

***Justifying Criminal Justice:  
Rethinking approaches to crime,  
punishment & rehabilitation.***

Keynote Address presented by the Hon. Justice Lincoln Crowley to the 19<sup>th</sup> Biennial  
Conference of the Criminal Lawyers Association of the Northern Territory

Bali, 24 June 2024

## Introduction

Friends, colleagues and fellow dingoes, it is my privilege to present the Keynote Address for the 2024 CLANT conference.

Even though I am not a Territorian, I will lay claim to some Territory roots in two ways. First of all, my Aboriginal family origins are from the territory. My grandmother was a Warramunga woman, born on a station out near Tennant Creek. She grew up there until about the age of twelve, when she was taken across to North Queensland to work as a cook on a cattle station. Second, I did my first two years of formal school in Darwin, where I attended Larrakeyah Primary School.

It is an honour to be invited to deliver this speech, but I must admit to some trepidation in coming to Bali for the conference. That is not because of the conference theme, the audience, or the subject matter of this address. Rather it is because I was last here in October 2002, when Paddy's Bar and the Sari Club at Kuta were bombed and 202 people, including 88 Australians, tragically lost their lives. My wife and I were actually on our honeymoon at the time. We were fortunately staying just up the road at Nusa Dua and not in Kuta. But we were at the Sari Club in Kuta the night before the bombings and were planning on going there again that evening. Our holiday and honeymoon were cut short by those dreadful events but that was not the end of our stay. Very shortly after our families got through to us at the hotel to confirm that we were safe and well, the Courier Mail was on the phone to my wife, also asking if we were safe and well and then quickly moving on to business. She was working as a journalist at the time and they wanted to know if she could go down to Kuta and file a few stories for the paper.

We both swore that we would never return. But the opportunity to attend this conference and deliver this address changed my mind.

The conference theme ~~Tough.~~ *Soft. Smart on Crime* touches upon issues that are of fundamental relevance and importance to all persons who work within the broader criminal justice system, but particularly so for legal practitioners and judicial officers. The essential question that sits behind the conference theme is: How can we do things better? How can we do things better to prevent crime, to promote the effective rehabilitation of offenders and to reduce recidivism, thereby reducing crime and protecting the community? How can we do things better to reduce rising rates of incarceration, particularly the incarceration of Indigenous offenders? How can we do things better to avoid and divert young people entering the criminal justice system?

We must ask ourselves these questions because 'tough' on crime approaches do not seem to provide the answers. Despite such approaches, recidivism rates have not decreased. Moreover, incarceration rates in Australia continue to rise, and Indigenous Australians remain grossly over-represented in the prison system.

Nevertheless, 'tough on crime' approaches continue to be advocated and implemented. And the reasons for this are not simply because they provide a logical solution to the social problem of crime. Indeed, such approaches more often reflect government policies that are devised and implemented for political purposes. Political parties of all persuasions are keenly aware that the public's perception of their approaches to dealing with crime, particularly youth crime, are vitally important to electoral success. Knee-jerk reactions to particular crimes that are widely covered in the media are common. Increasing maximum penalties, enacting harsh and restrictive bail laws and fettering the sentencing discretion of judges and magistrates for particular types of offences or offenders are common reactions. But is there any evidence that these approaches work to prevent recidivism and reduce crime in the community?

Proponents of the 'tough on crime' approach argue that 'soft' approaches are the cause of the problems plaguing the criminal justice system. In reality however, this characterisation does not describe any particular features of criminal justice policy, law or strategy. Rather, 'soft' is simply the antonym of 'tough' on crime in the law and order policy debate – and anyone opposed to tough on crime policies is soft on crime. Politicians therefore try to be tougher than their opponents. Judges and magistrates who fail to impose the maximum penalties on certain offenders or for certain offences are soft on crime – or better still as the Queensland Police Union President described for the media earlier this year, '...inner city, latte sipping judges' who need to be held to account.

Critics of punitive tough on crime policies and advocates for alternative solutions to problems of crime prevention, recidivism and excessive incarceration are all portrayed as being 'soft' on crime. This portrayal undermines the development and implementation of good policy making and sound legislation.

The root causes of crime are diverse. They include socio-economic factors such as poverty, lack of education, unemployment and lack of housing. They also include personal and psychosocial factors such as mental health issues and drug and alcohol use and abuse. And then there are base human instincts and impulses such as greed, anger, jealousy and revenge. Further still other causes may have a religious, cultural or ideological dimension.

Despite the wide range of causes of crime, the core of tough on crime approaches are premised on the assumed logic that punishment and deterrence will provide the solution to

crime. But rather than simply, accepting these assumptions and conceptualising law and order issues in black and white terms, we should recognise that being 'tough on crime' may not provide the answer (or the only answer). At all levels there is a need to rethink our assumptions and approaches to addressing the social problems of crime.

It is time to employ an evidence-based approach to these issues. The strategies, policies and laws that are enacted and endorsed by government and administered and implemented by the criminal justice system must address the root causes and drivers of crime and be based on proven interventions and programs that work to prevent crime and reduce reoffending.

It is time for all of us to rethink our approaches to crime, punishment and rehabilitation and to find smart solutions to the issues.

But, this is of course, easier said than done. So where do we start?

### **What is crime?**

To ground any discussion of smart solutions to the issues of reducing the prevalence of crime, the rates of recidivism and promoting and achieving effective rehabilitation, it is vital that we first revisit some of the basic concepts that underpin our system of criminal justice.

The most basic is our understanding of the concept of 'crime'.

The Macquarie Dictionary defines the noun 'crime' as: 'an act committed or an omission of duty, injurious to the public welfare, for which punishment is prescribed by law, imposed in a judicial proceeding usually brought in the name of the state.'<sup>1</sup>

Although this may be an accurate definition of the English word, we all know that crime is of course a much broader concept. But the definition does identify several essential features that become particularly important when we contrast our traditional criminal justice system with alternative systems or options for dealing with crime.

The first essential feature is the idea that crime is 'injurious to public welfare'. This is a concept that very much underpins our present criminal justice system. A person who commits a crime does not simply offend against a victim or a complainant. Rather, they offend against the entire community. Criminal law is a branch of public law. It is concerned with the public interest rather than private interests.

The second feature is that the consequence of crime is 'punishment'. The traditional criminal justice system is essentially a **retributive system** of criminal justice. Retributive

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<sup>1</sup> Macquarie Dictionary (online at 22 April 2024) 'crime' (def 1).

justice is based on the theory that when people commit crimes, “justice” requires that they be punished in return and that the severity of their punishment should be proportionate to the seriousness of their crime.<sup>2</sup> The focus is upon punishment, rather than prevention of future crime or the rehabilitation of offenders.

It is a system that operates according to three basic principles:

- Those who commit crimes, especially serious crimes, morally deserve to suffer a proportionate punishment.
- The punishment should be determined and applied by officials of a legitimate criminal justice system.
- It is morally impermissible to intentionally punish the innocent or to inflict disproportionately harsh punishments on wrongdoers.<sup>3</sup>

The third aspect of the definition of crime is that ‘judicial proceedings are usually brought in the name of the state’. The state, through its executive agencies, such as the police, investigates alleged crimes, arrests and detains alleged offenders and brings them before a court, initiating a judicial proceeding. The state, through the judiciary, or the courts, then hears and determines questions of guilt and imposes punishment on the guilty. The state, through its agencies such as corrective services and probation and parole authorities, then administers the punishment/sentence imposed by the court.

These concepts are again fundamental aspects of our present criminal justice system.

## **Facts & figures**

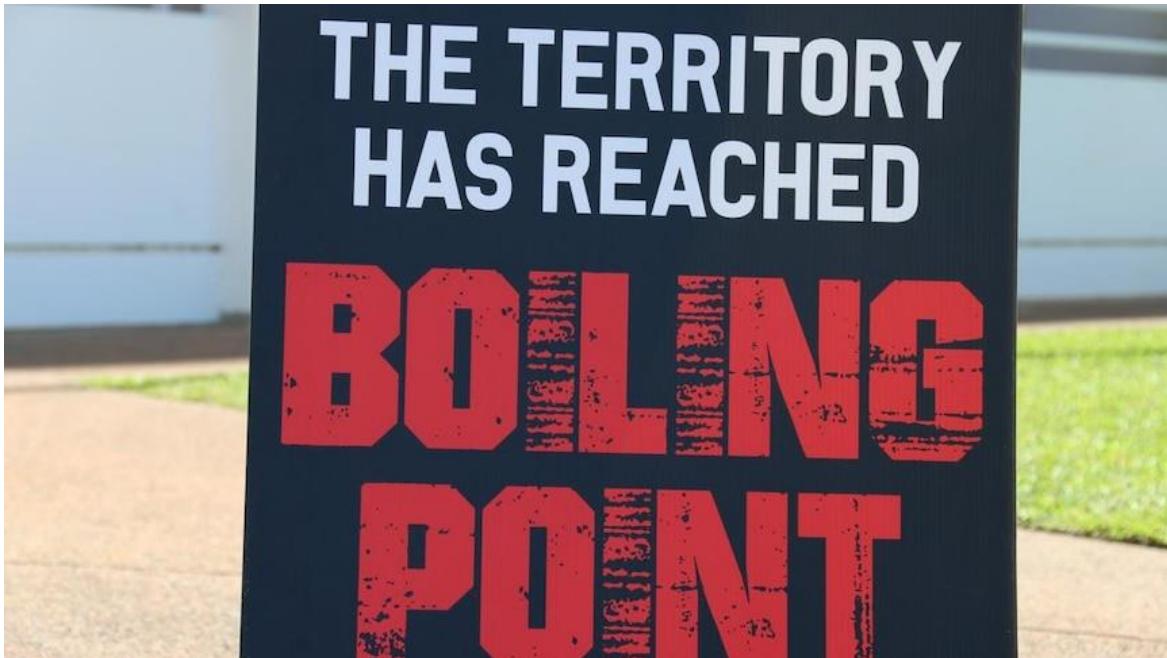
With that basic theoretical conceptualisation of our traditional system of criminal justice, we can move on to an analysis of some of the key measures that should inform the law and order debate and the complex issues of crime, punishment and rehabilitation.

It seems that almost every day there is another news article in the media declaring that we are in the midst of a crime wave, whether it be a drug crime wave, an organised crime wave or a youth crime wave. The latter being a particularly politically sensitive issue.

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<sup>2</sup> Jon'a Meyer, 'retributive justice', *Encyclopedia Britannica* (online encyclopedia, 12 September 2014) <<https://www.britannica.com/topic/retributive-justice>>.

<sup>3</sup> Alec Walen, 'Retributive Justice' *The Stanford Encyclopedia of Philosophy* (online encyclopedia, Winter 2023) <<https://plato.stanford.edu/archives/win2023/entries/justice-retributive/>>.



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Given the proposition that the criminal justice system should look to evidence-based approaches to dealing with crime, rehabilitation and recidivism, it is essential that we test any assumptions or perceptions that underpin the “crime wave” argument by examining relevant, authoritative facts and figures.

I was particularly interested in this aspect of the debate when conducting the research for this address. Before I started, I did a bit of an experiment. Without checking the statistics, I considered my general beliefs or opinions in respect of the recent trends for three matters:

- (1) Whether the crime rate was increasing, decreasing or remaining constant?
- (2) Whether the incarceration rate, increasing, decreasing or remaining constant?
- (3) Whether the recidivism rate was increasing, decreasing or remaining constant?

My initial opinions were:

- (1) That the crime rate has increased.
- (2) That the incarceration rate has increased.
- (3) That the recidivism rate has remained constant.

I then went to the statistics to see if my opinions were supported by the data.

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<sup>4</sup> Jack Hislop, 'Is crime in the Northern Territory getting worse? We tracked crime rates over 10 years', *Australian Broadcasting Commission*, (online, 2 August 2023) <[www.abc.net.au/news/2023-08-02/nt-crime-police-data-assault-domestic-violence-proeprty-offences/102663284](http://www.abc.net.au/news/2023-08-02/nt-crime-police-data-assault-domestic-violence-proeprty-offences/102663284)>.

### ***Are crime rates increasing or decreasing?***

The first figures to consider are the “Recorded Crime” statistics kept by the Australian Bureau of Statistics, (the ‘ABS’).

#### *Recorded Crime*

It should of course be noted that it is not possible to collate a complete, reliable set of statistics that record the number of crimes that are committed in any given period of time. Crimes may be committed even if they are not reported. Alleged crimes that are reported may not ultimately be proven as an offence committed by the supposed perpetrator of the alleged crime.

However, the ABS ‘Recorded Crime’ statistics do at least provide reliable and verifiable data which may be used to identify the incidence of crime in the community – and hence may be used as a proxy measure of the crime rate.

These statistics are about the numbers of offenders (perhaps the ABS should stipulate that they are in respect of ‘alleged offenders’) proceeded against by police in a given year.

According to the latest data published by the ABS, in 2022-2023 there was a decrease in the number of offenders proceeded against by police. The total number of 347,742 offenders that were subjected to police action in that period – was down by 6% from 2021–22, to the lowest number since the relevant time series began in 2008-2009.

Whilst that might suggest that there has been a decrease in the incidence of crime, the ABS also noted that even though there had been an overall decrease in the number of offenders, most offence categories showed increases on the previous year. The overall decrease was said to be attributable to a marked reduction in the category of miscellaneous offences, (down 82% or 49,975 offenders), which, in 2021–22, were predominantly fines issued for COVID-19 related offences.<sup>5</sup>

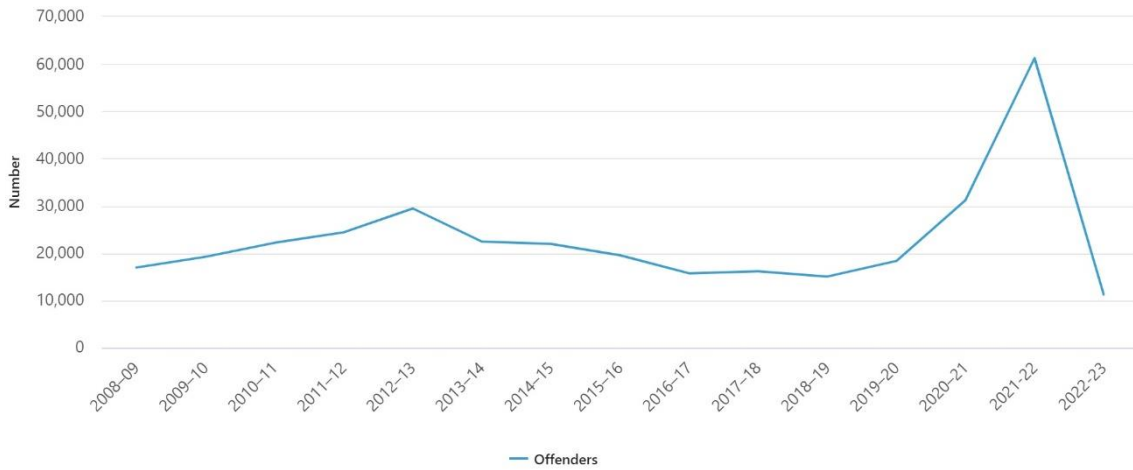
This anomaly in the overall figures can be demonstrated by comparing two graphs, showing the recorded yearly statistics over time.

The first graph is in respect of the miscellaneous offences, showing the 2021-2022 spike and a corresponding rapid decrease in 2022-2023:

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<sup>5</sup> Australian Bureau of Statistics, *Recorded Crime - Offenders, 2022-23 financial year* (Catalogue No 4519.0, 8 February 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#cite-window1>>.

