

Penal diversity within Australia

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Introduction

The criminological literature on punitiveness, which has sought to explain increasing imprisonment rates since the 1980s, has shifted its focus from social and economic explanatory models that are global in scale towards more local analyses, focussing on aspects of local cultures, traditions and values. One of the reasons for this development is a wish to explore the exceptions to the rules: either countries deviating from the leading narrative (Green, 2008; Pratt and Eriksson, 2013) or local / interstate differences in imprisonment rates. Differences within federal states have been revealed in the US (Barker, 2006; Beckett and Western, 2001), Canada (Webster and Doob, 2011), and Australia (Cunneen et al., 2013).

In most macro-level comparative analyses of recent penal evolution, Australia is seen as following to a certain extent the punitive approach of the US, along the lines of other Anglo-Saxon common law countries. In reality, the penal situation within Australia is much more varied and diverse. Australia's national imprisonment rate of 186 per 100,000 adult population¹ (Australian Bureau of Statistics, 2014b) masks wide internal disparities. Australia comprises eight independent jurisdictions with very different penal cultures, illustrated in the variety of imprisonment rates ranging from 130 (Australian Capital Territory) and 134 (Victoria) to 265 (Western Australia) and up to 829 (Northern Territory).

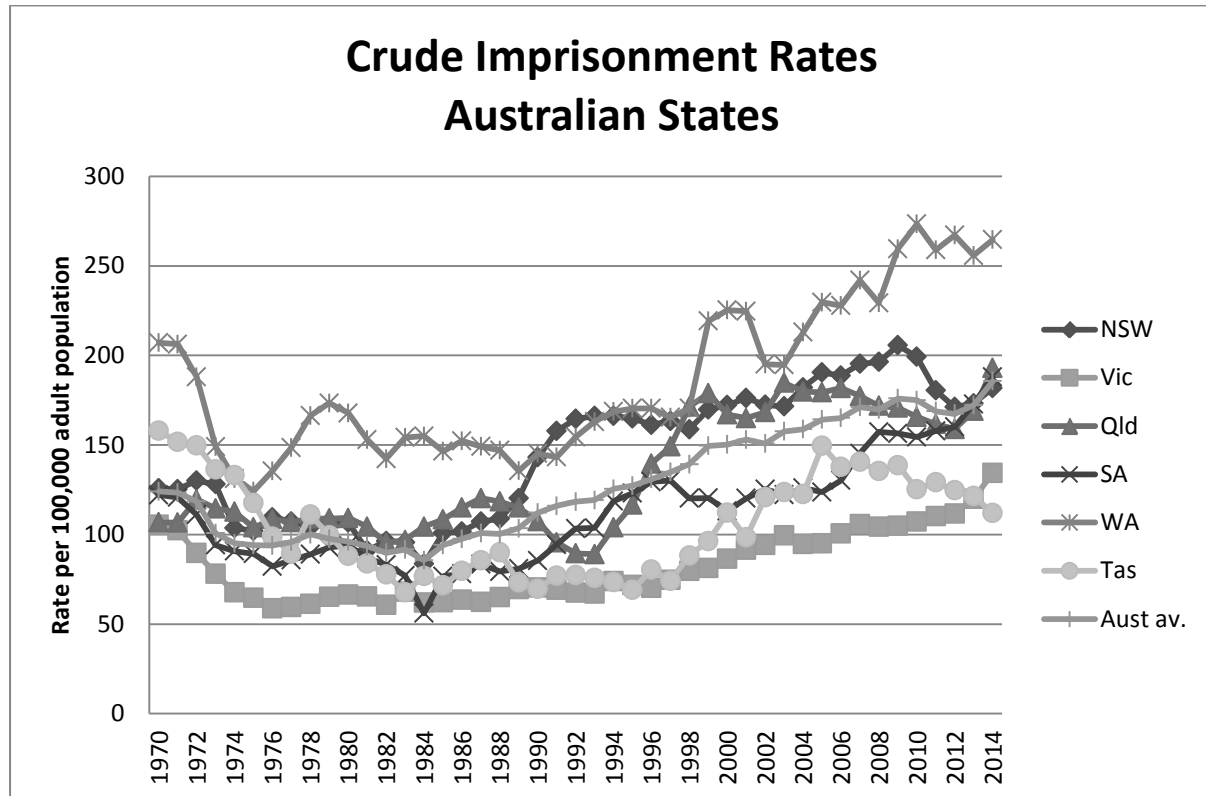
In this respect, Australia is an ideal penal laboratory: while all of these jurisdictions share many of those characteristics identified as important determinants of growing prison populations, local factors result in significant differences in both levels and distribution of punishment. In this article we present a case study of four Australian jurisdictions as representative of the variety of Australian penal cultures: New South Wales (NSW), Victoria, South Australia (SA) and Western Australia (WA). We discuss changes in law and policy which have influenced the size of the prison population since the 1970s and 1980s, identifying the most important drivers operating in each state and how they affect the prison population. We distinguish between explanations for imprisonment rate trends and imprisonment rate levels - an important distinction, as all four jurisdictions present the same upward trend in their imprisonment rates over the period described, but, as will be illustrated below, the level of their imprisonment rates – as in their numbers per 100,000 of the adult population - significantly differs. Therefore, we will argue that existing explanatory models that use imprisonment rates as a proxy for punitiveness are valid only when accounting for interjurisdictional differences in the direction of imprisonment rates, but not for their different levels.

¹ In this article, all imprisonment rates refer to the situation on 30 June 2014.

The Australian penal landscape

Before turning to the jurisdictional differences, we first provide some background on the penal context in Australia.

Figure 1: Imprisonment rates – Australian States and Territories



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project²

From Figure 1, we can see that imprisonment rates in Australian jurisdictions have been increasing since the beginning of the 1980s, a trend which reflects similar developments in most Western countries. What is remarkable is that they follow the same upward trend, but at significantly different levels. The available data show a pattern that is both stable and longstanding, stretching as far back as the 1880s in the case of Victoria and NSW (Freiberg and Ross, 1999). The profile of the prison population varies between states and territories, reflecting demographic differences - more particularly the age structure and the percentage of Indigenous³ people - as well as different punishment practices, reflected in the frequency of use of imprisonment and remand, as well as the average length of both. However, on a national level, serious crime rates have been falling for more than a decade, as did victimisation rates, confirming the relative independence between crime and imprisonment rates. Different sentencing patterns are therefore more an expression of the penal culture, and in this respect, different penal cultures, as that they can be explained by differences in crime

² For reasons of clarity, the Northern Territory and the Australian Capital Territory are not included in this figure.

³ Both terms 'Indigenous' and 'Aboriginal' are used interchangeably in this article. They include the Torres Strait Islander population.

and victimisation in the jurisdictions concerned (Cunneen et al., 2013). Before getting into this in more detail, we discuss the theoretical framework from which we start our analysis.

Theoretical background

Over time, various (global) models have been developed to explain differences and trends in punitiveness, most often as measured by the imprisonment rate. Much of the initial debate was generated by the influential and thought-provoking account of David Garland's *The Culture of Control* (2001). According to Garland, rising imprisonment rates reflected a changing penal culture dominated by the insecurities of 'late modernity' and by political responses to the economic, social, and cultural changes that came with it, and which had a significant impact on crime and welfare. For Garland, it is the combination of political neo-liberalism and neo-conservatism, as played out in the US and UK, that was the key driver, however, acting within a broader context of social and cultural conditions. This is in contrast with Wacquant (2009) who sees the 'punitive state' as the result of an explicit neo-liberal political project, replacing the welfare state with a 'workfare state'. This analysis is again framed in a mainly American context. Of relevance from our perspective is the global impact both authors attribute to these explanatory variables. However, as has been demonstrated since, other countries – including Anglo-Saxon countries which share a lot of the characteristics described by Garland and Wacquant – have only followed the example of American 'penal exceptionalism' to a limited extent (Pratt, 2011; Tonry, 2007; Webster and Doob, 2011). We will investigate this divergence from an Australian perspective below.

