EXPLAINING INCREASES IN IMPRISONMENT RATES

Arie Freiberg
Professor of Criminology
The University of Melbourne

Paper presented at the 3rd National Outlook Symposium on Crime in Australia,
Mapping the Boundaries of Australia's Criminal Justice System
convened by the Australian Institute of Criminology
and held in Canberra, 22-23 March 1999
Introduction

In June 1998, 18,692 prisoners were held in Australian gaols, an increase of over 7,000 over 1986 or 60 per cent. Over the last twelve years, the imprisonment rate has increased from 92.9 per 100,000 of the adult population to 133, or by over 42 per cent (see Appendix 1 and Appendix 2). This translates to approximately 99 per 100,000 of the total population. New gaols, both public and private are being built and old, de-commissioned prisons are being re-opened.

Imprisonment rates in Australia have mirrored rates in other English speaking countries such as the United Kingdom and the United States. In June 1997 the United States imprisonment rate stood at over 648 per 100,000 of the resident population (Proband 1998). At that date the combined prison and jail population reached 1,725,842. In absolute terms, the number of American prisoners has quintupled since the early 1970s. Per capita rates have quadrupled (Reitz 1996: 75). In England, imprisonment numbers jumped from 43,000 in 1993 to 65,000 in March 1998, an increase of over fifty per cent in four years, producing a rate of 123 per 100,000 (Ashworth 1998). Even the Netherlands, traditionally a penally moderate country has seen its imprisonment rate reach 78 per 100,000 in 1997, having risen from 35 in 1985, to 45 in 1990 and 65 in 1995 (Tak 1998).

As a net importer of penal culture, Australia as lagged both the United States and the United Kingdom only in the timing and scope of its penal policy, but not in its direction. In all of these countries, the evidence is that crime rates have not increased to the same extent as have the imprisonment rates. If anything, it would appear that overall crime rates have stabilised, or even decreased over the last decade (especially in the United States) but particularly so from the late 1980s and in the early 1990s. The timing differs between countries and the patterns are not identical between offences.

In the late nineteenth century a similar phenomenon occurred: falling crime rates in most developed countries, followed by falling imprisonment rates. We may only be in the first phase of this process, and perhaps we are witnessing a strange end-of-century phenomenon. More likely, despite the Asian economic crisis, there may be an underlying prosperity cycle which is affecting criminal activity just as there was in the late nineteenth century which continued up to the first world war (Freiberg and Ross 1999: Chapter 2).

In this brief presentation I will not dwell on changes in crime rates around the country. Other speakers at this conference have adverted to patterns of crime. My argument in this paper is that imprisonment rates are influenced by factors other than crime rates, and that these factors are similar in a number of English speaking countries. My aim is briefly to sketch recent changes in sentencing laws and practice in Australia and to place them within the broader context of sentencing changes in similar jurisdictions.

The Socio-Political Context

Economic rationalism has seen the dismantling of the social and criminal justice policies developed in the post-war period (O’Malley 1994). The combination of ‘social authoritarianism and economic libertarianism’ (Hudson 1996:3) has emphasised the role of the market, and with it such ideas as privatisation, de-regulation, small government and competition (O’Malley 1994:285). Just as the state retreats from economic interventionism, so it does at the individual level: rehabilitative models give way to atomistic theories of personal responsibility for action and punishment. The fiction of homo economicus, the rational, wealth-
maximising individual upon whom the economy is modelled is extended to homo criminalicus, the rationally calculating criminal, similarly seeking to maximise wealth through crime. Prison, not welfare is seen as the solution to crime.

The transformation of economies is a powerful and fundamental force. As O’Malley has noted, this is not just a retreat to conservatism, with its ‘comfortable familiarities’, but a ‘specific and radical shift centred on the dismantling of welfarist, interventionist and socialised state managerialism’ (O’Malley 1994:286). It is, he observes, ‘breathtakingly reformist’. In Victoria, for example, the structure of the state is rapidly being dismantled, with many state institutions, authorities and activities being contracted out or privatised. Over forty per cent of Victorian prisoners are now housed in private prisons. State bureaucracies have shrunk in size and the nature of administration itself has been transformed. As elsewhere, these social and economic trends have manifested themselves in the criminal justice system, which is similarly becoming internationalised or globalised.

In the United States, sentencing reform emerged from the sustained attacks in disparity, partly attributable to the indeterminate sentencing regimes then in place in most jurisdictions (Tonry 1996). The renaissance of retributive or just deserts theory resulted in the reduction or elimination of the discretion exercised by judges and parole board in favour of more or less rigorous guidelines. Administrative modifications of sentence such as parole and remissions were narrowed or removed, but executive input into the sentencing process by means of sentencing commissions or councils was increased. Partly as a result, discretion appears to have moved to the prosecutorial, rather than the dispositional stages of the process. Offender-based sentencing changed to offence based. By the 1990s, Tonry identifies a move beyond just deserts to incapacitative, preventive or public safety rationales, possibly heralding a returning to offender-oriented considerations. One-, two- and three-strikes laws proliferated, as did mandatory and minimum sentences, many of which overrode or displaced carefully crafted sentencing guidelines. Capital punishment continues to gain in popularity.

