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Criminal Justice Law Reform Challenges for the Future: It's Time to Curb Australia's Prison Addiction

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I. Introduction

This chapter will examine Australia's addiction to prison. It will commence by examining where we have arrived at in relation to our use of imprisonment, and why we must turn this around. In particular, it will consider the monetary and non-monetary costs of imprisonment, and the evidence on the crime prevention effects of prison. It will then posit what a new future in criminal justice might look like, drawing inspiration from recent development in the United States (US) and United Kingdom (UK). The role of the media, research on sentencing and public opinion, impact on victims, and the emerging case for justice reinvestment will also be considered.

The chapter concludes by arguing that all policy should henceforth be focused around the central issue of whether any proposed reform will increase or decrease our prison population. If it appears that the former

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is likely to occur, then the proposal should not proceed. In making this shift, it is acknowledged that the imprisonment rate is influenced by both substantive laws, such as the creation of new offences, and changes to procedure, such as reforms to bail, as well as reforms in other contexts, such as housing. All initiatives should be immediately off the policy-making table if they are likely to significantly increase our prison population. There must be particular scrutiny if the proposed initiative is likely to impact disproportionately on Indigenous people. If it appears that the proposal will reduce the prison population (e.g. by making sentencing laws less punitive), then this should in the first instance be licence to proceed, but the inquiry must not be left there. All initiatives must be subject to adequately funded independent evaluation to determine if they have actually had this desired impact. Adopting this approach would require courage and commitment from politicians, policymakers, the media and the public. The chapter ends by demonstrating what law reform might look like if we went down this path.

II. Australia's Prison Addiction

The chapter will commence with figures that contextualise the debate and make the case that Australia has become addicted to prison.² As of December 2016, we had 39,568 people in our prisons.³ Only three years earlier, the prison population was less than 30,000,⁴ but at the current rate of increase – exceeding 7 per cent a year⁵ – we will reach 40,000 prisoners in 2017. Our imprisonment rate is now just over 200 per 100,000.⁶ It should be noted that this masks some significant variation, with Tasmania and the Australian Capital Territory (ACT) the lowest imprisoning jurisdictions, at around 141 per 100,000, while the Northern Territory now incarcerates

2 This section draws on the data and rhetoric respectively of the following recent papers: Don Weatherburn, “Rack ‘Em, Pack ‘Em and Stack ‘Em”: Decarceration in an Age of Zero Tolerance’ (2016) 28 *Current Issues in Criminal Justice* 137; Andrew Leigh, ‘Prisons Dilemma: An Economist’s Perspective on Incarceration’, Paper presented at the Justice Connections 4 Symposium, November 2015, Canberra. Discussions with Don Weatherburn in particular have informed the development of this chapter.

3 Australian Bureau of Statistics (ABS), ‘Corrective Services, Australia – December 2016 Quarter’ (Cat No 4512.0, ABS, 2017).

4 ABS, ‘Corrective Services, Australia – December 2013 Quarter’ (Cat No 4512.0, ABS, 2014).

5 ABS (2017), above n 3.

6 Ibid.

a staggering 891 people per 100,000 in December 2016, although this had fallen from a peak of 968 in January 2016.⁷ However, all jurisdictions have increased their imprisonment rates over the last 15 years.

Interestingly, and perhaps surprisingly, our high imprisonment rate is a relatively recent phenomenon.⁸ As set out in Figure 9.1, the imprisonment rate fell steadily from 1900 to 1920, from 126 to 52 per 100,000. It generally stayed around this level for the next 30 years, before starting to climb, from 52 in 1950 to 81 in 1970. It then fell again, to 62–66 in 1975 to 1985. Since then, it has risen steadily between 1950 and 1980. It then climbed, but only fairly gradually, increasing to 66 in 1985. Over the 30 years that followed, however, it increased by nearly 300 per cent, to 196 in 2015 and 211 by December 2016.

