tr>
<tr>
<td>2014–15</td>
<td>411686</td>
<td>326244</td>
<td>85442</td>
<td>2000</td>
<td>1636</td>
<td>3739</td>
</tr>
</tbody>
</table>

The adult offender rate has increased closely with the increase in the incarceration rate, which intuitively makes sense given we would expect a positive relationship between the number of offenders and the number of people in jail.

Figure 15 Adult offender rate versus incarceration rate

Source: Institute of Public Affairs Calculations using Australian Bureau of Statistics Recorded Crime—Officers

Of course, while the offender rate gives some indication of the crime rate—an increase in offenders would suggest more crime and vice versa—it doesn’t give us the whole picture. This is because a given offender can commit more than one crime, so knowing the number of crimes committed per offender is an important piece of information.

Unfortunately, the data on the number of crimes per offender is not publically available. But the number of proceedings made by police per offender is available, which can be used as a rough proxy for the crime rate. The table below gives the average number of proceedings made by police per offender by state (data for WA isn’t available).
The average number of proceedings per offender has increased since 2008-09 in NSW, Victoria, Queensland, and the NT, stayed flat in South Australia and decreased slightly in Tasmania and the ACT.

Using a weighted average we estimate the national average police proceedings per offender to have increased by 14 percent from 1.4 in 2008-09 to 1.6 in 2014-15.90

The graph below plots the estimated crime rate, which is the number of offenders multiplied by the average number of proceedings per offender. Again we see a sharp increase in the crime rate and a close association with the incarceration rate, consistent with intuition.

Table 9 Mean number of proceedings per offender89

<table>
<thead>
<tr>
<th>Year</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>WA</th>
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<tbody>
<tr>
<td>2008–09</td>
<td>1.4</td>
<td>1.4</td>
<td>1.5</td>
<td>1.3</td>
<td>1.5</td>
<td>1.5</td>
<td>1.3</td>
<td>N.A</td>
</tr>
<tr>
<td>2009–10</td>
<td>1.4</td>
<td>1.4</td>
<td>1.6</td>
<td>1.3</td>
<td>1.5</td>
<td>1.4</td>
<td>1.3</td>
<td>N.A</td>
</tr>
<tr>
<td>2010–11</td>
<td>1.5</td>
<td>1.4</td>
<td>1.6</td>
<td>1.3</td>
<td>1.5</td>
<td>1.4</td>
<td>1.3</td>
<td>N.A</td>
</tr>
<tr>
<td>2011–12</td>
<td>1.5</td>
<td>1.4</td>
<td>1.6</td>
<td>1.3</td>
<td>1.5</td>
<td>1.4</td>
<td>1.2</td>
<td>N.A</td>
</tr>
<tr>
<td>2012–13</td>
<td>1.5</td>
<td>1.4</td>
<td>1.6</td>
<td>1.3</td>
<td>1.4</td>
<td>1.6</td>
<td>1.2</td>
<td>N.A</td>
</tr>
<tr>
<td>2013–14</td>
<td>1.6</td>
<td>1.5</td>
<td>1.7</td>
<td>1.2</td>
<td>1.4</td>
<td>1.8</td>
<td>1.3</td>
<td>N.A</td>
</tr>
<tr>
<td>2014–15</td>
<td>1.7</td>
<td>1.5</td>
<td>1.7</td>
<td>1.3</td>
<td>1.4</td>
<td>1.8</td>
<td>1.2</td>
<td>N.A</td>
</tr>
</tbody>
</table>

Figure 16 Crime rate and incarceration rate

Source: Institute of Public Affairs Calculations using Australian Bureau of Statistics Recorded Crime—Offenders

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89 Australian Bureau of Statistics (2015e), *op. cit.*
90 *Ibid.* IPA calculations
A limitation to using the number of proceedings as a proxy for crimes committed per offender is more than one offence can be committed per proceeding. So theoretically it is possible that the number of offences per proceeding has increased, decreased or stayed the same.

The vast majority of offenders are only proceeded once by police, ranging from 85 percent in the ACT to 66 percent in the NT.91

Table 10 Number of proceedings per offender (percentage of total)92

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>72.4</td>
<td>76.1</td>
<td>68.6</td>
<td>83.7</td>
<td>778</td>
<td>66.4</td>
<td>85.0</td>
<td>N.A</td>
</tr>
<tr>
<td>2</td>
<td>14.0</td>
<td>13.0</td>
<td>16.4</td>
<td>99</td>
<td>12.7</td>
<td>17.5</td>
<td>9.8</td>
<td>N.A</td>
</tr>
<tr>
<td>3</td>
<td>5.6</td>
<td>5.0</td>
<td>6.7</td>
<td>3.2</td>
<td>4.5</td>
<td>6.8</td>
<td>3.4</td>
<td>N.A</td>
</tr>
<tr>
<td>4</td>
<td>2.8</td>
<td>2.5</td>
<td>3.3</td>
<td>1.5</td>
<td>2.0</td>
<td>3.6</td>
<td>1.0</td>
<td>N.A</td>
</tr>
<tr>
<td>5+</td>
<td>5.2</td>
<td>3.4</td>
<td>5.0</td>
<td>1.6</td>
<td>2.9</td>
<td>5.6</td>
<td>0.7</td>
<td>N.A</td>
</tr>
</tbody>
</table>

Key facts 3

» The number of offenders and the offender rate has been fairly flat over recent years.
» The adult offender rate (which is what is relevant when analysing the incarceration rate) has increased sharply.
» The growth in the adult offender rate is in line with the growth to the incarceration rate.
» The juvenile offender rate has decreased sharply.
» The average number of proceedings made per offender has increased slightly from 1.4 in 2008-09 to 1.6 in 2014-15.

91 Australian Bureau of Statistics (2015e) op. cit.
92 Ibid
Victims

The number of victims has decreased substantially since 2000, down from 1.3 million to 750,000 in 2014.\textsuperscript{93} Crimes counted are: homicide, sexual assault, kidnapping, robbery, blackmail/extortion, unlawful entry with intent, motor vehicle theft and other theft. Unfortunately, ABS data for assault is only for certain states, which does impose a limitation on our interpretation of the overall number of victims given assaults are not a trivial occurrence.

Similarly, the victimisation rate—the number of reported victims as a percentage of the population—has decreased for a number of crimes from 2008/9 to 2014/15, for example:

- physical assault has decreased from 3.1 to 2.1;
- face-to-face physical assault has decreased from 3.9 to 2.9;
- robbery is down from 0.6 to 0.3;
- sexual assault is relatively flat at 0.3;
- break-ins are down from 3.3 to 2.7; and
- malicious property damage is down from 11.1 to 5.7.\textsuperscript{94}

Changes in recording and reporting make it difficult to compare data over time and across jurisdictions, as can changes in the prevalence of reporting amongst victims.

That adult offender rates and number of proceedings per offender have increased while the victimisation rate has decreased could indicate that the rise in offending is largely constituted by victimless crimes. It could also indicate there are more crimes being committed with multiple offenders per victim.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure17.png}
\caption{Number of reported victims, selected offences}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure18.png}
\caption{Victimisation rate as percentage of Australian population}
\end{figure}


\textsuperscript{94} Ibid
Since 2008-09, the number of nonviolent offenders has increased by close to 20 percent, violent offenders increased by 5 percent and the number of people who have committed offences against property has decreased by 1 percent. Illicit drug offenders have increased the most, by about 40 percent since 2008-09.95 Obviously, it is not clear if this is because more people are committing illicit drug offences, or more are being caught.

Finding 1

» Based on available data regarding offending and the number of victims, the growth in the incarceration rate is partially attributable to a rise in the adult offending rate.

95 Ibid
While a rising crime rate may be contributing to the incarceration rate increase, there is one aspect of offending that is not playing a role. Approximately 59 percent of the prison population has been incarcerated more than once. However, this has changed little over the last 10 years.

State and territory figures on this measure have also been generally stable over this period. Higher rates are generally found in jurisdictions with smaller populations, with the exception of South Australia, which has the overall lowest rate.

The stability of this measure means that the overall growth in the incarceration rate is driven equally by the imprisonment of re-offenders and new offenders.

In turn, this suggests that the poor performance of prisons in preventing re-offending is one of the drivers of the growing incarceration rate in the sense that were they performing better the...
overall growth would be lower (all else being equal). But they are not performing any worse in this respect than they have done in the past; the population of those who have been imprisoned has increased and therefore so has the number of people jailed more than once.

And for most of those who are jailed multiple times, their return comes quite swiftly. Nationally 44.3 percent of prisoners released in 2014-15 returned to prison within two years.98 This figure has increased by more than 12 percent over the last five years.

This suggests that the performance of prisons in prevent reoffending is getting worse. Reversing this trend would make a substantial contribution to limiting the growth of the incarceration rate.

Public policy: courts and the administration of criminal justice

Another possible contributor to the increase in the incarceration rate are changes in the administration of justice: remand, sentencing, parole. In this section we find that in addition to being partially explicable in terms of the behaviour of individuals, the increase in the incarceration rate has also been caused in part by public policy.

Bail and remand

A large proportion of the increase to the total incarceration rate was due to increases in unsentenced offenders (those on remand). For example, since 2005 the number of unsentenced prisoners has increased by 93 percent, compared with 29 percent for sentenced prisoners. This has resulted in the proportion of total prisoners who are unsentenced to increase from about 20 percent to 28 percent.

People on remand have increased as a proportion of Australian prisoners, from 22 percent in 2006 to 27 percent in 2015. Unlike the increase in the sentenced prison population this is not likely attributable to people being remanded longer. As the figure below shows, the average time spent on remand has not changed over the last 10 years across all courts.

People spend an average of 4.9 months on remand. While there has been an increase in time spent on remand in higher courts, from an average of 9.1 months to an average of 10.4 months, most proceedings take place in lower courts and so overall people are not spending more time on remand.

This can be seen more clearly by breaking down the unsentenced prison population by the time they are spending on remand.

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99 Remand means being held in custody while awaiting trial.
100 Australian Bureau of Statistics (2015d) op. cit. NB: data taken from the 2006 and 2015 reports.
101 Ibid
This suggests that inefficient processing by the judicial system is not a contributor to the increase in the prison population. In turn, this implies that the number of people on remand has increased because bail is either not being granted or is being revoked more frequently.

New South Wales is the state with the most remandees and has one of the highest proportions of unsentenced prisoners. Recent analysis by the NSW Bureau of Crime Statistics and Research (BOCSAR) shows that in that state the court and police bail refusal rates have increased in the last three years, since changes were made to the NSW Bail Act.102

---

BOCSAR further attributes the growth in the remand population to an increase in bail breaches leading to bail refusal and an increase in the number of people against whom criminal proceedings were commenced.

A rising refusal rate along with more breaches necessarily means that more people are being remanded. If other states are experiencing a similar phenomenon, this would partially explain the increase in the nationwide remand population. There is some evidence to suggest that they are.

The Senate Inquiry into Justice Reinvestment heard that more stringent bail conditions make it difficult for many offenders to successfully request bail and meet court requirements. Following legislative changes in March 2011, the Northern Territory saw an increase of 67 percent in the number of bail breaches recorded. There has also been a significant rise in the remand population in Western Australia.103

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103 Senate Legal and Constitutional Affairs References Committee (2013), Value of a justice reinvestment approach to criminal justice in Australia, p. 8
Finding 3

A large part of the rise in the prison population is constituted by unsentenced prisoners. The growth in unsentenced prisoners is partly attributable to more stringent conditions on the granting and keeping of bail.

Guilty pleas

It is sometimes argued that the rise in the incarceration rate is partly attributable to more people taking plea bargains. It is further implied that they are submitting to these deals under duress resulting from delays in the administration of justice and prosecutors charging defendants with more serious crimes even where they are not readily supported by the evidence.

In Australia, the evidence for this thesis is weak. As noted in the section on remand, the average time spent on remand has not increased in lower courts, where the great majority of criminal cases are decided, while there was a small increase in the nation’s higher courts. The increase, however, has not led to a large increase in the number of guilty pleas in those courts.

Figure 29 Higher courts: guilty pleas as a proportion of total adjudications 2010-11 vs 2014-15

This rise in the number of guilty pleas is offset by the fact that the total number of higher court adjudications in Australia has fallen in the past five years by 5.4 percent. This has led to a 4.3 percent reduction in the number of people being found guilty in higher courts. An estimate based on incomplete data indicates that this translates to a rough increase of less than 1 percent in the number of guilty pleas in higher courts across the country. This rise in the number of guilty pleas is offset by the fact that the total number of higher court adjudications in Australia has fallen in the past five years by 5.4 percent. This has led to a 4.3 percent reduction in the number of people being found guilty in higher courts. An estimate based on incomplete data indicates that this translates to a rough increase of less than 1 percent in the number of guilty pleas in higher courts across the country. This rise in the number of guilty pleas is offset by the fact that the total number of higher court adjudications in Australia has fallen in the past five years by 5.4 percent. This has led to a 4.3 percent reduction in the number of people being found guilty in higher courts. An estimate based on incomplete data indicates that this translates to a rough increase of less than 1 percent in the number of guilty pleas in higher courts across the country.

There is little evidence that courts are over-worked. The number of adjudications has stayed stable or decreased in almost every jurisdiction over the past five years, with the exception of Victoria.

Source: ABS Criminal Courts Australia 2010-11 and 2014-15

104 In the latest ABS reporting, there are no statistics for how defendants pleaded in Western Australia. This calculation is based on filling this gap in the data by ascribing to Western Australia the average of the guilty plea rates from the other states and territories. Western Australian data are included in the calculation of adjudications and guilty verdicts. Australian Bureau of Statistics (2015c), Criminal Courts Australia, Category 4513.0
In Australia in recent years, defendants are not spending more time on remand and are not pleading guilty at higher rates. The nation’s courts are processing roughly the same number of defendants each year. Therefore, if defendants are being pressured to plead guilty, this problem has not worsened in this period and therefore is not a contributor to the rising levels of incarceration in the states and territories.

### Finding 4

» There is no evidence to suggest that the increase in the prison population has been driven by more defendants pleading guilty.

### Sentencing

All else being equal, longer sentences necessarily contribute to increased incarceration rates. In the United States, it has been estimated that longer sentences have contributed up to half of the increase in the prison population (at state level).\(^{105}\) The lengthening of prison terms in that country has been driven by the use of mandatory minimum sentences, “three strikes” and similar laws aimed at re-offenders, and truth-in-sentencing laws making suspended sentences and parole rarer.

However, these laws are not used frequently in Australia. Australian courts and parole boards have retained more discretion to ensure proportionality in sentencing. Some states have implemented versions of them: for example, and as discussed later in this chapter, Victoria has abolished suspended sentences, while WA and the Northern Territory have used mandatory minimums. But these are exceptions. In Australia then, only part of the increase in the prison population is likely attributable to convicted criminals being given longer sentences. And this contribution is reduced further by the large number of prisoners who do not serve their full terms.

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Average sentences have gotten longer

Over the last 10 years, the average sentence for Australian prisoners has increased.

As Figure 30 shows, however, the median sentence has increased only slightly.

Together, these statistics suggest that offences which already attracted custodial sentences now attract heavier penalties. The rates of increase in the number of sentences greater than the median and in those less than the median have been similar. But those sentences in the former group have grown substantially, while those in the latter group are now closer to the median, boosting the overall average.

This can be seen by breaking down the prison population by sentence length.

There has been a substantial increase in the number of sentences greater than 12 months, with the largest increase in the five to ten year bracket. Although there has been a reduction in the proportion of sentences of less than 12 months, given that the overall number of sentences handed down has increased, it seems likely that this is because a substantial number of people who would have previously received short sentences are now receiving sentences closer or greater than the mean.

Every bracket beyond the 12-month mark has increased, suggesting an across-the-board toughening of sentences.

And in fact sentence lengths have increased on average for most of the crime categories for which there are statistics.
But the amount of time served has not increased

Although sentence lengths have increased, offenders are not generally spending more time in prison than 10 years ago. ABS statistics reveal that prisoners’ expected time to serve (ETTS) has been stable over the past 10 years, with the only substantial increase being for homicide.

This graph implies that there are more offenders being released after serving less than the median time but that those who are serving more than the median are serving slightly longer sentences on average than they did before.

This pattern, however, is quite inconsistent across the various crime types.

Source: ABS Prisoners in Australia 2006 and 2015
Figure 35 Median and mean expected time to serve by crime type 2006 v 2015

Source: ABS Prisoners in Australia 2006 and 2015

Figure 36 Median sentence length and median expected time to serve 2006 v 2015

Source: ABS Prisoners in Australia 2006 and 2015
Prisoners are being incarcerated longer for homicide but not necessarily for other violent offences, with time served getting shorter for abduction and robbery. There are similar small variations among nonviolent offences.

Combining the data, it becomes apparent that even though sentence lengths have gotten longer, this hasn’t necessarily translated into prisoners staying in prison longer.

Indeed, for drug and weapon offences the expected time to serve has decreased even as sentences have gotten harsher. For serious crimes like homicide and sexual assault, prisoners are staying in prisons longer although the length of their expected stints in prison have not grown as quickly as their sentences.

However, for no crime is the median expected time to serve in 2015 equal to or greater than the median sentence length for that crime in 2006. This may not be explained by parole being given to more prisoners—as the section on parole statistics below will show, there is good reason to believe that parole is being refused more frequently.

Nor is it explained by legal and policy differences at the jurisdictional level.

**Figure 37 Percentage changes in number of prisoners in each ETTS bracket 2006 vs 2015 (mainland states)**
Across the mainland states\textsuperscript{106}, the number of prisoners increased uniformly in the ETTS brackets less than the nationwide median value. There was also a general increase in the number in the longest ETTS brackets, especially in the 20 years and more bracket.

This has slightly changed the composition of the prison population, with the proportion of prisoners expected to serve longer stints in prison increasing most significantly (although this is offset in part by the reduction in the proportion of prisoners serving life sentences).

There are more prisoners in the longest ETTS brackets and there are also more in the shortest brackets. The bulk of the growth in the sentenced prisoner population are expected to serve long or short sentences—there has been less growth in the number of prisoners expected to serve between five and 15 years (despite the growth in the number of sentences of between five and ten years). This explains why the mean ETTS has not increased.

\textsuperscript{106} Tasmania, Northern Territory, and the ACT were excluded because of small sample sizes. Note also that while the graph’s maximum value is 300 percent, there was one value greater than this: the increase in the number of South Australian prisoners expected to serve more than 20 years increased by 1785 percent from 7 to 132. This was driven by a reduction in the number of life sentences and an overall increase in the expected time to serve.
It further shows that any attempt to reduce the overall incarceration rate by reducing time spent in prison would confront the political and moral reality that offenders serving increased sentences are in prison for good reason and there will be no public appetite for shortening their terms of imprisonment.

Conversely, reducing the prison population by allowing more people currently expected to serve short sentences to serve those sentences outside the prison system would increase the mean ETTS: there would be fewer people in prison but those who are in prison would stay there longer, on average, all else being equal. This would be more politically and morally practical as it would concentrate prison system resources on the worst offenders.

Finding 5

While sentence lengths have increased, this has not translated to prisoners spending more time in prison. Expected time to serve has increased for the worst offenders. Reform efforts could focus on using alternatives punishments in place of short prison sentences.

Prison population changes

The composition of the prison population in terms of crimes committed has changed over the past 10 years. There are proportionally more people in prison for acts intended to cause injury and for drug offences than there were 10 years ago.

Figure 39 Prison population (including remandees) by crime type 2006 v 2015

Source: ABS Prisoners in Australia 2006 and 2015
Prison population changes do not track increases in sentence lengths

Reading the charts in the two previous sections together, we can see a relationship between sentence lengths and the incidence of particular crimes emerge.

Stiffer penalties have coincided with reductions in the proportional incidence of certain types of crime. Significant examples include:107

- The average sentence for homicide has increased 27.1 percent, from 14.5 years to 19.9 years. Over the same period, the percentage of prisoners incarcerated for homicide fell 18.7 percent from 10.2 percent to 8.3 percent.

- The average sentence for sexual assault has increased 16.8 percent, from 7.6 years to 9.1 years. Over the same period, the percentage of prisoners incarcerated for sexual assault fell 9.3 percent, from 12.4 percent to 11.3 percent.

Similarly, weaker penalties on average have coincided with an increase in the proportional incidence of other crimes:

- The average sentence for acts intended to cause injury has decreased slightly (approximately 0.8 percent), while the percentage of prisoners incarcerated for this offence has risen 27.6 percent from 22.9 percent to 29.2 percent.

- The average sentence length for abduction, harassment, and other offences against the person has decreased by 14.9 percent, while the percentage of prisoners incarcerated for this offence has increased, from a low base, by 85 percent from 0.7 percent to 1.3 percent.

- The average sentence length for property damage and environmental pollution has decreased by 18.9 percent, from 2.6 to 2.2 years, while the percentage of prisoners incarcerated for this offence has increased by 20.6 percent from 1.1 percent to 1.3 percent.

Source: ABS Prisoners in Australia 2006 and 2015

Figure 40 Proportion of population (including remandees) by crime type 2006 v 2015

107 The following statistics are drawn from: Australian Bureau of Statistics (2015d), op. cit. Annual reports in this category from 2006 and 2015.
While these data may indicate that there is a correlation between sentence lengths and the incidence of a crime, some offences do not fit this pattern:

- Robbery and extortion, theft, and fraud and deception have all seen reductions in both average penalties applied and the proportion of prisoners incarcerated for those crimes. Note however that prisoners incarcerated for these crimes (and indeed, for almost every category of crime) have increased in absolute terms, just at a lower rate than other crimes.
- Conversely, prisoners incarcerated for weapons, negligence and drug offences have all proportionally increased even as penalties for those offences have also increased.

**Mandatory sentences**

By definition, mandatory sentencing laws mean a prison sentence is imposed on some offenders regardless of whether the judge would have supported such a sentence. However, in Australia, mandatory minimum sentences only exist in Western Australia and the Northern Territory.

Therefore the overall contribution of these laws to median sentence lengths and thereby to the current incarceration rate is quite small.

Should these laws become more common across the country, they will likely contribute to a rise in the incarceration rate in the future. This has been the experience in the United States, where these laws are widely used.

**Figure 41 Community-based corrections orders v full-time custody in Victoria 2014-15**

![Graph showing community-based corrections orders vs full-time custody in Victoria 2014-15](Source: ABS Corrective Services December Quarter 2015)

**Suspended sentences**

On 1 June 2014, Victoria abolished suspended sentences. Offenders for whom immediate incarceration was not deemed essential to justice were from that date to be placed on Community Corrections Orders (CCOs), which had been introduced in 2012.

Over 2014-15, the number of Victorians serving community-based corrections orders (as classified by the ABS, this category includes all such orders and not just CCOs) has increased substantially. The prison population has also grown over that time.

It seems likely, however, that in Victoria a number of people who might have otherwise been given suspended sentences are now receiving CCOs. The differences between suspended sentences and CCOs is that the latter may include a number of impositions on the liberty of offenders, like curfews and

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108 "Community-based corrections orders are non-custodial orders served under the authority of adult corrective services agencies and include restricted movement, reparations (fine options and community service), supervision orders (parole, bail, sentenced probation) and post-sentence supervision orders." Australian Bureau of Statistics (2015b), *Corrective Services, December Quarter 2015*
restrictions on movement. Because of the level of monitoring required, CCOs are more expensive than suspended sentences.

A recent NSW study found that the reoffending rate for offenders serving suspended sentences was similar to that for offenders who were incarcerated. Given that suspended sentences have lower social and financial costs, abolishing them is possibly counter-productive economically.109

However, even though CCOs are slightly more expensive than suspended sentences, they are also potentially more coercive too. This means that they may be a more appropriate punishments than the minimally-coercive suspended sentence. This in turn might make it possible to use these orders as an alternative to prison for some offenders for whom a suspended sentence is inappropriate. While the effects of the shift to CCOs in Victoria will need to be monitored, this measure may prove to be an effective alternative to prison for suitable offenders.