Intermediate, or non-custodial sanctions, never as prominent in the United States as in England, Australia or Canada, became even more problematic under the just deserts model. To an increasingly punitive population they appeared to be an inadequate response to their fear or desire for punishment. As a means of reducing an increasing prison population, they failed because they were never capable of fulfilling that mandate. Nonetheless, American ingenuity persevered, with the development of such schemes as intensive supervision orders, house arrest, electronic monitoring, boot camps, public shaming or humiliation rituals and others. Fines and other minimalist orders continue to be severely under-utilised in comparison to other Western jurisdictions.

In England, Barbara Hudson (1993) has identified similar themes, but with different emphases. The decline of rehabilitation is noted, but the move to desert-based sentencing is less pronounced because the abandonment of classical theory was never as dramatic. Intermediate sanctions, always more widely accepted and used, proliferated: suspended sentences, community service orders, attendance centre orders, fines and discharges (see also Ashworth 1995). Their basis in social work practice, rather than in psychiatry or technology, may have made them more widely available, acceptable and adaptable. More problematic than their under-use is the modern problem Hudson identifies as ‘sanction stacking’ or penal inflation, that is, the aggregation or combination of various sanctions which result in non-custodial sanctions which are effectively more severe than the short terms of imprisonment they are meant to replace (Hudson 1993:134). Overall, Hudson identifies a number of major trends: a
bifurcation of sentences - fewer sentences, but for longer periods for the most problematic offenders; an increase in informalism, expressed through diversion, de-institutionalisation, decarceration, reparation or mediation schemes and an increase in individualism over corporatism: more particularly, a move away from collective responsibility of the state to individual responsibility.

**Australia**

In Australia, sentencing change has not been as fast or as radical as it has been in the United States. Its main features represent evolutionary change rather than major changes in sentencing paradigms.

**Consolidation**

Until recently Australian sentencing laws were scattered in a mosaic of state and federal Acts, full of duplications and inconsistencies. Legislation rarely specified factors which should be taken into account when determining whether a particular sanction was appropriate or provided for priorities in the imposition of sentences. There was no declaration of the purposes of sentencing nor a ranking of their importance. Statutory maximum penalties were inconsistent and incoherent.

Following decades of criticism that the legislature had failed in its duty to provide courts with a rational and coherent legislative and policy framework for sentencing, major legislative reforms have taken place at federal and state levels. This process commenced with the *Sentencing Act 1991 (Vic)* and was followed by the *Penalties and Sentences Act 1992 (Qld); Sentencing Act 1995 (NT); Sentencing Act 1995 and Sentence Administration Act 1995 (WA) and finally the *Sentencing Act 1997 (Tas).*

The various Acts, to different degrees, have attempted to give some direction in relation to sentencing policy in matters which had previously been wholly left to the courts. Thus various Acts list the purposes for which sentences can be imposed. Some jurisdictions also specify some of the factors which a court must have regard to in sentencing. Sentencers may be provided with the legislatively preferred hierarchy of sanctions and a direction to observe the common law principle of parsimony, namely, that a court is ‘not to impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed’. The legislation may also provide guidance in relation to the exercise of the discretion whether or not to record a conviction, or include directions regarding the use of the various orders such as indefinite sentences, community-based orders, and dismissals, discharges or adjournments. In some instances the legislature has spelt out its policy on the relationship between particular sentencing orders, so that a court is now directed to give priority to restitution or compensation over a fine and is obliged to take into account the total impact of a combination of financial sanctions. The legislation also directs courts to have regard to the interests of victims.

**Discretion and Disparity**

Despite the overwhelming evidence of unjustifiable disparity which convinced so many American jurisdictions to curtail judicial discretion, many Australian legislatures and courts have rejected both the definition of the ‘problem’ and its proposed solution. Australian courts remain firmly of the view that the retention of a wide judicial discretion is necessary, that
individual justice is possibly more important than some more abstract notion of systemic 
fairness.

The essence of the Australian approach is that the courts should adopt a ‘consistency of 
approach in the sentencing of offenders’ (Sentencing Act 1991 (Vic), s.1(a); New South Wales 
1996:13). As long as the sentences imposed are not outside the ‘acceptable range’, as 
determined from time to time by the appellate courts, sentencing discretion will be upheld. 
Thus:

Wide discretion which, properly, allows individualisation and broad choice of rationales 
for punishment should be accompanied by accountability. In our view this is best 
achieved by a clear statement from the sentencing court as to the sentencing rationale 
chosen, the relevant factors and the reasons for adopting them. This makes the position 
clear to the offender, improves community and media understanding of the process 
(including apparent superficial inconsistencies) and provides an unequivocal platform 
for appellate review (New South Wales 1996:14).

Innovations such as the New South Wales Judicial Commission’s Sentencing Information 
System, aim to improve the consistency of sentencing by making available to sentencers, on 
line, sentencing law, statistics, information about correctional facilities and a sentencing 
calculator. Although there is some evidence that the use of this system is increasing, there have 
been no evaluations of whether, or to what extent, it has affected sentencing behaviour. My 
own, very impressionistic view is that, although all of the structural and other innovations 
outlined above have simplified the sentencing task and clarified the conceptual frameworks, 
they have not improved the quality or consistency of sentencing outcomes.

