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Fear: Crime and Punishment

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Abstract

Australia, like many western nations, has seen an unprecedented rise in the levels of imprisonment over recent decades. This paper discusses several factors that have flowed from this over-reliance on criminalisation and imprisonment as a tool of social policy.

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Australia, like many western nations, has seen an unprecedented rise in the levels of imprisonment over recent decades. Several factors have flowed from this over-reliance on criminalisation and imprisonment as a tool of social policy:

- governments have seen a significant growth in budgets allocated to criminal justice expenditure at the cost of providing community-based resources;
- criminal justice policy has become increasingly politicised with little difference between the policies of major parties except to the extent that they try to outdo each other in more punitive approaches to law and order; and
- perhaps most importantly, it has been the more marginalised and less powerful social groups which have experienced the brunt of growing prison numbers. In particular, people with mental illness, Aboriginal and Torres Strait Islander peoples and women have seen the most significant increases in their rates of imprisonment. One effect of these policies has been, at a considerable financial cost, to further entrench the social exclusion of the already marginalised.

Punishment: costs and numbers

Governments make considerable outlays in their budgets every year to ensure that individuals who have been convicted of crimes are punished. The most recent report on the cost of government service provision noted that correctional services had national net operating expenditure and capital costs of \$2.79 billion in 2008-09.¹ These costs and the numbers of people incarcerated have been on a significant upward curve at least from the later part of the 1980s. After more than two decades of growth we are spending more money and depriving more people of their liberty, but are we spending money efficiently and effectively? Do we feel safer and less fearful of crime? And can we afford either financially, socially or in terms of public safety the current system, particularly when responsible governments elsewhere have been looking to reduce prison numbers?

Prison expenditure in 2009 increased by 5 per cent over the previous year, and in line with the longer term trend. Indeed if we go back to the first report on government service provision in 1995, the warning then was fairly clear. The report noted that 'over the past decade spending in this area [corrective services] has grown strongly in real terms, at an annual average rate of 5.4 per cent Australia wide'.² And, as later reports on government service provision attest, prison expenditure continued to grow in real terms at a similar pace. Imprisonment rates have also been increasing – at only a slightly slower tempo than spending. In 2008-09 the daily average for prisoners was 27,612 people. This was an increase of 4.4 percent over the reported daily average of the previous year.³ The Australian Bureau of Statistics has estimated that in the decade between 1993 and 2003 the Australian rate of imprisonment increased by 22 per cent,⁴ and between 1998 and 2008 the rate had increased by 20 per cent.⁵

The increase in imprisonment in Australia has been reflected in many other western states. Recent international literature and research pose a number of explanations for the growth in imprisonment over the last 25 years. It has been suggested that many western democracies are entering a period of 'mass imprisonment'.⁶ This change represents a reversal of earlier trends where prison rates had been relatively stable or increasing only slowly during most of the twentieth century. According to many commentators,⁷ the rise of mass imprisonment is consistent with the broader political agenda of the neo-liberal state,⁷ a move away from rehabilitative aims towards a culture of control⁸ and an increased reliance on risk assessment.⁹

Punishment as social policy

Perhaps one of the most fundamental points to grasp is that rising imprisonment is not directly related to increases in crime. In the final analysis, the use of prison is a function of government policy and legislation and judicial decision-making. In summarising the international literature Wilkinson and Pickett note¹⁰ that only 12 per cent of the growth in the state prison population in the USA during the 1980s and 1990s could be associated with increases in criminal offending – the rest was the result of increased use of imprisonment and longer periods of imprisonment. Similarly a comparison between the UK and the Netherlands showed that two thirds of the difference in the higher UK imprisonment rates was a result of the greater use of custodial penalties rather than differences in crime rates. We have similar research in Australia: the NSW Bureau of Crime Statistics and Research studied the 48 per cent increase in Indigenous imprisonment rates in NSW between 2001 and 2008 (which, incidentally, was a greater increase than occurred with the non-Indigenous imprisonment rate). It found that 25 per cent of the increase was caused by more Indigenous people being remanded in custody and for longer periods of time, and 75 per cent of the increase was caused by more Indigenous people being sentenced to imprisonment (rather than to a non-custodial sentencing option) and being sentenced to gaol for longer periods of time. None of the increase was a result of more Indigenous people being convicted of a crime. In other words, the 48 per cent increase was not caused by increased crime levels.¹¹

