Balanced Justice

Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
Canberra ACT 2600

29 April 2015

Dear Committee members

Access to legal assistance services inquiry

The Balanced Justice project is a campaign which involves a number of community groups and aims to enhance the safety of all Queenslanders by promoting understanding of criminal justice policies that are effective, evidence-based and human rights compliant.

We **attach** six factsheets which discuss the following topics:

- Crime statistics
- Indigenous overrepresentation in prisons
- Justice reinvestment
- Mandatory sentencing
- Tougher sentencing
- Detention and bail for children

These factsheets summarise current best practice thinking, and may be helpful for the Committee's inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services.

We would be happy to discuss the content of the factsheets with the Committee

Yours faithfully

James Farrell
Balanced Justice

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Crime statistics – the real picture

Although crime statistics can help to provide a picture of the current situation regarding crime, it is important to understand the limitation of crime statistics when interpreting them.

Crime statistic sources

Information about crime trends in Australia comes from two main sources – police statistics and crime victim surveys.

Police statistics count all the incidents recorded as crimes by the police during the year in each state and territory. These statistics are generally reported as *incidence* measures, that is, a count of reported crimes, usually presented as a rate between the number of crimes and the number of people in the general population.[1] National figures on a selection of important crimes are published by the Australian Bureau of Statistics in an annual report.

Major crime victim surveys are conducted by the Australian Bureau of Statistics and these surveys ask people aged 15 years and over whether they have experienced particular crimes over the past 12 months. Crime survey results are usually based on *prevalence* measures, that is, the number of crime victims, usually expressed as a percentage of people or households that experienced the crime, regardless of the number of times victimised.[2]

Reliability of crime statistics

The greatest weakness of police statistics is that not all crimes are reported to or recorded by the police. There are only a few types of crimes where virtually all the offences are reported to or discovered by police (e.g. motor vehicle theft, homicide).[3] This means that the police statistics produced may not reflect the true crime situation.

While the anonymity associated with crime victim surveys helps to avoid some of the problems associated with the underreporting of crimes to police (i.e. fear of retribution or fear of giving evidence), it is important to note that despite the name, crime victim surveys are not surveys of victims of crime. Crime victim surveys are representative sample surveys of a defined population (usually the adult population) which can be used to obtain estimates of the prevalence of certain types of crimes in the population and estimates of the proportions of victims reporting these crimes to the police.[4] As crime victim surveys measure both reported and unreported crimes, these surveys have the potential to give a more accurate picture of the true prevalence of crime than police statistics.[5] However, in order for crime victim surveys to accurately reflect the true crime situation, the sample surveys must be truly representative of the population.

Is crime increasing?

Queensland Police statistics show that in Queensland, between 2000 and 2011:

- homicide rate fell by 56%
- assault rate fell by 10%
- robbery rate fell by 39%
- sexual assault rate fell by 31%
- drug offence rate fell by 1%.[6]

National crime statistics show that between 2000 and 2009, the national homicide rate fell by 39 per cent, the national robbery rate fell by 55 per cent, the national motor vehicle theft rate fell by 62 per cent and all forms of other theft fell by 39 per cent.[7]

Crime victim surveys also show a decrease in assault, robbery, break-in and malicious property damage rates between 2008-09 and 2011-12.[8]

Therefore, considering the above, crime rates appear to be on the decline.

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Public perception

Despite the reality that crime rates are falling, it is a commonly held view amongst Australians that crime is on the rise.[9] The reason for this view can likely be attributed to distorted, misrepresented or exaggerated facts on crime in the media and by politicians and the police.[10]

Although there are various ways that the media abuse crime statistics, a common method is the selective reporting of data. This usually involves comparing a period where the recorded crime rate is unusually low with a period where the crime rate is unusually high, resulting in a completely distorted view on the 'trend' in crime rates.[11] An obvious motivation for the manipulation of crime statistics is the increased public attention which such sensationalised statistics attract.

Politicians and police also engage in the selective use of data, selective reporting of the facts and misleading commentary, in order to manipulate crime statistics in a way which best suits their objectives.[12] Reasons for doing so may include the downplaying of certain statistics, or the bolstering of support for a proposed legislative reform.

Balanced Justice view

Unlike New South Wales, Western Australia and South Australia, Queensland does not have an agency which independently compiles, analyses and publishes crime statistics.

On 27 June 2013, the Queensland Police Service introduced the 'Online Crime Statistics Portal'. This portal enables community members to access crime statistics for their street, suburb, postcode, local government area, neighbourhood watch area or police region, district or division. While we welcome the public having increased access to crime statistics, we are concerned that by encouraging community members to focus on crime statistics in a particular area, communities may end up with a skewed perspective about crime activities occurring in Queensland and make incorrect assumptions about what is happening across the state.

Therefore, to ensure that the community is properly informed, we believe that a crime statistics agency, which is independent of police and government, should be established in Queensland. This agency's role would be to monitor crime statistics and crime recording practices, publish regular reports on crime trends, provide statistical information to the community and provide independent advice to the government.