The continuing public and political pressure on the courts, usually to increase sentence 
severity, has, however, led some courts to respond, possibly pre-emptively, to possible 
legislative attempts to confine or fetter their discretion, by issuing guideline judgments. A 
guideline judgment is a judgment of a court of appeal in which the court formulates general 
principles relating to an offence, or a group of offences, including, sometimes, an indication of 
the appropriate range of sentences, for the guidance of trial judges. Appellate courts frequently 
lay down general principles in the course of their judgments, but Australian courts have shied 
away from more general statements of sentencing law and numerical indications of an 
appropriate range of sentences (Warner 1998).

Though the Supreme Court of Western Australia has had statutory authority to do so for some 
years, it has not issued any guideline judgments. In fact, no statutory authority for such 
judgments is necessary and, in October 1998, a Full Bench (that is, five judges) of the Court of 
Criminal Appeal of New South Wales under its new Chief Justice, Jim Spigelman, handed 
down its first such judgment in a case of dangerous driving causing death (Jurisic, Unreported, 
12 October 1998). In its judgment, the court noted the previously low level of sentences 
imposed and the disparity between public opinion and judicial sentencing, a difference which, 
in its view, could eventually undermine the perceived legitimacy of the legal system. As the 
Court noted:

At times, and with respect to particular offences, it will be appropriate for the Court to 
lay down guidelines so as to reinforce public confidence in the integrity of the process 
of sentencing. Guideline judgments, formally so labelled, may assist in diverting
unjustifiable criticism of the sentences imposed in particular cases, or by particular judges.

… [G]uideline judgments should not be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.

The Court expressly rejected American style ‘grid’ systems or minimum penalties. It emphasised that the guidelines were not binding in any formal sense and that judges would retain the ultimate discretion in sentencing.

The judgment drew national attention and provoked intense debate about the role and independence of the courts, the role of discretion and the relationship between the courts and the community. The Attorney-General responded immediately by foreshadowing legislation which would permit the prosecution to ask the court to issue guideline judgments for particular crimes (The Australian 14/10/1998; McWilliams 1998). It is difficult to tell, at this stage, whether this move to shore up the standing of the judiciary’s role in sentencing will be effective. In New South Wales itself, the Opposition still appears keen to move down the path of US style grids. There are serious questions whether anything the judiciary can now do anything which will mollify the pressures for ever tougher sentences.

The Western Australian government, on the other hand, has now moved towards a U.S. style system. Unhappy with the courts’ response to public and political concerns with sentencing practices, in late October 1998 the government introduced a bill to amend its relatively recently recast sentencing legislation. This will provide for a ‘sentencing matrix’, in effect, the beginnings of a numerical guidelines regime. It is intended to make the sentencing process clearer, more consistent, more understandable to the public and ultimately, to give the Parliament more control over sentences imposed by the courts. Courts are to be made more ‘accountable’ to parliament through a system of information gathering, publication of benchmark sentences and, finally, through the legislative prescription of ‘presumed’ sentences, deviation from which will create an automatic right of appeal.

**Proportionality**

The principle of proportionality remains the keystone of Australian sentencing. It has been consistently affirmed by the High Court (Veen (No. 2 (1988) 164 C.L.R. 465; see Fox 1988) and by appellate courts in most Australian jurisdictions (Fox and Freiberg 1999: para 3.501).

In broad terms the rule is that except where overridden by competent legislation, the common law of sentencing in Australia prohibits judges or magistrates from awarding sentences exceeding that which is commensurate to the gravity of the crime then being punished. It is impermissible at common law for any punishment to be extended above this limit in an effort to isolate potentially dangerous persons, or to punish offenders with criminal histories more severely than the offence itself warrants, or to provide for medical, psychiatric or other treatment for convicted persons in penal or other settings, or to enhance special or general deterrence through exemplary sentences, or to promote other ‘educative’ purposes, or to force co-operation, restitution or compensation irrespective of whether fulfilment of these ancillary
objectives would protect the community against further crime. The rule applies to sentences of imprisonment (including the non-parole period) whether immediate or deferred and, arguably, to all other forms of sentence. However, over recent years, there have been a number of statutory departures from this basic principle.

However, special legislation has long existed at both the State and federal level permitting the preventive detention of habitual criminals. It is based on the concept that in sentencing an offender who had at least two serious previous convictions, a court should be allowed to award an extended sentence on convicting the offender for any similar subsequent crime. This legislation was little used but the concept of some form of preventive detention has maintained its appeal to legislators and has, over recent years, seen a revival (Thomas 1995; Pratt 1995; Pratt 1997; Meek 1995; Parke and Mason 1995; Fairall 1995).

In a number of jurisdictions the proportionality principle has been ousted by a series of provisions for the indeterminate detention of habitual or dangerous offenders. In 1990 Victoria introduced special preventive detention legislation, the Community Protection Act 1990 (Vic), to deal with a single notorious offender, Gary David, but this legislation lapsed upon his death in 1993. It was eventually replaced by more generally applicable legislation in that year, the Sentencing (Amendment) Act 1993 (Vic), modelled upon the Penalties and Sentences Act 1992 (Qld), Part 10., which re-introduced the concept of indeterminate sentences into Victorian law (see Victoria 1992; Fairall 1993).

