CRIMINAL JUSTICE REFORM

LESSONS FROM THE UNITED STATES

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Executive summary

Criminal justice reform first principles

- Criminal justice reform in the United States has slowed the rate of growth of incarceration, reduced recidivism, and saving money.
- The reform agenda has had bipartisan input and support, with reforms being implemented in many cases with Republican leadership.
- The principles of successful criminal justice reform:
  » Community safety is paramount, and can be increased by reducing recidivism and unnecessary incarceration
  » The criminal justice system should be subject to fiscal oversight, and the system can be rationalised towards community safety by redirecting money from incarceration to increased community supervision and policing
  » Reform is consistent with traditional moral principles like personal responsibility, redemption, and just punishment.

Addressing over-incarceration

- Punishment reform for nonviolent offenders: increasing the use of community-based 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.
- Reduce recidivism by emphasising employment: reentry services should include job training and removing barriers to employment for ex-prisoners.
- Criminal justice programs should be evidence-based, with reliable data collection and performance tracking.

Addressing over-criminalisation

- More than 20 American states have passed mens rea reform, restoring the requirement of culpability to a wide range of criminal actions.
- Regulatory criminal law often functions as a form of red tape with compliance costs passed on to consumers. The number of criminal provisions on the statute books is unknown, but a great many productive activities are potentially subject to criminal sanction.
Introduction

The ends of criminal justice are to protect the community, to defend the rights and freedoms of individuals, and to punish those who break the law. And by these measures, Australia’s criminal justice system is not performing well.

In Australia right now, there are more victims and more criminals than there were 10 years ago, despite a massive increase in incarceration and criminal justice expenditure. The rate of adult offending has increased by 15 percent since 2008-9, and the incarceration rate has increased by 40 percent in the last 10 years. Australian governments now spend $4 billion annually on prisons. Fifty-nine percent of prisoners have been incarcerated before. Taken together, these statistics form a *prima facie* case for reform: that more and more is being spent on criminal justice for worse and worse results.

In its previous report, *The use of prisons in Australia*, the IPA criminal justice project proposed that Australia was overusing incarceration as a punishment for low-risk, nonviolent offenders. The most serious offence of approximately 46 percent of prisoners in Australia was a nonviolent offence. The incarceration of these people costs taxpayers up to $1.8 billion annually. The incarceration of these people redirects money from other parts of the criminal justice system, including the police. And prior imprisonment is associated with a number of factors, like unemployment, which are correlated with criminality. The overuse of incarceration can therefore undermine community safety. It would be worthwhile to consider how else nonviolent offenders might be punished.

The use of prisons in Australia

Key facts:

- In 1975, there were 8,900 people in Australian prisons. In 2015, there were 36,000.
- The adult incarceration rate is now 196 per 100,000 -- the highest rate since Federation.
- The most serious offence of 46 percent of prisoners was a nonviolent offence.
- A large part of the rise in the prison population is constituted by people on remand.
- Prison spending is around $4 billion per year. $1.8 billion is spent locking up nonviolent offenders.
- The average annual per prisoner cost is $110,000.

Key recommendations:

- Punishment reform: extend the use of non-prison punishments for nonviolent, non-recidivist offenders.
- Redirect savings from reduced nonviolent incarceration to the police.
- Amend bail and parole laws to punish breaches administratively.
But criminal justice reform affects all parts of the criminal justice system, from the black-letter law to police on the street, and from sentencing in the courts to the punishments, including incarceration, imposed on convicted criminals. Changes in one part of the system will affect the operation of the other parts. And so, if we change the way Australia uses incarceration as a punishment for certain kinds of offenders, we need also to look at how we might reform the rest of the system to better achieve its ends.

In July 2016, Institute of Public Affairs Senior Fellow Chris Berg and Research Fellow Andrew Bushnell travelled to the United States to learn about recent successes that criminal justice reformers have had in that country.

Even more so than in Australia, the criminal justice systems of the United States become bloated and inefficient. For many years, the United States has had a level of incarceration far higher than levels seen in comparable jurisdictions around the world. This has prompted a number of reforms to be enacted in several states. Of particular interest are the reforms undertaken by Republican administrations in states like Texas and Georgia. These reforms have show that there are sound philosophical and political reasons for both sides of politics to re-examine how best to be smart on crime.

This paper describes the changing politics of criminal justice reform in the United States. It then outlines the specific reforms that governments have developed and supported, and their results. This paper distinguishes the United States’ experience from the situation here in Australia, suggesting how the application of criminal justice reform principles will differ from the United States in some important ways.
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 151.1

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
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 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. Reform 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.