In an attempt to categorise the diversity of penal cultures, Cavadino and Dignan (2006) develop a typology in which they divide 12 countries into four family groups, according to their different welfare models, based on the classic work of Esping-Andersen (1990) on the political economies of the welfare state. They reach the conclusion that it is mainly neo-liberal political economies that are subject to the growing punitiveness expressed in increasing imprisonment rates. According to Cavadino and Dignan (2006), while Australia belongs to the group of neo-liberal political economies, its social-democratic roots, which provided generous welfare provisions until the late 1970s, protected it from the punitiveness associated with others in the neo-liberal category. As O'Malley argued earlier, the Australian alliance between neo-liberalism and social-democratic politics shielded the country from, for instance, the 'categorical exclusion' seen in the American far more conservative version of neo-liberalism (O'Malley, 2002: 217). As a result, the welfare model in Australia has not been fully dismantled but rationalised and now requires an active involvement of welfare subjects. In respect to criminal punishment, corrections have been 'managerialised' and, to a certain extent, privatised (O'Malley, 2002). Of relevance for our discussion is the fact that, as Beckett and Western (2001) demonstrated in the US, welfare investment can vary within federations according to whether states have a more inclusionary or exclusionary character. However, because most welfare/income provisions in Australia are a federal responsibility, it is questionable whether state differences in health, welfare, and employment provisions can adequately explain differences in their imprisonment rates.

Building on the typology developed by Cavadino and Dignan (2006), Lacey (2008) attempts to frame their model in a broader set of political, economic, cultural and institutional

contexts, to allow for more explanatory power. She examines Hall and Soskice's (2001) distinction between liberal market economies and co-ordinated market economies. She describes Australia as a liberal market economy with a majoritarian democratic system. Liberal market economies have been shown to be more punitive and, because of their electoral, institutional, and economic structural arrangements, they tend to be more populist and exclusionary. But again, comparative historical research in the US (Barker, 2006) has shown that within the same democratic system, political contexts and the practices of civic engagement can vary and lead to different levels of reliance on confinement. Based on comparative historical research, using a wide range of archival material and secondary sources, Barker (2006) analyses how the degree of centralisation of political authority leads to different forms of democracy within American jurisdictions, which is reflected in their imprisonment rates. Barker's work provides a useful guiding perspective to consider interstate differences in punishment in Australia, but for now, we don't have the sources available to conduct a similar analysis.

Like other countries in the neo-liberal family, Australia has a common law judicial system based on adversarial procedures, and the relationship between government, the courts, and their bureaucratic institutions has been subject to managerialism and the introduction of New Public Management principles (Freiberg, 2005; Tubex, 2015). This development has been considered a product of neo-liberal government logic, and has been associated with punitiveness and the re-invention of the prison (Cunneen et al., 2013; Tubex, 2015). However, adversarial systems are not punitive by default. Imprisonment rates have varied over time and between jurisdictions independent of the nature of the judicial system and it is evident that a range of alternative and progressive initiatives have originated in adversarial systems, just as they have in inquisitorial civil law systems (Freiberg, 2011). This theme will be taken up for discussion later in this contribution.

Finally, in relation to populism and public opinion, Australian research confirms international literature on the impact of the media on the public's punitiveness (Green, 2008). The Australian public is not well informed about actual crime trends and the types of media they consume for their information appear to have significant effects: those who rely on talkback radio, commercial and tabloid media, have the most distorted views and are the most punitive (Indermaur and Roberts, 2005; Spiranovic et al., 2012). However, the proportion of Australians who agree - when polled - that stiffer sentences are needed gradually declined between 1987 and 2007 (Roberts and Indermaur, 2009). Moreover, and most interestingly, Roberts et al. (2011) demonstrate that differences in the levels of confidence in sentencing and the levels of punitiveness across the various jurisdictions within Australia are remarkably small, and can in no way explain the differences in their imprisonment rates. Therefore, they conclude that sentencing policy is more the result of political choice than the expression of public attitudes, echoing Beckett's (1997) similar claim.

In short, Australia resides in the group of countries that share a set of characteristics associated with increased punitiveness. However, these global factors fail to explain the great variation in imprisonment rates among Australian jurisdictions. The following case studies examine how the particular circumstances in four selected jurisdictions (NSW, Victoria, SA,

and WA) have produced such different penal outcomes in spite of the set of macro-level factors they share.

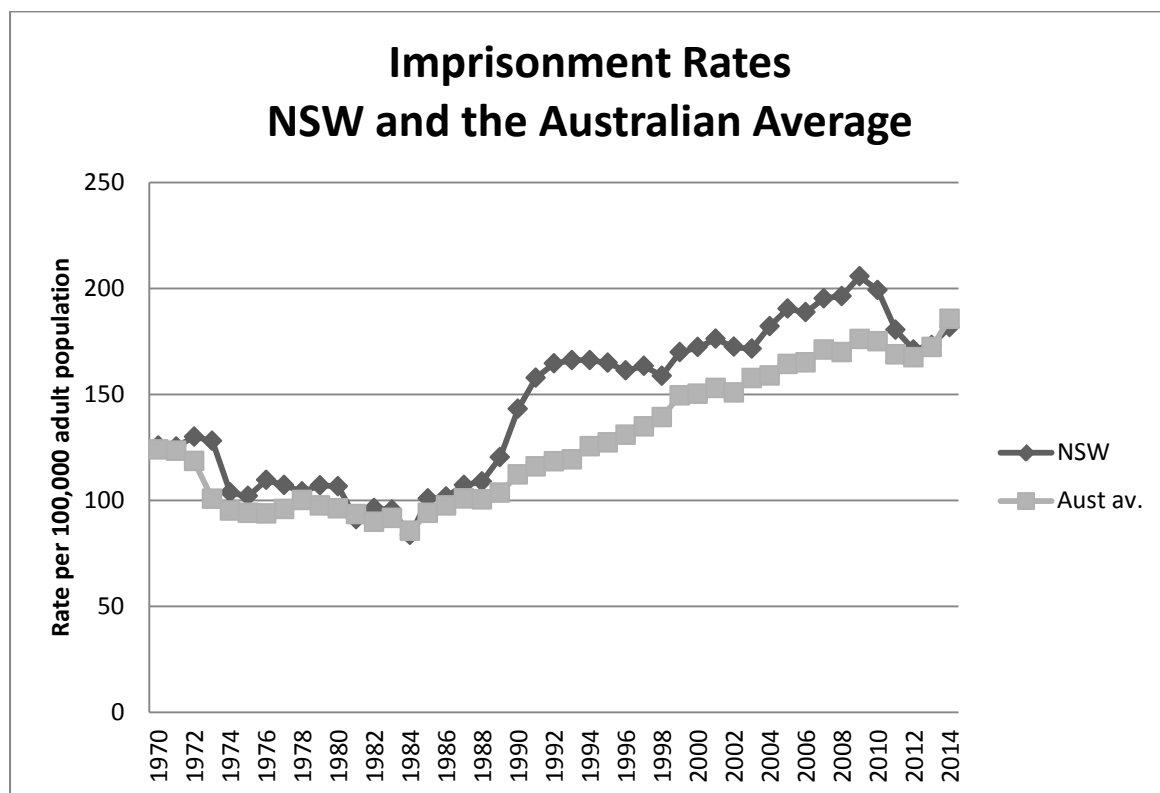
Drivers of penal policy in four Australian jurisdictions

In the following four case studies, we describe the main drivers which have been identified by local scholars as being predominant in determining the size and composition of the prison population in that state over the last decades. We then focus on the specific problem of Aboriginal overrepresentation in Australian prisons as a possible explanatory factor, before discussing how these drivers fit or contradict the leading explanatory models described above.

New South Wales: The dominance and volatility of law and order politics

New South Wales was established in 1788 as the first Australian penal colony and is the most populous state, with roughly one third of the overall 23.7 million total Australian population and one third (32%) of the total Australian prison population. As the largest state, NSW's trends tend to drive national imprisonment numbers and rates and the NSW imprisonment rate (182 per 100,000 adults) has consistently been around or slightly above the national average (186). After SA, NSW has the second highest percentage of remand prisoners⁴ (26%), and 24% of the prisoner population is Aboriginal (Australian Bureau of Statistics, 2014b).

Figure 2: Imprisonment rates in NSW and the Australian average



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project

⁴ Remand prisoners are those denied bail and awaiting trial.

A rough chronology from the 1970s to the present shows a period of criminal justice and penal reform through the 1970s and early 1980s, changing in the mid-1980s to an increasingly punitive political, public and media climate, reflecting international trends. New South Wales' imprisonment rates dropped from around 126 in 1970 to around 84 in 1984, and then started climbing steadily (Australian Prison Project, 2013). Following an increase of 34% between mid-2001 and mid-2009 under the Labor Party, an 8% reduction in the imprisonment rate occurred under a conservative state government (Brown, 2013b). Between September 2012 and March 2014, the prison population increased again with 13% and, after a short stop, this trend continued, mainly due to the influx of remand prisoners (New South Wales Custody Statistics, 2014; Weatherburn et al., 2014).