The 1993 Victorian legislation was aimed at extending the prison terms of serious sexual and violent offenders and created the new indefinite sentence of imprisonment for serious sexual and violent offenders. In 1997, these provisions were extended to serious drug and serious arson offenders. Now, where a Victorian judge is considering imprisoning a ‘serious offender’ as defined in Sentencing Act 1991 (Vic), s.6B(3), a re-orientation of the statutory purposes of sentencing takes place. The court is directed to regard the protection of the community as the principal purpose for which the sentence is imposed. The new legislation expressly declares that the sentencer may, in order to achieve that purpose, impose a custodial sentence ‘longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances’.

When dealing with anyone over twenty-one convicted of ‘a serious offence’, judges are now also empowered to impose an indefinite term of imprisonment regardless of the maximum penalty prescribed for the offence. A ‘serious offence’ includes at least 50 different crimes varying greatly in gravity.

The antipathy that Australian judges have shown to such legislation is indicated by the cautious approach they have enunciated, linking proportion to protection and totality. It is also demonstrated by their reluctance, and that of prosecution authorities, to invoke the indefinite sentence legislation (Freiberg 1999).

Although Queensland introduced provisions for indefinite sentences for serious violent or sex offenders in 1992, to date only one such sentence has been imposed. In Victoria three sentences have been imposed, in each case in relation to offences and offenders who would, in any case, have received extremely long sentences. Though highly symbolic, the practical effect of these provisions has been extremely limited and they cannot be said to have contributed to the rising rates of imprisonment.
More recent measures, which seem to draw their inspiration from American style ‘three-strikes’ legislation and which have the potential for producing disproportionate sentences, have been introduced in New South Wales, the Northern Territory and Western Australia.

In the Northern Territory, amendments to the Sentencing Act 1995 (NT) and the Juvenile Justice Act 1983 (NT) introduced what effectively amounted to ‘one strike’ legislation (Flynn 1997). The legislation requires a court to impose a mandatory minimum term for persons convicted of a range of property offences: fourteen days for adult first offenders; ninety days for an adult with one prior property conviction and twelve months for an adult with two or more prior property convictions. A juvenile (15 to 17 years old) with one or more prior property convictions must be sentenced to twenty-eight days in a detention centre. In March 1997 the Northern Territory government allocated $A3 million for 140 new prison places (Flynn 1997).

In Western Australia the Criminal Code Amendment Act (No 2) 1996 (WA) introduced provisions which require the courts to impose a mandatory twelve month prison sentence upon a person classified as a repeat burglar. This legislation, which was designed to deal with a spate of ‘home invasions’, is directed at offenders with at least one prior conviction for burglary and is expected to increase both the number of juveniles and adults in the prison system, particularly indigenous offenders (Morgan 1996). It follows earlier legislation to the same effect, the Crimes (Serious and Repeat Offenders) Sentencing Act 1992 (WA).

**Maximum penalties**

Adjustments and distortions of the proportionality principle take forms other than these kinds of statutory interventions. Australian legislatures, like those abroad, are ready to respond to the periodic crises of confidence which crime waves, or crime reporting waves, tend to precipitate. Whether it be death on the roads, rape, aggravated burglaries or home invasions, arson, or just crime in general, maximum penalties can, and often are, increased to assuage the current moral panic. The trend has been to continually increase maximum penalties.

**Role of the victim**

If it were once true, then it is no longer the case that the victim is the forgotten party in the criminal justice system. Victims now play an important role at a number of stages in the system, particularly sentencing. Victims’ rights legislation is becoming more common encompassing such matters as statutory charters of rights for victims, victims’ bureaux and advisory boards and providing victims with a say in parole release decisions.

Victim impact statements are now common. Despite fears that they would lead sentencers to give disproportionate weight to the effect of the crime on the victim to the detriment of other considerations such as rehabilitation of the offender, victim impact statements have not been shown to have had a significant impact upon sentence lengths or sentencing patterns generally (Hinton 1995; Erez and Roger 1995).

Paradoxically, the success of the victims movement has resulted in what appears to be the start of a movement to restrict victims rights. Schemes to compensate victims of crime for personal injuries have been in effect in Australia since the early 1970s. They provided limited compensation for a range of injuries, but as victims became more aware of their rights, and came to assert them more frequently and aggressively, state budgets came under increasing strain. The open-ended nature of the state’s commitment to providing compensation has come
to be regarded as untenable and in response, some jurisdictions have now legislated to
transform the compensatory system from financial compensation to therapeutic intervention.

In Victoria, the *Victims of Crime Assistance Act 1996* (Vic) removed the right of victims to
claim for pain and suffering and replaced it with vouchers for psychological counselling.
Although this legislation advances the interests of victims in many respects, in particular, by
establishing an improved infrastructure of support and advice, a cynic might have claimed that
the original imperative for reform was financial rather than therapeutic.