More generally, imprisonment rates in Australia do not appear to be a function of increased levels of crime, since increases in imprisonment rates have continued, while crime rates have levelled or fallen, in many categories of crime from 2000.¹² There have been contradictory movements in some states: Western Australia, for example, has maintained a 'three strikes' law relating to property offences while simultaneously abolishing short prison sentences of six months or less. However, the overall environment has been one of constantly changing criminal law. Roth¹³ found that between 1 January 2003 and 31 July 2006 there were over 230 major changes to law and order legislation in Australian states and territories, while Steel¹⁴ has noted the rapidity with which bail legislation has changed in some jurisdictions, usually in response to some politically expedient incident. More broadly, a number of factors appear to have contributed to the increased use of imprisonment, including changes in sentencing law and practice, restrictions on judicial discretion, changes to bail eligibility, changes in administrative procedures and practices, changes in parole and post-release surveillance and a judicial and political perception of the need for 'tougher' penalties. While these administrative, legal and technical changes contribute to increased penal severity, they are themselves reflective of less tolerant and more punitive approaches to crime and punishment.

In reflecting on the US growth in imprisonment, Simon argues that criminalisation and imprisonment has become increasingly used as a tool of social policy which has resulted in a process of 'governing through crime'.¹⁵ Increased punishment has been targeted at those defined as high risk, dangerous and marginalised. Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms.¹⁶

The advent of governing through crime, and the rise in penal severity, has been attributed to certain political configurations in some liberal democracies.¹⁷ These include lower levels of public trust in politicians and a new populism which distrusts 'experts'. Further, there is public lack of credibility specifically in the expertise of criminal justice professionals and less virtue and public good associated with judicial autonomy: judicial independence is seen as a problem to be contained rather than a basic democratic safeguard. Weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. This focus has led to populist political responses to perceived 'popular' opinion about crime: hence a view that the most politically expedient response to crime is the promotion and implementation of the 'toughest' response to crime. A contradictory outcome of the focus on governing through crime and the promotion of populist responses to crime is that the result is a higher level of *insecurity*: the problem of crime and the criminal appears everywhere from child sex offenders in the local neighbourhood to asylum seekers arriving by boat, from the threat of terrorists to public drunkenness on the streets and increasing juvenile crime. Like the dilemma faced in Goethe's poem

The Sorcerer's Apprentice, no matter how many people we incarcerate the problem seems destined to ever multiply more quickly.

However, not all modern democracies have followed the path of countries like Australia, New Zealand, the US or the UK which have relied on exclusionary and punitive approaches to penal policy. According to Lacey,¹⁸ some European jurisdictions have opted instead for criminal justice systems that are relatively moderate and inclusionary. Lacey argues that more social democratic and corporatist forms of government have sustained more moderate criminal justice policies. Consistent with this argument is the view of Wilkinson and Pickett that modern democratic societies with higher levels of inequality also have more punitive approaches to punishment.¹⁹ We can see significant differences in levels of imprisonment between states and territories within Australia. While the increases have occurred in all jurisdictions, the size of the increase has not been uniform across the country – NSW and Queensland in particular have had the highest increases – and the absolute levels of imprisonment vary widely around the country. The Northern Territory has the nation's highest imprisonment rate, with 646.7 prisoners per 100,000 adults, about five and six times the rates of Tasmania (136.6) and Victoria (103.6). Moreover, large and ostensibly similar jurisdictions, such as NSW and Victoria, also vary markedly. NSW has an imprisonment rate of 184.8 per 100,000 adults, almost double that of Victoria.²⁰