The dominance and volatility of law and order politics and its effects on imprisonment rates in NSW have been played out through a number of criminal justice system policies or drivers. The intensity of political debate around these policies has fluctuated, both across and within the two periods, from the 1970s to mid-1980s and from the mid-1980s to the present. The following discussion analyses the main drivers in both periods.

1970s: decriminalisation, bail reform and reducing sentence lengths. The Labor government elected in 1976 decriminalised public drunkenness, begging, vagrancy and most prostitution offences, raised the legal threshold for common public order offences such as offensive language and behaviour, abolished imprisonment for fine default, and reformed bail laws. Such changes contributed to the substantial reductions in imprisonment rates during the 1970s.

A conscious attempt was made to reduce the length of sentences, although not publicly argued as such, through the introduction in 1982 of a short-term licence release system under which prisoners within 12 months of their release date could apply to the Minister for Corrective Services for early release. The scheme, which was strongly opposed by the press and the judiciary, resulted in the release of 1,000 prisoners over a 15-month period, and then fell into disrepute when the Minister, Rex Jackson, was convicted and imprisoned for corruption in relation to the scheme. This delegitimized executive-based release schemes and set the scene for the later rise of 'truth in sentencing' (see Chan, 1992).

In 1983 the Labor government provided that remissions (of one third of the sentence length) be calculated by taking them off the non-parole period rather than the head (full) sentence. The intended effect was a significant reduction in sentence lengths, but judges reacted by increasing the length of the non-parole period in an attempt to nullify the change, which they saw as an 'interference' with their discretion (Weatherburn, 1985). Parole, introduced in NSW in the late 1960s, had by the early 1970s become a mechanism for substantially reducing sentence lengths (see *R v Portolesi* and *R v Sloane* 1973). This policy was rejected in 1974 by the High Court on the grounds that the NSW parole legislation did 'not convert a sentence of imprisonment into an opportunity for rehabilitation' (*R v Power* 1974). In 1978 a new *Bail Act* (NSW) 1978 included a right to bail for minor offences and a presumption of bail for other offences.

Backlash: the punitive turn. In 1986 the political, public and media climate surrounding criminal justice in NSW took a markedly punitive turn, stimulated by opposition shadow

minister for Corrective Services for the Liberal/National Country Party Coalition, Michael Yabsley. Law and order became a major election issue in the lead up to the 1988 state election, won by the Coalition, leading to an upsurge in imprisonment (Hogg and Brown, 1998). Yabsley had been successful in opposition in ramping up a 'law and order crisis' climate over penal reform, youth crime, and particularly horrendous crimes such as the rape/murder of beauty queen Anita Cobby in 1986 by a group of young men, in the process painting the Labor government as 'soft on crime'. Despite the Coalition government proclaiming its non-ideological, free market efficiency-based credentials, in a version of the 'free market/strong state' approach, Yabsley, in his role as Minister for Corrective Services in the Coalition government, instituted an intensification of penal discipline which fostered major prison riots, increased police numbers and expenditure, and increased penalties (Brown, 1990, 1991). Utilising the slogan of 'truth in sentencing' the new government passed the 1989 *Sentencing Act* (NSW) which abolished remission altogether and set a formula by which the non-parole periods should be three quarters of the head sentence. The result was an increase in sentence lengths by 19% for adults (Brown et al., 2011; Gorta, 1992) and 30% for children (Cain and Luke, 1991), and a 30% increase in the prison population over the first two years of the government. At this point Labor joined the 'law and order auction' with subsequent Labor governments vowing not to be outflanked on law and order. Cunneen et al. (2013: 58) argue that while 'truth in sentencing' notions and regimes were promoted in other jurisdictions 'none had the level of impact as in NSW.'

In 2003 a scheme of 'standard non-parole' periods (indicative but not mandatory minimum terms) was legislated for a range of serious offences, which had the effect of significantly increasing sentencing tariffs across a range of serious offences (Poletti and Donnelly, 2010). A NSW Judicial Commission study compared sentencing outcomes in Australian jurisdictions and found that NSW had the highest proportion of sentences of imprisonment across four offences (Indyk and Donnelly, 2007). Weatherburn et al. (2010) similarly found that adjusted for population, nearly twice as many people were sent to prison in NSW as in Victoria. On the bail front, legislative hyperactivity led to 23 'punitive' changes to the *Bail Act* in NSW between 1992 and 2008, nearly doubling the rate of bail refusals in the District and Supreme Courts between 1995 and 2005 and sending the remand rate on a rapid climb such that, by 2014, 26% of NSW prisoners were in remand custody (Australian Bureau of Statistics, 2014b). A Report by the NSW Law Reform Commission in 2012 roundly criticized these developments and recommended a return to a presumption in favour of bail for all offences. The NSW government in 2013 passed a new reform oriented *Bail Act*, based not on a presumption in favour of bail but on whether an 'unacceptable risk' exists that the person will fail to appear, commit a serious offence, endanger victims, individuals or community, or interfere with witnesses (s 17 *Bail Act* (NSW) 2013) (Brown, 2013a; New South Wales Law Reform Commission, 2012). The new reformist legislation had only been in operation for one month when a media campaign led by one talk back radio host and the tabloid *Daily Telegraph* over three cases where bail was granted, in a classic conflation of accusation, guilt and punishment, prompted the NSW government to backtrack and further restrict access to bail (Brown and Quilter, 2014), a move likely to further increase NSW imprisonment rates.

Conclusion

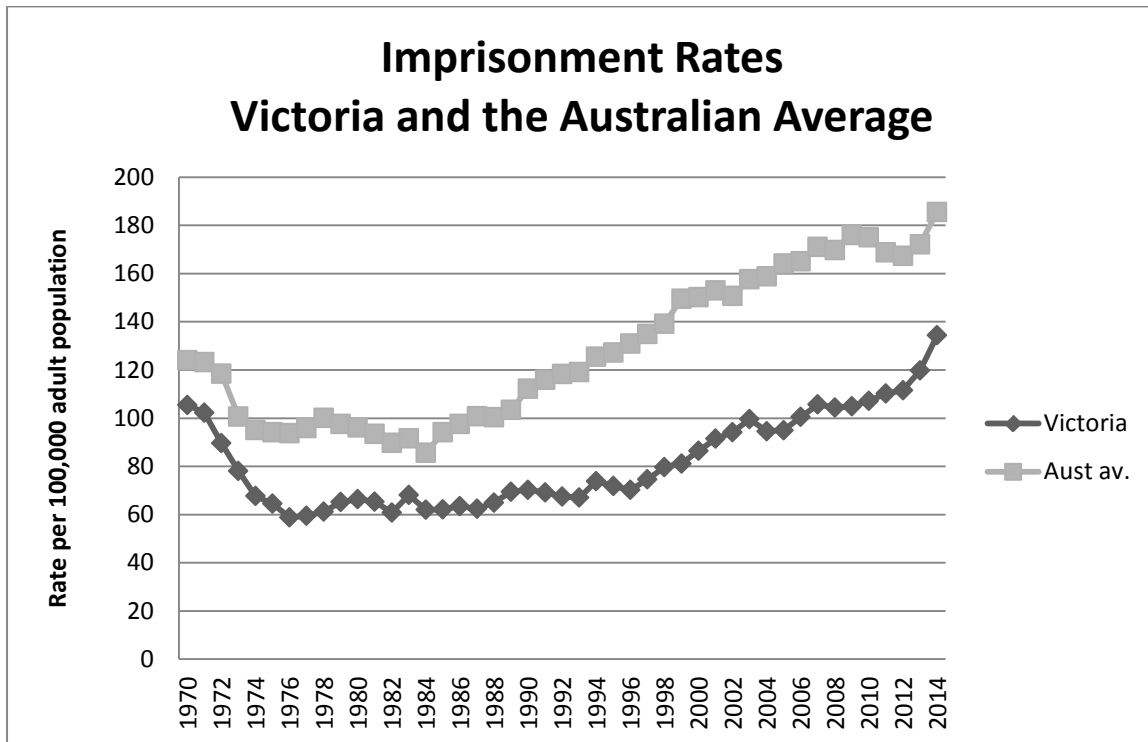
This brief overview of the political, legal and judicial struggle around some key criminal justice drivers of imprisonment rates in NSW between 1970 and the present reveals the over-determining influence of law and order politics, what Hogg and Brown (1998) call the ‘uncivil politics of law and order’ and others ‘popular punitiveness’ (Pratt et al., 2005). The politicisation of criminal justice policy has been accelerated by the rise of the ‘public voice’ (Ryan, 2003) challenging and diminishing the influence of expertise, and the emergence of the victim as political subject. The judiciary has been a key player in these struggles, attempting to resist what they see as legislative and executive incursions into judicial discretion, whether intended to reduce or increase sentences.