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Indigenous overrepresentation in prisons

When the Royal Commission into Aboriginal Deaths in Custody delivered its final report in 1991, it concluded that the high rate of Aboriginal deaths in prison stemmed from Aboriginal overrepresentation in prison.[1] The reason for this overrepresentation was a combination of Aboriginal disadvantage, substance abuse and institutional bias in the criminal justice system.[2]

The Royal Commission looked in detail at the issues facing Aboriginal and Torres Strait Islander communities and made recommendations about reducing and eliminating disadvantage.[3] Following the Royal Commission report, Commonwealth, State and Territory Governments made a concerted effort to reduce the rate of Aboriginal and Torres Strait Islander people imprisonment,[4] yet their collective efforts have not met with much success.[5]

The Queensland Government published a response document outlining their intention to tackle each of the recommendations which were obligatory for them to address.[6] The growing police arrests, prison population numbers and lack of application of discretionary powers by police and courts is proof of systemic failures by government agencies. This coupled with a failure to fund sufficient secondary and tertiary service providers to deal with offending behaviours and put in place diversions from custody is proof of little or no regard to not only the Royal Commission's recommendations but also the Queensland Governments own response in 1992.

Statistics released in 2012 revealed that despite comprising only 2.5% of the Australian population, Aboriginal and Torres Strait Islanders constitute just over a quarter (27% or 7,982) of the total prison population.[7] Furthermore, Aboriginal and Torres Strait Islander youth account for approximately 50% of incarcerated children. [8]

Factors that contribute to Indigenous Overrepresentation in Prison

Disadvantage

As identified in the Royal Commission report, one of the biggest factors contributing to overrepresentation by Aboriginal and Torres Strait Islander people in prison is disadvantage. People who are or have been in prison are typically from highly disadvantaged backgrounds and Aboriginal and Torres Strait Islander people are the most disadvantaged group in Australia.

As a consequence of years of systemic racism and colonisation, Aboriginal and Torres Strait Islander communities are now plagued with high unemployment, lack of job prospects, lack of economic or business opportunity, low incomes, dependence on government pensions and allowances, low home ownership, inability to accumulate capital, greater school drop-out rates, lower post school qualifications, and lower life expectancy.[9]

To gauge how this has all come about one must look at the detrimental impact laws have had upon Aboriginal and Torres Strait Islander people and what were the requirements for social and economic inclusion in the Australian social landscape under those laws. For want of a better term this country's legal system has been premised upon White Race Privilege.[10]

Substance abuse

Substance abuse is another key contributing factor, with issues of substance abuse featuring prominently in Aboriginal and Torres Strait Islander communities.[11]

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As a response to the devastating effects of colonialism, including dispossession, and illness and death resulting from disease and confrontation, alcohol has become somewhat of a panacea for Aboriginal and Torres Strait Islander people's pain, with many using it as a means of escape and solace.[12]

An Aboriginal community worker commenting on the connection between drug and alcohol abuse and the high crimes rates in the Wilcannia community stated:[13]

"*Drug and alcohol use is one of the biggest factors. I think there are lots of reasons for that. People drink to forget things, whether it's sexual assault or domestic violence in their home. The only way they are ever going to change drug and alcohol abuse is to have counsellors living in the community, on the ground, for the people. Mental health is a huge issue.*"

The harmful effects of alcohol on the lives of Aboriginal and Torres Strait Islander Australians are readily apparent, with Indigenous Australians experiencing health and social problems resulting from alcohol use at a rate disproportionate to non-Indigenous Australians.[14] The links between substance abuse and Aboriginal and Torres Strait Islander violence, suicide, offending and incarceration are widely recognised.[15] Drug and alcohol abuse has also been shown to increase the risk of child neglect and abuse which in turn increases the risk of juvenile involvement in crime,[16] and a significant increase in the number of Aboriginal and Torres Strait Islander children removed by State authorities from their families.

The *Bridges and Barriers* report published by the National Indigenous Drug and Alcohol Committee acknowledged the critical need for new strategies to address alcohol and other drug misuse to significantly reduce the overrepresentation of Aboriginal and Torres Strait Islander Australians in the prison system.[17]

Mental health

Another much overlooked factor is mental health within Aboriginal and Torres Strait Islander communities and the relationship of mental health problems with the social and economic circumstances of Aboriginal and Torres Strait Islander people.[18]

A report published in the Medical Journal of Australia about the mental health of Indigenous Australians in Queensland prisons found that approximately 73% of Aboriginal and Torres Strait Islander men and 86% of Aboriginal and Torres Strait Islander women in prison had a mental disorder (i.e. depressive, anxiety, psychotic or substance misuse disorders).[19] This is compared with 20% of the wider Australian community.[20]