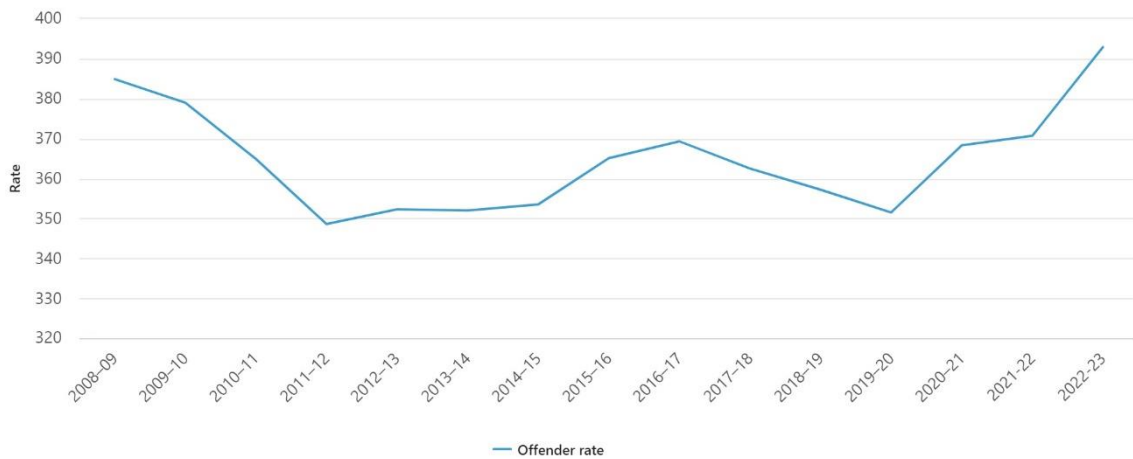
Offenders, principal offence of miscellaneous offences



Source: Australian Bureau of Statistics, Recorded Crime - Offenders 2022-23 financial year

The second graph is for the offender rate for offences involving acts intended to cause injury, showing an increase to the highest level since the time series began:

Offender rate(a), principal offence of acts intended to cause injury



(a) Rate per 100,000 persons aged 10 years and over

Source: Australian Bureau of Statistics, Recorded Crime - Offenders 2022-23 financial year

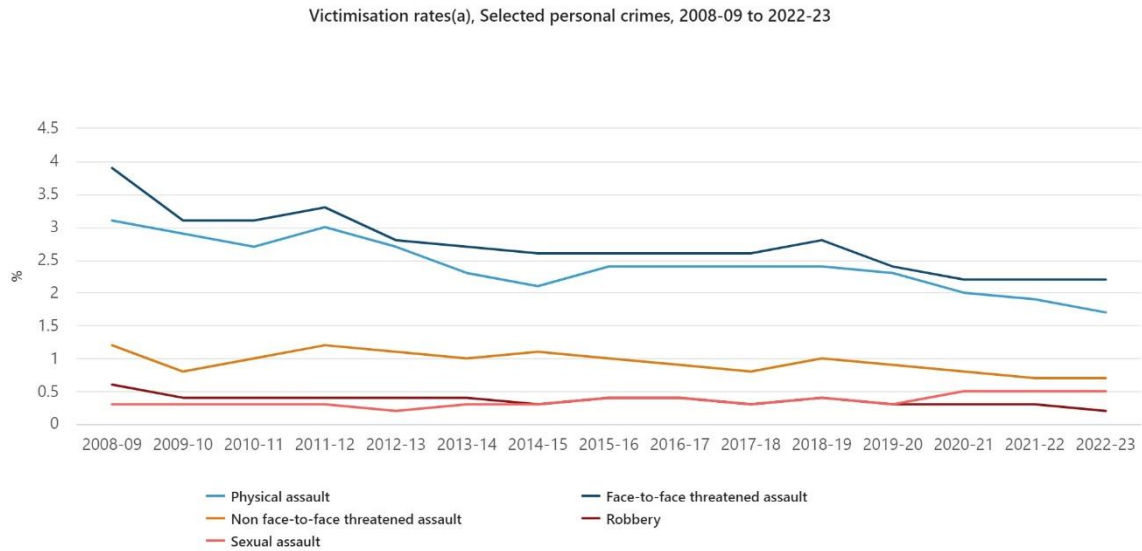
### Crime Victimization

Another set of figures which perhaps gives a more accurate picture of the levels of crime in Australia is the ABS' 'Crime Victimization' statistics. According to those figures, in the 2022-2023 period 4.0% of the population aged 15 years and over (833,600) was a victim



of one or more of the personal crimes of physical assault, threatened assault, robbery, or sexual assault.

However, as the following graph shows, for all offences but sexual assault, the victimisation rate has actually decreased since the start of the recorded data set in 2008-2009:



a. Victimisation rate refers to the total number of persons aged 15 years and over who experienced a crime type in the last 12 months, expressed as a percentage of all persons aged 15 years and over (18 years and over for sexual assault).

Source: Australian Bureau of Statistics, Crime Victimization, Australia 2022-23 financial year

### State/Territory data

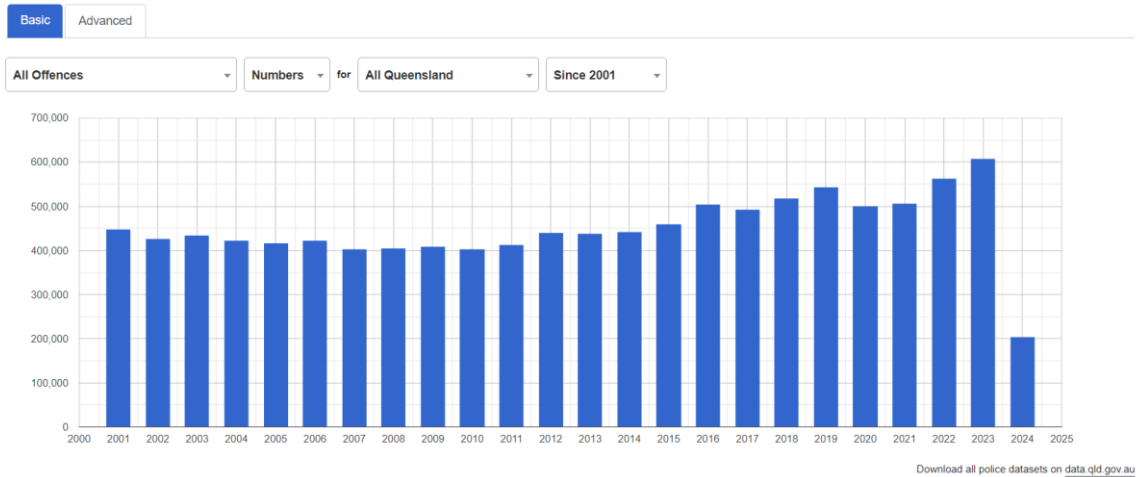
The graph of the last set of statistics seems pretty clear. However, as Homer Simpson famously said:

*“Oh, people can come up with statistics to prove anything, Kent. 14% of people know that.”*

So, with that in mind, I looked at the statistics for Queensland published by the Queensland Police Service. They show a quite different picture, with more definite increases in the ‘crime statistics’ for the total number of crimes in recent years:<sup>6</sup>

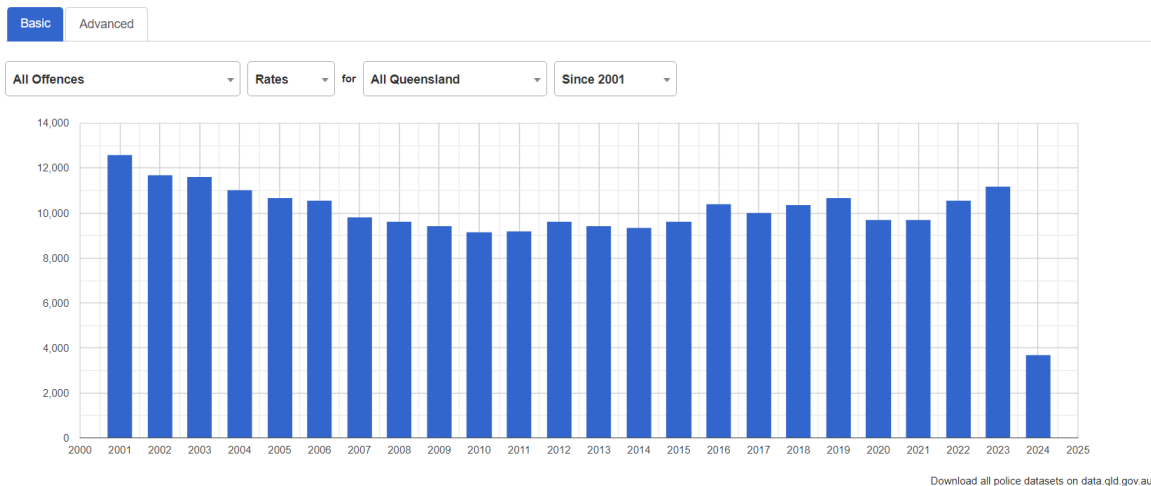
<sup>6</sup> Queensland Government, ‘Queensland Crime Statistics’ *myPolice Queensland Police News* (Police dataset) < <https://mypolice.qld.gov.au/queensland-crime-statistics/>>.

## Queensland Crime Statistics



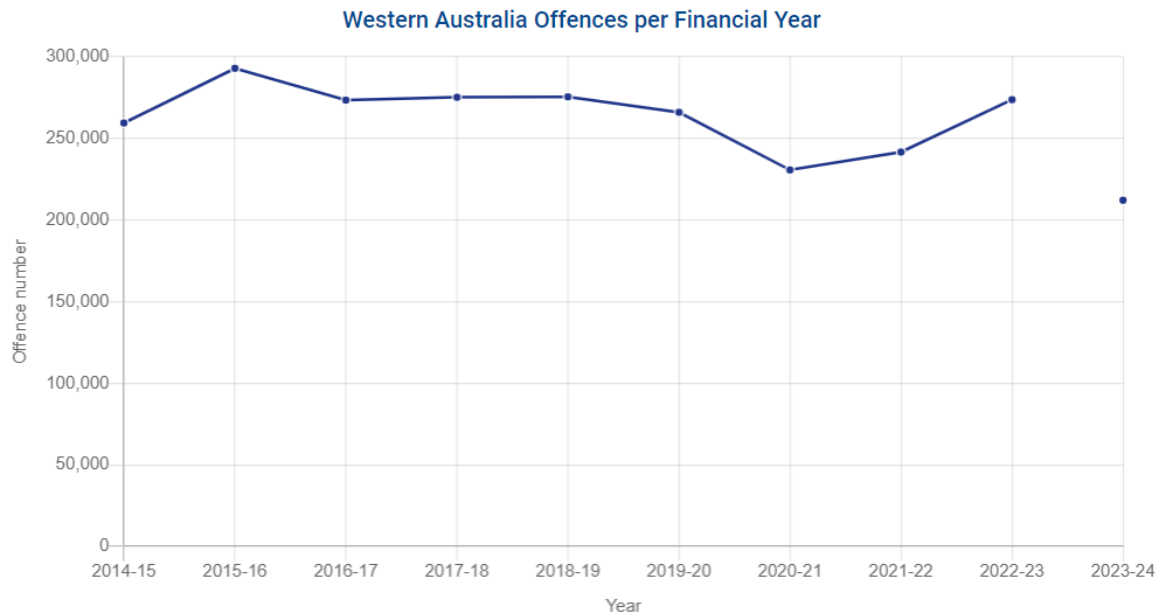
The media reported on these figures - with 7 News leading its television news with the statement that “Shocking new figures reveal the true extent of Queensland’s crime crisis” and claiming that the statistics revealed (not inaccurately) that around 50,000 offences were committed each month in the last year.

But what they did not report on were the QPS statistics for crime rates, which seem to correspond with what can be seen in the ABS statistics – there is a recent increase, but the rate is currently lower than it was when the data series commenced:



A somewhat similar position with respect to offence numbers appears in the data published by the Western Australia Police Force:<sup>7</sup>

<sup>7</sup> Government of Western Australia, ‘Crime in Western Australia’ *Western Australia Police Force* (WA Police Force Incident Management System, 3 May 2024) < [https://www.police.wa.gov.au/Crime/CrimeStatistics#/>](https://www.police.wa.gov.au/Crime/CrimeStatistics#/).



I was unable to find similar data to show for the Northern Territory on the official government websites – the recorded crime figures are updated monthly, split across geographical locations and offence types. However, I did find some interesting tables prepared by the Australian Broadcasting Commission for a story they reported last year,<sup>8</sup> charting the recorded numbers for five key offence types over the past 10 years.

According to their tables.

<sup>8</sup> Jack Hislop, 'Is crime in the Northern Territory getting worse? We tracked crime rates over 10 years', *Australian Broadcasting Commission*, (online, 2 August 2023) <[www.abc.net.au/news/2023-08-02/nt-crime-police-data-assault-domestic-violence-proeprty-offences/102663284](http://www.abc.net.au/news/2023-08-02/nt-crime-police-data-assault-domestic-violence-proeprty-offences/102663284)>.

The number of assaults increased significantly:

## Assaults

Assaults quarterly statistics - June 2013 to March 2023

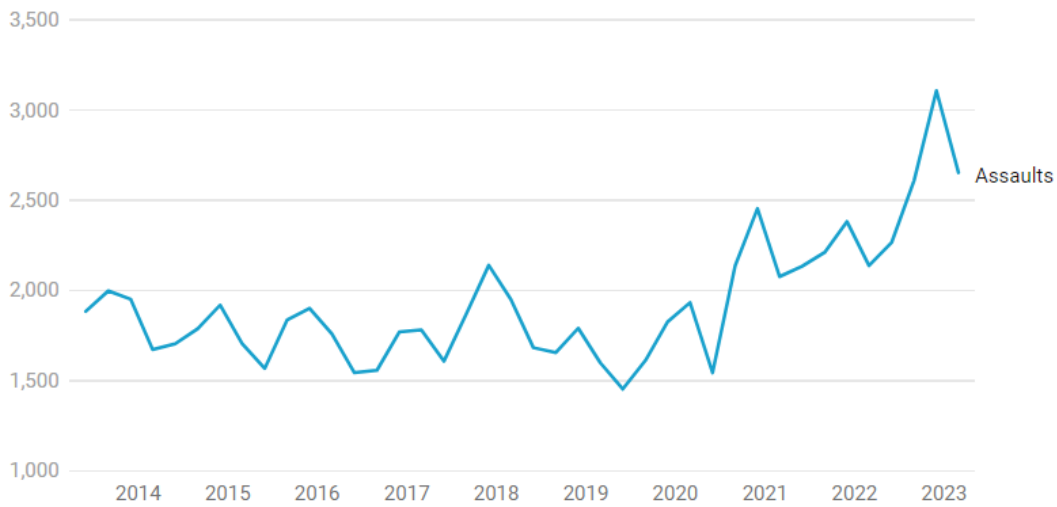


Chart: ABC News • Source: NT Police • [Get the data](#) • Created with [Datawrapper](#)

So too did the number of property offences:

## Property offences

Property offences quarterly statistics - June 2013 to March 2023

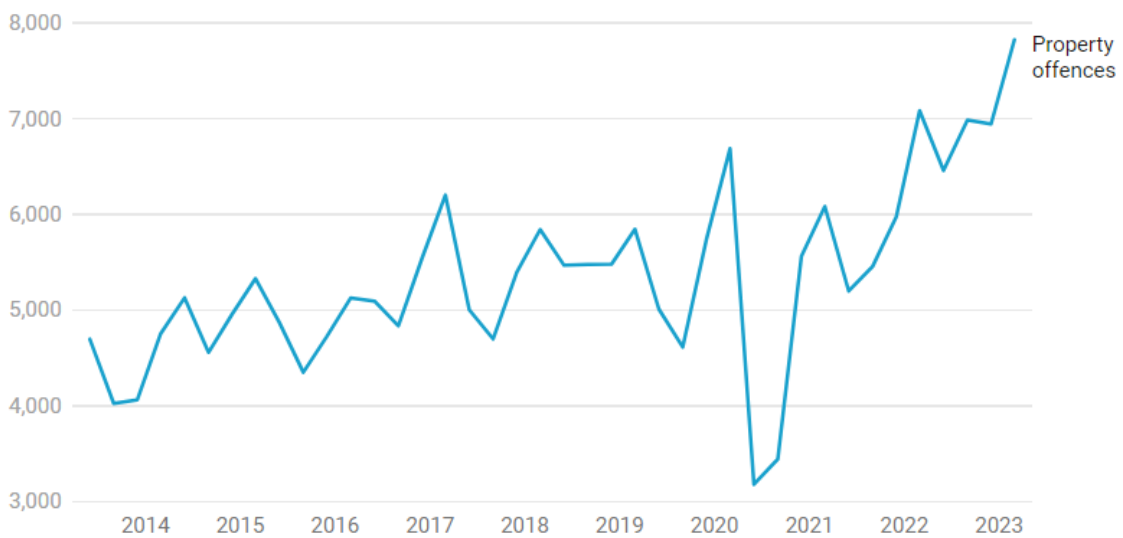


Chart: NT Police • Source: NT Police • [Get the data](#) • Created with [Datawrapper](#)

