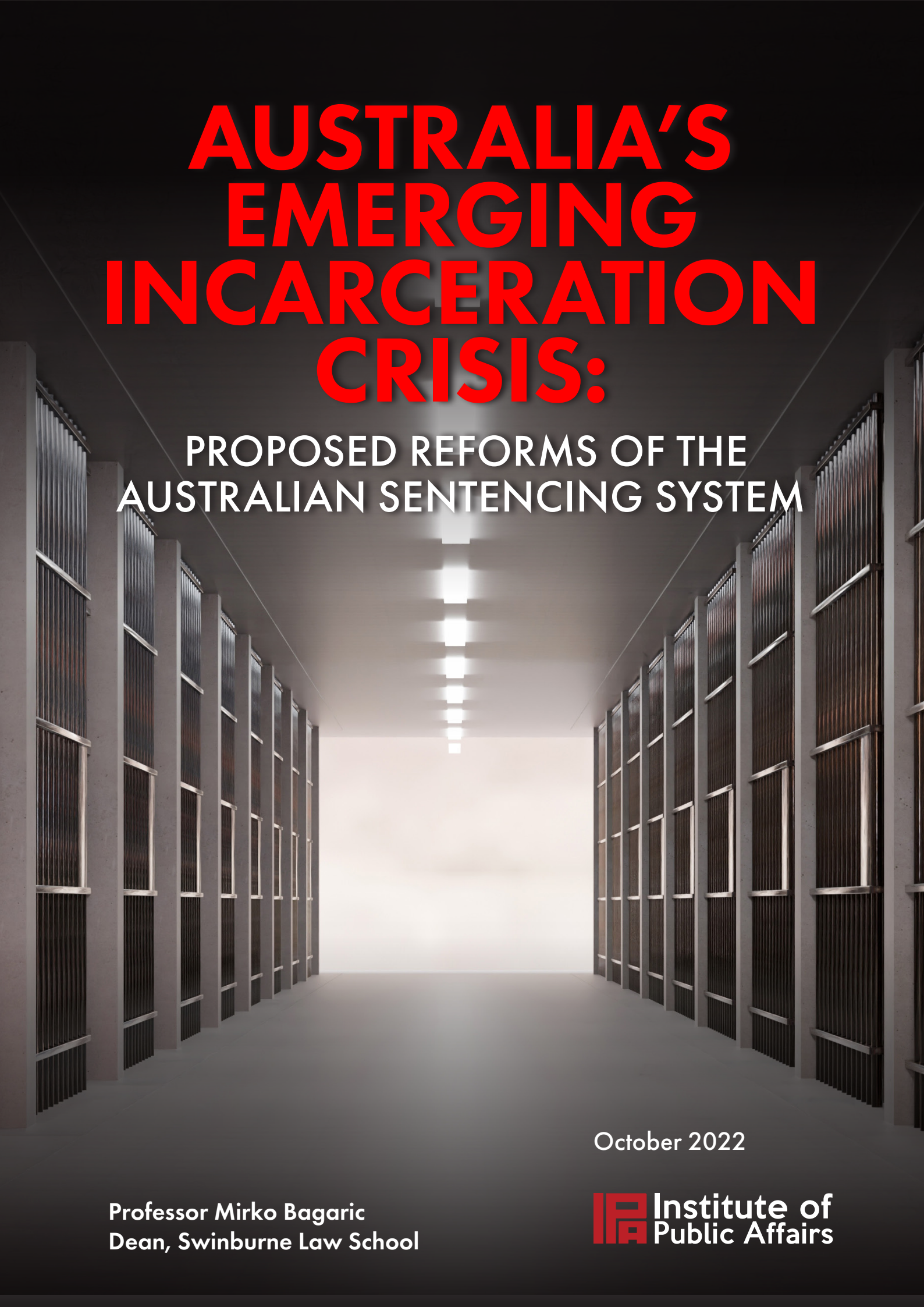

AUSTRALIA'S EMERGING INCARCERATION CRISIS:

PROPOSED REFORMS OF THE AUSTRALIAN SENTENCING SYSTEM

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Overview: Problems and solutions – The Australian sentencing system

The Institute of Public Affairs (IPA) has taken a lead role in providing empirically-grounded reform proposals for the criminal justice system, with a strong focus on reducing incarceration numbers. The report released in 2017, titled *Australia's Criminal Justice Costs: An International Comparison* noted that 'despite spending more than most countries [on prisons] and more and more each year, our results are poor and people don't feel safe'.

In recent years, this problem has become more acute. Prison rates have continued to increase, with an enormous amount of public money being spent on prisons and no improvement in community safety.