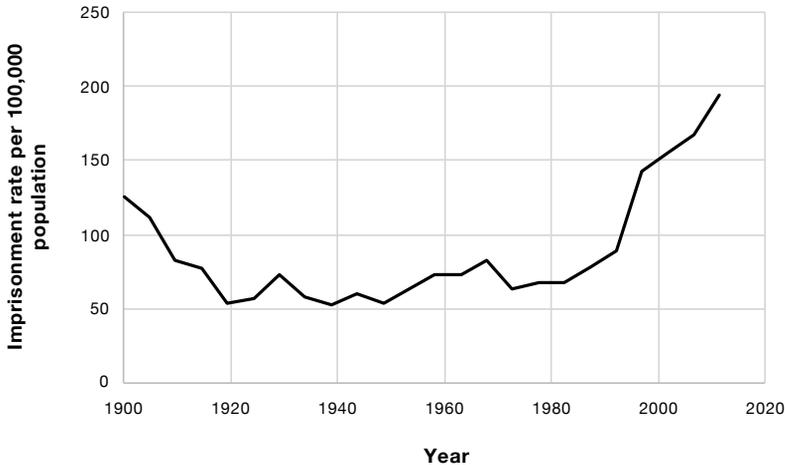


Figure 9.1: Australia's imprisonment rate (per 100,000), 1900–2015

Source: Adapted from Graycar (2001); ABS (various years)

⁷ Ibid.

⁸ See Adam Graycar, 'Crime in Twentieth Century Australia' (Cat No 1301.1, ABS, 2001); ABS 'Corrective Services, Australia – December 2001 Quarter' (Cat No 4512.0, ABS, 2002); ABS 'Corrective Services, Australia – December 2005 Quarter' (Cat No 4512.0, ABS, 2006); ABS 'Corrective Services, Australia – December 2010 Quarter' (Cat No 4512.0, ABS, 2011); ABS, *ibid.*

To place this in an international context, Canada's imprisonment rate is 106.⁹ The imprisonment rate in England and Wales, the highest in Western Europe, is 147.¹⁰ A number of European countries have rates well under 100 per 100,000, while Iceland's is only 45.¹¹ Of course, we're not doing as badly as the US, where the rate is just under 700 per 100,000,¹² but their rate is declining slowly,¹³ while ours is on a steady upwards trajectory.

When we examine the situation for Indigenous people, it is obviously much worse. In spite of only accounting for 3 per cent of the Australian population, Indigenous people make up 27 per cent of the national prison population, and reached 10,000 prisoners for the first time in the December 2015 quarter.¹⁴ Worse still, a third of the adult female population¹⁵ and over half of the juvenile detention population are Indigenous.¹⁶ The imprisonment rate¹⁷ tells the story in more detail. Overall, the Indigenous imprisonment rate in Australia in December 2016 was 2,409 per 100,000. For men, it was 4,370. An oft-cited figure is that an Indigenous man is more likely to go to prison than university. For men in Western Australia, the imprisonment rate is 7,002 per 100,000. In other words, seven out of every 100 Indigenous men in Western Australia are in prison at any given time. This is the most imprisoned group of people in the world. Suddenly, the imprisonment rate in the US doesn't look so bad.

A. The costs of prison

One context in which the US actually does better than Australia, if it can be termed such, is in relation to the cost of prison. Now, that itself comes at a price. For example, the US has much lower staff to inmate ratios than in Australia, and are generally far more punitive in their prison

9 Ibid. It should be noted that the Institute of Criminal Policy Research (ICPR) places our imprisonment rate at 151 per 100,000, compared with the ABS figure of 196: Roy Walmsley, *World Prison Population List* (ICPR, 11th edn, 2016). The reasons for this discrepancy are not entirely clear, but should be borne in mind in the context of international comparisons.

10 Ibid.

11 Ibid.

12 Ibid.

13 Lauren Glaze et al, *Correctional Populations in the United States*, 2014 (NCJ 249513, US Bureau of Justice Statistics, 2015).