**Parole**

Evidence suggests that parole is becoming more difficult to obtain.

**Figure 42 Parolees v sentenced prisoners 2006-2015**

![Parolees v sentenced prisoners 2006-2015](chart)

Source: ABS Corrective Services Reports

All else being equal, as the number of people serving custodial sentences increases, the number of people released into the community on parole should rise. As the graph above shows, however, this is not the case in Australia.

There could be a number of reasons for the divergence of these two numbers. It could be explained by changes in the composition of the prison population—the proportion of prisoners whom it is safe to release on parole may have gotten smaller, for example. It could also be explained by regulatory changes making parole requirements more difficult to satisfy, such that

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some people who in previous years might have been granted parole are now refused it. Given that the median expected time to serve has been steady, parole may be being refused more often to offenders serving long sentences.

Parole conditions vary from jurisdiction to jurisdiction, with different legislative requirements affecting the circumstances of automatic release and the factors considered in parole hearings. There are no national statistics for how frequently parole is refused and not every jurisdiction reports the data required to determine the parole refusal rate.

From the data that is available, however, there is evidence from some jurisdictions that parole boards have become less generous in their consideration of applications.

In Victoria, for example, the parole refusal rate in 2014-15 was 38.5 percent, up from 13.6 percent in 2005-06. Over this period, the number of paroles granted went down and the number of refusals went up. In Western Australia, the trend was even stronger. In 2014-15, 64.5 percent, up from 28.9 percent in 2005-6. The ACT’s refusal rate increased from 22.7 percent in 2005-6 to 38.1 percent in 2014-15.

Of jurisdictions with data available, the only one to buck the trend was NSW, where the refusal rate in 2014 was 27.9 percent compared to the 2005 figure of 36.8 percent. However, compared to the average rate for 2006-2010 of 32.9 percent, the reduction is not as pronounced.

There are no national statistics for the revocation of parole. However, some states do track these figures, and in those states the number of revocations has risen.

Emerging evidence from the United States suggests that applying minor punishments, such as short stints in jail, for minor and technical parole breaches is a more effective way to manage parolees.

**Finding 6**

> While complete data is not available, there is some evidence that parole has become more difficult to obtain and hold, which may affect the incarceration rate.

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110 Adult Parole Board of Victoria (2015), Annual Reports 2005-6 and 2014-15
Conclusions

The rise in the incarceration rate is a product both of more individuals choosing to commit crimes and public policy choices that favour imprisonment.

In this chapter, we argued that crime is a choice that individuals make when they deem it to be in their best interests. Their understanding of their interests is coloured by a range of factors, including some of the characteristics described in Chapter 2. We saw that there is good reason to believe that there are more people now choosing to commit crime and this is contributing to the rising prison population.

While more crime may be being committed, more people in prison is not a necessary consequence. There are also policy decisions that are contributing to the increase. The evidence suggests that the bail and parole have become more difficult to get and this has led to an increase in the prison population. Courts have also been imposing longer sentences, which could be a contributing factor as well, although it should be noted that prisoners are serving on average the same amount of time as in the past.
4. Reform Directions

The prison population and its attendant costs are growing. Up to 46 percent of people being incarcerated committed nonviolent offences. And governments are making public policy choices that promote the use of incarceration as a punishment. It is therefore fair to question whether all the resources being devoted to criminal justice are being used efficiently and beneficially.

It is our contention that any consistent approach to reducing incarceration begins with addressing the large number of nonviolent offenders in Australian prisons because:

- Punishments must be proportional to the offence; and
- The primary purpose of prison is the protection of the community.

The guiding principle of punishment is proportionality: the punishment must fit the crime. The growing prison population implies that the number of people or offences for which prison is appropriate has grown. But there is no reason to expect that this is the case. Instead, the growing prison population reflects a widespread failure in the criminal justice system to respect the principle of proportionality.

Reducing the prison population is a matter of rationalising which criminals should and should not be subject to incarceration. We argue that the general rule upon which to conduct this rationalisation is the distinction between violent and nonviolent crime. Prison is proportional for the violent and antisocial because they are the only ones who need to be isolated from the community, which is a unique function of prison.

Nonviolent offenders are less likely to pose a physical risk to the community and therefore less likely to need to be isolated in prison. Furthermore, they can still be punished in a way that fits their crimes, even without prison.

This chapter describes how the principle of proportionality informs criminal punishment and makes some observations about the implications of this principle. We argue that proportionality implies that as a general rule nonviolent offenders should be given punishments other than prison, provided there is reason to believe they will respond to those punishments. We go on to discuss alternatives to prison, the proper limits of the criminal law, and strict liability issues. We also argue that it follows from proportionality that policing should be the focus of justice reinvestment efforts.

The principle of proportionality

Proportionality in sentencing is the principle that the punishment must fit the crime. Typically, this involves matching the severity of the punishment to the harm caused by the defendant, taking into account any mitigatory factors like remorse and prior good character. By linking punishment to the harm caused by the offender, this principle places a limit on the extent to which society can use criminal justice to pursue its interests, including its safety.

This principle has been criticised for being uncertain. Any judgement of proportionality is necessarily only approximate. Criminal justice does not operate as a market and as such there is no system akin to pricing whereby we can measure the preferences of criminals and victims. In place of this information we have only the priorities of the government, which are usually
politically determined and therefore operate as distortions of the criminal justice system.\textsuperscript{114} For example, politicians need achievements to campaign on when running for re-election and therefore favour the creation of new laws and new penalties to the rationalisation of laws and penalties.

However, while this political reality is undeniable, it is also true that the principle of proportionality has intuitive force: we do not impose the death penalty for jaywalking, no matter how we might desire to deter jaywalkers. Unless it can be seriously argued that the strongest punishments can be justifiably applied to the most trivial offences, the argument around proportionality is one of degree, not principle.

Taking this principle seriously has a number of implications for how nonviolent criminals should be punished. The rest of this chapter makes some observations about policy changes that follow from this principle.

**The purpose of prison is to protect the community**

**Violent offenders should receive jail sentences**

Prison serves a number of purposes. It satisfies the community’s need for retribution and it deters people from committing crime. For those who are given custodial sentences, prison can also be a part of their rehabilitation and reintegration into society. But prison’s main function is to isolate individuals whose liberty threatens the safety and tranquillity of the community.

There are a variety of philosophical arguments for why this should be so,\textsuperscript{115} but it is sufficient for our purposes to note that community


safety is the only aim of criminal justice that cannot be achieved by other reasonable means. Rehabilitation can be facilitated through community-based programs and deterrence can be achieved through inflicting other types of hardship on offenders. Society might content itself with other forms of punishment. But while partial measures like home detention offer some security, the only way for the community to be safe from a criminal—capital punishment aside—is a prison.

For this reason, prison is a proportionate punishment for those criminals who pose a risk to the community because they have demonstrated a propensity for violence or a pattern of anti-social behaviour. Physical harm demands a harsher punishment for two reasons:

• Physical harm causes suffering throughout the healing process, which may never end. This is a cost to the victim that cannot be repaired.
• Physical harm imposes additional costs on the public that other harms do not, such as fear.

Nonviolent offenders should have the chance to avoid jail

The inverse of the above is that, if prison is for community protection then, as a general rule, wherever public safety can be reasonably assured, nonviolent offenders should, in the first instance, be punished by means other than prison.

There are a range of punishments that might be imposed on nonviolent offenders in lieu of prison, ranging from home detention to professional disqualification to fines. These punishments can be levied to a degree sufficient to deter reoffending just as effectively as a prison sentence.

As noted above, almost half of Australian prisoners were charged with or convicted of nonviolent offences. Many of these individuals do not pose a physical threat to the community and as such they may not need to be isolated through imprisonment. Recognising that they may not need to be in prison would be the boldest reform we could make.

The expansion of home detention laws in South Australia are a good example of what can be done in this area. In May 2016, the South Australian parliament passed the Statutes Amendment (Home Detention) Bill 2015, enabling judges to permit low-risk, nonviolent offenders to serve their sentences in home detention and some suitable prisoners to be released into home detention earlier in their sentences.

Reform direction 1

» Extend the use of alternative punishments like fines and home detention for nonviolent, low-risk offenders.
Justifying additional punishment for recidivism

It has been argued that stronger punishments for recidivists are a form of double punishment. Mirko Bagaric has written that:

> Each time a person is sentenced for an offence, they should be principally sentenced for that offence only, not for what they have done in the past—they have already been punished for this. To do otherwise involves either punishing a person for their supposed “character” (which is far too nebulous a commodity to justify inflicting pain on a person through the process of criminal sanctions) or double punishment.116

Applying this principle in conjunction with the argumentation above would mean that repeated nonviolent offending would not justify incarceration. This is certainly a counterintuitive result; we would expect that punishments would get harsher as a pattern of offending emerges.

The question of whether prior offending should be an aggravating factor in sentencing has been debated for more than a century. It is beyond the scope of this paper to attempt to resolve this question. We do not need to know whether longer prison sentences for recidivists than for first-time offenders are justified; we need only to note why in the case of recidivists prison might be preferred to other punishments which we might apply to first-time offenders.

As we have seen, Australian prisons are not very effective in preventing reoffending by released inmates. Australian performance in this respect mimics the experience of other jurisdictions.117 This suggests that prisons are not effective at rehabilitating criminals. The high proportion of Australian prisoners who have been imprisoned before also suggests that prison does not work especially well as a specific deterrent. If it is possible that the public’s need for retribution can be satisfied through alternative punishments, this leaves only community safety as a possible justification for imprisoning recidivists.

A pattern of antisocial behaviour can be taken as an indication that an offender is not responding to punishment. We can say that the recidivist has shown through his repeated offending that the only way the community will be rid of his criminality is to put him in prison. Prisons may not prevent future offending by released inmates but prisoners cannot further harm the community for as long as they are imprisoned. This is sufficient reason to prefer prison to alternative punishments in the case of recidivists.

Community safety comprises both physical safety and freedom from criminality. Where the latter interest is infringed upon by an offender who has shown that he won’t respond to other punishments, as in the case of recidivists, then prison is a proportionate response.

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117 For example, a 2002 meta-study by the Canadian Solicitor-General found that imprisonment slightly increases the risk of reoffending. P. Smith, C. Goggin, & P. Gendreau (2002), The effects of prison sentences and intermediate sanctions on recidivism: General effects and individual differences, User Report 2002-01, Solicitor General Canada.
The use of strict liability should be limited

Traditionally, the criminal law has required that a guilty act (actus reus) be accompanied by a guilty mind (mens rea). There are however a great many regulatory offences that have eliminated the mental element, such that an offender can be held accountable for an act even if he did not intend to break the law. To choose just one example, in Australia you can be sentenced to up to seven years in prison for damaging a protected wetland, whether or not you knew the wetland was protected.

Strict liability regulatory offences can impose prison sentences on individuals who have demonstrated no intent to cause harm. It is difficult to see incarceration for these offenders as necessary for the protection of the community and its norms.

In the United States, legal reformers have begun to push for the restoration of mens rea in the criminal law. Reformers have proposed a law that would make all federal laws in that country that are silent on intent to be held to imply a requirement of a knowing state of mind, judged objectively with a “reasonable person” test.118

This effort has met with some resistance. Its opponents argue that it would make it much more difficult to prosecute those whose conduct adversely affects the environment, financial systems, public health. However, with the expanding number of criminal offences in the US (the exact amount is unknown but may exceed 5000 at the federal level alone119) it is impossible to know the exact range of conduct that is now considered criminal, and therefore difficult to say that everyone in breach of these laws should be punished, much less punished with incarceration. Nonetheless, opponents of mens rea reform have threatened to walk away from bipartisan criminal justice reform over the issue, seeing it as unjustly favoring corporate interests.120

The exact contribution that strict liability makes to over-criminalisation in Australia, and thus to the growing culture of incarceration, requires further study. However, it is clear that in order to address the rising incarceration rate, we must be more consistent in our application of the principles of punishment, paying closer attention to the real purpose of prison and the circumstances in which it is unnecessary. This implies that mens rea reform should be considered as part of broader criminal justice reform efforts.

Reform direction 2

» Restore the requirement of mens rea for regulatory criminal offences. Where strict liability is imposed, alternative punishments to prison should be applied, provided the offender has not demonstrated a propensity for violence or anti-social behaviour.

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119 Ibid
Further implications of proportionality for nonviolent offenders

Deterrence is only a subsidiary consideration in punishment

Proportionality implies that deterrence plays only a subsidiary role in determining the appropriate level of punishment for a criminal. If punishment is guided by the harm done by the offender, then future acts, either by the offender himself or by other individuals, do not seem to be relevant.

This result can be avoided if we construe the harm done by the offender to include not just the damage done to the victim but to the societal norm which the law expresses. We can then see how deterrence might justify a stiffer punishment. But given that a single crime is unlikely to do much damage to a societal norm, the amount that might be added to a sentence in the name of deterrence is small.

In practice, this implies that victimless crimes such as drug use should only carry slight penalties, and certainly not prison sentences.

Reform direction 3

» Do not punish victimless crimes with incarceration.

White-collar crime should not be treated exceptionally

The above arguments about how proportionality is to be assessed and about the limits of deterrence are often disregarded in the case of so-called white-collar crime.

The term "white-collar crime" was invented by Edwin Sutherland for expressly political purposes.121 He believed that the upper classes of society committed just as much crime as the lower classes but were punished and stigmatised much less. White-collar crime is therefore founded on the idea that special attention needs to be given to a particular group, whose behaviour needs to be constrained by exceptional legal means.

Today, white-collar crime is usually taken to refer to corporate crimes, typically where there is a breach of trust. It includes such offences as:

• Insider trading
• Mishandling of trust accounts
• Regulatory infractions
• Director liability

These crimes tend to attract very heavy penalties.122 Because white-collar offenders are typically nonviolent and generally don’t require rehabilitation, their incarceration is normally justified by the public’s desire for retribution and the need to deter similar acts. Given that retribution can be gotten with different punishments, the weakness of general deterrence as a justification for

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122 For example, insider trading is punishable by up to 10 years in prison. ASIC notes that penalties for corporate crimes in Australia are generally similar to those in comparable jurisdictions. Australian Securities and Investments Commission (2014), Report 387: Penalties for corporate wrongdoing, March 2014
incarceration, and the lack of risk posed to the community by these offenders, there is good reason to consider incarceration for white-collar crime to be disproportionate and unnecessary.

The strength of this proposition is obscured by the powerful stigma that activists have successfully attached to this class of offenders. In practice, this stigma is the main reason for the heavy custodial penalties that these crimes attract. For example, white collar crime is also one of the reasons that mens rea reform is so controversial. Opponents of that reform are particularly concerned that it would hinder the prosecution of corporate crime. That is, they explicitly argue that the state needs to be able to prosecute these crimes more easily than others. This is indicative of the general inconsistency with which white-collar crime is considered.

The criminal justice system should have incentives for restitution

Of the alternatives to prison, restitution is the only punishment that explicitly puts the needs of the victim first; before inquiring into any other interests of justice, where possible we ought to incentivise making the victim whole.

This argument is strengthened by the observation that incarceration actually requires the victims of crime to pay to punish the victim as their taxes are spent on incarceration. And given the host of issues prisoners face upon release, such as poor health and employment outcomes, there is likely to be a greater impost on the victim through publicly funded health care and unemployment payments.

Some people argue that fines and restitution amount to letting rich people buy their way out of prison. But fines can help the state recover the costs of justice, and restitution is of benefit to the victim. The concern that people with the means to pay these penalties will avoid jail is offset by these benefits. It has been argued that the possibility of avoiding prison operates as an incentive to offenders to make restitution where otherwise they would not. Moreover, the state could use alternative collection methods, such as garnishing wages and reducing benefits. Doing so would allow courts to impose fines and restitutions orders on a wider range of offenders.

Undoing the harm caused by the offending is a good first step towards proportionality. Additional punishment for the inconvenience to the victim, the cost to the state, and to cause pain to the offender will likely still be necessary, but this does not necessarily imply a prison sentence.

Reform direction 4

» Allow offenders to make restitution to their victims and take this into account in sentencing. Broaden the applicability of fines and restitution by enabling alternative collection mechanisms, such as garnishing wages and reducing government benefits.

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125 That said, where restitution is made impossible by deliberate actions taken by the defendant to thwart recovery of ill-gotten gains, this may well indicate in those cases that alternatives to prison would be futile, and fail to measure up to the harm caused.
Strengthening the police could be effective justice reinvestment

Gary Becker initiated a long line of research which applied rational choice theory to why crime occurs, and how to achieve cost-effective reductions to crime. The basic framework is that crime is a function of costs and benefits. Criminal justice policy can raise the costs of crime in two ways: raising the probability of being arrested, and increasing the penalty of crime upon arrest (i.e., the length of a jail sentence).

Under certain assumptions, an implication of this framework is that an almost infinite combination of probabilities of arrest and severity of punishments can be made to achieve a given crime rate. Becker suggested that resources could be saved by spending less on detection and arrest, compensated for by longer prison sentences to leave the overall expected cost—and therefore the supply of crime—unchanged.

This framework continues to form the foundation of analysis of criminal justice. But a key underlying assumption of Becker’s original paper can be challenged: that the average criminal has similar preference for risk and future discounting as the average person in society more generally. In fact, there is some evidence to suggest that the average prisoner discounts the future heavier than does the average person (see chapter 3 for a fuller discussion of this).

This implies that increasing the expected cost of crime through the probability of arrest, rather than increasing sentence lengths, could more cost-effective than vice-versa.126 And Alex Tabarrok has argued that it follows from this observation that punishment for crime should be “quick, clear, and consistent”.127

This argument has one clear practical consequence. It is common to talk of justice reinvestment128: the idea that expenditures on prisons can be more profitably deployed to address the root causes of crime. What the evidence suggests is that a particularly effective reinvestment would be in policing.

Note however that this is not an argument for spending more money policing matters that do not rightly fall within the purview of the criminal law. That is, this observation is limited by the earlier observation that the current bounds of the criminal law are far too expansive. Moreover, it can be expected that tightening those bounds would make resources dedicated to policing more effective.

Reform direction 5

» Redirect resources saved from incarcerating fewer criminals — particularly low risk, nonviolent criminals — to the police, strengthening their capacity to deter and detain criminals.

A related point is that policing of people on bail or parole should also focus on detecting more breaches and imposing weaker punishments more frequently. The consequences of breaching parole, in particular, are often severe, with the parolee returned to prison to serve out the remainder of his sentence. It has been argued that this severity leads to parole officers and judges trying to avoid punishing breaches until a pattern of breaches emerges. This is perceived by parolees as arbitrary: some breaches go unpunished while others result in prison. The alternative

126 See, for example, “Longer jail sentences do deter crime, but only up to a point”, The Economist, 29 March 2016.
127 Alex Tabarrok (2015), “What was Gary Becker’s biggest mistake”, Marginal Revolution, 16 September 2015
128 Senate Legal and Constitutional Affairs References Committee (2013) op. cit.
is to punish all breaches with milder punishments, such as detention in holding jails or fines.\textsuperscript{129}

As we have seen, a large contributor to the increase in Australia’s prison population is constituted by people on remand, and parole has become more difficult to obtain. Changing the conditions of bail and parole may make them more accessible to more offenders and more acceptable to the courts.

**Reform direction 6**

- Investigate amending bail and parole laws to impose certain but mild consequences on all breaches.

\textsuperscript{129} McArdie (2015) op. cit.
5. Conclusion

Australia puts a lot of people in prison. The incarceration rate is higher now that at any point since just after federation. In the last 40 years the number of people in Australian prisons has increased by more than 300 percent. We have proportionally more people in prison than almost all comparable countries, and the number is increasing every year.

A rising incarceration rate is not a problem in and of itself. There are a number of criminals who need to be separated from the community. Incarceration only becomes a problem if it is overused—that is, if the public is paying to lock up individuals who could safely and more productively be punished in different ways. In Australia, along with the rising incarceration rate and prison population, we see large numbers of nonviolent offenders being imprisoned, high levels of recidivism, and a persistent level of crime.

The price of this approach is substantial. Almost $4 billion is spent on prisons each year. And then there are the downstream effects: unproductive citizens, broken families, and repeat offending. On all standards—public safety, economics, and morality—the rapid rise of incarceration in Australia demands investigation.

Unfortunately, one of the main contributors to this trend is simply that more individuals are choosing crime more frequently. Research in recent decades has yielded real insight into how the criminal mind works, by focusing on criminality as an option that may be adopted by individuals who perceive, for whatever reason, that it is in their interests. In short, crime is a choice.

The people in Australia's prisons tend to share a particular set of characteristics. They have less formal education than their peers and they have been employed less in their lives. Many have been among the country's long-term unemployed. Along with this, prisoners are more likely to use illicit drugs. They are also more likely to be Indigenous Australians.

These correlations can easily be mistaken for causes. But while these factors may contribute to the reasoning behind criminal activity, they are not definitive. Criminals, like everyone else, determine their preferences and act accordingly, which is why they can be held to account by the criminal justice system. What this suggests is that to reduce crime, we need to make it less attractive. In this respect, reducing crime is more than simply a matter for criminal justice reform, and likely involves reforms in workplace relations and the education system that promote individual agency and personal responsibility.

Nonetheless, there have been some criminal justice policy choices made by Australian governments that favour prison over alternative punishments and approaches. Bail has become more difficult to get, and as a result Australia’s remand population has ballooned. Similarly, parole is being granted less frequently and judges are handing down longer sentences. Australians and their governments are both, in their own ways, choosing prison at higher rates than in the past.

We can begin to address this change by thinking more seriously about what prisons are really for and in which circumstances it is necessary or desirable to put people in them. Prisons are primarily for the protection of the community. This implies that the prison population should be constituted of violent and antisocial offenders. Yet 46 percent of prisoners are incarcerated for nonviolent crimes, at an approximate annual cost of $1.8 billion. This in turn raises the question
of proportionality: whether prison is a punishment that fits all of the crimes to which it is applied. Where the threat to the community is low, alternatives to prison should be preferred, both in order to respect the moral force of proportionality and to ensure that the limited resources of the criminal justice system are deployed effectively.

It follows too from these principles that the criminal law should not sprawl into domains traditionally governed by the civil law. In cases where the remedies available to civil law courts would suffice, the criminal law is not needed. Relatedly, since the criminal law’s aim is to protect society from particular individuals, and since prison is the punishment uniquely suited to providing such protection, it makes sense that those individuals should have demonstrated some ill intent before the community isolates them. Restoring the requirement of mens rea to many regulatory offences would signal the importance of intent to the criminal law, better capturing the moral argument for punishment, which rests on the free choice of the criminal.

And because crime is a choice, we know that deterrence plays a role in criminal justice. It cannot, however, be a reason to forget about proportionality in sentencing. Such a trade-off is not necessary anyway. We know that criminals respond more to the chance of being caught than they do to the harshness of the punishment that awaits them if they are apprehended. The best way to deter crime is to make it a less attractive choice by increasing the chance of being caught. This means that the savings we make by being more judicious in our use of prisons can be usefully reinvested in the police force.

None of this is to say that nonviolent criminals should not be punished. And it is certainly not to suggest leniency for the violent. As this report very clearly shows, however, Australia is spending a fortune on imprisoning some people to little or no benefit.