Over the past two decades the United States – known in criminology circles as the 'mass incarcerator' – has made significant progress in reducing the incarceration of low-risk, non-violent offenders. This has reduced the overall incarceration rate which delivers a dividend to taxpayers through less spending on prisons, some of which can be re-invested to strengthen the policing of violent and sexual offences to improve community safety. Additionally, reducing unnecessary rates of incarceration allows more Americans to be productive members of society, through working, paying taxes, and supporting their families and local communities.

The adage applied by reformers predominately from deep-red conservative states such as Georgia and Texas was 'jail is for people we are afraid of, not those we are mad at.' This recognises the unique nature of prison and that it should be reserved for people who are a threat to community safety. For those who are not a threat to safety, but who have nonetheless broken the law and ought to be punished, alternatives to prison should be pursued.

Australia, however, is lagging behind the world-leading reforms undertaken in the United States, and across many parts of Europe and Scandinavia over the past two decades.

The criminal justice system has a number of stages, including investigation, arrest, trial and conviction or acquittal and then the imposition of sanctions against offenders. This last stage, sentencing, is arguably the most important aspect of the system: the sanctions available against offenders target the most cherished and coveted individual interests, including the right to liberty. Moreover, mistakes at the sentencing stage of the process threaten to undermine the integrity of the entire criminal justice system. If, for example, murderers habitually received only small fines or shoplifters were sentenced to life imprisonment, this would seriously undermine the efficacy of the entire criminal justice process. This report focuses on reforms to the sentencing system. This system is fundamentally broken in Australia. There is no tenable rationale that can

justify the jarring reality that Australia's imprisonment rate has increased three-fold over the past three decades, making Australia one of the most punitive developed nations on earth.[1]

The most pressing and important issue relating to sentencing law and practice is its continued disregard of expert knowledge and empirical evidence. Sentencing is the institution where there is the greatest gap between practice and knowledge.[2] Most other social institutions and areas of learning, such as medicine, engineering and education, readily embrace and change their practices in response to new learning that demonstrates more efficient and effective ways of achieving desirable outcomes. By contrast, the key sentencing policies and practices which are responsible for the incarceration crisis have been implemented and maintained despite extensive research which demonstrates that the system is flawed.

Empirical evidence highlights that key sentencing objectives that have been invoked to justify heavier penalties, such as marginal general deterrence and specific deterrence, are unattainable, yet they remain central goals of Australian sentencing system.[3]

This report examines the gulf between sentencing knowledge and practice, and makes recommendations regarding the measures that need to be undertaken to bridge that gap, so that law-makers can bring sentencing practice in line with current knowledge and make it fairer and more efficient. If the proposals in this report are adopted, the incarceration rate could be reduced by up to 30%, far less tax-payer dollars will be spent on prisons and the community will be safer.

The election of the Albanese Federal Government and increased focus on problems with the sentencing system provides a window in which the community and law-makers are receptive to evidence-based reforms to sentencing. To take advantage of this opportunity, it is necessary understand the flaws of the current system and the barriers to implementing progressive reforms and provide coherent evidence-based reform proposals.

The reform proposals in this report will make changes to the sentencing system which will secure the following four objectives:

1 World Prison Brief, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All. The statistics in this table are several years old, however as noted below the incarceration rate in Australia per 100,000 has increased markedly since that time (from 165 to 214) and hence it is unlikely that Australia's comparative imprisonment rate has improved.

2 This report includes a number of research findings regarding the efficacy of sentencing to achieve key objectives. The report is not a substantiation document. The main research articles underpinning the findings in this report are: Mirko Bagaric, 'An Argument for Uniform Australian Sentencing Law' (2013) 37 *Australian Bar Review* 46; Mirko Bagaric, 'Sentencing: From Vagueness to Arbitrariness – The Need to Abolish the Stain that is the Instinctive Synthesis' (2015) 38 *University Of New South Wales Law Journal* 72; Mirko Bagaric, 'Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars' (2014) 19 *Michigan Journal of Race and the Law* 349; Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals' (2015) 62 *Buffalo Law Review* 1159; Mirko Bagaric, Dan Hunter and Jenifer Svilar, 'Prison Abolition: From Naïve Idealism to Technological Pragmatism (2021) 111 *Journal of Criminal Law and Criminology* 351-406.

3 See Part 6 of this report.

1. Reducing crime;
2. Punishing criminals appropriately;
3. Minimising the cost of the system; and
4. Ensuring that the system does not violate important moral norms.