\(^9\) 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 prison construction and maintenance of more than $2.5 billion over the next five years.

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.12

By 2015, violent offenders made up 5.6 percent more of the Texas prison population, illustrating the shift in emphasis.13 The bolstered services included new staff for monitoring criminals in the community and for residential and non-residential drug treatment programs.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.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.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.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,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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<tr>
<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>
</tr>
<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.

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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

\(^{21}\) Bushnell and Wild (2016) (as above)

\(^{22}\) Andrew Bushnell (2016), “Let’s get fine defaulters out of our jails”, *Canberra Times*, 28 July 2016

\(^{23}\) Stephen Teles in private conversation, July 2016

\(^{24}\) Bushnell and Wild (2016) (as above) p. 5

\(^{25}\) Marc Levin, “Texas Criminal Justice Reform: Lower Crime, Lower Cost” p. 3

\(^{26}\) 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.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”.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.29 A similar project has been undertaken

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.
in Bourke, New South Wales. ³⁰ 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”.³¹ The effectiveness of policing was also endorsed by the White House review of incarceration.³²

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.³³ 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.³⁴ The task force comprised representatives from various relevant government

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³¹ Chettiar 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.\(^{35}\)

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.\(^{36}\)

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.\(^{37}\)

In recent years, savings from reduced incarceration have been redirected to, along with rehabilitation programs, job training for inmates.\(^{38}\) Two prisons now host charter schools so that inmates can achieve their high school diplomas.\(^{39}\) Governor Deal also took executive action to “ban the box”, eliminating the requirement for applicants for state jobs that they reveal any previous convictions.\(^{40}\)

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.\(^{41}\)

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.\(^{42}\)

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35 Texas Criminal Justice Coalition (2010), *A new start: a re-entry guide for Texas*,

36 “Reentry review” Texas Department of Criminal Justice 2012


39 Naomi Shavin (2015), “A Republican Governor is leading the country’s most successful prison reform”, The New Republic, 1 April 2015

40 Note that this only applies to state jobs, and that Georgia has no intention of making this the law for private companies.

There is also emerging evidence that this policy changes harms members of minority groups: Doleac, Jennifer L. and Benjamin Hansen (2016), “Does ‘ban the box’ help or hurt low-skilled workers? Statistical discrimination and employment outcomes when criminal histories are hidden”, *National Bureau of Economic Research*

41 Council of State Governments Justice Center, *The reentry and employment project*,

42 S. 675 - REDEEM Act of 2015
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. 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. A 2015 study also found that the exact figure is unknown.

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. And Queensland research shows that vocational education and training reduces recidivism. 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.

One of the most serious barriers to entry into the workforce in Australia is the high minimum wage, which reduces workforce growth. 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.

43 Bushnell and Wild (2016) (as above) p. 38
44 Mark Halsey (2010), “Imprisonment and prisoner re-entry in Australia”, Dialectical Anthropology Vol. 34, No. 4 December 2010 p. 547
46 Bushnell and Wild (2016) (as above) p. 20
49 Aaron Lane and Mikayla Novak (2014), Submission to the Fair Work Commission: Annual Wage Review 2014, Institute of Public Affairs
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 United 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
3. Over-criminalisation

The other limb to criminal justice reform is to reconsider the scope of the criminal law; just as over-incarceration reforms addresses the question of how best to deal with those who come into the criminal justice system, the idea of over-criminalisation addresses the question of whether too many people and actions are being treated as criminal.

In the United States, this conversation has focused on two main areas of reform: restoring the requirement of mens rea (guilty mind) to criminal offences, and reducing the number of regulatory criminal offences.

3.1 Mens rea reform

- Mens rea (‘guilty mind’) is the mental element of a crime. The criminal law has historically required the state to prove intention or recklessness on the part of the accused.
- Now, many crimes, especially in the regulatory criminal law, do not have this requirement.
- Reformers in the USA have amended statutes to reinstate the requirement of fault, which is fairer for the accused and restricts the spread of the criminal law.

The idea

Traditionally, criminal culpability has depended on two distinct elements of a crime to be made out: the physical element or actus reus, proving that the accused committed the act in question, and the mental element of mens rea, proving that the accused committed the act with intention or recklessness.

Crimes that do not require mens rea are either strict liability, meaning that the accused can defend himself by showing that his actions were honest and reasonable, or absolute liability, meaning that the accused will be guilty if he committed the actus reus regardless of his intent.

Strict and absolute liability criminal offences are a product of the Industrial Revolution and the desire of the state to protect people from the new risks that that upheaval created. But mens rea was held at common law to be an essential characteristic of criminal culpability, and the legislature should not set it aside lightly.