While this discussion has focused on the more overt manifestations of penal politics around criminal justice policy in NSW, in the background lie complex and less easily demonstrable shifts in penal culture not particular to NSW. These include the emergence of risk and risk mentalities in both public and political debate, and in correctional paradigms such as the increased prevalence of risk-needs assessment.

Victoria: The decline of Victorian ‘exceptionalism’

Victoria’s rate of imprisonment has historically been one of the lowest in Australia. Although a relatively small state geographically, it is quite heavily populated. While it accounts for around one quarter of the total population, its prison population comprises only 18% of Australia’s prison population. Although demographically similar to NSW it has, for more than a century, had a far lower prison population (Freiberg and Ross, 1999: Chapter 4), partly due to lower crime rates, the small number of Indigenous people in their prison population (8%) and the low rate of remands in custody (19%), but predominantly due to a comparatively benign judicial culture in respect of the use of imprisonment (Australian Bureau of Statistics, 2014; Freiberg and Ross, 1999).

Figure 3: Imprisonment rates in Victoria and the Australian average



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project

For most of the described period, Victoria's prison population trend mirrored that of the Australian prison population, but at a significantly lower level. In June 2014, Victoria's imprisonment rate stood at 134 prisoners per 100,000 adults (against a national average of 186). The steepest growth of all is seen in the past two years - which is not reflected in Figure 3 - from 4,884 prisoners in June 2012 to 6,112 in June 2014 (a 25% increase)(Australian Bureau of Statistics, 2014b). Therefore, the main focus of this case study will be on the most recent period.

A changing penal climate. The growth in prison numbers in the 1970s was partly influenced by rising crime rates but by the early 1990s, as elsewhere, these had generally moderated. What changed from the 1980s was the penal climate fuelled by a growing tide of penal populism that manifested itself in gradual and barely perceptible changes in judicial sentencing patterns, the accumulation of which drove the steady rise in prison numbers.

Reform activity since the early 1990s has been decidedly punitive in nature. In 1991, remissions were abolished by a Labor government in the name of 'truth in sentencing', though the effects were moderated by the fact that judges were instructed to reduce sentence lengths to compensate (Freiberg, 1995). Between 1993 and late 1999 the conservative government introduced a number of law and order policies for recidivist, sexual and violent offenders, as well as victim impact statements (Fox, 1993). Though these measures did not, of themselves, drive prison numbers up, they contributed to a harshening of the penal climate.

Between 2000 and 2010, the left-leaning Labor government continued the punitive trend. Although it implemented a raft of progressive, evidence-based responses to offending (such as a range of problem-oriented courts including drug courts, Indigenous courts and a

Neighbourhood Justice Centre), it did not adopt a wholly moderate agenda. During its tenure a number of policies came into effect, particularly around the highly emotive issue of sexual offending. The government restricted the use of suspended sentences for serious crimes and enhanced the role of victims in the sentencing process.

The penal climate continued to heat up with the return of a Liberal/National Coalition government in 2010, following a campaign that was heavily focused on issues of crime and safety. It has implemented a range of reforms, with particular emphasis on sentencing. These reforms have had a rapid and significant effect on the prison population. This rise cannot be attributed to the traditional causes, like increasing crime rates, changing demographics or broader social and economic pressures, as all of these have remained relatively stable (see, for example, Australian Bureau of Statistics, 2014a). Rather, it is primarily the local political environment that has led to a more punitive approach to crime and justice.

Law and order: the 2010 Victorian election. In contrast to previous years, during which election rhetoric about crime and justice issues was relatively restrained, the 2010 Coalition opposition's election campaign was firmly founded on the idea that Victorians were tired of a 'soft on crime' approach and that a new government would give the state the 'tough-on-crime' measures that it apparently so desperately wanted.

The Coalition approach during and shortly after the election campaign was based on a politicisation of crime, a reduced reliance on expert advice and evidence and a firm belief in the effectiveness of prison as a crime-control mechanism. It is these three stratagems – in combination with several high-profile criminal cases – that may be seen as the primary drivers of penal policy in Victoria in recent years.

The politicisation of crime: the context. The Coalition opposition raised the profile of the crime issue in the 2010 election by questioning the integrity and veracity of Victorian official police statistics (Victorian Ombudsman, 2011). The opposition highlighted increasing crime as a problem that caused concern for the community. Despite a distinct lack of evidence that Victoria was an unsafe place, the 'tough-on-crime' rhetoric was part of an effective campaign and a Liberal/National government was elected.

Privileging 'public opinion' over expert evidence. Once the new government took office, declarations were made to the effect that criminal justice policy had been dominated by experts for too long and that public concern should be better heeded by politicians. To this end the government conducted a public opinion survey in conjunction with the state's tabloid newspaper (*the Herald Sun*), the aim of which was to seek public opinion on the appropriate sentence for a range of offences.

At the same time, the survey evidence collected by the state's expert advisory body, the Sentencing Advisory Council, was released, showing that Victorians are more accepting of alternatives to imprisonment than might be expected on the basis of political rhetoric and media headlines (Gelb, 2011). The research undertaken by the Council, however, was dismissed as flawed. In later years, other research showing, for instance, that deterrence through imprisonment was not effective (Ritchie, 2011), that incapacitation was an expensive

strategy (Ritchie, 2012), and that imprisonment was criminogenic (Sentencing Advisory Council, 2013) was greeted with scepticism by the government.

Privileging of 'public opinion' over expert evidence served useful political purposes in providing material for the media and is indicative of the strength of the government's conviction that the public – the supposedly punitive and fearful public – demands ever-tougher practices and policies.

A belief in the effectiveness of prison as a crime-control mechanism. From the time it took office, the Coalition government made clear its intention to 'get tough on crime'. Time and again government spokespeople 'made no apologies' for their 'tough-on-crime' stance, on the basis that they are merely providing the Victorian community with what it wants. While the government did not deliver any evidence that informed public judgement in Victoria was indeed punitive and supportive of greater use of (and investment in) prisons, it nonetheless pressed ahead with its agenda of increasing the severity of punishment and the use of prisons as the primary crime-control mechanism.

Suspended sentences were completely abolished in September 2014. Home detention has been abolished. Parole has been severely restricted following a 'Willie Horton' type event in which an offender on parole raped and murdered a young woman and a subsequent review of parole commissioned by the government (Callinan, 2013). The membership of the Parole Board has changed and release on parole made very difficult. The government estimated that 600 additional people are in prison as a result of the recent parole reforms (Victoria, Parliamentary Accounts and Estimates Committee, 14 May 2014: 3). Two new forms of presumptive sentences, in the form of 'baseline sentences' and presumptive minimum terms, were introduced.

It is ironic that nearly four years into its term, the government's promised rewards did not materialize. A public opinion poll published in November 2013 showed that since 2010, only 27% of the public thought that law and order and public safety had improved, 41% thought that it had stayed the same and 29% thought that it had got worse (Gordon, 2013). Managing fear often proves to be more difficult than managing crime. Indeed, law and order issues were low on the election agenda and the Coalition government and its 'tough-on-crime' policies were ousted at the November 2014 Victorian state election. However, it remains to be seen if the newly installed Labor government rolls back any of the Coalition's reforms.