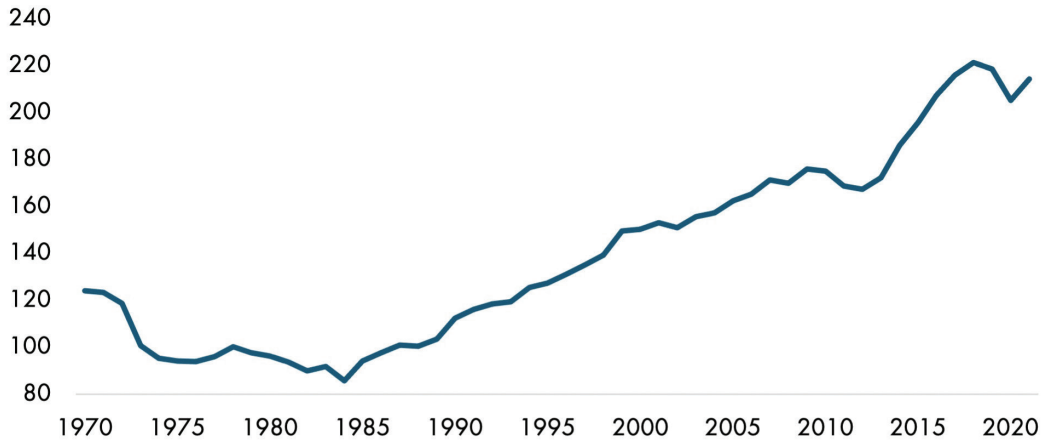
In order to improve the sentencing system, it is necessary to reassess the current aims of sentencing; give content to the principle of proportionality; harmonise aggravating and mitigating considerations, establish standard penalties for key offence types and introduce new criminal sanctions. This matters are now discussed below, after examining the failings of the current system.

Summary of the current failings of the sentencing system

The current sentencing system is flawed because it pursues goals which are unattainable and accords insufficient weight to the principle of proportionality.

The flawed approach to sentencing has resulted in Australia having one of the highest prison rates in the developed world – and it continues to increase. Recent data from the Australian Bureau of Statistics data shows that from 1 July 2020 to 30 June 2021, Australian prisoners increased by 5% to 42,970 inmates.[4] The imprisonment rate grew from 205 to 214 prisoners per 100,000 adult population.[5] This trend is consistent with the pattern over the past few decades. The incarceration rate reached a low of 85 prisoners per 100,000 adults in 1984.[6] Since then, the proportion of Australian adults in prison has increased by some 240%, the equivalent to approximately 4% per year. If current trends continue, then the adult prison population could reach 300 per 100,000 adults by the year 2030.[7]

Chart 1: Incarceration Rate Australia (Adult Population)



Moreover, there is also no considered attempt to match the severity of the crime and the harshness of the penalty. Of the 42,970 prisoners in custody, 27,680 were sentenced offenders and the remaining were on remand.[8] Violent and sexual offenders accounted for 16,158 prisoners, while the remaining inmates had committed other offences such as theft, illicit drug offences and driving offences.[9] Thus, approximately 42% of prisoners had not committed sexual or violent offences.

4 ABS, *Prisoners in Australia*, https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download, released 9 December 2021.

5 From 30 June 2020 to 30 June 2021, Australian prisoners increased by 5% (1,910) to 42,970.

6 Ibid.

7 It took nearly 50 years for the rate to go from 50 per 100,000 (in 1940) to 100 per 100,000 (in 1998).

8 ABS, *Prisoners in Australia*, https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download, released 9 December 2021

9 ABS, *Prisoners in Australia*, https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download, released 9 December 2021, table 23.

In 2020-21, net operating expenditure on corrective services was just under $4.19 billion for prisons, and the cost to the taxpayer of each prisoner per year was $375 per day ($136,875 annually).[10] This was a 13.3% increase from the previous year.[11]

The dividend of prison is small. In 2020-21, 45.2% of prisoners released from prison after serving a sentence in 2018-19 returned to prison within two years of release.[12] Thus, prison often only provides a transient form of protection from offenders.

There is now a pressing need to implement sound sentencing policies. The imprisonment rate in Australia has tripled over the past three decades. As noted above, Australia is now one of the most punitive developed countries on earth. By any international benchmark Australia has an extremely high incarceration rate. In fact of the 38 OECD countries, only Turkey, Costa Rica, Columbia, Hungary, Mexico, Israel, Lithuania, Poland, Slovakia, the Czech Republic and the United States have higher imprisonment rates.[13] All of these nations have marginal rule of law safeguards except the United States, Poland and Israel. When compared to most Western nations, Australia's prison rate is dramatically high. It is much higher than other Commonwealth countries with similar legal systems, such as the United Kingdom and Canada and more than double Western European countries, such as Germany, Netherlands, Sweden and Switzerland. It is more than triple the rate of Finland, Iceland and Japan.