The US experience

More than 20 states have passed some form of mens rea reform, many of them using model legislation developed by the American Legislative Exchange Council. The legislation typically provides that unless a criminal offence is explicitly stated to be strict or absolute liability, criminal intent must be demonstrated.

At the Federal level, mens rea reform has proven highly controversial. The Criminal Code Improvement Act of 2015 would make all Federal criminal offences that are silent as to intention

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54 Conversation with Ronnie Lampard, American Legislative Exchange Council, July 2016
require that the Government prove that the accused knew or ought to have known that the act was unlawful. Critics of the bill allege that it would weaken environmental, health, and safety standards and increase litigation.\textsuperscript{55} For this reason, \textit{mens rea} reform has been derided as a handout to corporations and big business.\textsuperscript{56}

But reformers have had success in implementing this legislation because it goes to a fundamental question of fairness.\textsuperscript{57} Researchers in the United States pass around horror stories of criminal prosecutions for harmless, unintentional acts like accidentally riding a ski-mobile into a nature reserve during a blizzard.\textsuperscript{58}

\textbf{American Legislative Exchange Council model policy}\textsuperscript{59}

\begin{quote}
\textit{Criminal Intent Protection Act}

\ldots

(2) \textbf{Criminal Intent Required Unless Otherwise Provided} – When the language defining a criminal offense or penalty does not specify the criminal intent required to establish an element of the offense or penalty, then such element shall be established only if a person acts:

(a) with the conscious object to engage in conduct of the nature constituting the element;

(b) with the conscious object to cause such a result required by the element;

(c) with an awareness of the existence of any attendant circumstances required by the element or with the belief or hope that such circumstances exist; and

(d) with either specific intent to violate the law or with knowledge that the person’s conduct is unlawful.

(3) \textbf{Prescribed Criminal Intent Requirement Applies To All Elements} – When the language defining a criminal offense or penalty specifies the criminal intent required to establish commission of an offense or imposition of a penalty without specifying the particular elements to which the criminal intent requirement applies, such criminal intent requirement shall apply to all elements of the offense or penalty, including jurisdictional elements.
\end{quote}

\textbf{How it might work in Australia}

Many strict and absolute liability offences are in areas where the government wants to ensure compliance and speed up administration. They can be found in the Commonwealth’s regulation of economic activity and the environment and at the state level in the management of roads and public transport, justice, and licensing.


\textsuperscript{56} Brendan Fischer and Lisa Graves (2015), “Exposing the Kochs’ real motive to reform the criminal justice system”, Alternet, 17 December 2015

\textsuperscript{57} See, for example, the summary of why “criminal laws that dispense with a criminal state of mind requirement are pernicious” in Stephen Markman, “Substantive limitations on the criminal law” in Lynch (ed.) (2009) \textit{In the Name of Justice: Leading experts reexamine the classic article ‘The aims of the criminal law’}, Cato Institute pp. 155-6

\textsuperscript{58} Carroll, Conn (2011), “Bobby Unser vs the Feds”, Daily Signal, 14 March 2011

\textsuperscript{59} American Legislative Exchange Council (2016), “Criminal Intent Protection Act”
Section 5.6 of the Commonwealth Criminal Code already provides that offences that do not specify fault elements should be interpreted as requiring either intention or recklessness, depending on whether the physical element was a type of conduct or a specific result. The issue at the Commonwealth level, then, is whether specific offences justifiably exclude the requirement of mens rea.

In 2015, the Australian Law Reform Commission conducted a review of how Commonwealth law was affecting Australians’ traditional rights and freedoms. The review found that certain specific laws regarding national security, customs, copyright should be reconsidered. It also found that an earlier 2002 recommendation from the Senate that the Attorney-General’s Department should review strict and absolute liability provisions to ensure they uniformly protected the rights of defendants be reconsidered. In its response to that earlier inquiry, the then Howard government asserted that the Criminal Code contained sufficient safeguards for defendants, and rejected the suggestion that it should limit the use of absolute liability. It asserted that the government may want to apply strict liability in matters such as “national security, health, safety, or the environment”.

Other Australian jurisdictions have also conducted reviews of strict and absolute liability. In 2006, the New South Wales Parliament Legislation Review Committee released a discussion paper on the issue. In 2008, the Australian Capital Territory Legislative Assembly Standing Committee on Legal Affairs recommended that a review of the territory’s legislation be undertaken and that legislative drafting guidelines be amended to provide guidance about strict and absolute liability provisions.