There was a particularly marked increase in the number of domestic violence offences:

## Domestic violence

Domestic violence assaults quarterly statistics - June 2013 to March 2023

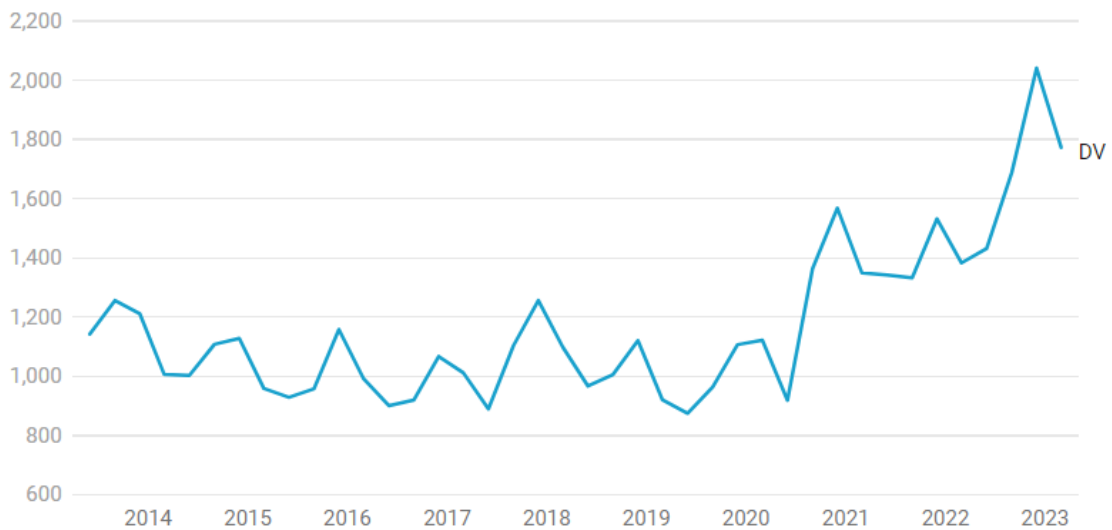


Chart: ABC News • Source: NT Police • [Get the data](#) • Created with [Datawrapper](#)

But the number of homicides had decreased (albeit the numbers are small):

## Homicide

Homicide quarterly statistics - June 2013 to March 2023

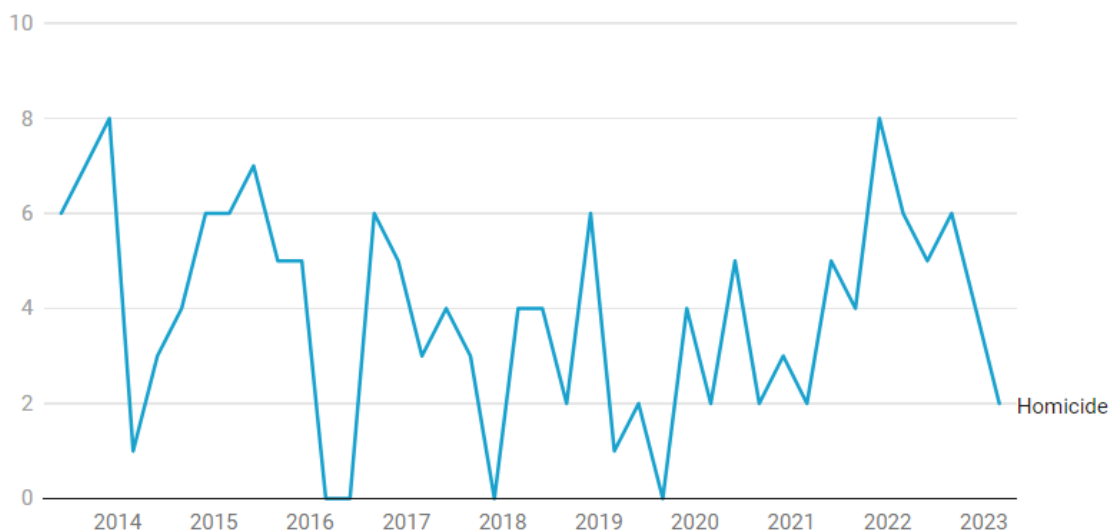


Chart: ABC News • Source: NT Police • [Get the data](#) • Created with [Datawrapper](#)

And the number of sexual assaults had fluctuated over time, being higher now but less than the earlier peak in around 2017:

## Sexual assaults

Sexual assaults quarterly statistics - June 2013 to March 2023

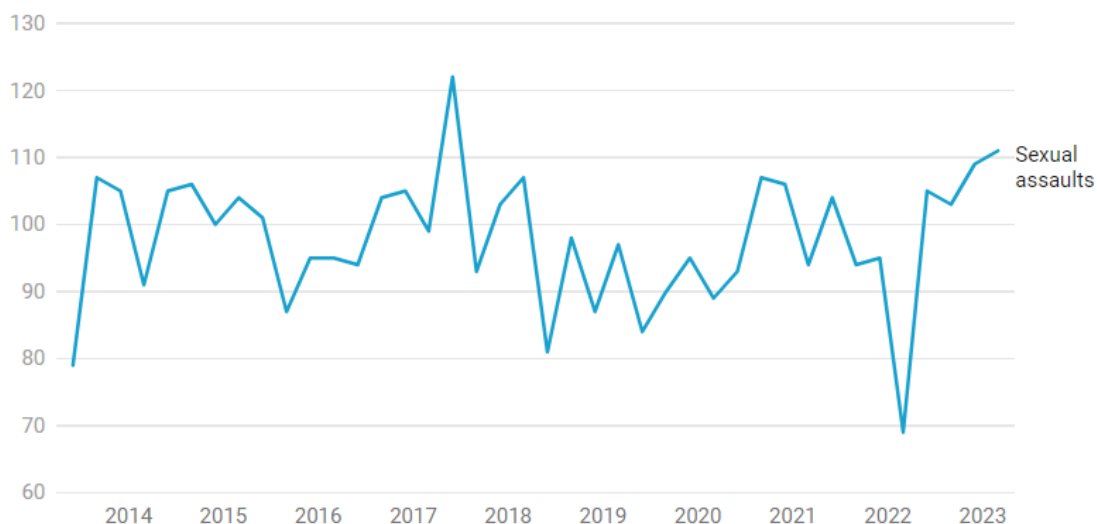


Chart: ABC News • Source: NT Police • [Get the data](#) • Created with [Datawrapper](#)

### Youth crime

As a sub-category, youth crime has once again become a focal point for those who argue that crime rates are soaring and that governments and the judiciary are soft on crime. Hardly a day goes by at the moment without the media decrying the “slap on the wrist” sentences handed “out by out of touch” magistrates and judges and calling for action – usually in the form of refusal of bail for alleged offenders and tougher sentences for young people who have committed crimes.

And action is indeed being taken. On 12 February this year, the NT government officially announced it would undertake another review of the youth justice system in the Territory.<sup>9</sup> The Department of the Chief Minister and Cabinet’s website says: ‘In a significant move towards ensuring a contemporary, effective, and compassionate approach to youth justice, the Northern Territory (NT) Government has initiated a review of the youth justice system noting the reform that has taken place over recent years.’ The final report, with findings and recommendations, is due by 30 November 2024.

I note with interest that the next Territory Election is to be held on 24 August 2024.

<sup>9</sup> A previous review was conducted in 2011.

Then there has been the recent turmoil in Alice Springs. In response to calls from the media and some in the local community to take urgent action to address an apparent surge in youth crime, a three-week curfew was imposed on the town (27 March to 16 April). The curfew meant that residents under the age of 18 were not allowed to enter the CBD area between 6pm and 6am. The local mayor and the NT government hailed it as a great success. But to what end and by what measure? A temporary influx of police, visibly patrolling the streets for three weeks to enforce a curfew for young people might provide a momentary 'circuit-breaker' but is hardly likely to do much to address the real causes of crime in that community (or any other).

So, what do the statistics actually show about the rates of youth crime?

The latest ABS statistics recorded that in 2022–23, there were 48,014 offenders aged between 10 and 17 years proceeded against by police, an increase of 6% (2,804 offenders) from 2021–22.<sup>10</sup> After accounting for population growth, the youth offender rate also increased from 1,778 to 1,847 offenders per 100,000 persons aged between 10 and 17 years. This was the first increase in the rate of youth offending since 2009–10.<sup>11</sup>

Until these recent figures, the trend has actually been falling youth crime rates across most Australian jurisdictions over the past decade or more.<sup>12</sup>

In terms of repeat offenders, the ABS figures also show that in most states and territories that around one third of youth offenders were proceeded against by police more than once in 2022-2023. Victoria had the lowest percentage at 27% and NT had the highest at 53%.

### Comparison of offender rates across states/territories

One final graph that is of interest for crime rates, is this one that shows a comparison of the offender rate between states/territories for the 2021-2022 year, based on ABS data:

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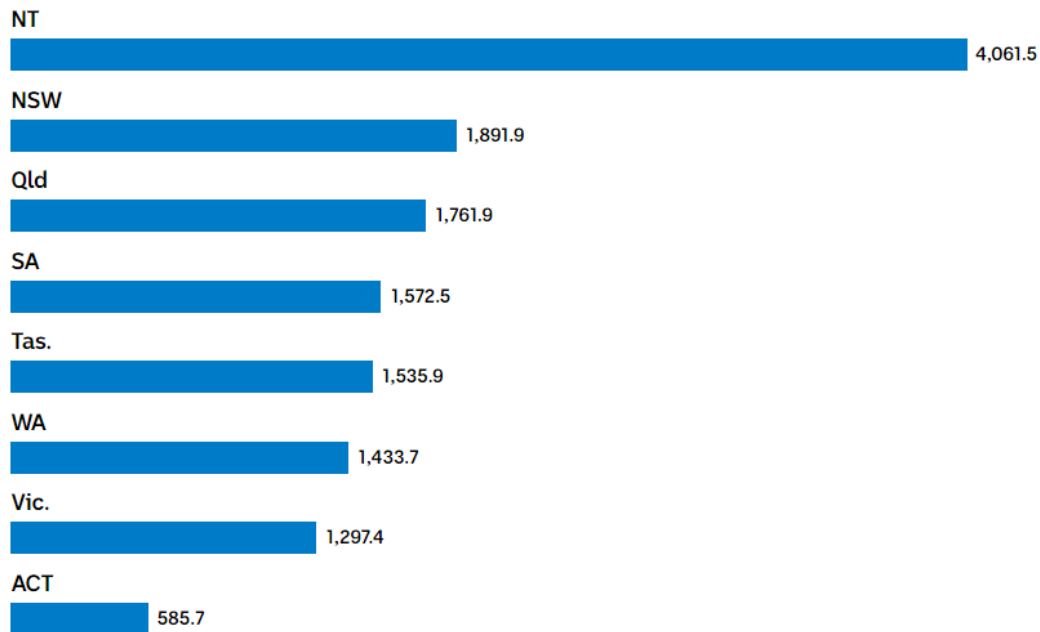
<sup>10</sup> Australian Bureau of Statistics, *Recorded Crime - Offenders, 2022-23 financial year* (Catalogue No 4519.0, 8 February 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#cite-window1>>.

<sup>11</sup> Australian Bureau of Statistics, *Recorded Crime - Offenders, 2022-23 financial year* (Catalogue No 4519.0, 8 February 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#cite-window1>>.

<sup>12</sup> Garner Clancey, Cindy Wang and Brenda Lin, 'Youth justice in Australia: Themes from recent inquiries' (Trends & issues in crime and criminal justice series No 605, Australian Institute of Criminology, October 2024), 2.

## Offender rate by state, 2021-22

The number of offenders per 100,000 population during the 2022 financial year



Source: Australian Bureau of Statistics / [Get the data](#)

The graph shows NT has the highest rate by far and ACT has the lowest. And this has been a consistent state of affairs for many years.

### Conclusion on the crime rate

Although there are limitations on accurately measuring the incidence of crime in the community and it is not entirely borne out by the available statistics, the recorded information may allow us to conclude that there has been a slight increase in rates of crime in recent times, however crime rates are not “soaring”. Whilst there may have been an increase in the incidence of some crime types and the rates in particular jurisdictions and some cohorts may have experienced greater recent increases, the longer-term trend overall has been a falling crime rate.

### The perception of increasing crime rates

So, if crime rates are not soaring, why does it seem that is the case? The answer is that it is all a matter of perception.



The perception of crime does not accurately reflect the reality of the level of crime that occurs in the community. This discrepancy is particularly apparent in the public's concern regarding a perceived increase in crime amidst the reality of declining crime rates.<sup>13</sup>

Past studies have shown a substantial proportion of the Australian population incorrectly believe crime rates are increasing when, in fact, they are stable or declining.<sup>14</sup>

Researchers in this area have identified several widely held but inaccurate 'common sense' assumptions about crime that underpin the beliefs held by a significant proportion of the Australian population, such as:<sup>15</sup>

- crime rates are at an all-time high – we currently live in a society characterised by unprecedented levels of crime
- more police officers with more police powers and tougher penalties on offenders are needed to combat the crime problem.

In large measure it is the media that is responsible for creating, maintaining and fuelling these perceptions, particularly through its constant news cycle focusing on violent and sexual crimes, at the expense of reporting on, and stimulating, wider debates on the causes of crime and crime prevention.<sup>16</sup>

While sensationalized reporting may capture audience interest, it can also distort perceptions of crime rates and types, leading to an exaggerated sense of fear and insecurity among the public. Furthermore, the representation of certain demographic groups in media coverage of crime can reinforce stereotypes and biases, perpetuating stigmatisation and discrimination.

Few people are the direct victims of crime in the community (around 4% was the figure I cited earlier). The majority of the public's knowledge about crime and justice is derived from the media.<sup>17</sup> For most people, their 'experiences' of crime are vicarious and often

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<sup>13</sup> Brent Davis and Kym Dossetor, '(Mis)perceptions of crime in Australia' (Trends & issues in crime and criminal justice series No 396, Australian Institute of Criminology, 1 July 2010) 1.

<sup>14</sup> Don Weatherburn and David Indermaur, 'Public Perceptions of Crime Trends in New South Wales and Western Australia' (Crime and Justice Bulletin No. 80, NSW Bureau of Crime Statistics and Research, March 2004) 7.

<sup>15</sup> Russell Hogg And David Brown, *Rethinking Law & Order* (Pluto Press, 1998).

<sup>16</sup> Derek Chadee and Jason Ditton, 'Fear of crime and the media: Assessing the lack of relationship', (2005) 1(3) *Crime Media Culture*, 322, 324.

<sup>17</sup> Aditi Anand and Mohini Taneja, 'The Influence of Media on Public Perception of Crime', (2004) 6(2) *International Journal for Multidisciplinary Research*, 1.

encountered more as entertainment or agenda driven opinion rather than as news or information provided for the public benefit.

Social media has of course added a new, and pervasive, dimension to the influence of media on public perceptions of crime. Ubiquitous platforms such as Twitter (X), Facebook, Youtube and Instagram allow for the rapid dissemination of news and information as well as the amplification of diverse voices and perspectives. But with the good comes the bad. Social media allows misinformation and disinformation to spread like a virus. Fake news is reported as real news. Generative AI is replacing reality and with it making the truth a subjective state of mind rather than objectively verifiable fact.<sup>18</sup>

All of this results in substantial misperceptions of crime among the general public. And this can be detrimental for society as it negatively affects public attitudes, policy making, and societal dynamics. Biased sensationalised reporting fuels the types of punitive responses that prioritize punishment over prevention or rehabilitation, perpetuating cycles of crimes and incarceration.

Governments come under considerable pressure to increase spending on law and order and get 'tough on crime' (or tougher) when the public believes crime is rising. And of course, it is axiomatic that governments that prioritise spending on such issues to appease the public, inevitably have fewer funds to spend on other important public services, such as hospitals, schools and roads. In the end, public misperceptions about crime rates are inimical to the public interest.

