CRIME & PUNISHMENTS

Australia's wasteful criminal justice system needs a major overhaul, but we shouldn't leave it to the bureaucrats, writes Andrew Bushnell.
Australia’s criminal justice system is ineffective and wasteful, failing to protect the community from crime and recidivism while costing taxpayers more and more each year. Possible causes of this failure include a misallocation of resources within the system, an incorrect punishment mix and an over-reliance on the criminal law by legislators.

Criminal justice is one of the most important functions of government. The protection of people and their property is what makes ordered liberty possible, and it depends on criminals receiving the punishments they deserve. By consistently imposing penalties on those who break the law, the state gives its citizens confidence to live, work, and raise their families free from violence and undue interference.

However, far from constituting a blank cheque for bureaucrats, the importance of criminal justice only reinforces the need for public scrutiny of the system’s results and costs. In Australia right now, applying this scrutiny reveals a picture of a distinctly flawed system.

**MISALLOCATED RESOURCES**

There is no shortage of money in the criminal justice system. According to the Productivity Commission’s Report on Government Services 2016, more than $15.3 billion was spent by Australian governments on criminal justice across 2014-15, up from $13.9 billion five years ago. This increase is more or less in line with inflation but it shows clearly that money is not being taken out of the criminal justice system.

More interestingly, the same report indicates that proportionately more of Australia’s criminal justice expenditure is being directed towards corrective services, of which the largest cost is prisons. Five years ago, 22 per cent of criminal justice budgets went to corrective services. This has risen to more than 24 per cent.

Prisons cost Australian taxpayers more than $4 billion each year. That is $110,000 per prisoner per year.

At the same time, as resources have been redirected from policing to punishment, the adult offender rate has increased. Between 2008-9 and 2014-15, the number of adult offenders increased by 15 per cent.

We are seeing the development of a system that prefers to deter people with penalties rather than to prevent offending with active policing. There are good reasons to believe that this approach is wrong-headed.

We need to remember the purpose of incarceration. The one function of prisons that other forms of punishment (other than the death penalty) cannot achieve is protecting the community from dangerous and anti-social criminals by removing them from circulation.

Incarceration does also have a deterrent effect. But this effect does not increase in proportion to the length of the prison sentence to be served. Research into the characteristics of criminals shows that criminals do not give as much weight to the future as law-abiding citizens. This means that for a criminal, 20 years in prison is much the same as 10 years. However, criminals are sensitive to the likelihood that they will be caught. This suggests that crime may be more effectively deterred through an emphasis on detection and apprehension. And this implies a greater role for police.

Lastly, we know that prisons are not very effective in preventing criminals from reoffending. Of all the prisoners in Australia, 59 per cent have been incarcerated before and 44 per cent of released prisoners reoffend within two years of their release. And because ex-prisoner status is associated with a lack of employment and stable housing and these factors are in turn associated with criminality, imprisonment can be to the longer-term detriment of community safety.

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Given that incarceration is increasingly taking money away from the police and is failing to deter crime and reoffending, it is worth considering whether some non-violent criminals can be punished in a different way, provided doing so is safe and can be accepted by the community as sufficiently retributive.

**PUNISHMENT REFORM**

Right now, up to 46 per cent of those incarcerated in Australia are non-violent offenders. That is, their worst offence was a non-violent offence. Incarcerating these people costs as much as $1.8 billion a year. It is likely that we can make our criminal justice system more effective and efficient by expanding the use of non-carceral punishments for some of these offenders.

For offenders who do not pose a physical risk to the community, home detention and community corrections orders can be applied. The previous Liberal government in Victoria, for example, replaced...
suspended sentences with community corrections orders that give judges more options for controlling offenders being punished in the community. Furthermore, the current South Australian government recently gave judges more freedom to impose home detention on criminals who meet certain criteria.

Fines and restitution orders should also be expanded. Fines allow the community to recoup some of the cost of repairing the damage caused by offenders. Restitution is even more powerful, providing direct recompense to victims. The Labor member of parliament Andrew Leigh has proposed that the Commonwealth tax and transfer system be used to collect fines by garnishing offenders’ wages and benefits. If implemented, this system would facilitate a greater use of monetary punishments.

The guiding principle of criminal punishment is proportionality: The punishment must fit the crime. The question of punishment reform, then, is not whether criminals ought to be punished, but whether prison is always the best punishment. This needs to be assessed in terms of satisfying victims’ rights and interests, protecting the community and deterrence. The exact mix of punishments that this implies is still to be worked out.