Racialisation and punishment

While distrust in government and experts, a fear of crime and a developing 'culture of control' may go some way to explaining the punitiveness which has underpinned developments in penal policy, it is also clear that punishment is highly racialised. The two jurisdictions in Australia which have the highest imprisonment rates (the Northern Territory and Western Australia) are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are way beyond any meaningful comparison to other rates in Australia: the Indigenous rate of imprisonment in Western Australia is 4309.6 per 100,000, while the Indigenous male rate is 7803.5.²¹ By the first quarter of 2010 the number of Indigenous people imprisoned in Australia had reached 7613 and comprised 26 per cent of the total prison population. The Indigenous rate of imprisonment was 14 times higher than the non-Indigenous rate.²²

US research suggests that racial resentment is inextricably connected to public punitiveness, that race and racism 'shape the contours' of how Americans think about crime and punishment.²³ According to Unnever and Cullen one of the most salient and consistent predictors of punitiveness is 'racial animus': mass imprisonment and the death penalty are acceptable in the US because they are disproportionately aimed at African Americans.²⁴ It has been well publicised in the US that the odds of an African American male going to gaol are higher than going to college, or getting married.²⁵ No similar comparative analysis has been conducted in Australia. So what does the data indicate?

First, it is worth considering that the Indigenous re-imprisonment rate (66 per cent within 10 years) is much higher than the retention rate for Indigenous students from year 7 to year 12 of high school (46.5 per cent) and higher than the university retention rate for Indigenous students (which is below 50 per cent).²⁶ In other words, Indigenous people are returned to prison at a higher rate than they are retained in either high school or university. Secondly, imprisonment rates for Indigenous people have been increasing. Nationally the rate increased by 45.5 per cent for Indigenous females and 26.6 per cent for Indigenous males between 2000 and 2008.²⁷ Meanwhile, Indigenous participation in university and TAFE decreased across all age groups between 2001 and 2006. For example, Indigenous participation at university for 25 to 34 year olds fell by 18 per cent between 2001 and 2006.²⁸

The *2006 Census* showed 7057 Indigenous people enrolled in a university or tertiary institution. Of those, 2322 were males and 4735 were females.²⁹ At same time, there were 6091 Indigenous people imprisoned. Of these, 5549 were male and 542 were female.³⁰ On the basis of the *2006 Census* data Indigenous men are 2.4 times more likely to be in gaol than in a tertiary institution at any one time.³¹ Given the trends of *decreasing* Indigenous tertiary participation levels and *increasing* Indigenous imprisonment rates it is likely that these odds have increased further since 2006. Furthermore, the situation is likely to be considerably worse than these static census figures would indicate, because Aboriginal and Torres Strait Islander people move in and out of the prison system relatively frequently. We know that Indigenous prisoners are more likely to be re-imprisoned on multiple occasions, and that many more Indigenous people will be imprisoned for short sentences over a twelve month period

than the annual census figure would indicate.³² This likelihood of multiple imprisonment experiences over a lifetime stands in stark contrast to lower participation rates in tertiary institutions and poor retention rates after enrolment.

The traditional goals or objectives of sentencing and punishment are deterrence, rehabilitation, denunciation, retribution and community protection. Given the mass imprisonment of Indigenous people it is worth asking whether these goals have much purchase or legitimacy in sentencing Indigenous offenders. The desired outcomes of specific deterrence of the offender and general deterrence in the community is undermined by high levels of re-offending, and the widespread familiarity within the community of incarceration and the criminal justice system more generally. Similarly it is difficult to argue that rehabilitation is achieved when re-offending levels are high and there is limited access to programs (either therapeutic or vocational) while in prison. Community protection may be achieved in the short term through incapacitation, but not in the longer term if there is a failure to change behaviour.