It is these types of misperceptions that lead to the 'knee-jerk' decisions and public policies of the executive government and ill-conceived legislative amendments by parliament. We are all well aware that public perceptions of crime and of criminal justice can have an important influence on policy decisions relating to policing and law enforcement, bail and sentencing.

But rather than exercising caution and taking an evidence-based approach to properly assess and address the issues of concern to the public or to dispel the myths and misperceptions through informed discussion, debate and decision making, policy makers and politicians are all too often motivated by self-interest and political survival when it comes to dealing with the causes of crime. Preoccupation with short-term popularity at the expense of long-term solutions, particularly when an election is in sight, lead to politically expedient and reactive policies and laws that are held up to the public as an answer to their concerns. Unfortunately, many responses by government to the serious issues of crime in

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<sup>18</sup> Aditi Anand and Mohini Taneja, 'The Influence of Media on Public Perception of Crime', (2004) 6(2) *International Journal for Multidisciplinary Research*, 1.

our communities are superficial, designed to assuage the public's perceptions by creating new perceptions that they are tough on crime and are taking steps to make the community safer.

It is through these machinations that public misperceptions about crime ultimately influence the workings of the criminal justice system.<sup>19</sup>

### ***Are incarceration rates increasing or decreasing?***

So, what then is the position with respect to the evidence of incarceration rates?

#### *Persons in custody*

The latest ABS statistics on the number of prisoners in jails across Australia confirm the trend of increasing incarceration rates and a ballooning prison population.<sup>20</sup>

The key statistics show:<sup>21</sup>

- 42,274 persons were in custody in the December quarter of 2023, stable since the September quarter 2023.
- There were 16,131 unsentenced prisoners (~38%), stable for the quarter.
- 81,760 persons were serving community-based corrections (CBC) orders, up 1% (412 persons) from the September quarter 2023.

The ABS statistics show a small increase in the recent average number of persons in custody. The rate peaked in early 2020 and between December 2018 and December 2023 there has actually been a slight overall decrease.<sup>22</sup>

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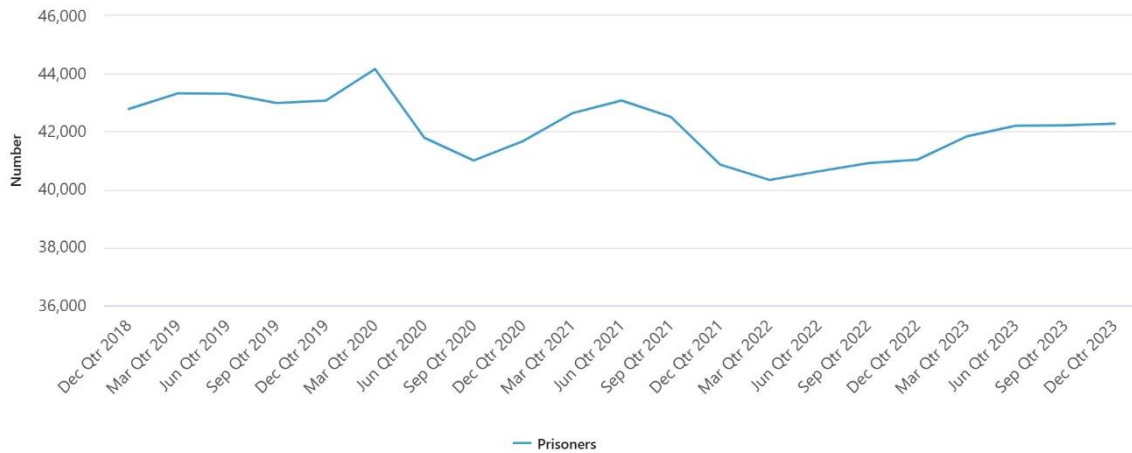
<sup>19</sup> Murray Lee, *Inventing Fear of Crime: Criminology and the Politics of Anxiety* (Willan, 2007).

<sup>20</sup> Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 21 January 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2023>>.

<sup>21</sup> Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue No 4512.0, 14 March 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>>.

<sup>22</sup> Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue No 4512.0, 14 March 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>>.

Average number of persons in custody(a), Dec 2018 to Dec 2023



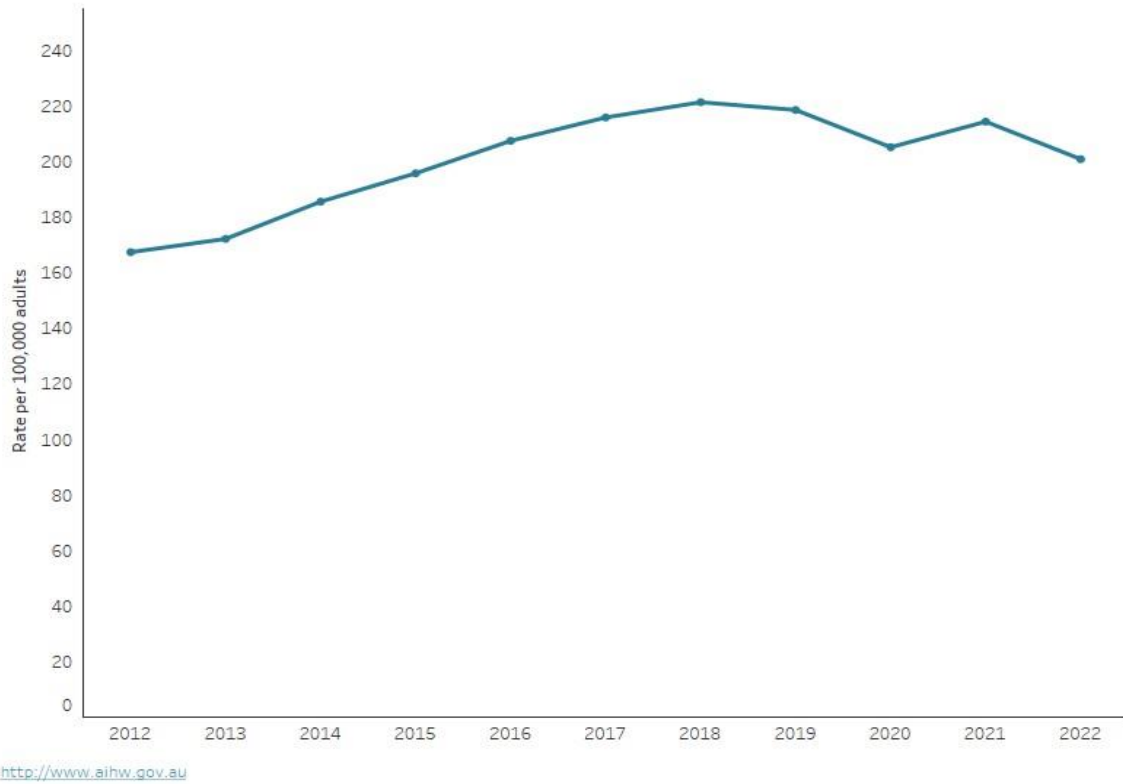
(a) Based on average daily number.

Source: Australian Bureau of Statistics, Corrective Services, Australia December Quarter 2023

However, the numbers are not good. The imprisonment rate for the latest March 2024 quarter is now at 203 persons per 100,000 adult population.

The Australian Institute of Health and Welfare has analysed data over a slightly longer period, which shows an overall increase in the rate over the decade from 2012 to 2022, rising from 167 per 100,000 adult population in 2012 to 201 in 2022, albeit again with a slight reduction in the rate before the recent rise:<sup>23</sup>

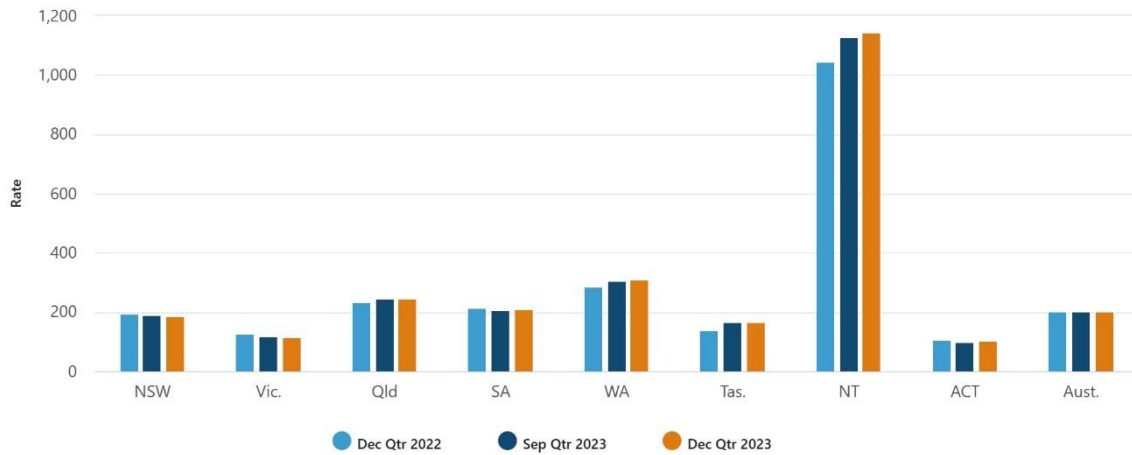
<sup>23</sup> 'Adults in prison', *Australian Institute of Health and Welfare* (Web article, 15 November 2023) < <https://www.aihw.gov.au/reports/australias-welfare/adults-in-prison#australias-prison-population>>.



In terms of the proportion of the adult population, NT has by far the highest average daily numbers of persons in custody, nearly six times the national average, at 1,142.8 per 100,000 adult population:<sup>24</sup>

<sup>24</sup> Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue No 4512.0, 14 March 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>>.

Average daily imprisonment rate(a), By states and territories, Dec 2022, Sep 2023 and Dec 2023



(a) Rate is the number of prisoners per 100,000 adult population. Based on average daily number.

Source: Australian Bureau of Statistics, Corrective Services, Australia December Quarter 2023

### Prisoners on remand

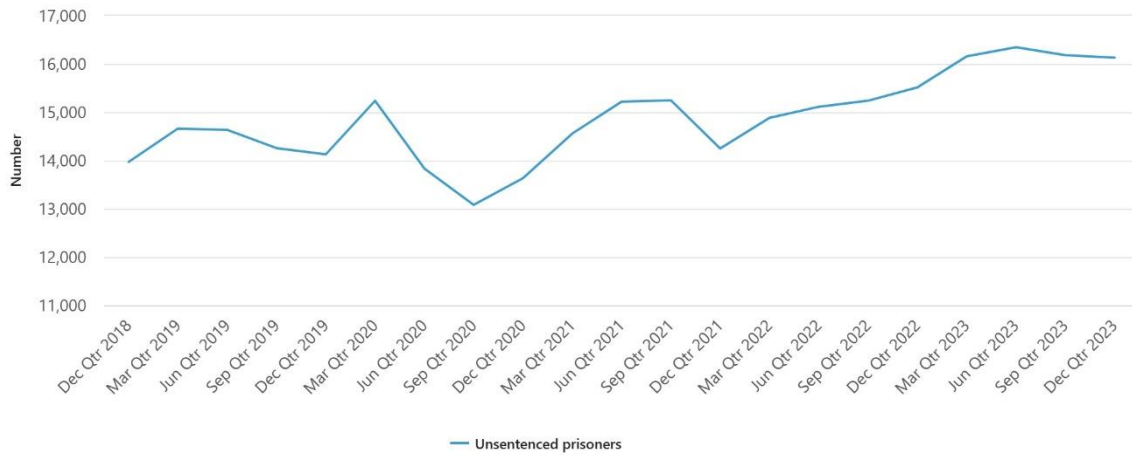
One figure that is definitely increasing is the number of prisoners on remand.

From 30 June 2022 to 30 June 2023 the number of sentenced prisoners increased by 1% (264) to 25,888. However, unsentenced prisoners increased by 7% (1,073) to 15,937. The proportion of prisoners who were unsentenced increased from 37% to 38%. There were increases in total prisoners in Queensland, Western Australia, Tasmania, and the Northern Territory; and decreases in New South Wales, Victoria, South Australia, and the Australian Capital Territory.<sup>25</sup> The latest data confirms the growth trend:<sup>26</sup>

<sup>25</sup> ABS, Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 21 January 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2023>>.

<sup>26</sup> Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue No 4512.0, 14 March 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>>.

Average number of unsentenced prisoners(a), Dec 2018 to Dec 2023



(a) Based on average number on the first day of the month.

Source: Australian Bureau of Statistics, Corrective Services, Australia December Quarter 2023

### Aboriginal and Torres Strait Islander peoples in custody

In terms of Aboriginal and Torres Strait Islander prisoners, the recent figures continue to demonstrate the continued gross over-representation. From 30 June 2022 to 30 June 2023, Aboriginal and Torres Strait Islander prisoners increased by 7% (950) to 13,852.

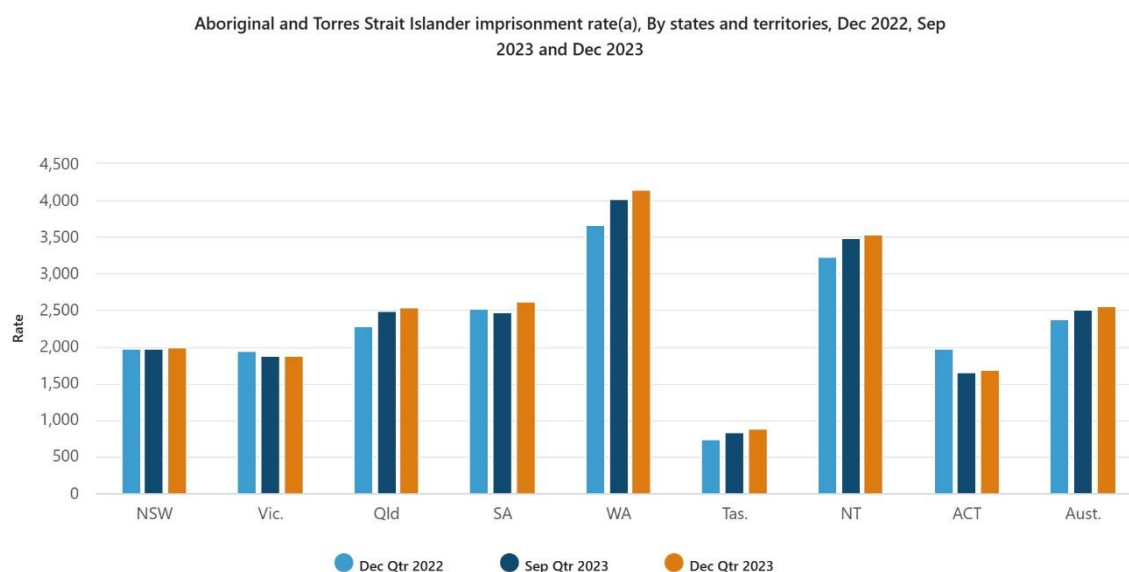
In 1991, the final report of the Royal Commission into Aboriginal Deaths in Custody noted the disproportionate numbers of Aboriginal people in custody, reporting that an analysis of data from 1989 showed that for Australia as a whole the Aboriginal adult imprisonment rate at that time was 1,465 per 100,000 Aboriginal persons in the community aged 17 years and above, while the equivalent rate for non-Aboriginal adults was 97 per 100,000 persons. That meant that there were proportionately 15 times as many Aboriginal people in prison than there were non-Aboriginal people in prison.<sup>27</sup>

The gross disparity in those numbers was one of the many findings that led to the Commission making more than 300 recommendations to bring about a fairer system of justice for Aboriginal and Torres Straits Islander peoples.

Thirty-five years on, the Aboriginal and Torres Strait Islander imprisonment rate is now at **2,549 persons per 100,000** adult Aboriginal and Torres Strait Islander population.

<sup>27</sup> Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991) vol 1, ch 9.3.

The rates were highest in WA, NT and SA respectively.<sup>28</sup>



(a) Rate is the number of prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. Based on average daily number.

Source: Australian Bureau of Statistics, Corrective Services, Australia December Quarter 2023

As of 30 June 2023, Aboriginal and Torres Strait Islander prisoners accounted for 33% of all prisoners, of which 91% (12,540) were male, 9% (1,309) were female and 78% (10,828) had experienced prior adult imprisonment.