The great outlier in terms of prison numbers is the United States. In criminology circles this is typically referred to as the mass incarcerator as a result of its breathtakingly high imprisonment rate. But even the United States has accepted that mass incarceration is an abject failure. United States incarceration numbers quadrupled following the commencement of the "War on Drugs" in 1971. United States incarceration numbers peaked in 2007[14] when there were 2,293,000 inmates in American prisons and jails - a rate of nearly 1,000 persons per 100,000 population. The rate has dropped nearly 20% since 2007, to a current total prison population of approximately 1.9 million.[15]

The reason for the drop has little to do with increased sympathy for criminals, but rather the realisation that the financial burden ($81 billion annually) of locking up over two million Americans was no longer sustainable. Between 1980 and 2010, the United States effectively tripled its spending on imprisonment.[16] This expenditure diminishes the

10 This comprises $272 per day in real net operating expenditure and $103 in capital costs: Productivity Commission, 'C8: Corrective Services' in *Report on Government Services 2022* (28 January 2022): https://www.pc.gov.au/research/ongoing/report-on-government-services/2022/justice/corrective-services#downloads. Table 8A.19. See also, Table 8A.1 and 8A.2. This information is for the financial year 2020-21.

11 Productivity Commission, 'C: Justice' in *Report on Government Services 2021* (22 January 2021) Table 8A19.

12 Productivity Commission 'C: Justice' in *Report on Government Services 2022* (28 January 2022) Table CA.4 https://www.pc.gov.au/research/ongoing/report-on-government-services/2022/justice. The rate of prisoners returning to prisoners within two years of release increased from 44.1% in 2015-16.

13 Australia's rate of 165 in the international comparison differs from that in ABS report above, because this figure is based on imprisonment rate per 100,000 people not 100,000 adults.

14 Bureau of Justice Statistics, 'Prison and Jail Incarceration Rates Decreased by More than 10% from 2007 to 2017' (Press Release, 25 April 2019), https://www.bjs.gov/content/pub/press/p17ji17pr.pdf.

15 Vera Institute of Justice, The Price of Prisons (2017): https://www.prisonlegalnews.org/media/publications/The_Price_of_Prisons_Vera_Institute_of_Justice_2017.pdf

16 Melissa S. Kearney et al., 'Ten Economic Facts About Crime and Incarceration in the United States', The Hamilton Project (2014) 13.

pool of government funds that are available for essential social services. The National Research Council has noted:

> Budgetary allocations for corrections have outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance . . . Today, state spending on corrections is the third highest category of general fund expenditures in most states, ranked behind Medicaid and education. Corrections budgets have skyrocketed at a time when spending for other key social services and government programs has slowed or contracted.[17]

The Centre of Budget and Policy Priorities reported in 2014 that 11 states currently spend more on imprisoning offenders than on higher education. Increases in correctional spending also outpaced spending on primary and secondary education (which is much greater than higher education spending generally) by double the rate in 23 states over the same time period.[18] It is notable that the reforms to reduce incarceration numbers have been driven by conservative states, such as Georgia and Texas.[19]

While the imprisonment rate in Australia remains considerably lower than that of the United States, our overall per capita expenditure on incarceration is similar to that in the United States. The average annual cost of detaining an offender is less than $40,000 in the United States[20] - more than three times less than in Australia.

Mass incarceration was a failure in the United States. It is an emerging failure in Australia. Clear-minded reforms need to occur in Australia in order to prevent us sleep-walking into the same massive policy failure as the United States.

Sentencing is the only area of social policy that has remained effectively unchanged for over a hundred years. Policy continues to be directed by political and judicial hunches and 'common sense' without regard to scientific and social learning – in crude terms, judges punish large numbers of offenders (many of whom have not committed damaging crimes) behind large walls for as long as they see fit. Sentencing is a research and knowledge wasteland. The proposed reforms will align sentencing practice with knowledge in this area.

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17 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014) 314.

18 See "Report: Increases in Spending on Corrections Far Outpace Education," U.S. Dept. of Ed. (July 7, 2016), https://www.ed.gov/news/press-releases/report-increases-spending-corrections-far-outpace-education.

19 See Andrew Bushnell, 'Criminal Justice Reform – Lessons from the United States', Institute of Public Affairs, (April 2017)

20 Pew Charitable Tr., Local Spending on Jails Tops $25 Billion in Latest Nationwide Data 1 (2021), https://www.pewtrusts.org/-/media/assets/2021/01/pew_local_spending_on_jails_tops_25_billion.pdf ($34,000 for jails); Vera Institute Prison spending in 2015: https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending#:~:text=Among%20the%2045%20states%20that,of%20%2469%2C355%20in%20New%20York 945 state average for prisons was $33,27); Bureau of Prisons, Justice, Annual Determination of Average Cost of Incarceration Fee, 1 September, 2001, https://www.federalregister.gov/documents/2021/09/01/2021-18800/annual-determination-of-average-cost-of-incarceration-fee-coif (between $35,663 and $39,158 for federal prisoners).