These results highlight the critical mental health needs of Aboriginal and Torres Strait Islander Australians, particularly those who are incarcerated. Unfortunately, the National Indigenous Drug and Alcohol Committee recently reported on the lack of opportunities that exist for Indigenous people to access appropriate treatment for mental disorders in custody.[21] This means that mental health problems are likely to remain untreated and continue to affect the individual on their return back into the community; potentially placing these individuals at greater risk of re-incarceration.[22]

Racial bias

While the Royal Commission into Aboriginal Deaths in Custody placed most of its emphasis on disadvantage and substance abuse in Aboriginal communities as the principal reasons for Aboriginal overrepresentation in prison, it also highlighted a number of areas where, in its opinion, institutional bias in the criminal justice system also played a role.[23] These areas included bias against Aboriginal offenders in the willingness of police to employ alternatives to arrest, lack of community-based alternatives to prison in rural communities,

inadequate funding of Aboriginal legal aid and excessively punitive sentencing.[24]

However, there is disagreement as to whether institution bias in the criminal justice system continues to be a factor contributing to overrepresentation by Aboriginal and Torres Strait Islander people in prisons. It has been stated by some that whilst Aboriginal and Torres Strait Islander people were historically subject to discriminatory treatment by police and courts, there is little evidence that racial bias in policing or the courts currently plays a significant role in shaping Aboriginal and Torres Strait Islander overrepresentation in prison.[25]

A 2007 study on this topic held that racial bias is not the cause of overrepresentation in prison and that Aboriginal and Torres Strait Islander defendants are more often sent to prison because they commit more serious offences, acquire longer criminal records, and more frequently breach non-custodial sanctions.[26] Consequently, it is suggested that the focus should be on problems of Aboriginal and Torres Strait Islander substance abuse and economic disadvantage, rather than the workings of the criminal justice system.[27]

While it continues to be debated whether explicit forms of racial bias exist in the criminal justice system, the reality is that the following changes have contributed to the increased use of imprisonment, which has particularly impacted on Aboriginal and Torres Strait Islander people:[28]

- lack of discretionary powers by police officers;
- reinstatement of the Community Development Employment Programs;
- 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;
- the limited availability of non-custodial sentencing options;
- the limited availability of rehabilitative programs; and
- a judicial and political perception of the need for 'tougher' penalties.

What needs to be done?

Although it is important that the criminal justice system does not operate in a manner which is inherently discriminatory towards Aboriginal and Torres Strait Islander people, preventing this alone will not solve the problem of Indigenous overrepresentation in prisons. Underlying factors which result in Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system must also be addressed.

Therefore, while this has been said before, if the overrepresentation of Aboriginal and Torres Strait Islander people in prison is to be reduced, the following must occur:

- the disadvantage experienced by Aboriginal and Torres Strait Islander people needs to end;
- drug and alcohol abuse by Aboriginal and Torres Strait Islander people must be reduced (therefore, the reasons behind substance abuse in Aboriginal and Torres Strait Islander communities must be addressed); and
- the mental health needs of Aboriginal and Torres Strait Islander people must also be addressed (with adequate support being made both within the community and prisons).

Justice Reinvestment

There is a growing recognition of the pressing need to try new initiatives such as justice reinvestment.[29] Justice reinvestment refers to diverting funds that would ordinarily be spent on keeping individuals in prisons to communities with high rates of offending

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and incarceration, giving those communities the capacity to invest in programs and services that address the underlying causes of crime, thereby reducing criminal behaviour and the rate of re-offending.[30] The emphasis of justice reinvestment is on empowering the community, with the idea being that the community dictates how the money should be spent.[31]

Addressing the symptoms of endemic criminal behaviour is a far more suitable approach to dealing with the effect of crime. A youth program in Logan City, Queensland, known as the Friday night Live at Yugambeh (***F.L.Y.***) program, commenced 6 years ago targeting at risk youth to divert them from criminal behaviour. The result was an approximate drop in Aboriginal and Torres Strait Islander youth crime by 17%. Unfortunately, the F.L.Y. program has been unsuccessful in attracting government funds as the precursor for being eligible for funding was that the program had to be dealing with known offenders.

[For more information on Justice Reinvestment, see the Balanced Justice factsheet "Is Justice Reinvestment a good idea for Australia?"]

The contributing factors identified above need to be tackled at the local community level, with genuine involvement by Aboriginal and Torres Strait Islander community members in key decision making. Adopting the justice reinvestment approach may be a way of ensuring that this occurs.

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Is Justice Reinvestment a good idea for Australia?

What is Justice Reinvestment?