14 ABS, above n 3.

15 Ibid.

16 Australian Institute of Health and Welfare (AIHW), *Youth Detention Population in Australia* 2016 (AIHW, 2016).

17 ABS, above n 3.

administration. Nevertheless, imprisonment costs around \$45,000 per prisoner, per year in the US.¹⁸ In Australia, that figure is over \$110,000, including capital costs.¹⁹ In the ACT, which hosts Australia's first 'human rights prison',²⁰ the price tag exceeds \$160,000 per year. Australia now spends more than \$3.8 billion on prisons every year.²¹

Then there are the non-monetary costs. In the recent guideline judgment of *Boulton*,²² the Victorian Court of Appeal acknowledged the limitations of prison, including loss of personal autonomy and privacy, the risk of violence, institutionalisation and exposure to more serious criminals. The impact on prisoners' families is also a major concern, although poor data collection hampers our understanding in this context. In 2005, Quilty²³ estimated that 5 per cent of all Australian children are affected by parental incarceration in any given year and this rose to 20 per cent for Indigenous children. Both of these figures are likely to have increased significantly in line with increased imprisonment rates. Parental incarceration has in turn been linked with adverse effects on children.²⁴

B. But don't we need prison to keep us safe?

So, prison costs us a lot in a variety of ways. But don't we need it to prevent crime? Well, the good news there is that crime is already well down. In fact, over the last 15 years, the national homicide rate has fallen by 32 per cent, and robbery and burglary rates have fallen by 66 per cent and 67 per cent respectively. In addition, motor vehicle theft has fallen by 71 per cent, while other forms of theft have fallen by a still impressive 43 per cent.²⁵

18 Vera Institute of Justice, *The Price of Prisons: What Incarceration Costs Taxpayers* (2012).

19 Productivity Commission, *Report on Government Services 2016* (2016).

20 For comment, see Lorana Bartels, 'The State of Imprisonment in Australia: Can the ACT Achieve a "Human Rights" Prison?', *The Conversation*, 17 April 2015, theconversation.com/state-of-imprisonment-can-act-achieve-a-human-rights-prison-39119; Lorana Bartels, 'The ACT Prison: Human Rights Rhetoric Versus Crowded and Bored Reality' (2015) 9 *Court of Conscience* 21; Lorana Bartels and Jeremy Boland, 'Human rights and Prison: A Case Study from the Australian Capital Territory', in Elaine Fishwick, Marinella Marmo and Leanne Weber (eds), *Routledge International Handbook of Criminology and Human Rights* (Routledge, 2016), 556–67.

21 Productivity Commission, above n 19.

22 *Boulton v The Queen* [2014] VSCA 342. For discussion, see Lorana Bartels, 'Sentencing Review 2014–15' (2015) 39 *Criminal Law Journal* 326.

23 Simon Quilty, 'The Magnitude of Experience of Parental Incarceration in Australia' (2005) *Psychiatry, Psychology and Law* 12(1), 256–57.

24 Weatherburn, above n 2.

25 Ibid.

It may then be argued that our increased use of prison achieved these results. However, Australian data indicate little correlation between each jurisdiction's crime and imprisonment rates.²⁶ The international data tell a similar story.²⁷ In any event, US²⁸ and Australian²⁹ research suggests that you would need to increase the prison population by 10 per cent to get a 1 to 2 per cent decrease, with changes in sentence length having no impact. That would generally be regarded as a pretty poor return on investment.

Other research indicates that once a community gets past a certain point, rather than preventing crime, prison actually *causes* crime.³⁰ Todd Clear's³¹ hypothesis for why this occurs is that rising prison rates take more and more people out of certain highly disadvantaged neighbourhoods. Past a certain point, he argues, this leaves the community weakened, fragmented and unable to defend itself against crime. As Weatherburn³² recently observed in the Australian context, this may well be what is happening with some Indigenous communities.

III. A New Future?

The foregoing is well known to criminologists, who do not need to be further convinced of the need for a different approach.³³ What is required, however, is for this message to permeate through to politicians, in the first instance, and the media and public. What we need is support from

26 For discussion, see Rick Sarre, 'Social Innovation, Law and Justice' (Paper presented at the History and Future of Social Innovation Conference, Adelaide, June 2008).

27 See Bronwyn Naylor, 'The Evidence Is In: You Can't Link Imprisonment to Crime Rates', *The Conversation*, 23 April 2015, theconversation.com/the-evidence-is-in-you-cant-link-imprisonment-to-crime-rates-40074.

28 John Donahue, 'Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin' in Steven Raphael and Michael Stoll (eds), *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* (Russell Sage Federation Press, 2009) 269–342.