Sentencing is an important normative and political issue

Criminal justice, and sentencing in particular, is one of the most important issues in the community. In fact, surveys leading up to the recent Victorian state election in November 2018 showed that it was the most important issue to voters (even more important than health and education policy).

Each of the nine Australian jurisdictions (including the federal jurisdiction) has its own discrete sentencing law. There is considerable convergence among these laws, but they are far from uniform. Sentencing was traditionally viewed as being a matter principally for the states and territories. This is no longer the case. Federal criminal law now covers all types of offence categories, including crimes against the person, drug offences and crimes against property. Moreover, the federal government (being at the apex of the Australian government framework) can take the lead role in shaping sentencing laws.

In order for the reforms to be politically viable, they must be capable of attracting community support. Fortunately, this is one of the rare instances of criminal law reform where the empirically correct changes align with community expectations. Explained properly, the changes could attract overwhelming community support.

The single most important consideration which informs the reforms is the interests of the victim. The key driver of the reform is to understand the extent to which respective criminal offences harm or damage the lives of victims. The severity of the offence must be defined by reference to victim harm so that proportionate penalties can be imposed.

This will lead to an effective bifurcation of the sentencing system: serious sexual and violent offenders will be sentenced to prison more frequently and often for longer terms, while other types of offenders will be sentenced to imprisonment less frequently.

The other key driver of the proposed reforms is the expectations of the general community. The community wants to ensure criminals are properly punished and prevented from reoffending. The community also seeks to ensure that the criminal justice system is less financially burdensome. The community prefers for money to be spent on health and education rather than the imprisonment of criminals. These expectations will be partially achieved by reducing the crime rate. They will be further achieved by the introduction of a different range of sanctions.

The recommendations below set out the framework for greater convergence in sentencing throughout Australia, which all Australian governments should implement.

In order for the sentencing system to work in a fair and efficient manner, it should be driven by two specific goals. These goals encompass the four specific objectives in the first part of these report. The key goals are:

1. The imposition of proportionate sentences. This requires that the severity of the crime is matched by the harshness of the penalty.
2. The protection of the community. This is principally achieved by ensuring that sexual and violent offenders are incapacitated in order to reduce the level of risk that they present to the community.

The broad effect of the proposals

The main outcomes of the proposals in this report are:

- Serious violent and sexual offenders will be imprisoned more frequently;
- Other offenders will be imprisoned less frequently;
- The prison population will reduce by approximately 30%[21];
- Large revenue savings will occur due to reduced prison numbers; and
- A safer community due to increased police numbers.

In revenue terms, this would result in an annual tax-payers saving of approximately $1.25 billion. Moreover, it would mean that there would be approximately 14,000 additional Australians in the community each year on average, who would contribute to the social and financial fabric of the community. This is especially important in the current economic setting, where unemployment is at its lowest point in decades at 3.5% and many businesses are finding it overwhelmingly difficult to find workers.

The first step in reforming the sentencing system is to review the key aims of sentencing law and abolish goals that are undesirable or empirically unachievable. Broadly each Australian jurisdiction endorses the same aims of sentencing in the form of community protection (or incapacitation), general deterrence, specific deterrence, rehabilitation and denunciation.[22] The last four of these aims are dubious.

There has been a voluminous amount of empirical research into the efficacy of state-imposed punishment to achieve the goals of general deterrence, specific deterrence and rehabilitation. It is beyond the scope of this report to consider these findings at length. However, the trend of the findings is relatively consistent and hence it is possible to provide an overview of the relevant literature. In short, the weight of the current empirical evidence provides no basis for confidence that punishment is capable of achieving the specific deterrence. General deterrence works only in the absolute sense, and there remains considerable uncertainty on the capacity of the sentencing system to rehabilitate offenders. The goal of incapacitation should be confined to offenders who commit crime which causes serious harm to people. Each of these aims is now examined more fully.

Incapacitating offenders in prison is the most effective form of community protection given that during their period of confinement offenders cannot commit crime in the community. All sexual and violent offenders should be incarcerated for lengths of time commensurate with the seriousness of their offence, with those at the highest risk of re-offending incarcerated for longer periods (with a sentence loading of 20-50% which is consistent with the rates of re-offending).

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21 As noted above, approximately 42% of prisoners have not committed a violent or sexual offence. Most of these should be deal with by other sanctions. Only the most serious of these offenders should remain in prison.

22 *Crimes Act 1900* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act* 1992 (Qld) ss 5, 9; *Sentencing Act 2017* (SA) ss 3, 4; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 1995* (WA) s 6.

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay. It attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment), which they will seek to avoid in the future. The available empirical data suggests that specific deterrence does not work.[23] There is nothing to suggest that offenders who have been subjected to harsh punishment are less likely to re-offend than identically-placed offenders who are subjected to lesser forms of punishment. Thus, there is no basis for pursuing the goal of specific deterrence.