A goal of punishment is said to be the public denunciation of crime. Yet effective denunciation requires that the institutions of the criminal justice system are seen as legitimate by the offender and their community. The act of denunciation requires institutional legitimacy. However if the justice system is seen as an alien institution, an Anglo-Australian institution with only limited connectedness to Indigenous people, then denunciation is not likely to be effective. Similarly, retribution requires moral authority and political legitimacy. Retribution in sentencing requires the community, if not the offender, to recognise that the act was wrong. It is the wrongness of the act, and the authority of the justice system which justifies the infliction of pain on the offender. However, without that authority and legitimacy, retribution is likely to be experienced as oppression. As Blagg has noted, there can be radically incommensurate views between mainstream Australia and Aboriginal people about the meaning and experience of prison. Blagg suggests that the prison itself becomes a site for the maintenance of an Aboriginal domain.³³ While there has been some move to increase the legitimacy of the courts through the introduction of various Aboriginal sentencing courts (eg Murri Courts, Koori Courts, circle sentencing courts), these reforms are seriously undermined when most Indigenous offenders go through mainstream courts, and increasing numbers are being sentenced to gaol.³⁴

Waste management and the hidden costs of imprisonment

Harsh criminal justice policies and ever increasing prison numbers may be popular among politicians and some voters. Punitive measures can be introduced by government in response to apparent populist demands with relative ease. Governments can be seen to be doing 'something' without much consideration of the longer term impacts. Indeed, increased criminalisation does not require complex bureaucracies or systems of government,³⁵ although it does require increased budgetary allocations. A result has been what some have called the 'waste management' prison which 'promises no transformation of the prisoner... Instead, it promises to promote security in the community simply by creating a space physically separated from the community'.³⁶ It functions to hold people who are defined as presenting an unacceptable risk for society.

The idea of the waste management prison is at least metaphorically useful in capturing some of the changes which have occurred as a result of penal expansionism. The size of the prison system has grown to deal with expanding prison numbers, and a significant focus on risk and custody has developed, alongside the physical expansion of the penal estate. How we *think* about the physical size of prisons has also changed over the last two decades. A medium sized prison in the 1990s was about 300 inmates, and large prison was around 500. Across Australia today new prisons are being built or old prisons expanded to hold around 1000-plus prisoners. Staffing ratios have fallen, there are more prisoners per prison officer and there is far greater reliance on various technical forms of surveillance and security in the new prisons. Economies of scale are being used to try and push down the average cost per prisoner. However, in the Australian context it would be too simplistic to see prisons as no longer aimed at, or interested in, reforming individuals. Certainly the public rhetoric of correctional services still prioritises rehabilitation as a core goal, alongside security. Typically, with a focus on measurable performance outcomes, correctional services identify a reduction in re-offending as a key corporate goal. Yet the achievement of this goal is increasingly illusory. Indeed, the expansion of prisons make it less likely that recidivism rates will decline.

The problem that penal expansionism poses is that greater and greater resources have to be allocated to building and operating prisons, and proportionately less is available for programs within

prisons and for non-custodial sentencing options and other support services outside of prison. Mass imprisonment has become the policy solution to the political problem posed by law and order politics. A continuing string of political promises to be tougher on law and order inevitably demands an expansion of the incarceration end of the criminal justice system. It is clear that the more marginalised groups within society are those that have been impacted upon the most. We referred in the previous section to Indigenous people. There have also been significant increases in women's imprisonment: between 1993 and 2003 the female prison population increased by 110 per cent, with particularly large increases among Indigenous women prisoners.³⁷ The presence of people with mental health disorders and cognitive disability (MHDCD) in prison is not new, but the rate of people with MHDCD appears to have increased.³⁸ Women with mental health disorders are more highly over-represented amongst the prison population than men. People with MHDCD are convicted and imprisoned for lower level offences such as theft, road traffic/motor vehicle regulatory offences; justice offences, alcohol and drug related offences and public order offences.³⁹ Baldry paints a picture of people with MHDCD constantly recycling through the prison system, living chaotic lives on the outside without support, often homeless, until coming back to prison for a relatively short sentence and then being released back into the same highly marginalised situation, where they are re-arrested and re-imprisoned.⁴⁰