29 Wai-Yin Wan et al, 'The Effect of Arrest and Imprisonment on Crime' (Crime and Justice Bulletin No 158, NSW Bureau of Crime Statistics and Research (BOCSAR), 2012). See also Don Weatherburn, Jiuzhao Hua and Steve Moffatt, 'How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary' (Crime and Justice Bulletin No 93, BOCSAR, 2006).

30 See Weatherburn, above n 2, for discussion.

31 Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (Oxford University Press, 2007), as summarised in Weatherburn, *ibid*. See also Mark Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (Princeton University Press, 2009).

32 Weatherburn, *ibid*.

33 See, for example, Weatherburn, *ibid*; Sarre, above n 26; Mirko Bagaric, 'Prisons Policy Is Turning Australia into the Second Nation of Captives', *The Conversation*, 10 April 2015, theconversation.com/prisons-policy-is-turning-australia-into-the-second-nation-of-captives-38842.

across the political spectrum to stop doing things the way we've been doing them for the last generation, and try a new way. That might sound laughable in a world of tabloid newspapers and talkback radio, but it is happening now in the US, which has seen small prison population reductions each year since 2012.³⁴ In October 2015, over 130 senior police officers, prosecutors and sheriffs formed a group called 'Law Enforcement Leaders to Reduce Crime and Incarceration', which 'represents an abrupt public shift in philosophy for dozens of law enforcement officials who have sustained careers based upon tough-on-crime strategies'.³⁵ In January this year, a bipartisan task force appointed by Congress to suggest ways to reduce the federal prison population provided its final recommendations to the White House. The recommendations included sending fewer low-level drug offenders to prison and imposing shorter sentences.³⁶ In March 2016, then President Barack Obama also asserted that drug addiction is a health issue, not a criminal justice problem, and committed over \$150 million to drug treatment.³⁷

In the UK, David Cameron recently became the first prime minister to give a speech on prison reform in over 20 years, in which he acknowledged that 'politicians from all sides of the political spectrum are starting to realise the diminishing returns from ever higher levels of incarceration'.³⁸ He spoke of the need for wholesale reform and explained that 'the truth is that simply warehousing ever more prisoners is not financially sustainable, nor is it necessarily the most cost-effective way of cutting crime'.³⁹ Furthermore, he recognised that prisons are 'often miserable,

34 Erica Good, 'US Prison Populations Decline, Reflecting New Approach to Crime', *New York Times*, 25 July 2013, www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html; Lauren Carroll, 'Federal Prison Population Drops for First Time in 3 Decades, Eric Holder Says', *Politifact*, 23 February 2015, www.politifact.com/truth-o-meter/statements/2015/feb/23/eric-holder/federal-prison-population-drops-first-time-3-decad/.

35 Timothy Williams, 'Police Leaders Join Call to Cut Prison Rosters', *New York Times*, 20 October 2015, www.nytimes.com/2015/10/21/us/police-leaders-join-call-to-cut-prison-rosters.html.

36 Charles Colson Taskforce on Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* (Urban Institute, 2016). For comment, see Eric Tucker, 'A Bipartisan Task Force Is Suggesting a Policy Shift That Could Save the Federal Government \$5 Billion', *Business Insider*, 26 January 2016, www.businessinsider.com/ap-task-force-recommends-how-to-cut-us-prisoner-count-by-60000-2016-1?IR=T.

37 Timothy Pratt, 'Obama: "Drug Addiction Is a Health Problem, Not a Criminal Problem"', *The Guardian*, 30 March 2016, www.theguardian.com/us-news/2016/mar/29/barack-obama-drug-addiction-health-problem-not-criminal-problem.

38 David Cameron, 'Cameron Prison Reform Speech in Full', 8 February 2016, www.politics.co.uk/comment-analysis/2016/02/08/cameron-prison-reform-speech-in-full.