The high proportion of Aboriginals and Torres Strait Islanders within the total prison population is in stark contrast to the relatively small proportion that Indigenous people comprise of the total Australian population – which, as at the last Census date of 30 June 2021, was just 3.8%.<sup>29</sup> The largest populations of Aboriginal people were in NSW, Qld and WA. However, the Northern Territory has the highest proportion of Aboriginal and Torres Strait Islander people relative to its total population size, at 30.8%.

### Young people

According to the last numbers compiled by the AIHW, on an average night in the June quarter 2023, 812 young Australians aged 10 and over were in detention because of their

<sup>28</sup> Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue No 4512.0, 14 March 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>>.

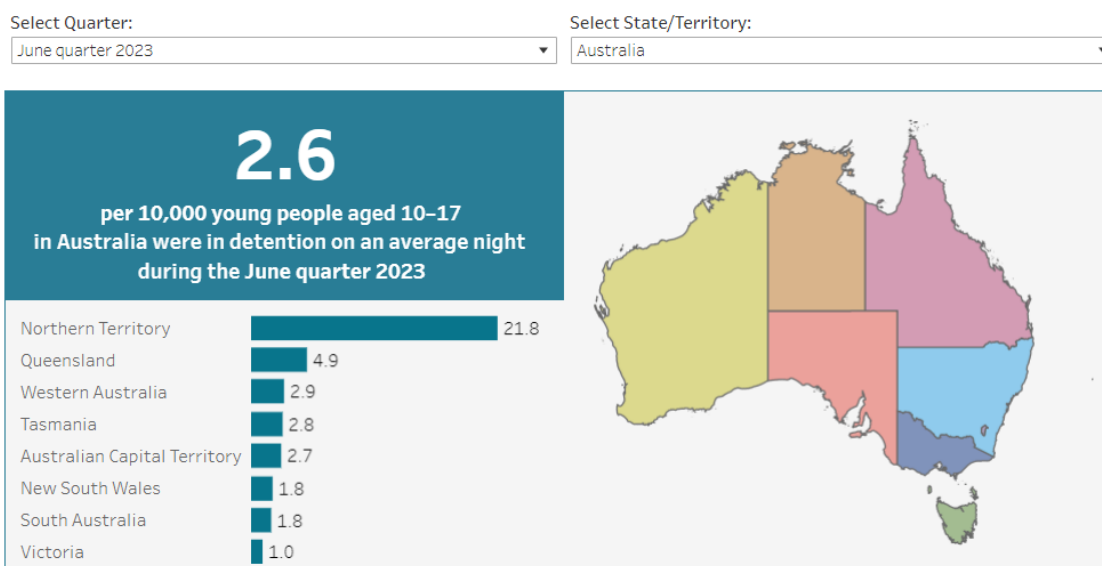
<sup>29</sup> Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2023) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/30-june-2021>>.



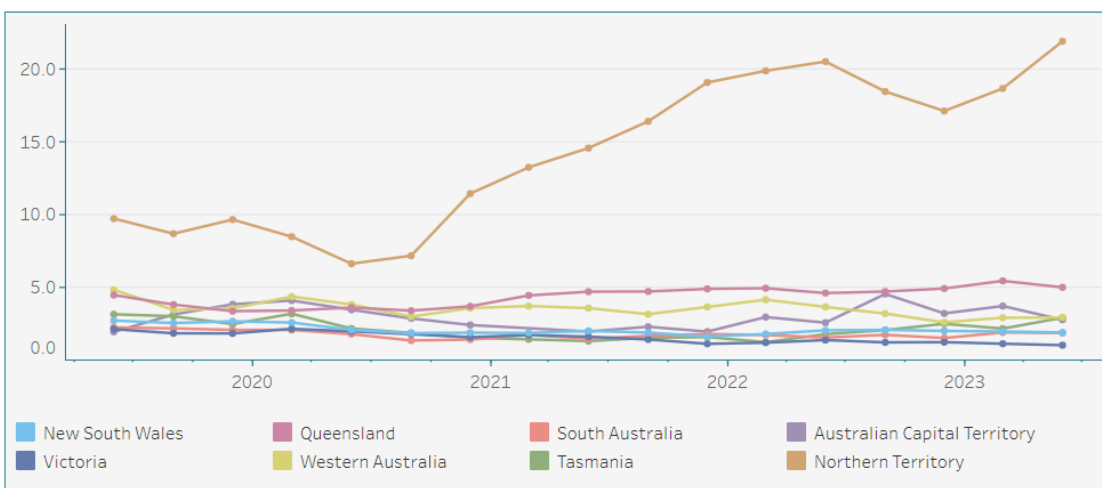
involvement, or alleged involvement, in criminal activity.<sup>30</sup> The number of young people in detention has however fallen, down from a high of 941 in the June quarter 2019.

Over the past four years of recording the data, the NT has consistently had the highest average rates of young people in detention and the rate is rising:

**Figure 2: Rates of young people in detention on an average night in Australia**



June quarter 2019 to June quarter 2023



Source: AIHW 2023. Youth detention population in Australia 2023  
<https://www.aihw.gov.au>

<sup>30</sup> 'Youth detention population in Australia 2023, *Australian Institute of Health and Welfare* (Web report, 13 December 2023) < <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/about>>.

In terms of sheer numbers however, in the June quarter 2023, Queensland had the highest average number of young people in detention on an average night – 306, with WA 96 and NT 58 behind larger states of NSW (186) and Victoria (100).

Almost 4 in 5 (77%) young people in detention on an average night in the March quarter 2023 were unsentenced – still awaiting their initial court appearance or sentencing.<sup>31</sup>

### Indigenous youth

The appalling rates of over-representation of Aboriginal and Torres Strait Islander peoples in custody are even worse when it comes to young people.

Young people are most likely to be in detention if they are male, aged between 14 and 17 and are Aboriginal or Torres Strait Islander.

Of that total number of 812 children aged 10 years and over in detention on an average night in the June quarter 2023, 478 were First Nations young people. Of all young people aged 10–17 in detention during this period, 3 in 5 (63%, or 436 of 689) were First Nations young people, yet First Nations young people made up just 5.7% of the Australian population aged 10–17.<sup>32</sup>

### Conclusion on the incarceration rate

Although there may have been a slight recent decrease in youth detention numbers, the figures generally show increases in the number of young persons incarcerated, particularly those on remand.

### ***Are recidivism rates increasing or decreasing?***

Perhaps the more important measure when it comes to the effectiveness of the criminal justice system is the rate of recidivism. Recidivism rates (or rates of repeat offending) are often used as a measure of effectiveness of prison systems and post-release offender management programs.

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<sup>31</sup> Australian Institute of Health and Welfare, 13 December 2023, Youth detention population in Australia, <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/summary>, accessed 11 May 2024.

<sup>32</sup> Australian Institute of Health and Welfare, 13 December 2023, Youth detention population in Australia, <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/summary>, accessed 11 May 2024.

So, just how many offenders reoffend after they have been sentenced for committing a crime.

Again, there are difficulties and limitations in measuring the rate of recidivism in the community. One way is to determine the number of people who come back before the courts after being sentenced within a particular period. Another is to measure the percentage of the prison population who have been returned to prison within a certain period. A commonly used time frame is a period of 2 years.

On that measure, according to the most recent figures, across Australia as a whole, 42.5% of prisoners released during 2020-2021 returned to prison within two years (i.e., 2022-2023). The Northern Territory had the highest rate at 58.2%.<sup>33</sup>

Another way to gauge recidivism is to ascertain the percentage of released prisoners who return to corrective services within a given period. This measure captures not only persons who are imprisoned but also those who are placed on other orders requiring them to be supervised by corrective services. The figures show that for the same two-year period, Australia wide 51.5% of prisoners returned to corrective services. In the Northern Territory the figure was 59.6%. Oddly, the highest percentage was in the jurisdiction that also had one of the lowest percentages of prisoners returning to prison within the two-year time frame – ACT with 63.7% and 34.1% respectively.

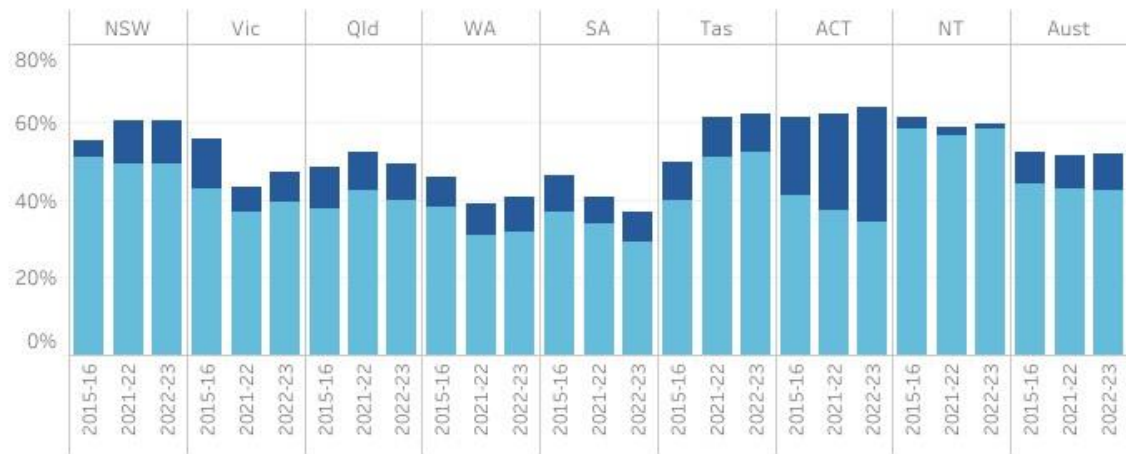
With some variations across states and territories, the recidivism rate in Australia remained roughly the same between 2015-2016 and 2022-2023.

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<sup>33</sup> Productivity Commission (Cth), *Report on Government Services 2023, Part C, Table CA.4* (Report, 2023).

Select year(s):  
 Multiple values: ■ to community corrections only  
■ to prison only or to both prison and community corrections

Figure C.3 Adult offenders released from prison who returned to corrective services within two years of release  
 By jurisdiction, by year



Source: table CA.4

Data tables are referenced above by a 'CA' prefix and all data (footnotes and data sources) is available for download from above (in Excel and CSV format).

On these scales, the recidivism rate seems high. Much higher than we might expect. But how does it compare with other countries. A relatively recent study, which used available data for two-year re-conviction rates for individuals released from prison from different countries, found Australia's rate was the highest (55% for the 2019-2020 year) slightly above the USA (53%) but much higher when compared to the jurisdiction with the lowest rate, Norway (18%) and others such as Singapore (19.1%) and Canada (35%).<sup>34</sup>

### Conclusions on the facts and figures

So, what can we take away from these facts and figures? Apart from concluding that the crime rate in general is not skyrocketing, but that the incarceration rate is climbing, and that rates of reoffending remained fairly constant over nearly the past ten years, the statistics perhaps raise more questions for participants in the criminal justice system than the answers they provide.

<sup>34</sup> Denis Yuhnenko, Leen Farouki and Seena Fazel, 'Criminal recidivism rates globally: A 6-year systematic review update' (2023) 88 *Journal of Criminal Justice*, 3.

What explanation is there for these statistics? What are the reasons or causes for the trends they revealed? How can the criminal justice system respond? Is the criminal justice system adequately equipped to address these issues.

The answers to these questions are not easy. Indeed, there is unlikely to be one simple answer. But one thing that is tolerably clear is that simply escalating tough on crime approaches does not seem to provide the solution to the complex issues of crime in our community.

If that is so, then we must look beyond the political rhetoric and reassess the continued utility of some the fundamental assumptions upon which our criminal justice system is based?

### **Tough on crime policies, laws and approaches**

Law and order policy has become increasingly punitive over time. It has been observed that since the 1980s there has been a shift away from bureaucratic and expert-driven penal policy toward one that is based more on emotions and symbolism. One explanation for this is the rise of 'popular punitivism', which can be defined as the interplay in modern society between the media, public opinion and politicians that generates a backdrop to the formulation and implementation of both criminal justice and penal policy.<sup>35</sup>

Political cycles and the news media play critical roles in law and order policy making. Political parties often seek to appear 'tough on crime' through various announcements and initiatives, most frequently prior to an election. The major political parties routinely promise more money for more police on the beat, greater funding for new 'state of the art' equipment and sophisticated technologies to help fight crime and tougher penalties for recidivist offenders.

It was perhaps no surprise then that when the NT budget was recently handed down, the Chief Minister announced \$570 million would be rolled out over the coming years to better resource the Territory's police and fund the recruitment of 200 new police officers.

Regardless of the particular jurisdiction, tough on crime approaches commonly tend to emphasise similar types of law and justice solutions, such as:

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<sup>35</sup> Stephen Monterosso, 'Punitive Criminal Justice and Policy in Contemporary Society' (2009) 9(1) QUT Law Review 13, 13; Terry Thomas, 'When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender' (2004) 2 *European Journal of Criminal Policy and Research* 338.

- Increasing policing resources
- Providing law enforcement agencies with new powers
- Restricting or removing the right to bail for persons charged with, but not convicted of, alleged offences
- Increasing maximum penalties for certain crimes
- Imposing prescriptive legislative guidelines or principles that must be applied by sentencing courts
- Introducing mandatory sentencing for certain crimes

While having little effect on crime rates, many of these types of policies provide more opportunities for police to interact with and sanction people, increase the likelihood that individuals entering the criminal justice system will receive harsher penalties and the likelihood that people will remain in, or return to, the criminal justice system.<sup>36</sup>

Inevitably, these approaches led to another authoritarian law and order imperative - building more prisons to accommodate the burgeoning prison population. And this compounds the problem. Incarceration rates continue to increase while enormous amounts of public money are spent on prisons, with no tangible improvement in community safety.

Ultimately, almost all of these approaches are based on assumptions, or theories, of crime and human behaviour that have developed over time to become accepted, fundamental principles of our criminal justice system. But are they still valid?

If we wish to see marked reduction in crime rates, reduced incarceration rates and recidivism rates, and ultimately a safer community, should we continue to unquestioningly adopt and endorse these theories and assumptions as the basis for our criminal justice system?

### **Theories on causes of crime**

There is of course no single or simple answer to what causes crime. Crime is a complex phenomenon that can be influenced by a combination of biological, psychological, social, and economic factors.

Some of these factors are related to the individual's personality, thinking patterns, self-esteem, and emotions. Others are related to the individual's circumstances, such as

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<sup>36</sup> Brenda Lin, Brendan Delahunty and Garner Clancey, 'Law and order' policy' in Diana Perch et al (eds), *Australian Politics and Policy* (Sydney University Press, 2024) 1126, 1128.

poverty, neglect, alcohol and drug abuse, and economic distress. The causes of crime may also vary over time and across different contexts.

Various theories have developed within the fields of sociology, criminology and in other disciplines that allow us to examine the causes of crime from different perspectives. We can see these different theories reflected in the types of laws and policies that are developed to address crime.

The major theories can be categorised as either:

- (a) Biological theories, or
- (b) Sociological theories.

### ***Biological theories***

#### *Classical biological theories*

**Classical biological theories** are predicated on the notion that some people are born criminals who cannot be deterred from committing crimes. The root causes of their criminal behaviours are their inherent biological features - such as their genetics, neurology or physical constitution.

Early theories drew influence from Darwin's theory of evolution and natural selection. For instance, the 19<sup>th</sup> century Italian prison psychiatrist, Cesare Lombroso, developed the concept of the 'born criminal' under the influence of both phrenology (the now-defunct study of skull features) and Darwin's ideas. He believed criminals were 'atavistic' - evolutionary throwbacks' whose brains were mal-developed or not fully developed. He theorised that criminals shared a number of common physical features, such as sloping foreheads and receding chins. He even went so far as to suggest that he could identify the types of crimes that an individual would have a propensity to commit – based upon their physical appearance: an expressive face, manual dexterity and small wandering eyes for thieves, cold, glassy stares and bloodshot eyes for murderers, thick lips and protruding ears for sex offenders, and a shorter, more wrinkled appearance with darker hair and smaller skulls for women who would offend.<sup>37</sup>

While Lombroso's work is no longer considered credible, biological theories continue to be developed, aided by modern scientific technologies and learning that enables an

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<sup>37</sup> Elisabeth Brookes, 'Cesare Lombroso: Theory of Crime, Criminal Man, and Atavism', *Simply Psychology* (Web Page, 8 February 2023) <<https://www.simplypsychology.org/lombroso-theory-of-crime-criminal-man-and-atavism.html>>.

individual's inherent physical and physiological attributes to be accurately mapped, measured and assessed.