The social costs of imprisonment are observable on a number of levels. There is an unequal distribution of imprisonment among the poor, among socially marginal groups and minority groups (particularly Indigenous people). In most cases, imprisonment does not resolve issues relating to alcohol and drug abuse; the effects from experiencing physical, sexual and emotional violence as a child and/or as an adult; or the prevalence of intellectual disabilities and mental health problems. In general 60 per cent of inmates are not functionally literate or numerate; 44 per cent are long-term unemployed; 60 per cent did not complete Year 10; 64 per cent have no stable family; a high proportion were state wards (that is, previously placed in state care as children); and most come from the most seriously disadvantaged communities.⁴¹ Imprisonment can further exacerbate or cause loss of employment and income, loss of housing, and breakdown of families and relationships, including the children of imprisoned parents going into care and the beginning of a new cycle of poor educational outcomes and contact with the criminal justice system. The social costs of imprisonment can also be seen through the inability of the prison to reform or rehabilitate offenders and in its self-reproducing nature: in NSW some 67 per cent of current prisoners had previously been imprisoned.⁴²

It is also important to consider the relationship between social costs and dollar costs. NSW spends the largest part of the national annual expenditure on prisons – over \$1 billion or 37 per cent of the \$2.8 billion annually, so it is useful to consider expenditure in this state. In NSW corrections expenditure per person in the population increased in real terms over the last five years by 11.5 per cent.⁴³ During a similar period, NSW state government recurrent expenditure on schools declined in real dollars by 0.51 per cent and expenditure per fulltime student declined in real terms by 0.64 per cent.⁴⁴ NSW real recurrent expenditure in the Vocational and Educational Training (VET) sector fell by 6.3 per cent over the same period.⁴⁵ NSW government expenditure per person on public hospitals rose in real terms by 9.8 percent during the same period.⁴⁶ In summary, the NSW state government increase in expenditure per person on prisons was greater than the increase per person on public hospitals, while real recurrent expenditure on school and adult education declined.

It is worth considering prisons in the context of *opportunity* costs, by which I mean the cost of passing up the next best choice when making a decision. If government capital expenditure and recurrent funding is used for building and maintaining prisons the opportunity cost is the value of the next best purpose the funding could have been used for. For example, as an alternative to prisons, government funding could have gone into school or adult education, supported housing, mental health services, drug and alcohol rehabilitation or employment programs. The choice between various options would be an easier decision if we knew the end outcome. However, we know the significant limitations of prison as a rehabilitative institution and crime and control option. And we do have sufficient information to make informed choices on the best results gained for public expenditure. Various Australian and international research has shown that reductions in long term unemployment, increased school and adult vocational education, stable accommodation, increased average weekly earnings and various treatment programs will bring about reductions in re-offending.⁴⁷ And we do know that building prisons is a comparatively expensive option. For every prison bed we construct we could provide more than 30 school student places.⁴⁸

Economist often refer to social costs as negative externalities, or the negative external costs involved in the production of goods or services. These external costs are seldom borne by the producer. The failure to properly account for external costs leads to an over-production of those goods that have a

high social cost. For example, the logging of trees for timber can cause the loss of a recreation area, loss of soil quality and erosion, loss of air quality, etc, but this loss is usually not quantified and included in the price of the timber that is made from the trees. As a result, individual producers have no incentive to factor in these external social costs, and as a result more of this activity is performed than would be if its cost had a true accounting. As a result there is over-production because the real social costs are not being properly met.

There is an analogous argument with imprisonment. Governments do not acknowledge the real social cost of imprisonment – they pass that cost onto the racialised and working class communities from which the incarcerated are drawn. They do not acknowledge the costs on the individuals incarcerated, their families or their communities. Nor do they acknowledge the costs of reproducing crime and victimisation through the recidivism compounded by imprisonment. They also do not acknowledge the opportunity costs – that for every person imprisoned we have fewer programs, services, school places, etc – less of the very things we know might reduce crime and its consequent social harms. Because the true social costs of imprisonment are not acknowledged or accounted for, we have endemic over-production of the prison as a strategy of containment. Governments simply do not meet the real costs of imprisonment – and, in fact, they pass those costs back to the impoverished communities from which they draw prisoners through lower standards of health, education and housing.