The justification normally advanced for strict and absolute liability is that they make it easier to obtain convictions. But the criminal justice system does not exist to produce convictions, nor even, in the first place, to produce particular results. The moral authority of criminal justice depends on prosecution being reserved, as much as practicable, to those who are in the wrong. Otherwise, it could be used to almost any end, and turned against any outcome society may deem at a given moment to be undesirable.

Whether or not Australia has a problem with the overuse of strict and absolute liability is still to be determined definitively. However, those bodies that have looked at the issue have suggested that governments ought to pay more attention to the costs of imposing these kinds of offences. Imposing criminal sanction on a citizen is the most serious action, short of war, that the state can undertake. As such, whether the criminal law is capturing the undeserving is a question worthy of serious consideration.

Both the Commonwealth and the states should review their criminal statutes and take steps to restore the requirement of mens rea to the criminal law.

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60 Criminal Code Act 1995 (Cth)
63 Legislation Review Committee (2006), Strict and absolute liability: discussion paper, New South Wales Legislative Assembly
64 Standing Committee on Legal Affairs (2008), Strict and absolute liability offences, Australian Capital Territory Legislative Assembly
65 See, eg., this editorial from the New York Times

“The proposed provision would require that prosecutors prove that a defendant “knew, or had reason to believe, the conduct was unlawful,” if a “reasonable person” would not have had reason to believe it was unlawful. This confusing standard would create endless litigation as the government and defendants argued over how, exactly, to meet it in each new case.”

3.2 Regulatory criminal law

- The scope of the criminal law has broadened over the past generation. Many areas of human activity that previously were governed by the civil law now may give rise to criminal liability.
- Many of these new criminal penalties have been created by the bureaucracy exercising delegated authority.
- Over-criminalisation distorts the economy by forcing money to be taken from productive activity and used to meet compliance and enforcement costs.

The idea

The idea of over-criminalisation can be expanded beyond those who are held criminally liable despite their intentions to those whose action should not be criminal at all. Conservative criminal justice reformers in the United States argue that there are some actions that are currently criminal that either should not be, or should carry lesser penalties.

These criminal offences are typically found in areas of the law governing the operation of businesses, the use of private property, and the environment. Reformers argue that the interests ostensibly protected by these laws are not so important that their infringement should merit criminal penalty, rather than civil remedy.

The US experience

There are now so many crimes on the federal statute books that no-one has been able to count them. A study by the Heritage Foundation estimated that the figure was over 4,500. There are multiples of that number across the 50 states.

The criminal law should be reserved for the most serious offences against public order. But the line between criminal and civil law is being increasingly blurred by the proliferation of criminal penalties being created by subordinate legislation. For this reason, Senator Cruz has proposed that Congress and the President should work together -- perhaps through a commission -- to scrub the entire United States Code, eliminating crimes that are redundant and converting regulatory crimes into civil offences.

Senator Marco Rubio of Florida has added his voice to the call for reducing the scope of the criminal law. Citing the uncountable number of criminal provisions and the argument that the average American commits an average of three penalties a day, Rubio has written, “This state of affairs is intolerable in a republic and practically invites selective enforcement”. He went on to summarise the steps that Congress should take to comprehensively deal with the problem of over-criminalisation.

[Congress] should start by cataloguing all federal crimes in one statutory location, restoring a standard of intent in criminal law, reining in out-of-control regulatory agencies, and stopping the seizure of the property of citizens to fund law enforcement agencies.

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67 Chettiar and Waldman (eds.) (2015) (as above) p. 32
68 Ibid, p. 95
How it might work in Australia

As in the United States, the first step towards addressing over-criminalisation in Australia will be to scope the problem by conducting an audit of the number of criminal penalties on the statute books. There is no known estimate of how many separate criminal provisions exist across Australian jurisdictions. This is unfortunate, especially given that the current government has passed more than 15,464 pages of legislation since coming to power, and has overseen the promulgation of 92,421 pages of regulations.69

It is known, however, that there are many behaviours punishable by the criminal law that do not demand such a severe intervention by the government. You can be imprisoned for being in possession of damaged coins or banknotes70 and you can be fined almost $300 for riding a bicycle without your hands on the handle.71

For many obscure criminal penalties, there is generally no intention to enforce the law to its maximum extent. Damaging a protected wetland (whether or not you knew it was protected) carries a penalty of up to 7 years in prison but the Department of the Environment and Energy admits that it focuses on “engaging with the regulated community” to encourage compliance.72

The severe criminal penalty seemingly exists mostly for the purpose of intimidating people into complying. This is a problem because inflated criminal penalties that almost always go unused undermine the certainty of the law by making prosecutions seem arbitrary. The state should not have laws that it is reluctant to enforce; the reluctance implies a doubt about their validity and jeopardises equality before the law, as like cases may not be treated alike.