This report is a suggested beginning for a reform process that is badly needed. Society requires standards, and we should never shirk from enforcing our laws. But for safer streets and more prosperous lives, we need to think carefully about how we impose the law on those who would choose to break it.
Government reports

Adult Parole Board of Victoria (2015), Annual Reports 2005-6 and 2014-15
Australian Bureau of Statistics (2001), Year Book Australia 2001, Table C8.11
Australian Bureau of Statistics (2011), Australia and New Zealand Standard Offence Classification, Category 1234.0
Australian Bureau of Statistics (2015a), Australian Demographic Statistics December 2015 Category 3101.0
Australian Bureau of Statistics (2015b), Corrective Services, Category 4512.0 December Quarter 2015
Australian Bureau of Statistics (2015c), Criminal Courts Australia, Category 4513.0
Australian Bureau of Statistics (2015d), Prisoners in Australia 2015, Category 4517.0
Australian Bureau of Statistics (2015e), Recorded Crime—Offenders 2014-15, Category 4519.0
New South Wales Health Department (2009), New South Wales Inmate Health Survey 2009
Senate Legal and Constitutional Affairs References Committee (2013), Value of a justice reinvestment approach to criminal justice in Australia, June 2013
Smith, RG et al (2014), Counting the cost of crime in Australia: A 2011 estimate, Australian Institute of Criminology
United Kingdom Ministry of Justice (2012a), Accommodation, homelessness and reoffending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey
United Kingdom Ministry of Justice (2012b), Prisoners’ childhood and family backgrounds
United States Department of Justice (1988), Survey of Youth in Custody 1987, September 1988

Victorian Ombudsman (2015), Investigation into Rehabilitation and Reintegration of Prisoners in Victoria, September 2015
Western Australia Parole Board (2006), Annual Report 2006
Wisconsin Department of Health and Social Services (1994), Division of Youth Services, Family Status of Delinquents in Juvenile Correctional Facilities in Wisconsin, April 1994

Monographs and reports

Australian Institute of Health and Welfare (2015), The Health of Australian Prisoners
Bennett, Dr. William J. (1994) Index of Leading Cultural Indicators, Broadway Publishers
Griffith Institute for Social Research (2008), Literacy Unbarred: Investigating the Literacy and Numeracy Levels of Prisoners Entering Queensland Correctional Centres
Hudson, Sarah (2013), Panacea to Prison? Justice reinvestment in Indigenous Communities, Centre for Independent Studies
New York: Russell Sage Foundation
Kevin, Maria (2013), Drug Use in the Inmate Population — prevalence, nature and context, Corrections Services NSW, Research Publication No. 52, June 2013
The Pew Charity Trusts (2010), Collateral Costs: Incarceration’s Effect on Economic Mobility, The Pew
Charitable Trusts


Articles


Doyle et al. (2015), ‘Alcohol and other drug use among Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander men entering prison in New South Wales’ Health and Justice, Vol 3 2015


Journalism


“Longer jail sentences do deter crime, but only up to a point”, The Economist, 29 March 2016


Alex Tabarrok (2015), “What was Gary Becker’s biggest mistake”, Marginal Revolution, 16 September 2015

INDIGENOUS AUSTRALIANS AND THE CRIMINAL JUSTICE SYSTEM

Andrew Bushnell, Research Fellow

September 2017
INDIGENOUS AUSTRALIANS AND THE CRIMINAL JUSTICE SYSTEM

Andrew Bushnell, Research Fellow

About the author

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Executive summary

This paper provides an overview of national statistics pertaining to the high level of incarceration of Indigenous Australians and the socioeconomic background to that phenomenon. The paper goes on to consider how to address this issue by applying the traditional criminal justice principles of equal justice, personal responsibility, and fair punishment.

National averages are useful for identifying broad trends. However, these trends are not consistent across jurisdictions and communities and the below should be read with that in mind.

The incarceration of Indigenous Australians

Government data shows that when compared to the non-Indigenous, Indigenous Australians are:

• Imprisoned at more than 12 times the rate
• More likely to serve short sentences of imprisonment
• More likely to be imprisoned or charged with assault or another violent offence
• When imprisoned, more likely to have been imprisoned previously

These statistics emerge from within a context of socioeconomic disadvantage, with Indigenous Australians being:

• Less likely to finish school
• Subject to greater instability, abuse, and violence at home
• More likely to exhibit risky drinking habits
• More likely to be unemployed and to have a low income

Additionally, the demographics of the Indigenous population exacerbate some of these trends, with the Indigenous population being:

• Younger on average than the rest of the Australian population
• Much more likely to live in remote and very remote areas, often because of cultural and spiritual commitments and often with first languages other than English.

All of these factors make alternatives to incarceration, like home detention, work orders, and rehabilitation orders more difficult for government to deliver to Indigenous Australians than to the non-Indigenous.
Applying criminal justice first principles to the incarceration of Indigenous Australians

The criminal law in Australia is founded on certain principles that cannot be compromised without calling into question the legitimacy of the system itself. Among these are:

• The criminal law’s authority must be universal. All Australians should know what is permitted and what is prohibited, and should be able to rely on the law constraining everyone in the same ways.
• The criminal law is inherently normative: it is connected to a particular idea of justice and the good. This can be seen in the concept of corrections, which implies that there is a correct way to behave and that society can permissible coerce compliance with that standard.
• Protecting the universality and normativity of the law depends on equal justice, which is defined as being treated formally the same by the sovereign and the institutions of state.

Criminal justice reform must be consistent with these principles. In practice this means:

• Community safety is the highest priority. The criminal law serves to vindicate individual rights and society’s interest in seeing those rights protected.
• Personal responsibility: our criminal justice system is predicated on the autonomy of individuals. While disadvantage shapes individuals’ perceptions of the incentive involved in crime, it does not obviate their responsibility for their actions.
• Punishment is integral to criminal justice. Punishments should be retributive, proportional, and consistent, and take into account all the circumstances of the offending and the harm caused to the victim and society.

Governments should do more to ensure Indigenous Australians can access our system of universal justice through:

• The provision of interpreters where required
• The establishment of residential alternatives to prison in major population centres
• Providing job skills and employment programs to prisoners
• Improving the legal literacy of Indigenous communities

Finally, the limits of the criminal justice system must be acknowledged. The socioeconomic disparities seen in many Indigenous communities cannot be solved by criminal justice reform. Over the longer-term, it is the actions of Indigenous Australians within their communities that will make the most positive impact. Government can help to facilitate this work by making sure that communities are well-policed and safe and by fostering opportunities to participate in the economy through employment.
Introduction

There is growing awareness that criminal justice in Australia is not achieving the results in terms of community safety that our citizens rightly expect.

Incarceration in Australia has grown rapidly in the past decade. From 2007 to 2016, the prison population grew by 43 percent, and this year will exceed 40,000 people. The adult incarceration rate has risen 23 percent to a record high of 208 per 100,000 adults. Expenditure on prisons is more than $3.8 billion per year, with Australia spending more per prisoner than all but three other developed countries. But recidivism rates are high: 58 percent of prisoners have been in prison before. And many Australians report in international surveys that they don’t feel safe in the suburbs at night.

It is impossible to address this issue without examining the incarceration of Indigenous Australians. More than a third of the growth in the prison population over the past decade was caused by the incarceration of Indigenous offenders. Indigenous Australians offend at a higher rate, and are imprisoned at a rate that vastly exceeds even the highest rates in the developed world. These facts take place within a context of severe disadvantage. Factors known to correlate with crime, like unemployment, low educational attainment, and exposure to crime and abuse are on average higher in Indigenous communities.

In part, this disadvantage is a product of Australia’s colonial history, which has been an unchosen revolution for the inhabitants of the land and their descendants. This is true notwithstanding the tremendous wealth and prosperity modern Australia affords for most of its citizens, and Australia’s status as one of the world’s most stable and fair liberal democracies.

For this reason, Indigenous policy is the most sensitive topic in Australian politics. But in our meetings with governments and civil society organisations working in this area, the Institute of Public Affairs has been struck by the determination of people across the country to address this issue in a considered manner.

This paper aims to contribute to this debate by providing a perspective that, while mindful of Indigenous disadvantage, does not believe it to be determinative. This paper contends that the high level of Indigenous offending and incarceration can be addressed in a manner consistent with the traditional bases of the criminal justice system: community safety, fair punishment, and personal responsibility. It contends that to do otherwise is to diminish the agency and dignity of Indigenous Australians and perpetuate a racial separatism that is not in the long-term interests of Australians and national solidarity.

This paper is in two parts:

- Part 1 provides a statistical overview of Indigenous incarceration and the socioeconomic factors correlated with it.
- Part 2 provides an application of traditional criminal justice principles to the challenge posed by the high level of Indigenous incarceration.
Part 1: An overview of the incarceration of Indigenous Australians

Australia has a rising incarceration rate overall, with the figure for the total population now at its highest since Federation, at 208 per 100,000. But the rapid increase in the national rate has been driven by the extraordinary level of incarceration among Indigenous Australians. One third of the growth in the prison population between 2007 and 2016 was caused by the incarceration of Indigenous Australians.¹

The adult incarceration rate of Indigenous Australians is more than 12 times that of non-Indigenous Australians. Despite living in one of the world’s most developed countries, Indigenous Australians are incarcerated at a rate more than two and half times that of the United States incarceration rate, which is itself a massive outlier among the rich countries of the world.²

The first part of this section provides a statistical analysis of Indigenous incarceration, including the rates of incarceration, offending, reoffending, and victimisation, along with types of offending and average sentence lengths. This analysis is not intended to be comprehensive but provides clear evidence of the scale and scope of the issue.

The second part of this section provides a statistical analysis of many social factors known to be correlated with crime. These factors are more present among Indigenous Australians.³ The aim is to place Indigenous incarceration statistics within the broader social context within which many (though of course not all) Indigenous Australians live. This context will inform the discussion in Part 2 of how Australia’s traditional criminal justice principles should be applied to Indigenous Australians.

This is a national overview. While there are many trends that are consistent across Australia’s states and territories, the situation in each area is unique and may depart from national trends in some respects both in terms of the data and in what contributes to those results.

Finally, this is an overview of adult prisoners only, unless otherwise noted.

---

1 Australian Bureau of Statistics, Prisoners in Australia 2015 and 2016 (2016a)
2 United Nations Office on Drugs and Crime, Statistics on crime (uploaded 13 April 2015) [accessed 27 June 2017]
3 See the discussion in Andrew Bushnell and Daniel Wild, The use of prisons in Australia: Reform directions, Institute of Public Affairs 2016 pp. 19-26
1-1: Incarceration and offending

1-1-1: Prison population and incarceration rate

Key statistics

Table 1: Indigenous incarceration - key statistics 2007 and 2016

<table>
<thead>
<tr>
<th></th>
<th>Indigenous</th>
<th></th>
<th>Non-Indigenous</th>
<th></th>
<th>Total</th>
<th></th>
<th>% change</th>
<th></th>
<th>% change</th>
<th>% change</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2007</td>
<td>2016</td>
<td></td>
<td>2007</td>
<td>2016</td>
<td>% change</td>
<td></td>
<td>2007</td>
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<td>% change</td>
</tr>
<tr>
<td>Number of prisoners</td>
<td>6630</td>
<td>10596</td>
<td>59.8%</td>
<td>20390</td>
<td>28216</td>
<td>38.4%</td>
<td>27224</td>
<td>38845</td>
<td>42.7%</td>
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<tr>
<td>Number sentenced</td>
<td>5100</td>
<td>7337</td>
<td>43.9%</td>
<td>15985</td>
<td>19297</td>
<td>20.7%</td>
<td>21128</td>
<td>26649</td>
<td>26.1%</td>
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</tr>
<tr>
<td>Number unsentenced</td>
<td>1530</td>
<td>3221</td>
<td>110.5%</td>
<td>4405</td>
<td>6871</td>
<td>101.4%</td>
<td>6096</td>
<td>12111</td>
<td>98.7%</td>
<td></td>
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<tr>
<td>Percentage unsentenced</td>
<td>23.1%</td>
<td>30.4%</td>
<td>31.7%</td>
<td>21.6%</td>
<td>31.4%</td>
<td>45.5%</td>
<td>22.4%</td>
<td>31.2%</td>
<td>39.2%</td>
<td></td>
</tr>
<tr>
<td>Incarceration rate per 100k</td>
<td>1923.3</td>
<td>2345.9</td>
<td>22.0%</td>
<td>131</td>
<td>154.4</td>
<td>17.9%</td>
<td>169</td>
<td>208</td>
<td>23.1%</td>
<td></td>
</tr>
<tr>
<td>Percentage violent (total)</td>
<td>60</td>
<td>61</td>
<td>1.7%</td>
<td>49</td>
<td>51</td>
<td>4.1%</td>
<td>51</td>
<td>53.3</td>
<td>4.5%</td>
<td></td>
</tr>
<tr>
<td>Percentage nonviolent (total)</td>
<td>40</td>
<td>39</td>
<td>-2.5%</td>
<td>51</td>
<td>49</td>
<td>-3.9%</td>
<td>49</td>
<td>46.4</td>
<td>-5.3%</td>
<td></td>
</tr>
<tr>
<td>% Most serious offence was assault (total)</td>
<td>32.2</td>
<td>33.4</td>
<td>3.7%</td>
<td>14.1</td>
<td>17.1</td>
<td>21.3%</td>
<td>18.5</td>
<td>21.5</td>
<td>16.2%</td>
<td></td>
</tr>
<tr>
<td>Percentage violent (sentenced)</td>
<td>57.2</td>
<td>58.6</td>
<td>2.4%</td>
<td>47.7</td>
<td>50.8</td>
<td>6.5%</td>
<td>50</td>
<td>52.9</td>
<td>5.8%</td>
<td></td>
</tr>
<tr>
<td>Percentage nonviolent (sentenced)</td>
<td>42.8</td>
<td>41.4</td>
<td>-3.3%</td>
<td>52.3</td>
<td>49.2</td>
<td>-5.9%</td>
<td>50</td>
<td>47.1</td>
<td>-5.8%</td>
<td></td>
</tr>
<tr>
<td>% Most serious offence was assault (sentenced)</td>
<td>28.9</td>
<td>29.8</td>
<td>3.1%</td>
<td>11</td>
<td>13.6</td>
<td>23.6%</td>
<td>15.6</td>
<td>18.1</td>
<td>16.0%</td>
<td></td>
</tr>
<tr>
<td>Percentage violent (unsentenced)</td>
<td>68</td>
<td>66</td>
<td>-2.9%</td>
<td>53</td>
<td>51</td>
<td>-3.8%</td>
<td>56</td>
<td>55</td>
<td>-1.8%</td>
<td></td>
</tr>
<tr>
<td>Percentage nonviolent (unsentenced)</td>
<td>32</td>
<td>34</td>
<td>6.3%</td>
<td>47</td>
<td>49</td>
<td>4.3%</td>
<td>44</td>
<td>45</td>
<td>2.3%</td>
<td></td>
</tr>
<tr>
<td>% Most serious offence was assault (unsentenced)</td>
<td>43.5</td>
<td>41.8</td>
<td>-3.9%</td>
<td>24</td>
<td>24.8</td>
<td>3.3%</td>
<td>28.6</td>
<td>29.3</td>
<td>2.4%</td>
<td></td>
</tr>
<tr>
<td>Percentage: Prior imprisonment</td>
<td>74.3</td>
<td>76</td>
<td>2.3%</td>
<td>51.3</td>
<td>48.8</td>
<td>-4.9%</td>
<td>57</td>
<td>56.2</td>
<td>-1.4%</td>
<td></td>
</tr>
<tr>
<td>Median aggregate sentence (years)</td>
<td>2</td>
<td>2</td>
<td>0.0%</td>
<td>3.5</td>
<td>3.5</td>
<td>0.0%</td>
<td>3</td>
<td>2.3</td>
<td>-23.3%</td>
<td></td>
</tr>
<tr>
<td>Median expected time to serve (years)</td>
<td>1.3</td>
<td>1.2</td>
<td>-7.7%</td>
<td>2</td>
<td>2.2</td>
<td>10.0%</td>
<td>1.8</td>
<td>1.8</td>
<td>0.0%</td>
<td></td>
</tr>
<tr>
<td>Median time spent on remand (months)</td>
<td>2.2</td>
<td>2.4</td>
<td>9.1%</td>
<td>3.1</td>
<td>3.1</td>
<td>0.0%</td>
<td>2.7</td>
<td>2.9</td>
<td>7.4%</td>
<td></td>
</tr>
<tr>
<td>median age (all prisoners) (years)</td>
<td>30.5</td>
<td>31</td>
<td>1.6%</td>
<td>34.1</td>
<td>36</td>
<td>5.6%</td>
<td>33</td>
<td>34.3</td>
<td>3.9%</td>
<td></td>
</tr>
<tr>
<td>Percentage male</td>
<td>90.7</td>
<td>90</td>
<td>-0.8%</td>
<td>93.4</td>
<td>92.8</td>
<td>-0.6%</td>
<td>93</td>
<td>92</td>
<td>-1.1%</td>
<td></td>
</tr>
<tr>
<td>Percentage Indigenous</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>24.4%</td>
<td>27.3%</td>
<td>12.0%</td>
<td></td>
</tr>
</tbody>
</table>
Indigenous prison population and incarceration rate

As a proportion, Indigenous Australians are vastly more represented among the prison population than among the general population. In 2016, Indigenous Australians made up 2.8 percent of the general population, but 27.3 percent of the prison population.\(^4\)

The level of Indigenous incarceration has been increasing in both proportion and absolute numbers for the past decade. Between 2007 and 2016, the Indigenous incarceration rate increased by 31.3 percent and the Indigenous prison population increased by 59.8 percent.

**Figure 1: Indigenous prison population and incarceration rate over time**

![Figure 1](image-url)

The Indigenous prison population is not only rising in absolute terms but as a proportion of the population. The incarceration rate of Indigenous Australians per 100,000 adults has risen from 1787 to 2346—an increase of 31.3 percent. This has contributed to the overall Australian adult incarceration rate rising over the same period from 169 to 208.

These numbers make plain that Indigenous Australians are vastly more likely to be incarcerated than the non-Indigenous. In 2016, Indigenous people were more than 15 times more likely to be in prison than non-Indigenous people.

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\(^4\) Australian Bureau of Statistics, Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 (2016b) and Australian Bureau of Statistics (2016a) op. cit. NB: the incarceration statistics throughout this section are from that latter source unless otherwise noted.
As noted in section 1.2 below, Indigenous Australians are on average younger than the non-Indigenous. When the data is corrected to account for the younger age profile of the Indigenous population, the ratio of Indigenous to non-Indigenous incarceration falls slightly to 12.5.

While the line in Figure 2 for non-Indigenous incarceration looks flat, this is only because of the scale used. In fact, the non-Indigenous incarceration rate rose 17.9 percent over the period, compared with a 22 percent rise among the Indigenous, indicating that Australia’s growing use of incarceration affects the population as a whole.

**Indigenous remandees**

Across Australia, one of the main drivers of the increase in incarceration has been the rapid growth in the number of people on remand.

In 2016, there were 10,596 Indigenous Australians in prison. Of these people, 69.6 percent were under sentence and 30.4 percent were on remand awaiting trial or sentencing. In 2007, the percentage on remand was lower: 23.1 percent. These splits and the change over the ten-year period were similar for non-Indigenous Australians.
Sentence lengths and expected time to serve

One potential cause of the prison population increasing is sentences and time served getting longer. If people are in prison for longer then there is greater overlap between their sentences and those of the newly-sentenced, meaning more people in prison at any one time.

However, for Indigenous Australians, the average sentence length has not changed much over the past decade. In 2007, the median sentence length for Indigenous prisoners was 2 years. In 2016, this figure was unchanged. The median expected time to serve for Indigenous prisoners changed from 1.3 years to 1.2 years.

As Table 1 shows, these figures were all higher for non-Indigenous Australians. This is because Indigenous Australians are more likely to receive short sentences.
The difference between the distribution of the two populations on this measure is attributable to different patterns of offending. This is discussed further in section 1.1.2.

The situation is similar in regards to time spent on remand. The median time spent on remand for Indigenous prisoners increased slightly between 2007 and 2016, from 2.2 months to 2.4 months. Median time spent on remand increased across all classes of offending between 2007 and 2016 except for robbery and extortion.
1-1-2 Types of offence and rates of offending

The level of Indigenous incarceration is inseparable from the level of offending and types of crimes committed by Indigenous offenders.

Offender rates and multiple offending

Data shows that Indigenous Australians offend at a higher rate than non-Indigenous. For states where data is available, the disparity in the number of offenders per 100,000 population aged ten years and over between Indigenous and non-Indigenous is stark and persistent.

Figure 5: Offender rates selected states and territories by Indigenous status

Indigenous offenders are also more likely to be proceeded against more than once in a year. In all states and territories for which data is available, the ABS reports a higher mean number of proceedings per Indigenous offender than per non-Indigenous offender.5

Table 2: Proportion of offenders by number of proceedings and Indigenous status

<table>
<thead>
<tr>
<th>Times proceeded against</th>
<th>NSW</th>
<th>Queensland</th>
<th>South Australia</th>
<th>Northern Territory</th>
<th>ACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>51.0</td>
<td>71.7</td>
<td>49.8</td>
<td>66.7</td>
<td>58.0</td>
</tr>
<tr>
<td>2</td>
<td>21.2</td>
<td>14.6</td>
<td>21.4</td>
<td>17.2</td>
<td>20.0</td>
</tr>
<tr>
<td>3</td>
<td>11.2</td>
<td>5.6</td>
<td>10.9</td>
<td>7.0</td>
<td>10.0</td>
</tr>
<tr>
<td>4</td>
<td>5.7</td>
<td>2.8</td>
<td>6.5</td>
<td>3.7</td>
<td>5.0</td>
</tr>
<tr>
<td>5 or more</td>
<td>10.9</td>
<td>5.4</td>
<td>11.4</td>
<td>5.4</td>
<td>7.1</td>
</tr>
</tbody>
</table>

5 Australian Bureau of Statistics, Recorded Crime - Offenders 2015-16 (2016c)
Most serious offence

Indigenous offenders are significantly more likely than non-Indigenous to have as their most serious offence acts intended to cause injury, unlawful entry with intent, and offences against justice procedure, as shown in Figure 6.

Figure 6: All prisoners (sentenced and unsentenced) most serious offence
Indigenous Australians and the Criminal Justice System

Victimisation

This higher level of offending translates to a higher level of assault victimisation among Indigenous Australians. Indigenous Australians are also more likely to be victims of sexual assault than the non-Indigenous.6 Despite the higher incidence of robbery offences among Indigenous Australians, the non-Indigenous are more likely to be victims of these crimes.

Table 3: Victimisation rates—selected crimes by available state

<table>
<thead>
<tr>
<th>Victimisation rate 2016</th>
<th>Indigenous</th>
<th>Non-Indigenous</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>Assault</td>
<td>1807.8</td>
</tr>
<tr>
<td></td>
<td>Sexual Assault</td>
<td>231.4</td>
</tr>
<tr>
<td></td>
<td>Robbery</td>
<td>20.0</td>
</tr>
<tr>
<td>Qld</td>
<td>Assault</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Sexual Assault</td>
<td>260.8</td>
</tr>
<tr>
<td></td>
<td>Robbery</td>
<td>15.0</td>
</tr>
<tr>
<td>SA</td>
<td>Assault</td>
<td>5128.3</td>
</tr>
<tr>
<td></td>
<td>Sexual Assault</td>
<td>274.6</td>
</tr>
<tr>
<td></td>
<td>Robbery</td>
<td>43.4</td>
</tr>
<tr>
<td>NT</td>
<td>Assault</td>
<td>6243.4</td>
</tr>
<tr>
<td></td>
<td>Sexual Assault</td>
<td>234.8</td>
</tr>
<tr>
<td></td>
<td>Robbery</td>
<td>13.4</td>
</tr>
</tbody>
</table>

There is no clear nationwide trend over the available time series. Uniquely in New South Wales there has been a substantial decrease in assault victimisation, both for Indigenous and non-Indigenous, and the ratio between the two measures is lower (2.6) than in South Australia (6.0) and the Northern Territory (5.9).