**Restorative justice**

One influential movement is that towards restorative justice at the juvenile and adult levels.
Restorative justice, diversionary conferencing, family group conferencing or community
conferencing is seen by many as a major alternative to traditional sentencing forms. Drawing
upon a variety of theoretical and historical bases (Braithwaite 1989; Alder and Wundersitz
1994; Hudson et al 1996; Moore 1993; Blagg 1997:482) these programs seek to create pre- or
post-sentencing alternatives bringing victims and offenders together. The aim is for the latter to
take responsibility for their actions and make reparation to the former as part of an agreed
outcome.

Various conferencing, mediation, community justice and similar schemes have been tried in
New South Wales, especially what became known as the Wagga Wagga experiment (NSW
1996:296; *Young Offenders Act 1998* (NSW), South Australia (*Young Offenders Act 1993*
(SA)), Victoria (Victoria 1993), Western Australia (*Young Offenders Act 1994* (WA) and
Tasmania (*Youth Justice Act 1997* (Tas)). Both Western Australia and Tasmania have
introduced new provisions for ‘mediation reports’ which permit a court, before passing
sentence on an offender, to adjourn proceedings and order a mediation report. The report, by a
mediator, may be oral or written and may advise the court in respect of the attitude of the
offender to mediation, to the victim, the effects on the victim of commission of offence and any
agreement between offender and victim as to actions to be taken by the offender by way of
reparation. There are a number of opportunities at this conference to hear about some of these
changes in more detail from those involved in the experiments.

**Intermediate sanctions**

Australian courts have always made more use of intermediate sanctions than have the United
States courts. Fines, in particular, are commonly used sanctions, particularly in the lower
courts. The ‘experiments’ of the last two decades with ‘alternatives’ to imprisonment such as
community service, periodic detention, attendance centres and intensive probation have run
their course, with moderately little impact upon sentencing patterns, a new wave of
experimentation is under way. Intensive correction or supervision orders intended as front or
back end diversions have been introduced in Western Australia, South Australia, Queensland
and the Northern Territory, some allied with electronic monitoring or surveillance (Morgan
1996:381). Home detention has most recently been trialled in New South Wales since 1992,
with new legislation, the *Home Detention Act 1997* (NSW), being introduced to regularise its
status. This scheme, which in effect imprisons the offender in the home, is available for a
sentence of up to 18 months for a range of non-serious offences, but has been slow to be
accepted (Liverani 1998). Other experiments are taking place with new sanctions such as
curfews and ‘area restriction orders’ in Western Australia (Morgan 1996:378), but these are
still in their early stages.
In 1997, the Northern Territory introduced a system of ‘punitive work orders’ for offenders which appears to provide a mandatory sentence of 224 hours with harsh penalties for breach (Warner 1998:282). Notoriously, offenders undertaking such work are required to wear an orange vest with the words ‘community service order’ prominently displayed on them and, unsurprisingly, this requirement has been criticised as being ‘isolating, degrading, humiliating and stigmatising (Warner 1998:284). In practice, as is so often the case with objectionable sentences, the courts are reluctant to use them and Warner reports that in their first year of operation, no orders were made in respect of juveniles and only a few for adults.

Some Australian jurisdictions have flirted with American style innovations such as boot camps. For example, in Western Australia, in 1994, the conservative Western Australian government opened a form of ‘boot camp’ designed to administer discipline to hard core repeat offenders aged between 16 and 21 years old. The government drew its inspiration from shock incarceration camps in the United States and opened a rural facility designed to accommodate 30 inmates who would otherwise have gone to prison. It was intended that half of the inmates would be Aboriginal offenders.

After a mere 18 months, the facility was closed following a scathing report by a judge which revealed that the facility was too remote, culturally inappropriate for the intended participants, provided poor training and services and the young people referred there would not have received a gaol sentence in any case. Its daily occupancy was ten offenders, one-third of its capacity, no juveniles were sent and only one Aboriginal offender was referred. In all, some $2.8m was spent on what the report described as a ‘fiasco’ (Newman 1996). Reviewing the American literature and example in 1995, and the short Australian experience, Atkinson presciently concluded (1995:6):

… the boot camp context is inappropriate and arguably alien to Australian history and cultures… [They are] inappropriate and dangerous to Aboriginal offenders … Boot camps have not taken firm root in Australia. They do not have the public profile, or relentless momentum of the US example.

**Suspended sentences**

The revival of an old sanction, the suspended sentence, appears to be one of the major innovations in Australia sentencing. In Victoria, the suspended sentence was re-introduced in 1985 to provide a substitute for sentences of imprisonment of under 12 months. This was extended to 24 months in 1991 and 36 months in 1997 because of its popularity. In fact, in Victoria the suspended sentence has had a greater impact upon the pattern of sentencing in Victoria than any other newly introduced sentencing option (Tait, 1995). Within three years of the re-introduction of this sanction in 1985, some 14 per cent of offenders in the higher courts were given a suspended sentence, by 1991 - 92, the figure was up to 24 per cent, and by 1994, 35 per cent of sentences for principal offences in the higher courts were suspended sentences of imprisonment (Freiberg and Ross 1999).