Conclusion

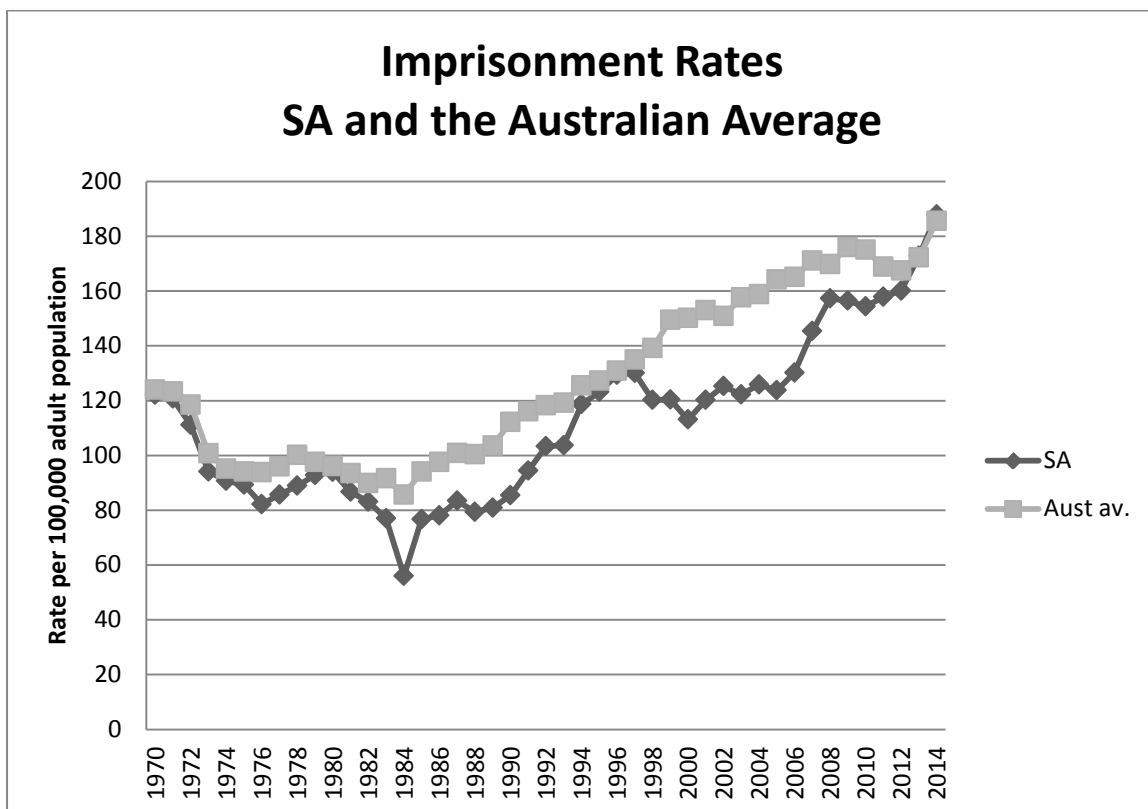
Crime and punishment cannot be understood separately from their cultural context. Local political factors - operating within broader socio-economic forces rather than objective crime rates - hold the key to understanding responses to criminal behaviour in general and imprisonment rates in particular (Young and Brown, 1993; Zimring and Hawkins, 1994). Victoria's penal policies have been driven by, and are embedded in, a discourse that is directed less at the instrumental level than at symbolic and emotional levels, mostly triggered by high-profile media events. They are based in differences in the local political environments which are reflective of larger cyclical fluctuations between both ends of the political spectrum which follow the historical pattern of hope/promise, harsh reality, followed

by disillusionment. Analogous to our understanding of climate change, while weather is changeable, reflecting short-term influences, climate is a long-term phenomenon. Victoria's 'penal weather' is becoming more volatile, more reactive to the commission of, and attendant publicity given to horrific crimes and their emotive consequences. Its penal climate, like Australia's, has gradually become harsher. What was once an exceptional jurisdiction appears now to be regressing to the mean.

South Australia: Imprisonment beyond debate

South Australia is home to almost 1.7 million residents (7% of the Australian population), the vast majority (around 75%) of whom reside in the greater Adelaide metropolitan area. South Australia covers approximately a million square kilometres, much of it desert. The early nineteenth century colony (referred at the time as the 'province' of SA) was colloquially known as the 'upright' settlement. It was the only Australian colony that was free of transported convicts. Hence there were no early plans for a prison, as the settlers, one assumes, were deemed to be largely law abiding. One-hundred-eighty years later, SA's prison population accounts for 7% of the total Australian prison population. It has the highest median aggregate sentence length of any jurisdiction in Australia (4.5 years), and the highest percentage of unsentenced prisoners (35%) as of 2014. Indigenous people comprise 23% of the prison population (Australian Bureau of Statistics, 2014b).

Figure 4: Imprisonment rates in SA and the Australian average



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project

For most of its history, SA traditionally enjoyed a relatively low rate of imprisonment. It reached its lowest point in 1984 after the Labor government introduced automatic release, which resulted in about 400 prisoner releases over a very short period. Since then, however,

the rate has followed the national trend upwards. Indeed, in the last decade it has continued to climb steadily. The imprisonment rate in 2005 was 124 per 100,000 adult population. It is currently 188, placing it just above the national average of 186. Moreover, prisoner numbers jumped sharply in the last two years, increasing by almost 20% from 2,077 prisoners to 2,488 prisoners by June 2014 (Australian Bureau of Statistics, 2014b).

A philosophical shift. Some forty years ago a new era of penal policy modernism was heralded by a key philosophical shift in the goals of imprisonment in SA. The Criminal Law and Penal Methods Reform Committee (the ‘Mitchell Committee’) published the first of its five reports in 1973. This report dealt with sentencing and corrections. In the report the authors observed, ‘The object of modern sentencing policy ... is not on sending offenders to prison but wherever possible on keeping them out of prison’ (Mitchell et al., 1973: 164). The response of the government was a shift of emphasis from prisons as places of privation to prisons as agencies of correction. This was accompanied by a significant change in the role of prison officers. They were no longer to act as para-military guards but thenceforth as ‘correctional services’ employees whose responsibility it was to ‘correct’ lives interrupted and broken by crime. In the early 1980s the Department for Correctional Services continued to espouse a similar mandate, committing itself to providing ‘... a service to give effect to court orders and institute, develop and maintain appropriate programmes to reduce recidivism and increase the social competence of offenders’ (Telfer, 2003: 256).

A decade later, in December 1993, the Labor Party was defeated by the Liberal Party which, ironically, traditionally espouses more conservative views on ‘law and order policies’ than the Labor Party. One of their election promises was to introduce ‘truth in sentencing.’ This arose out of public dissatisfaction with the practice of authorities discounting time to be served on account of the ‘good behaviour’ of the prisoner. The government stepped in to clarify that prisoners would serve the actual time to which they had been sentenced and not a day less. True to their word, the following year the *Statutes Amendment (Truth in Sentencing) Act 1994* (SA) was passed. This Act abolished remissions (a process by which prisoners could receive a discount on even the minimum term of imprisonment because of their good behaviour) and required people who had been given custodial sentences to serve the minimum sentence of imprisonment set by the court. It began a trend of rising imprisonment numbers and rates. This trend persists and was not affected at all by a change of government (to Labor) in 2002.

A political climate of punitiveness. Since 2002, indeed, the Labor government has maintained a ‘tough on crime’ stance almost as a badge of honour. An important influence derived from the Snowtown murders (also known as the ‘bodies-in-the-barrels’ murders: a series of homicides committed between August 1992 and May 1999)(Mitchell, 2004). The murderers were arrested in 2003 and sentenced in December that same year. The Rann government that had been elected in 2002 responded to the mood of the public and acted to reinforce the view that they would provide safety to the general public by adopting a law and order stance. Under the Attorney-General’s lead, the parliament removed the statute of limitations that previously prevented sex offenders from being prosecuted for offences that occurred before 1982. Sex offenders thereupon faced higher penalties and a raft of new sex

offences was created. Illegal drug manufacturing, dealing, and use have subsequently been targeted through new offences and increased penalties. Harsher penalties have been introduced for crimes committed against police, emergency service workers and health professionals. In November 2007 the government amended the law (Section 32(5)(ab) *Criminal Law (Sentencing) Act 1988 (SA)*) to insist upon a 20-year non-parole period for any person convicted of murder. Moreover, on 12 June 2012, the *Correctional Services (Miscellaneous) Amendment Act 2012 (SA)* came into effect. As a result of this amendment, the Parole Board can now cancel parole for a breach of any condition and order that prisoners serve the remainder of their sentences. They can prevent automatic parole for parolees who reoffend whilst on parole. Moreover, the amendments enable a police officer to arrest a parolee without a warrant in cases where he or she believes there is reasonable cause to suspect the parolee has breached a condition of their parole.

While it is very difficult to find a direct causal relationship between these changes and the rises in imprisonment rates in SA, the correlations between the timing of the above changes and the rates of growth are nevertheless striking. In addition, suspicion has fallen on SA's high remand in custody rate as a reason for a significant rise in prisoner numbers since the year 2000.