Prior imprisonment

Indigenous prisoners are more likely to have been imprisoned before than are non-Indigenous prisoners. And many studies have shown that Indigenous offenders are more likely to be recidivists.7

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7 Jason Payne, Recidivism in Australia: Findings and future research, Australian Institute of Criminology 2007 pp. 90-2
This high number indicates that prisons are on the whole ineffective in correcting the behaviour of the Indigenous Australians who enter into them. This failure is one of the reasons often cited for why addressing the high level of Indigenous incarceration will require a change to the sorts of punishments and programs imposed upon Indigenous offenders. It is worth noting that Australian prisons are not particularly effective in correcting the behaviour of non-Indigenous prisoners either.

1-2: Health and welfare statistics for Indigenous Australians

The high level of imprisonment and offending seen in the previous section takes place within a context of significant social dysfunction within many Indigenous communities. This section sketches some of the indicators of this dysfunction most relevant to possible criminal justice reforms.\(^8\)

1-2-1: Demographics

Age profile

Figure 8: Proportion of prison population by age group and Indigenous status

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\(^8\) Unless otherwise noted, the data in this section is from: 
Australian Institute of Health and Welfare, The health and welfare of Australia’s Aboriginal and Torres Strait Islander peoples 2015
Youth is associated with criminal offending. Figure 8 shows the distribution of Australian prisoners across age ranges by Indigenous status. It shows that prisoners are more likely to be young, and this is especially true for Indigenous prisoners. Across Australia, 52 percent of prisoners are under the age of 35. This rises to 63 percent for Indigenous prisoners.

Because young people are more likely to commit crime, populations with a younger age profile will likely demonstrate more criminality. Some part of the higher level of offending and incarceration among Indigenous Australians is attributable to the younger average of this cohort.

**Figure 9: Age profile by Indigenous status**

Prisoners are overwhelmingly male: 90 percent of Indigenous prisoners, and 93 percent of non-Indigenous prisoners, are male. It is crucial for public safety that young people, and in particular young men, are channelled into productive activity, reducing the incentive to commit crime.

**Remoteness and culture**

Indigenous Australians are more likely to live in remote and very remote areas. As shown in the previous sections, socioeconomic factors relevant to crime are more present in these communities. The presence of Indigenous Australians in these areas is often a product of cultural and familial attachments.

Indigenous Australians are more evenly spread across the nation’s cities, regions, and remote areas. 34.8 percent live in major cities, less than half the rate of non-Indigenous. And 13.7 percent of Indigenous Australians live in very remote areas, compared to just 0.5 percent of non-Indigenous. Such is the difference in distribution that in very remote areas, Indigenous Australians, who are 2.8 percent of the total population of the country, are 45 percent of the population in those areas. The greatest numbers of Indigenous Australians living in remote and very remote areas are in the Northern Territory, Western Australia, Queensland, and South Australia. In the Northern Territory more than half live in very remote areas.
Across the country, 72.8 percent of Indigenous Australians report that they recognise their traditional homelands, with 24.9 percent still living on such lands. In very remote areas, these figures are 90.9 percent and 51.7 percent. The cultural significance of country, especially for those Indigenous Australians who still live there, is a complicating factor for criminal justice: incarceration separates Indigenous offenders from the practice of their culture, which some argue is counterproductive for their rehabilitation. Remoteness also makes the delivery of non-custodial punishments and rehabilitation services more difficult.
The continuation of culture includes the use of languages other than English as primary languages. Eleven percent of Indigenous Australians speak a language other than English as their main language at home. This figure is 60 percent in the Northern Territory.

**Figure 11: Cultural ties**
- Red: Recognises and lives on homelands/traditional country
- Light grey: Recognises but does not live on homelands/traditional country
- Dark grey: Does not recognise homelands/traditional country
- Blue: Total
1-2-2: Socioeconomic factors

Educational attainment

Unfortunately, many Indigenous Australians are not finishing school. The reasons for this are complex, and some relevant statistics are discussed below. It is apparent that the energies of young Indigenous people are not being directed towards education and the benefits that it brings later in adulthood. However, some improvement has been made, with today’s 20-24 year-old cohort more likely to have finished school than those in the 25-65 cohort, with the Year 12 retention rate rising since the turn of the century.

Figure 12: Highest year of schooling completed by Indigenous status and age cohort

While at school, Indigenous children are more likely to be developmentally vulnerable than non-Indigenous children, meaning that they score in the lowest 10 percent in one or more domains of testing, and have lower attendance rates.
Home life

Educational achievement is strongly-linked with a child's home life. Some of the strongest predictors of children’s performance at school are out-of-school factors like home environment, socioeconomic status, parental involvement, and family structure. These factors are also themselves linked with offending.

Unfortunately, Indigenous families are more likely to underperform on measurements of these factors.

Studies have shown that criminals are more likely to come from single-parent households. Indigenous families are more likely to be single parent—in 2015, the Australian Institute of Health and Welfare found that 21 percent of Indigenous households are one-parent with dependent children, compared to 6 percent of non-Indigenous households.

Indigenous households are also more likely to contain multiple families. The 2016 census showed that 5.1 percent of Indigenous households had multiple families, compared to 1.8 percent of non-Indigenous households. Relatedly, the 2011 census found that 13 percent of Indigenous households were overcrowded, compared to 3 percent of non-Indigenous households.

An ABS survey in 2014-15 found that Indigenous people are more likely to be in rental accommodation, and therefore have less stable housing arrangements, and their homes are more likely to be missing important amenities. A 2014-15 survey of Indigenous Australians found that 67 percent over the age of 15 were living in rented properties, more than double the rate (29 percent) for non-Indigenous. Twenty-eight percent of Indigenous Australians lived in properties with major structural problems, and 15 percent lived in houses that lacked at least one basic component of a healthy environment, such as a washing facilities, clothes and bedding, waste disposal, and the safe storage and preparation of food. All of these issues were more present in remote communities than in urban and regional centres.

The problems in these households are related to, and compounded by, the increased likelihood of alcohol abuse and domestic violence.

According to the 2012-13 Health Survey, Indigenous Australians are more likely than non-Indigenous to abstain altogether from alcohol. But Indigenous Australians who do drink are more likely to drink in ways that pose a risk to their health in the long-term:

- 37 percent of Indigenous Australians exceeded national binge drinking guidelines, exposing themselves to higher risk of short-term harm (compared to 27 percent of non-Indigenous).
- While Indigenous and non-Indigenous exceeded the long-term risky drinking guidelines at the same rate, Indigenous Australians were more likely to be in the “high risk” category (6.3 percent to 4.6 percent).

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10 Bushnell and Wild 2016 op. cit. pp. 19-22
11 Australian Institute of Health and Welfare, Housing circumstances of Indigenous households: Tenure and overcrowding 2014 p. 18
12 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, 2014-15
13 Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey 2012-13 Table 14.3
14 Australian Bureau of Statistics (2013) op. cit. Table 13.3
A 2010 study found that harmful alcohol abuse was twice as prevalent among Indigenous Australians as among the non-Indigenous. A separate AIC study found a clear link between alcohol and violence.\(^\text{15}\)

The abuse of alcohol is linked with offending generally. In a 2012 study by the Australian Institute of Criminology (AIC), 30 percent of detainees reported a link between drinking and the offences they had committed.\(^\text{16}\) A 2017 study by PriceWaterhouseCoopers put this figure at 90 percent for Indigenous offenders.\(^\text{18}\)

The higher level of alcohol abuse in Indigenous communities is a factor in the higher level of offending by Indigenous Australians. More specifically, it is also a factor in the high level of family and domestic violence seen in those communities.

Indigenous males and females are both vastly more likely to be hospitalised because of family violence than non-Indigenous Australians. A 2006 AIHW survey found that Indigenous males were 22 more likely to be hospitalised for this reason, and Indigenous females 35 times more likely. A 2016 opinion piece by Curtin University academic Hannah McGlade put the female rate at 37 times that of non-Indigenous Australians, which figure rose to 86 in the Northern Territory and 95 in central Australia.\(^\text{19}\)

Indigenous children are four times more likely to be subjected to abuse as non-Indigenous children.\(^\text{20}\) Moreover, this is a study by the Australian Crime Commission found that much of the child abuse and domestic violence in Indigenous communities was “undisclosed and under-reported”.\(^\text{21}\)

Exposure to family violence and being subject to abuse are linked with children offending both as juveniles and later as adults.\(^\text{22}\)

### Employment and Income

Indigenous Australians have a higher unemployment rate and lower earnings.

In the 2014-15 National Aboriginal and Torres Strait Islander Social Survey, it was reported that the unemployment rate for Indigenous Australians was 20.8 percent, far higher than the 5.8 percent rate for non-Indigenous. 38.9 percent of Indigenous Australians were not in the labour force, compared to 22.9 percent of non-Indigenous.\(^\text{23}\)

For Indigenous Australians, unemployment and labour force participation were worse outside of the major cities. The opposite was true for non-Indigenous Australians, reflecting that they are likely to live in remote and very remote areas because that is where they work. Indigenous Australians, by contrast, are more likely to have non-economic reasons for living in those areas, as described in Section 1-2-1 above.
Unemployment contributes to lower average earnings for Indigenous Australians. Only 19.8 percent of Indigenous Australians earn more than $1000 per week, compared to 41 percent of non-Indigenous. 26.8 percent of Indigenous Australians earn less than $400 per week; the equivalent figure for non-Indigenous is 11 percent.²⁴

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²⁴ Australian Bureau of Statistics 2016b op. cit. NB: figures exclude those whose incomes were only partially or not stated)
Unemployment and low incomes are linked with crime. This is because they increase the marginal benefit to individuals of crime, and reduce the marginal cost—unemployed and low-income people have more to gain and less to lose by committing crime, so crime can seem a more attractive choice for them than for others.
Part 2: Applying criminal justice first principles to the incarceration of Indigenous Australians

The high levels of incarceration, offending, and socioeconomic disadvantage in Indigenous communities are related. Disadvantage is not the cause, however, of crime, and therefore it is not exculpatory. Indigenous Australians, like everyone else, are the ultimate authors of their actions—to believe anything else is to strip them of their dignity.

Instead, the relevance of the deprivation seen in Indigenous communities is that it changes the perceived costs and benefits of crime. For people who live in poverty, the marginal benefits from crime is higher, and the costs of being caught are lower. This is compounded by lower education and substance abuse, which make perceiving longer-term costs more challenging, and by cultural differences, which make anticipating the normative context of the law more difficult.

For the criminal justice system, the task is to take account of the often vastly different living circumstances of Indigenous Australians without compromising the fundamental principles of justice. Australian criminal justice is founded on personal responsibility and fair punishment. Individuals have rights, and violators of those rights must be punished in a way that fits the harm they have caused. Any departure, much less exemptions, from this basic creed will undermine the integrity of the system and fail to gain widespread support in the general community.

The purpose of this section is to outline how Australia’s traditional criminal justice principles apply to Indigenous crime and punishment, with the aim of providing a framework against which proposed reforms addressing Indigenous incarceration can be assessed. It makes the case that:

- The criminal law is normative and reflects particular values. Separatism in the criminal law undermines those values, including the principle of equal justice before the law. Indigenous-only sentencing courts and programs violate this principle.
- Retribution is inherent in a system based on individual rights and personal responsibility. The goal of correcting and rehabilitating offenders should be achieved within this context. Alternative punishments, such as home detention and work orders, should be imposed on low-risk and nonviolent offenders where it is safe to do so. Government should do more to make these options more available to Indigenous offenders.
- Personal responsibility is not obviated by socioeconomic disadvantage. The proper way to account for the circumstances of a crime is through the traditional principles of individualised justice, bounded by the need for proportionality and consistency in sentencing. The circumstances of Indigenous offending should be considered in line with the same rules by which such circumstances are always considered.
- Many of the problems of Indigenous communities, like housing and alcohol abuse, are upstream from the criminal justice system and cannot be addressed through criminal justice reform. Over the longer-term, government’s role is to enable local communities to resolve these issues for themselves.
2-1: The universality of the criminal law

The legitimacy of Australia’s criminal justice system rests on its universality: all Australians know, or should know, which behaviours are prohibited, what the punishment is for transgression, and which interests the law protects, and they know, or should know, that everyone is subject to the law in the same way.

It is not coherent to say that the history of the settlement of Australia vitiates the claim to sovereignty of the Australian Crown and its subjects. Were that the case, the criminal justice system would not have any authority at all. The legitimacy of Australia’s government is assumed by the criminal justice system, and this means that it is legitimate for all Australians equally. For this reason, the criminal law—and the law generally—should not distinguish between Australians based on their race.

The rule of law seeks to limit arbitrariness by binding the government with inviolable principles and by granting all subjects rights against the state to ensure their interests are protected. A government that treats subjects inconsistently based on their race is exercising power unjustly.

In the context of the interactions between the criminal law and the Indigenous peoples of Australia, the meaning of this principle in practice is disputed. Because the Crown exercises authority that is not derived from nor endorsed by the traditional cultures of Indigenous Australians, it is often argued that there is a fundamental inconsistency between the norms encoded in the criminal law, and especially in our system of sentencing, and the values of traditional Indigenous cultures, with the implication that the normal operation of the criminal justice system is inherently discriminatory against Indigenous people and that therefore there must be implemented alternative procedures that are more reflective of the Indigenous people who come into the system.

However, while it is true that the criminal law of modern Australia does establish certain moral claims, the authority of the criminal justice system to take into account competing moral or cultural ideas is limited.

2-1-1: The criminal law and norms

The law’s authority is not merely positive. It is not derived simply from the assertion of the lawmaker’s prerogative, but depends upon its connection to absolute justice. That is, the law’s authority depends upon its being a good faith attempt to realise the universal ends of justice.25 Even on a strictly positivist interpretation of legal authority, the meaning of the law must be interpreted in light of common standards.26

However, the law’s connection to standards (moral or otherwise) that exist in the political system and culture of which it is part does not mean that it is simply an ideological construct or expression of political power. That would render the law inherently uncertain, always changing to reflect the interests of the powerful.27 But the law is much more stable than that. The law is derived

26 HLA Hart argues, in the positivist tradition, that the law’s authority depends on its certainty, but allows that because of the uncertainty of language, judges must have discretion to interpret the meanings of words. By contrast, Ronald Dworkin argues that when judges need to exercise their discretion they must draw upon their understanding of the rights of individuals embedded in the political system within which legal rights are created.
from a broader socio-cultural context but aspires to be as certain and consistent as possible by formalising universal procedural rules.

The knowledge that judges draw upon when interpreting the law is situated within the culture and traditions that gave rise to the political system of which the law is part. For Australian law, this means that the law is inseparable from the basic tenets of our liberal democracy, such as equality before the law and the right to participate equally in political decision-making. These tenets in turn rest upon a notion of the individual as someone who holds rights against other individuals and against the state. Whether these are objective principles or products of a particular tradition is, from the point of view of the law, immaterial. Australian law is bound by its very nature to impose itself on all its subjects in the same way, always drawing upon the same ideas.

The connection between the criminal law and the culture of its authors and subjects can be seen in the very notion of corrections. Both retributive and rehabilitative approaches to dealing with criminals have as one of their aims the correction of criminals’ behaviour. This implies that there is a norm of behaviour to which criminals must conform if they are to participate freely in society. Whatever one takes the philosophical basis of the criminal law to be, there can be no doubt that the criminal law’s operation is normative.

For Indigenous Australians who continue to live within their own ancient traditions, this normative content of the law is, at least to some extent, alien. The question, however, is whether the law can take into account values that are not part of the system within which it resides without compromising its legitimacy. That is, can Australia’s criminal law justly treat Indigenous Australians differently from everyone else, or is doing so in derogation of Australians’ equality before the law?

2-1-2: Equal justice before the law

One of the bedrock principles of liberal democracy is the equality of individuals before the law. As traditionally understood, this principle means that the procedures by which the law interacts with a subject should be the same regardless of any of the characteristics of that individual. Notwithstanding the great diversity among individuals within our society, it is the intention of the law to treat them as all the same. Their equality is a formal stipulation, independent of their identities.

In recent years, the law’s emphasis on formal equality has come under sustained critique. It is asserted that formal equality is not possible absent substantive equality, and that the absence of the latter in society means that formal equality works—whether intentionally or not—to reinforce social hierarchies. To take just one example of this kind of argument in the Australian context, the Hon John von Doussa, then-President of the Australian Human Rights and Equal Opportunity Commission said the following in 2005:

> Assertions of equality usually imply positive connotations, but may disguise hidden vices. Differences of race, ethnicity, religion, sex and economic and cultural circumstances can mean that ‘one law for all’ protects the values and interests of a majority of citizens at the expense of minorities. It does so by privileging unity and formal equality over cultural diversity and substantive equality.28

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Efforts to account for the diversity among individuals and groups in society in the criminal law have led to the creation of specialist Indigenous courts in New South Wales, Victoria, Queensland, and South Australia, specialist facilities for Indigenous Australians in custody, and agreements between states and Indigenous community groups regarding the administration of criminal justice. The 2017 Australian Law Reform Commission discussion paper Incarceration Rates of Aboriginal and Torres Strait Islander Peoples contains 35 separate references to “culturally appropriate” procedures and services, whether actual or proposed, indicating how dominant this line of argument has become within Australia’s legal community.

With so many race-based services already in existence and the Australian criminal justice system still functional, concerns about the effect of formal inequalities in the name of substantive equality on the legitimacy of government in this country might seem unfounded or overblown. But the utilitarian argument for abandoning formal equality fails: the rising Indigenous incarceration rate over the past decade has taken place within the context of race-specific policy. The evaluation of specific programs for Indigenous offenders is often made more difficult by the lack of data, but at the macro level, it is clear that decades of incipient racial separatism have done nothing to arrest the growth of the Indigenous prison population.

And of course, separate legal processes for Australians based on their race is offensive in principle. The logical end point of the materialist critique of formal equality is separatism: if the Australian Crown has no right to govern Indigenous Australians, that can only be because either its sovereignty is illegitimate or because Indigenous Australians are not formally Australian. As noted by von Doussa in the same speech:

> The courts have consistently held that Aboriginal people are subject to the laws of the Commonwealth and of the States and Territories in which they respectively reside. In Walker v State of New South Wales Mason CJ observed that to hold otherwise would offend the basic principle that all people should stand equal before the law.30

As such, the principle of equality before the law depends on equal subjection to the sovereign of the nation. The law’s force rests on its equal application to its subjects. Departing from that formal equality undermines the sovereignty of the law.

Criminal justice reform for Indigenous offenders is limited by the need to ensure consistency across the country in the treatment of offenders who have committed the same crimes. Reform should focus on improving the ability of Indigenous Australians to interact with the law, rather than trying to create a parallel system.

This means improving Indigenous legal literacy and providing the tools that Indigenous people need to access justice, such as interpreters and counsel. Indigenous Australians who come into contact with the criminal justice system should be able to understand the processes and procedures of criminal justice. This may require interpreter services and the state should work with civil society to make interpreters available.

Additionally, the principle of judicial discretion and the need for punishment to fit the crime provide some scope for the circumstances of offenders to be taken into account—this is true for Indigenous offenders as for everyone else. The scope of these principles is discussed in more detail in section 2-2-3 below.

29 Closing the Gap Clearinghouse, “Diverting Indigenous offenders from the criminal justice system”, 2013 p. 2
30 von Doussa op. cit.
2-2: Criminal justice reform principles

The Institute of Public Affairs has consistently argued for criminal justice reforms that align with the traditional principles of personal responsibility, fair punishment, and fiscal discipline, with an emphasis on lowering crime and improving community safety over the long-term.

There is a considerable body of evidence from the United States that it is possible to safely reduce incarceration and criminal justice spending while reducing offending and reoffending. Our April 2017 paper Criminal justice reform: Lessons from the United States identifies the following principles for addressing over-incarceration:

- Punishment reform for nonviolent offenders: increasing the use of non-prison corrections and rehabilitation services for those who are of little risk to the community
- Justice reinvestment: redirecting money slated for incarceration to other parts of the criminal justice system more likely to reduce crime and recidivism (without abandoning the concept of punishment or rolling criminal justice into the welfare state)
- Reduce recidivism by emphasising employment: reentry services should include jobs training and removing barriers to employment for ex-prisoners
- Criminal justice programs should be evidence-based, with reliable data collection and performance tracking.31

The application of these principles to the particular situation of Indigenous Australians is complex. As shown in Part 1, the preponderance of violent crime in many Indigenous communities, and their remoteness and lack of amenities, makes the delivery of non-custodial punishments and rehabilitation programs more challenging. But that difficulty should not preclude an attempt to create reforms that cohere with traditional principles of criminal justice and with the evidence base for what works to reduce crime and incarceration.

2-2-1: Community safety

Incapacitation

The foremost concern of the criminal justice system is maintaining and improving community safety. Reducing incarceration must be done safely. This means that violent and recidivist criminals should continue to be imprisoned.

Incapacitation is a viable way to reduce crime. International research shows that imprisoning repeat offenders saves their communities from the many crimes they would have otherwise committed.32 If the criminal justice system is to take community safety seriously, prison is a vital tool.

Alternatives to prison

There is widespread agreement that even where the incarceration rate is very high, as with Indigenous Australians, reforms intended to reduce that rate should not increase the crime risk of the community. The ALRC acknowledged this in its discussion paper on Indigenous incarceration, stating:

31 Adapted from Andrew Bushnell, Criminal justice reform: Lessons from the United States, Institute of Public Affairs 2017 p. 2

It is the intention of the ALRC that the questions and proposals in this Discussion Paper should not be read as extending to those who would place community safety or the safety of individuals at risk. Further, the ALRC does not suggest that criminal behaviours should be excused or ignored as a means to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples.\textsuperscript{33}

With the high rates of violent crime, especially assault and family violence, in Indigenous communities, and the high percentage of Indigenous prisoners who have been imprisoned before, the safe reduction of the Indigenous prison population will be a long-term process.

Preventative measures, such as better policing and higher legal literacy among Indigenous Australians, will lower the number of people entering into the criminal justice system. And reducing reoffending by using custodial sentences to prepare Indigenous prisoners for work and life outside of prison will lead to a gradual reduction in the number of prisoners.\textsuperscript{34}

Many of the Indigenous Australians currently in prison will not be eligible for community-based programs if a history of violence is determinative. Facing a similar issue, American reformers have attempted to distinguish between criminals we are “mad at” and those we are “afraid of”.\textsuperscript{35}

With appropriate selection controls, there is some potential for allowing violent offenders to participate in residential programs, but not in community-based programs. Currently, “last chance” programs tailored to Indigenous offenders like the Balund-a residential diversionary program in New South Wales do accept violent offenders who have demonstrated an ability to benefit from the service.\textsuperscript{36} However, this does mean that Indigenous offenders from remote communities will need to be relocated to population centres that can sustain residential programs or, like Balund-a, are working farms.

Lastly, while governments should work with civil society and with employers to design and implement community-based punishments and work programs, it should not outsource the administration of those programs. There is potential for corruption and abuse in the non-standard administration of justice. Moreover, there is an equal justice concern if the nature of these community-based programs is significantly different from the programs administered elsewhere in the jurisdiction. Programs for like offenders should be similarly rigorous.

**Parole**

It has been proposed that parole should be granted automatically unless it can be shown there is good reason to revoke it.\textsuperscript{37}

However, automatic court-ordered parole would undermine the concept of corrections. The purpose of incarceration is, apart from the isolation of dangerous and antisocial people, to incentivise prisoners to change their behaviour to better conform to the norms of society.