39 Ibid.

painful environments. Isolation. Mental anguish. Idleness. Bullying. Self-harm. Violence. Suicide ... These establishments are full of damaged individuals'.⁴⁰

If the US and UK – with respectively higher and lower imprisonment rates than Australia – can show signs of shifting their rhetoric, surely we can too. But it won't be easy. A few years ago, the NSW Liberal Attorney-General, Greg Smith SC, was very open, both before and after his election, about his commitment to reducing the prison population.⁴¹ Under his watch, the NSW prison population started falling. In 2012, he ordered three prisons to be closed. Unfortunately, this was all a bit too sensible for the rest of his party or the NSW shock jocks, and he lost his portfolio in 2014, having been lampooned in the tabloid media as 'Marshmallow Smith' for being soft on crime.⁴² Since then, the NSW prison population has been on the rise, hitting 12,000 for the first time recently.⁴³

The ACT recently had in Simon Corbell an Attorney-General who consistently refused to play the law and order game and pushed back against calls for mandatory sentences.⁴⁴ The early indications about his successor, Gordon Ramsay, suggest he is no more likely to embrace the tough-on-crime rhetoric.⁴⁵ We obviously need more politicians of courage, regardless of their political affiliation. At the federal level, Labor's Shadow Assistant Treasurer, Andrew Leigh,⁴⁶ has spoken about the need to reduce imprisonment rates. The Australian Greens' justice policy aims include, *inter alia*:

40 Ibid.

41 Robert Milliken, 'Ending Sydney's Law-and-Order Auction', *Inside Story*, 3 April 2012, insidestory.org.au/ending-sydneys-law-and-order-auction.

42 For comment, see Milliken, *ibid*; David Brown, 'Is Rational Law Reform Still Possible in a Shock-jock Tabloid World?', *The Conversation*, 15 August 2014, theconversation.com/is-rational-law-reform-still-possible-in-a-shock-jock-tabloid-world-30416; for comment, see David Brown, 'State of Imprisonment: Prisoners of NSW Politics and Perceptions', *The Conversation*, 21 April 2015, theconversation.com/state-of-imprisonment-prisoners-of-nsw-politics-and-perceptions-38985; Jonathon Green, 'Back to Prison', *ABC Background Briefing*, 18 May 2014, www.abc.net.au/radionational/programs/backgroundbriefing/2014-05-18/5452044.

43 ABS, above n 3.

44 Michael Inman, 'No One Punch Laws in ACT, Says Corbell', *Canberra Times*, 4 February 2014, www.canberratimes.com.au/act-news/no-onepunch-laws-in-act-says-corbelle-20140203-31xpn.html; Alexandra Back, 'Attorney-General Simon Corbell Stands Firm On One-punch Laws', *Canberra Times*, 1 February 2016, www.canberratimes.com.au/act-news/attorneygeneral-simon-corbelle-stands-firm-on-onepunch-laws-20160131-gmieeu.html.

45 Megan Gorrey, 'Attorney-General Gordon Ramsay Says Legal Aid Critical to "Inclusive" Judiciary', *Canberra Times*, 4 February 2017, www.canberratimes.com.au/act-news/attorneygeneral-gordon-ramsay-says-legal-aid-critical-to-inclusive-judiciary-20170131-gu2d8j.html.

46 Leigh, above n 2.

- an end to politically-motivated law and order campaigns that exploit and fuel public anxieties;
- a comprehensive, multidisciplinary and evidence-based approach to reduce crime by addressing the underlying causes of crime and recidivism;
- the implementation of alternatives to imprisonment where appropriate, including restorative justice, diversionary programs and justice reinvestment strategies;
- action to address the continued overrepresentation of Aboriginal and Torres Strait Islander Peoples in the justice system.⁴⁷

As others have repeatedly argued,⁴⁸ we also need a sensible media. Again, we are quite lucky in the ACT, which, for the most part, has well-informed journalists willing to listen to evidence, and generally more willing to inform than inflame. It is refreshing to see stories where the facts are allowed to speak for themselves.⁴⁹ Other media outlets need to do this, too.

Sarre has called on the public to ‘challenge populism, and to tell governments that they *can* build long term social investment into criminal justice policy-making without risking electoral backlash’.⁵⁰ For this to occur, we need to communicate honestly and effectively with the public. We need to get people to understand that prison is not a particularly effective crime reduction tool. People also need to understand that crime is decreasing, and has been doing so for some time.⁵¹ We need to ensure

47 Australian Greens, *Justice Policy*, greens.org.au/policies/justice (viewed 16 April 2016).

48 See, for example, Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998); Nicholas Cowdery QC, *Getting Justice Wrong: Myths, Media and Crime* (Allen and Unwin, 2001); Sarre, above n 26.