The weight of evidence suggests that rehabilitation fares only slightly better. Certain rehabilitative techniques have some degree of success for some offenders, but there is no data to show that there are wide-ranging techniques to reform all offenders.[24] Moreover, recent data establishes that the rate of offenders who do re-offend upon release from prison is in fact increasing – casting significant doubt on present day rehabilitative techniques. The Productivity Commission Report on Government Services 2020 shows that the portion of adult offenders released from prison who returned to prison within two years of release was 46.4%.[25] The rate was the highest in the Northern Territory at 59.4% and lowest in South Australia at 37.5%. The figures relate to offenders who were released in 2016–2017. The data also showed that the national rate at which prisoners returned to prison within two years had increased every year over the last five years. The recidivism rate was in fact much higher than 46.4%. Overall 54.9% of prisoners returned to either prison or community corrections within two years.

The figures are illuminating for several reasons. In most other human endeavours we see an improvement, albeit sometimes gradual, in the manner in which the community deals with problems which impact individuals and society at large. Criminal activity causes an enormous amount of harm to the community – including, as we have seen, the cost of imprisonment which is over $4 billion dollars annually. Yet, as a society we are making no inroads into reducing the rate of re-offending. This data demonstrates an unequivocal and pressing need for a critical evaluation of all of the key rehabilitation programs in Australia with a view to starting with a blank canvass and developing and implementing activities and programs which make offenders less likely to re-offend. At the moment, the criminal justice is failing abysmally in this objective and it is a pretence (albeit sometimes a convenient one) to claim that our system takes seriously the goal of rehabilitating offenders

The findings regarding general deterrence are relatively settled. General deterrence seeks to dissuade potential offenders with the threat of punishment by illustrating the harsh consequences of offending. There are two forms of general deterrence. Marginal general deterrence is the view that severe penalties reduce the incidence

23 Bagaric, above n 2.

24 Ibid.

25 Productivity Commission, 'C: Justice' in *Report on Government Services 2020* (2020) Part C, Table CA.4 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice>.

of crime. It contends that there is a direct connection between harsh penalties and a lower crime rate. Absolute general deterrence is the more modest claim. It concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct. Absolute general deterrence does not require or support the imposition of harsh sanctions. In order for it to be effective, any sanction which people find unpleasant (such as a fine) is sufficient. The evidence suggests that marginal deterrence is a flawed theory, while absolute general deterrence does work.

Marginal general deterrence seems to be flawed in relation to all penalty types – even the threat of capital punishment does not reduce crime. The most wide-ranging recent analysis of the impact of the death penalty on crime is by the National Research Council of the National Academies, which concluded:

> The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.[26]

While there does not seem to be a link between higher penalties and less crime, it seems that people are not totally irrational when they contemplate committing crime. The evidence shows that to the extent that people make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. There is a connection between lower crime and the perception in people's minds that if they commit an offence they will be apprehended and subjected to some form of criminal sanction.

Thus, the theory of absolute general deterrence is valid. It follows that the keys to reducing crime are (i) the existence of criminal sanctions; and (ii) putting in place systems and investigative processes that will make prospective offenders believe that if they do offend there is a high chance that they will be detected and prosecuted. In short, more police on the street is the best way to reduce crime.

26 National Research Council of the National Academies, *Deterrence and the Death Penalty* (The National Academies Press, 2012) 2.

The guiding principle on how much to punish: Proportionality - the punishment must match the crime

The above objectives are the main ways in which the criminal justice system seeks to justify the imposition of criminal sanctions. When it comes to the important issue of how much to punish (as opposed to why we should punish), the main guiding determinant is the proportionality. This is the principle that the hardship imposed by the punishment should be matched by the harm caused by offence.

The principle of proportionality has received universal support and endorsement in the legal system, but is observed only in theory. In practice it is not applied because the penalty is distorted by sentencing premiums or reductions which have been applied in order to pursue unattainable objectives (like general deterrence) and the operation of over one hundred aggravating and mitigating considerations (such as remorse and breach of trust).[27] The proposed model will overcome this distortion by abolishing the pursuit of unattainable sentencing aims and removing most aggravating and mitigating factors.

The second reason that proportionality is not applied in practice is because the legislatures and courts have not made any serious attempt to match the two limbs of the principle: How many years of imprisonment correlate to the pain endured by a rape victim, for example?

The main difficulty here is that the two currencies are different. The interests typically violated by criminal offences are physical integrity and property rights. When it comes to sanctions however, the main currency is deprivation of freedom - by imprisonment. Despite this disjunct there is a solution. Rigour and consistency can be injected into the proportionality principle if both aspects of the equation focus on the extent to which the interests and flourishing of victims and offenders are set back as a result of the crime and punishment, respectively.