\textsuperscript{33} Australian Law Reform Commission, *Incarceration rates of Aboriginal and Torres Strait Islander peoples* 2017 pp. 26-7

\textsuperscript{34} Unemployment is strongly correlated with offending - see discussion in Bushnell and Wild 2016 op. cit. p. 20

American states have emphasised job training as part of criminal justice reform, and studies in Australia show similar programs to be effective in reducing reoffending - Bushnell 2017 op. cit. pp. 13-15

\textsuperscript{35} Bushnell 2017 op. cit.


\textsuperscript{37} See for example, ALRC 2017 op. cit. p. 99
Research indicating that parolees reoffend less than those who serve their full sentence merely reflects that those who can demonstrate good behaviour while imprisoned are more likely to demonstrate good behaviour once released. Making parole easier to obtain would likely remove this difference, as the parolee population would contain people who had not changed their behaviour at all.

Providing a mechanism by which automatic parole can be set aside would not resolve this issue. The onus should be on the prisoner to demonstrate that he or she can behave properly, not on the criminal justice system to show why a convicted criminal should complete his or her punishment. Reversing this onus would send the wrong message about the purpose of incarceration.

**Data-based programs**

In discussions with American reformers, the Institute of Public Affairs was consistently informed that reliable data and robust evaluation were vital to the successful implementation of non-prison punishments.38 In the United States, criminal justice reform has typically begun with a top-to-bottom review of programs by the Pew Charitable Trusts. In a previous paper, the Institute of Public Affairs suggested that a similar role could be provided by the states’ ombudsmen, and that the Council of Australian Governments should coordinate the consistent recording of crime statistics across the country.

The Closing the Gap Clearinghouse has acknowledged that the evaluation of Indigenous diversion programs is hampered by a lack of data:

> There is little by way of in-depth data and objective evaluations to determine the medium and long-term effectiveness of Australian diversionary programs.39

The safe reduction of Indigenous incarceration depends on the ability of criminal justice policymakers and administrators to identify successful programs. From a utilitarian point of view, it is not yet known or knowable whether race-specific programs are more effective than universal programs.

This point was also acknowledged in the Council of Australian Governments’ report Prison to Work.40

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38 See discussion in Bushnell 2017 op. cit. pp. 16-17

39 Closing the Gap Clearinghouse 2013 op. cit.

40 Council of Australian Governments, Prison to Work 2016 p. 9
2-2-2: Personal responsibility

Individual autonomy

The criminal justice system is predicated on the belief that individuals can justly be held to account for actions they take that harm other people or society generally. Underpinning this belief about justice is a belief in individual autonomy: that individuals are, in the end, the authors of their own actions and therefore responsible for them.

Against the vision of individual autonomy is the criminological perspective, which sees crime as a natural product of the complex interactions of a number of influences on a person, including exposure to crime, socioeconomic disadvantage, and drug use.

However, whether or not humans have free will, a concept notoriously difficult to define, their every action is made in a context of potential alternative actions. It is enough for the criminal law that a person’s actions indicate disordered thinking, where order is determined by the law (and its cultural and political context). And by its very existence, the law assumes its own power to influence human action, with part of this influence coming from the threat of corrections.  

The economic perspective of crime

The economic perspective of crime is that individuals commit to break the law in the same way that they commit to do anything else: they weigh the perceived costs and benefits and act accordingly. Their actions reveal their preferences.

This framework makes it possible to understand how factors like unemployment, low educational attainment, socioeconomic disadvantage, and exposure to crime make crime a more attractive choice for individuals exposed to them. People exposed to these factors see lower costs for committing crime, as their legitimate earnings now and in the future are lower, their ability to see beyond the immediate payoff of crime to longer-term benefits of obeying the law is diminished, and the likelihood that crime is something they see as normal is higher. This analysis also helps to explain why criminals are more likely than others to adopt behaviours associated with immediate gratification rather than delayed benefits, like alcohol and drug use, and less likely to adopt behaviours with distant benefits, like participating in education.

The economic view implies that raising the immediate costs of law-breaking is the most effective deterrent. This is best achieved by increasing the chance of detection, rather than by increasing the severity of punishment, which is a less immediate cost. It also means decreasing the immediate benefit of crime by ensuring that people have more to gain by obeying the law, which can be achieved through increasing people’s chances of employment.

For Indigenous Australians’ interactions with the criminal justice system, the implications of this analysis are that improved relations between communities and the police, so that police are better able to detect and prevent crime, and employment opportunity are crucial factors for reducing Indigenous offending and incarceration. For those individuals who come into the corrections system, the goal should be to prepare them for productive society. Programs like the Northern

41 David Terracina, “Criminal Law Issues”, Chapter 6 in E. Picozza (ed.) Neurolaw
42 Bushnell and Wild 2016 op. cit. pp. 29-31
43 Ibid. p. 63
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Territory’s ‘Sentenced to a Job’ and the New South Wales Government’s decision to redirect prison spending towards literacy and numeracy are in line with this goal.

**Mental health**

Adverse circumstances change individuals’ perception of incentives. But they do not entirely obviate personal responsibility. For all mentally-fit individuals, these influences coexist with more positive influences that point the way to better choices.

Indigenous Australians are more likely to be assessed by general practitioners as presenting with mental health problems. Indigenous Australians also have higher rates of Foetal Alcohol Spectrum Disorder than the general population, which affects the mental fitness of many Indigenous offenders. Where such health concerns are present, culpability may be reduced. But community safety concerns would remain. Mentally unsound offenders should continue to be detained in appropriate facilities for treatment.

**Intergenerational effects of crime**

Crime is known to be strongly intergenerational. The children of criminals are more likely to commit crime, along with developing other behavioural problems, not completing school, and being unemployed. These factors are all related.

Uniquely among Australians, many Indigenous people’s lives are shaped to some extent by the ongoing effects of the dispossession and cultural breakdown caused by colonisation. Apart from the contribution that this has made to the perpetuation of poverty in these communities by denying Indigenous Australians the ability to build wealth over time, the disestablishment of tradition and custom contributes to a sense of what has been called, in United States research, “despair”. The recent reversal in long term reductions in mortality among the white American working class has been attributed to rising self-destructive behaviours such as opiate abuse, alcoholism and suicide, which in turn are linked with worse outcomes in education and employment. The health crisis confronting white Americans highlights that the collapse of traditional ways of life contributes to intergenerational disadvantage, regardless of race or colonisation. The situation of disadvantaged Indigenous Australians is akin to the situation of other disadvantaged individuals.

Intergenerational disadvantage does not obviate the personal responsibility of individual actors. But it is one more factor shaping the ability of actors to determine the true costs and benefits of their actions. Moreover, the elements of despair exist in many communities for different reasons. Because such an effect is impossible to quantify, the principle of equality before the law ought to proscribe the use of history in determining culpability and punishment. Otherwise the court would be obliged to examine the totality of any given offender’s family history. Clearly, a measure like a blanket sentencing discount for Indigenous Australians is antithetical to the principle of equality.

46 Australian Institute of Health and Welfare 2015 op. cit. p. 80
48 Bushnell and Wild 2016 op. cit. p. 9
So too are existing legislative instruments, such as Victoria’s Bail Act 1977, that require consideration of Aboriginality in decision-making. To the extent that bail conditions should take into consideration cultural and family expectations, it should do so for all who are granted bail. The decision to grant bail should be based on the willingness and ability of the applicant to abide by bail conditions. The relevant considerations are whether the applicant has shown a tendency toward violence, the risk of reoffending while on bail, and the risk of bail conditions being breached. Neither Indigeneity nor disadvantage has specific relevance to these considerations.

2-2-3: Fair punishment - making the punishment fit the crime

Retribution is integral to justice

Punishment is inherent in the concept of rights. It does not make sense to assert that individuals have rights if no negative consequences follow for those who violate them. Just as the criminal justice system’s very existence implies a belief in individual autonomy, it implies that punishment is integral to justice. The relevant question for criminal justice reform is not whether to prefer a retributive or rehabilitative approach, but how to deliver retribution through punishment while achieving rehabilitation and the other ends of justice.

There are two more reasons to emphasise that such reforms retain a retributive character.

The first is that emphasising the therapeutic benefits of non-prison punishments is to neglect the interests of victims. Seeing justice done is an important part of the healing process for many victims. The desire of victims to see more severe punishment is not dispositive but it is also far from meaningless. Moreover, it is important that society see in the criminal justice system greater respect and care for those who have been harmed than for those who committed harmful actions. One of the reasons for the public prosecution of criminals is that they offend against the norms of society, and in so doing take advantage of everyone who abides by the law. The persistence of the norm of obedience to law is secured through punishment. As Gerard V. Bradley has argued:

Civil society punishes in its own name for its own sake because, in truth, civil society is the victim of each and every crime.

Second, and relatedly, studies have shown that our concept of justice is inseparable from retribution. Even where people state that they are more influenced by utilitarian concepts such as deterrence and rehabilitation, their behaviour in tests indicates that they are motivated more by retribution - that is, by a desire to see bad behaviour punished. This finding accords with game theory experiments that show people are willing to sacrifice some measure of their own personal wellbeing to make sure that bad behaviour is punished. Individuals effectively price in the value they get from maintaining social norms. And games where bad behaviour is disciplined early led to better results for participants. Jonathan Haidt summarises this point as:

Punishing bad behaviour promotes virtue and benefits the group.

For criminal justice reform, this clearly implies that attempts to redesign the criminal justice system so that it is tailored to treating crime as a natural social pathology will fail to gain public support.

53 Jonathan Haidt, The righteous mind: Why good people are divided by politics and religion, Pantheon Publishing 2012 p. 179
The desire for retribution is deep-seated. This is perhaps one reason why successful criminal justice reform in the United States has been led by conservatives.54

There is no reason to believe that criminal justice policy regarding the punishment of Indigenous offenders should be, or could ever be, separated from the inherent value of retribution and its essentiality to Australian criminal justice. The relevant question is how to design and impose non-prison punishments on suitable offenders while satisfying public demands for retribution and the reinforcement of social norms.

**Punishment and disadvantage**

Criminal justice should impose punishments that are retributive, consistent with punishments given for similar offences, and proportionate to the harm caused by the offender. It is in the assessment of this last requirement that judges have scope to consider the particular circumstances of the offence and the characteristics of the offender. These factors are not relevant to the harm caused to the victim—it does not, for example, matter who stole your television, only that it was stolen—but they are relevant to how severely the offender has transgressed against social norms and thus harmed society generally. This principle is why crimes have traditionally required mens rea (guilty mind) in the form of intention or recklessness, and it is why certain circumstances may count in mitigation against punishment.

In what ways might disadvantage, and specifically the disadvantage faced by Indigenous Australians, plausibly diminish the seriousness of the transgressive element of a crime?55

There is generally no direct causal connection between any criminal act and the socioeconomic characteristics of an offender. Even in an incentive environment shaped by disadvantage, criminal actions are not usually necessary. Although we can think of a scenario in which, say, the only choices are stealing a loaf of bread or starving, these do not usually exist in the real world. Moreover, even in adverse circumstances like those in many Indigenous communities, many people do not commit crime. For this reason, it cannot plausibly be argued that disadvantage always plays a material role in the offending of disadvantaged people. Therefore, in punishing disadvantaged offenders, there can be no presumption that their socioeconomic circumstances are or should be considered mitigatory.55

When the High Court considered this question in Bugmy v R, it found that while disadvantage is relevant to individualised justice, Indigeneity per se is not. The court held that such a presumption would actually offend the principle of individualised justice.56 To this it should be added that assuming being Indigenous is a disadvantage sufficient to diminish culpability expresses a denial of the agency, and thus dignity, of disadvantaged individuals, and risks portraying all Indigenous communities as inherently disordered.

Because the factors associated with Indigenous offending are the same as those associated with offending generally, it is inappropriate to draw attention to Indigeneity in and of itself. The only purpose of doing so would be to separate Indigenous Australians from non-Indigenous to further call into question the authority of the Crown to administer justice to the former group.

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54 Bushnell 2017 op. cit.
55 The jurisprudence of the Canadian Supreme Court in Gladue and Ipeelee, and legislation requiring courts to take into specific consideration is therefore misguided. See ALRC 2017 op. cit. Chapter 3
56 Bugmy v The Queen [2013] HCA 38 [29]-[31]
It would also offend the principles of fair punishment to take into consideration the high level of Indigenous representation in Australian prisons. There can be no causal connection between that statistic and the acts of any individual. It could likewise not be argued that the historically high level of incarceration in Australia should count in mitigation for all Australian offenders.

One of the purposes of punishment is to deter others from committing similar acts. Deterrence is closely tied to retribution: both are justified by the concept of society being one of the victims of crime. But in sentencing, deterrence must be subsidiary to other considerations, like proportionality and consistency. At a certain point, deterrence goes beyond reinforcing social norms and punishes particular people for the potential acts of others. Taking into consideration punishments already visited upon others is similar: it ties the offender’s punishment to the actions of others, distorting the proportion between the harm caused and the punishment.

Judicial discretion

The inherently retributive nature of our criminal justice system does not preclude some measure of individualisation of punishment. But the principles by which individual punishments are tailored must themselves have general application. Judges have, and should retain, discretion to consider how a specific offender’s actions have harmed society, and the proper role of specific punishments in addressing that harm, but this discretion is bounded by the demands of equal justice and proportionality and therefore does not include racial considerations.

It should not be forgotten that mandatory sentencing and other attempts to limit judicial discretion have developed in response to the perception of the public and their representatives that the judiciary is too lenient. It is possible for a sentence to be disproportionately lenient.

Judges must remember that the purpose of the criminal law is to deliver retribution on behalf of victims and society, and to correct the behaviour of offenders so that they conform to society’s norms. An unfortunate move away from the language of punishment and corrections has created the impression that criminal justice is no longer concerned with reinforcing public standards. The discretion of judges to individualise sentencing needs to be exercised within the bounds of proportionality and equal justice.

Similarly, it is inconsistent to advocate the abolition of mandatory sentences in the name of judicial discretion and to advocate removing the discretion of judges to impose short sentences. Judges should retain the discretion to impose short sentences if alternatives are not deemed suitable.

Proportionality guides punishment

One of the maxims of criminal justice is that the punishment should fit the crime. While the proper proportion between the harm caused by the offender and the severity of the punishment proposed can never be determined with absolute precision, the principle carries obvious intuitive force. Other relevant considerations in sentencing are that the sentence should be no more than required by justice, consistency between punishments for like offences, and taking into consideration any mitigating circumstances of the crime in light of the characteristics of the offender. This latter principle is subordinate to the others: unlimited discretion to tailor punishment to the offender would render the other considerations moot.

Incarceration is not always the punishment that best fits a crime. Prison delivers the greatest retributive effect and is the strongest deterrent (among punishments) but is not the best method by

57 Bushnell and Wild 2016 op. cit. pp. 56-7
which to achieve the other ends of justice, like rehabilitation and, over the long term, community safety.

Implementing punishment reform for low risk offenders can achieve better results in terms of recidivism, while maintaining sufficient retributive, deterrent, and immediate community safety effects. A combination of home detention, community service, fines, restitution orders, and work orders can deliver a sufficient deprivation of liberty to satisfy the demands of retribution but are more strongly correlated with changes in behaviour. In the United States, conservative states like Texas and Georgia have diverted offenders from prison to residential and outpatient rehabilitation, among other reforms, and seen crime and costs go down.\footnote{Bushnell 2017 op. cit. pp. 8-13}

The goal is to fill in the spectrum of coercion between release and incarceration. Recent reforms like the abolition of suspended sentences in Victoria and New South Wales and the expansion of home detention in South Australia show the potential for innovation in the way punishment is delivered.

Lastly, for those who cannot pay fines, schemes like that in Western Australia allowing offenders to work off their debts are considerably better than incarceration as a solution to that problem.

Tying the discharge of fines to the completion of work and training is a good way to discipline offenders who cannot otherwise pay their fines. Work and development orders enable courts to impose a proportionate amount of coercion to fine-defaulters. Rigorous, data-based oversight of programs involved in work and development orders is necessary to make sure that they impose real conditions and maximise results. Public scepticism about community service in particular needs to be addressed by demonstrating that these programs operate as advertised.

For non-compliant offenders, there should be the possibility of earnings and benefits being garnished.

**Punishing breaches of release conditions**

One area in which disproportionately severe punishment is often seen is in technical breaches of bail and parole. In the United States, “swift, certain, and fair” punishments for minor breaches have been introduced in many states.\footnote{Ibid. pp. 9-10} Instead of either ignoring minor breaches or imprisoning people because of them, case officers are empowered to impose administrative penalties such as tightening reporting requirements or other conditions of release.

In Australia, the New South Wales Government has recently moved in this direction. Along with the hiring of new district court judges to speed up the processing of those on remand, measures such as this will help to reduce the growth of the remand population, which will benefit Indigenous Australians without singling them out.\footnote{Andrew Bushnell, “NSW reforms point way to reducing high rate of Indigenous incarceration”, The Australian 28 July 2017} Similarly, that state’s recent reform of penalties for driving with a suspended licence will likely disproportionately benefit the state’s Indigenous people.\footnote{NSW Department of Justice, “Driver licence disqualification reforms” [accessed 4 September 2017] http://www.justice.nsw.gov.au/Pages/Reforms/driver-licence-disqualification.aspx}
2-3: The limits of the criminal justice system

Part 2 of this report has provided a discussion of some of the key considerations for reformers looking to improve the interactions of the criminal justice system with Indigenous Australians in light of cultural distinctiveness and socioeconomic disadvantage. Such is the complexity of this situation, however, that the criminal justice system is a limited tool for addressing it.

2-3-1: Upstream from the criminal justice system

Most of the problems described in Part 1 are upstream of the criminal justice system. For example, the overcrowding in Indigenous households will not be affected by criminal justice policy. While Parts 2-1 and 2-2 make an argument for how the criminal justice can ameliorate some of the effects of Indigenous disadvantage on crime and punishment without compromising on the traditional principles of Australian justice or the system’s internal coherence, even a perfectly-ordered criminal justice system will not eliminate the circumstances and patterns of behaviour that drive Indigenous disadvantage. Indeed, more radical measures to reduce Indigenous incarceration will also not address the reasons why crime is committed in the first place.

That the underlying socioeconomic phenomena are beyond criminal justice is recognised by the Council of Australian Governments’ Closing the Gap targets, which do not include a criminal justice target and instead focus on improving health and education.62

Governments continue to fund programs to raise Indigenous living standards. Around $5.9 billion is spent each year on Indigenous-specific programs. Total transfers to Indigenous Australians rise to $30 billion per year if Indigenous receipt of benefits from universal programs is included.63 This is considerably more than is spent on prisons in total in Australia each year, which is around $3.8 billion.64 Only one of the six Closing the Gap targets is currently on track.

2-3-2: Remoteness, residence, and alcohol

One of the enduring challenges of Indigenous policy is the remoteness of many Indigenous communities. This remoteness, and the communities’ small population size, make delivery of services more difficult and costly. It also makes the communities more difficult to police and community-based punishments harder to deliver. Often this means that offenders are not caught and not deterred or they are imprisoned, often for want of better options, in distant population centres. Realistically, this will continue to be the case. Traditional Indigenous culture is tied to country, which all but precludes for many people a move to more prosperous economies. (As shown in 1-2-1, Indigenous people in remote areas are more likely to recognise their traditional kinship and live on traditional country.)

It should go without saying that law-abiding Indigenous Australians in remote areas should not be coerced into moving. But for those who, by their actions, place themselves into the corrections system, connection to traditional country should not mean that the only option is incarceration.

64 Sara Hudson, Mapping the Indigenous Program and Funding Maze, Centre for Independent Studies 2016
64 Productivity Commission, Report on Government Services 2017
When Texas redirected money from incarceration to substance abuse treatment, a significant portion of that money went towards residential rehabilitation facilities, halfway houses, and intermediate sanctions facilities for those who make technical breaches of their release conditions. Similar facilities could provide for non-prison punishments for some Indigenous offenders. These types of facilities can only operate in large population centres from which they can draw staff and which will provide inmates with opportunities to carry out work orders and job training. If separation from home is the price that an offender must pay to avoid prison, then that should be considered fair enough (for Indigenous and non-Indigenous alike).

A system of residential facilities for those serving community-based punishments would also ameliorate another of the main difficulties in managing Indigenous Australians’ interactions with the criminal justice system: unstable housing situations. The lack of stable housing contributes to low grant rates of bail and parole as well as to the socioeconomic problems associated with dysfunctional families, defective housing, and overcrowded homes. Housing supply and maintenance is not an issue that the criminal justice system can resolve. For this reason, though, it is important that the criminal justice system make provision for suitable offenders to be punished in the community through residential programs.

Lastly, the abuse of alcohol is a problem that the criminal justice system can only manage, it cannot solve it. The reasons that people choose to drink are complex and will need to be addressed by communities and individuals from the bottom-up. In remote communities, cooperation between private businesses and civil society may be the best way to manage the supply of alcohol. Accords are a proper exercise of market power, so long as membership is voluntary. However, Indigenous Australians retain the right to purchase alcohol wherever it is legally sold, just as all Australians do. Across-the-board prohibition will not work and is not desirable. Alcohol bans will not address the reasons that people choose to drink.

2-3-3: Community action

The cycle of abuse, disadvantage, and crime needs to be broken. This means making sure that children are safe and can attend school, that Indigenous Australians know the protections to which they are entitled by law and how the country’s criminal justice system operates and how it can protect their interests, that the police operate effectively and with the trust of Indigenous communities, and that more broadly, Indigenous Australians share in the normative basis of the law and respect its role in defending those norms. It also means making crime less attractive and easy, through detection and through the provision of a path to productive society via employment. While criminal justice policy, and government generally, can help to facilitate this vision, ultimately it will be the work of Indigenous civil society to create shared institutions of meaning that engage Indigenous people in self-improvement and morally-fulfilling lives.

This is a sustainable vision of self-determination. Not separatism or sovereignty, but the opportunity for communities to work for their own benefit. A renewed spirit of subsidiarity would likely benefit all Australians, but it would certainly enable those Indigenous communities and leaders with the requisite will to build their own futures.

65 Bushnell 2017 op. cit. p. 9
Conclusion

The Institute of Public Affairs visited a number of people working on this issue in the Northern Territory in August 2017 and has had discussions with representatives from across the political spectrum. We have been consistently impressed by the amount of good will that exists in Australian politics in relation to resolving this vital national issue. This paper is offered in good faith as a contribution to this debate, resting on a firm belief that the vindication of individual rights is to the long-term benefit of all Australians and that the universality of our liberal democratic institutions is an expression of our national solidarity.

As the statistics detailed in this report show, the factors influencing the high rate of Indigenous offending and incarceration are associated with crime for all people. The unique historical circumstances of Indigenous disadvantage do not change the analysis that it is the shocking extent of those influences in Indigenous communities that make crime a more appealing choice for many people living within them.

Making crime less attractive means giving people more to live for, through education, employment, participation in the community and in spiritual organisations, the creation of stable families, and physical safety. These are the basics of a good life in a modern society.66

Considerable effort has gone into advocating for the law and the institutions of government to be made more “culturally appropriate” for Indigenous Australians. But one does not have to believe that such institutions can ever be perfectly rational and culturally-neutral to believe that this is misguided. The institutions are themselves a part of modern Australian society: they have emerged over centuries of English-speaking civilisation to protect the interests of individuals so that they can operate in a liberal democracy. They are appropriate to the modern life of the nation of which Indigenous Australians are part, and their legitimacy depends on their universality. For Indigenous Australians, who cannot opt out of those institutions any more than other Australians can, this means finding a way to live and perpetuate their cultural ideas within the ordered liberty that our institutions create.

But insisting on the formal equality of Australians does not mean pretending that material inequalities do not exist. Plainly, there are many Indigenous Australians whose living standards fall far short of what everyone else in this country rightly expects. There is a role for the criminal justice system to play in making sure that it does not exacerbate these problems through over-punishment or neglecting the need for all citizens to be able to understand the law, to be protected by it, and to participate meaningfully within the system when necessary.