A high remand in custody rate. South Australian judges and magistrates, for a range of reasons, remand people in custody (rather than granting them bail) at significantly higher rates than the rest of Australia. South Australia has a much higher percentage of remand prisoners as a proportion of all prisoners than any other jurisdiction in Australia. In addition, its remand rate currently stands at 35 per 100,000 population, while the remand rate for the whole of Australia is 24 (Australian Bureau of Statistics, 2014b).

Explaining the higher rate is not easy. For example, it is not a direct consequence of the median time that remandees spend on remand because SA's current period (2.3 months) is one of the lowest of all jurisdictions in Australia. A number of possible explanations have been explored (Sarre et al., 2006), including the state's police procedures, magistrates practices, and the paucity of bail support mechanisms and hostels, all of which militate against the granting of bail. Whatever the causes, the fact remains that when there is a very high proportion of prisoners who have been refused bail, there will be inevitably consequential flow-on effects on the prison population.

Conclusion

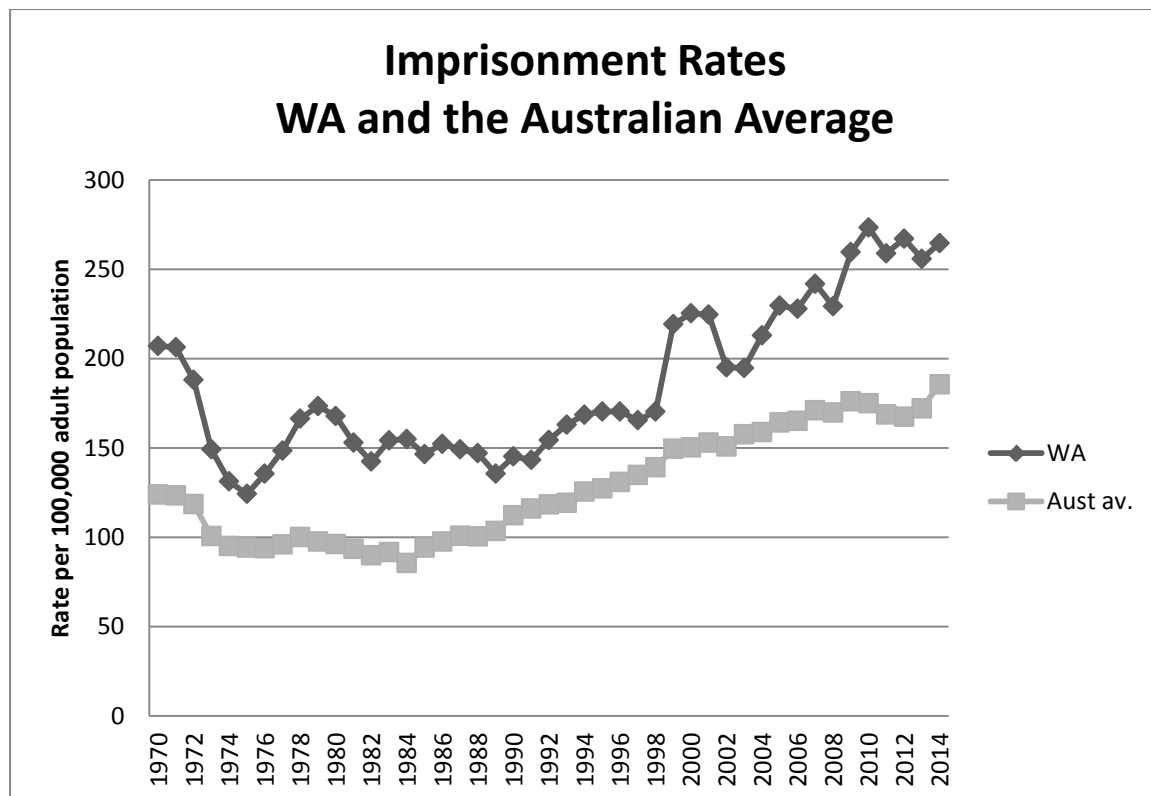
If Durkheim is correct, and trends in punishment are determined less by crime-control exigencies and more 'by social values, social reactions and social organization of the group on whose behalf punishments are imposed' (Garland, 2013: 24), then one can find a good deal of evidence in SA over the last two decades to confirm this view. Both of the major political parties tout similar law and order policies. Both parties' policy-makers have discovered that a 'get tough' approach is both politically sellable and easily manufactured. As a consequence, no major party parliamentarian debates non-custodial alternatives, lest they be seen to be 'soft on crime'. The only debates are about what sort of expansions to prison capacity should be considered, not whether there needs to be an expansion to capacity, or how much longer a new penalty of imprisonment will be for a certain offence rather than

whether a non-custodial alternative is more effective. This view has persisted despite the Labor government commissioning, in 2009, the Hora Report (Hora, 2009) on justice alternatives. One can safely conclude that as long as a high level of public punitiveness continues to characterise contemporary justice discourse, there will be little challenge, politically, to the current high imprisonment rate.

Western Australia: A history of imprisonment and Indigenous overrepresentation

The imprisonment rate in WA has historically been high, second to, though significantly lower than, that of the Northern Territory (NT). Further, there is the vastness of the state, which is more than 10 times the size of the UK, with Perth being the second most isolated capital city in the world. It is Australia’s largest state, but significant parts are sparsely populated and it only accounts for 11% of the Australian population, while the prison population is 15% of its total prison population. Three percent of the general population is Indigenous (Australian Bureau of Statistics, 2012), and many of them are living in rural and remote areas with limited available services. Western Australia was one of the last of the country’s settlements to be established (founded 41 years after the initial settlement of NSW), and it began importing convicts at a time when the other states had either ceased or were about to cease the practice (1850-1868). Western Australia’s colonial history is, consequently, relatively recent. Together with the NT and Queensland, it is often described as a ‘frontier state’, referring to ‘a settler society that sees itself as vulnerable and threatened by ‘outsiders’” (Blagg, 2008: 30; Broadhurst, 1997).

Figure 5: Imprisonment rates in WA and the Australian average



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project

The imprisonment rate in WA has consequently remained above the Australian average with, over recent decades, peaks following the (legislative) changes described below. The imprisonment rate stands at 265 per 100,000 adult population, significantly higher than the national average of 186. Twenty-three percent of the prison population is on remand, and 40% of the total prison population is Indigenous (Australian Bureau of Statistics, 2014b).

The high prison population in WA has been the object of study before: In 1979 a Committee of Inquiry was appointed by cabinet to consider whether it was possible to reduce the use of imprisonment in WA. In 1981, the 'Dixon report' concluded for the period 1971-1980 that it was not the length of prison sentences in WA which caused the high imprisonment rate, but the frequency with which people were imprisoned in the state, which impacts more particularly on Aboriginal offenders. However, according to the report, though the prison population would decrease by 30% if all people of Aboriginal descent were removed, the imprisonment rate would still be 20% above the national average (Report of the Committee of Inquiry into the Rate of Imprisonment, 1981). Today, the situation remains similar. The WA non-Indigenous imprisonment rate stands at 164 - still significantly above the national non-Indigenous average of 137 (Australian Bureau of Statistics, 2014b).

Indigenous overrepresentation and the colonial history. Currently, Indigenous people make up 40% of the WA prison population, and are imprisoned at a rate 18 times that of non-Indigenous adults. This is the highest overrepresentation of Indigenous people in the Australian prison population (Australian Bureau of Statistics, 2014b).

The overrepresentation of Aboriginal people in the WA prison population has long historical roots going back to 1840 with high imprisonment numbers and the establishment of special Aboriginal prisons – unique in the country. This overrepresentation reflects the fierce battles between first peoples and the settlers during the 'gold rush' and only declined after the *Aborigines Act 1905 (WA)* was put in place⁵, after which Aboriginal people were confined to other places of containment, such as reserves, settlements, missions and pastoral stations (Finnane 1997; Finnane and McGuire 2001; Purdy 1996). Aboriginal overrepresentation in prison started increasing again in the 1950s. This has been linked to the economic development of the north of the state, which increased the value of the land on which many of these confinement sites were located. This, in combination with the assimilation policy⁶, caused the closure of many of these institutions. The result was that the Aboriginal people lost their work and their home. They moved to the cities where their contacts with non-Indigenous Australians increased. This, together with free access to alcohol, impacted on the traditional lifestyle of Aboriginal people and increased their contact with the criminal justice system (Broadhurst 1987; Finnane and McGuire 2001; Hogg 2001; Purdy, 1996).