Justice reinvestment is relatively new concept and is an approach to dealing with over-imprisonment. Justice reinvestment refers to diverting funds that would ordinarily be spent on keeping individuals in prisons to communities with high rates of offending and incarceration, giving those communities the capacity to invest in programs and services that address the underlying causes of crime, thereby reducing criminal behaviour and the rate of re-offending.[1] Justice reinvestment focuses on both existing criminal behaviour and reducing the number of people entering the criminal justice system in the first place.[2]

How Justice Reinvestment works

The main stages of justice reinvestment are as follows:[3]
1. 'Justice mapping': analysing data provided by state and local agencies relating to crime, then to using that data to map specific neighbourhoods that are home to large numbers of people under the supervision of the criminal justice system.
2. Collecting information about services in the community and developing 'practical, data-driven policies' that reduce spending on corrections to reinvest in other services likely to improve public safety and reduce crime.
3. Redirecting funds from corrective services and implementing the policies to reduce offending.
4. Evaluating the effectiveness and impact of the policies on rates of incarceration, recidivism and criminal behaviour, to ensure effective implementation.

The emphasis of justice reinvestment is on empowering the community. The idea is that the community dictates how the money should be spent.[4] It is about taking a local approach to dealing with a local problem.

The types of justice reinvestment programs adopted will vary according to the needs of particular areas. The causes of crime are complex and may also be location specific, so programs need to be tailored accordingly.[5] However, justice reinvestment programs may include investments in education, job training, health, parole support, housing or rehabilitation.[6]

United States and Justice Reintervention

In the US, one in every 100 adults is incarcerated and two-thirds of released prisoners return to jail.[7] This costs the US more than US$60 billion per year.[8] As a result, the concept of justice reinvestment has proven popular in the US. So far, 16 US states have signed up with the Council of State Governments Justice Centre to investigate or apply justice reinvestment in their jurisdiction, with another five states pursuing justice reinvestment independently or through non-profit organisations.[9]

The justice reinvestment programs have been notably successful throughout the US. The 2004 justice reinvestment pilot in Connecticut resulted in the cancellation of a contract to build a new prison, realising savings of US$30 million.[10] So far, US$13 million of these savings have been reinvested into community-based crime prevention initiatives, including funding the Department of Mental Health and Addiction Services to support community-based programming and resourcing community-led planning processes to develop neighbourhood programs to improve outcomes for residents.[11] Reinvested funds have also been channelled into revamping probation and parole, focusing on reducing technical violations and increasing transitional support for probation violators who would otherwise have been re-incarcerated.[12] Justice reinvestment efforts in Texas resulted in $1.5 billion in construction savings and $340 million in annual averted operations costs.[13]

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Why is Justice Reinvestment needed in Australia?

Financial costs

- As at 30 June 2012, there were **29,383** prisoners (sentenced and unsentenced) in Australian prisons —a national imprisonment rate of 168 prisoners per 100,000 adults, an increase of 1% from the previous year.[14]
- The latest figures available show that in 2011–12, national expenditure on prisons totalled **$2.4 billion**.[15] This is a cost of **$305** per prisoner, per day or **$111,325** per prisoner per year (in Queensland, during this same period, the cost of incarceration was **$318.50** per prisoner per day or **$116,252.50** per prisoner, per year).[16]

Twenty years ago there were 2259 people in prison in Queensland (QCS Annual report 1993/4), now there are over 6000. If we were to reduce the prison population to the level of 1993, we would save $446 581 931 per year. That's four hundred and forty six million that could be invested in crime prevention.

Overrepresentation of Indigenous Australians in prisons

- Despite comprising only 2.5% of the Australian population, Aboriginal and Torres Strait Islanders constitute just over a quarter (27% or 7,982) of the total prison population.[17]
- Indigenous youth account for approximately 50% of the total population of children's prisons.[18]
- There is a very high rate of recidivism in the Indigenous prison population—75% of Indigenous prisoners have a history of prior imprisonment compared to 50% of non-Indigenous prisoners.[19]

Social costs

The cost of imprisoning an individual extends beyond financial costs. The effects of imprisonment include:

- disruption and damage to the lives of every member of the family, particularly where a parent is imprisoned;[20]
- disruption to Indigenous communities where the Indigenous person played an important social, cultural and family role, leaving family and community members to try and fill the void;[21] and
- loss of employment and income, exacerbation of debt issues, possible loss of housing, potentially affecting the incarcerated person's ability to reintegrate back into society when released.[22]

People in prison are disproportionately affected by drug and alcohol problems, intellectual disability, illiteracy and innumeracy, low educational attainment, and unemployment.[23] In relation to Indigenous Australians, factors linked to increasing the risk of their involvement in crime includes, substance abuse, overcrowded living environments, unemployment and poverty.[24] Without addressing these factors, disadvantaged individuals will continue to commit crimes. Justice reinvestment is an opportunity to address the underlying factors which may cause someone to commit a crime and to break the cycle.

Criticisms of Justice Reinvestment

Criticisms of justice reinvestment include:

- Australia's penal system is quite different to the US, the concepts of justice reinvestment may not work in practice in Australia; [25]
- the concept of justice reinvestment is vague; it does not have a clear definition and means different things to different people;[26] and
- justice reinvestment could be used as a cover for cost cutting.[27]

Balanced Justice view

The traditional punitive approaches to law and order have not worked and the emergence of the justice reinvestment concept is the perfect opportunity for Australia to trial a new approach to preventing crime.