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Just as the factors influencing Indigenous offending and incarceration are versions of those present in other disadvantaged communities, so too should the criminal law approach reform with the same principles that have worked elsewhere:

- punishment reform for those criminals who can safely be punished outside of prison
- data-based recidivism programs
- job skills training, and
- residential rehabilitation for addicts.

The paramount concern is to improve community safety by reducing crime. This cannot be done by abandoning the retributive approach, which is inherent in our criminal justice system founded on the defence of individual rights and personal responsibility.

All of the tools necessary for improving Indigenous outcomes in criminal justice are known and available. The radical redesign of criminal justice away from individual autonomy towards a deterministic criminological analysis is unnecessary and risks diminishing the agency and standing of the very disadvantaged people it aims to help.
Bibliography

Institute of Public Affairs criminal justice reports

Bushnell, Andrew Australia’s criminal justice costs: An international comparison, Institute of Public Affairs, Melbourne 2017
Bushnell, Andrew Criminal justice reform: Lessons from the United States, Institute of Public Affairs, Melbourne 2017

Conversations

In August 2017, the Institute of Public Affairs met with the following organisations and people in Darwin to discuss the issue of Indigenous incarceration. We are grateful for their insights.
Office of the Attorney-General of the Northern Territory
Office of the Leader of the Opposition
Department of Correctional Services
Danila Dilba Health Service
NT News
Former Chief Minister of the Northern Territory Adam Giles

Government statistics and reports

Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey 2012-13
Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, 2014-15
Australian Bureau of Statistics, Recorded Crime - Offenders 2015-16
Australian Institute of Health and Welfare, The health and welfare of Australia’s Aboriginal and Torres Strait Islander peoples 2015
Australian Law Reform Commission, Incarceration rates of Aboriginal and Torres Strait Islander people 2017
Closing the Gap Reform Commission, Incarceration rates of Aboriginal and Torres Strait Islander people 2017
Closing the Gap Clearinghouse, “Diverting Indigenous offenders from the criminal justice system”, 2013
Department of Prime Minister and Cabinet, “2.16: Risky alcohol consumption” in Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report
Morgan, Anthony and McAtamney, Amanda, Key issues in alcohol-related violence, Australian Institute of Criminology 2009
Ogloff, James RP et al, Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study, Australian Institute of Criminology 201
Payne, Jason Recidivism in Australia: findings and future research, Australian Institute of Criminology 2007
Payne, Jason and Gaffney, Antonette, How much crime is drug or alcohol related? Self-reported attributions of police detainees, Australian Institute of Criminology 2012
Productivity Commission, Report on Government Services 2017
Other reports
Hudson, Sara Mapping the Indigenous Program and Funding Maze, Centre for Independent Studies 2016
PWC, Indigenous incarceration: Unlock the facts 2017

Academic articles

Journalism
Biddle, Nicholas  “FactCheck Q&A: is $30 billion spent every year on 500,000 Indigenous people in Australia?” The Conversation 5 September 2016
Davidson, Helen, “Child and domestic abuse in Indigenous communities ‘chronically undisclosed’” Guardian Australia 30 March 2015
McGlade, Hannah, “Indigenous women subject to horrifying levels of violence”, The Australian June 20, 2016

Websites

Monographs
Jonathan Haidt, The righteous mind: Why good people are divided by politics and religion, Pantheon Publishing 2012
Terracina, David “Criminal Law Issues”, Chapter 6 in E. Picozza (ed.) Neurolaw

Other
Bugmy v The Queen [2013] HCA 37
von Doussa, John, “One law for all” speech to the Australasian Law Teachers Association Conference, 6 July 2005
VICTIM APPEAL: HOW TO ADDRESS MANIFESTLY INADEQUATE SENTENCES

Andrew Bushnell, Research Fellow
VICTIM APPEAL: HOW TO ADDRESS MANIFESTLY INADEQUATE SENTENCES

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Executive summary

Victim appeal is an innovative reform designed to:
• Increase public confidence in the judiciary; and
• Increase the satisfaction of victims of crime with the criminal justice process.

Victim appeal would give victims of crime the right to instruct the Director of Public Prosecutions (DPP) to seek leave to appeal against a sentence handed down by a District or County Court or Supreme Court.

This right would be in addition to the existing discretion of the Director Public Prosecution or, in some states, the Attorney-General, to appeal against sentences.

Unlike Crown appeals in most states, victim appeals would go to a leave hearing at the Court of Appeal, which would determine whether the appeal can proceed.

The DPP would advise the victim of the chances of a successful appeal and bear the costs of the appeal.

Australians have consistently reported low confidence in the judiciary.

Public confidence in the judiciary is driven by:
• The perception of leniency; and
• Access to information about crime trends and specific cases.

Over the past decade and across jurisdictions, sentencing patterns in Australia have been stable. For serious crimes like homicide, assault, and sexual assault, judges have sentenced offenders to prison at approximately the same rate and for the same periods of time.

However, over the same period, the number of Crown appeals against ‘manifestly inadequate’ sentences has fallen. In 2008-09, there were 138 such appeals in the mainland states. In 2016-17, this had fallen to 85.

This is despite the fact that these types of rare, sensational cases, in which judges fail to apply community standards continue to occur and to attract disproportionate media attention. This media attention in turn damages the reputation of the judiciary.

Victim appeal provides a new mechanism for correcting these rare cases. Its introduction will help mitigate their effect on the public’s confidence in the judiciary.

Victim appeal also builds upon the existing practice of allowing victims to read Victim Impact Statements at sentencing hearings. This practice has been shown to have some therapeutic effect for victims. However, many victims continue to report feeling a lack of agency in the system. Victim appeal provides victims with a real and consequential decision to make as part of the criminal justice process.

Lastly, victim appeal should be preferred to more dramatic reforms like mandatory sentencing, which increases the risk of disproportionately severe sentences, and giving victims separate representation in criminal trials, which undermines our traditional adversarial criminal justice system.
Introduction

This paper recommends that victims of crime be given the right to instruct the Director of Public Prosecutions (DPP) to seek leave to appeal sentences that they, the victims, find unjustly lenient. The primary goal of this reform is to address community concern that the judiciary is out-of-touch with community standards regarding both how harm to victims and society is construed and how severity of punishment is to be measured. A secondary benefit of the reform is that it will increase the agency of victims within the criminal justice system, increasing both their satisfaction with the process and the community’s confidence that victims’ interests are secured by the system.

Over the past decade, Australians have consistently reported low confidence in the judiciary. This is despite any clear evidence that the judiciary is more lenient than the community expects, or that it has become more lenient over time. It is argued in this report that this lack of confidence is driven, at least in part, by rare but high-profile cases in which judges imposes sentences that fall short of the community’s understanding of justice. Studies suggest that the public’s beliefs about the operation of the criminal justice system are shaped by media reporting. These sensational cases attract widespread interest and contribute to the public’s impression that the judiciary should not be trusted. The proposed reform aims to limit the damage that such cases do to the reputation of the judiciary and to reduce the number of such decisions by increasing the sensitivity of judges to community standards.

Sensational cases

Every year, a number of cases are finalised with judges imposing sentences that depart from common sense. These cases often attract considerable negative attention. In 2014, for example, a notorious New South Wales case was finally brought to an end when Kieran Loveridge, convicted of a spate of attacks that included the one-punch killing of Thomas Kelly, saw his original sentence doubled on appeal by the DPP. Loveridge had been sentenced to serve just five years and two months in prison but the Court of Criminal Appeal doubled this to more than 10 years.1 More recently, the Victorian DPP announced an appeal against the sentence handed to Jonathan Cooper, convicted of the murder of war veteran Kenneth Handford, following a petition being delivered to Attorney-General Martin Pakula with 30,000 signatures.2 This year, in Queensland the Attorney-General announced an appeal against the sentence given to convicted rapist James Ronald Lennox. His four-and-a-half-year sentence was to be suspended after just 14 months.3 And the Victorian DPP announced that it would appeal the reduction of a sentence, from 26.5 years to 18 years, for Akon Guode who was convicted in 2015 of killing three of her children and attempting to kill the fourth.4

Cases such as these often lead to legislative change. For example, the Loveridge case led to the introduction of mandatory sentences for one-punch killings in New South Wales. In Victoria, mandatory sentencing laws were tightened following two assailants convicted of assaulting a

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2 Olivia Shying (2017), “Public prosecutor to appeal sentence given to war veteran murderer” The Courier 19 May 2017
4 Melissa Iaria (2018), “DPP appeals Court of Appeal’s decision to cut child-killing mum’s term” 14 September 2018
paramedic escaping jail.\(^5\) But the unusualness of these cases means that they broad-based reforms are an overreaction. What is required is a reform that increases the system’s ability to correct sensational cases such as these.

**Fewer state appeals against sentence in recent years**

The ability of the DPP (and in some states, the Attorney-General) to appeal against manifestly inadequate sentences is the system’s failsafe mechanism. However, as demonstrated by the Cooper case, triggering this failsafe often follows public outrage, meaning that the damage to the reputation of the judiciary is already done. Not only does the public lack confidence in the judiciary, it lacks confidence in the system to correct its mistakes.

This lack of confidence is supported by data showing that across the country, there are fewer state appeals against sentence than there were 10 years ago. In 2006-7 there were 128 such appeals across the five mainland states. In 2016-17 this number was just 85.\(^6\)

Extending the right to trigger appeals against sentence from the DPP and/or the Attorney-General to victims would help to reverse this trend. It would also give the public confidence that the decision to appeal (or not appeal) is not solely in the hands of members of the legal community, but also with the average member of the public. Victim appeal uses victims as a proxy for community attitudes to increase the connection between the judiciary and common sense.

**Victim appeal in the context of victims’ rights**

It is often said that hard cases make bad laws. For this reason, sensational cases do not justify a revolution in the way that we, as a community, administer justice.

Since at least the publication of William Blackstone’s *Commentaries on the laws of England* in 1765, it has been understood that the criminal law embodies community judgement of moral rights and wrongs. This moral judgement gives crime a public dimension that is lacking from the civil law. Crime has therefore traditionally been prosecuted by the state, in recognition that crime harms not only the victim but society itself.\(^7\) In recent decades, Western countries have sought in various ways to integrate victims into public prosecutions. This has included minor procedural changes like granting victims the right to be consulted by prosecutors, as now encoded in the law of every Australian jurisdiction, to more dramatic institutional changes, like allowing victims to be represented in criminal trials by their own counsel, as is now permitted in the United States federal court system.

Victim appeal should be understood in this context as a modest reform. It is a proportionate response to the identified problem, and, it is argued, mitigates many of the concerns of those who would seek more expansive changes. Victim appeal preserves the adversarial system and judicial independence in favour of reducing, in one specific way, the discretion of the public prosecutor. This reform obviates the need not only for institutional changes to the criminal justice system but further-reaching legislative interventions like mandatory sentencing.

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5 Richard Willingham and James Oaten (2018), “Victorian Government to overhaul sentencing laws, promising more criminals will go to jail” ABC News 22 May 2018

6 Data for the other jurisdictions was not available back this far.

7 Sir William Blackstone (1893), *Commentaries on the laws of England in four parts* p.54, p. 93
This report is structured as follows. The first section outlines the proposed reform, including how it will work, its rationale, and how its risks can be mitigated. The second section provides a statistical analysis demonstrating the likelihood that rare sensational cases contribute disproportionately to the public’s lack of confidence in the courts. A brief discussion of the downsides of mandatory sentencing is included. The third and final section is a discussion of victim appeal in the context of victims’ rights. While victim appeal is argued to have some potential therapeutic benefits for victims, this is a subsidiary consideration and insufficient justification for a broader victims’ rights agenda.
1 Giving victims the right to appeal manifestly inadequate sentences

**KEY POINTS**

» Under the current system, the DPP reviews every sentence handed down in cases in which it has acted and determines whether an appeal is in the public interest and has a reasonable prospect of success.

» In Queensland, Western Australia, and Tasmania, the Attorney-General can direct the DPP to appeal.

» The proposed reform would extend this decision-making power to victims of crime (and in homicides, their next of kin). Victims, having been briefed by the DPP, would be able to direct the DPP to seek leave to appeal.

» This reform would increase victims’ agency within the system, which has been correlated with enhanced satisfaction.

» Importantly, it would also have two communicative benefits: first, it would communicate community standards to the judiciary and the DPP; secondly, it would communicate to the public that the decision to appeal or not has been taken with the victim’s approval, increasing confidence in the representativeness of the criminal justice system.

The purpose of the criminal justice system is to deliver punishments that are proportional in their severity to the harm caused by the crimes being punished, while reducing crime overall by deterring and correcting criminal behaviour. In Australia and other democracies, this system of punishment takes place within a system of individual rights, which are rules that have emerged over time to allow communities to live together and individuals to pursue their own lives. As such, the vindication of these rights and the assessment of the harms of crimes are inseparable.

This in turn means that along with defending the community against harm, one of the objects of the criminal justice system is the satisfaction of the victims of crime, meaning those individuals whose legal rights have been violated. While our criminal justice system is defined by a contest between the state, representing the community, and the defendant, it is legitimate to seek procedures that also satisfy victims, not only for the value that they themselves derive from that satisfaction, but to demonstrate to the community that the state properly understands what is at stake in the prosecution of criminals and the fight against crime.

The aim of victim appeal is to both increase the sensitivity of the system to community standards and increase victims’ satisfaction with the process. By extending the right to appeal too-lenient sentences from the state to the victim, we can reinforce the role that community standards play in sentencing and thereby strengthen the ability of the courts to deliver justice.
1-1: How it would work

The concept of the reform is simple: victims should be given the right to direct that the DPP seek leave to appeal against sentences victims deem unjust. There are however a number of complexities to how this right would operate in practice, which are outlined below.

1-1-1: Who can appeal and in what circumstances?

At the moment, in most jurisdictions in Australia, the DPP has the right to appeal sentences that are “manifestly inadequate”. This means that the sentence has to be one that a court might find was outside the sentences available to the sentencing judge, being so far removed from the normal sentences imposed in similar cases. In Queensland, this power resides with the Attorney-General.8 In Western Australia, either the Attorney-General or the DPP can initiate an appeal.9

State appeals against sentences are made under legislation that limits them to sentences that are in error.10 In Victoria, for example, section 287 of the Criminal Procedure Act 2009 provides that the DPP may appeal to the Court of Appeal if the DPP both “considers that there is an error in the sentence” and “is satisfied that an appeal should be brought in the public interest”.11 When considering whether an error has been made, the appeal court will decide whether there is a matter of principle that needs to be established so as to avoid manifest inadequacy or inconsistency in sentencing.12

Guidelines for appeals across the country reflect the settled law. Appeals against sentence are to be rare, involve matters of public interest, and operate to protect public confidence in the criminal justice system.13 For example, Victorian DPP policy states that the DPP will only bring an appeal if the DPP is satisfied that “all applicable statutory criteria are established” and “there is a reasonable prospect that the appeal will succeed”.14 In determining whether the public interest test is met, the DPP will consider a range of factors including “whether the offence is of considerable public concern”, “the attitude of the victim to a prosecution”, “community protection” and “deterrence, both specific and general”. Importantly, another factor to consider is “the need to maintain public confidence in the basic constitutional institutions such as the Parliament and the courts”.15 Several states’ guidelines state explicitly that DPP appeals against sentence are to be “rare” (New South Wales) or “used sparingly” (South Australia, Tasmania).

Under victim appeal, the victim would not appeal on his or her own behalf. Victim appeal would instead give the victim the right to direct the DPP to appeal the sentence, just as the Attorney-General can so direct in certain states. The proposed victim right would be in addition to the existing right of the DPP and/or the Attorney-General to launch an appeal. This is because the aim

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8 Criminal Code 1899 (QLD) s 669A


11 Criminal Procedure Act (VIC) 2009 s 287


13 For links to DPP guidelines, please refer to the references section at the end of this document.

14 Office of Public Prosecutions Victoria (2016), Policy of the Director of Public Prosecutions for Victoria pp. 37-8

15 Ibid p. 2
of the reform is not to undo or interfere with existing processes but to create an additional avenue to appeal so that sentencing judges are more aware that their decisions can be reviewed by a higher court.

1-1-2: What role would the DPP play?

The office of the DPP would make itself available to consult with the victim. In South Australia, victims already have the right to request that the DPP consider an appeal against sentence. The DPP is committed by law to consult with victims, which commitment falls under the oversight of the Commissioner for Victims Rights.

Around the country, all sentences are typically reviewed by the DPP as a matter of course. This advice should be provided to victims on request. The possibility that this advice could be used by defence lawyers against the DPP in proceedings following the victim’s exercise of this right would likely shape the DPP’s advice, incentivising the DPP to adopt the victim’s point of view, or giving more weight to that view among other considerations.

If the victim directs the DPP to seek leave to appeal, the application would be drafted by the office of the DPP and public prosecutors would appear at the hearing. The victim would not have separate representation. The office of the DPP would bear the costs of the appeal, in order to:

- Ensure equal access to the exercise of this right;
- Incentivise the DPP to properly advise victims; and
- Maintain the public nature of prosecutions.

1-1-3: To which offences would victim appeal apply?

It is proposed that the right should be exercisable in at least all cases involving serious indictable offences. The right could be extended to proceedings involving minor indictable offences heard by Magistrate’s Courts if government determined that doing so was worthwhile or necessary for consistency across the courts. The reform would likely be costlier if extended to minor indictable offences.

In homicide cases, the right would be exercised by next of kin, consistent with the practice of Victim Impact Statements. In cases involving victims who are minors, the parents or legal guardians would exercise the right.

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16 Eg NSW ODPP guidelines state that “The prosecutor in any case conducted by the ODPP should assess any sentence imposed”. Office of the Director of Public Prosecutions (NSW) (2007), Prosecution guidelines of the Office of the Director of Public Prosecutions p. 53
Queensland guidelines state that “In every case the prosecutor must assess the sufficiency of the sentence imposed”. Office of the Director of Public Prosecutions (Queensland) (2016), Director’s guidelines p. 59
1-1-4: What about guilty pleas and plea agreements?

In Australia, plea agreements do not limit judicial discretion in sentencing. Any submission made by the prosecution regarding sentencing is merely an opinion and the sentencing judge cannot base his or her sentencing order on such a submission.\(^{17}\) Sentencing recommendation provided by prosecutors therefore have little relevance to the operation of victim appeal.

To avoid the DPP submitting such recommendations that may later be contradicted by an appeal ordered by a victim, as in South Australia, victims should be given the right of consultation regarding plea agreements struck by the DPP.\(^{18}\) Victim appeal incentivises the public prosecutor to take this responsibility seriously.

1-1-5: Are there any precedents for this reform?

This would be a novel reform.

In Germany, victims can appeal when courts decide not to proceed to trial, but they cannot appeal the results of the trial.\(^ {19}\)

In India, the Criminal Procedure Code grants victims the right to appeal acquittals, convictions for lesser offences, and orders that impose “inadequate compensation”, but the state reserves the right to appeal for “sentence enhancement”.\(^ {20}\) This right goes much farther than the proposal here, but nonetheless does not provide a precedent for giving victims the right to appeal inadequate sentencing. The justification, however, is similar. Victims’ appeal in India was introduced in 2006 as part of the implementations of the recommendations of the Malimath Committee on Criminal Justice Reforms, which were in part inspired by the need to “restore the confidence of the common man in the Criminal Justice System”.\(^ {21}\) The Committee recommended that the appeal right extend to sentencing.\(^ {22}\)

South Australia provides victims with the right to request that the DPP make such an application. This right does not trigger an appeal, but does commit the DPP to consulting in regards to the request. It is enforceable by the Commissioner for Victims’ Rights under the Victims of Crime Act 2001 (SA).

In considerations of victims’ rights in terms of direct involvement in criminal proceedings, it is notable that in New South Wales, victims have limited standing to appeal against pre-trial rulings that involve confidential information.\(^ {23}\) As discussed in Section 3-2, giving victims standing goes further than the limited right of victim appeal proposed here.

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17 Barbaro v R; Zirilli v R [2014] HCA 2
18 Principle 15 of the Declaration of principles governing treatment of victims reads: “A victim who is dissatisfied with a determination (for example the sentence) made in relation to the relevant criminal proceedings (being a determination against which the prosecution is entitled to appeal) may request the prosecution to consider an appeal against the determination. A victim must make this request within 10 days after the making of the determination. The prosecution must then give due consideration to that request” Commissioner for Victims’ Rights (2001), Declaration of principles governing treatment of victims
19 Susanne Walther (2006), “Victims’ rights in the German court system” Federal sentencing reporter 19(2) pp. 113-118
20 Sikha Barman (2017), “Victims’ right to appeal under Indian criminal justice system” MSSV Journal of Humanities and Social Sciences 1(2) p. 91
21 Government of India, Ministry of Home Affairs (2003), Committee on reforms of criminal justice system Volume 1 p. 3
22 Ibid p. 36
23 Criminal Appeal Act 1912 (NSW) s 5F(3AA)-(3AB)
1-2: Benefits of the reform

Giving victims the right to direct the DPP to appeal against inadequate sentences would have three important effects. It would:

- force the DPP to consult in good faith with victims regarding the likelihood of such an appeal succeeding, in turn encouraging the DPP to give more weight to victims’ views;
- communicate to sentencing judges that they need to consider victims’ views if they want to avoid their sentences being appealed more frequently; and
- communicate to the community that the courts do consider victims’ interests in sentencing and the grounds on which inadequate sentences are reviewed, thereby increasing confidence in the courts.

In addition, this reform gives victims an active role in sentencing, which is likely to increase their satisfaction with the outcomes of the system. One consideration of any victims’ rights reform is the benefit that a sense of satisfaction and closure gives to victims’ recovery. The victim’s right to appeal would also likely satisfy community concerns that manifestly inadequate sentences are harmful to victims.

The therapeutic value of the reform for victims should be considered a subsidiary but important reason for the reform. Increasing the satisfaction of victims sends a valuable message to the community about the connection between the judiciary and community standards of justice.

One final virtue of victim appeal in this respect is that it would increase the transparency of DPP decision-making. The DPP’s reasons for not pursuing an appeal would need to be communicated to the victim. This would reassure the public that when appeals do not proceed, this is because the victim is satisfied by the DPP’s advice. When leave is not granted for an appeal, this too would serve to communicate to the public how these decisions are made. Given that the public’s confidence in the courts is determined in part by its knowledge of how courts’ decision-making operates, this increase in transparency could have the benefit of improving the courts’ reputation.

In these ways, this reform would address the two identified problems (as outlined in the introduction and as illustrated in more detail in Sections 2 and 3):

1. that despite stable performance at the aggregate level, the reputation of the courts continues to be adversely affected by exceptional cases in which judges impose sentences wildly out-of-step with community standards; and
2. the desirability of increasing victims’ satisfaction derived from the criminal justice system.

Lastly, victim appeal is designed to work within the bounds of existing criminal justice procedure. The discretion of the judiciary in sentencing would not be affected, nor would the independence of prosecutors. Instead, victim appeal forces those actors to be sensitive to the needs of victims, whose apprehension of the harm they have suffered is relevant to sentencing both directly and as indicative of how community standards have been infringed.24 Victim appeal has the virtue of not being a far-reaching change to criminal justice procedure.

24 A similar rationale has been offered for giving victims a veto over plea agreements struck by prosecutors. This reform would not however place any pressure on the judiciary, nor address the fact that it is a minority of cases that give rise to concerns about community standards not being met.
1-3. Risks and mitigation

1-3-1: Frivolous appeals

The main risk of this reform is that it will lead to a number of appeals being launched by victims against the advice of the DPP, tying up DPP and court resources to very little effect.