But what we do know is that in Australia there are a number of non-violent criminals currently incarcerated at great cost, and that the growing use of incarceration in Australia is taking money away from the police while doing very little to curb rising crime rates or stop offenders from becoming habitual criminals. For this reason, we need punishment reform that delivers better results in these respects while still satisfying victims and the community.

**CRIMINAL LAW REFORM**

It follows from punishment reform that we should also consider whether we are over-criminalising individual conduct. Just as the overuse of prison represents a misallocation of resources that makes us all less safe, our legislators’ over-reliance on the criminal law to discourage and penalise behaviours they don’t like takes resources away from policing and enforcing more important laws. Australia is being smothered by regulation, and one aspect of this is the criminalisation of behaviours causing no direct harm to others, or causing harm better treated through civil law. For example, you can be imprisoned for up to seven years for damaging a protected wetland. Laws such as this one are redundant at best and oppressive at worst. They are rarely, if ever, used, with regulators preferring to work with those who are regulated to remedy potential breaches.

**AS A MATTER OF PRINCIPLE, OVER-CRIMINALISATION IS A PERVERSION OF THE CRIMINAL LAW, EXPANDING IT TO AREAS WHERE WHAT IS TRULY REQUIRED IS A REMEDY, NOT RETRIBUTION.**

But the growing use of the criminal law is also an attempt by the administrative state to scare the public by elevating concern about certain favoured interests.

As a matter of principle, over-criminalisation is a perversion of the criminal law, expanding it to areas where what is truly required is a remedy, not retribution. It is essentially an ideological argument about which matters deserve public opprobrium. Call it legislative virtue signalling. And in practice, this means ever-greater resources are dedicated to compliance and regulation activities.

Criminal justice reform, then, is not only about rationalising the criminal justice system, but also about criminal law; not just about what happens to people caught up in the criminal justice system, but who that system affects.

**THE US EXPERIENCE**

Australia is not the first country to face the twin problems of misallocated criminal justice spending and an expanding regulatory criminal law. The United States has long had an incarceration rate far higher than other Western countries—almost four times the rate in Australia. The Heritage Foundation found that in the US there are up to 5000 criminal laws on the statute books at the federal level alone.

In the last 10 years, though, several conservative states in the US have undertaken substantial reforms, reducing incarceration safely and taking steps to wind back over-criminalisation. States such as Texas have switched to imposing non-carceral punishments on drug users and other low-level offenders, and redirected money from new prison spaces to rehabilitation programs, and to parole reforms. They have seen positive results, with lower recidivism rates and slowed expenditure growth from reduced incarceration.

On the over-criminalisation front, reformers have had success in restoring the requirement of mens rea to regulatory offences. Mens rea
is the mental element of a crime—the requirement that the offender knew or should have known he was breaking the law. A great many regulatory criminal offences are strict or absolute liability, meaning that there is no requirement of fault.

It might be argued that the US is too different from Australia to draw any valuable lessons from their experiences. It is true that Australia has nothing like the level of incarceration of states like Texas, and that the extent of regulatory criminal law and the use of strict and absolute liability in Australia needs to be investigated further. But criminal justice reform is not just about what is wrong now. It is about avoiding problems in the future. And this involves understanding what a well-ordered criminal justice system based on conservative principles looks like.

**DOING NOTHING IS NOT AN OPTION**

If conservatives do not engage with the failures of the criminal justice system, then the reform space will be occupied by others, who are not likely to share our conception of justice, based on individual rights, personal responsibility and just retribution.

The field of criminology is dominated by a worldview that sees crime as the inevitable product of societal dysfunction. On this view, individual criminals cannot be held accountable for their actions because they are not truly the authors of them. Instead, crime is seen as a function of poverty and under-education, and its remedy is an expansion of social welfare, administered by an ever-growing state, paid for, inevitably, by higher taxes.

The goal of the criminal justice system is not to somehow engineer a crime-free society. It is instead to defend the rights of individuals by ensuring that those who breach them are fairly punished, and by doing so to perpetuate the civil peace within which individuals and families can flourish.

But to realise our principles, we must acknowledge the failures of the current system and work to correct them. It is only by doing so that the traditional conception of criminal justice can prevail in the face of a radical challenge from those who see crime as a pathology and citizens only as potential patients. Conservative criminal justice reform is a piece of the broader conservative agenda of rolling back the administrative state. The point is not to reimagine criminal justice *de novo*, but to sustain and strengthen the system into the future.