49 See, for example, Michael Inman, ‘Suspended Sentence For Shoe Store Manager Who Stole More Than \$70,000’, *Canberra Times*, 12 November 2015, www.canberratimes.com.au/act-news/suspended-sentence-for-shoe-store-manager-who-stole-more-than-70000-20151112-gkx06r.html; Michael Inman, ‘Devout Christian Brenton Honeyman Gets Suspended Jail Sentence For Child Porn Possession’, *Canberra Times*, 6 January 2016, www.canberratimes.com.au/act-news/devout-christian-gets-suspended-jail-sentence-for-child-porn-possession-20160106-gm08h1.html.

50 Sarre, above n 26, 11–12.

51 See, for example, Don Weatherburn and David Indermaur, ‘Public Perceptions of Crime Trends in New South Wales and Western Australia’ (Crime and Justice Bulletin No 80, BOCSAR, 2004); Brent Davis and Kym Dossetor, ‘(Mis)perceptions of Crime in Australia’ (Trends and Issues in Crime and Criminal Justice No 396, Australian Institute of Criminology, 2010).

the public is well-informed. Research from both Australia⁵² and overseas⁵³ demonstrates that the more educated people are about crime, the less punitive they become. In addition, a national Australian study⁵⁴ found that there were equal levels of satisfaction about sentencing across the country, even though we obviously have widely disparate sentencing patterns. Given people are not likely to become any more satisfied with sentencing if we increase penalties, we might as well cut them. They are certainly not likely to be any less pleased with the outcome.

What about the victims? Research⁵⁵ indicates that victims are no more punitive than others. Nevertheless, the media are often keen to sell the story that supposedly lenient penalties disadvantage victims.⁵⁶ Again, the ACT provides something of an unusual case study, with a Victims of Crime Commissioner, John Hinchey, who readily acknowledges the crime prevention role of a range of strategies. For example, in the context of recent debate on one-punch assaults in the ACT, he pointed to the need for increased police powers and ‘reforms aimed at promoting long-term cultural change related to alcohol consumption, acceptability of violence and substance misuse’.⁵⁷ He is to be commended for recognising that we can’t imprison our way out of crime, and it is of no benefit to victims to attempt to do so.

Victims – including the many offenders who are themselves victims⁵⁸ – have legitimate physical, financial, emotional and psychological needs, and we need to attend to them. But tougher sentencing isn’t the answer.

52 Kate Warner et al, ‘Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, 2011).

53 See, for example, Tony Doob and Julian Roberts, *An Analysis of the Public’s View of Sentencing: A Report to the Department of Justice, Canada* (1983). See also Karen Gelb, *More Myths and Misconceptions* (Victorian Sentencing Advisory Council, 2008) for an overview.

54 Lynne Roberts et al, ‘A Country Not Divided: A Comparison of Public Punitiveness and Confidence in Sentencing across Australia’ (2011) 44 *Australian and New Zealand Journal of Criminology* 370.

55 Gelb, above n 53.

56 See, for example, Lisa Morrison, ‘Twenty-year Domestic Violence Victim Attacks “Lenient” Sentence for Ex-Partner’, *The West Australian*, 31 July 2015, au.news.yahoo.com/thewest/regional/great-southern/a/29150713/twenty-year-domestic-violence-victim-attacks-lenient-sentence-for-ex-partner/.

57 Megan Gorrey and Alexandra Back, ‘Man Charged Over Alleged One-punch Attack in Civic’, *Canberra Times*, 8 January 2016, www.canberatimes.com.au/act-news/canberra-victim-of-new-years-onepunch-attack-in-civic-surprised-hes-alive-20160108-gm1x8e.html.

58 Russell Marks, ‘Taking Victims Seriously’, *The Monthly*, 14 March 2015, www.themonthly.com.au/blog/russell-marks/2015/14/2015/1426288245/taking-victims-seriously.