As it stands, the system of state appeals against sentence is designed to keep appeals rare. This reflects the settled law which is based on the premise that they place defendants at risk of double jeopardy. But it should be noted that many jurisdictions in Australia have moved to limit the application of double jeopardy, following a 2007 agreement by the Council of Australian Governments. Preserving judicial discretion in sentencing is another cited reason to keep the number of Crown appeals against sentence low. This is indeed an important principle. However, as cited in the South Australian DPP guidelines, King CJ of the South Australian Supreme Court had it right in 1982 when he wrote, in R v Osenkowski, that prosecution appeals have the important function, among other functions, of enabling “idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected.”

The risk of overburdening appeal courts with frivolous appeals can be mitigated by following the example of South Australia. In that state, the DPP must seek leave to appeal against a sentence. A hearing is held before a three member panel of the Criminal Court of Appeal. Similarly, appeals triggered by the victim’s exercise of this right should not proceed directly to the appeal court but rather should cause a hearing to take place in which the court considers the merits of the appeal before it proceeds. This would minimise the costs of unrealistic appeals.

This risk is also mitigated by the role that the DPP will continue to play in advising victims of the likelihood of success of an appeal against sentence.

Moreover, the success of the appeals is not the entire purpose of the reform. Increasing the number of appeals against inadequate sentences will also increase the sensitivity of the system to victims’ interests and the transparency of the system to the benefit of the public. As outlined in Section 2 below, it is likely, based on stable sentencing statistics at the aggregate level over time and across jurisdictions, that low public confidence in the courts, also stable over time, is in part based on exceptional cases in which sentencing judges depart egregiously from community standards. Appeals against sentence are apparently too rare to raise public confidence in sentencing. Pointing this out is not to dismiss the values that the state and the law points to in keeping such appeals rare. It is, rather, to make the claim that the damage to public confidence caused by this infrequency should be addressed. The goal of reformers concerned about this problem should be to rebalance these interests.

26 Director of Public Prosecutions South Australia (2014), Statement of prosecution policy and guidelines p. 27
27 Director of Public Prosecutions South Australia (unknown year), Understanding appeals in criminal court matters
1-3-2: Difficulties in exercising the right

The converse risk is that very few victims choose to exercise the right. But this would simply mean that the anticipated systemic effect is limited only to the processes by which the DPP or Attorney-General decides against an appeal. It would not negate the positive effect of the reform entirely.

A related concern is that the media and public attention attracted by unjustly lenient sentences would be focused on the victim. This seems unlikely, though, because the proposed right is in addition to the right of the DPP and/or the Attorney-General, which means that those offices would still be subjected to pressure to exercise their rights—indeed, the victim’s ability to trigger the appeal would likely increase the scrutiny of the DPP and/or Attorney-General.

In circumstances where the victim’s identity is suppressed, the consultations between the DPP and the victim would have to remain confidential. Victims who wanted it known that the appeal was their decision would be at liberty to reveal that. If an appeal is triggered by the victim, this will be disclosed at the leave hearing as the defence would likely have a right to know what advice the DPP provided to the victim.
Addressing the public’s low confidence in the courts

KEY POINTS:

- This section argues for victim appeal based on the need to address the public’s lack of confidence in the courts.
- This lack of confidence has been consistently reported in several surveys over the past decade or more.
- Over that period, courts have not changed their sentencing practices, with the use of prison as a punishment and the length of sentences imposed remaining very stable across jurisdictions.
- One factor that has changed is that there are far fewer Crown appeals against sentence than there were a decade ago.
- Increasing the frequency with which sentences are tested by appeals is a modest reform that would increase the sensitivity of the judiciary to community standards.
- This is to be preferred to the heavier-handed intervention of reducing judicial discretion by passing mandatory sentencing laws, which increase the possibility of sentences that are disproportionately severe.

Victim appeal is designed to restore, in part, the public’s confidence in the courts by reassuring them that the standards applied in sentencing are based on common sense and the interests of victims. It is argued in this section that sensational cases in which judges are too lenient drive down confidence in the courts. And yet, the number of appeals against such sentences has fallen over the past decade. Victim appeal ameliorates this problem by providing an immediate means of recourse against unusually bad sentences. In jurisdictions that are consistently more lenient than others, victim appeal may help by contributing to an increase in punishment severity (noting though that the goal of sentencing is proportionality and not harshness per se).
Public confidence in the judiciary is essential to the operation of the criminal justice system. Judges operate with the imprimatur of the state, which represents the interests of the public. There is therefore a direct connection between the authority of the courts and their embodiment of the shared moral norms of the community. High profile lenient sentences inflame the public sentiment. This feeds into and reinforces Australians’ low level of confidence in the courts, especially if fewer cases are being appealed against on ground of leniency.

The 2003 Australian Survey of Social Attitudes found that just 29% of respondents have confidence in the courts and the legal system. In 2007, the same survey found that respondents reported higher levels of confidence in courts to have regard for defendants’ rights than victims’ rights. 70 percent of respondents indicated having either a “great deal of confidence” or “quite a lot of confidence” that courts would have regard for defendants’ rights, as against just 47 percent of respondents reporting the same for victims’ rights. A desire for harsher sentences was negatively correlated with lower confidence in the courts.28

A series of surveys in New South Wales between 2007 and 2014 revealed similar findings. In 2014, 66 percent of respondents reported that sentences are too lenient. This figure was 59 percent in 2012 and 66 percent in 2007. Respondents also indicated a lack of confidence in the criminal justice system to meet the needs of victims: in 2014, 44 percent of respondents were confident in this aspect of the criminal justice system, compared to 45 percent in 2012 and 35 percent in 2007. There was a rise in the number who reported confidence that the system “brings people to justice”, with 66 percent reporting that in their opinion it does in 2014 compared to just 55 percent in 2007. It should be noted that the 2014 survey found that across almost all questions, greater confidence than 2007 was recorded.29

The 2007 study found that participants were often misinformed about the criminal justice system, overestimating the proportion of crimes that involve violence and underestimating conviction and imprisonment rates for assault and burglary. Respondents with greater knowledge of crime trends were more likely to report that sentences were “about right” and were more confident about the system meeting the needs of victims. The 2014 study also found that how punitive respondents were was affected by their understanding of how prevalent violence is in crime and how accurate is their understanding of crime trends.

A 2012 follow-up study found that respondents were more knowledgeable than in 2007, and less punitive, with 59 percent reporting that sentences were too lenient.30

These findings mirror other studies that show that attitudes towards sentencing are affected by respondents’ familiarity with the system. A 2006 paper from the Victorian Sentencing Advisory

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28 David Indermaur and Lynne Roberts (2009), “Confidence in the criminal justice system” Trends and issues in crime and criminal justice No. 387, Nov 2009, Canberra: Australian Institute of Criminology


[NB: the surveys asked respondents about the criminal justice system as a whole, not just the courts. As Indemaur and Roberts point out (2009, as above) higher rates of confidence in the police may inflate confidence levels for the system as a whole.]

Council summarised domestic and international research and found that **people become less punitive when they have more information about particular cases.** A survey conducted across 2008-09 and reported in 2012 found that respondents were more likely to report that sentences for violent crimes were too lenient. That survey also showed that respondents’ punitiveness varied based on their information levels and sources. A 2010 survey of jurors in Tasmania also found that while jurors shared the public’s level of punitiveness in the abstract, 90 percent agreed with the sentences handed down by judges in cases in which they participated.

For its part, the judiciary is very confident that it plays an important role in society and in the community. According to a 2007 survey, fully 97 percent of judges and magistrates report that agree or strongly agree that their work is important to the community. The public and the judiciary are largely in agreement about the qualities that a judge should have, with legal knowledge, hard work, and life experience valued highly by both groups. However, judges and magistrates are more likely to value impartiality as the most important quality members of the judiciary should possess.

These surveys suggest that while the Australian public is concerned about how the judiciary performs, this concern in part stems from a lack of information about, and participation in, the criminal justice system. Survey respondents’ views tend to align with judges when better informed about trends in sentencing and criminal justice procedures. This in turn suggests dramatic changes to sentencing policy, such as mandatory sentencing (discussed in more detail in Section 2-4-2 below), are not required to satisfy public demand.

Given that the public’s main source of information about the criminal justice system is the media, and given that when informed about the particular circumstances of cases the public is less likely to report dissatisfaction with the system, the public’s low confidence in the judiciary stems in part from media reporting of the most sensational cases, which include those cases with unjustly lenient sentences. That is, while these cases may be exceptional, they likely play a disproportionate role in affecting public confidence in the judiciary by convincing the public that the judiciary is out of touch. Indeed, one way of interpreting the public’s lower interest in impartiality as a judicial value is that they expect judges to be partial to community standards. If we accept that this is an important factor in the fair and authoritative operation of our courts, then we need a system that effectively responds to these incidents.

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32 This survey and articles reporting on it are summarised here: Lenny Roth (2014), *Public opinion on sentencing: recent research in Australia* Sydney: NSW Parliamentary Research Service


34 These findings are discussed in: Sharyn Roach Anleu and Kathy Mack (2010), “The work of the Australian judiciary: public and judicial attitudes.” *20 Journal of Judicial Administration (JJA)* p. 3

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2-2: Trends in sentencing

This section analyses data concerning sentencing by types of offences, types of sentences, and prison sentence length. The purpose of this section is to demonstrate that sentencing practices over time and across Australian jurisdictions have been stable. Read together with Section 2-1, the case can be made that this consistency in sentencing suggests that it is unusual sentences, rather than the pattern of sentencing, that should be targeted for reform in light of the public’s low confidence in the courts.

Methodological note:

The exceptional nature of sensational cases stands in contrast to the stability of sentencing practices over time and across jurisdictions. Where possible, this analysis breaks down sentencing data by court type. Most criminal offences are prosecuted in the Magistrates’ Courts; however serious indictable offences are prosecuted in the higher courts. As such, the kinds of sensational cases that affect public confidence are most likely to be heard in higher courts. Magistrates’ Courts hear some minor indictable offences, and a small number of Crown appeals against sentence originate in Magistrates’ Courts. However, by far the most common offence type heard in the Magistrates’ Courts is traffic violations, which are relatively uncontroversial.

All of which means that finding a reliable denominator for the rate of Crown appeals against sentence is complicated.

In Section 2-3, the analysis considers the number and frequency of DPP appeals against sentence. To avoid the noise created by traffic offences, we have excluded these guilty findings from the analysis of Magistrate’s Courts. A rate of sentence appeals is provided both against higher courts decisions and all guilty findings, traffic offences excluded.
2-2-1. Types of crime

Since 2008-09, higher courts have recorded guilty findings (including guilty pleas) most frequently in cases involving principal offences of assault, sexual assault, burglary, and drug offences. That is, among convicted offenders these are the most frequent principal offences.

Figure 1 below shows that apart from a growth in the share of guilty findings being in drug cases, the distribution of guilty findings across types of offending has mostly been consistent in recent years.

**Figure 1** Number of guilty findings by most serious offence as proportion of total guilty findings, higher courts 2008-09 and 2016-17

Source: Australian Bureau of Statistics, *Criminal Courts Australia 2016-17*, Table 7
Figure 2 shows the same data for Magistrates’ Courts, and confirms that traffic violations make up almost half of cases in those courts. Acts intended to cause injury and drug offences are also prominent.

**Figure 2** Number of guilty findings by most serious offence as proportion of total guilty findings, Magistrates’ Courts 2008-09 and 2016-17

Across court levels, it can be seen that over the last decade, the pattern of guilty findings by most serious offence has changed little, meaning that courts are mostly seeing the same types of offending at mostly the same rates.
2-2-2. Types of punishment

Of those found guilty, we can calculate the percentage who are sentenced to prison as their primary punishment. This data is not available for all offences and all jurisdictions; however, it is available for homicide, assault and sexual assault cases of the type that has typically outraged the community.

**Homicides**

Figure 3 shows that over the last five years, across the mainland states, 90 percent of those convicted of a homicide or related offence were sentenced to prison. There were not wide variations between jurisdictions. Homicide cases are almost always heard in the higher courts so Magistrates’ Courts data is excluded in this sub-section.

**Figure 3** Homicide and related offences – Percentage of guilty findings leading to incarceration as principal punishment (mainland states only), five-year average 2012-13 to 2016-17

When we break this down, we can see that there has not been much variation in how homicides have been treated by courts over the past five years. Figure 4 shows that average across mainland states has been within two percentage points of 90 percent each year.
Western Australia and South Australia have both had years recently in which this figure has been lower than usual, but because the absolute numbers involved are quite small (between 30 and 50 guilty findings) this might be explained by coincidence—there might simply have been an unusual number of cases warranting less severe punishments.

**Acts intended to cause injury**

Figure 5 shows that over the last five years, in higher courts, across the country the share of defendants sentenced to prison for acts intended to cause injury (the class of offences that includes assault) was consistent across the country, apart from South Australia, which imprisoned those convicted of this type of offence at a noticeably lower rate.

In the Magistrates’ Courts, which hear less serious assaults (and in greater volume), the percentages were much lower. Victorian magistrates are the most lenient by this measure. Queensland magistrates are much more likely than magistrates in the other mainland state to use prison as the principal punishment for this type of offence. This might be because of how the Queensland parliament defines indictable offences, or because of a lack of available alternative punishments, or because the nature of the offending in that state is worse, or a combination of these factors.
**Figure 5** Acts intended to cause injury - Percentage of guilty findings leading to incarceration as principal punishment, by court type (mainland states only), five-year average 2012-13 to 2016-17

Source: ABS Criminal Courts (various years, various tables)

Figure 6 shows this data over time.

**Methodological note:**

For simplicity’s sake, the data shown in the time series in Figures 6 and 8 are the combination of higher and lower courts. This also has the advantage of eliminating the difficulty posed by the states’ different division of responsibilities between court levels.

Nationally the imprisonment rate for those convicted of acts intended to cause injury has risen from 18.9 percent in 2012-13 to 23.7 percent. All mainland states have seen rises in this category. By this measure, Queensland is consistently more punitive than the other mainland states, while Victoria is consistently more lenient. These differences are driven by decisions in the Magistrates’ Courts.
As with homicides, it is fair to say that there has been little change in this measure over time. And what change there has been has been towards severity. However, there is greater variability between states. This might be a function of different judicial attitudes but might also be explained in part by the wider variety of offending captured by this category.
**Sexual assault**

Statistics for the sentencing of sexual assault show even greater variation across jurisdictions. In both levels of courts, New South Wales has been most likely to use prison as the principal punishment for sexual assault. South Australian courts at both levels are less likely to sentence offenders in this category to prison, as are Victorian Magistrate’s Courts.

**Figure 7** Sexual assault – Percentage of guilty findings leading to incarceration as principal punishment, by court type (mainland states only), five-year average 2012-13 to 2016-17

![Graph showing percentage of guilty findings leading to incarceration as principal punishment by court type (mainland states only) for 2012-17].

**Source:** ABS Criminal Courts 2016-17

**Note:** Mainland states average used in the absence of national figures being reported for some years.

Time series figures for all courts show that these interstate differences have been persistent in recent years. Victorian courts have been the least likely to sentence offenders in this category to prison. It is not possible to know to what extent this is reflective of underlying offending patterns or different attitudes in the judiciary/magistracy. In absolute terms, Victoria has proportionally fewer guilty findings in this category than New South Wales: in 2016-17, New South Wales had more
than 21,000 guilty findings in all courts whereas Victoria had a little under 12,000. This does suggest there is some difference in the behaviour of individuals across the population, though it does not say anything about how serious are the offences that occur.

**Figure 8** Acts intended to causes injury – Percentage of guilty findings leading to incarceration as principal punishment, all courts (mainland states only), 2012-13 to 2016-17

The stability in the rates of the use of prison as principal punishment for these three types of offences suggests the judiciary is neither becoming harder nor softer in its attitude to sentencing. Other factors, especially the unique circumstances of offending in each case, are likely account for much of the small variation seen year-to-year.
2-2-3: Sentence length

Of those offenders who are sentenced to prison, ABS data shows that in some jurisdictions, the average sentence for these offenders has been stable or risen slightly in the last decade.

Methodological note:

Please note that the figures in this section include all offenders sentenced to prison by all courts, including Magistrate’s Courts.

Figure 9 shows that where there has been a decline in sentences it has been to levels more consistent with the other mainland states and the national average—as in the reduction in average sentence lengths for acts intended to cause injury (the red bars) in Victoria and South Australia.

Figure 9 Average sentence lengths for acts intended to cause injury and sexual assault by jurisdiction 2007 and 2017

Source: Australian Bureau of Statistics, Prisoners in Australia 2007, Table 29, and 2017, Table 24
If we look at the broader pattern of sentencing across all ABS classifications, we can see that the distribution of sentence lengths has remained similar over the past decade.

Figure 10 shows that most sentences are between one and 10 years, with the most common being sentences between two and five years. There has been a small shift from short sentences (less than one year) to sentences of this length, suggesting that courts are using community corrections orders more frequently for some offenders and giving lengthier sentences to others.\textsuperscript{35}

\textbf{Figure 10 Proportion of sentences by sentence range, all offences, national, 2007 and 2017}

In 2017, this pattern was broadly similar across Australian jurisdictions. The Northern Territory has an anomalous use of short prison sentences, which may be explained by the lack of available alternative punishments. South Australia imposes life sentences more frequently than other states.

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\textsuperscript{35} Trends in community corrections sentencing are discussed at greater length in our report, Making community corrections work. Andrew Bushnell [2018], Making community corrections work, Melbourne: Institute of Public Affairs
Figure 11 Proportion of sentences by sentence range by jurisdiction, 2017

Source: Australian Bureau of Statistics, Prisoners in Australia 2017, Table 26
2-2-4: Summary of sentencing trends

These figures reviewed in this section show that over the past decade and across Australian jurisdictions, sentencing practices have been reasonably consistent. There has been little change in the rate at which offenders convicted of homicide, assault, and sexual assault are jailed, and little change in the range of prison sentences imposed on offenders. There has also been little change in the types of crimes coming before the courts. Together, these data suggest that the courts have not responded to the public’s low confidence in their performance by changing their sentencing practices.

If these consistent standards are held by the public to be too lenient, then this will contribute to their reported lack of confidence. However, the consistency of these standards combined with studies showing that media reporting and access to information about judicial decisions affects how the public views the courts also admits the possibility that it is not the overall pattern of sentencing practices that is causing the public to lose confidence, but rather sensational cases of the type identified earlier. That is, the public bases its opinion of the performance of the courts on those cases to which it is exposed, and those cases are likely to be ones that are outside the normal performance of the courts.

2-3: Crown appeals against sentence by the numbers

One way of measuring the frequency of sensational or exceptional cases is by examining the number of Crown appeals against sentence. The following data are taken from the Annual Reports of the various DPPs across the country. The aim of this section is to identify how often states and territories appeal against sentences, as a proxy for how many sentences offend against community standards.

Put another way, victim appeal is in part predicated upon the claim that sentences ought to be tested for their manifest inadequacy more frequently with Crown appeals. This raises the question of how frequent are such appeals.

The last year for which all Australian jurisdictions have reported statistics is 2016-17. Table 1 shows how many state appeals there were in each jurisdiction that year, and how many of them were successful.

Table 1 Crown appeals against sentence by jurisdiction, 2016-17

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>SA</th>
<th>WA</th>
<th>Tas</th>
<th>NT</th>
<th>ACT</th>
<th>Aus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecution appeals</td>
<td>43</td>
<td>18</td>
<td>1</td>
<td>12</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>10</td>
<td>99</td>
</tr>
<tr>
<td>Number of successful prosecution appeals</td>
<td>22</td>
<td>11</td>
<td>0</td>
<td>7</td>
<td>6</td>
<td>-</td>
<td>0</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: DPP Annual Reports for each jurisdiction
As noted above, serious indictable offences are heard in the higher courts, where they are prosecuted by the DPP. To understand how infrequent are Crown appeals against sentence, we can compare the data in Table 1 against the number of guilty findings in these courts. Another possible comparison is with guilty findings in all courts, excluding traffic offences. This figure is provided for completeness but it is not necessarily the fairest comparison: most cases in the lower courts are dealt with summarily and do not raise points of law that might be tested on appeal. It is very rare for Magistrates’ decisions to be appealed by prosecutors for this reason.

Table 2 shows that compared to the number of guilty findings, the number of Crown appeals against sentence is very small: less than 1% against higher court sentence and just 0.03% when compared to all non-traffic offences. One important takeaway from this data is that concerns that victim appeal will raise the number of appeals need to be considered against the very low number of appeals we see currently. There are very few appeals, and, as Figure 12 shows, fewer now than in the recent past.

Table 2 Crown appeals against sentence by jurisdiction, 2016-17

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>SA</th>
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<th>ACT</th>
<th>Aus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecution appeals</td>
<td>43</td>
<td>18</td>
<td>1</td>
<td>12</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>10</td>
<td>99</td>
</tr>
<tr>
<td>Total guilty findings (higher courts)</td>
<td>4002</td>
<td>1646</td>
<td>4408</td>
<td>1197</td>
<td>2115</td>
<td>280</td>
<td>440</td>
<td>161</td>
<td>14246</td>
</tr>
<tr>
<td>Total guilty findings (all courts, minus traffic offences)</td>
<td>76599</td>
<td>55106</td>
<td>97388</td>
<td>16949</td>
<td>50675</td>
<td>5306</td>
<td>6695</td>
<td>685</td>
<td>309391</td>
</tr>
<tr>
<td>Ratio of appeals to higher court guilty findings</td>
<td>1.07%</td>
<td>1.09%</td>
<td>0.02%</td>
<td>1.00%</td>
<td>0.52%</td>
<td>1.43%</td>
<td>0.00%</td>
<td>6.21%</td>
<td>0.60%</td>
</tr>
<tr>
<td>Ratio of appeals to all court guilty findings</td>
<td>0.06%</td>
<td>0.03%</td>
<td>0.001%</td>
<td>0.07%</td>
<td>0.02%</td>
<td>0.08%</td>
<td>0.00%</td>
<td>1.46%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

Methodological note:

“Number of prosecution appeals finalised” includes an unknown number of appeals that were begun in the previous financial year or were against decisions handed-down in the previous financial year. It is not possible to track individual cases through the process to eliminate this limitation. The figure for Western Australia is the number of appeals lodged—this is for consistency in the times series below, as Western Australia did not report appeals finalised in previous years.

“Total guilty findings by higher courts” excludes appeals. As noted in the source of the data: ABS Criminal Courts 2016-17, Explanatory Note 17.
As the time series in Figure 12 demonstrates, the number of state appeals against sentence has increased in Victoria in recent years. Queensland consistently has fewer such appeals. The number of appeals in NSW dropped sharply to 2015-16 but recovered somewhat in 2016-17. The drop off may have been in part caused by a backlog of cases at the District Court. In 2016, the NSW Government announced that it would hire additional District Court judges to reduce the backlog.\textsuperscript{36} Figures were not available for all years for Tasmania, the Northern Territory, and the Australian Capital Territory so they have been excluded.

\textbf{Figure 12} Crown appeals against sentences (withdrawn appeals excluded)

\begin{center}
\begin{figure}
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{Crown appeals against sentences (withdrawn appeals excluded)}
\end{figure}
\end{center}

Source: State DPPs Annual Reports

One notable result from this time series is that the two mainland states in which the Attorney-General can order an appeal be lodged, Queensland and Western Australia, have consistently fewer state appeals against sentence than the other mainland states. One possible reason for this is that in those states, the decision to appeal or not is affected by political considerations. While it might be expected that Attorneys-General could find some political advantage by attacking the courts for perceived leniency, in reality, they are usually more risk adverse than this, likely reasoning that the benefits of appeals rarely outweigh the costs and communication risks involved.

As shown in Figure 13, the past decade has seen an overall downward trend, with the current number of Crown appeals against sentence being more than 50 percent below its peak in 2008-09. However, the number has been reasonably stable over the past five years, following a sharp drop between 2010-11 and 2011-12.