Regardless of the jurisdiction, it is an accepted fact that socioeconomic factors play a critical role in whether a person commits a crime. As justice reinvestment is about working with communities to address the underlying factors which cause crime, the fact that Australia's penal system differs to other jurisdictions should not detract from the potential success of this

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approach. Furthermore, the lack of definition of justice reinvestment will allow it to be adopted and tailored by a community in a way that best suits their needs.

Lastly, as a critical stage of justice reinvestment is evaluating the effectiveness and impact of justice reinvestment policies on rates of incarceration, recidivism and criminal behaviour, this will ensure the accountability of such policies and prevent justice reinvestment from being used as a cost cutting strategy.

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Mandatory sentencing

Mandatory sentencing is harsh and unfair and does not reduce crime

Mandatory sentencing is being introduced for more offences in Queensland, despite overwhelming evidence from Australia and overseas demonstrating that it fails to reduce the crime rate, leads to harsh and unfair sentences and disproportionately affects Aboriginal and Torres Strait Islander and other marginalized groups.

Most jurisdictions in Australia already have some form of mandatory sentencing. In the Northern Territory, assaults causing harm carry mandatory prison sentences,[1] and in Western Australia, "third strike" burglars face a minimum of 12 months' imprisonment. In NSW, there are presumptive minimum sentences for certain offences,[2] while the Commonwealth has mandatory sentences in some circumstances. Increasingly, the Queensland government is introducing mandatory sentencing to more and varied offences, including:

- murder;[3]
- certain child sex offences;[4]
- evading police;[5]
- graffiti;[6]
- possession, supply or trafficking of unregistered firearms;[7]
- driving under the influence of drugs or alcohol (three times in five years).[8]

While mandatory sentencing may appear a superficially attractive option to reduce crime and provide consistency and certainty in sentencing, evidence-based research shows that it simply doesn't work.

Mandatory sentencing fails to consider an offender's circumstances

Mandatory sentencing means a one size fits all approach which doesn't properly consider the circumstances of the offender. Giving judges and magistrates discretion maximises the chances of finding a sentence which will address the causes of the offending and reduce the chance of reoffending. Evidence shows that therapeutic approaches to sentencing, such as community and treatment-based orders, can substantially reduce reoffending rates compared with prison.[9]

Kevin Cook, a homeless man, was sentenced to 12 months in prison under the Northern Territory's three strike laws in 1999. His crime? Stealing a towel from a clothes line.[10]

Mandatory sentencing leads to harsh and unfair sentences

Mandatory sentencing means a one size fits all approach to the culpability of the person who has committed the crime, instead of matching the sentence to how serious the crime was. This leads inevitably to harsh and unfair sentences.

Mandatory sentencing shifts discretion from the courts to police and prosecutors

Instead of judges having discretion to impose the appropriate sentence, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when someoneis faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. Victims groups have opposed mandatory sentencing because it discourages pleas of guilty. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to police and prosecutors who decide – behind closed doors – whether or not a charge that carries a mandatory sentence should be brought against someone.[11]

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Mandatory sentencing disproportionately affects marginalised communities

In Western Australia and the Northern Territory, mandatory sentencing laws disproportionately affected Aboriginal offenders, particularly young people from remote areas.[12]

In the United States, far from leading to more consistent sentencing, mandatory minimum sentences for drug cases widened the gap between sentences imposed for black and Hispanic people and white people charged with similar crimes.[13]

Mandatory sentencing does not reduce crime

In the Northern Territory, property crime increased during the mandatory sentencing regime, and decreased once it was repealed. Advisory Commissions and Committees in the United States, UK and Canada have all rejected the notion that mandatory sentencing acts as a deterrent to crime.[14]

This is hardly surprising, since research demonstrates that the perceived risk of being caught is a much greater deterrent than the fear of punishment when caught.[15]

In 2008, Victoria's Sentencing Advisory Council, an independent statutory body, conducted a review of that state's mandatory minimum sentence for driving while disqualified, and found that the mandatory sentencing scheme:

- was NOT effective in protecting the community;
- did NOT lead to sentences that rehabilitated peopleor prevented them from reoffending;
- resulted in penalties which are disproportionately high; and
- caused strain on the criminal justice system.[16]

Based on this evidence, the Victorian Government abolished the mandatory prison sentence for this offence in 2010.[17]

Mandatory sentencing violates human rights

Mandatory sentencing laws in the Northern Territory and Western Australia have been examined by three of the United Nations committees – on civil and political rights, the rights of the child and against racial discrimination. Each concluded that the laws violated Australia's international human rights obligations.[18]

Balanced Justice view

The Balanced Justice view is that mandatory sentencing should be taken off the agenda. Sentencing reform should focus on promoting the court discretion so that judges can tailor the punishment to fit the crime and make orders (such as drug and alcohol treatment) that maximise the chances of preventing reoffending.