A major premise of all biological theories is that whether due to mental or physical disability, deficit or impairment, individuals with criminal propensities cannot learn to control themselves. It is thus 'nature' and not 'nurture' that determines an individual's propensity for criminal behaviour.

As a result, persons with inherent biological conditions that manifest in criminal traits or tendencies are not susceptible to rehabilitation and are unable to change their behaviours.

In certain limited instances, biological factors might explain the behaviours of some individuals, such as the actions of psychopaths, but in most instances biological make-up and processes alone do not determine whether a person will have a propensity to engage in crime.

### Biosocial theory

Recognising this, a more modern approach to biological theories of crime is '**biosocial theory**' – which seeks to examine and understand interactions between biological and social factors, rather than purely natural causes. The biosocial theory of crime continues to distinguish itself from sociological theories by focusing on internal factors. It considers the effect of contextual and environmental conditions, but still emphasizes biological influences. It seeks to examine and understand the contributions of both nature and nurture to anti-social behaviour and crime. It underscores the need to consider both biology and social context when understanding criminal tendencies.<sup>38</sup>

Some modern criminologists do consider genetic predispositions (such as testosterone and IQ levels), but they look at the interplay between these factors and a person's social environment rather than focusing on seemingly immutable traits. By foregrounding social factors, these criminologists theorise, we can mitigate risks of criminal behaviour prompted by biological factors.

Policies based on biosocial theory often start at the root of the problem. An example are policies designed to educate expectant parents-to-be in high-risk categories (such as single parents, teenagers and low-income individuals) to avoid circumstances that might impede healthy child development eg. drinking alcohol whilst pregnant can irreparably harm a child – such as by causing Foetal Alcohol Spectrum Disorder.

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<sup>38</sup> Kevin Beaver and Anthony Walsh, *Biosocial Theories of Crime* (Routledge, 1<sup>st</sup> ed, 2010).



## ***Sociological theories***

Sociological theories argue that society shapes the circumstances in which criminal activity occurs. Rather than focusing on the individual, crime is explained in terms of the social environment - society influences people to commit crimes. There are numerous such theories. I will briefly highlight a couple.

### **Strain theory**

One major sociological theory is **strain theory**, which suggests that people engage in crime when they experience strain or stress, caused by a person's inability or failure to achieve the cultural goals valued by a society, such as wealth, status/respect and autonomy.

This strain between these types of desirable goals and the means to obtain them results in frustration, resentment and despair and places the individual under pressure.

Crime therefore results when there are insufficient legitimate means or opportunities available to achieve these goals. This can happen to people from low-income backgrounds, those who were not well-educated, those who lack social networks and career opportunities, and so on.

According to this theory, an individual's ability to attain socially acceptable goals plays a part in determining whether a person conforms or deviates from societal norms. In a binary system of the 'haves' and the 'have nots' crime is committed by the 'have nots' as a means of getting what they cannot obtain through legitimate, lawful means.

Crime can therefore be addressed through improving an individual's capacity to achieve the desired cultural goals. For example, through programs that provide individuals with greater employment and education opportunities.

### **Social learning theory**

Another major sociological theory is **social learning theory**. The precepts of this theory would be well familiar to all of us without the theoretical explanation.

According to social learning theory, young people learn to engage in anti-social, criminal behaviours in the same way they learn to engage in pro-social, conforming behaviours: through association with or exposure to others. Family, friends and peer groups have an especially large impact on what we learn and how we behave.<sup>39</sup>

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<sup>39</sup> 'Crime Causation: Sociological Theories', *Encyclopedia.com* (Online Encyclopedia, 15 May 2024) < <https://www.encyclopedia.com/law/legal-and-political-magazines/crime-causation-sociological-theories>>.

How many times have we heard the explanations of 'she started hanging out with the wrong crowd' or 'he was led astray'.

According to this theory, individuals are particularly influenced by how other people reward or model behaviour. The theory also posits that because criminal behaviours are learned they therefore can be counteracted by developing a social environment in which criminal behaviour is not normalised.<sup>40</sup>

Social learning theory is most frequently used as the basis for supportive, less punitive programs, particularly those aimed at young people. In the criminal justice system, it is a major premise of the principle of rehabilitation – with support and supervision, individuals can gain insight into the reasons for their offending behaviour, develop positive, pro-social networks and learn positive coping skills to deal with the influence of peers.

#### Social control theory of crime

A related theory is **social control theory**, which sees crime as an outcome of social institutions, such as families, communities or religion, losing control over individuals through the erosion of faith, trust and respect.

This can also include a breakdown of trust in the government and the police.

#### Rational choice theory

That then brings me to '**rational choice theory**', which is the theory most often associated with tough on crime approaches.

The theory originated in the eighteenth century and can be traced back to the ideas of political economist and philosopher Adam Smith, who sought to explain economic forces through the concept of the rational actor motivated by self-interest.

Rational choice theory assumes that an individual makes a choice to commit a crime - arising out of a logical balancing and judgement of cost versus reward. Because of its premise, the theory focuses on punishment as the best means to deter individuals from committing crimes. It assumes that individuals will weigh the potential costs of their behaviour, being the expected punishment they might receive for committing a crime,

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<sup>40</sup> John Boman, Thomas J Mowen and George E Higgins, 'Social Learning, Self-Control, and Offending Specialization and Versatility among Friends' (2019) 44(1) *American journal of criminal justice* 3,

against the potential the rewards they might gain, and if the costs are too high they will decide that it is not worth committing the crime.<sup>41</sup>

It is this type of theory that informs and influences the sentencing purposes of punishment, general deterrence and specific deterrence and those who believe in the adage of 'do the crime, do the time' – or to put it another way to cast it in terms of individual choice – 'if you can't do the time, don't do the crime'.

Rational choice theory appeals to the general public, policy makers and to many persons involved in the criminal justice system because it provides a logical explanation for the causes of crime and places responsibility and blame squarely upon the individual.

But critics argue that rational theory has a major flaw in its basic premise. It assumes a totally rational actor, but humans are never totally rational. A number of factors complicate such a simplistic understanding of crime and human nature, for example:

- Juveniles and young adults have immature brains that are not fully developed to appreciate and comprehend risk and consequences
- Persons with mental health issues or drug and other addictions act impulsively and make irrational decisions because of impaired judgement
- Human beings are generally influenced more by their emotions than logic
- Individuals who commit crimes often lack information or the perspective to make a sound judgement (how many know that the maximum penalty for burglary under the *Criminal Code* (NT) is imprisonment for 14 years and take that into account before deciding to enter a building with the intention of committing an indictable offence)

A further argument against the utility of rational choice theory is the notion that the types of individuals who would be 'scared straight' by the prospect of punishment are already disinclined to commit crimes. Those who are capable of rational thought are the very people who are more likely to obey the law.

### **The traditional criminal justice system**

Whether or not they are clearly articulated and identified as such, the policies and laws that make up our traditional criminal justice system are shaped by these types of theories, or rather the assumptions and rationales (and public perceptions, populist views and political

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<sup>41</sup> 'Major Criminology Theories and How They Affect Policy', *Kent State Online* (Blog Post, 31 October 2018) <<https://onlinedegrees.kent.edu/sociology/criminal-justice/community/criminal-behavior-theories>>.

views) upon which these theories are founded. This is evident at each stage of the three major components of the traditional criminal justice system: the police, the courts and prisons (or corrections).

### ***Policing***

Similar to many other police services in Australia and around the world, the motto of the NT Police is “To serve and protect”. It succinctly embodies the two-fold purpose and function of police – the serve the community by protecting its members from harm that may be caused by crime.

Chiefly, this is done through the crime prevention, detection and disruption and the investigation of crime and the apprehension of alleged offenders who are then brought before the courts to be dealt with according to law.

The strategies and methods by which police achieve/performance these goals are diverse. However, a major component of policing involves deterrence. According to rational choice theory, a heightened risk of detection will deter potential offenders and thereby reduce crime. This is an extension of the idea of general deterrence - the fear of future punishment therefore discourages or deters transgressing of social norms expressed through the law.<sup>42</sup>

And there is some evidence for this, albeit weak. A 2019 study by the NSW Bureau of Crime Statistics and Research (BOCSAR) examined the causal effect of police on crime and arrests after a massive police recruitment campaign in the lead up to the NSW 2003 election whereby total police numbers grew by 7.2% (about 10 additional officers for every Local Area Command). It found that increasing police numbers can reduce crime, predominantly through deterrence but not necessarily through the apprehension of more offenders.<sup>43</sup> There were reductions in property crimes and motor vehicle thefts but no significant reduction in violent crimes. However, the reductions were marginal. The study found that a 1% increase in the size of the police force generated:

- a 0.8% reduction in theft;
- a 1.1% reduction in car theft;
- no convincing reductions in other crimes.

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<sup>42</sup> ‘Understanding deterrence’ (AI Crime Reduction matters No 27, Australian Institute of Criminology, 4 November 2004) 1.

<sup>43</sup> Steve Yeong, ‘The effect of police on crime and arrests: Are police deterring or incapacitating criminals?’ (Crime and Justice Bulletin No 223, NSW Bureau of Crime Statistics and Research, March 2019) 1, 8.

While additional police might keep the streets safe, the reality is the majority of crime occurs in private and is therefore unlikely to be prevented or deterred by additional police.<sup>44</sup> The types of crimes that might be more readily deterred, detected and prevented through police patrols are the more minor street crimes (graffiti, drunk and disorderly behaviour, criminal damage and property crimes) – often committed in public places where police and members of the public interact.

Further although much police work is grounded in the assumption that the threat of detection and ultimate arrest will deter prospective wrongdoers, many criminals act on impulse, without attempting a rational calculation of the risk of apprehension and the value of ill-gotten gains.<sup>45</sup>

Finally, whilst discretion, cautioning and the diversion of offenders from the criminal justice system are police strategies that are sometimes available to police as the means to deal with crime for certain offenders and offences - it must of course again be recognised that crime results from a range of factors, many of which are entirely beyond the ability of police to control – such as socio-economic factors and environmental factors. Yet, police are increasingly called upon, and expected, to respond to an array of social problems—from homelessness and substance misuse to mental health crises, among others—for which they are both under prepared and ill-suited to respond.

### ***Courts - sentencing purposes and objectives***

That then brings me to the next phase of the traditional criminal justice system, the courts.

A principal aspect of the role of courts in the criminal justice system is the sentencing of offenders. As I mentioned earlier, in the retributive model of criminal justice, it is the courts which act with the authority of the state to impose punishment upon those guilty of committing crimes. Our system of criminal justice does not condone vigilantism or people 'taking justice into their own hands.' Only the state has the authority to punish.

It has been argued however, that the sentencing part of the system is 'fundamentally broken' in Australia and that there is no tenable rationale that can justify the 'jarring reality that Australia's imprisonment rate has increased by such an extent over the past three decades, that we are now one of the most punitive developed nations on earth.'<sup>46</sup>

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<sup>44</sup> Peter Grobosky, 'Efficiency and effectiveness in Australian policing' (Trends & issues in crime and criminal justice No 16, Australian Institute of Criminology, December 1988) 3.

<sup>45</sup> Ibid.

<sup>46</sup> Mirko Bagaric, 'Australia's Emerging Incarceration Crisis: Proposed Reforms of the Australian Sentencing System' (Report, Institute of Public Affairs, October 2022) 2.

For those who agree, 'Jailing is failing' is the catch cry (or rather the T-shirt slogan of choice).

Critics of the system suggest that the most pressing and important issue relating to sentencing law and practice is its continued disregard of expert knowledge and empirical evidence. They claim sentencing is the institution where there is the greatest gap between practice and knowledge. While most other social institutions and areas of learning, such as medicine, engineering and education, readily embrace and change their practices in response to new learning that demonstrates more efficient and effective ways of achieving desirable outcomes, that is not the case for sentencing.

Instead, it is argued, the key sentencing policies and practices which are responsible for the 'incarceration crisis' have been implemented and maintained despite extensive research which demonstrates that the system is flawed. Evidence suggests that key sentencing objectives that are invoked to justify heavier penalties, such as general deterrence and specific deterrence, are unattainable, yet they remain central goals of the Australian sentencing system.<sup>47</sup>

Sentencing purposes and principles, both at common law and under each of the various statutory sentencing laws that operate throughout Australia, are generally well-established and understood by those involved in the criminal justice system. They provide consistency and predictability in the sentencing approaches of courts and the outcomes for offenders.

An example of a legislative statement of such sentencing purposes is to be found in s 5(1) of the *Sentencing Act 1995* (NT), which provides 'Sentencing Guidelines' that identify the only purposes for which sentences may be imposed on an (adult) offender, namely:

- a) to punish the offender to an extent or in a way that is just in all the circumstances;
- b) to provide conditions in the court's order that will help the offender to be rehabilitated;
- c) to discourage the offender or other persons from committing the same or a similar offence;
- d) to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;
- e) to protect the Territory community from the offender;
- f) a combination of 2 or more of the purposes referred to in this subsection.

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<sup>47</sup> Ibid, 3.

This statutory prescription of sentencing purposes is similar to that which exists in other Australian jurisdictions.<sup>48</sup>

These sentencing purposes differ in the effects they are intended to achieve. As the plurality observed in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476-477:

... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

Punishment and denunciation are 'backward looking' direct responses to the criminal act. The offender must be punished to an extent and in a way that is just in all the circumstances for what they have done. Retribution and the imposition of an undesirable and tangible consequence are key elements of punishment. At the most basic level – punish is concerned with ensuring that an offender gets their 'just deserts'. Criminal sanctions should be commensurate with the seriousness of the crime – in other words proportionate to the gravity of the offence.

Denunciation is squarely aimed at showing the community's disapproval of the offending conduct. The Court's sentence communicates society's condemnation of the offender's conduct. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator.<sup>49</sup>

Protection of the community seeks to secure a different objective – but perhaps the overarching objective of most, if not all, of the other stated sentencing purpose (albeit in NT not stated to be a primary objective – unlike some other jurisdictions). The community may be protected from future crimes if the individual is rehabilitated. The community may also be protected from future crimes if the individual is incapacitated/incarcerated. It may also be protected if the individual, and other like-minded purposes, are deterred from committing similar crimes in the future.

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<sup>48</sup> *Penalties and Sentences Act 1992* (Qld), s 9(1); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A; *Sentencing Act 1991* (Vic), s 5(1); *Sentencing Act 1997* (TAS), *Sentencing Act 2017* (SA), ss 3, 4; *Crimes (Sentencing) Act 2007* (ACT), s 7(1).

<sup>49</sup> *DPP v DJK* [2003] VSCA 109 (Vincent JA); *WCB v The Queen* (2010) 29 VR 483,493–494 [35] (Warren CJ, Redlich JA).

Deterrence and rehabilitation are both 'forward looking' sentencing purposes – they seek to prevent the commission of future crimes. Deterrence may be aimed at the individual offender (through specific deterrence) or at 'like-minded' persons (through general deterrence).

But what evidence is there that these types of sentencing purposes are effective in achieving their goals? In particular, do they make the community a safer place by reducing and preventing crime?

Quite aside from the difficulties of identifying sound moral and philosophical justifications for imposing pain and suffering on an individual through punishment, the idea that **punishment**, through sentences of imprisonment, prevents crime has been criticised as lacking a proven basis for its effectiveness in reducing crime.

In *R v Dube* (1987) 46 SASR 118, King CJ stated, at 119-120:

...The much discussed question of the effectiveness of imprisonment as a deterrent to crime, and in particular of the effectiveness of increased levels of punishment, was adverted to during argument. ***I think that it must be conceded that there is no proven correlation between the level of punishment and the incidence of crime and that there is no clear evidence that increased levels of punishment have any effect upon the prevalence of crime.*** Nevertheless the criminal justice system has always proceeded upon the assumption that punishment deters and that the proper response to increased prevalence of crime of a particular type is to increase the level of punishment for that crime. I think that courts have to make the assumption that the punishments which they impose operate as a deterrent. That being so, I think that it follows that the proper response, and the response which is expected by the community at large, to the increased prevalence of serious crime is increased punishment for that crime.