**Figure 13 Number of Crown appeals against sentence, mainland states 2007-08 to 2016-17**

This time series can be compared to time series data for the number of guilty findings in all courts. However, because the number of appeals is so small compared to the number of guilty findings, this ratio is not very responsive to changes in the number of appeals. There is a slight downward trend, which reflects the fact that the decline in the number of appeals is not caused by a decline in the number of guilty findings. The shape of the two lines in Figures 13 and 14 are notably similar, showing that the trend is not obviously affected by the number of guilty findings.
Indeed, if we look more closely at the numerator and denominator of this ratio, we can see that they do not reveal a clear relationship.

Figure 15 shows that there is a slight trend towards more guilty findings, recovering from a steep decline from 2009-10 to 2010-11, while there is a slight trend towards fewer appeals. This figure shows that there is no necessary connection between these figures, which reinforces the exceptional nature of Crown appeals against sentence: just because there are more cases, does not mean that there are more unusual cases.
That said, the key point is that there has been a decline in the number of appeals, both in absolute and relative terms. Two observations follow:

- The rate at which sentences are appealed by the Crown has been higher in the recent past, suggesting that it would not be a radical change were the rate to rise again.

- The stability in recent years suggests that the DPP and Attorneys-General are not persuaded of the need for or the viability of more appeals against sentence, community concerns notwithstanding. This reflects how stringent is the law regarding appeals against sentence; however, this law has not grown more stringent in recent years so is unlikely to explain the downward trend.

There is some evidence, then, that courts’ sentencing decisions are being challenged less frequently by the state than 10 years ago. This means that sentencing judges are more insulated from scrutiny of their decisions, and means that the Directors of Public Prosecutions are either less willing or less able to proactively enforce community standards.

2-4: Victim appeal as a response to trends in sentencing

2-4-1: The case for victim appeal based on sentencing trends

This section has shown that:

- Australians have consistently reported low confidence in the judiciary; and
- In sentencing, the judiciary has been consistent across jurisdictions and types of crime; and
- The DPP and/or Attorneys-General have been appealing fewer sentences in recent years.

Connections between these findings should not be overstated. It is also likely that if the public has a view of the judiciary and magistracy as too lenient overall, the consistency we have seen in sentencing is only likely to reinforce that view.

However, studies have shown that confidence in the courts is affected by access to information. This means that cases that attract media attention are likely to shape how the public perceives the courts. For obvious commercial reasons, the media reports on interesting, unusual cases rather than on every case or the overall pattern of cases.

The decline in the number of Crown appeals against sentence suggests that authorities are finding fewer cases with sentences that seem to dramatically depart from community standards. There is no way to know for certain whether this is justified or not. However, cases continue to appear in the media that generate widespread commentary and the perceived leniency of the courts continues to be a key issue in criminal justice, as evidenced by recent legislative moves to implement and tighten mandatory sentencing.

The argument presented here is not that victim appeal can address every reason for the public’s low confidence in the judiciary. Rather, it is that:

- to the extent that exceptional cases and subsequent media coverage contribute to the public’s lack of confidence in the judiciary, and
- to the extent that that impression is reinforced by the Crown appealing fewer sentences, and
• To the extent that the judiciary’s consistency in sentencing is in defiance of community standards and is insulated from popular opinion by the knowledge that sentences are unlikely to be challenged, then
• victim appeal is likely to have a positive effect on public confidence in the judiciary.

Victim appeal is therefore primarily a systemic tweak aimed at a systemic problem. Moreover, it is a better way to address this problem than less-subtle approaches, the most obvious of which, mandatory sentencing, warrants brief discussion.

2-4-2: Victim appeal compared to mandatory sentencing

If, as outlined above, the reputation of the courts is suffering from a few exceptional cases in which judges’ sentences depart unacceptably from community standards, it might be thought that this is reason for legislatures to assume responsibility for sentencing through legislations.

This has been an increasingly popular solution for legislatures in Australia. For example, and as noted in the introduction, in Victoria, since 2014 assaults against emergency services personnel carry mandatory prison sentences. Following a recent controversy in which two offenders were not incarcerated following their conviction for assaulting paramedics attending an emergency, the state government proposed tightening this law further, removing judges’ ability to take into account certain circumstances of the offending, including related drug abuse.37

However, as infuriating as such decisions may be, mandatory sentencing is an overreaction that creates the risk of unjustly severe sentences—a risk that should also alarm those who care about the traditional standards of sentencing. Sentences are supposed to be proportional to the harm caused by the offender. Although the legislature represents the community, and therefore might be thought of as best placed to speak to community standards, legislation is too imprecise a tool, unable to capture extraordinary cases—which are, as noted above, the problem. Judicial discretion and principles derived from precedent provide a surer calibration between severity and harm. These principles develop over time and from the experience of different people and different circumstances. The legislature cannot speak to the full experience of the community as it has evolved.38

The problem is not the power vested in the courts, but how courts exercise that power. Mandatory sentencing misdiagnoses the cause of the problem in question. Worse, it suggests that the public cannot and should not expect to be represented by judges and magistrates who share their values, and must instead accept that the legislature and the courts will always be in tension, if not conflict. Victim appeal is therefore the superior reform because it preserves the form of the criminal justice system and instead of interfering with the discretion of the courts, arms them with more information about community standards while also increasing their transparent accountability to the community for their decisions.

37 Willingham and Oaten (2018), as above
38 A similar problem rules out jury sentencing as an option. While a jury could speak to the standards of society in the moment, it would not necessarily be consistent with the standards of the community over time and across cases. The point of victim appeal is not to separate sentencing from precedent but to give victims, as community members, input into the system of judge-made sentencing.
3 Victim appeal as part of the victims’ rights agenda

**KEY POINTS:**

- Victim appeal is also supported by its therapeutic value for victims.
- Just as the introduction of Victim Impact Statements has benefited victims, so will giving them a real decision-making capacity.
- However, there is a limit to the therapeutic value argument: following such a line of reasoning leads to unnecessary overreactions like giving victims representation in criminal trials. Such an innovation departs too far from our traditional adversarial system.

In the previous section, it was argued that victim appeal can help to address the persistent problem of the public’s low confidence in the courts. This section argues for a different benefit of the reform: that it can make the criminal justice process more satisfying for victims. In this way, victim appeal can also draw upon the same justification as existing victims’ rights reforms.

The most visible aspect of the victims’ rights agenda in Australia has been the introduction of Victim Impact Statements. It is argued in this section that victim appeal complements this reform, and may actually be superior to it in some important ways.

The paper concludes, however, by warning against the introduction of the more dramatic change of granting victims the right to their own representation in criminal trials. The therapeutic value of victim involvement in the criminal justice system does not justify abandoning our traditional adversarial system of justice. Instead, the primary reason to increase the satisfaction of victims should be the value of doing so for achieving the first goal, which was increasing public confidence in the courts.
3-1: Victim impact statements

Victim appeal is in part predicated on the desirability of providing victims with greater agency in the criminal justice system and thereby connecting the judiciary to community standards.

In recent years, governments have moved to address the first part of this concern. Jurisdictions across Australia have passed legislation entitling victims to present statements at sentencing detailing how offenders’ crimes have affected them. The justification for the introduction of Victim Impact Statements (VIS) is that they are therapeutic for victims and that they introduce new evidence into proceedings about the type and amount of harm caused by the crimes in question.\(^{39}\)

For example, a 2017 review of victims’ involvement in sentencing in NSW focused almost entirely on VIS. This review summarised some of the recent research on the emotional benefits to victims of VIS, finding that the range of experiences of victims is wide, with some finding the process frustrating and others finding it to be therapeutic.\(^{40}\) However, evidence is stronger for some therapeutic effect than for disappointment.\(^{41}\)

One of the frustrations of VIS is that their therapeutic value often comes into conflict with the laws of admissibility of evidence. A Victorian Law Reform Commission review of the role of victims in criminal justice found that “Victims feel constrained by restrictions on what they can say in their victim impact statement. They often want to, and do, include information in their statement that is not admissible.” This leads to revisions having to be made to the statement or the court to exclude part of the statement. The Commission recommended that rules of admissibility be amended so as to tie the probative value of VIS to the purpose of allowing victims to explain how they have been affected by the crimes in question. This permissive view is often already adopted in practice: sentencing hearings do not have juries and judges are already in a position to minimise the prejudicial effect of VIS that do not adhere to strict rules of admissibility. But the Commission reiterated that the principles of sentencing do not permit the subjective opinions of victims to directly affect sentence severity. The Commission noted that, “Whatever a victim’s attitude towards sentencing, it is critical that an offender’s sentence does not depend on whether the victim is forgiving or punitive… A victim’s views about sentencing are considered to be opinions and are therefore not considered relevant”.\(^{42}\) It also noted that there is a concern that if the court allows objections to the content of a VIS to be heard, this stress can counteract the therapeutic benefits of VIS.\(^{43}\)

Evidence suggests that judges and magistrates consider VIS useful in sentencing. A survey by the Victorian Victims Support Agency found that 67 percent of judges and magistrates considered VIS to be significant in sentencing often or occasionally. Research from South Australia found that the introduction of VIS had not increased sentencing severity.\(^{44}\) It has been noted that the effectiveness

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\(^{39}\) A good short summary of this case for VIS is provided in Tyrone Kirchengast (2011), “Victim rights in Australian homicide cases” Oxford Journal of Legal Studies 31(1) pp. 136-7

\(^{40}\) NSW Sentencing Council (2017) Victims’ involvement in sentencing: consultation paper [Accessed 2 October 2018]

\(^{41}\) It has been argued that critics of VIS base their criticism on victims wishing to “control the outcome of the sentencing process”, which is not possible. This however may count towards victim appeal as a better way of satisfying victims. Julian V. Roberts (2009) “Listening to the crime victim: evaluating victim input at sentencing and parole” Crime and Justice 38(1) pp. 347-412

\(^{42}\) Victorian Law Reform Commission (2016) The role of victims of crime in the criminal trial process: report pp. 149-151

\(^{43}\) NSW Sentencing Council (2017) as above p. 64


Also referred to here: Victims Support Agency (2009) A victim’s voice: Victim Impact Statements in Victoria pp. 6-7
of VIS is limited by the reluctance of judges to take them into account in sentencing.\textsuperscript{45} However, the harm caused to the victim is one element of proportionality in sentencing (along with the harm caused to the community and the severity of the punishment), and VIS is relevant to this. In this way, VIS can be seen as reinforcing a traditional retributive system of justice, in that they make plain the connection between punishment at sentencing and the harmed individual.\textsuperscript{46}

On the other hand, the limitations of VIS as a form of victim participation in criminal proceedings are significant. While judges may be able to glean from VIS details about how the offending has affected victims, placing too much weight on this personal evidence introduces an unacceptable level of subjectivity into sentencing. Sentencing should not turn on how compelling a victim is in recounting his or her experience: this is unfair to victims and offenders alike.\textsuperscript{47} This is not to say that VIS are without value. But VIS do not and cannot give victims any control over proceedings, and so do not ameliorate the effects of out-of-touch judges who are determined to ignore the community construction of the meaning of harm and the effects of crime.

All of the virtues claimed for VIS apply equally to victim appeal. Victim appeal allows victims to register their disapproval of sentences, in a way that forces judges to consider their point of view. Moreover, victim appeal does so without the risks VIS carries for the administration of justice. Victim appeal gives victims a real decision to make. Victim appeal has a material effect on proceedings and enters into the public record the satisfaction of victims with the operation of the courts and public prosecutors. Victim appeal also avoids the procedural questions created by reliance on VIS for victim participation, such as the need for evidence to be objective and standards consistent across cases. It is therefore more effective in providing victims a role in proceedings and in protecting traditional criminal justice procedure.

That said, the goal of victim appeal is to complement VIS and other existing victims’ rights, not to replace them.

\textsuperscript{45} Tyrone Kirchengast (2013), “Victim lawyers and the adversarial criminal trial” New Criminal Law Review: an international and interdisciplinary journal 16(4)

\textsuperscript{46} Julian V. Roberts (2009), as above p. 354

\textsuperscript{47} British barrister Mark George QC has written that VIS “gives a very unfair advantage to the articulate”. Mark George (2012), “Involving victims in sentencing” The Justice Gap 12 October 2012

It should be noted that the Northern Territory, like US states Michigan, Kentucky, and Minnesota, allows victims to comment upon the sentence they believe ought to be imposed. However, this can exacerbate the frustrations outlined above. Roberts (2009) writes:

“One of the most robust findings in the victim impact literature is that victims who expect their statement to have a direct influence on sentencing react with disappointment and anger once it becomes clear that their sentencing ‘submission’ will not be followed.” As above p. 360

Also, during the mid-1980s rise of the victims’ rights movement, a review of the subject argued that “the only rationale for the criminal sanction with which emphasising the particular harm [to victims] is consistent is that of retaliation”. The article also noted that the desire of victims for revenge conflicted with proportionality and equality in sentencing. Lynne N. Henderson (1985) “The wrongs of victim’s rights” Stanford Law Review 37(4) 996-1000
Victim appeal has a potential therapeutic benefit for victims. However, this benefit should not be viewed in isolation, nor should the goal of the criminal justice system be to maximise it. The therapeutic value of victim appeal should not be taken as an endorsement of a therapeutic approach to criminal justice. Such an approach can be taken too far, jeopardising our traditional conception of justice.

For example, a therapeutic approach may justify granting victims the right to their own representation in court. This three-party system would move Australian jurisdictions away from the adversarial system towards a more inquisitorial system.

Giving victims standing and representation has been presented as a way to address the weaknesses of victim impact statements. By this reasoning, representation in court allows victims to participate by moving motions, and being granted this agency is therapeutic in the way that presenting a mere statement is not. Moreover, providing victims with counsel reduces the risk that they will present evidence that is subjective, misleading, or false.48

One advocate of such a reform in Australia is the former Commissioner of Victims' Rights in South Australia, Michael O'Connell. Following a pair of controversies regarding lenient sentences, then-Commissioner O'Connell argued that victims should be given formal representation in sentencing hearings, “moving toward equality with prosecution and defence”. His stated rationale for this innovation was that victims' satisfaction is connected to their participation in the system.49

In South Australia, the Commissioner for Victims’ Rights is an independent advocate for the interests of victim throughout criminal proceedings. While the Commissioner cannot enforce victims’ rights directly, he or she is able to advise the Attorney-General and intercede with the DPP on behalf of victims. This role has already involved public funding for legal representation for victims in disputes with prosecutors.50

However, placing this representation in criminal courts would be a significant change. There is one precedent from a similar country: in 2004, the United States Congress passed the Crime Victims’ Rights Act, which gave victims standing to participate in trials and appeals. Courts have appointed counsel to victims who would not otherwise have been able to exercise this right.51

There are two noteworthy deficiencies with this reform. In one sense, it does not go far enough: it does not afford victims any more decision-making power in sentencing hearings. While victims must be heard in court, they cannot direct the prosecution at any stage of the proceedings. Standing for victims therefore does not solve the identified problem of tying prosecutors and sentencing judges more closely to community standards as represented by the victim. In another sense, though, this reform goes too far: granting victims standing is a distortion of the adversarial system of justice. In common law jurisdictions, justice is determined through the parties presenting competing constructions of the facts and law, with the judge ruling as to whether the prosecution has presented a case that meets the required standard of proof (in criminal cases, the standard is “beyond a reasonable doubt”). The role of the victim is therefore primarily as a witness to the crime and its harms.

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48 Tyrone Kirchengast (2013) as above p. 591
49 Sean Fewster and Ben Hyde, “SA Victims’ Rights Commissioner says victims should be represented by lawyers during criminal sentencing hearings” Adelaide Advertiser 3 June 2014
The reflections of then-Commissioner O’Connell are instructive as to both these points. On the one hand, as he writes, “Victim studies and my experiences convince me that there is nothing less empowering for a victim... than being unable to influence any decision that affects him or her”. Yet he goes too far in extending this line of argument to dismissing concerns about the difference between common law and civil law jurisdictions:

Although historically victim participation has been frowned upon in common law jurisdictions that is not so in civil, inquisitorial jurisdictions... It seems to me that for there to be certainty of justice, victims must [be] integrated into criminal proceedings.\(^5^2\)

There are significant philosophical and cultural differences between the two systems. It is beyond the scope of this essay to detail those differences, however it should be noted that they have emerged from different histories, entail different roles for all participants from police to lawyers to judges, and are based on different assumptions about the ends of justice, such as whether criminal proceedings are primarily designed to determine the truth of the matter. The piecemeal integration of ideas that are broadly incompatible with our system of justice is just as much of an overreaction as legislative interference in judicial independence.

While victims’ rights have been championed by politicians across the spectrum of politics in the United States and here in Australia, there is a fundamental inconsistency between the common law system and more expansive attempts to integrate victims into proceedings as third parties.\(^5^3\) The tradition of the common law holds that there are two victims in every crime: the person directly affected, and the community whose norms have been violated. In contrast, it has been argued that victims’ rights are justified by minimising the “harm” done to victims through their participation in the adversarial system; and similar logic applies to reducing other collateral harms brought about by the operation of that system as it relates to offenders and their families. This is made clear by the connection between offending and victimisation, with many offenders themselves having been on the other end of crime in their lives.\(^5^4\) Victims’ rights therefore threaten to undermine the connection between criminal justice and community standards, instead locating the harm of crime in the individual circumstances of particular cases.\(^5^5\) This individualisation of justice comes at a further cost to personal autonomy and responsibility: as victims become more the focus of the criminal justice system, victimhood becomes more broadly defined, with crimes previously considered victimless coming to be seen as contributing to societal defects and thereby as victimising the disadvantaged. This broad construction of victimisation can lead to over-criminalisation.\(^5^6\)

\(^{52}\) O’Connell (2011), as above p. 13

\(^{53}\) These tensions are summarised in Erez and Rogers (1999), as above pp. 217-9

\(^{54}\) An interesting example of this kind of argument can be found in Michael M. O’Hear (2006), “Victims and criminal justice: What’s next?” Federal Sentencing Reporter 19(2) pp. 83-90

\(^{55}\) The weakening of the public aspect of crime actually weakens the justification for criminal justice, and therefore retribution against criminals.

\(^{56}\) For an interesting discussion of this phenomenon and its relationship to the concept of society as a victim of crime as it has affected the rise of victims’ rights in Sweden, see Henrik Thom, Anita Rönneling and Lise-Lotte Ryterbro (2011), “The emergence of the crime victim: Sweden in a Scandinavian context” Crime and Justice 40(1) especially pp. 571-3
The individualisation of crime diminishes the role of the public prosecutor as a representative of communal moral standards, which is the opposite of what the problem diagnosed in this document requires. Indeed, victims’ rights may serve as a Trojan horse for more radical approaches to law and order that are fundamentally inconsistent with the adversarial system, individuals rights, and personal responsibility.\(^{57}\)

As such, victim appeal is to be preferred to victim representation because it:

- delivers real agency to victims over a specific part of proceedings directly relevant to their interests; and
- preserves the traditional procedures of our justice system.

Lastly, as stated in Section 1, the reason to increase the therapeutic value of the criminal justice system for victims is not solely, or even primarily, about the victims themselves. Instead, the chief value of doing so is to communicate to members of the public that they can have confidence that should they ever be victimised, they will be treated appropriately and their standards of justice will be reflected in the decision-making of the courts.

\(^{57}\) An alternative view is presented by Tyrone Kirchengast. He suggests that victim participation in criminal justice proceedings provides a potential bridge between the common law and civil law system, as both systems adapt to the need for “raising the status and agency of the victim”. He argues that victim lawyers can operate within an adversarial system. Kirchengast (2013), as above pp. 589-590
Conclusion

Since its inception in 2016, the Institute of Public Affairs Criminal Justice Project has aimed to promote reform of the criminal justice system while defending traditional standards of retribution and adversarial justice. There is a wide range of problems affecting criminal justice in this country: high and increasing rates of incarceration; burgeoning expenditure; the ever-widening scope of the criminal law; and low public confidence in the system and the safety it is supposed to provide. But the system needs reform, not revolution. Victim appeal should be seen in this context.

Victim appeal would be a small but powerful reform to the criminal justice process. Victims would have the right to direct the DPP to seek leave to appeal against sentences imposed in cases involving serious indictable offences. This right would be in addition to the existing right of the DPP (and in some states the Attorney-General) to appeal against manifestly inadequate sentences. The aim of the reform is to increase the sensitivity of judges in sentencing to community standards by increasing the number of prosecution appeals against sentence.

The main benefit of this reform is that it will address the persistent low levels of confidence that Australians report having in the courts. There is reason to believe that this low confidence is disproportionately affected by rare sensational cases in which judges depart radically from common sense notions of justice. Sentencing patterns have not changed in recent years and studies show that when provided information about cases, the public often agrees with sentences handed down by judges and magistrates. But the public is most likely to be exposed, via the news media, to unusual cases and to base their opinion of the courts on those cases. However, the failsafe mechanism for such cases is now being underused. Just a tiny fraction of sentences is appealed by the Crown. Sentences are not tested enough for the public to see the system as self-correcting when mistakes are made. Victim appeal would increase public confidence in the system by communicating to the public that manifestly inadequate sentences will be reconsidered in light of community standards. Victims can be thought of as a proxy for those standards. And the involvement of victims in the decision-making process will have a positive effect on public confidence in the system.

A secondary benefit of victim appeal is for victims themselves. Reforms like the introduction of Victim Impacts Statements have increased crime victims’ satisfaction with the criminal justice system, and this has some therapeutic benefit for them. It is reasonable to believe that providing victims with this opportunity for decision-making would have a similar benefit.

Victim appeal should also be considered relative to alternative reform options. Mandatory sentencing is an overreaction. The problem is likely not with judicial sentencing in general but with exceptional cases. Reducing judicial discretion increases the chance of disproportionately severe sentences and concedes that there is no way to reconnect the judiciary to community standards. On the other hand, the importance of victims’ rights should not be taken as justification for radical changes to our criminal justice system. Neither low confidence in the courts nor victims’ satisfaction justify the abandonment of the adversarial system.
Australians deserve criminal justice institutions and processes that they can trust. This trust can only come from the assurance that the courts (along with the police and corrections) will reflect a common sense understanding of justice that coheres with the beliefs of the people. On the rare occasions that judges simply get sentencing wrong, there needs to be a mechanism for correcting those mistakes that communicates to the public that their interests, and the interests of victims, are being respected. Victim appeal advances both of these sets of interests.
References

Journalism and media


Legislation, cases, legal encyclopaedias


Barbaro v R; Zirilli v R [2014] HCA 2

Everett v R [1994] HCA 49


Monographs

Victim Appeal: how to address manifestly inadequate sentences

Academic articles and other research

Barman, Sikha (2017), “Victims’ right to appeal under Indian criminal justice system” MSSV Journal of Humanities and Social Sciences 1(2) pp. 87-99


Gelb, Karen (2006), Myths and misconceptions: public opinion versus public judgment about sentencing Melbourne: Sentencing Advisory Council


Indermaur, David and Lynne Roberts (2009), “Confidence in the criminal justice system” Trends and issues in crime and criminal justice No. 387, Nov 2009, Canberra: Australian Institute of Criminology


Walther, Susanne (2006), “Victims’ rights in the German court system” Federal sentencing reporter 19(2) pp. 113-118


Government websites


Government policies

Prosecution guidelines
NB: listed in the order of jurisdictions used by the ABS and in the figures and tables


Other policies


DPP annual reports
NB: listed in the order of jurisdictions used by the ABS and in the figures and tables


Other government reports


Government statistics

Australian Bureau of Statistics (2017), Criminal Courts Australia various years

Australian Bureau of Statistics (2017), Prisoners in Australia various years