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Tougher sentences – what the community wants?

Public opinion on sentencing

A constant message in the media is that courts are too 'soft on crime', they let offenders 'walk free' and fail to protect the public.[1] As a vast majority of the public form their opinions in relation to the criminal court system based on information presented in the media, it is no surprise that a majority of the public also think that the courts are too lenient on people who have committed crimes.[2]

International research regarding public opinion on crime and justice has reached a number of consistent conclusions:[3]

- the public thinks that sentences are too lenient;
- people tend to think about violent and repeat offenders when reporting that sentencing is too lenient;
- people have very little accurate knowledge of crime and the criminal justice system;
- the mass media is the primary source of information on crime and justice issues;
- when people are given more information, their levels of punitiveness drop dramatically; and
- despite apparent punitiveness, the public favours increasing the use of alternatives to imprisonment.

Recent study[4]

In a recent Australian study, for a period of two years (2007-2009), jurors from all criminal trials in Tasmania were involved in the sentencing of cases they had deliberated on. Each jury returning a guilty verdict was invited by the judge to participate in the study by remaining in court to listen to the sentencing submissions.

Before the sentence was imposed, jurors were asked:

- to indicate the sentence that they thought the offender should receive;
- to answer questions about crime and sentencing trends; and
- to give their views on sentencing severity and whether judges were in touch with public opinion.

After the sentence was imposed, jurors were asked questions such as their view on the appropriateness of the sentence imposed, and whether their original opinions on sentencing had changed.

In relation to questioning about current sentencing practices across all offence types (violence, property, drug and sex offences), the majority of jurors responded that sentences were too lenient. This was most pronounced for sex and violence offences.

However, when jurors were asked to indicate which sentence they thought the offender should receive, 52 percent of jurors selected a more lenient sentence than the sentence actually imposed by the judge and only 44 percent were more severe than the judge.

Furthermore, it was found that there was a high overall level of satisfaction in relation to the sentence imposed by the judge, with 90 percent of jurors considering the sentence imposed to be either very appropriate or fairly appropriate.

This study suggests when individuals are presented with accurate and complete information, they are less likely to be as punitive.

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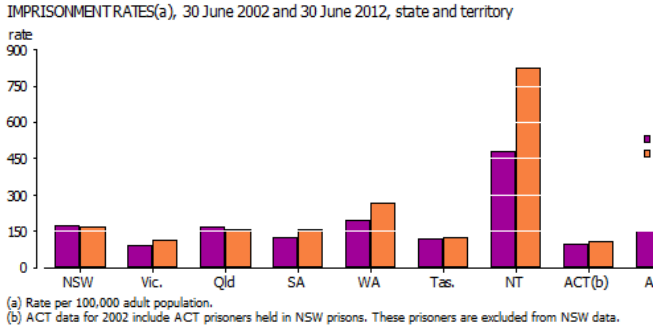
Therefore, it appears that the public's critical view of the courts, and their punitive stance towards sentencing, ultimately stems from a lack of knowledge regarding the crime situation and the workings of the criminal justice system.

Why is public opinion so important?

The public's concern with rising crime rates and dissatisfaction with sentencing has been used by Western governments over the past two decades as a justification of a hard-line approach and 'tough-on-crime' political rhetoric.[5] Legislation is often introduced and justified by politicians with reference to public opinion.[6] Furthermore, while public opinion is not a legally recognised factor for consideration during the determination of sentencing, it appears that judges make assessments of public opinion, with comments such as 'community expectation' and 'community sentiments' routinely appear in sentencing.[7] For these reasons, it is extremely important that the opinion held by the public in relation to crime and sentencing reflects the actual situation.

The reality of sentencing

At 30 June 2012, all states and territories, with the exception of New South Wales and Queensland recorded increased imprisonment rates compared to 2002.[8]



Northern Territory and Western Australia saw the biggest increases, while Queensland and New South Wales saw slight decreases:[9]

- Northern Territory –72% increase (from 480 prisoners per 100,000 adult population to 826 prisoners per 100,000 adult population);
- Western Australia –37% increase (from 195 to 267 prisoners per 100,000 adults);
- Queensland –6% decrease (from 168 to 159 prisoners per 100,000 adults);
- New South Wales –1% decrease (from 172 to 171 prisoners per 100,000 adults).

Therefore, on average across Australia, over the past 10 years the imprisonment rate increased, demonstrating that the courts are not being as lenient as the public may think.

The increase in imprisonment rates is the likely combination of factors including the:[10]

- passing of new laws;
- increasing maximum and minimum sentences;
- reduction in the use of remission, parole and other alternatives to prison; and
- increasing use of the criminal law to prosecute offences.