The interests and flourishing of victims of serious sexual and violent offences (based on quality of life indicators, such as health, employment and relationship outcomes) are significantly diminished as a result of the crimes to which they have been subjected. In short, these offences significantly damage the lives of victims. Victims of property offences suffer far less.[28]

In relation to the impact of sanctions, it emerges that prison is burdensome, and in fact to a greater extent than is manifest from the nature of the sanction. Prisoners have a lower life expectancy and their lifetime income levels are greatly reduced compared to individuals with a similar profile who have not been imprisoned.[29] Prison is a considerable deprivation.

27 These are discussed further in the next section of this report.

28 Bagaric, above n 2.

29 Ibid.

Proportionality requires the harshest sanctions to be reserved for the most serious crimes. The default position of the proposed reforms is that all serious sexual and violent offenders are sentenced to imprisonment. Fewer other types of offenders will be sentenced to imprisonment.

Aggravating and mitigating factors

In deciding how much to punish, courts also take into account aggravating and mitigating factors. Aggravating considerations increase penalty severity, while mitigating factors reduce the harshness of the sentence. The fairness, transparency and consistency of the sentencing process is greatly undermined by 200 or so aggravating or mitigating factors that have been 'developed' by the judiciary over the decades. Most of these considerations have no policy justification. The existence of these considerations makes it possible for judges to virtually craft any sentence because the law states that it is a matter for judicial discretion to determine how much weight they attach to an aggravating or mitigating consideration. Thus, for example, a judge can reduced a penalty by either 5% or 40% on the basis of offender remorse. The sentencing process is made more uncertain by the fact that judges are not required to state in their reasons how much weight they accord to any considerations.

The operation of aggravating and mitigating considerations requires significant reform. The starting point is that all of these considerations should be abolished unless they are justified by reference to one of four pillars: (i) the proper aims of the sentencing system; (ii) the proportionality principle; (iii) the objectives of the criminal justice system or (iv) wider well-established principles of justice.

Application of this approach means that there should be only 15 considerations that increase or decrease penalties beyond a core penalty which is proportionate to the seriousness of the offence. All these considerations should have an upper range for the amount of weight they carry. The considerations and the maximum weight they should attract are set out below.

The permissible aggravating factors are:

- Prior criminal record (50%)
- High degree of involvement in a crime (10%)
- High degree of planning (10%)
- High level of harm (10%)

The permissible mitigating considerations are:

- Severe impact from punishment (eg offender held in supermaximum prison conditions for reasons not attributable to his or doing) (50%)
- Plea of guilty (25%)
- Assisting authorities (25%)
- Deprived socio-economic background attributable to offending (eg certain Indigenous offenders) - but only in relation to non-sexual and non-violent offenders (25%)
- Circumstances where the punishment would have a severe impact on dependants of the offender (20%)

- Severe impact of incidental punishment, eg offender loses career or suffers injury while committing offence (20%)
- Spontaneous offence (10%)
- Self-defence (10%)
- Necessity (10%)
- Duress or coercion (10%)
- Mental illness (10%)

These factors do not operate in a simple cumulative manner otherwise a combination of mitigating factors could potentially amount to a discount of 100% or more. Instead, the discounts or additions are to be applied individually, to the contracted sentence, following application of the previous consideration. Thus, pleading guilty and assisting authorities does not lead to a 50% discount of the entire sentence. Rather, the discount is 43.75% (25%, plus the remaining part of the sentence (75%) multiplied by 25%).

New sanctions

Criminal sanctions involve the deliberate infliction of pain on offenders. Previously, the human body was regarded as a valid target for criminal sanctions and so too was the right to life. However, capital punishment and corporal punishment have both now been abolished.

Criminal sanctions should be always evolving, but must do so in a strategic manner, incorporating relevant technological advances. The harshest form of sanction applicable in the current system (imprisonment) targets the right to liberty. New sanctions need to be effective (ie., target interests that are important to people) and efficient (ie., not expensive to administer).

New interests that should be targeted are the right to own property and the freedom of movement. Many crimes have a financial motive: this includes most property and drug distribution offences. People who engage in these offences should be subjected to a new sanction, termed a property ownership disqualification. This means, in effect, that offenders should be precluded from owning or possessing any assets, either for a specified time or forever. A lesser form of this sanction is an offender taxation levy. The levy would operate so that two-thirds of all income derived by the offender would be payable as taxation. The total payable would be double the amount wrongfully obtained by the offender. In addition to this, the offender would be required to pay a one off fine equal to the amount wrongfully obtained by the offender. This sum would be paid to the victim. It would constitute a life-long debt against the offender until it was repaid in full. It would be enforced in a similar manner to HECS and other tax debts. This would mean that in effect the offender would be required to pay back three times the amount taken by him or her.