Conclusion: fear and safety

It was Durkheim who argued that punishment serves a particular symbolic function of drawing the moral limits around a society. The spectacle of punishment was not aimed at the offender: its target was the broader citizenry. Punishment of the offender had the outcome of increasing social solidarity. Yet punitive responses to crime do not make us feel safer. If there is any solidarity it is in the consensus forged around fear and, arguably, this fear drives a passion for punitive punishments. Indeed, it has been suggested in the US that governing through crime has fuelled a culture of fear and control, which simultaneously lowers the threshold of fear while placing ever greater burdens on individuals.⁴⁹

In the first section of this essay I referred to the significant difference between imprisonment in NSW and Victoria, with the imprisonment rate in Victoria only slightly more than half that of NSW. In many ways they are two comparable jurisdictions: both with the largest urban populations in Australia, both culturally diverse, both major economic centres. Yet the two states have different approaches to punishment. There is a greater use of custody in NSW than Victoria. NSW has a consistently higher proportion of offenders sentenced to fulltime imprisonment than Victoria,⁵⁰ recidivism rates are also higher in NSW⁵¹ and NSW spends more than double the budget on corrections compared to Victoria.⁵² Indeed NSW now faces the prospect of needing to build a 1000 bed prison every two years if prison numbers continue to grow at 5 per cent per annum.

We might expect, as a result of all this activity and expense, that the residents of NSW feel safer than their southern counterparts in Victoria. But reports from national surveys on perceptions of community safety show otherwise.⁵³ Consistently over a number of years Victorians are more likely to report feeling 'safe' or 'very safe' than people in NSW across a range of activities including being at home alone during the day, at home alone during the night, walking or jogging during the day, and walking or jogging during the night. The only area where Victorians reported feeling less safe than people in NSW is on public transport.

Outside of Australia responsible governments are responding to the problem of over-incarceration and developing policy to reduce imprisonment. Change is occurring in high imprisoning states in the US with the development of justice re-investment strategies⁵⁴ and other programs for release of prisoners. In the last 18 months in the UK there has been the UK Commission on English Prisons Today and a report by the UK House of Commons Justice Committee.⁵⁵ The House of Commons report called for a one third reduction in prison numbers, a justice re-investment strategy, a national debate on spending on criminal justice and increasing community understanding of the cost of imprisonment. In Australia such a debate has yet to seriously begin.

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- ⁵² SCRGSP (2010) *op cit*.
- ⁵³ *Ibid*: 6.22-6.23 and associated Tables.
- ⁵⁴ Justice re-investment can be defined as an approach which calculates public expenditure on imprisonment in localities with a high concentration of offenders, and diverts a proportion of this expenditure back into those communities to fund initiatives that can have an impact on rates of offending. See Schwartz, M (2010). 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Representation' *Australian Indigenous Law Review* (forthcoming). In the US see the Council of State Governments, *Justice Reinvestment: A project of the Council of State Governments Justice Center* <<http://justicereinvestment.org/states>> at 25 July 2010. In the Australian context it has been the former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma who has publically pushed the idea of justice re-investment. See Aboriginal and Torres Strait Islander Social Justice Commissioner (2010). *Social Justice Report 2009*. Sydney: Australian Human Rights Commission. See also Legal and Constitutional Affairs References Committee, Parliament of Australia (2009). *Access to Justice*. Canberra: Commonwealth of Australia.
- ⁵⁵ Commission on English Prisons Today (2009). *Do Better Do Less: The Report of the Commission on English Prisons Today*. London: The Howard League for Penal Reform; and Justice Committee, House of Commons (2009). *Cutting Crime: The Case for Justice Reinvestment*. London: UK Parliament, House of Commons.