The efficacy of **deterrence** as a sentencing purpose is also questioned. Again, even by the courts.

In *R v Wong* (1999) 48 NSWLR 340; [1999] NSWCCA 420 Spigelman CJ said (at [127]):

There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter.

This statement was cited with approval in *Weribone v R* [2018] NSWCCA 172, where the Court considered a challenge to the application of principles of general and specific deterrence in circumstances where s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) contains a statement of similar sentencing purposes to that contained in s 5(1) of the NT *Sentencing Act*, but where the purpose of deterrence is expressly stated in these terms in s 3A(b):



‘...to prevent crime by deterring the offender and other persons from committing similar offences’

In agreeing that leave to appeal should be refused, White JA said this:

The argument advanced ... is that although s 3A provides that the sentencing judge may take general deterrence into account in fixing a sentence, the sentencing judge cannot do so unless there is evidence that to increase for reasons of general deterrence what would otherwise be an appropriate sentence is not authorised. Section 3A does not bear that construction. To the contrary, it entitles the sentencing judge to assume that specific or general deterrence is a relevant factor in sentencing without requiring proof that that is so. ... **Whether the assumption upon which s 3A(b) is enacted is justified is a different question.** The extra-judicial speeches [cited by the applicant]...did not support the applicant’s submission as to what the law is in relation to specific or general deterrence in sentencing, as distinct from what the law should be...what the law should be is a matter for the legislature.

Earlier, the Victorian Sentencing Council examined the evidence from empirical studies of deterrence and concluded that the evidence suggests that the threat of imprisonment generates a small *general* deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.<sup>50</sup>

It also noted that research into specific deterrence shows that imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism. Possible explanations for this are said to include that: prison is a learning environment for crime, prison reinforces criminal identity and may diminish or sever social ties that encourage lawful behaviour, and imprisonment is not the appropriate response to many offenders who require treatment for the underlying causes of their criminality (such as drug, alcohol and mental health issues). The conclusion is that harsh prison conditions do not generate a greater deterrent effect, and the evidence shows that such conditions may lead to more violent reoffending.

What about **rehabilitation** as a sentencing purpose? I am sure that if you speak to most judges and magistrates, they will tell you that this is an important sentencing consideration, particularly for young people and adults who can rightly be categorised as ‘youthful first-time offenders’ and for those who have the capacity and desire to reform.

Sentences that prioritise an offender’s rehabilitation are sometimes seen as a ‘soft’ option or ‘unduly lenient’. That may be so if one considers punishment to be the primary goal of

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<sup>50</sup> Victoria, Sentencing Advisory Council, Does Imprisonment Deter? A Review of the Evidence, April 2011.

sentencing. But it is not. If one considers community protection to be more important, rehabilitation may indeed be preferred to imprisonment.

But what do we know about the effectiveness of rehabilitation?

### **Corrections**

That brings me to consider the role of corrections. There are two relevant aspects of corrections to consider – prisons and community corrections.

**Prisons** are places of confinement where individuals, under the authority of the state, are lawfully deprived of their liberty as a form of punishment for the crimes they have committed.

However, punishment is not the only goal sought to be achieved by imprisonment. Indeed, prison can be understood as serving four principal purposes:<sup>51</sup>

- **Retribution:** prison punishes by depriving an individual of their liberty and holding them to account for their misdeeds. The rationale for the retributive purpose of imprisonment is justice: a convicted offender gets a deserved penalty.
- **Incapacitation:** prison protects society by removing from circulation of individuals who are deemed to pose a threat to public safety. If dangerous offenders are put in prison, the opportunities for them to commit crimes are reduced.
- **Deterrence:** prison aims to deter crime by discouraging individuals from committing offences because the consequences of getting caught and convicted could well lead to incarceration and loss of liberty, possibly for an extended period.
- **Rehabilitation:** prison aims to rehabilitate offenders and prepare them for release in the hope of reducing the risk of reoffending.

We all know that correctional services offer or facilitate general education and training options for prisoners as well as treatment and psycho-educational programs to address their offending behaviours whilst in prison, including programs targeting:

- Family violence issues
- Drug and alcohol problems
- Sex offender treatment
- Violent offender treatment

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<sup>51</sup> Peter Kurti, Maya Khurana, 'What is prison good for?' (Analysis Paper No 60, The Centre for Independent Studies, 18 January 2024) 2.

- Post-release, community reintegration

This approach reflects changes over the past few decades, whereby corrections have shifted perspective from punishment towards rehabilitation and reintegration. This is perhaps the latest pendulum swing in the ongoing debate amongst theorists, academics and practitioners on the issue of recidivism, between those who adhere to sociologist Robert Martinson's pessimistic view that 'nothing works',<sup>52</sup> a view that was widely endorsed in the 1970s, and those with a more optimistic outlook, who believe that offenders are capable of rehabilitation and seek to identify 'what works'.

The hope when sentencing an offender to imprisonment is that they will be rehabilitated through therapeutic, educational and other programs. It is commonplace, upon reception into the custodial environment (or within the community under supervision on a community based order) for corrections, to identify an offender's 'criminogenic needs' – that is, the dynamic attributes of an offender that are considered susceptible to change and when changed, are associated with the possibility of reducing re-offending.<sup>53</sup>

But what evidence is there that such programs work?

Unfortunately, in the Australian context, the answer at present seems to be - not much.

A 2017 review of rehabilitation programs in Australian prisons concluded that although Australian rehabilitation programmes are now well established and professionally delivered, relatively little is known about their effectiveness.<sup>54</sup>

Similarly, a more recent 2020 review on the subject of offender rehabilitation in Australian prisons noted that it continued to be surprisingly hard to locate evidence that current offending behaviour programs are resulting in lowered rates of re-offending, and that we still know relatively little about the impact of such programs on re-offending.<sup>55</sup> It also noted that whilst international evidence showed that rehabilitation programs can bring about positive change in rates of re-offending, the most recent reviews conclude that even when the best-designed, implemented and evaluated programs are considered, the evidence of

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<sup>52</sup> Lipton, Douglas, R. Martinson, and J. Woks, *The Effectiveness of Correctional Treatment: A Survey of Treatment valuation Studies*, Praeger Press, New York.

<sup>53</sup> Corrective Services Administrators' Council 'Guiding Principles for Corrections In Australia' (Revised February 2018).

<sup>54</sup> Karen Heseltine and Andrew Day, 'Rehabilitation Programmes in Australian Prisons' in: Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 831.

<sup>55</sup> Andrew Day, 'At a crossroads? Offender rehabilitation in Australian prisons' (2020) 27(6) *Australian and New Zealand Association of Psychiatry, Psychology and Law* 939, 941.

rehabilitation success is only modest. Of course, much depends on the individual offender and their circumstances in addition to the length, intensity and therapeutic integrity of the programs that are delivered.

Finally, an international 2023 study, partly supported by funding from the Australian Research Council, which examined the effectiveness of prison-based rehabilitation programs for offenders serving sentences of two years or less found that the availability of rehabilitation programs addressing violent behaviour, or education and employment deficiencies can substantially decrease re-incarceration, but increased future community-based sentences. Those focusing on addiction and other program types were not found to effect recidivism at all.<sup>56</sup>

It is not quite time to abandon the 'what works' approach of prison-based rehabilitation and return to the 'nothing works' approach. We can and should continue to have faith in such programs as a means for reducing crime rates and recidivism but more assessment and analysis of these types of programs is required to ensure their utility and effectiveness.

### ***Community based orders***

Similar issues are encountered when the effectiveness of community corrections in reducing recidivism is considered, albeit higher rates of success may be achieved when compared to prison-based programs.

A 2020 study focusing on the effectiveness of Community Correction Orders in Victoria, identified that long-term unemployment, severe economic hardship, physical and mental health issues, social isolation and troubled personal relationships were commonly identified amongst offenders sentenced to a CCO. However, the study concluded that whilst participants experienced the punitive aspects of a CCO, there was limited evidence that they were supported to address key issues that may be predictive of future offending. In particular, support to re/engage in education, training and employment was said to be a key area of unmet need and engagement in other therapeutic programs was low.<sup>57</sup>

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<sup>56</sup> William Arbour, Guy Lacroix and Steeve Marchand, 'Prison Rehabilitation Programs and Recidivism: Evidence from Variations in Availability' (Melbourne Institute Working Paper No 07/23, 15 December 2023).

<sup>57</sup> Green, R., Hopkins, D., & Roach, G. (2020). Exploring the lived experiences of people on Community Correction Orders in Victoria, Australia: Is the opportunity for rehabilitation being realised? *Australian and New Zealand Journal of Criminology*, 53(4), 585–605.

Similarly, a 2021 study which considered the extent to which Australian justice sector policies address the social determinants of health and crime prevention concluded:<sup>58</sup>

Most crime prevention strategies were geared toward tertiary prevention strategies such as diversionary courts and rehabilitation programs for offenders. In all Australian jurisdictions, the challenge of preventing crime (as a policy problem) was mainly conceived as one of changing the behaviours of “flawed” individuals already in the criminal justice system, thereby leading to a predominant focus on tertiary crime prevention strategies rather than primary or secondary crime prevention... The focus on tertiary crime prevention is consistent with evidence that funding is shifting away from social determinants (such as education and housing) to prison spending in some states of Australia.

### **Alternative approaches?**

One way to address the related issues of crime, the rising over-incarceration and stagnant high rates of recidivism may be to consider greater use of other options for dealing with crime, offenders and victims, such as through alternative justice forums or mechanisms. Such avenues already exist in different jurisdictions – they may be complementary to or a part of the traditional justice system.

I will briefly discuss three such approaches that have been incorporated, in different ways and to varying extents, into the traditional criminal justice system.

### ***Restorative justice***

In contrast to the retributive model of the traditional criminal justice system, restorative justice is a theory of justice that focuses on the harm caused by crime and wrongdoing to people, relationships and community. The concept of restorative justice is not new. It emerged in the 1990s and several features of the model are now formally part of the criminal justice system, particularly in respect of youth justice.

Restorative justice practices can be applied in many ways, some of which include:

- ***Diversion*** – the offender is diverted from entering the criminal justice system, either through a caution or by agreeing to enter into a therapeutic program.
- ***Victim/offender mediation*** – which brings together a person who has been harmed with the person who caused the harm to have a conversation about what

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<sup>58</sup> Samantha Battams et al, ‘Tertiary Crime Prevention’ (2021) 32(6) *Criminal Justice Policy Review* 618.

occurred. The emphasis is on being heard, understood, having questions answered, taking responsibility, showing remorse and contributing towards healing.

- **Restorative justice conferences** – which brings together a person/people who have been harmed, the person/people who caused the harm and other impacted community members (eg. family, neighbour, shopkeeper etc) to have a conversation about what occurred. The emphasis is on being heard, understood, having questions answered, taking responsibility, showing remorse and contributing towards healing.
- **Talking circles** – which brings community members together in order to increase understanding of one another, strengthen relationships and potentially solve community challenges by exploring harms, needs, obligations and solutions.
- **Restorative engagement** – which brings together the person harmed with a senior leader of the institution in which the harm occurred to outline their personal account of harm, its impact, the ongoing effects and to receive a personalised and genuine acknowledgement of the resulting harm.<sup>59</sup>

The major differences between these alternative approaches and the traditional criminal justice system relate back to the definition of crime I provided earlier.

Rather than crime being committed against the state and seen as a violation of the law, crime is considered as causing harm to individuals and communities.

Instead of the system being orientated towards determining guilt and imposing punishment with the authority of the state, restorative justice is concerned with repairing the harm caused by crime.

Instead of excluding persons impacted by the crime, such as victims and their families, from the justice outcome, restorative justice posits that the people most affected by a crime are central to the process and the resolution of the harm caused by the crime.

Restorative justice is therefore seen as an alternative to retributive justice. The traditional criminal justice system is a retributive justice system, whereby authorities respond to crime. Whereas the aim of the traditional criminal justice system is to punish offenders for their crimes the aim of restorative justice is to repair the harm caused by crime.<sup>60</sup>

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<sup>59</sup> 'What is restorative justice', *RMIT University, Centre for Innovative Justice* (Web Page) <<https://cij.org.au/opencircle/what-is-restorative-justice/>>.

<sup>60</sup> Kathleen Daly and Hennessey Hayes, 'Restorative Justice and Conferencing in Australia' (Trends & issues in crime and criminal justice No 186, Australian Institute of Criminology, February 2001) 2.

Restorative justice features have been adopted in the Territory as part of the mainstream criminal justice process. I will briefly highlight some of the restorative justice features that have been incorporated in the NT in respect of the two cohorts of offenders that are over-represented in the statistics: Aboriginal people and young people.

### Aboriginal offenders

Aspects of restorative justice have been recently reintroduced to provide more culturally appropriate and effective sentencing options for adult Aboriginal offenders who appear before the Local Court in the Territory, under the Community Court Sentencing Procedures that are set out in Division 3A of the *Sentencing Act 1995* (NT).

Community Court allows local elders and leaders, through community Law and Justice Groups, to provide the Court with information and advice to assist the Court to determine the appropriate sentence for an offender. Aboriginal community input promotes substantive equality by informing the court of factors relevant to the experiences of Aboriginal defendants, advising the court on community-based sentencing options, and enabling defendants to more fully understand the ramifications of their offending. Aboriginal justice and dispute resolution concepts are incorporated by providing Aboriginal Elders with a central role in the sentencing process. As a result, the Court is provided with important information about the offender and Aboriginal communities are strengthened by engaging them in the justice process and giving them more control over their community members.<sup>61</sup>

Community Courts previously operated from 2003 to 2012 but were abandoned because of a possible inconsistency in the territory's existing sentencing legislation at the time (s 104A – information about customary law or cultural practices). From 2004 to 2012, 217 Community Courts were convened across 18 communities in the Territory. The legislation has since been amended,<sup>62</sup> with the new provisions commencing on 1 December 2023.

According to the relevant Practice Direction issued by the NT Local Court, the ultimate aims of the use of such procedures include:<sup>63</sup>

- Increase the offender's prospects of rehabilitation and reparation to the community.
- Reduce causes of re-offending by Aboriginal offenders.

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<sup>61</sup> Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review* 79, 80.

<sup>62</sup> *Sentencing Legislation Amendment Act 2023* (NT) – which amended both the *Sentencing Act* and the *Youth Justice Act* to establish Community Court sentencing procedures.

<sup>63</sup> Northern Territory Local Court, *Practice Direction 5I: Community Court Sentencing Procedure (Adult)*, 29 January 2024, version 2.10, 117.

- Reduce the over-representation of Aboriginal persons in the Northern Territory justice system.
- Reduce the number of victims of crime.

Amongst other things, Community Court allows an offender to be dealt with by, and in, their community. This can be particularly important for small, remote communities. Coupled with this are the Alternative to Custody programs and facilities that are being developed and implemented, whereby Aboriginal offenders can undertake cultural rehabilitation, on Country in their own communities and with the support of professional staff and programs.

During his speech to the Legislative Assembly on the occasion of the second reading of the relevant bill,<sup>64</sup> the Attorney-General and Minister for Justice, the Hon. Chansey Paech, stated that the reintroduction of Community Courts was a key commitment of the Northern Territory Aboriginal Justice Agreement.<sup>65</sup> The Attorney also said:

... the new community court sentencing procedure will enhance community safety by ensuring the imposition of sentences that are based on a greater understanding of the causative factors of offending and the impact on community. This measure will go towards addressing and reducing the high rates of imprisonment and recidivism in the Territory by engaging and supporting Aboriginal community leadership and cultural authority through the active participation of law and justice groups in the criminal justice sentencing process.

As of 7 February 2024 – Community Court was only available on Groote Eylandt but it is anticipated that Community Court will become available in Maningrida and Kintore later this year.<sup>66</sup>

Circle sentencing and other alternative sentencing options for Aboriginal and Torres Strait Islander offenders exist in other Australian jurisdictions – such as Circle Sentencing in the NSW Local Court, the Walama List in NSW District Court, the Murri Court in Qld and the Koori Court in Victoria. And they have proven successful. A 2020 study conducted by BOCSAR found that offenders participating in Circle Sentencing were less likely to receive a prison sentence than other Aboriginal offenders who were sentenced, and less likely to re-offend within 12 months.<sup>67</sup>

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<sup>64</sup> Sentencing Legislation Amendment Bill 2023 (NT).