The enforcement of these laws is also economically distortionary. Resources that could be put to productive use are tied up in compliance and enforcement. Additionally, greater compensation must be paid to employees who bear the risk of criminal prosecution.

This is starting to affect the finance industry. In 2016, it was reported that some bankers in Australia may be wary of working in markets that affect benchmark rates because of the criminal penalties now attached to manipulation of those rates.73 This would mirror the experience of the United States, where Wall Street firms have had increasing difficulty in hiring compliance officers, with increased legal risk driving up salaries.74

Unfortunately, in Australia the political trend is towards strengthening so-called white collar crime penalties. In late 2016, the Senate Economics References Committee held an inquiry into white collar crime penalties. In its testimony to that committee, the Institute of Public Affairs argued, consistent with the lessons from the United States outlined above, that penalties for white collar criminals should align with penalties for other nonviolent offenders. Moreover, noting the risk that over-deterrence will distort the economy, many regulatory crimes should be governed instead by

70 Crimes (Currency) Act 1981 (Cth)
71 Road Safety Road Rules 2009 (Vic)
72 Department of the Environment (2013), Compliance and enforcement policy: Environmental Protection and Biodiversity Conservation Act 1999, Australian Government
the civil law. The inquiry recommended that civil penalties for white collar crimes be increased. But an idea of its overall tone can found in its title, Lifting the fear and suppressing the greed.

In reality, the expansion of the regulatory criminal law is just another form of red tape that gets passed onto consumers. Therefore, government red tape elimination efforts should be expanded to include the reduction of the regulatory criminal law.

The cost of red tape

A 2016 paper by the IPA’s Dr Mikayla Novak found that:

- The economic cost of red tape, in foregone output, is estimated to be $176 billion, equivalent to 11 percent of GDP
- Government estimates of the cost of red tape fail to adequately account for compliance costs across all levels of government

Over-criminalisation contributes to this figure by imposing compliance burdens and discouraging productive activity.

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75 Senate Economics References Committee (2017), ‘Lifting the fear and suppressing the greed’: Penalties for white-collar crime and corporate and financial misconduct in Australia

76 Ibid
Conclusion

Australia can learn from criminal justice reform in the United States, using that country as both a positive and negative example. The differences between US jurisdictions and their Australian counterparts, such as much higher levels of incarceration and existing sentencing policy, may mean that the potential results in Australia may not be as positive or immediate. For this reason, the policies adopted in the US will need to be adapted to Australian circumstances.

On the positive side, the United States’ experience shows that it is possible to lower crime and recidivism by redirecting spending within the criminal justice system. Money allocated to an ever-expanding prison population can be saved by implementing punishment reform for nonviolent criminals. These savings can then be reinvested in parts of the criminal justice system that have a greater benefit for community safety. Research shows that targeted investments in the police can effectively deter criminal behaviour, which will produce a downstream dividend.

This is not to deny a role for improving the rehabilitation services provided by the criminal justice system. The in-prison experience should be tailored to returning inmates to productive society. The United States’ example shows that criminal justice system reforms combined with an opportunity-driven economic agenda can help ex-convicts into paid employment, which is positively correlated with staying on the straight and narrow.

The success of justice reinvestment depends on reliable data and the rigorous oversight of related programs. In Australia, there is a role for cooperation between the Commonwealth and the states in the collection of uniform data across jurisdictions.

Criminal justice reform is not limited to incarceration. As in the United States, Australian governments need to reconsider the extension of the criminal law into areas traditionally governed by the civil law. The imposition of criminal penalties can be economically distorting, can hide red tape behind the public’s respect for the criminal law, and can undermine certainty and confidence in the criminal law. Australian governments also need to redouble the effort to ensure that strict and absolute liability is not unjustly imposed.

The criminal justice system is how the state keeps its most basic promise to citizens. Community safety and the maintenance of public order are the highest values of government. It is right and proper that this system includes punishment for those who breach the peace and proactive enforcement of the norms encoded in the law. But the seriousness of this undertaking demands vigilance in the oversight of its performance. With the known problems in the Australian criminal justice system mirroring those in the United States, it is incumbent upon Australian governments to consider the lessons that country has learned, often at great cost, and to study the changes that it has made.
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In July 2016, the Institute of Public Affairs met with the following people, whose insights into the reform process in the United States were invaluable:

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Evan Bernick, Institute for Justice
Christopher Butler and Lorenzo Montanari, Americans for Tax Reform
Chuck DeVore and Marc Levin, Texas Public Policy Foundation
Benita Dodd, Georgia Public Policy Foundation
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