Law and order politics and judicial action. The Dixon report is proof of a genuine concern in WA about the high imprisonment rates, and there were moments of moderate optimism in relation to penal policies in the early 1990s (Harding, 1992). However, as explained below,

⁵ Its aim was the protection, control and segregation of Aboriginal people.

⁶ This held that Aboriginal people should have the same rights and privileges as other Australians – including same wages, which made them a less attractive workforce.

good intentions to reduce prisoner numbers were continuously undermined, both by initiatives devised to ensure electoral success and by judicial action.

Mandatory sentences were introduced on two occasions, first in 1992 as a political response to the death of a young pregnant woman and her child on Christmas Eve 1991 in a collision with a stolen car driven by an Aboriginal youngster. Earlier that year, 20,000 people gathered outside Parliament House to protest against the juvenile justice system. While the initial response to the rally was rather moderate, after this incident the Labor cabinet acted quickly and promised to deal with 'hard-core juvenile criminals'. The subsequent law that was hastily passed – the *Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA)* - proved to be of limited effectiveness but appealed to 'a frustrated and angry public', and disproportionately affected Indigenous men (Harding 1993; Morgan 1999, 2000).

While the Liberal Party in its first term abolished sentences of three months or less and enacted a range of non-custodial sentences to reduce imprisonment rates, by the time the *Sentencing Act 1995 (WA)* came into force, the government got into 'pre-election' mode and proclaimed 'three strikes' legislation for repeat home burglary offenders (Morgan, 1996). These sentencing reforms led to an increase of remand, as well as rises in the mean maximum terms imposed and the actual time served (Department of the Attorney-General, 2006), which primarily affected Indigenous youngsters (Broadhurst, 1997). The only newspaper in WA, *The West Australian*, played a prominent role in advocating the legislation, feeding into the populist agenda and selling stories that made harsher punishment an appealing political solution to the crime problem (Hinds, 2005).

'Truth in sentencing' legislation was introduced in 1999, under a Liberal government, which abolished automatic one-third remission. After attaining office, the Labor government legislatively confirmed in 2003 the 'truth in sentencing' approach, but also aimed for improved 'prisoner re-entry'. To that end, sentences of up to six months were abolished – in some cases imprisonment was no longer an option, in others the maximum sentence length was increased - to stop the revolving door effect created by repeated short sentences. As in Victoria, courts were instructed to reduce the fixed term of their sentences by one third to neutralise the abolition of remission (Morgan, 2003). However, the outcome of the 2003 legislation was an increase in the mean minimum sentences imposed and a greater proportion of the sentence to be served (Department of the Attorney-General, 2006).

Labor repealed the discounting provision in the run up to the 2008 elections, to allow for tougher sentences in serious cases. In that campaign, the Liberal Party stood on a strong law and order platform, claiming that, after seven years of Labor, 'the average Western Australian citizen is now more likely to be affected by criminal offending which has an anti-social element than ever before' (Crofts, 2011: 399). On being elected, they gave effect to their election promise and introduced Prohibited Behaviour Orders - an Australian version of the UK's Anti-Social Behaviour Orders (ASBO). Ironically, ASBO's were abolished in the UK at almost the same time as the introduction of the Prohibited Behaviour Orders because they 'delivered so little' (Crofts, 2011).

Finally, a very significant change occurred in 2009, with the appointment of a new chair of the Parole Board. At the request of the then Attorney-General, the new chair instituted a very strict interpretation of the parole legislation, and while WA used to have a very liberal parole policy, with around a 90% rate of release, this dropped to 21% in the period 2009-2011. This, in combination with an increase of cancellations of parole orders, caused nearly a 24% increase in sentenced prisoners over a period of only eight months (West Australian Auditor General's Report, 2011).

Conclusion

The high imprisonment rate in WA reflects a historically heavy reliance on imprisonment in response to crime and is linked to the shape the settlers gave to the penal complex and their interaction with Indigenous people. This could be described as a 'punitive culture' related to the state's isolated position, its 'frontier' mentality, and particular geographical and demographical characteristics. Starting from this position, politicians over time made legislative changes that initially could be described as bifurcation (Bottoms, 1977): reserving a punitive approach for some high-profile offender groups - both at the front and back ends of the criminal justice process - while utilising alternatives to custody for minor offenders. However, the latter goal has not been pursued by the judiciary, resulting in upsurges in the imprisonment rate. Meanwhile, the discourse has increasingly moved towards a law and order penal policy agenda, regardless the party in office. Given the fact that all these initiatives had their biggest impact on the most overrepresented group in WA prisons, being (young) Indigenous people, their numbers increased rapidly.

The question of Indigenous overrepresentation in the criminal justice system is the subject of a long standing and passionate debate in Australia, and will be further developed below.

Colonial history and Indigenous overrepresentation

Criminologists have persistently referred to Aboriginal Australians as the most imprisoned race in the world, and the statistics bear this out. Initially, the problem of Aboriginal overrepresentation in Australian prisons was brought under the spotlight because of the high rate of Aboriginal deaths in prison and the assumption that this was related to maltreatment or neglect, which led to the establishment of the Royal Commission into Aboriginal Deaths in Custody in 1987. The Commission's report concluded that Aboriginal deaths in custody were a reflection of high Aboriginal imprisonment rates rather than disproportionate rates of deaths (Johnston, 1991).

The national imprisonment rate for Indigenous people⁷ is 13 times higher than for non-Indigenous people (Australian Bureau of Statistics, 2014b). It is worse still for Indigenous women and young people, who are about 24 times overrepresented (Weatherburn, 2014). Moreover, they are often serving short sentences for less serious offences, cycling through the prison system at a higher rate than census data reflect (Cunneen et al., 2013: 181-3).

Therefore, it is often assumed that high imprisonment rates in Australian jurisdictions, and the differences between them, are mainly an 'Aboriginal problem', concentrated in

⁷ This is the age standardised imprisonment rate: a statistical method that takes into account the different age structure of Indigenous people.

jurisdictions with high Indigenous population / prisoner numbers. However, this is only partly true. It is a valid explanation for the NT, where Aboriginal people comprise a very high proportion of the total population (27%) and constitute 86% of the prison population. Removing Indigenous people in prison from the calculation would make the imprisonment rate in the NT plummet by 81%. Nevertheless, in the jurisdictions discussed here, the proportion of Indigenous people as part of the total population is 3% or below. Discounting the Aboriginal population from the imprisonment rate would not change the picture as described above: the non-Indigenous imprisonment rate would still be the highest in WA (164)(-38%) followed by SA (148)(-21%), then NSW (141)(-22%), leaving Victoria the lowest (124)(-7%), compared with a national non-Indigenous imprisonment rate of 137 (-26%).