The evidence in Victoria appears to be that the suspended sentence has diverted some sentences of imprisonment, but also some intermediate sentences. Although it has also had an impact upon lower order sanctions such as fines and bonds the patterns are variable and very much offence sensitive. It is also clear that Victorian breach rates are lower than those reported in England as are the execution rates (Freiberg and Ross 1999). This may change, however,
with the increases in the length of possible suspensions, as well as a tightening of the rules relating to sentencing on breach introduced in 1997.

Suspended sentences which were also available for some years in South Australia, have now been introduced in Queensland, the Northern Territory, Western Australia (up to five years), Tasmania (for any period of time and subject such conditions as the courts thinks necessary or expedient) and have been recommended for introduction in New South Wales (NSW 1996). Whether these new initiatives evolve down the English route of net-widening and increased prison numbers or the Victorian route of some diversion remains to be seen.

**Prisons and prison populations**

As I indicated previously, referring globally to Australian imprisonment rates masks complex regional differences in the use of imprisonment. In New South Wales, the most populous state, between 1986 and 1998, the New South Wales imprisonment rate per 100,000 adults jumped from 95.0 to 132.9 (39 percent), most of which occurred between 1988 and 1992, a period following a major sentencing reform which included both the abolition of remission and a restructuring of the method by which prison sentences are imposed by the courts (see Freiberg 1995). Over the last three years there has been a slight downward trend in full time custody. The New South Wales government intends to commission a 900 bed remand and reception centre and hopes that the commencement of home detention program will divert minor offenders from full time custody (Report on Government Services 1998:436).

Between 1983 and 1998 Victoria’s imprisonment rate increased by 12.4 per cent, albeit that the State’s rate was historically low. Since the abolition of remissions in April 1992 the actual number of offenders imprisoned has jumped from 2,250 in mid-1993 to 2,400 by the end of that year. It reached 2,500 by late 1994. Prisoner numbers peaked at the end of 1994, then stabilised at around 2,450, where they remained until mid-1996. In mid-1997, they climbed again, reaching over 2,650 and in early August 1998 stood at over 2,800.

Steadier, but consistent increases in imprisonment rates have occurred in South Australia and Queensland. In South Australia rate jumped from 75.4 in 1986 to 128.9 in 1998 (an increase of 70 percent), but numbers have stabilised over the past year or so with a significant decrease in the crime rate. The earlier increase was partly attributed to significant increases in average head sentences and non-parole periods (the latter being more important in terms of actual time spent in prison) arising from a series of problematic changes in laws relating to parole and remissions (Roeger 1993).

In Queensland the rate increased from 110.3 in 1986 to 187.7 in 1998 (70 percent), although it should be noted that the rate had dipped to 89.0 per 100,000 adults in 1993. Between June 1993 and June 1997 the Queensland prison population increased from 2,068 to 3,851, an 86 percent increase. According to the Queensland Criminal Justice Commission,¹ the increase in

---


¹ Personal communication, Dr David Brereton, March 1998.
prison numbers was due less to increasing sentence lengths than to increased throughput in the courts. The number of persons dealt with by the higher courts over this period increased by 58 percent while, in addition, the number of persons sentenced to imprisonment by the Magistrates’ Court increased by 41 percent, due to both increased numbers and an increased use of imprisonment as a sanction. There was also a marked increase in the number of persons imprisoned for breaching orders, such as suspended sentences.

Jurisdictions with historically high imprisonment rates, namely Western Australia and the Northern Territory, remain so, with increases of 8.9 percent and 16 percent respectively.

Between 1986 and 1996, the nature of Australian prison populations changed (see Australian Bureau of Statistics 1997). The average age of prisoners rose from 29.9 years to 31.8 years; the proportion of prisoners aged 25 years or less decreased from 36.5 percent to 28.6 percent and the proportion of female prisoners rose from 4.8 percent to 5.3 percent. Sex offences increased from 9.1 percent of offences by most serious offence category to 13.6 percent, as did assaults, from 5.9 percent to 12 percent. Property offences, however, declined.

Indigenous Imprisonment Rates

The reasons for variations in imprisonment rates are complex. The number of indigenous persons in a jurisdiction and the indigenous imprisonment rate are certainly contributing factors. According to the recent Report on Government Services (1998:411) 20% of Australia’s prison population was of Aboriginal or Torres Strait Island descent: The imprisonment rate was 1,820 per 100,000 ATSI adults, a rate which was 12 - 17 times that for the general population except in the Northern Territory and Tasmania, where rates were 3 - 6 times higher. Aboriginal offenders comprise 70 percent of the Northern Territory prison population, 33 percent of the Western Australian prison population, and 26.6 percent of the Queensland population, but only 4.6 percent of the Victorian prison population.

Privatisation

The managerialist and competitive environment in which governments now operate has affected the delivery of correctional services. In 1997 there were 111 prison and periodic detention facilities in Australia, including six privately operated facilities in four jurisdictions, New South Wales, Victoria, Queensland and South Australia. 1,862 prisoners, or 11 per cent of the total population were in private facilities, compared with 2 per cent in the United States (Report on Government Services 1998:408). In Victoria, 40 per cent of prisoners are held in private facilities, compared with 32 per cent in Queensland.