Thus, by way of example, if a person defrauds the tax office in the sum of $100,000, he or she would be required to pay back immediately $100,000 and then pay an additional $200,000 through the offender taxation levy. The amount of taxation that would be attributable to paying off this sum is two-thirds of the offender's total income, minus the normal tax that would be payable. Thus, an offender who is subject to the top marginal tax rate of 47% would have 20% of their income directed towards paying off the sanction.

In addition to this, technological incarceration should also be developed as a sanction. The key feature of this sanction is the use of modern monitoring and sensor technology, which can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending. The sanction would build on the design features of home detention orders, which use GPS tracking and are already used in many parts of Australia. Technology has already been developed that can monitor the movements of people and other moving objects and is in use in a number of contexts including detecting if a patient

falls in hospital and in directing driverless cars. Tamper proof sensor equipment and visual recording equipment could be attached to the bodies of offenders to monitor their movement. This would supplement GPS technology that monitors the location of offenders. The equipment would detect if offenders engage in suspicious movement (such as picking up a sharp object or applying significant force to an object) and all of the offender's electronic communications would be monitored to ensure that he or she did not engage in irregular transactions.

This sanction would have significant advantages beyond merely reducing the harm that an offender would cause if his or her actions were not monitored. As noted above, empirical data shows that the greatest deterrent to crime is not the severity of the possible punishment but the belief by offenders that if they commit a crime that they will be detected. Thus, the mere imposition of this sanction would greatly reduce the incidence of re-offending. Moreover, when offenders who are undergoing the monitoring sanction do offend, the sensor equipment will provide cogent evidence regarding their involvement in the offence. The sanction can be operationalised in a number of different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring obviously be varied (from say six months to ten years) but the area of confinement can also be controlled.

Thus, for example, offenders who have committed relatively serious white-collar offences could have their movement confined to two kilometres from home (except for their workplace) and within this zone be precluded from places such as restaurants and bars and be subjected to the taxation levy. The combination of the offender tax levy and technological incarceration would significantly curtail their freedom while at the same time ensuring that they pay back their ill-gotten gains while also continuing to contributing to society as a productive and employed member of the community – instead of further depleting the public revenue by housing another prisoner and depriving the labour market of an employable individual.

Standard penalties

The current methodology for determining penalties is unsound. It is termed the 'instinctive synthesis' and is a mechanism whereby sentencers make a decision regarding all of the considerations relevant to sentencing and then give due weight to each of them (and, in the process, incorporate considerations that incline to a heavier penalty and offset factors that favour a lesser penalty) and then set a precise penalty. The hallmark of the instinctive synthesis process is that it does not require (or permit) judges to set out with any particularity the weight (in mathematical terms) accorded to any individual consideration. A global judgement is made without recourse to a process that demarcates the precise considerations that influence that judgement.

Accordingly, a degree of subjectivity is incorporated into the sentencing calculus. Current orthodoxy maintains that there is no single correct sentence and that the 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.[30] This permits judges to craft a sentence that appeals to their intuitive sense of justice. Research confirms that such decisions are often impacted by implicit judicial bias. Judges are influenced by their political views; the sex and socio-economic background of the offender; their mindset prior to the decision and the race of the offender.

The best manner in which to inject greater clarity, fairness and objectivity into sentencing is to set a presumptive penalty for all offences (as is currently the case with crimes dealt with by way of infringement notices and some standard penalty provisions in Victoria and New South Wales) which can only be departed from on the basis of the aggravating and mitigating factors set out above. The standard penalties need to be proportionate to the severity of the offence and should not be overly punitive – as is the situation in the United States. Examples of standard penalties which should be implemented are:

- Murder – 18 years' imprisonment
- Homicide – 8 years' imprisonment
- Rape – 5 years' imprisonment
- Assault causing serious harm – 5 years' imprisonment
- Armed robbery – 4 years' imprisonment
- Theft (greater than $10,000) from an institution – two years' technological monitoring and an offender taxation levy.
- Theft (greater than $10,000) from an individual – three electronic monitoring and property ownership sanction for 5 years'.

30 *Hudson v The Queen* (2010) 205 A Crim R 199, 206.

The way forward

Implementation of the proposed recommendations will ensure that the sentencing system in Australia is properly grounded in empirical data regarding what is achievable through a system of state-imposed punishment. The model is loosely based on the systems in Scandinavian countries. The prospect of lowering crime rates and reducing prison numbers is achievable. The imprisonment rate in Scandinavian countries is half of that in Australia and the victimisation rate is less by a factor of approximately one third. A proportionality focused sentencing system driven by empirical data can confer profound benefits to the community, in the form of a fairer and less expensive sentencing system and safer community.

AUSTRALIA'S EMERGING INCARCERATION CRISIS: PROPOSED REFORMS OF THE AUSTRALIAN SENTENCING SYSTEM

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