In fact, saving money on prisons will enable us to reallocate resources towards things that will help victims, such as counselling and financial support. If we cut our imprisonment rate in half, we'll have an extra \$1.7 billion per year to support victims, with money left over for a range of effective crime prevention measures.⁵⁹

IV. Conclusion

This chapter has argued that the challenge to which our criminal laws and our legal system more generally must be geared is curbing our addiction to prison. One means of doing so would be significant review of our sentencing laws; for example, the use of mandatory sentences.⁶⁰ However, the issue is much broader and deeper than this. From now on, every time a proposal is put forward, policymakers, politicians, the media and members of the public should have to ask themselves and each other one simple question: 'Will this proposal drive the prison population up or down?' It is conceded that it may at times be difficult to determine the ultimate impact of particular law reforms. There may also be good reasons for creating new offences; for example, where there is an identified gap, especially in the context of technological developments. However, it should equally be noted that there is a tendency to legislate in circumstances where there is a perceived gap, but existing laws could be used instead and the new offence may end up being only rarely prosecuted.⁶¹ In light of the far-reaching implications of policy in a range of portfolios outside of the criminal justice system and the inefficiency and ineffectiveness of current

59 It is beyond the scope of this chapter to explore the concept of justice reinvestment in detail, but this seeks to allocate money that would have been spent on prisons on community-based initiatives that seek to address the causes of crime. For discussion, see, for example, Senate Standing Committee on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Commonwealth of Australia, 2013); Sarah Hopkins, 'Justice Reinvestment Saves Huge Costs of Law-and-Order Auctions', *The Conversation*, 20 October 2014, theconversation.com/justice-reinvestment-saves-huge-costs-of-law-and-order-auctions-33018. A pilot project is currently underway in Cowra, NSW: 'Justice Reinvestment Program Reaches New Milestone', *Cowra Guardian*, 8 January 2016, www.cowraguardian.com.au/story/3649006/justice-reinvestment-program-reaches-new-milestone/?cs=593. The ACT Government has also committed to 'the development of a whole of government justice reinvestment approach aimed at reducing recidivism and diverting offenders, and those at risk of becoming offenders, from the justice system': ACT Justice and Community Safety Directorate, *Justice Reinvestment Strategy* (2015). The author is a member of the advisory group for this strategy.

60 For discussion, see, for example, Lorana Bartels and Rick Sarre, 'Law Reform Targeting Crime and Disorder', in Rick Sarre and Antje Deckert (eds), *Australian and New Zealand Handbook of Criminology. Crime and Justice* (Palgrave, forthcoming).

61 For discussion, see Arlie Loughnan, 'Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era' (2010) 35 *Alternative Law Journal* 18.

practices, it is further argued that this approach should apply not only to criminal justice, but *all* relevant policy; for example, housing, education, health and transport. If the answer is likely to be ‘up’, then that should be the end of that initiative.

For the reasons also set out above, particular scrutiny should be required as to the potential impact of any policy on Indigenous people. In addition, ongoing consultation and collaboration with Indigenous stakeholders is required to reduce the shameful rates of overrepresentation in our prisons.⁶² Opposition Leader Bill Shorten has committed to reinstating a justice target to achieve this,⁶³ while the federal government has described such an approach as ‘foolish’, arguing that it had ‘no control’ over justice policy.⁶⁴ The Red Cross⁶⁵ recently recommended that *all* Australian governments commit to reducing Indigenous imprisonment rates by 50 per cent over the next five years. This recommendation is sensible, given the overrepresentation of Indigenous people in the criminal justice system in all Australian jurisdictions, and the practical and normative impact of federal policy on state and territory criminal justice practices. The current inquiry by the Australian Law Reform Commission on the incarceration rates of Indigenous peoples⁶⁶ may provide some impetus for change in this regard.

Even if a proposal appears to pass muster, the inquiry must not end there. Resources need to be allocated to ensure the initiative is independently evaluated for its outcomes, to determine whether it has actually had the desired results. If not, it must be determined why not and, in due course, that approach should also be abandoned in favour of one with a more

62 See, for example, Michael Gordon, ‘Patrick Dodson Makes Impassioned Plea for “a Smarter Form of Justice”’, *The Sydney Morning Herald*, 13 April 2016, www.smh.com.au/federal-politics/political-news/patrick-dodson-makes-emotional-plea-for-action-on-aboriginal-incarceration-20160413-go52vi.html.