Private prisons were another American inspired initiative, which, proportionately, Australia seems to have taken further than any other jurisdiction (Russell 1997). Australian private prisons are part subsidiaries of American and English corporations such as Wackenhut, Corrections Corporation of America and Group 4 and, in some cases, have brought with them overseas personnel and practices.

The organisation of correctional services has been transformed in Victoria and Queensland through the corporatisation of correctional services. The purpose of this is to separate ‘purchasers’ and ‘providers’ of correctional services, steerers from rowers, in order to provide competition. In Victoria, government providers of prison and community correctional services operate under a corporate structure and they, like the private providers, are now responsible to the Correctional Services Commissioner who has oversight of, and responsibility for, the whole
correctional system. The implications of this system, in terms of accountability to the public, are profound (Harding 1997; Freiberg 1997). And despite privatisation of over 40 per cent of the prison system in Victoria, the cost per prisoner has not decreased (Report on Government Services 1998:437).

Attempts to outsource or to privatise forty per cent of community corrections in Victoria commenced in 1997 but apparently foundered on the rock of costs: it was found that the private sector could not deliver the same or better service at a lower cost than the public sector. Although Australia’s community corrections are delivered through the public sector, it has always been the case that specialised services, such as drug treatment, education, skills training and the like have been delivered by both private and public agencies.

Conclusion

As is probably appropriate for an ‘outlook’ symposium, I will try to draw together some of the themes of this paper and try to see where sentencing in Australia may go in the next few years.

Australia is, and always has been involved in, a wider penal culture. In the English-speaking western cultures, the prevailing political and social culture appears to be changing in fundamental ways, driven by deep-seated economic changes. The sentencing manifestations of individualism, privatisation, managerialism, economism and technology are merely variations of wider themes that play themselves out in commercial and industrial organisations, in the changing role of government and in the forms of law. It is these major global (or Western) changes in economic, political and social formations which have influenced the mood, sensitivities and sensibilities of the public, legislators and judges. To the extent that we are a part of the global economy and the global market place of ideas will we continue to be influenced by events elsewhere.

Professor Tony Bottoms of Cambridge University has argued recently that increasing social insecurity provides one explanation of increasing penal severity expressed in more and longer sentences and increases in imprisonment rates. As social and economic certainties erode, particularly for the older members of the community, they seek solace in tougher laws (Bottoms 1995: 47). Outrage and frustration about crime manifests itself in public opinion polls, spurious or otherwise, in radio talk-back programs and, in states such as Western Australia, in street demonstrations against crime. Politicians are adept at tapping into these fears and argue that legislative ‘get tough’ responses to the articulated, and inarticulate, concerns of the electorate are examples of ‘democracy at work’ (Beckett 1997: 8).

In their study of public support for punitive policies such as the ‘three strikes’ laws in California, Tyler and Boeckmann (1997) found that such initiatives were part of a wider move to support the removal of discretionary authority away from the courts which signalled a repudiation of legal authority more generally. General confidence in legal and political authority seems to be waning leading to greater support for non-legal means of dealing with crime or for reducing the role and scope of courts’ discretion. Their survey of a small number of Californians revealed that public punitiveness was linked more to judgments about social conditions and underlying values than to concern about the level of crime and the work of the courts. Support for three strikes laws was not related to judgments about the future dangerousness of offenders as much as to moral cohesion. In other words, the instrumental effects of sentencing policy, that is, reducing the rate of crime or the chances of being victimised, were less important than judgments about social conditions: concern over the
decline of social institutions such as the family, the lack of a moral and social consensus, the
delay of social ties and a discomfort with growing social and ethnic diversity. Their study
suggests that declining moral cohesion leads to more punitive attitudes because people who are
sceptical of the courts, of politics and of society in general are also sceptical of the ability of
social, welfare and penal agencies to rehabilitate offenders; to integrate or remoralise them.
Prisons become warehouses for those who forfeited their rights or who have shown contempt
for the criminal justice system in particular, and society in general, by their repeated offending
(Roberts 1996).

The prison is not longer conceived of as being remotely rehabilitative, but does what many
other sanctions cannot: control, contain and incapacitate (Zimring and Hawkins 1991: 88). As
society turns from rehabilitative and deterrent notions to punitive and preventive ones, prison
sentences may become fewer, but considerably longer. Notions of selective and collective
incapacitation may replace the moral and ethical grounds for punishment. Unfortunately, the
empirical basis of these incapacitative strategies has yet to be established.

The rapid rise of populist parties such as Pauline Hanson’s One Nation Party and their political
success in a conservative constituency such as Queensland, at the same time as imprisonment
rates have risen steeply, may confirm a Durkeimian connection between fear, insecurity and
popular punitiveness. Allied to this insecurity is the re-emergence of neo-classical explanations
of crime which see it as the product of free and rational choice of individuals with the power to
make informed decisions.