<sup>65</sup> Department of the Attorney-General and Justice (NT), 'Northern Territory Aboriginal Justice Agreement 2021-2027' (2021).

<sup>66</sup> As reported 'Community Court in the Northern Territory' *Northern Territory Local Court* (Web Page, 7 February 2024) <<https://localcourt.nt.gov.au/court-updates/community-court-northern-territory>>.

<sup>67</sup> Steve Yeong and Elizabeth Moore 'Circle Sentencing, incarceration and recidivism' (Crime and Justice Bulletin No 226, NSW Bureau of Crime Statistics and Research, April 2020) 1.



The recent NT Budget allocated \$15M to establish Law and Justice Groups and Community Courts in six locations over the next two years. But more investment in these types of initiatives is required. Further, thorough review, assessment and evaluation of these initiatives will be required in order to demonstrate their effectiveness as a long-term option.

### Youth justice

All Australian jurisdictions have youth justice legislation that provides for how young people are to be dealt with in the criminal justice system. Each has within its statutory framework aspects of restorative justice.

In the NT, the applicable legislation is the *Youth Justice Act 2005* (NT). The Act provides considerable scope for the use of alternative sentencing procedures and options designed to divert young offenders from the criminal justice system and to promote their rehabilitation.

Part 3 of the NT YJA (Diversion of Youth) provides for police diversion before charge, where a police officer reasonably believes that the youth has committed an offence (other than a 'prescribed offence') through warnings, Youth Justice Conferencing or referral to a diversion program. If the diversion is successfully completed, to the satisfaction of the police officer, no criminal proceeding can be commenced or continued against the youth in respect of the offence – the youth is successfully diverted from entering the next stages of the criminal justice system.

Diversion can also happen once matters are before the Youth Justice Court. The Court may adjourn a proceeding for up to 12 months to enable a young person to demonstrate rehabilitation (s 83(1)(d)) or may order the young person participate in a program approved by the Minister (s 83(1)(e)).

Under Part 5, Div 4 of the YJA, Community Court sentencing for young Aboriginal offenders is again available – this mirrors the sentencing procedures under the *Sentencing Act* for adults and allows the Court to receive information from a local community Law and Justice Group to assist the Court in the sentencing process. As with adults, Community Courts previously operated for young Aboriginal persons, in accordance with s 4(o) of the YJA. Although the YJA did not have the same issues of apparent legislative inconsistency that caused the operation of adult Community Courts to be suspended, such courts were abolished by the then newly elected government in December 2012.

The Youth Justice Court may also order that the young persons participate in a pre-sentencing conference (s 84), which may involve the victim, community representatives and family members. The convenor's report on the conference and any agreed outcomes is provided to the sentencing Court. Agreed outcomes can include steps to be taken by the

young person to accept responsibility for their behaviour, to make amends with the victim of the offence and/or to assist them to reintegrate into the community.

As with the reintroduced scheme for adults, at the present time it is too early to assess the effectiveness of the Community Court initiative.

However, there is evidence that diversion of young people works. A study into pre-court diversion of young people in the NT published in 2007 found that over the 5 years since pre-court diversion of young people had been introduced in the NT:<sup>68</sup>

- the great majority of juveniles (76%) did not reoffend within the first year after their initial diversion or court appearance;
- however, there were significant differences between juveniles who attended court (39% reoffending within 12m) and those who were diverted (21% - where a conference was undertaken; and 19% where a warning given);
- those who were diverted reoffended less than those who attended court and those who went to court reoffended more quickly; but
- significant differences in offending related to age, gender, Indigenous status and location - confirming the need for specific responses to particular groups of young people.

Noting the finding that the majority of juvenile offenders did not reoffend within one year, the study suggested:

The implication of this is that making these juveniles go through the court process exposes them to an unnecessary and possibly damaging experience...and is an unnecessary use of time and resources for the criminal justice system.

The study recommended that further research into factors that impact on offending behaviours was required, but that policy should focus on better identifying children at an early age who are at risk of developing antisocial behaviour, and that particular focus should be given to young Indigenous males given the level of over-representation in the criminal justice system.

It concluded:

Because of the multitude of factors which can lead to offending behaviour, policies should involve not just the criminal justice system but a wide range of relevant government and non-government sectors, including the wider community, as the

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<sup>68</sup> Teresa Cunningham, 'Pre-court diversion in the Northern Territory: impact on juvenile reoffending' (Trends & issues in crime and criminal justice No 339, Australian Institute of Criminology, 22 June 2007) <<https://www.aic.gov.au/publications/tandi/tandi339>>.

responsibility to address the needs of Australian children lies with society as a whole.

Similarly, the 2011 report on the Review of the Northern Territory Youth Justice System,<sup>69</sup> found that:

Evidence suggests that diverting young people away from courts reduced re-offending rates. On that basis, diversionary options should be expanded, as should eligibility for diversion.

It also recorded:

The Review found that a significant number of young offenders were placed in detention centres on remand (i.e. are waiting for their matter to be determined by the court) because there was nowhere else for them to go. This is an awful state of affairs.

Increasing the number of youth rehabilitation camps is likely to reduce the numbers of young people who are held in detention on remand. They are unlikely to receive a range of necessary interventions while they are in a detention centre.

Whilst acknowledging there was a need to ensure sentences imposed on young people meet community expectations, reflected the seriousness of the offence and punished the offender, the review concluded:

... putting young people in detention centres is not a medium to long term solution to reducing crime. Detainees leave detention centres and go back into the community—unless their needs are addressed, how can we expect them to change their behaviours?

And of course, the Royal Commission into the Protection and Detention of Children in the Northern Territory delivered its report to the Commonwealth and Northern Territory Governments on 17 November 2017 – finding that youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people. It recommended a paradigm shift in youth justice, particularly detention, to increase diversion and therapeutic approaches.

It concluded that the evidence overwhelmingly shows that a therapeutic approach has the best prospect of reducing youth offending and supporting young people to become

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<sup>69</sup> Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report* (Report, September 2011) vi.

productive members of society. If young people do not reoffend, then the community is made safer.<sup>70</sup>

### ***Therapeutic jurisprudence***

A related concept to the restorative justice approach is therapeutic jurisprudence.

Therapeutic jurisprudence is the study of how systems of justice influence behavioural outcomes and emotional wellbeing.<sup>71</sup> It seeks to understand how law and legal process operate therapeutically. It directs attention to the impact of the law and legal processes on wellbeing, particularly, though not isolated to, their psychological impact.<sup>72</sup> It is a broad concept, and indeed it is criticised as being a vague and undefined concept that allows offenders to emote and expects judicial officers to act as social workers and counsellors.

In the criminal justice system, therapeutic justice draws upon learning from behavioural sciences. It uses an evidence-based approach to law and sentencing which recognises that a purely punitive approach is not effective in changing behaviour and keeping communities safe. It acknowledges that punishment alone does not prevent crime, but rather addressing the causes of crime does. These causes are often present in a large proportion of offenders from disadvantaged backgrounds and include poverty, unemployment, family violence, substance abuse, trauma and mental health issues.<sup>73</sup>

Therapeutic justice provides the theoretical basis for some of the speciality courts that have developed in recent times, such as drug courts and mental health courts, and also some of the specific sentencing options or treatment programs that are designed to address the root causes of an offender's criminal behaviours in a wholistic context. The role of the court is not only to apply the law but to act to resolve the underlying problems that contribute to criminal behaviour. It does so through a multi-disciplinary approach, involving the court, lawyers, professionals and practitioners from other disciplines and other stakeholders.

Drugs courts are a prime example of therapeutic justice in action. They now operate in most Australian jurisdictions.

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<sup>70</sup> *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017).

<sup>71</sup> Suzanna Fay-Ramirez, 'Therapeutic Practice Through Restorative Justice: Managing Stigma in Family Treatment Court' (2016) 16(3) *QUT Law Review* 50, 50.

<sup>72</sup> Max Henshaw, Lorana Bartels and Anthony Hopkins, 'To Commit is Just the Beginning: Applying Therapeutic Jurisprudence to Reform Parole in Australia' (2019) 42(2) *UNSW Law Journal* 1411, 1417.

<sup>73</sup> 'The Concept of Therapeutic Justice', *The Australasian Institute of Judicial Administration Inc* (Web Page) <<https://aija.org.au/publications-introduction/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence/>>.

Drug courts are premised on the basic assumption that if an offender's crime is drug-related, reducing their drug consumption should reduce their involvement in drug-related crime. Drug courts provide a judicially supervised, therapeutically oriented, integrated treatment regime. Although the programs differ across jurisdictions – common features are that eligible offenders voluntarily participate. They usually have their sentence deferred, or are subject to a suspended sentence, whilst they participate in the program. They are closely supervised and monitored, which includes frequent meetings, frequent drug testing and court reviews. Progress is rewarded. Non-compliance is sanctioned. Successful completion concludes the process. Failure to complete results in imposition/activation of a sentence.

Whilst critics of therapeutic justice claim it is too offender-orientated, fails to recognise victims and is a 'soft approach' there is clear evidence that drug courts work in assisting offenders to rid themselves of their dependency and in doing so to reduce the prospect of reoffending.

A 2020 BOCSAR study on the effect of the NSW Drug Court program on recidivism measured the long-term differences between a large group of offenders who underwent the program (the treatment group) compared to offenders who did not (the control group). The study found that the treatment group participants who successfully completed the program recorded a 17% lower re-conviction rate, and those who did reoffend took 22% longer to do so compared with reoffenders in the control group.<sup>74</sup>

Similarly, the results of a 2014 review of the Drug Court of Victoria showed significant improvements in the rate and severity of offending by Drug Court participants as compared to offenders in the mainstream system: a 31% lower rate of reoffending within the first 12 months; 34% lower rate of offending within two years.<sup>75</sup>

### ***Justice reinvestment***

The final topic I want to touch on is perhaps the one that could produce the greatest change in rates of crime, incarceration and recidivism, but poses the greatest challenges for widespread acceptance, adoption and implementation – and that is the concept of justice reinvestment. This is a still emerging idea in the Australian criminal justice system.

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<sup>74</sup> Don Weatherburn et al, 'The long-term effect of the NSW Drug Court on recidivism' (Crime and Justice Bulletin No 232, NSW Bureau of Crime Statistics Research, September 2020) 1.

<sup>75</sup> KPMG, *Evaluation of the Drug Court of Victoria: Magistrates' Court of Victoria* (Final Report, 18 December 2014) 4.

In simple terms, justice reinvestment is a strategy that aims to reduce the number of people in the prison system by determining more effective means of managing offenders and addressing reasons for their offending.<sup>76</sup> It is a data-driven approach that aims to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety.

It is however a broad strategy and there is no settled definition or approach.

It initially developed in the US in the early 2000s in response to burgeoning prison populations and associated increasing costs of imprisonment. The concept of justice reinvestment initially developed was based on the idea of investing funds drawn from corrections budgets into the neighbourhoods or geographic areas that produced large numbers of prisoners and therefore contributed greatly to both prison numbers and prison costs.<sup>77</sup>

The problems in the US that lead to the emergence of the concept of justice reinvestment are echoed in Australia. We have an ever-increasing incarceration rate and it is one of the highest in the world (we are in the top 10). And the costs of imprisonment are enormous. According to the Australian Productivity Commission, in 2022-2023 we spent \$4.63 billion on prisons and \$0.82 billion on community corrections. When depreciation costs were added, total expenditure was \$6.02 billion. The figure has increased by \$2 billion in the last five years. It is estimated that the cost of incarceration to the taxpayer is \$147,900 per prisoner per year, or \$405 per day.<sup>78</sup> A cost that would easily get you a room, with room service, at the Hilton Darwin (and perhaps Regency Lounge access at the Hyatt, Sanur).

In the US, justice reinvestment strategies have evolved to now focus more on systemic changes to the criminal justice system.

However, in Australia, justice reinvestment remains strongly focused on place-based strategies but has also extended to the idea of investing in particular groups or communities that are over-represented in the criminal justice system, such as Aboriginal and Torres Strait Islander peoples. This has particular appeal for remote communities as it may provide greater opportunities for community control and decision making in devising the solutions to the drivers of crime at a local level and may allow offenders to remain connected to community, Country and family as they undertake rehabilitation.

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<sup>76</sup> Matthew Willis and Madeleine Kapira 'Justice reinvestment in Australia: A review of the literature' (Research Report No 9, Australian Institute of Criminology, 11 May 2018) 2.

<sup>77</sup> Melanie Schwartz, David Brown and Chris Cunneen, 'Justice Reinvestment' (Brief 21, Indigenous Justice Clearinghouse, July 2018) 1.

<sup>78</sup> Mia Schlicht 'The Cost of Prisons in Australia: 2023' (Research Report, Institute of Public Affairs, July 2023) 1.

And there is government support for it. In the 2022-2023 Federal Budget, the Commonwealth government committed \$69 million over 4 years to establish a National Justice Reinvestment Program to support up to 30 community-led justice reinvestment initiatives, with ongoing funding of \$20 million per year from 2026–27. Further funds were announced in the recent Federal Budget. Under this program Aboriginal or Torres Strait Islander communities can apply for funding to support community led strategies aimed at preventing and reducing contact with the criminal justice system, such as early intervention, cultural mentoring, school-retention and mental health support.<sup>79</sup>

Katherine, Darwin, Groote Eylandt and Lajamanu communities have already applied for funding through this initiative.

Whether funds are diverted from corrections or invested upfront under other initiatives, justice reinvestment in Australia contemplates funding the provision and support of community infrastructure and programs and services that will address and alleviate the prevalence and effects of what are often seen as the socio-economic determinants of crime: poverty, homelessness, lack of education and employment, mental health and drug and alcohol issues and family and domestic violence. The ultimate aim of such investment is to reduce crime and make communities safer by tackling the root causes of crime.

Conceptually, the idea has much to commend it.

Increased incarceration does not reduce crime rates or recidivism rates. But it is costly. Scarce resources can be better utilised to improve the wellbeing of individuals and communities whilst achieving concurrent social benefits – safer communities and reductions in crime, incarceration and recidivism.

## **Conclusion**

The law and order debate in Australia continues to polarise public opinion. Despite what the official statistics might indicate about crime rates, proponents of tough on crime approaches continue to call loudly for governments to do more to protect communities through imposing increasingly punitive sanctions on offenders – both alleged and convicted.

But the evidence shows that such policies and approaches do not work to significantly reduce crime. Indeed, they contribute to a rising incarceration rate as more people are locked up in prisons for longer. And all at exorbitant cost.

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<sup>79</sup> 'Justice Reinvestment', *Attorney-General's Department (Cth)* (Web Page) <<https://www.ag.gov.au/legal-system/justice-reinvestment>>.

Greater reductions in crime and recidivism and increased community safety are more likely to come through investment in strategies that address the root causes of crime at the local level rather than through increased investment in the punitive aspects of the traditional criminal justice system.

In its 2021 research paper, *Australia's prison dilemma*,<sup>80</sup> the Australian Productivity Commission noted:

Empirical evidence is key to a proper assessment of the merits of new approaches in different jurisdictions, as well as to good program design and implementation. The Commission has come across some striking gaps in undertaking this project. As an example, the data do not provide a clear picture of how long people stay on remand. Nor is there a good understanding of reoffending patterns once people leave prison. Some efforts are underway to fill these gaps... While there is some compelling Australian-based research, there are few systematic studies with sufficient empirical depth and theoretical ambition to inform large-scale policy reform and evaluation. Systematic studies of criminal justice processes and decision making (covering policing, prosecution, sentencing, correction and parole) in the Australian context are largely missing.

It can only be hoped that further research, assessment and evaluation to identify 'what works' will continue and that governments and policy makers throughout Australia will ignore the chants to be 'tough' on crime and will instead be guided by the evidence to devise and implement smart policies and responses to address the social problem of crime in our communities.

After all, as the English writer H. G. Wells observed, 'Crime and bad lives are the measure of a State's failure, all crime in the end is the crime of the community.'<sup>81</sup>

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<sup>80</sup> Productivity Commission, Commonwealth of Australia, *Australia's prison dilemma* (Research Paper, October 2021) 5.

<sup>81</sup> Herbert George Wells, *The Works of H.G. Wells* (T. Fisher Unwin, 1925) vol 9 'A Modern Utopia', ch 5.