Given that the increased use of imprisonment has continued whilst crime rates have been falling, it has been suggested that it is politics, rather than crime, which is increasing these imprisonment rates.[11]

[See Balanced Justice factsheet 'Crime Statistics – the real picture' for more information on decreasing crime rates.]

Balanced Justice view

As public opinion can influence political agendas and ultimately legislation, it is crucial that the public is adequately informed.

The disbanding of the Sentencing Advisory Council of Queensland in 2012 was a step backwards for Queensland, as the state no longer has an independent body to keep the public informed about sentencing in Queensland. The Council had been responsible for the:

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- provision of information to the community to enhance knowledge and understanding of matters relating to sentencing;
- publication of information relating to sentencing;
- research of matters relating to sentencing; and
- publication of the research results.

If the public are to be properly educated about sentencing in Queensland, there needs to be an independent and reliable source responsible for collating and disseminating information about sentencing and sentencing related matters.

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Detention and bail for children

Detention as a last resort

The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (the ***Beijing Rules***) which outline the importance of nations establishing a set of laws, rules and provisions specifically applicable to child offenders and with the administration of juvenile (youth) justice being designed to meet the varying needs of child offenders, while protecting their basic rights.[1] The Beijing Rules and Article 37(b) of the United Nations Convention on the Rights of the Child (***CROC***) also require that in juvenile justice, detention pending trial must only be used as a *measure of last resort* and *for the shortest possible period of time.* Whenever possible, detention pending trial should be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.[2]

Research supports this approach in relation to that children, namely that the criminal justice system should recognise their inexperience and immaturity.[3] Early adolescence through to early adulthood is a peak period for brain development and consequently a period of increased risk.[4] *Children, due to the continuing development of the frontal lobes that does not culminate until the early to mid-twenties, exhibit behavioural and emotional deficits compared to adults. They have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity is a commonly observed element in juvenile offending and raises questions as to the culpability of juveniles in relation to criminal behaviour.*[5]

Minor offending by many young people may therefore be the result of testing the boundaries of acceptable behaviour through this developmental period. Alternatively, early brain development and socio-emotional and cognitive development can be severely affected by inadequate or harmful parenting. While the majority of abused and neglected children do not offend, a significant number of children who do offend have had abusive, neglectful or inadequate parenting.

Whatever the reason, what is important is that any interventions will help to foster a young person's desistance from crime.[6] It has been found that the more restrictive and intensive an intervention, the greater its negative impact, with juvenile detention being found to have the strongest criminogenic effect – that is, increasing their involvement with crime rather than their ability to desist[7] and the younger a child is when first detained, the more likely that they will come back into custody.[8]

Removal of principle of detention as a last resort

The Queensland Government is currently reviewing the youth justice system and has suggested that detention as a last resort could be removed as a principle for both adult and child offenders.

Firstly, this would place Queensland clearly in breach of international commitments.

Further, it would also risk criminalising young people by involving them in the detention system earlier than is necessary. By using the most significant punishment early, the court has effectively played its "trump card" and there is nowhere else to go after this other than to keep locking the young person up for longer and longer.

Since detention has not been shown to be effective in preventing re-offending and is expensive to run (it costs the Australian taxpayer approximately $237,980 per year to imprison one young person), removal of the principle of detention as a last resort would not seem to be of any benefit to the community, either in terms of safety or cost effectiveness. Young people, particularly young women, completing a detention sentence have also been identified at greater risk of homelessness on release – which puts them at further risk of offending.

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Increasing remand of children in custody in Australia

Since 2004, the number of juveniles in detention in Australia has been increasing.[9] This is concerning for several reasons including:

- the widespread use of remand in custody is inconsistent with the principle of detention as a last resort for juveniles
- only a small proportion of young people remanded in custody are convicted and sentenced to a custodial order
- periods of detention represent missed opportunities to intervene in juveniles' lives with constructive and appropriate treatment.[10]

Queensland has a particularly poor record with over 70% of young people in detention on remand – about the highest in the country.

Bail in Queensland

One way in which a person who is charged with an offence is brought before the court is by *arrest and charge*. A decision is then made about whether the person will be released into the community or kept in custody until their matter is dealt with by the court. If they are released then this may be with or without *bail*.

The purpose of bail is to ensure the attendance at court of a person charged with a criminal offence while recognising international human right principles of the right to liberty and presumption of innocence that underpin the justice system. Further, given that bail is not to be used as a punitive measure, the objects should reflect the fact that a person who has not been convicted of an offence should not be imprisoned unless there is a good reason to do so[11].

Where bail is granted, the police or court may impose conditions to ensure that while on release the person will not:

- commit an offence; or
- endanger anyone's safety or welfare; or
- interfere with a witness or otherwise obstruct the court matter.

Reasons for not remanding children in particular in custody include:

- it is at odds with the presumption of innocence (children held in remand report feeling isolated and frustrated by the experience of being denied bail and held on remand; they feel as if they have already been found guilty[12]);
- for those young people engaged in school or work, it disrupts that and risks disengagement, again increasing the risk of re-offending;
- it may expose young people to negative influences[13] - detention centres have been described as 'Universities of Crime' where young people may know more about offending when they come out than when they went in.