These, Pratt argues, are not ‘mere local aberrations’ but reflections of wider social changes
(Pratt 1998: 13). Moving from the antipathy towards prisons and the development of
community-based sanctions of the 1970s and 1980s, the penal policies of the 1990s tolerate or
even encourage custodial sentences. There is no longer any pressure for decarceration
(Zimring and Hawkins 1991: 202). In England, the Home Secretary under the Conservative
government, Mr Michael Howard declared, in 1993, that ‘prison works’ (Ashworth 1995: 78)
and subsequently the prison population increased by over 50 per cent.

Other commentators such as Garland (1996) and Sparks (1996) have also detected a fracturing
or segmentation of society, increasing polarisation of wealth, growing intolerance of the poor
which manifest themselves in a search for new and better forms of social protection and a
willingness to discard existing legal frameworks (Pratt 1998: 14).

Few remain immune to the growing public fear, including the judiciary. Zero tolerance of crime
leads to maximum intolerance of criminals. Until recently political imperatives have no been
regarded as being part of the judicial decision-making process. But, as we have seen with the
introduction of guideline judgments in New South Wales, courts do feel responsible to, or see
the need to be partly responsive to, public sentiment. The introduction of ‘matrix’ sentences in
Western Australia marks a new phase of overt and direct political control of judicial
sentencing.

It is possible to detect changes in judicial sentiments. Appellate courts appear to have become
more willing to uphold sentence lengths which far exceed any previous tariffs, to focus upon
the punitive, deterrent and incapacitative aspects of sentencing and to be more responsive to
victims’ views than they have in the past. As more judicial officers are appointed who may be
less wedded to the older traditions, the judicial culture may change.
Sentencing law is much less important, in my view, than local sentencing culture and practices. Thus the persistent differences in imprisonment rates between the states remains, despite the fact that their legislation has become increasingly similar. The recent wave of reform of sentencing legislation has created converging sentencing frameworks, but ever more diverging sentencing practices. Thus Queensland, which legislated a very similar Act to Victoria, has seen a massive rise in the number of prisoners, while Victoria’s rise has been uneven and less pronounced.

It is difficult to predict the direction of sentencing, but what could bring about major changes in sentencing patterns, however, is the introduction of mandatory or minimum sentences in pursuit of incapacitative or retributive ends. Despite trenchant attacks on the advisability or effect on such sentences, and clear evidence of their counter-productivity (Tonry 1996: Chapter 5), they remain attractive to politicians as a means of forcing the hands of a judiciary which may be seen by the populace as being ‘soft on crime’ or somehow out of date. The sentencing matrix in Western Australia is an indication of a changing balance between parliament and the courts.

Sentencing structures are built on unstable foundations. They are the result of, and vulnerable to, shifting social, political and economic pressures. They will survive so long as they fulfil the needs of the dominant political elements of the society of which they are a product and the deeper emotional or psychic needs of the populace. As the traditional balance of powers between Parliament, the judiciary and executive changes, sentencing practice will change. If the public had its say, or at least that part of it listened to by the government, had its way, imprisonment rates will rise. That rise may be tempered by the historical sentencing culture or, possibly, by a millennial wave of prosperity which seems to be sweeping over the United States and which may wash up on our shores. What seems to be clear is that with the increasing rate of change in sentencing laws, with a more rapid turnover of judicial, correctional and governmental officers and with an ever decreasing sense of historical continuity and loss of institutional memories sentencing culture will erode, and change will become the dominant penological as well as social condition (Freiberg and Ross 1999).
References


Appendix 1  Australian Daily Average Number of Prisoners per 100,000 Adult Population - 1983 to 1997


Appendix 2  Sentenced and Remand Prison Populations - Number on June 1998

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Prison Pop’n</th>
<th>Rate per 100,000 Adults</th>
<th>Number of Remandees</th>
<th>% of Prisoners</th>
<th>Rate per 100,000 Adults</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>2837</td>
<td>79.9</td>
<td>449</td>
<td>15.8</td>
<td>12.6</td>
</tr>
<tr>
<td>Tasmania</td>
<td>306</td>
<td>86.5</td>
<td>53</td>
<td>17.3</td>
<td>14.9</td>
</tr>
<tr>
<td>South Australia</td>
<td>1365</td>
<td>121.2</td>
<td>264</td>
<td>19.3</td>
<td>22.4</td>
</tr>
<tr>
<td>NSW (inc ACT)</td>
<td>6443</td>
<td>136.3</td>
<td>1062</td>
<td>16.4</td>
<td>22.5</td>
</tr>
<tr>
<td>Queensland</td>
<td>4882</td>
<td>188.9</td>
<td>508</td>
<td>10.4</td>
<td>19.6</td>
</tr>
<tr>
<td>Western Australia</td>
<td>2336</td>
<td>174.8</td>
<td>285</td>
<td>12.2</td>
<td>21.3</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>612</td>
<td>458.7</td>
<td>80</td>
<td>13.0</td>
<td>60.3</td>
</tr>
<tr>
<td>ACT (Remand)</td>
<td>36</td>
<td>15.4</td>
<td>37</td>
<td>15.8</td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>18817</td>
<td>133.9</td>
<td>2737</td>
<td>14.5</td>
<td>19.5</td>
</tr>
</tbody>
</table>

Source: Corrective Services Australia, Australian Bureau of Statistics, September 1998