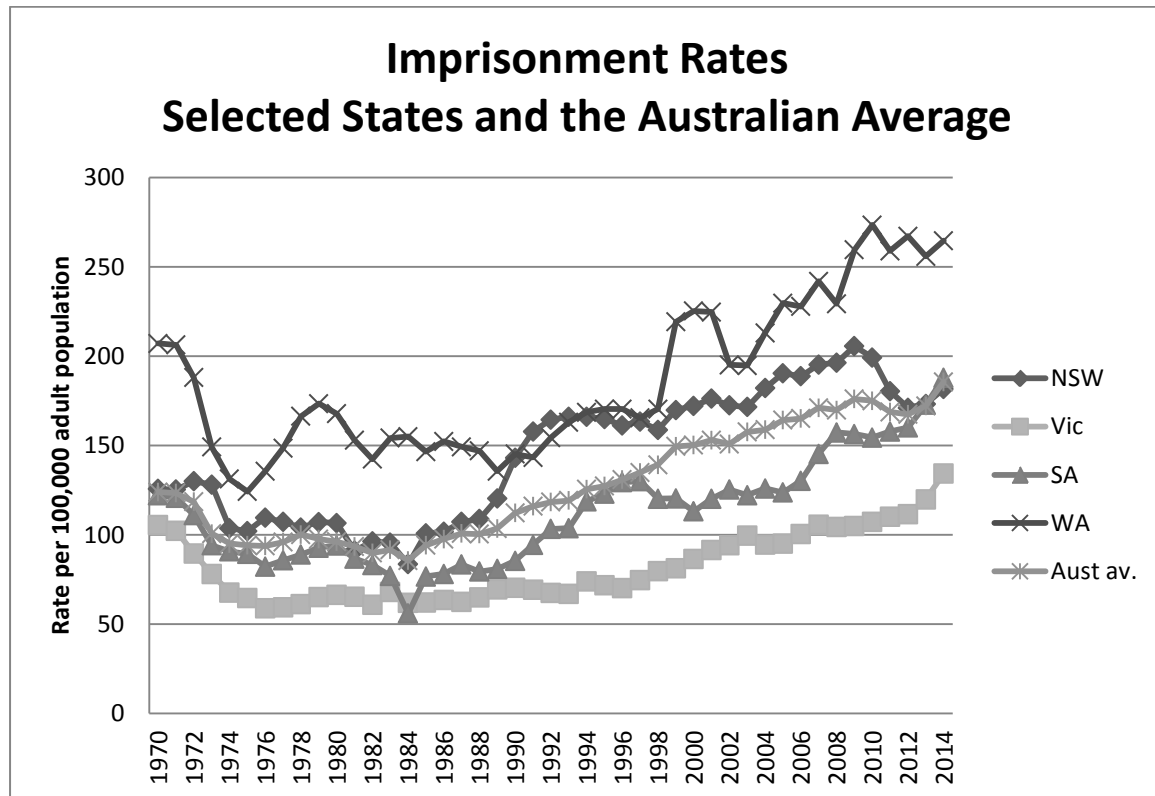
While the overrepresentation of Indigenous people in the prison population cannot explain the differences discussed in our four case-study jurisdictions, it is still arguably the key penal problem in the Australian context and therefore merits some brief discussion.

The reasons why Indigenous people are so overrepresented, as well as the strategies required to address this problem, divides the country into different 'schools' of experts. With the risk of oversimplifying the discussion, we distinguish two major lines of thought. One view is that it is the very foundations of our colonial history that created a penal culture which is discriminatory towards people facing multiple deprivations, and this led to the overrepresentation of Indigenous people in the criminal justice system today (Cunneen et al., 2013). Taking it one step further is the claim of 'institutional racism' or 'systemic bias'; referring to 'facially neutral' laws that have different effects on Indigenous people, disadvantaging them (Blagg, 2008). According to this stream of thought, the structural racialization of punishment, and the fundamental alterity of Indigenous people, must be acknowledged before penal reform can ever be realised. A second view explains Indigenous overrepresentation as a matter of greater involvement in crime, which is in its turn related to critical factors of deprivation that have shown to be criminogenic. According to this view, justice would be improved not by changing the system, but by altering the way it responds to Indigenous offending and by addressing the conditions that impact on Indigenous offending behaviour (Weatherburn, 2014).

Further discussion of these views and the presence or lack of evidence to corroborate them is beyond the scope of this article. The important point here is that Aboriginal overrepresentation in the Australian prison population is an inextricable feature of our penal culture. It does not offer sufficient explanation for the differences in the imprisonment rates between the jurisdictions discussed, but correlates with more general variances in underlying punitiveness. Significantly, this punitiveness impacts most harshly on Indigenous populations.

Discussion

Figure 6: Imprisonment rates in the selected states and the Australian average



Source: Australian Bureau of Statistics (2014b) and Australian Prison Project

The four case studies discussed above leave us with a somewhat puzzling result; not so much when it comes to the recent trends in the imprisonment rates, but more so when explaining the more persistent differences in levels.

When it comes to trends, one could say that the Australian jurisdictions follow international developments. The 1970s were quite progressive, with measures being taken in all four jurisdictions to reduce admissions to prison, and a prisoner's length of stay. This decline is discernible in the imprisonment rates of each jurisdiction discussed. From the second half of the 1980s, imprisonment rates were increasing. This first happened in NSW and SA, and was followed by WA. The time lag in Victoria is interesting, as it only comes to follow the national trend during the second half of the 1990s, becoming more significant in the last few years.

In all four case studies the same drivers of these increases have been identified. A first and most important driver is the politicisation of crime and the move towards law and order politics. As is the case in other (Anglo-Saxon / bi-partisan) countries, neither party has stepped away from using the rhetoric as an electoral tool. 'Truth in sentencing' legislation sweeps across the country from east to west, both in NSW and SA as an election promise from the Liberal Party. In Victoria and WA, it was introduced by the Labor Party, with an initial attempt to control sentence lengths and imprisonment rates, but over time the protection of the community becomes a higher priority. Strong measures have been taken against offences that are considered particularly serious or sensitive from a populist point of

view, and the importance of the victim becomes more apparent. Punitive political intervention also occurred in the parole system, either by legislative restrictions, clear instructions about the interpretation of its aim or, on the contrary, by giving Parole Boards more punitive powers. In this respect, Tonry's observation of the US can be applied to the Australian situation: 'Countries and, within [Australia], states have the policies and prison populations they choose to have' (Tonry, 2013: 185).

However, not all political initiatives had (the desired) effect. A second important driver is the considerable impact of judicial practice. In spite of the adversarial nature of the courts system, and their suggested vulnerability to populism, the effect has not always been punitive. As demonstrated in the NSW and WA case studies, the judiciary has its own agenda, being averse to political interference, and initiatives to reduce sentence lengths were sometimes countered by sentencing practices. Further, judges and magistrates in SA are – for a number of reasons – responsible for the high rate of remand and a possible flow-on effect on the prison population. However, in Victoria, and regardless of the political party in office or the punitive nature of their initiatives, imprisonment rates remained relatively low, due to moderate and stable sentencing patterns. Sentencing changes have occurred in Victoria, but they are rather modest in comparison to the other jurisdictions. It seems that only since 2010 conservative politics have prevailed, curtailing the discretionary power of the courts.

Finally, the interplay of politics and the judiciary does not happen in a void. In all the case studies, reference has been made to the impact of public opinion and the media on these changes, this to the detriment of expert opinion. While public opinion may have played a role in setting the tone of policy debates, the relationship with the political authority seems inverse; they are the 'stick to beat the dog'. As clearly demonstrated in the Victorian example, it depends on which reflection of public opinion one relies to justify one's choices; the one reflected in the tabloid press or as investigated by the state's expert advisory body. However, all four case studies show the powerfully influential effects of perceived public opinion in the wake of notorious crimes that are heavily mediatised and lead to harsher, hastily passed changes in legislation.

All in all, recent evolutions in all four jurisdictions discussed can be explained to a certain extent by political reactions to 'conditions of late modernity', and a move toward a more outspoken, but still moderate, neo-liberal individualism. In such an environment, those who are considered to pose a risk are more easily excluded and treated in punitive and unforgiving ways. These factors play out in each jurisdiction, and, as such, confirm the wide distribution of these forces, but they are shaped and tempered by local traditions, cultures and values. They do not, however, explain why the differences in imprisonment rates between these jurisdictions remain stable over time.

The fact that the differences in imprisonment rates remain stable over long periods of time goes beyond developments of 'late modernity', beyond increasingly neo-liberal politics, and beyond the legal and institutional inheritances of the British Empire. Regardless of the relative proximity of these Australian jurisdictions, their shared historical roots, where policies have clearly travelled, and where the cultural embeddedness (Melossi, 2011) looks similar, distinctive local penal cultures, robust over time, do exist and can be expected to

persist. This is what makes Australia such an interesting ‘penal laboratory’: on the one hand, it shows that global forces are important and consequential, but they still allow for significant local divergence, and powers to ‘resist punitiveness’. On the other hand, it invites for further analysis of local cultures and values which go beyond the analysis of datasets and (global) explanatory models as defined in recent criminological theory.

Conclusion

We conclude that explanations of ‘punitiveness’ that are based in institutional, political and legal analyses, are valid to explain the recent trends in penal outcomes within the selected Australian jurisdictions, but they are satisfactory in explaining underlying differences in the levels of punitiveness. Each of the Australian jurisdictions has inherited and retained a British model of political organisation and has a legal system based in the common law tradition; they all remain clearly within the Anglo-Saxon approach to punishment. Patterns of penal contagion are evident in a range of policies and practices that also tend to characterise the English-speaking world of the last half-century. There remains, however, significant variation between each jurisdiction’s level of imprisonment. Though they all share comparable trends, distinctive penal cultures have developed in each jurisdiction that are reflected in very different penal practices and outcomes. Further investigation of local features is required to understand the development of the cultures we now find.

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