Breach of bail

The law relating to bail is slightly amended for children (10-16 year olds: in Queensland, a child is a person who has not yet turned 17 years for the criminal law.[14]). If any person fails to attend court or breaches a condition of their bail, then they can be arrested and brought back to court. This breach of bail or bail condition is a further offence for adults which means that the court can impose a fine or imprisonment for that breach but it is not an offence for children and so they cannot be sentenced for this. In either case, however, the court can then decide not to grant bail again but order the adult or child to remain in custody until their case is dealt with.

The Queensland Government is reviewing the youth justice system and has suggested changes in relation to bail which would treat a child offender the same an adult offender in that breach of bail would become an offence. As noted above, this is contrary to accepted international norms and does not take account of the inexperience and immaturity of young people.

It is important to note that there is no evidence that monitoring, arresting and detaining young people for breaches of their bail condition reduces re-offending among juvenile offenders. [15] The more likely outcome of a' breach offence' is the further criminalisation of the child and an increased likelihood of the child being

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placed in custody, thereby further entrenching the child in the criminal justice system.

Young repeat offenders often face a number of challenges in their lives which put them at greater risk of (re-) offending. By virtue of their youth and that the law generally (aside from the criminal law) does not recognise that children are independent before the age of 18, there are many influences which affect their lives and life situations over which they have no control and can make no choices.

An example of this is the issue of where a young person lives. Young people under 18 have difficulties in being able to rent in their own right. Sometimes the family home is not a safe or viable place for the young person to be or the family relationships are in disarray and this may lead them to leave. Their access to a legitimate income is also significantly reduced compared to an 18 year old and therefore being able to pay rent and other life necessities, including food and travel, becomes problematic.

If a young person is out of home for whatever reason and has no money, then involvement in offending behaviour becomes a potential consequence. This could be as simple as evading a fare on public transport. They do not have the life skills or experience to know where they should go to seek help and often assume that no-one would be interested in helping them anyway.

Similarly, even if a young person is on bail and at home, if the family is not able to support them adequately in terms, for example, of ensuring that they meet any bail conditions or making sure they have the resources to get to court, then they have limited ability or capacity to manage that situation and may well find themselves in breach of bail. This is a particular concern for children on care and protection orders who are overrepresented in the youth justice system.

Some bail conditions are particularly onerous for young people and can "set them up to fail". To tell a young person they cannot associate with any of their friends, for example, or not to go to a certain place where young people meet is unrealistic. Young people are social beings and to isolate them for maybe weeks at a time is going to invite a breach of the condition – certainly without any other support being provided to the young person. Even if the young person does not contact their friends, it is likely their friends will try to contact them and a breach is likely to occur.

Care needs to be taken to ensure that any bail conditions imposed are reasonable and are directly relevant to the purposes of ensuring that the young person attends court on the specified day and protecting the community. [16] Charging young people with what might be termed "technical breaches" can create problems in the longer term to no-one's benefit – as this example from New South Wales shows:

> In NSW a young girl was arrested for breaching a bail condition which required her to be home by 9.00 p.m. She was arrested as she was making her way home when the train pulled in at five minutes past nine. She spent at least a month in custody, even though when convicted she did not receive a custodial sentence for the shoplifting charge. The young girl gave up her schooling after these events.[17]

Balanced Justice view

Available statistics and research suggest that detention of a juvenile is generally ineffective as a deterrent to their re-offending.[18] Therefore if the goal is to support young people and to reduce repeat offending, options which are likely to result in the increased detention of children are inappropriate.

The focus should instead be on:

- addressing the issues that put children at risk of becoming offenders to start with, particularly repeat offenders; and
- diverting young people coming into contact with the criminal justice system as soon as possible.

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[10] As above at 4-5

[11] PIAC

[12] *Australian Law Reform Commission,* 'Seen and heard: priority for children in the legal process (1997) Report 84 at 277 <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf> (15 April 2013)

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[14] Youth Justice Act 1992 (Qld), Schedule 2

[15] Vignaendra, S, Moffatt, S, Weatherburn, D & Heller, E, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (May 2009), *BOCSAR Bulletin* 128 cited in Wong, K, Bailey, B & Kenny, D, 'Bail Me Out: NSW Young People and Bail' (February 2010), *Sydney: Youth Justice Coalition* at 3 <http://www.yjconline.net/BailMeOut.pdf > (15 April 2013)

[16] As above at 497

[17] Stubbs, J, 'Re-examining Bail and Remand for Young People in NSW' 2010 (43) *Australian & New Zealand Journal of Criminology* 485 at 497-498

[18] *Australian Law Reform Commission,* 'Seen and heard: priority for children in the legal process (1997) Report 84 at 285 < http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf> (15 April 2013)

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