63 Anna Henderson, ‘Bill Shorten Pledges to End “National Shame” By Reviving Indigenous Imprisonment Reduction Targets’, *ABC News*, 19 November 2015, www.abc.net.au/news/2015-11-19/labor-pledges-to-revive-indigenous-justice-targets/6953032.

64 Calla Wahlquist, ‘Nigel Scullion Scoffs at Proposed National Target on Indigenous Jail Rates’, *The Guardian*, 12 February 2016, www.theguardian.com/australia-news/2016/feb/12/nigel-sculion-scoffs-at-proposed-national-target-on-indigenous-jail-rates.

65 Australian Red Cross, *Vulnerability Report 2016: Rethinking Justice* (2016), www.redcross.org.au/files/VulnerabilityReport2016.pdf.

66 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, www.alrc.gov.au/inquiries/indigenous-incarceration. Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017).

beneficial outcome. A genuine commitment to evidence-based practice is paramount in this endeavour, and all stakeholders must have the courage to constantly reevaluate their preconceptions about ‘what works’.

Others have likewise made this clarion call. Bagaric has called on Australian governments to ‘develop a strategy to reduce incarceration numbers to about 100 per 100,000’.⁶⁷ Weatherburn recently pressed the case for a ‘complete overhaul of the way crime and imprisonment is addressed in NSW’.⁶⁸ As noted above, the Red Cross has called for a 50 per cent reduction in Indigenous imprisonment rates over the next five years. In addition, it recommended a 10 per cent reduction in overall imprisonment rates over this timeframe.⁶⁹

Adopting this approach would clearly require a fundamental shift. It would require the courage to abandon decades of tough on crime rhetoric. Political parties would no longer be able to criticise each other for being soft on crime, although being ‘stupid’ on crime would perhaps become a greater political risk. Over a decade ago, Weatherburn suggested that many politicians ‘would welcome an opportunity to stop beating the law and order drum, if one were provided that did not come at too high a political price’.⁷⁰ Politicians who dare to speak the truth should not have to risk their political careers as Greg Smith did.⁷¹

Fortunately, we have a model of what law-making might look like if there were the political will to adopt this approach. Sarre⁷² helpfully prepared the following hypothetical transcript:

THE PREMIER: Thank you Mr Speaker. I rise to announce a new goal that this government intends to meet in the next twelve months, that is, to reduce the imprisonment rate by 20 per cent ... We do this because we recognise that higher rates of imprisonment have not made any difference to rates of violent crime over the last decade. We note the

67 Bagaric, above n 33.

68 Rachel Olding, ‘BOCSAR Crime Stats Boss Don Weatherburn Calls for Lighter Prison Sentences’, *The Sydney Morning Herald*, 17 February 2016, www.smh.com.au/nsw/weatherburn-comes-out-swinging-20160216-gmvavn.html.

69 Australian Red Cross, above n 65. Somewhat remarkably, the Federal Justice Minister, Michael Keenan, responded to the Red Cross report by asserting that ‘[t]he idea that locking up bad people doesn’t work is not true. It does, we know that for a fact’: Sam Tomlin, ‘Locking Bad People Up “Works”: Minister for Justice Rejects Calls for Prison Overhaul’, *ABC News*, 31 March 2016, www.abc.net.au/news/2016-03-31/federal-justice-minister-rejects-prison-criticism/7289038.

70 Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (Federation Press, 2004) 47.

71 For comment, see Brown (2014) and Brown (2015), above n 42.

72 Sarre, above n 26, 1.

wildly disproportionate way in which Indigenous Australians are over-represented ... in prison in this state, and the drain on state resources ... We plan to make these reductions on the basis of the research evidence ...

THE SPEAKER: I recognise the Honourable the Leader of the Opposition.

THE LEADER OF THE OPPOSITION: Thank you Mr Speaker. I applaud the Premier's zeal on this matter but I argue that he is setting his sights far too low. The electorate deserves better than that. If elected, our party will drop imprisonment rates even further, to 50 per cent ... We also plan to spend the money we save on custodial corrections on victim support services. The evidence, I might add, points to victims being far less vindictive than we might otherwise assume. Finally, we will also commission more research into the evaluation of existing and new initiatives to ensure that we get the best outcomes for the dollars we spend.

Hopefully, it is not too far-fetched to dream that we might one day see this in an Australian parliament.

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